

120 FERC ¶ 61,097  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Braintree Electric Light Department

Docket No. EL06-48-002

ORDER DENYING REHEARING

(Issued July 27, 2007)

1. On September 9, 2006, Braintree Electric Light Department (Braintree) sought rehearing of the order issued in this proceeding on August 4, 2006.<sup>1</sup> The August 4 Order denied Braintree's petition for declaratory order concerning its Reliability Must Run Agreement (RMR Agreement) between Braintree and ISO New England, Inc (ISO-NE). Braintree had requested that the Commission find that the rates and charges in the RMR Agreement satisfy the just and reasonable criteria of section 205 of the Federal Power Act (FPA).<sup>2</sup> In this order, we deny rehearing of the August 4 Order.

**Background**

2. Under Market Rule 1,<sup>3</sup> ISO-NE has authority to negotiate agreements for the purchase of electric energy at cost-based rates from generation facilities that are identified by ISO-NE as being necessary to ensure reliability and are unable to recover their operating costs under current market conditions. Braintree has a 96 MW, dual-fuel, combined-cycle generating facility, known as Potter 2, which is located within the Southeast Massachusetts (SEMA) region. ISO-NE had issued a determination of need

---

<sup>1</sup> *Braintree Electric Light Department*, 116 FERC ¶ 61,121 (2006) (August 4 Order).

<sup>2</sup> 16 U.S.C. § 824d (2000).

<sup>3</sup> Market Rule 1 permits ISO-NE to negotiate contracts for the supply of power at cost-based rates to keep a generating facility in operation when the facility is needed for reliability in New England. Market Rule 1, section III, Appendix A at III.A.6.2 and section III, Appendix A, Exhibit 2 at 3.3.

for Potter 2 based on the conclusion that Potter 2 is needed to support transmission system voltages and to reduce thermal loadings in SEMA. In its petition for declaratory order filed January 19, 2006, Braintree stated that it had not earned its facility costs for each of the past five years. Under the proposed RMR Agreement, Braintree would provide reliability service for ISO-NE in exchange for a Monthly Fixed-Cost Charge, based on an Annual Fixed Charge Revenue Requirement of \$5,959,369. Braintree sought “to obtain Commission review establishing that rates and charges that include and pass through the cost of Braintree’s proposed RMR Agreement with ISO-NE will be just and reasonable.”<sup>4</sup> Braintree requested an effective date of January 20, 2006.

3. On March 23, 2006, Commission Staff issued a deficiency letter to Braintree that included questions regarding engineering issues and the ISO-NE’s reliability determination. Braintree filed its response on April 14, 2006, and ISO-NE submitted a response shortly thereafter. On May 30, 2006, ISO-NE submitted a letter notifying the Commission that the generating facilities owned by Braintree were not needed for reliability. ISO-NE determined that the stuck breaker and double circuit tower contingencies identified for Potter 2 did not violate Northeast Power Coordinating Council (NPCC) and ISO-NE operating criteria for normal contingencies that involve the loss of multiple elements because it concluded that there were no inter-area impacts and, in turn, no reliability needs to be addressed by the RMR Agreement.

#### **August 4 Order**

4. The Commission denied Braintree’s petition for declaratory order in the August 4 Order because ISO-NE’s updated and corrected reliability analysis showed that Potter 2 was not needed to provide reliability in the SEMA region. The Commission noted that ISO-NE is authorized to enter into RMR agreements, subject to Commission approval, with generators that are needed for reliability, and that generators which are not needed are not eligible for RMR rate treatment under an RMR agreement. Based on ISO-NE’s determination, Braintree was not entitled to recover cost-based rates under its RMR Agreement. The Commission added that issues raised in the protests concerning costs were moot, since Braintree did not qualify for RMR treatment based on ISO-NE’s reliability determination.

5. Nevertheless, because Braintree had relied on ISO-NE’s initial determination, the Commission found that Braintree should be assured of recovering its variable costs until May 30, 2006, which was the date that ISO-NE notified the Commission that Braintree was not needed for reliability. The August 4 Order invited Braintree to seek

---

<sup>4</sup> Petition at 7.

compensation to the extent it could show that the revenues it received during the period January 19 through May 30, 2006 did not meet its variable costs; any showing of a shortfall must exclude fixed costs and opportunity costs. The Commission explained that this outcome was consistent with its refund policy.<sup>5</sup>

### **Request For Rehearing**

6. Braintree makes two arguments on rehearing. First, Braintree argues that the Commission arbitrarily and capriciously limited its cost recovery to its variable costs for the period that it operated in good faith under its proposed RMR Agreement, in reliance on ISO-NE's original reliability determination. Braintree asserts that the Commission's use of its refund policy, as articulated in *Carolina Power & Light Company*,<sup>6</sup> is inappropriate, given that that policy is aimed at enforcing compliance by public utilities with their statutory filing obligations under the FPA. According to Braintree, reliance on the holding of *Carolina* advances no rational purpose because: (1) Braintree is not a public utility; (2) it is exempted from FPA section 205 and 206 filing obligations; and (3) there is no analogy between Braintree's timely seeking RMR treatment in a manner equivalent to public utilities and the situation of a public utility that has neglected to file a jurisdictional agreement with the Commission in accordance with the FPA.

7. Further, Braintree cites *Towns of Concord v. FERC*,<sup>7</sup> for the proposition that the Commission must consider relevant factors and strike a reasonable accommodation among them in an order granting or denying a refund; such an order should be "equitable in the circumstances of this litigation."<sup>8</sup> Braintree asserts that limiting recovery to its variable costs would not further the Commission's policy, as expressed in its various New England RMR orders, to promote regional reliability.

8. Moreover, Braintree complains that the outcome of the August 4 Order absolves ISO-NE from any responsibility for its erroneous reliability determination. Braintree states that the Commission's March 23 deficiency letter, gave ISO-NE reason to review its reliability determination; it implies that there was no excuse for ISO-NE to overlook its error for 6 more weeks (the time between the April 19 response to Staff's March 23

---

<sup>5</sup> August 4 Order, 116 FERC ¶ 61,121, at P 22 & n.12.

<sup>6</sup> 87 FERC ¶ 61,083 (1999) (*Carolina*).

<sup>7</sup> 955 F.2d 67, 76 (D.C. Cir. 1992) (*Towns of Concord*).

<sup>8</sup> *Id.*

letter and the May 30 letter). According to Braintree, that six-week hiatus “was the direct cause of Braintree’s inability to mitigate its operating losses by participating in the April 17-21 Forward Reserve Market auction.”<sup>9</sup> At the same time, Braintree states that it had neither reason nor opportunity to second-guess ISO-NE’s initial reliability determination or to independently identify any flaw in the analysis. Thus, Braintree concludes, the August 4 Order cannot be found “equitable in the circumstances.”<sup>10</sup>

9. Second, Braintree argues on rehearing that the Commission arbitrarily and capriciously precluded it from recovering its opportunity costs, which it would have earned in the Forward Reserve Market for the commitment period June 1 to September 30, 2006, were it not for its reliance on ISO-NE’s reliability determination. Braintree explains that the obligations of participating in the Forward Reserve Market are inconsistent with those undertaken by a generator in an RMR agreement, and states that ISO-NE advised it that bidding into the Forward Reserve Market could cause it to breach the pending RMR Agreement if that Agreement were accepted by the Commission. Had Braintree submitted its customary bid in the Forward Reserve Market auction, it states, the auction would have awarded 45 MW to Potter 2 at the market clearing price of \$1402.03/MW for four months; it concludes that the resulting loss of \$252,365.03 is the direct consequence of its reliance on ISO-NE’s determination of need.

### **Discussion**

10. The Commission will deny rehearing, as discussed below.

11. Under Market Rule 1, ISO-NE has the authority to determine whether a generator is needed for reliability purposes, which is a prerequisite for negotiating an RMR agreement. Then the Commission reviews each proposed RMR agreement as it reviews any other proposed rate schedule. Just as the Commission is obligated to review the cost support accompanying a proposed rate schedule, it is obliged to review the evidence accompanying a proposed RMR agreement,<sup>11</sup> including ISO-NE’s reliability determination. For instance, in *Devon Power LLC*,<sup>12</sup> the Commission stated that the filing of proposed RMR agreements under section 205 “gives market participants an

---

<sup>9</sup> Rehearing at 9.

<sup>10</sup> *Towns of Concord*, 955 F.2d at 76.

<sup>11</sup> *Bridgeport Energy, LLC*, 114 FERC ¶ 61,265 at P 12 (2006).

<sup>12</sup> 110 FERC ¶ 61,315 (2005).

opportunity to provide input and present evidence contradicting ISO-NE's determinations."<sup>13</sup> Likewise, in *Milford Power Co.*,<sup>14</sup> the Commission explained that Market Rule 1 permits ISO-NE to enter into reliability agreements "subject to Commission approval."<sup>15</sup> Absent Commission review and approval, there would be no review and ratepayers would be subject to rates that would not be subject either to the discipline of markets (because that is when an RMR agreement typically is used, after ISO-NE determines that it is needed for reliability and that out-of-market financial arrangements will be necessary to ensure that the unit remains available<sup>16</sup>) or to regulatory oversight.

12. While Braintree is not a public utility, the Commission does have the authority to review this RMR Agreement. Just as the Commission can review a non-jurisdictional utility's revenue requirement when it is incorporated into a jurisdictional public utility's formula rate,<sup>17</sup> so the Commission can review an RMR agreement whose costs are incorporated into the ISO-NE's rates.<sup>18</sup> Additionally, ISO-NE's OATT requires that RMR Agreements be filed with the Commission,<sup>19</sup> and more importantly Braintree

---

<sup>13</sup> *Id.* P 41.

<sup>14</sup> 112 FERC ¶ 61,154 (2005).

<sup>15</sup> *Id.* P 15; see also *PPL Wallingford Energy, LLC v. FERC*, 419 F.3d 1194, 1196 (D.C. Cir. 2005) (While Market Rule 1 gives ISO-NE "the authority to negotiate individual RMR agreements as are required to maintain and/or improve system reliability[,] it also requires that "such agreements are to be filed with the Commission in accordance with the Commission's rules and regulations, and, as such, may be subject to the review of the Commission.") (quoting *New England Power Pool*, 100 FERC ¶ 61,287 at 62,268 (2002)).

<sup>16</sup> See *Devon Power LLC*, 109 FERC ¶61,154 at P 28 (2004), *order on reh'g*, 110 FERC ¶61,315 (2005).

<sup>17</sup> See *City of Vernon, California*, 109 FERC ¶ 63,057 (2004), *aff'd*, 111 FERC ¶ 61,092 , *order on reh'g*, 112 FERC ¶ 61,207 (2005).

<sup>18</sup> Here Braintree submitted a revenue requirement to be inserted into the formula rates of ISO-NE, a public utility.

<sup>19</sup> ISO New England, Inc., FERC Electric Tariff No. 3, Market Rule 1, section III, Appendix A, at III.A.6.2, First Revised Sheet No. 7434 and section III, Appendix A, Exhibit 2 at 3.3, Second Revised Sheet No. 7461.

voluntarily filed for Commission review and asserted in its petition that the Commission was required to review the RMR Agreement under the just and reasonable standard contained in section 205.<sup>20</sup>

13. Moreover, once Braintree filed the RMR Agreement, the March 23 deficiency letter noted concerns regarding the need for the reliability service. As such, even if Braintree was previously unaware that Potter 2 was not needed, the deficiency letter put Braintree on notice of the Commission's concerns.<sup>21</sup>

14. Regarding refunds, in the August 4 Order the Commission stated that the decision to limit Braintree's recovery to Braintree's variable costs was consistent with its refund policy in *Carolina*. In *Carolina* the Commission's original time value refund remedy prevented *Carolina* from recovering variable costs and on rehearing the Commission provided that the time value remedy would be limited to an amount that permits recovery of variable costs. In *Carolina*, the Commission explained that a refund limited by variable costs was equitable in part because the rates at issue were accepted by the Commission: "We believe that this result is equitable in that no public utility will face the prospect of losing money on a sale under late-filed rates that otherwise are accepted for filing."<sup>22</sup> While the facts of *Carolina* are admittedly different, the philosophy underlying *Carolina* applies equally here. Braintree relied on the ISO-NE determination of need and began operating under its RMR Agreement, and the equitable outcome here is to ensure that at a minimum Braintree recovers its variable costs. As explained in *Carolina*, the awarding of variable costs provides a floor that ensures that the utility does not operate at a loss.<sup>23</sup>

---

<sup>20</sup> Petition at 1-2. Additionally Braintree stated in its petition that it voluntarily agreed to refund any amount it received in excess of amounts that the Commission finds to be just and reasonable. *Id.* at 3.

<sup>21</sup> *Kansas Power and Light Co.*, 56 FERC ¶ 61,121 at 61,464 (1991) (Commission has delegated to the office director the authority "to issue deficiency letters when a utility's submittal does not meet the Commission's minimum filing requirements," and if the utility "does not satisfy the [office d]irector's request, [the utility's] proposed filing will not be accepted for filing").

<sup>22</sup> *Carolina*, 87 FERC at 61,357.

<sup>23</sup> *Id.*

15. Furthermore, Braintree has failed to provide any evidence quantifying its actual revenue recovery. Nor has Braintree argued that it did not receive its variable costs. We note that during the period at issue Braintree would have received the market clearing price for all energy it sold in the market, and without an RMR Agreement, it would keep the revenues it earned that are above its incremental energy costs, rather than credit them against the fixed payment under the RMR Agreement. To the extent the clearing price exceeded Braintree's incremental cost bid, Braintree would have earned revenues in excess of its variable costs. Finally, Braintree has failed to support its claimed opportunity cost of \$252,365 for the four-month period in question.

16. Accordingly, the Commission disagrees with Braintree's assertion that the August 4 Order resulted in an inequitable outcome. The August 4 Order allowed Braintree to recover its out-of-pocket expenses while ensuring that the Commission can meet its obligation to ensure that the rates charged by ISO-NE are for necessary services and are just and reasonable. Contrary to Braintree's assertions and consistent with *Carolina*, this finding protects Braintree from operating at a loss while ensuring that rate payers pay only for needed reliability service and pay only just and reasonable rates.<sup>24</sup>

17. Furthermore, contrary to Braintree's arguments, this is an equitable solution consistent with *Towns of Concord*. In *Towns of Concord*, the court explained that the relevant standard the Commission should apply to refunds under the FPA requires consideration of, and reasonable accommodation among, the relevant facts:

Customer refunds are a form of equitable relief, akin to restitution, and the general rule is that agencies should order restitution only when money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. . . . [A]bsent some conflict with the explicit requirement of the core purposes of a statute, [the court] ha[s] refused to constrain agency discretion by imposing a presumption in favor of refunds.... The agency need only show that it considered relevant factors and ... struck a reasonable accommodation

---

<sup>24</sup> See *NSTAR Electric & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir 2007) (explaining that precedent contemplates "that the Commission would balance deterrence of violations of the filing requirement against the inappropriateness of making rates confiscatory . . . ; the Commission's consideration of an actor's good faith seems quite compatible with that balance").

among them,...and that its order granting or denying refunds was equitable in the circumstances of this litigation.<sup>25</sup>

18. Looking at the specific circumstances here, we conclude that allowing recovery of variable costs is an equitable outcome under *Towns of Concord*. At the outset, it cannot be said the Braintree's recovery under the RMR Agreement was a certainty since it was subject to Commission approval. Moreover, Braintree voluntarily chose to pursue the RMR Agreement, and thereby chose to foreclose the opportunity to participate in the Forward Reserve Market. Thus its request for additional compensation is an attempt to insulate itself from the risk of a business decision. Furthermore, Commission action questioning ISO-NE's reliability determination provided further cause for Braintree to question the legitimacy of the ISO-NE's need determination and, in turn, the RMR Agreement.

19. Although these factors arguably suggest that Braintree is due no compensation, other factors suggest otherwise. The most significant factor in favor of compensation is Braintree's reliance on ISO-NE's miscalculation of reliability needs.<sup>26</sup> A second related factor is providing an incentive to ISO-NE to make accurate reliability determinations. Another is the fact that Braintree's obligations under the RMR Agreement precluded it from participating in the Forward Reserve Market. Therefore, on balance, we conclude that under these circumstances, Braintree is due compensation. Separately, in this regard, we urge ISO-NE in the future to carefully scrutinize its analysis of reliability needs, and its computer modeling, to ensure that its determination of reliability needs is accurate and thus that RMR agreements are agreed to only when necessary.

20. Moving to what level of compensation is equitable, we disagree with Braintree that it should be granted its opportunity costs. As explained above, the Commission in analogous circumstances provides relief by allowing recovery of variable costs, which ensures that Braintree did not operate at a loss. And as also noted above, Braintree had an opportunity to earn more than its variable costs, and it offered no evidence that it

---

<sup>25</sup> *Towns of Concord*, 955 F.2d at 76.

<sup>26</sup> Market Rule 1 states that the ISO shall not be liable to a Participant for actions or omissions by the ISO in performing its obligations under an RMR agreement, provided it has not willfully breached the RMR Agreement or engaged in willful misconduct. Market Rule 1, section III, Appendix A, Exhibit 3 – Form of Mitigation Agreement.

failed to recover any of its opportunity cost for the four month period in question. In light of these considerations, we conclude that no further compensation should be due beyond variable costs.<sup>27</sup> Additional compensation in the form of opportunity costs would require ISO-NE customers to pay even more for a service that they did not need. In balancing Braintree's reliance on ISO-NE's determination against ISO-NE's customers' paying for unnecessary service, the Commission finds that limiting Braintree's recovery to variable costs is a reasonable accommodation, consistent with the philosophy underlying our refund policy, and equitable under these circumstances.

The Commission orders:

Braintree's request for rehearing is hereby denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

---

<sup>27</sup> Our decision, however, does not prejudice or preclude Braintree from seeking damages against ISO-NE on the basis of detrimental reliance or any other claim that Braintree may have the right to bring in state court.