

122 FERC ¶ 61,235
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.

Connecticut Municipal Electric Energy Cooperative
and Richard Blumenthal, Attorney General for the
State of Connecticut

v.

Docket No. EL08-17-000

Milford Power Company, LLC and
ISO New England Inc.

ORDER ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued March 20, 2008)

1. On December 4, 2007, the Connecticut Municipal Electric Energy Cooperative (CMEEC) and Richard Blumenthal, Attorney General for the State of Connecticut (CTAG) (collectively CMEEC/CTAG) filed a complaint against Milford Power Company, LLC (Milford) and ISO New England Inc. (ISO-NE), seeking to terminate the Milford Reliability Must Run Agreement between Milford and ISO-NE (RMR Agreement). In this order, we establish hearing and settlement judge procedures to determine Milford's continued eligibility for the RMR Agreement.

I. Background

2. Milford is a two-unit, combined cycle generation facility that has a cumulative capacity of approximately 555 MW located in Southwest Connecticut. Both of the Milford Units began operations in early 2004 and, according to ISO-NE are needed for system reliability. On March 22, 2005, the Commission conditionally accepted the RMR Agreement and established hearing and settlement judge procedures.¹

¹ *Milford Power Co., LLC*, 110 FERC ¶ 61,299, (*Milford I*), order denying reh'g and granting clarification, 112 FERC ¶ 61,154 (2005) (*Milford II*).

3. On April 19, 2006, Milford, ISO-NE, the Connecticut Department of Public Utility Control and the Connecticut Office of Consumer Counsel (collectively the Settling Parties) filed a partial settlement agreement resolving all issues raised in the proceeding except for the amount of the Annual Fixed Revenue Requirement (AFRR) to be collected. On October 27, 2006, the Settling Parties filed the Defined Cost of Service Settlement Agreement that resolved the sole remaining cost of service issue, which reduced the originally filed AFRR by \$9 million to \$72.5 million per year.

4. On May 18, 2007, the Commission approved the Milford Settlement Agreements² subject to the condition that: (1) the standard applicable to the Commission's review of the Milford RMR Agreement shall be the just and reasonable standard; and (2) any challenges to the RMR Agreement by non-parties to the Milford Settlement Agreements under section 206 of the Federal Power Act (FPA)³ shall be reviewed by the Commission under the just and reasonable standard.⁴ Additionally, the Commission stated that any future transmission payments Milford received under the Forward Capacity Market (FCM) Settlement⁵ and their impact on Milford's RMR eligibility was beyond the scope of the settlement proceeding.⁶ However, the Commission noted that it had not previously addressed this issue and that if CTAG obtained evidence that Milford was financially ineligible for an RMR agreement due to its receiving FCM Transition Payments,⁷ it could file a separate complaint.⁸

² *Milford Power Co., LLC*, 119 FERC ¶ 61,167 (*Milford III*), *order denying reh'g and accepting compliance filing*, 121 FERC ¶ 61,042 (2007) (*Milford IV*), *petition for rev. docketed*, No. 07-1501 (D.C. Cir. Dec. 7, 2007) (collectively Milford Settlement Agreements).

³ 16 U.S.C. § 824e (2000 & Supp. V 2005).

⁴ *Milford III*, 119 FERC ¶ 61,167 at P 32.

⁵ *Devon Power LLC*, 115 FERC ¶ 61,340, *order on reh'g and clarification*, 117 FERC ¶ 61,133 (2006) (FCM Settlement Order).

⁶ *Milford III*, 119 FERC ¶ 61,167 at P 47.

⁷ Under the terms of the FCM Settlement Agreement transition payments start at \$3.05 kW/month and will increase annually until capping at \$4.10 kW/month during the 2009-2010 period.

⁸ *Milford III*, 119 FERC ¶ 61,167 at P 47-48.

II. Complaint

5. CMEEC/CTAG assert that the Milford RMR Agreement should be terminated because Milford is now recovering sufficient market revenues⁹ to cover its facility costs¹⁰ so that the RMR Agreement payments are now unnecessary. CMEEC/CTAG state that the Commission has repeatedly held that RMR agreements are a last resort,¹¹ that should be in place for as brief a time as possible,¹² eliminated as soon as reasonably possible, and that must not become a crutch for generator cost recovery.¹³

6. CMEEC/CTAG recognize that they do not have access to non-public data regarding the revenues Milford has earned during the period of its RMR Agreement. However, CMEEC/CTAG estimate the amount of payments to Milford based on publicly available information. CMEEC/CTAG state that based on their analysis the data shows that, had FCM transition payments been available to Milford prior to December 1, 2006, Milford would not have needed an RMR agreement to recover its facility costs at that time. Therefore, CMEEC/CTAG contend that since Milford is now receiving FCM transition payments, it no longer needs the RMR Agreement to recover its facility costs. As such, CMEEC/CTAG request that the RMR Agreement be terminated.

⁹ CMEEC/CTAG use the term “market revenues” to cover all revenues received by or attributable to the generator, other than revenues derived from the RMR Agreement itself.

¹⁰ Facility Costs are defined as the costs ordinarily necessary to keep a facility available, such as fixed O&M, administrative and general (A&G), and taxes. *See Bridgeport Energy LLC*, 112 FERC ¶ 61,077, at P 35 (2005); *Mystic Development, LLC*, 116 FERC ¶ 61,168, at P 24-25 (2006).

¹¹ Complaint at 6, *citing*, *Norwalk Power, LLC*, 120 FERC ¶ 61,048, at P 2 & n.3 (2007) (*Norwalk Power*), *reh’g pending*; *Berkshire Power Co.*, 112 FERC ¶ 61,253, at P 22 (2005); *Devon Power LLC*, 110 FERC ¶ 61,315, at P 40 (2005); *Devon Power LLC*, 103 FERC ¶ 61,082, at P 31 (2003).

¹² *Id. citing New England Power Pool*, 103 FERC ¶ 61,304, at P 41 (2003).

¹³ *Id. citing Bridgeport Energy, LLC*, 118 FERC ¶ 61,243, at P 41 & n.43 (2007).

7. In its calculation of Milford's continued need for RMR treatment, CMEEC/CTAG assert that it is irrelevant whether or not debt service cost¹⁴ is included as part of Milford's facility costs. They contend that when combined with FCM transition payments, Milford's market revenues exceed the sum of its facility costs and debt service by nearly \$1 million in 2005, by more than \$10 million in 2006, and by more than \$7.5 million during the first nine months of 2007.

8. CMEEC/CTAG assert that in accepting the RMR Agreement, the Commission stated that the RMR Agreement should be terminated when circumstances warrant. CMEEC/CTAG state that the Commission rejected Milford's proposed inclusion of the *Mobile-Sierra* public interest standard¹⁵ in the RMR Agreement and instead replaced it with the just and reasonable standard.

9. Furthermore, they state that the Commission specifically stated that if Milford's financial circumstances changed such that the RMR Agreement was no longer necessary, CMEEC/CTAG could file a complaint under section 206 seeking to terminate the RMR Agreement.¹⁶ Because of this alleged cost recovery, CMEEC/CTAG request that the Commission terminate Milford's RMR Agreement or, in the alternative, set Milford's financial eligibility for the RMR Agreement for hearing.

III. Notice and Responsive Pleadings

10. Notice of the complaint was published in the *Federal Register*, 72 Fed. Reg. 70,832 (2007), with interventions and protests due on or before December 26, 2007, which was extended to January 7, 2008. Milford filed a timely answer. NSTAR Electric Company and New England Power Pool Participants Committee filed motions to intervene and the Connecticut Department of Public Utility Control filed a notice of intervention. CMEEC/CTAG and Milford filed answers.

¹⁴ CMEEC/CTAG state that they lack information regarding Milford's actual debt service obligations. They note that Milford employed a hypothetical capital structure and cost of debt in its RMR cost of service filing (50 percent long-term debt and 50 percent equity). Using Milford's 6.60 percent cost of debt and a rate base that Milford calculated as roughly \$339.5 million, CMEEC/CTAG assume Milford's debt service costs to be roughly \$11.2 million.

¹⁵ *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (collectively *Mobile-Sierra*).

¹⁶ *Milford II*, 119 FERC ¶ 61,167 at P 48, *reh'g denied*, 121 FERC ¶ 61,042, at n.41 (2007).

A. Milford's Answer

11. Milford argues that CMEEC/CTAG failed to demonstrate that the rates, terms and conditions of the Milford RMR Agreement are no longer just and reasonable, and therefore, asserts that the complaint should be dismissed. Milford contends that CMEEC/CTAG did not argue that Milford is no longer needed for reliability, nor did they assert that the settlement rate is no longer a just and reasonable rate for Milford's cost of providing essential reliability service. Instead, Milford argues that the complaint is premised on the assumption that it is now unjust and unreasonable for Milford to continue to receive the Settlement Rate if CMEEC/CTAG can demonstrate that Milford is now able to recover its facility costs through a combination of market revenues and FCM transition payments.

12. Milford argues that CMEEC/CTAG's assumption is fundamentally flawed for two reasons: (1) the Settlement Agreement resolved the issue of Milford's financial eligibility for an RMR Agreement through the end of the transition period¹⁷ and, therefore, the complaint is nothing more than a collateral attack on the Milford Settlement Agreements; and (2) the settlement rate is just and reasonable because, in its absence, Milford would not have a reasonable opportunity to recover its total costs, due to market flaws and the non-locational nature of transition payments.

13. Milford states that the Milford Settlement Agreements specifically resolved all disputes relating to the eligibility of Milford for an RMR agreement, its right to collect its full cost of service, and set the term of the agreement through May 31, 2010. Furthermore, Milford asserts that the Commission strongly favors settlement agreements, since they provide the Commission with an essential tool for resolving cases without the need for a fully litigated proceeding.¹⁸ Milford also asserts that in considering whether to modify the terms of a settlement agreement, the Commission must consider whether the objectives of the settlement will be frustrated and if modifications will lessen the willingness of parties in future proceedings to settle.¹⁹

14. Milford asserts that the Milford Settlement Agreements were negotiated in conjunction with the FCM Settlement Agreement and resolved the treatment of the

¹⁷ The Transition Period as defined by the FCM Settlement runs from December 1, 2006 to June 1, 2010, terminating with the first period for which suppliers would receive payments pursuant to the FCA auction mechanism. FCM Settlement Order, 115 FERC ¶ 61,340 at P 30.

¹⁸ Milford Answer at 20, citing *Massachusetts Mun. Wholesale Elec. Co. v. Power Auth. of the State of New York*, 105 FERC ¶ 61,102, at P 38 (2005).

¹⁹ *Id.*, citing *Nat'l. Fuel Gas Supply Corp.*, 27 FERC ¶ 61,111, at 61,212 (1984).

Milford facility during the transition period of the FCM Settlement by specifically considering the FCM transition payments Milford would be receiving.²⁰ Under the Milford Settlement Agreements, transition payments are credited against Milford's Monthly Fixed Cost Charge so that Milford's total revenues do not exceed its AFRR. Milford asserts that the Milford Settlement Agreements were a package that involved considerable compromise on Milford's part including: (1) a reduction of \$9.0 million per year in its AFRR; (2) the elimination of Milford's right to claim a *force majeure* event; and (3) provisions giving ISO-NE the right to terminate the RMR Agreement if Milford's availability falls below 50 percent on an annual basis.²¹ Milford states that a significant factor in agreeing to these concessions was the resolution of its eligibility for the RMR Agreement through the end of the transition period. Milford asserts that CMEEC/CTAG did not introduce any new facts regarding Milford's inframarginal revenues or FCM transition payments that were not fully contemplated and addressed in the Milford Settlement Agreements. Consequently, Milford argues that CMEEC/CTAG have failed to demonstrate why the settlements are no longer just and reasonable.

15. Milford asserts that the alternative proposed by CMEEC/CTAG, reliance on market revenues and transition payments, would not result in Milford being fairly compensated for the locational value of its capacity and would not provide a reasonable opportunity for Milford to recover its full cost of service. Milford states that even if the CMEEC/CTAG were able to demonstrate that Milford was recovering its facility costs through a combination of market revenues and transition payments, they still would not have met their burden under section 206 of demonstrating that the Milford Settlement Agreements are no longer just and reasonable. Milford contends that the only alternative, a return to market-based rates, would not provide Milford with a reasonable opportunity to recover its full costs during the transition period. Milford states that in the absence of any evidence that the current market is capable of producing market-based rates that properly reflect the value of the reliability service that Milford provides in Southwest Connecticut, the Commission must reject the Complaint.

16. Milford states that it will not be able to recover either its facility costs or its full cost of service in the ISO-NE markets until, at the earliest, the beginning of the first FCM commitment period on June 1, 2010. Milford states that CMEEC/CTAG's assertions to the contrary do not properly take into account Milford's debt service obligation.

17. Finally, Milford argues that the application of the facility costs test as a basis for terminating the approved Milford Settlement Agreements violates the filed rate doctrine. Milford states that there is no language in Market Rule 1 that requires an entity to meet a

²⁰ *Milford III*, 119 FERC ¶ 61,167 at P 41-42; *see also* Partial Settlement Agreement, Transmittal Letter at 2-3.

²¹ *Milford III*, 119 FERC ¶ 61,167 at P 41-42.

continuing financial eligibility requirement in order to retain an RMR agreement, nor does it contain any provision authorizing the early termination of an approved RMR agreement on the premise that an entity may be able to recover its facility costs from revenues in the market. Furthermore, Milford states that the use of the facility costs test as a continuing eligibility test is unjust and unreasonable because, as the Commission has found, the present market will not provide Milford with a reasonable opportunity to recover its full cost of service until the FCM begins.

B. CMEEC/CTAG Answer

18. In its answer, CMEEC/CTAG argue that contrary to Milford's assertions, the language in the Milford Settlement Agreement specifically provides for any non-parties to file any challenge to the RMR Agreement in a section 206 complaint.²²

CMEEC/CTAG state that the issue here is whether Milford is still eligible for *any* RMR Agreement not whether the specific rates in this RMR Agreement are just and reasonable. CMEEC/CTAG assert that in accepting the RMR Agreement, the Commission stated that it was accepting the agreement based on Milford's financial eligibility at that time and stated that the potential impact of FCM Transition payments was outside the scope of that proceeding. CMEEC/CTAG state that the Commission then directed CTAG to file a separate section 206 complaint if it obtained evidence that the transition payments render Milford financially ineligible for an RMR agreement. CMEEC/CTAG assert that since it has now obtained such evidence, it has filed this complaint and requests that the Commission terminate Milford's RMR Agreement as unnecessary or in the alternative, establish hearing and settlement procedures.

19. CMEEC/CTAG assert that when the Commission reviews Milford's eligibility Milford should not be permitted to revise its debt service costs from its previous estimates which were accepted as part of the prior settlement agreement. Further, CMEEC/CTAG state that Milford has not identified either the lenders or the collateral used to secure the loans it references. CMEEC/CTAG asserts that Milford has not provided any sufficient supporting documentation or evidence to justify including its debt service estimates as part of the facility costs.

20. CMEEC/CTAG disagree with Milford's argument that the facility costs test is a violation of the filed rate doctrine, claiming Market Rule 1 does not require a generator to demonstrate a failure to recover its facility costs in order to qualify for an RMR Agreement. CMEEC/CTAG state that a "facility cost" standard neither violates the filed rate doctrine nor vitiates the right to charge a just and reasonable rate. CMEEC/CTAG assert that the Commission has previously addressed and rejected this contention, finding that section 205 of the FPA requires the Commission to evaluate the need for such

²² *Milford III*, 119 FERC ¶ 61,167 at P 31.

agreements.²³ CMEEC/CTAG state that there is no filed rate violation because there is no rate on file that eliminates the Commission's responsibility to exercise its section 205 authority. Additionally, CMEEC/CTAG state that having sought and obtained authorization to sell power at market-based rates, Milford has no inalienable right to the recovery of its full cost of service, especially since Market Rule 1 establishes no entitlement to full cost of service rates.²⁴

C. ISO-NE Answer

21. In its answer, ISO-NE states that it is only the administrator of the RMR Agreement and it is neither receiving nor making payments under the RMR Agreement. As such, ISO-NE states that it takes no position on the complaint. ISO-NE does request that Commission limit its response to those RMR agreements that were in effect prior to June 1, 2010 as these agreements will then terminate with the full implementation of the FCM. Further ISO-NE asserts that it is currently reviewing changes to future out-of-market reliability compensation and ISO-NE expects to file a proposal with the Commission this summer.

D. Milford's Response

22. In its response to CMEEC/CTAG's answer, Milford asserts that the only remaining dispute concerns Milford's debt costs – whether the actual costs should be included in the facility cost analysis and whether Milford sufficiently substantiated them. Milford asserts that its actual debt costs are necessary for an accurate facility cost analysis, and in its response included information about its debt and equity holders that CMEEC/CTAG asserted was missing. Accordingly, Milford argues that the complaint should be dismissed since it has demonstrated that absent the RMR Agreement it is still unable to recover its costs.

E. CMEEC/CTAG Answer

23. CMEEC/CTAG answer that Milford offers no explanation for the delay in presenting its debt service costs and does not explain its entire financial history. CMEEC/CTAG state that Milford presents only a subset of the relevant documents,

²³ CMEEC/CTAG Answer at 14 *citing, Bridgeport Energy, LLC*, 113 FERC ¶ 61,311, at P 26 (2005).

²⁴ CMEEC/CTAG Answer at 15. “Market Rule 1 requires generators seeking RMR agreements to file proposed agreements for Commission review under FPA section 205, ‘with each party free to take any position it determines appropriate regarding recovery of and return of and on investment.’” Market Rule 1, App. A, Exh. 2, § 2.3.1(c)(iii).

which omits its September 10, 2003 “Restructuring Agreement” with El Paso, under which El Paso transferred its 95 percent interest in Milford to the lenders in exchange for a “release...from certain obligations.”²⁵ CMEEC/CTAG state that Milford’s RMR Agreement should be terminated; however, if it is not, the Commission should set for hearing whether Milford’s alleged debt service expenses should be considered facility costs.

F. Milford’s Response

24. On March 11, 2008, Milford filed an additional response again arguing that its debt service costs are properly included in its facility costs analysis and fully supported. Milford contends that with the facts that it has provided, CMEEC/CTAG’s complaint is merely a collateral attack on Commission policy regarding the inclusion of debt service costs and, thus, should be dismissed.

IV. Commission Discussion

25. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the notices of intervention and timely, unopposed motions to intervene serve to make the parties that filed them parties to this proceeding. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers because they provided information that assisted us in our decision-making process.

26. The just and reasonable standard is the appropriate standard of review applicable to the Commission’s review of the RMR Agreement. As we have stated, due to the uniquely broad applicability of RMR agreements to markets and market participants alike, it is inconsistent with our duty under the FPA to be bound to the higher “public interest” standard when reviewing RMR agreements.²⁶ Furthermore, in accepting the Milford RMR Agreements, the Commission stated that any challenges to the agreements filed by non-parties under section 206 of the FPA would also be reviewed by the Commission under the just and reasonable standard.²⁷

²⁵ CMEEC/CTAG’s February 22, 2008 Answer to Milford’s Answer at 8, *citing* Application Under Section 203 of the Federal Power Act and Requests for Expedited Consideration, Confidential Treatment and Waivers, *Milford Power Company, LLC*, Docket No. EC06-24-000, at 3 (November 21, 2003).

²⁶ *Milford Power Co., LLC*, 119 FERC ¶ 61,167 at P 32.

²⁷ *Id.*

27. We reject Milford's argument that the facility costs test violates the filed rate doctrine. Market Rule 1 authorizes ISO-NE, in consultation with the Independent Market Monitoring Unit, to make a determination that a particular generator is needed for reliability purposes and, once that determination is made, to pursue "whatever financial arrangements are necessary to ensure that the facility will be available."²⁸ ISO-NE therefore has the authority to make an initial reliability determination, subject to Commission review, and to negotiate a proposed RMR agreement. As we have explained in other orders, the Commission has a statutory obligation to review every proposed RMR agreement to determine whether the rates and terms proposed are just and reasonable and to examine each proposed RMR agreement against the standard of section 205(a) of the FPA that all rates and charges demanded by any public utility are just, reasonable, and not unduly discriminatory or preferential.²⁹ Thus, although Market Rule 1 authorizes ISO-NE to negotiate RMR agreements as it deems necessary, any resulting agreements must be filed with the Commission and, as such, are subject to Commission review.³⁰

28. We also reject Milford's argument that the facility costs test as a continuing eligibility test is unjust and unreasonable. As stated in previous orders, the Commission has developed and used the facility costs test to help determine the justness and reasonableness of proposed RMR agreements.³¹ We also have addressed the continued need to review whether the currently approved RMR Agreements are still just and reasonable. The FCM Settlement Agreement specifically notes that participants do not

²⁸ ISO-NE Market Rule 1, App. A, Exh. 2 § 2.3.1(a).

²⁹ *E.g., Bridgeport Energy, LLC*, 118 FERC ¶ 61,243, at P 61 (2007) (citing *Devon Power LLC*, 107 FERC ¶ 61,240, at P 72, *order on reh'g*, 109 FERC ¶ 61,154 (2004), *order on reh'g*, 110 FERC ¶ 61,315 (2005)).

³⁰ *New England Power Pool*, 100 FERC ¶ 61,287, at 62,268 (2002); *see also Bridgeport Energy LLC*, 112 FERC ¶ 61,077 at P 32 (stating that the Commission "[does] not take the position that designation of a need for reliability from ISO-NE guarantees Commission approval of an RMR contract").

³¹ *See, e.g., Bridgeport Energy*, 118 FERC ¶ 61,243 at P 61; *Mystic Development, LLC*, 116 FERC ¶ 61,168, at P 20-21 (2006); *Pittsfield Generating Company, L.P.*, 115 FERC ¶ 61,059, at P 39 (2006), *settlement accepted and reh'g denied*, 119 FERC ¶ 61,001 (2007); *Consolidated Edison Energy Massachusetts, Inc.*, 112 FERC ¶ 61,253, at P 25, 32 (2005), *reh'g denied*, 114 FERC ¶ 61,099 (2006), *settlement accepted*, 116 FERC ¶ 61,311 (2006); *Consolidated Edison Energy Massachusetts, Inc.*, 116 FERC ¶ 61,180, at P 39-46 (2006); *Bridgeport Energy*, 112 FERC ¶ 61,077 at P 36-37, *reh'g denied*, *Bridgeport*, 113 FERC ¶ 61,311 at P 26-30, *reh'g denied*, 114 FERC ¶ 61,265 (2006).

waive their rights to challenge the need for RMR contracts, given changes in a generator's compensation or changes to system infrastructure.³² Further, we stated in an order on a complaint filed by the CTAG and other Connecticut parties against ISO-NE that "to the extent that any party feels that an RMR agreement is no longer necessary (especially in light of transition payments under the FCM Settlement Agreement), that party is free to file for relief with the Commission under section 206."³³ Further, in *Mystic Development, LLC*, the Commission found that "it is appropriate that prospective capacity revenues from transition payments be included in the Facility Costs Test."³⁴ Thus, the Commission determined that the facility costs test must be used to determine the initial eligibility for an RMR agreement, as well as continuing eligibility for an RMR agreement. We find that Milford offers no basis why the facility costs test should be used to review only initial eligibility for an RMR contract and then not be used when considering changes in revenue recovery for that same generator.

29. Thus, as we stated in *Norwalk*,³⁵ it is not clear from the evidence to date that Milford *requires* a cost of service RMR agreement to remain available to provide reliability service from these units. We find that whether or not the FCM transition payments Milford is now receiving (along with potential market revenues) are sufficient to cover Milford's facility costs so that the RMR Agreement is no longer necessary raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge proceedings ordered below. We therefore will set the issue for hearing and settlement judge procedures with the following guidelines.

30. The hearing and settlement judge shall review and compare generating facility costs such as fixed operations & maintenance costs, administrative and general costs, and taxes to revenues earned in the energy and capacity markets to determine whether the proposed RMR Agreement continues to be necessary for Milford to recover its facility costs.³⁶ In addition, this review should include Milford's debt service costs, just as we

³² See FCM Settlement Agreement § XIII.F.

³³ *Richard Blumenthal, Attorney General for the State of Connecticut v. ISO New England, Inc.*, 117 FERC ¶ 61,038, at P 71 (2006).

³⁴ *Mystic Development, LLC*, 116 FERC ¶ 61,168 at P 30.

³⁵ *Norwalk Power, LLC*, 120 FERC ¶ 61,048, at P 27 (2007) (*Norwalk*).

³⁶ *Bridgeport Energy, LLC*, 112 FERC ¶ 61,077, at P 36 (2005); *Berkshire Power Co., LLC*, 112 FERC ¶ 61,253, at P 22 (2005) (*Berkshire I*), order on reh'g, 114 FERC ¶ 61,099, at P 7 (2006) (*Berkshire II*); *Mystic Development, LLC*, 114 FERC ¶ 61,200, at P 32 (2006).

consider any other fixed costs.³⁷ However, the Commission reviews each RMR agreement on a case-by-case basis to determine whether particular debt service payments should be considered as facility costs.³⁸ Therefore, this review shall determine whether Milford's debt-service payments should be considered as facility costs.

31. Where, as here, the Commission institutes an FPA section 206 investigation on a complaint, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date of the filing of the complaint nor later than five months after the filing of the complaint. We will establish the statutorily-directed refund effective date at the earliest date allowed, the date of the filing of the complaint, December 4, 2007.

32. Section 206(b) also requires that if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. Based on our review of the record and in consideration of the nature of the issues set for hearing, and assuming that the parties are unable to reach a settlement, we expect that a presiding judge should be able to render a decision within approximately twelve months, or, if the parties were to proceed to trial-type evidentiary hearing procedures immediately, on or before February 28, 2009. If a presiding judge were to render an initial decision by that date, and assuming that the case does not settle, we estimate that we will be able to issue our decision within approximately six months of the filing of briefs on and opposing exceptions or by October 30, 2009.

33. While we are setting these matters for a trial-type evidentiary hearing we encourage the parties to make every effort to settle their dispute before hearing procedures commence. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2007). If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Administrative Law Judge (Chief Judge) will select a judge for this purpose.³⁹ The settlement judge shall report to the Chief Judge

³⁷ *Berkshire II*, 114 FERC ¶ 61,099 at P 7.

³⁸ *Mystic Development, LLC*, 116 FERC ¶ 61,168 at P 25.

³⁹ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of the issuance of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

and the Commission within 30 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) The refund effective date established pursuant to section 206(b) of the FPA is December 4, 2007, the date of the filing of the complaint.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred on the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held in Docket No. EL08-17-000 concerning Milford's continued eligibility of their approved RMR Agreement, as discussed in the body of the order. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2007), the Chief Judge is hereby directed to appoint a settlement judge within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(D) Within thirty (30) days of being appointed by the Chief Judge, the settlement judge shall file an initial report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If the settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is

authorized to establish procedural dates, and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

By the Commission. Commissioner Wellinghoff is concurring in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Connecticut Municipal Electric Energy
Cooperative and Richard Blumenthal,
Attorney General for the State of Connecticut

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(Issued March 20, 2008)

WELLINGHOFF, Commissioner, concurring in part:

The majority states in today's order that the just and reasonable standard is the appropriate standard of review applicable to the Commission's review of the subject RMR Agreement. I agree with that conclusion, based on the standards that I identified in *Entergy Services, Inc.*⁴⁰ For this reason, I concur with today's order.

Jon Wellinghoff
Commissioner

⁴⁰ 117 FERC ¶ 61,055 (2006).