UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Bridgeport Energy, LLC — Docket Nos. ER05-611-000, ER05-611-001

ORDER CONDITIONALLY ACCEPTING RELIABILITY MUST RUN AGREEMENT SUBJECT TO HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued July 19, 2005)

1. On February 18, 2005, as supplemented on May 20, 2005, Bridgeport Energy, LLC (Bridgeport) filed a proposed unexecuted Reliability Must Run Agreement (RMR Agreement) between Bridgeport and the Independent System Operator New England, Inc. (ISO-NE), for Bridgeport's generation facility (Facility) located in southwest Connecticut (SWCT). In this order, pursuant to section 205 of the Federal Power Act (FPA),[1] we conditionally accept and suspend for a nominal period the proposed RMR Agreement, make it effective June 1, 2005, subject to refund, and establish hearing and settlement judge procedures.

I. Background

2. In several orders issued in 2003, the Commission began addressing issues concerning the sufficiency of New England’s capacity markets and the use of RMR agreements in constrained areas of the region, particularly SWCT. The Commission rejected several RMR agreements in these orders, expressing concerns about the effect such contracts have on the competitive market for capacity.[2] As an interim measure to address certain flaws in the New England capacity market, the Commission directed ISO-

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[1] 16 U.S.C. § 824d (2000).

[2] *See, e.g., Devon Power LLC, et al.*, 102 FERC ¶ 61,314 (*Devon I*) *and Devon Power LLC,* 103 FERC ¶ 61,082 (*Devon II*), *reh’g granted in part and denied in part,* 104 FERC ¶ 61,123 (2003) (*Devon III*); *PPL Wallingford Energy LLC,* 103 FERC ¶ 61,085, *reh’g granted in part and denied in part*, 105 FERC ¶ 61,324 (2003) (*PPL Wallingford*).

NE to institute revised bidding rules (called Peaking Unit Safe Harbor, or PUSH, bidding) to give low-capacity factor generating units operating in designated congestion areas the opportunity to recover their costs through the market.[3] Additionally, the Commission directed ISO-NE to develop and file by March 1, 2004 a permanent mechanism to implement a location-based or deliverability requirement in the installed capacity (ICAP) or resource adequacy market, so that capacity located in designated congestion areas would be appropriately compensated for reliability.[4]

3. In response to the Commission's directive, ISO-NE filed a proposed locational ICAP (LICAP) mechanism for implementation by June 1, 2004. As proposed, the LICAP mechanism would have added a locational element to the ICAP markets by establishing four regions with separate ICAP requirements and prices:[5] Maine, Connecticut, Northeast Massachusetts/Boston, and the remainder of New England. Under this proposal, capacity transfer limits would have been established to limit the amount of capacity that a load serving entity could procure from outside its region to meet its capacity obligation. In an order issued on June 2, 2004, the Commission found that, while the proposal was conceptually sound, additional revisions were necessary prior to its implementation and delayed implementation of LICAP until January 1, 2006.[6]

4. In 2004 and early 2005, the Commission accepted several RMR agreements and conditioned them to terminate on the day a location-based capacity or deliverability requirement is implemented pursuant to the Commission's earlier directives.[7] The Commission reasoned that accepting the RMR agreements for a limited term was appropriate, given that the units covered by the contracts were aging, low capacity factor units that were performing poorly under the PUSH bidding rules.[8] The Commission

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[3] *Devon II* at P 33; *Devon III* at P 25-31.

[4] *Devon II* at P 37.

[5] ICAP obligations are imposed on load serving entities, requiring them to procure a specified amount of ICAP each month to ensure that there is sufficient capacity to supply system peak load under various contingencies.

[6] *Devon Power LLC*, 107 FERC ¶ 61,240 at P 1-2 (*Devon V*), *order on reh'g*, 109 FERC ¶ 61,154 (2004) (*Devon VI*), *order on reh'g*, 110 FERC ¶ 61,313 (2005); *order on reh'g*, 110 FERC ¶ 61,315 (2005).

[7] Devon Power LLC, 106 FERC ¶ 61,264 (2004) (Devon IV).

[8] *Id.* at P 18.

expressed confidence, however, that, once a permanent location-based capacity or deliverability requirement is established in New England, out-of-market arrangements, like RMR agreements, would no longer be necessary to maintain reliability.[9]

II. Bridgeport's Filings

5. Bridgeport requests RMR treatment for its Facility, which is a 530 MW efficient, gas-fired, combined-cycle generation facility, comprised of one steam turbine and two combustion turbines operated as a single point of dispatch. Bridgeport states that the Facility commenced commercial operation in July 1999.

6. Bridgeport requests approval of its proposed RMR Agreement to permit its Facility to continue providing reliability services, as Bridgeport states that it is experiencing a "substantial revenue shortfall from sales at market prices."[10] Bridgeport maintains that the proposed RMR Agreement is necessary for these units pending the implementation of a Commission-approved LICAP market design. Further, Bridgeport notes that once ISO-NE determines that a generating unit is required for reliability, if the generator is "not satisfied with its current compensation alternatives," then the generator is entitled to file a cost-of-service agreement for reliability services with the Commission.[11] Thus, Bridgeport states that, following formal notification by ISO-NE in December 2004 that the Bridgeport Facility was needed for reliability, it negotiated the proposed RMR Agreement with ISO-NE. Bridgeport maintains that the proposed RMR Agreement is, with limited exceptions that reflect the specific circumstances of the Bridgeport Facility, substantially similar to the form of the Cost-of-Service Agreement contained in ISO-NE's Market Rule 1 (*Pro Forma* COS Agreement).

7. In return for the reliability services provided by Bridgeport's Facility, the proposed RMR Agreement allows Bridgeport to receive its fixed costs for its Facility through the ISO-NE monthly settlement process. Also, Bridgeport will bid energy and ancillary services from the Bridgeport Facility into the NEPOOL markets based on the characteristics of the units and use Stipulated Bid Costs as formulated in the RMR Agreement. Bridgeport proposes a rate methodology to derive the Facility's Annual Fixed Revenue Requirement which is translated into a monthly fixed cost charge. The proposed method credits certain revenues against the monthly fixed cost charge. These revenues include: (1) revenues resulting from clearing prices in excess of the Facility's

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[9] *Id.* at P 28.

[10] Transmittal Letter at 6.

[11] *Id.* at 5-6.

Stipulated Bid Costs; (2) ICAP revenues; and (3) other revenues from the Facility. Bridgeport also states that the Facility will be subject to reductions in the Monthly Fixed-Cost Charge for unavailability and to penalties for failure to comply with dispatch instructions.

8. The proposed RMR Agreement will expire on the implementation date of a LICAP mechanism applicable to Bridgeport's Facility. If ISO-NE determines that the Facility is no longer necessary for reliability, ISO-NE may terminate the RMR Agreement upon 120 days written notice to Bridgeport.

9. On April 20, 2005, the Director, Division of Tariffs and Market Development - East, acting pursuant to delegated authority, issued a deficiency letter seeking additional information relating to Bridgeport's proposed RMR Agreement including, among others, an effective date for the proposed Agreement, which Bridgeport had failed to include.

10. On May 20, 2005, Bridgeport filed its response to the deficiency letter. In its response, Bridgeport seeks waiver of the Commission's 60-day prior notice requirement to permit the RMR Agreement to become effective on June 1, 2005.

III. Notice of Filings and Responsive Pleadings

11. Notice of Bridgeport's filing was published in the *Federal Register*, 70 Fed. Reg. 10,393 (2005), with interventions and protests due on or before March 11, 2005. On March 4, 2005, an extension of time to file comments was granted until March 18, 2005. Notice of Bridgeport's supplemental filing was published in the *Federal Register*, 70 Fed. Reg. 32,768 (2005), with interventions and protests due on or before June 13, 2005. On June 9, 2005, the Commission extended the comment date to June 24, 2005 while also denying Bridgeport's request for a Commission-issued protective order.[12]

12. Timely motions to intervene were filed by: the Attorney General for the State of Connecticut (CTAG), Northeast Utilities Service Company (NUSCO) on behalf of Northeast Utilities Operating Companies (NU) and Select Energy, Inc., PSEG Energy Resources & Trade LLC (PSEG ER&T), New England Power Pool Participants Committee (NEPOOL), and The Connecticut Office of Consumer Counsel (CT OCC). The Connecticut Department of Public Utility Control (CT DPUC) filed a notice of intervention.

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[12] *Bridgeport Energy, LLC*, 111 FERC ¶ 61,381 (2005).

13. Dominion Resources, Inc., Dominion Nuclear Connecticut, Inc., and Dominion Energy Marketing, Inc. (collectively, the Dominion Companies) filed a motion to intervene out-of-time.

14. ISO-NE, United Illuminating Company (United Illuminating), United Bridgeport Energy, Inc. (UBE), and the Connecticut Municipal Electric Energy Cooperative (CMEEC) filed timely interventions and motions to reject, protests, or comments. CT DPUC, CT OCC, and CTAG filed a joint motion to reject and protest.

15. Bridgeport filed an answer to the motions to reject and to select protests.

16. In response to Bridgeport's May 20, 2005 supplemental filing, CT DPUC, CT OCC, CTAG, and CMEEC (collectively, CT Parties) filed a timely renewed motion to reject and supplemental protests.

17. Bridgeport filed an answer to the renewed motions to reject and protests.

IV. Discussion

A. Procedural Matters

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given the early stage of the proceeding, the lack of undue prejudice or delay and the party's interest, we find good cause to grant, under Rule 214, the Dominion Companies' unopposed, untimely motion to intervene in this proceeding.

19. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Bridgeport's answers because they have provided information that assisted us in our decision-making process.

B. Need For RMR Agreement

1. Bridgeport's Arguments

20. Bridgeport argues that an RMR Agreement is needed for its Facility because the Facility is needed for reliability, and the Facility is unable to recover its costs in the market. Bridgeport states that ISO-NE issued a formal determination of the need for reliability services from the Facility, resulting in Bridgeport's application for an RMR Agreement under Market Rule 1. Bridgeport states that recent Commission orders have acknowledged that "the existing capacity market design neither allows generation units in

areas like SWCT to recover their costs nor incents the entry of needed new capacity."[13] Bridgeport claims that the "failure" to correct this "critical design flaw" in the New England markets accounts for Bridgeport's under-recovery of its costs.[14] Bridgeport also notes that the absence of locational scarcity pricing, which has also been identified by the Commission, is an additional contributor to the inability of Bridgeport to recover its costs from the market.[15] Bridgeport states that despite siting its Facility in the right location, a load pocket where additional generation capacity is needed, it is still unable to recover its fixed costs.

21. Bridgeport states that the Commission recognized the inadequate compensation problem in *Devon II* when it authorized the use of RMR agreements until a LICAP mechanism is in place for generation units that are needed for reliability, but cannot earn sufficient revenues from the markets to continue operation. Bridgeport states that it is an appropriate candidate for an RMR agreement because its units are required for reliability, but are unable to recover sufficient revenues in the marketplace to justify continued operation. Further, Bridgeport notes that absent the ability to file for cost-of-service compensation, the Bridgeport Facility's continued operation and availability for reliability purposes cannot be ensured.[16]

22. While Bridgeport acknowledges that it is a unique RMR applicant because it is an efficient, combined-cycle generation facility that operates at a relatively high capacity factor, Bridgeport states that the design and age of the units are "completely irrelevant" to the issue of whether the current capacity market in SWCT is "fatally flawed."[17] Moreover, Bridgeport argues that its Facility meets the Commission’s criterion for designation as an RMR generator, as established in *PSEG*,[18] *i.e.*, that the unit in question does not "have an opportunity to recover an adequate amount of fixed costs through the energy, reserves, or capacity markets."[19] Bridgeport argues that it is inadequately

[13] Transmittal Letter at 4.

[14] Supplemental Filing at 3.

[15] *Id.* at 11.

[16] Transmittal Letter at 7.

[17] Supplemental Filing at 5.

[18] *PSEG Power Connecticut, LLC*, 110 FERC ¶ 61, 020 (2005) (*PSEG*), *reh’g denied*, 110 FERC ¶ 61, 441 (2005) (*PSEG II*).

[19] Transmittal Letter at 5.

compensated through the market even though: (1) the Facility is generally bid at marginal cost to maximize dispatch and to earn available market revenues; (2) Bridgeport's capacity and availability factors compare favorably with other new units; and (3) Bridgeport's total installed capacity cost compares favorably, and is in fact lower than other new units.

23. Bridgeport states that the existing ICAP market is so "flawed" that in 2004, available auction revenues amounted to less than 0.1 percent of Bridgeport's fixed costs, and Bridgeport's bilateral capacity transactions provided for recovery of less than 4.3 percent of Bridgeport's fixed costs.[20] Bridgeport states that its revenues are insufficient to recover its operation and maintenance (O&M) expenses and taxes other than income tax, and in recent years there has been no revenue to cover depreciation or provide for a single cent of return.[21] By contrast, Bridgeport states that each dollar of capacity paid per kW-month under a LICAP mechanism (and assuming LICAP sales of 500 MW) would provide Bridgeport with $5.7 million per year of income.[22] Bridgeport states that it will not recover its cost-of-service unless capacity revenues exceed $3-$4 per kW-month in 2006 and $4-$5 per kW-month in 2007.[23] Bridgeport requests acceptance of the proposed RMR Agreement to ensure that its units remain available for reliability service in Southwest Connecticut.

2. <u>Comments</u>

a. <u>RMR Eligibility</u>

24. CT Parties and CMEEC urge the Commission to reject Bridgeport's proposed RMR Agreement. They argue that acceptance of the proposed RMR Agreement would violate Commission precedent holding that RMR agreements are to be invoked only as a remedy of last resort. Further, CT Parties and CMEEC reference *PSEG* to contrast Bridgeport with the older, seldom-used peaking units, with high marginal costs and

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[20] Supplemental Filing at 4-5.

[21] *Id*. (Bridgeport also notes that since beginning commercial operations in 1999, it has never recovered its full cost of service).

[22] *Id.* Attachment A at 7.

[23] *Id*.

mitigated bids that form the "RMR template."[24] CMEEC states that approval of an RMR agreement for a highly efficient baseload merchant facility like Bridgeport's would undercut any principled basis for limitations on the availability of RMR agreement coverage.

25. CT Parties note that Bridgeport's only offered justification for the proposed RMR Agreement is its dissatisfaction with current revenues while CMEEC states that the root cause of Bridgeport's compressed margins is the surplus of baseload generation capacity in New England. CMEEC argues that granting the proposed RMR Agreement to a baseload plant will re-allocate investment risk back to consumers from investors, allowing a generator to choose the regulatory regime that provides higher revenues (market-based rate authority or a cost-of-service agreement). CMEEC states that this is contrary to the Commission's mandate under the Federal Power Act to establish just and reasonable rates, and results in the elimination of the competitive market. CMEEC argues that the Commission should not rely on the future implementation of the LICAP mechanism to end the need for RMR agreements because generators who are unhappy with their compensation could still obtain RMR agreements after LICAP is implemented. Finally, CMEEC states that approving the proposed RMR Agreement would be contrary to the Commission's treatment of a similar request last year in *PPL Wallingford* regarding an RMR agreement for its new and efficient units.

b. Facility Availability

26. CT Parties acknowledge that the Commission has previously determined that units seeking RMR agreement with ISO-NE are not required first to apply to shut down or retire the units under section 18.4 of the Restated NEPOOL Agreement. However, CT Parties maintain that Market Rule 1[25] and Commission precedent[26] require that units seeking RMR payments prove that they will become unavailable between now and

[24] CMEEC notes that the Commission has recently approved RMR contracts for peaking units that are needed for reliability, but do not operate often enough in the energy market to recover their costs through inframarginal rents.

[25] CT Parties cite section 3.3.1 of Exhibit 2, Appendix A of Market Rule 1 which states that ISO-NE may "undertake whatever financial arrangements are necessary to ensure that the facility will be available."

[26] CT Parties cite *Devon VI* at P 28 where the Commission noted that "the applicable NEPOOL procedures limit the use of RMR agreements to situations in which ISO-NE determines the units are necessary for reliability and that out-of-market financial arrangements are required to ensure that the unit will be available."

January 1, 2006 (the scheduled date for LICAP implementation). In addition, CT Parties state that Bridgeport's assertion regarding retirement of the facility is not credible given the likelihood for significant compensation from LICAP beginning in 2006.

c. Need for Reliability

27. CT Parties state that the issue of whether Bridgeport's Facility is needed to serve reliability is an issue of fact. As such, CT Parties argue that the Commission must provide the parties in this proceeding minimum due process, including an opportunity to conduct discovery, present rebuttal evidence, and examine ISO-NE's witnesses in a hearing. CT Parties note that because ISO-NE has asserted that over one-half of New England's 29,000 MW of generation capacity will be eligible for RMR agreements within the next two to three years, the Commission must hold ISO-NE and Bridgeport to their burden of proving that Bridgeport's Facility is needed to serve reliability. Additionally, CT Parties state that pursuant to section 205 of the FPA, the Commission cannot delegate the reliability determination to ISO-NE, as ISO-NE is not a federal agency and the ultimate authority to authorize RMR agreements rests with the Commission.

3. Bridgeport's Answer

28. Bridgeport reiterates its position that it has satisfied the criteria for an RMR contract. In response to CT Parties and CMEEC, Bridgeport states that the Commission has already rejected arguments that RMR Agreements would be limited to old, inefficient, and uneconomic units.[27] Further, Bridgeport notes that the rejection of an application for an RMR agreement in *PPL Wallingford* was not based upon the age of the units, but rather the availability of the PUSH (Peaking Unit Safe Harbor) mechanism for units that run infrequently (capacity factor less than 10 percent). In addition, Bridgeport states that arguments against the proposed RMR Agreement based upon *PPL Wallingford* or the failure of a generator to apply to shut-down pursuant to section 18.4 of the Restated NEPOOL Agreement are collateral attacks on previous Commission orders. Bridgeport also states that under Market Rule 1, there is no requirement that ISO-NE find that a facility owner's financial condition is "dire" to negotiate financial arrangements that allow for continued reliability. Regarding CT Parties' assertion that the reliability designation is an issue of fact, Bridgeport notes that according to ISO-NE, SWCT would

[27] In its answer of April 11, 2005 at 6, Bridgeport states that the Commission's approval criteria for an RMR contract depends upon whether ISO-NE has made a determination that the generator is required for reliability and whether a cost-of-service RMR agreement is necessary to ensure the continued availability of the unit (and not on the vintage, heat rate or capacity factor of the unit).

be over 430 MW short of capacity in 2005 without Bridgeport. Bridgeport also argues that similar to *PSEG* and *Milford*,[28] the Commission should reiterate its deference to ISO-NE concerning reliability determinations.

4. **Supplemental Comments**

29. CT Parties assert that the root cause for Bridgeport's financial difficulties is operation of the competitive energy market in New England and not a market design flaw. In support of this statement, CT Parties argue that Bridgeport's adverse financial circumstances stem from the surplus supply of generation in New England and a mismatch between Bridgeport's generation technology and the current need for that technology in New England. CT Parties dispute Bridgeport's assertion that transmission constraints in SWCT have contributed to the facility's under-recoveries, and assert that market data demonstrate that transmission constraints were generally not binding. In support of this claim, CT Parties cite ISO-NE data for Bridgeport's Location Marginal Pricing (LMP) node (1032).[29] CT Parties note that congestion at the Bridgeport Energy locational marginal pricing node was minimal in 2004 in both the day-ahead and real-time markets, with an average congestion value of 0.62 percent of the average LMP in the Day-Ahead Market and 0.2 percent in the Real-Time Market.

30. Further, CT Parties state that in the last four years, New England has seen a massive increase in new, efficient natural gas combined cycle generation. CT Parties argue that because of the glut of capacity and the dispatch order of generation, generators like Bridgeport are forced to cut their bids for sales of energy output and their resulting margins are decreased. CT Parties state that this reduced margin distinguishes efficient units with high capacity factors (like Bridgeport’s Facility) from peaking units which operate infrequently and are unable to recover their fixed costs in the energy market. CT Parties note that the addition of this new generation in New England occurred at the same time that Bridgeport’s Facility was constructed, denying Bridgeport the argument that the risks from this context were unknown and unforeseeable. Finally, CT Parties note that the influx of combined cycle units like Bridgeport in New England have resulted in an excess of baseload capacity relative to the New England load profile. CT Parties offer that if a larger portion of the resource mix were peaking/higher cost intermediate units, then the effective heat rate of the system would be higher for more hours, and efficient

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[28] *Milford Power Company, LLC*, 110 FERC ¶ 61,299 (2005) (*Milford*), *reh’g pending.*

[29] *See* Renewed Joint Motion to Reject and Protest of CT Parties at 4.

units like Bridgeport's would experience better financial results. CT Parties state that the proposed RMR Agreement will force consumers to bail out a generator that selected the wrong technology resource.

5. **Commission Determination**

31. As noted elsewhere in this order, the Commission has previously determined that an RMR contract is a tool of last resort. Because these contracts remove generators from the competitive marketplace, they exert pressure on the remaining generators to also seek RMR coverage. Further, contrary to the intent of the competitive marketplace, these contracts shift the risk of investment back to consumers by removing these units from the market. However, in 2004 and early 2005, the Commission accepted several RMR agreements and conditioned them to terminate on the day a location-based capacity or deliverability requirement is implemented pursuant to the Commission's earlier directives. The basis for these initial agreements (pre-*Milford*) was the concern that absent a cost-of-service agreement, these older, inefficient peaking/intermediate units which were needed for reliability would not continue to operate.

32. In its initial filing, Bridgeport restates the Commission's opinion from *Devon V* that discussed the use of "RMR contracts for units that are needed for reliability but cannot earn sufficient revenues from the markets to continue operation."[30] Bridgeport also states that under Market Rule 1, once ISO-NE has determined that a generating unit is necessary for reliability, if the generator is not satisfied with its current compensation alternatives, the generator is entitled to file a cost-of-service agreement for reliability services.[31] Finally, in its answer, Bridgeport argues that there is no requirement that ISO-NE find a facility owner's financial condition as "dire" in order to negotiate financial arrangements that will allow continued reliability.[32] The Commission has previously acknowledged that submission of a request to deactivate pursuant to section 18.4 of the Restated NEPOOL Agreement is not a prerequisite for approving an RMR contract. However, we do not take the position that designation of a need for reliability from ISO-NE guarantees Commission approval of an RMR contract, especially for a highly efficient merchant generator, capable of earning a significant portion of the available market revenues. Rather, we must examine the facts in each instance against the standard

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[30] *Devon V* at P 45.

[31] Transmittal Letter at 5-6.

[32] Bridgeport's April 11 Answer at 10 (citing ISO-NE filings in *Milford*).

of section 205(a) of the FPA that all rates and charges demanded by any public utility for the sale of electric energy subject to the Commission's jurisdiction shall be just and reasonable.

33. We find that whether the proposed RMR Agreement is necessary for Bridgeport to recover its facility costs, as described below, raises issues of material fact that cannot be resolved on the record before us, and is more appropriately addressed in the hearing and settlement judge procedures ordered below. The issues include, among others: (1) whether Bridgeport has realized true losses each year since commencing operation in 1999; and (2) whether the proposed RMR Agreement is necessary to prevent deactivation of the Bridgeport Facility. We are not setting for hearing the issue of whether Bridgeport is needed for reliability, as discussed further below.

34. Bridgeport's Facility is a new, highly-efficient combined-cycle baseload facility that has not been mitigated[33] and has a relatively high capacity factor of approximately 70 percent.[34] By contrast, the RMR agreements we accepted prior to *Milford* involved peaking units located in load pockets, that were seldom run and frequently subject to mitigation under the current market rules. As a result, these peaking units were unable to recover their costs from the energy or reserves markets. While new merchant baseload facilities like Milford and Bridgeport are clearly different from the peaking RMR applicants, the Commission approved the Milford RMR contract (with the rates set for hearing) on the basis that Milford was similar to the previously approved RMR applicants in two important respects: the facilities are needed for reliability in New England, and the facility owners have not earned sufficient revenues in the market to keep the facility in operation pending LICAP.[35]

35. However, it is also possible to differentiate Milford from Bridgeport, and this fact forms the basis for our different decisions regarding the two facilities. Milford applied for RMR treatment after approximately 13 months of operation (8 months for one unit, 5 for the other). As we noted in *Milford,* in 2004, after paying its variable fuel expenses, Milford had insufficient revenue to pay the costs ordinarily necessary to keep a facility available, such as fixed O&M, administrative and general (A&G), and taxes (identified

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[33] Supplemental Filing, Attachment A at 4 (Bridgeport states that it has not been mitigated since the implementation of Standard Market Design by ISO-NE in March 2003).

[34] Exhibit BKP-1 at 5.

[35] *Milford* at P 40.

henceforth as "facility costs").[36] Milford is a single project, debt-financed facility, in default on its loan obligations, and was unable to access additional capital to ensure that the facility would remain operational. While protesters argued that Milford's operating history was too short to justify an RMR contract, the Commission determined that there was a legitimate threat that without an RMR agreement, Milford would be unable to fulfill its reliability obligation in "the most heavily constrained area within New England."[37]

36. By comparison, Bridgeport has been operational for approximately six years. Bridgeport states that during its entire operating history, it has never recovered its full cost of service.[38] This statement is supported in Bridgeport's supplemental filing, in which Bridgeport compares annual revenues to annual costs from 1999-2004.[39] The presented fixed costs include both depreciation and return on rate base. However, as in *Milford*, since Bridgeport has applied for and received authorization to provide generation services under market-based rates,[40] in determining whether the proposed RMR Agreement is necessary to prevent Bridgeport from deactivation, the Commission will compare facility costs like fixed O&M, A&G, and taxes to revenues earned in the energy and capacity markets.[41] The Commission's use of this facility cost comparison, however, does not prevent generators who apply for an RMR contract in New England from including depreciation and rates of return as part of their filed cost of service rates, as these items have been considered part of an applicant's recoverable costs under RMR cost-of-service agreements, including most recently in *Milford*.

37. Upon examination of Bridgeport's annual facility costs (including fixed O&M, A&G, and taxes other than income taxes) compared to annual revenues, we note that in four of the six years presented (1999-2002), Bridgeport was able to recover its facility costs, variable costs, and earn a return ranging from approximately $8 million to approximately $20 million. In the fifth year, 2003, the facility essentially covered its

[36] *Id*., n.31

[37] *Devon II* at P 49.

[38] Supplemental Filing at 5.

[39] Supplemental Filing, Attachment 7a-1.

[40] *Bridgeport Energy, LLC*, 83 FERC ¶ 61, 307 (1998).

[41] Bridgeport seeks to include depreciation and a rate of return in its argument that the facility has never recovered its costs.

facility costs and variable costs without any additional return. In 2004, Bridgeport fell approximately $4 million short of recovering its facility costs and $10 million short of recovering its facility plus variable costs. These annual returns do not exclude several costs that are unexplained in the filing. For example, during 2002-2003, Bridgeport's stated A&G costs are approximately 100 percent higher than the A&G costs in the other years, and during 2000, fixed operation expenses were more than 100 percent higher than the fixed operation expenses in the year with the next highest fixed operation expenses ($30.9 million compared to $13.9 million).

38. In 2005, Bridgeport forecasts an under-recovery of its full cost-of-service (inclusive of depreciation and rate of return) of approximately $53.4 million.[42] The largest portion of the presented fixed costs for 2005 is a $25.8 million maintenance expense (relative to a stated typical maintenance expense of less than $2 million in most other years). A one-time extraordinary maintenance expense of this magnitude may not be relevant when determining whether a cost-of-service RMR contract is necessary for a facility to remain in service, as it may be more appropriate for this cost to be capitalized and/or amortized over the expected life of the project. Further, Bridgeport forecasts that even without LICAP, revenues will double in 2006 relative to 2005.[43]

39. It is not obvious that Bridgeport's several years of significant positive returns followed by two years of "inadequate" cost recovery meet the Commission benchmark for granting RMR approval; *i.e.*, the concern that absent an RMR contract, the facility will be unable to continue operation. Bridgeport has been able historically to recover its facility costs in the market, even considering some stated costs that are not fully explained or supported. Further, it is not the position of the Commission that cost-of-service agreements should be the recovery floor for generators that are unable to earn a profit for a given year. By contrast, the Commission has stated that under the current market structure, RMR contracts are necessary for generators that are not given the opportunity to recover their costs and have not generated sufficient revenue to remain in the market. In fact, in most years, Bridgeport has been able to recover its costs under the current market structure. Further, we note that there may be merit to CT Parties' argument that Bridgeport's adverse financial circumstances stem partially from the surplus supply of baseload generation in the New England region. We also note that unlike Milford, Bridgeport is equity financed and, therefore, does not present the same issue concerning its ability to meet its financial obligations.

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[42] Supplemental Filing, Attachment 5-1.

[43] *Id*. (Removing depreciation and return on rate base from Bridgeport's expected 2006 costs, Bridgeport forecasts a return of over $13 million *before* LICAP).

40. The Commission is accepting ISO-NE's determination that Bridgeport is needed for reliability. Market Rule 1, the currently-effective rate schedule on file with the Commission, permits ISO-NE to determine whether units are needed for reliability. ISO-NE has stated in a letter to Bridgeport that Bridgeport's Facility is needed for reliability purposes.[44] The CT Parties have not presented any evidence that ISO-NE's study is unreliable, or that ISO-NE incorrectly determined, in consultation with the Independent Market Advisor (and reflected in ISO-NE's letter to Bridgeport), that this resource is needed for reliability. The CT Parties request hearing on this issue but have not disputed ISO-NE's factual determination. The Commission accepts ISO-NE's analysis and will not set this issue for hearing.

41. The issue of whether the proposed RMR Agreement is necessary for Bridgeport to recover its facility costs is set for hearing and settlement judge procedures. If the Commission ultimately determines that the RMR Agreement is necessary, then a just and reasonable cost-of-service rate will need to be established in this proceeding. While the hearing and settlement judge procedures established in this order should consider the entire cost of service, the Commission will rule summarily on certain other aspects of the RMR Agreement, and provide additional guidance for the ordered hearing, as discussed below.

D. <u>Cost of Service</u>

42. Bridgeport proposes cost recovery for the term of the RMR Agreement pursuant to the *Pro Forma* COS Agreement. Bridgeport proposes a proxy capital structure of 50 percent debt and 50 percent equity and a return on common equity (ROE) of 10.88 percent, leading to an overall return on rate base. Bridgeport proposes a total annual fixed cost of $57,825,914.[45]

43. Bridgeport states that the amount of plant in service has been reduced by approximately $80 million, as many of the design and development costs incurred in the development of the Bridgeport Facility were incurred by North Carolina Design & Development Company, LLC (NCD&D), an affiliate of Bridgeport.[46] Bridgeport

[44] Bridgeport's February 18 filing, Appendix F.

[45] Exhibit No. SSG-3, Schedule 1 at 1.

[46] Transmittal Letter at 3.

maintains an Administrative Services Agreement with NCD&D whereby Bridgeport pays NCD&D over the life of the Bridgeport Facility for services related to the original construction.

1. **Going Forward Costs**

44. CT Parties argue that the proposed RMR Agreement should be rejected because Bridgeport's recovery should be limited to the marginal costs of Bridgeport's Facility. CT Parties state that the fundamental purpose of RMR contracts is to preserve reliability, not provide a guaranteed recovery of sunk costs, especially with LICAP payments scheduled to begin in January 2006. Similarly, CMEEC states that if the proposed RMR Agreement is not rejected, then Bridgeport should only be eligible to recover its "going forward costs,"[47] and capital costs should be recovered from market revenues. In support of its position, CMEEC states that as Bridgeport has not threatened to retire or deactivate its units, a full cost-of-service contract is not the only avenue option to ensure that the Bridgeport Facility remains available. Finally, CMEEC argues that this treatment is consistent with the going forward cost allocation approved for frequently mitigated units in PJM in *PJM Interconnection, LLC*.[48]

45. Bridgeport responds stating that the proposed "going forward cost" mechanism has been rejected in recent Commission orders, including *Mirant*,[49] *PSEG*, and *Milford*, and that Market Rule 1 allows a generator to file a cost-of-service agreement. Further, Bridgeport notes that in *Milford*, the Commission rejected a request to adopt the going forward cost mechanism from *PJM Interconnection, LLC,* citing the difference between the capacity markets in PJM and New England.

46. We accept Bridgeport's full cost of service approach as consistent with cost of service provisions of Market Rule 1.[50] In prior RMR proceedings, the Commission has permitted recovery of fixed costs and variable costs under RMR contracts as essential costs for the services that the units continue to provide.[51] Additionally, the full cost of

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[47] CMEEC defines going forward costs as Fixed O&M and Property Tax Expense.

[48] *PJM Interconnection, LLC,* 110 FERC ¶ 61,053 (2005), *order on rehearing,* 112 FERC ¶ 61,031 (2005) (*PJM Interconnection, LLC*).

[49] *Mirant Kendall, LLC,* 109 FERC ¶ 61, 227 (2004) (*Mirant*); *order denying reh'g,* 110 FERC ¶ 61,272 (2005).

[50] *See* Market Rule 1, Appendix A, Exhibit 2, section 3.3.1.

[51] *See Mirant* at P 36; *PSEG* at P 30, *Milford* at P 70.

service approach is appropriate for RMR agreements that mirror the *Pro Forma* Cost of Service Agreement in Market Rule 1, because any infra-marginal revenues or "other" revenues earned by these units in the market are credited against the monthly charges. Furthermore, as in *PSEG II*, here we find CMEEC's reference to the recent order in *PJM Interconnection, LLC* to be misplaced.[52]

2. Rate of Return

47. CT Parties state that the proposed 10.88 percent return on equity (ROE) is not just and reasonable given the low risk resulting from full cost recovery under cost-of-service rates and Bridgeport's debt/equity ratio. In support, CT Parties state that if approved for an RMR contract, Bridgeport will face relatively little risk if it receives full cost-of-service rates. CT Parties state that the risk of a generator under an RMR contract is approximately the same as the risk of regulated utilities earning cost-of-service rates, and that by comparison, 10.88 percent is excessive. Bridgeport responds, stating that the Commission has repeatedly reiterated its support for the use of a proxy capital structure and a proxy ROE in developing cost-of-service rates for merchant generators in New England. Bridgeport also notes that calculating a unique ROE and capital structure for each RMR applicant would require a costly and time-consuming discounted cash flow analysis for each.

48. To reiterate from *Milford*, we found in *Devon IV* that a 10.88 percent ROE is a conservative proxy for merchant generating facilities.[53] The Commission's analysis performed to justify this ROE, using the midpoint of the zone of reasonableness, did not include any increases to ROE based on high company risks, such as default on loans. The Commission further used a proxy group of five large, integrated, publicly-traded utilities in determining this proxy ROE, rather than a group of proxy merchant generators.[54] We have historically justified the use of a proxy rate of return on common equity in this circumstance,[55] and will continue to do so.

[52] *See PSEG II* at P 22-23. The PJM proposal that the Commission accepted in *PJM Interconnection, LLC* was a market-design mechanism to compensate frequently mitigated units, not a contract for reliability services like the contract at issue here.

[53] *Devon IV* at P 23.

[54] *See Devon Power LLC*, 103 FERC ¶ 61,155 at P 3 (2003).

[55] *Devon III* at P 49, *PSEG* at P 45.

3. COS Hearing Issues

a. Income Tax

49. In its supplemental filing, Bridgeport added a section to address the Commission's *Policy Statement On Income Tax Allowances*[56] which was issued after the deficiency letter was issued for this proposed RMR Agreement.[57] Bridgeport states that in accordance with the Commission's Policy Statement, because its upstream corporate owners are corporations, they are subject to an actual or potential tax liability on the income from Bridgeport. Thus, Bridgeport claims that it is entitled to a full income tax allowance as part of its cost-of-service rate. CT Parties state that Bridgeport should not be able to recover federal and state income taxes because as a pass-through entity for income purposes, Bridgeport has no actual liability for such taxes.[58] In its answer, Bridgeport states that the CT Parties' reliance on *BP West Coast* is misplaced since the upstream owners of Bridgeport, UIL Holdings Corporation and Duke Energy Corporation are taxable corporations. Further, Bridgeport states that the Court's ruling in *BP West Coast* to deny tax liability in rates was limited to tax pass-through entities owned partly by non-corporate participants.

50. We note that the Commission's Policy Statement is in the proper standard for determining income tax liability. However, we find that the preceding arguments raise issues of material fact that cannot be resolved on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

b. Levelized Rate

51. CMEEC and CT Parties argue that Bridgeport's request to set its rates on a non-levelized basis is unjust and unreasonable, as Bridgeport's Facility is new, and non-levelized rates for a new facility will lead to the potential for significant over-recoveries during the period Bridgeport is under RMR contract. In addition, CMEEC states that in the "out years," when cost-based rates under the declining rate base method would be lower than levelized rates, it is likely that Bridgeport will return to selling at market rates,

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[56] 111 FERC ¶ 61,139 (2005).

[57] Supplemental Filing, Attachment A at 22.

[58] CT Parties cite *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263, 1285-93, *reh'g denied*, 2004 U.S. App. LEXIS 20796-98, where the U.S. Court of Appeals for the D.C. Circuit held that a limited partnership was not entitled to an allowance for income taxes it did not pay.

leading to additional over-recovery. CT Parties recommend the use of a mid-life convention to determine the average plant-in-service for this proceeding, along with compensating adjustments to accumulated deferred income taxes and current income tax expenses. In its answer, Bridgeport states that because the term of the proposed RMR Agreement is relatively short (expiring with the implementation of LICAP, scheduled for January 1, 2006), requiring the use of a levelized rate during this period would ensure that Bridgeport fails to recover its costs during this period, denying Bridgeport an opportunity to earn a return on its investment, and contrary to the Commission's decision in *Milford*.

52. We find that the preceding arguments raise issues of material fact that cannot be resolved on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

c. Energy Management Fee

53. CMEEC states that Bridgeport's proposed energy management fee should be rejected, as the proposed RMR Agreement also includes cost recovery for administrative and general expenses. In support, CMEEC cites *Connecticut Jet Power LLC*,[59] where CMEEC states that the Commission found that the inclusion of unspecified "management fees" is inappropriate where administrative and general costs are already included in rates.

54. We find that the preceding arguments raise issues of material fact that cannot be resolved on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

d. Other Items

55. ISO-NE stressed the need for additional investigation of several items related to Bridgeport's February 18 filing. These items include: (1) expenses incurred under O&M, maintenance services, and management services agreements, (2) the long term service agreement with Siemens Westinghouse Operating Services Co., (3) the administrative services fee from NCD&D, (4) the annual expense for fixed gas transportation cost and the nature of those billings from the service provider, (5) A&G Salaries, and (6) legal fees. In its comments, ISO-NE recommends that Bridgeport supplement its February 18 filing. Alternatively, ISO-NE states that the Commission should set the cost-of-service for hearing, suspend the hearing and institute settlement proceedings to allow for a more detailed explanation of Bridgeport's cost basis. In its answer, Bridgeport states that

[59] 105 FERC ¶ 61,096 (2003) at P 9.

during its pre-filings discussions and negotiations with ISO-NE, ISO-NE did not request additional detail regarding these expenses or copies of the contracts. In its answer, Bridgeport proceeds to provide more detail concerning ISO-NE's questions.

56. In addition, CT Parties claim that Bridgeport's revenue data from its February 18 filing is insufficient to determine the cause of its alleged revenue deficiency. Specifically, CT Parties note that Bridgeport provides no information regarding how much of its output is delivered under fixed-price obligations and how much is delivered in the market, and CT Parties note the risk to ratepayers of Bridgeport's "open market gambits." In its answer, Bridgeport states that virtually all of Bridgeport's revenues are from the ISO-NE markets, and Bridgeport has only limited bilateral capacity sales. Further, Bridgeport states that because the ISO-NE markets are flawed, there is no merit to the CT Parties argument. Finally, Bridgeport notes that it supplied ISO-NE with information concerning its existing bilateral capacity transactions prior to filing the RMR Agreement, and that revenues from any bilateral agreements would be credited against a monthly RMR payment.

57. As stated previously, we find that the preceding arguments raise issues of material fact that cannot be resolved on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below. In addition, as part of the hearing and settlement judge procedures, a determination should be made whether (and on what schedule) Bridgeport will be required to file reports reflecting all categorized cost and revenue information with ISO-NE and any affected customers during the term of the RMR Agreement.

E. Proposed Deviations from the *Pro Forma* Cost of Service Agreement

58. As stated elsewhere in this order, the issue of whether the proposed RMR Agreement is necessary for Bridgeport’s Facility is set for hearing and settlement judge procedures. If the hearing determines that the RMR Agreement is necessary, then the ensuing discussion of the proposed deviations from the *Pro Forma* COS Agreement will be pertinent.

59. Bridgeport's proposed RMR Agreement contains certain provisions which differ from the *Pro Forma* COS Agreement contained in NEPOOL Market Rule 1. CT Parties note that throughout the contract "Accepted Electric Industry Practice" was substituted for "Good Utility Practice." CT Parties state that they do not object to the substitution provided that, consistent with *PSEG*, the definition of "Accepted Electric Industry Practice" includes adherence to the long-established standard of "Good Utility Practice." CT Parties also dispute the addition of two new terms not present in the *Pro Forma* Agreement to section 5.2.2(e); (1) that ISO-NE pay to Bridgeport the disputed amount for repair costs to the Resource subject to refund; (2) that ISO-NE and Bridgeport use

alternative dispute resolution before going to the Commission or court to resolve any disputes over the cost of repair. CT Parties state that ISO-NE should not be required to pay Bridgeport disputed repair cost amounts since consumers would have no assurance that the costs are reasonable and may have no recourse in the event of insolvency. Further, CT Parties argue that the Commission should not approve the request to require alternative dispute resolution since ISO-NE does not have the same financial interest in RMR Agreements as consumers who pay for the RMR Agreement. CT Parties request that in the alternative, the contract should provide that state utility regulators and consumer advocates and others should be given notice of and permission to participate in any required alternative dispute resolution proceedings.

60. As Bridgeport notes in its answer, the Commission has previously addressed both of these issues in *PSEG*. As we determined in *PSEG*, an examination of Market Rule 1 reveals that the definitions of Accepted Electric Industry Practice and Good Utility Practice appear to be synonymous.[60] Thus, we will accept this change as consistent with the *Pro Forma* agreement in Market Rule 1. Regarding section 5.2.2(e), as the Commission stated in *PSEG*, any change in the monthly reliability payment requires the Commission's prior determination, under section 205 of the FPA, that the new amount is just and reasonable. Thus, any additional expenditures as provided for under section 5.2.2(e) not already on file with the Commission would constitute a change in the filed rate and would require Bridgeport to file them under 18 C.F.R. §35.13 prior to any proposed recovery. As Bridgeport has already included a sentence in section 5.2.2(e) addressing the need for a 205 filing for any additional expenditures, the concerns of the CT Parties have been addressed.

F. Other Issues

61. As stated elsewhere in this order, the issue of whether the proposed RMR Agreement is necessary for Bridgeport's Facility is set for hearing and settlement judge procedures. If the hearing determines that the RMR Agreement is necessary, then the ensuing discussion of the termination date of the proposed RMR Agreement and restriction of Bridgeport's market-based rate authority will be pertinent.

1. Termination Date

62. CT Parties state that should the RMR Agreement not be rejected, the term of the proposed contract should be fixed to a specific date instead of expiring with the

[60] New England Power Pool FERC Electric Rate Schedule No. 7, Original Sheet No. 3, section 1.3.2.

implementation of LICAP. The basis for CT Parties' argument is that should the implementation of LICAP be delayed beyond January 1, 2006, the proposed RMR Agreement could continue indefinitely. CT Parties also argue that basic contract law requires contract terms to be definite, and that basing the contract's termination on a contingency that may never occur, could invalidate the contract. In supplemental comments, CT Parties add that because the RMR Agreement is slated to terminate with the implementation of LICAP in January 1, 2006, during the period from January 1, 2006 to May 31, 2006, customers will not benefit from LICAP revenue offsets to the monthly cost of service requirement. CT Parties argue that based on a June 1, 2005 effective date, this would result in Bridgeport over-recovering its cost of service on an annual basis (June 2005 to June 2006).

63. The termination date issue has been addressed in prior RMR orders, most recently in *PSEG II*. In addressing this issue previously, we noted that in the LICAP proceedings, the Commission stated that it would consider RMR agreements that are limited to a single term that expires when the LICAP mechanism is implemented.[61]

2. Market-Based Rate Authority

64. CMEEC argues that, should the RMR Agreement include costs other than going-forward costs, the Commission should condition the acceptance of the Reliability Agreement on restriction of Bridgeport's market-based rate authority. CMEEC states that Bridgeport's desire to guarantee its return of and on its investment demonstrates that Bridgeport possesses generation market power, and therefore, Bridgeport should not be allowed to sell at market-based rates during the contract term on an "unconstrained basis."

65. Restriction or suspension of market-based rate authority for generators under RMR contract has been addressed numerous times by the Commission, including most recently in *PSEG II*. As in *PSEG II*, we note that under article 3.1.2 of the proposed RMR Agreement, if approved for an RMR Agreement, any revenues from the Bridgeport Facility will be offset against the reliability payment in the RMR Agreement; as a result, Bridgeport may still use its market-based rate authority to obtain revenues in the markets that would then be credited against the reliability payments. Further, as noted in *PSEG II*, Bridgeport is required under the terms of the RMR Agreements to submit stipulated bids, which if selected will generate offsetting revenues. Because Bridgeport must submit bids at the Stipulated Bid Costs, it cannot adjust its bids to exercise market power, satisfying any market power concerns that might exist. Thus, the Commission does not believe it is necessary to restrict Bridgeport's market-based rate authority.

[61] *Devon V* at P 72; *order on reh'g*, *Devon VI* at P 25, 29.

G. Notice Requirement and Suspension

66. As stated elsewhere in this order, the issue of whether the proposed RMR Agreement is necessary for Bridgeport's Facility is set for hearing and settlement judge procedures. If the hearing determines that the RMR Agreement is necessary, then the ensuing discussion of notice and suspension will be pertinent.

67. In its supplemental filing, Bridgeport requests that the Commission accept its proposed RMR Agreement and grant waiver of the Commission's 60-day prior notice requirement to permit a June 1, 2005 effective date. Bridgeport states that good cause exits for the Commission to grant waiver because: (1) Since more than 90 days have passed since its initial filing of its proposed tariff on February 18, 2005, Bridgeport has satisfied the 60-day prior notice requirement; (2) Citing *Milford*, Bridgeport notes in its supplemental filing that where a filing is amended in good faith to cure a deficiency, the Commission allows it to retain its initial filing date, and (3) Bridgeport has notified ISO-NE of its intent to seek a June 1, 2005 effective date and will begin complying with the proposed Bridgeport Tariff on that date.

68. The CT Parties seek rejection of the unexecuted RMR Agreement: because Bridgeport has not filed rate comparison data under 18 C.F.R. §§ 35.13(c)(1)-(2) to quantify the impact of the rate change. If the RMR Agreement is not rejected, CT Parties request that the proposed rates be suspended for the full five-month statutory period, and the RMR Agreement be set for hearing.

69. In support of suspension of the rates, CT Parties state that the proposed rates would impose excessive costs on ratepayers that are more than ten percent above the just and reasonable rates. CT Parties acknowledge that the Commission has determined (including in *Mirant*) that the *West Texas*[62] standard does not apply to entities seeking cost-of-service rates when they previously operated under market-based rate authority. However, CT Parties state that the *West Texas* standard has been applied previously to an initial application for RMR coverage and that the Commission failed to explain the difference in circumstances.[63] Further, CT Parties cite *Lockyer* [64] to support their claim that rates for wholesale electric service under FERC-granted market-based rate authority

[62] *West Texas Utilities Company*, 18 FERC ¶ 61,189 (1982) (*West Texas*).

[63] *Citing Devon IV* at P 25 & n.30.

[64] *See California ex rel. Bill Lockyer v. FERC*, 103 F. 3d 1006, 1012-13 (9th Cir. 2004).

are filed rates for purposes of the FPA and thus do not escape review under the just and reasonable standard. CT Parties aver that the distinction made in *Mirant* between rates charged under market-based rate authority and newly filed cost-of-service based rates cannot stand in light of *Lockyer*. Finally, CT Parties assert that Bridgeport's requested cost-of-service recovery of $9.09 per kW-month is excessive relative to the $6.09 per kW-month recently paid to NRG for Devon units 7 and 8.

70. CMEEC states that the proposed rates should be suspended for the full five-month statutory period and the RMR Agreement should be set for hearing. If the RMR Agreement is not rejected, CMEEC requests that the Commission deny Bridgeport's requested waiver of the 60-day notice requirement and of any cost-of-service data obligations under Part 35. CMEEC states that the Commission should deny waiver of the notice period because the request is identical to the recent denial of waiver in *PSEG*. CMEEC seeks denial of waiver for Bridgeport's cost-of-service data obligations under Part 35 because Bridgeport seeks to supercede its prior market-based rate tariff.

71. In its answer, Bridgeport states that the circumstances of *Milford* and *Mirant* (where waiver of notice was granted) are indistinguishable from Bridgeport's in terms of the timing of its required negotiations with ISO-NE. Bridgeport also states that the Commission has ruled that *West Texas* does not apply when the present rate is not based upon the applicant's cost of service and that this argument is a collateral attack on prior Commission orders. Regarding the request by the CT Parties concerning Bridgeport's cost-of-service filing requirements, Bridgeport states that like other entities that have been granted waiver of the Uniform System of Accounts, it can not provide its cost-of-service information in a form that does not exist. Bridgeport notes that the fact that a generator does not keep records in accordance with the Commission's Uniform System of Accounts is not grounds for rejection of an RMR agreement.

72. We note that since more than 90 days have passed since its initial filing of its proposed tariff on February 18, 2005, Bridgeport has satisfied the 60-day prior notice requirement.

73. In *West Texas* we explained our standard for determining whether a rate increase is excessive as compared to the rate on file and thus may require maximum suspension. Recently, in several RMR orders, including *Mirant*, *PSEG*, and *Milford*, we stated that *West Texas* was not applicable where the current rate on file for the RMR units is not a cost of service rate, but rather is a market-based rate.[65] Consistent with these findings, since Bridgeport's current rate on file for these units is not a cost of service rate, but rather is a market-based rate, we find that *West Texas* is not applicable here.

[65] *Mirant* at P 16; *PSEG* at P 68; *Milford* at P 23.

Furthermore, as in *Milford*,[66] we find that CT Parties' argument, that the Commission must compare the proposed rates with the former rates for Devon 7 and 8 to determine whether the proposed rates are excessive, is misplaced.

74. In *PSEG II*, the Commission recently addressed CT Parties' claims regarding the Commission's prior application of *West Texas* in *Devon IV*.[67] As we stated in *PSEG II*, since deciding in *Devon IV* that it would not impose a full five-month suspension period because its preliminary findings indicated that the rates were not "substantially excessive,"[68] the Commission has since consistently held that it will not apply *West Texas* to an RMR agreement where the rate on file is not a cost-of-service rate. In *Mirant*, *PSEG*, and *Milford*, the Commission declined to apply *West Texas* to RMR agreements where the units at issue were previously operating under other than cost-based rates, such as market-based rates.

75. To reiterate from *PSEG II*, this policy is appropriate because where an entity does not have a firm cost-based rate on file with the Commission and is instead permitted to charge a market-based rate that can vary, the Commission is unable to determine whether the proposed cost-based rate would be a rate increase at any given time. Since market-based rates move higher and lower based on market conditions, the cost-based rate contained in the RMR Agreements may be higher or lower, depending upon the point in time at which one compares the cost-based rate to the prevailing market rate. To rely on such an imprecise calculation to determine whether an entity's proposed rates represent a "substantially excessive" increase and will be suspended for the maximum period creates too great a risk that the entity "will . . . be deprived forever of substantially cost-justified revenues that would have been collected in the absence of a maximum five month suspension period," without any corresponding benefits to the public.[69]

76. In *PSEG II*, the Commission also addressed the argument that under *Lockyer*, rates for wholesale electric service under FERC-granted market-based rate authority are filed rates for purposes of the FPA, and thus do not escape review under the just and reasonable standard.[70] As we said recently in *PSEG II*, CT Parties correctly point out that

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[66] *Milford* at P 23.

[67] *PSEG II* at P 39-40.

[68] 106 FERC ¶ 61,264 at P 25.

[69] *See West Texas* at 61,375.

[70] *PSEG II* at P 41.

Lockyer states that market-based rates must satisfy the just and reasonable standard. Here, Bridgeport's proposed rates have not escaped review simply because the Bridgeport Facility previously operated under market-based rate authority. To the contrary, the Commission is not only setting the issue of the need for Bridgeport's RMR Agreement for hearing, but is also initiating hearing proceedings to review the proposed rates contained in the RMR Agreement to ensure that they are just and reasonable.

H. Hearing Procedures

77. The Commission's preliminary analysis of Bridgeport's filing indicates that it has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential or otherwise unlawful. Accordingly, we will conditionally accept Bridgeport's proposed RMR Agreement for filing, suspend it for a nominal period, to become effective on June 1, 2005, subject to refund, and set it for hearing and settlement judge procedures as ordered below. As we have indicated elsewhere in the order, there are two fundamental issues that the hearing and settlement procedures should address: the hearing should determine whether Bridgeport has realized true losses each year since commencing operation in 1999 and whether the proposed RMR Agreement is necessary to prevent deactivation of the Bridgeport Facility; if it is determined that the proposed RMR Agreement is necessary to prevent deactivation of the Bridgeport Facility, then the hearing and settlement judge procedures established in this order should consider the entire cost of service exclusive of the areas where we have ruled summarily.

78. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. 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.[71] If the parties desire, they may, by mutual agreement, request a specific judge as a settlement judge in the proceeding; otherwise the Chief Judge will select a judge for this purpose.[72] The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief

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[71] 18 C.F.R. § 385.603 (2005).

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

Judge shall provide the parties with additional time to continue their settlement discussions or provide for the commencement of a hearing by assigning the case to a presiding judge.

<u>The Commission orders</u>:

(A) Bridgeport's proposed RMR Agreement is hereby conditionally accepted for filing, as modified, suspended for a nominal period, to be effective June 1, 2005, subject to refund.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon 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 concerning the justness and reasonableness of Bridgeport's proposed RMR Agreement. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in 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 (2005), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding 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 sixty (60) days of the date of this order, the settlement judge shall file a report with the Chief Judge and with the Commission 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 at least every sixty (60) days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding administrative judge, to be designated by the Chief Judge, shall convene a prehearing conference in this proceeding, within fifteen (15) days of the date of the presiding judge's designation, in a hearing room of the Commission, 888 First Street, N.E. Washington, D.C. 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.

(S E A L)

Linda Mitry,
Deputy Secretary.