UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Consolidated Edison Energy Massachusetts, Inc. Docket Nos. ER05-903-000
ER05-903-001

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

(Issued September 9, 2005)

1. On April 29, 2005, as supplemented on July 11, 2005, Consolidated Edison Energy Massachusetts, Inc. (CEEMI) filed a proposed unexecuted Reliability Must Run Agreement (RMR Agreement) between CEEMI and the Independent System Operator New England, Inc. (ISO-NE) for West Springfield 3 (WS-3), located at CEEMI's West Springfield Station in West Springfield, Massachusetts. CEEMI requests that the Commission accept its proposed RMR Agreement and grant waiver of the Commission's 60-day prior notice requirement[1] to permit an effective date of May 1, 2005, subject to refund. In this order, pursuant to section 205 of the Federal Power Act (FPA),[2] we conditionally accept and suspend for a nominal period the proposed RMR Agreement, make it effective May 1, 2005, subject to refund, and establish hearing and settlement judge procedures.

[1] *See* 16 U.S.C. § 824d (2000); 18 C.F.R. § 35.3 (2005).

[2] 16 U.S.C. § 824d (2000).

I. Background

2. ISO-NE has authority, pursuant to Market Rule 1,[3] to negotiate power supply agreements for the purchase of electricity at cost-based rates from generation facilities that ISO-NE identifies as being necessary to ensure reliability, but which are unable to recover operating costs under current market conditions. In recent decisions, the Commission has approved limited-term RMR agreements for newer, baseload facilities needed for reliability that demonstrated an inability to earn sufficient revenues to keep generation operational due to market flaws.[4]

II. CEEMI's Filings

3. CEEMI owns West Springfield Station which consists of WS-3, a 107 nominal MW oil and gas-fired steam generating unit, one 22 MW gas-fired turbo jet (WS-10), and two dual 48 MW dual fuel combustion turbines (CEEMI Expansion). CEEMI acquired ownership of West Springfield Station in 1999 and retired units WS-1 and WS-2 in 2000. Consolidated Edison Energy Massachusetts Expansion (CEEMX) installed the two combustion turbine expansion units, whose costs are kept on the books of CEEMX, separate from CEEMI. CEEMI seeks RMR treatment only for WS-3, although CEEMI states that some of the costs incurred in maintaining and operating WS-3 are common to, and shared among the other CEEMI units at West Springfield Station and in surrounding towns.[5]

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[3] Market Rule 1 permits ISO-NE to enter into contracts for the supply of power at cost-based rates where the generation facilities from which power is to be supplied are needed for reliability in New England, and where the generation facility has demonstrated that it has not earned sufficient revenues in the market to keep the facility in operation.

[4] *Milford Power Company, LLC,* 110 FERC ¶ 61,299 (2005), *order on reh'g,* 112 FERC ¶ 61,154 (2005) (*Milford*).

[5] In surrounding towns in Western Massachusetts, the CEEMI portfolio includes one 21 MW gas-fired turbo jet (Doreen), one 21 MW gas-fired turbo jet (Woodland), and five hydroelectric generating stations totaling 17.2 MW (comprised of Dwight Station at 1.5 MW, Indian Orchard Station at 3.7 MW, Putts Bridge Station at 3.9 MW, Redbridge Station at 4.5 MW and Gardner Falls Station at 3.6 MW).

4. CEEMI seeks approval of its proposed RMR Agreement "to ensure that West Springfield 3 remains available to support system reliability, and to provide fair compensation to WS-3 for so doing."[6] CEEMI maintains that the proposed RMR Agreement is necessary for WS-3 pending the implementation of a Commission-approved Locational Installed Capacity (LICAP) market design. Thus, CEEMI states that, following formal notification by ISO-NE in March 2005 that WS-3 was needed for reliability, it negotiated the proposed RMR Agreement with ISO-NE. CEEMI maintains that the proposed RMR Agreement is, with limited exceptions that reflect the specific circumstances of the West Springfield Station, substantially similar to the form of the Cost-of-Service Agreement contained in ISO-NE's Market Rule 1 (*Pro Forma* COS Agreement).

5. In return for the reliability services provided by WS-3, the proposed RMR Agreement allows CEEMI to receive its fixed costs for WS-3 through the ISO-NE monthly settlement process. Acting as Agent for CEEMI, Consolidated Edison Energy (CEE), an Exempt Wholesale Generator, will bid energy and ancillary services from WS-3 into the NEPOOL markets based upon the unit's characteristics and Stipulated Bid Costs as formulated in the proposed RMR Agreement.[7] CEEMI proposes a rate methodology to derive the unit'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 unit's Stipulated Bid Costs; (2) Installed Capacity (ICAP) revenues; and (3) any other revenues from the unit. CEEMI also states that WS-3 will be subject to reductions in the Monthly Fixed-Cost Charge for unavailability. The proposed RMR Agreement requires CEEMI to notify ISO-NE of a Forced Outage of WS-3, along with any return to service costs. Within thirty days of a Notice of Forced Outage issued by either CEEMI or ISO-NE, either party may notify the other that it has determined that WS-3 should be shut down. The proposed RMR Agreement will expire on the implementation date of a LICAP mechanism applicable to WS-3.

6. On June 10, 2005, the Commission's Director, Division of Tariffs and Market Development - East, acting pursuant to delegated authority, issued a deficiency letter (Deficiency Letter) seeking additional information relating to CEEMI's proposed RMR

[6] Transmittal Letter at 1.

[7] The Stipulated Bid Costs are self-adjusting formulary rates that reflect agreed-upon formulae and marginal costs for fuel, variable operation and maintenance expenses (O&M) and environmental allowances, as defined in the proposed RMR Agreement and as reported to ISO-NE.

Agreement including, among others, a demonstration of any historical losses incurred by WS-3. In response to the deficiency letter, CEEMI made a supplemental filing on July 11, 2005 (July 11 supplemental filing)

7. CEEMI requests an effective date of May 1, 2005 for the proposed RMR Agreement.

III. Notice of Filings and Responsive Pleadings

8. Notice of CEEMI's filing was published in the *Federal Register*, 70 Fed. Reg. 25,039 (2005), with interventions and protests due on or before May 20, 2005. Notice of CEEMI's supplemental filing was published in the *Federal Register*, 70 Fed. Reg. 42,049 (2005), with interventions and protests due on or before August 1, 2005.

9. Timely motions to intervene were filed by: the New England Power Pool Participants Committee (NEPOOL), Bridgeport Energy LLC (Bridgeport), NRG Power Marketing, Inc., Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC and Somerset Power LLC (collectively, NRG), the Northeast Utilities Service Company (NUSCO) on behalf of the Northeast Utilities Companies and Select Energy, Inc. (Select Energy) on its own behalf, and Milford Power Company, LLC.

10. Dominion Energy New England, Inc. and Dominion Energy Marketing, Inc. (collectively, the Dominion Companies) and the Attorney General of the Commonwealth of Massachusetts (MassAG) filed motions to intervene out-of-time.

11. ISO-NE, and NSTAR Electric & Gas Corporation (NSTAR), filed timely interventions and protests or comments. Massachusetts Municipal Wholesale Electric Company (MMWEC) filed a motion to intervene out-of-time, motion to reject, and protest.

12. CEEMI filed an answer to the comments, motions to reject, and to select protests on June 6, 2005 (June 6 Answer).

13. In response to CEEMI's July 11 supplemental filing, MMWEC filed a timely renewed motion to reject, supplemental protests, and request for a Commission-issued protective order.

14. CEEMI filed an answer to MMWEC's renewed motion to reject and protest (August 12 Answer).

IV. Discussion

A. Procedural Matters

15. 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 unopposed, untimely motions to intervene in this proceeding of the Dominion Companies, MassAG, and MMWEC.

16. 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 CEEMI's answers because they have provided information that assisted us in our decision-making process.

B. Need For RMR Agreement

1. CEEMI's Arguments

17. CEEMI argues that an RMR Agreement is necessary for WS-3 because the unit is needed for reliability, and because the deferral of LICAP in New England "has put generators such as CEEMI in a position whereby they have essentially no choice but to seek RMR Agreements...."[8] CEEMI states that ISO-NE confirmed the need for WS-3 for system reliability in a March 2005 report, noting that the unit is needed for transmission adequacy and to support import capabilities into Connecticut necessary to meet reliability criteria. Specifically, according to CEEMI, ISO-NE's analysis indicates that without WS-3, the 115 kV underground cable between East Springfield and Breckwood would be expected to exceed its Long Time Emergency rating for an excessive number of hours in 2005.

18. In support of its need for an RMR Agreement, CEEMI notes that WS-3 operates relatively infrequently, with a capacity factor during the last three years between 7.3% and 11.2%.[9] As such, CEEMI states that the future operating life of this unit is "uncertain," and the proposed RMR Agreement is necessary to assure the unit's continued operation and availability to support ISO-NE's transmission reliability criteria. Further,

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[8] Transmittal Letter at 5, citing *Devon Power LLC*, 112 FERC ¶ 61,179 (2005).

[9] April 29 Filing, Attachment E (Heintz testimony) at 4.

CEEMI argues that the proposed RMR Agreement is supported by *Devon*[10] and is the "only means presently available for assuring continuing unit availability on the basis of rates that can be determined as just and reasonable rates prior to the implementation of a comprehensive LICAP program in 2006."[11]

19. CEEMI also points to recent Commission decisions in *Mirant*,[12] *Milford*,[13] and *PSEG*[14] for support of its proposed RMR Agreement. CEEMI states that in these orders, the Commission acknowledged market deficiencies and reaffirmed the appropriateness of RMR agreements for units needed for reliability pending implementation of the LICAP mechanism in New England. Further, CEEMI cites *PSEG II*, where the Commission outlined the criteria for the acceptance of RMR agreements (as stated in the *Devon* orders) as "situations in which units are necessary for reliability and require out-of-market financial arrangements to remain available."[15] CEEMI states that WS-3 "clearly" satisfies these criteria and argues that, as an older plant with "little remaining rate base," WS-3 is dependent on market returns, which are inadequate to consistently cover costs like O&M and administrative and general (A&G) expenses that are necessary for the unit to provide reliability services.

20. In addition, CEEMI states that WS-3 has been subsidized by more economically competitive units in CEEMI's portfolio, such as hydroelectric and remote jets, while consuming a disproportionate share of the labor costs. CEEMI also notes that WS-3 has been available, yet operated, only 9.0 percent of the hours in 2004, which was the only source of "traditional" electric generation market-based revenues for that year. CEEMI states that WS-3 has never recovered its full cost-of-service since its acquisition by CEEMI in 1999, although this is the standard that the Commission has determined as the appropriate measure of just and reasonable rates for providing reliability services prior to

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[10] *Devon Power LLC*, 107 FERC ¶ 61, 240 (*Devon*).

[11] Transmittal Letter at 5.

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

[13] *See supra* note 4.

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

[15] *PSEG II* at P 14.

LICAP implementation. CEEMI also notes that WS-3 is properly sited, adjacent to a significant load area in Springfield, Massachusetts where it is needed for reliability, yet has experienced revenue shortfalls below cost-of-service levels. CEEMI attributes this revenue shortfall to the flawed market design in New England that fails to recognize the locational value of capacity.

2. Comments

21. NSTAR and MMWEC urge the Commission to reject CEEMI's proposed RMR Agreement. Noting that CEEMI is not seeking to surrender its market-based pricing authorization, NSTAR argues that when CEEMI applied for and received authorization to charge market-based rates for WS-3, it agreed to accept market risk. NSTAR states that under the FPA, market-based prices fall within the "zone of reasonableness" and are just and reasonable pursuant to section 205. By comparison, NSTAR argues that the proposed RMR Agreement is inconsistent with the standards of section 205, and would shift the consequences of CEEMI's investment choice to consumers, removing WS-3 from the discipline of market risks.

22. MMWEC argues 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. In support, MMWEC notes that CEEMI has failed to demonstrate that WS-3 is operating at a loss, offering no statement that WS-3 is operating at a loss, and providing no historical revenue data for the unit. Rather, MMWEC notes that the January 3, 2005 letter from CEEMI to ISO-NE requesting a reliability determination mentions potential "additional capital investment" as the impetus for the request. MMWEC claims that the Commission should not accept the proposed RMR Agreement without a detailed demonstration that WS-3 does "not have an opportunity to recover an adequate amount of fixed costs through the energy, reserves, or capacity markets."[16] In addition, MMWEC states that if the premise for the proposed RMR Agreement is the need to pursue capital improvements, then CEEMI should detail those improvements and demonstrate why they cannot be made absent an RMR agreement. Finally, MMWEC states that since WS-3 is not located in a load pocket or designated congestion area (DCA), the Commission should not "open the door" to RMR agreements outside of DCAs absent a demonstration that no alternatives exist.

23. NSTAR acknowledges that the Commission has previously determined that a unit seeking an RMR agreement with ISO-NE is not required to first apply to shut down or retire the units under section 18.4 of the Restated NEPOOL Agreement. However,

[16] MMWEC cites *PSEG* at P 18.

NSTAR and MMWEC both argue that the intent of unit retirement is the underlying purpose of RMR agreements, and MMWEC states that a submission to deactivate or retire WS-3 would demonstrate financial need. NSTAR states that CEEMI does not make any pretense of an intention to retire WS-3, and approached ISO-NE for a reliability determination as the date for a scheduled turbine inspection (and corresponding capital expenditures) approached. NSTAR argues that CEEMI is seeking price supports because the market is not producing the revenues expected by CEEMI.

24. NSTAR argues that the proposed RMR Agreement conflicts with the intended benefits of electric restructuring: (1) lower pricing of electric power supplies through greater efficiencies; and (2) placing the investment risk on investors, rather than consumers. NSTAR states that acceptance of the proposed RMR Agreement will result in a generator with market-based rate authorization receiving compensation at a rate equal to the "higher of" cost-of-service or market price, without any incremental benefit to consumers.

3. CEEMI's Answer

25. Contrary to the assertions of NSTAR and MMWEC, CEEMI states in its June 6 Answer that a demonstration of either an intent to retire WS-3 absent an RMR Agreement and/or the demonstration of inadequate revenues when compared with the costs of operations are "completely unrelated" to the service provided under the proposed RMR Agreement. Further, CEEMI argues that these "symbolic" demonstrations would only serve to "hamper the reliability of electric service" prior to the implementation of LICAP in New England. Instead, CEEMI states that it seeks an RMR Agreement for the "simple reason" that ISO-NE has determined that WS-3 is necessary for reliability in New England. Moreover, CEEMI acknowledges that the calling up of WS-3 by ISO-NE out-of-merit (OOM) led to the January 3, 2005 request to ISO-NE that it evaluate whether WS-3 is needed for system reliability. CEEMI also reiterates that the Commission has previously found that there are both short and long-term reliability compensation issues in New England. Finally, CEEMI notes that any revenues it receives from the proposed RMR Agreement would be cost-based and would "forego all scarcity rents."

4. Supplemental Comments

26. In addition to its prior motions to reject the proposed RMR Agreement, MMWEC argues that CEEMI's July 11 supplemental filing fails to demonstrate that WS-3 has

earned insufficient revenues to cover the unit's "facility costs."[17] In support, MMWEC cites language in the Deficiency Letter (and *Milford* and *Bridgeport*) to reiterate its point that requests for RMR treatment must be based upon a reliability determination from ISO-NE *and* a demonstration that the unit is not earning sufficient market revenues to remain in operation. MMWEC states that assuming CEEMI's revenue and cost data from the July 11 supplemental filing are reliable, there has been no demonstration that the only available option is the proposed RMR Agreement; MMWEC notes that CEEMI's data show that WS-3 has earned aggregate revenues in excess of facility costs of nearly $5.9 million from 1999 to 2004. In addition, MMWEC argues that due to the record temperatures and higher peak loads experienced in New England this year, it is likely that WS-3 will continue to earn sufficient revenues to cover its facility costs. Further, MMWEC states that the presented costs for WS-3 may be overstated, as it is not clear whether CEEMI has properly allocated costs among its units, specifically concerning the expansion units which reside in the same facility as WS-3, yet whose costs are tracked by CEEMX.

27. Finally, to the extent that the Commission intends to review the materials filed on a confidential basis, MMWEC requests that the Commission (1) enter a protective order; (2) direct CEEMI to produce the information withheld from the public version of its filing pursuant to that protective order; and (3) issue an additional notice setting an appropriate period of time for review and comment upon the confidential information.

5. CEEMI's Answer

28. In its August 12 Answer, CEEMI addresses the supplemental comments of MMWEC. Regarding the Commission's previous acknowledgements of the lack of a locational capacity market in New England, CEEMI states that "inferences may be drawn and presumptions should flow" for units with low capacity factors like WS-3 that are needed for reliability.[18] Further, CEEMI avers that the mere fact that an owner would seek an RMR agreement, setting the unit's compensation at cost-of-service rates, "speaks volumes" for an owner's true expectations of market-based revenues, and it is

[17] The term "facility costs" was defined in *Bridgeport Energy, LLC*, 112 FERC ¶ 61,077 (2005) (*Bridgeport*) at P 35 as the costs ordinarily necessary to keep a facility available, such as fixed O&M, administrative and general (A&G), and taxes.

[18] August 12 Answer at 5.

"presumably with these sorts of awareness that the Commission has embraced the RMR provisions of ISO-NE Market Rule 1."[19]

29. Concerning MMWEC's argument that WS-3 does not satisfy the "financial need test" from *Bridgeport*, CEEMI argues that MMWEC misinterprets the specific revenue data presented by CEEMI, incorrectly allocating substantial energy and non-energy market revenues to WS-3, rather than across CEEMI's entire Massachusetts portfolio. In addition, based upon the United States Court of Appeals for the District of Columbia Circuit ruling in *PPL Wallingford Energy LLC v. FERC*, No. 03-1292, 2005 U.S. App. LEXIS 16587 (D.C. Cir. Aug. 9, 2005) and the proposed RMR Agreement, CEEMI contends that the significant historical out-of-pool capacity sales revenues that CEEMI has presented for WS-3 are non-recurring, and will not be available during the proposed RMR Agreement period. Thus, CEEMI states that these revenues can not be used to support MMWEC's argument that WS-3 does not require an RMR agreement to recover its costs during the period of relevance from May 2005 until October 2006. Finally, CEEMI states that removing fuel and trading revenues and out-of-pool capacity sales to New York during the past three years (as these are not revenues from the energy and capacity markets as defined in *Bridgeport*), results in significant net negative revenues for WS-3.

6. Commission Determination

30. In the instant filing, CEEMI claims several different bases for its proposed RMR Agreement. As mentioned previously, in its initial filing of April 29, 2005, CEEMI asserts that because WS-3 is needed for reliability (as determined by ISO-NE) and the unit operates relatively infrequently, then the RMR contract is necessary to assure that the unit remains operational. CEEMI also notes in its initial filing that approval of the proposed RMR Agreement is consistent with *Devon*, which determined that LICAP might provide a means for addressing compensation issues for units in New England, especially those units in Northeast Massachusetts (NEMA)/Boston and Southwest Connecticut (SWCT). CEEMI also cites from *Devon*, that in the interim period prior to LICAP, "the Commission will consider the need for these [RMR] contracts, and the justness and reasonableness of the rates proposed therein, as they are filed."[20]

31. Additionally, CEEMI's January 3, 2005 letter to ISO-NE requesting a reliability determination notes that as the date for a scheduled turbine inspection for WS-3

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[19] *Id*.

[20] *Devon* at P 72.

approached, CEEMI needed to consider whether "additional capital investment" was justified under the current market structure. Further, CEEMI acknowledges in its June 6 Answer that "the calling up of WS-3 by ISO-NE out-of-merit led to the January 3, 2005 request to ISO-NE that it evaluate whether WS-3 is needed for system reliability."[21]

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, as we noted in *Bridgeport*, we do not take the position that designation of a need for reliability from ISO-NE guarantees Commission approval of an RMR contract. Rather, we must examine the facts in each instance against the standard of section 205(a) of the FPA that all rates and charges of a 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 WS-3 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. It will be important in the hearing to determine the costs and revenues that are unique to WS-3.[22]

34. Thus, consistent with both *Milford* and *Bridgeport*, in determining whether the proposed RMR Agreement is necessary to prevent WS-3 from deactivation, the Commission will compare facility costs like fixed O&M, A&G, and taxes to revenues

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[21] June 6 Answer at 14 (CEEMI explains further in the July 11 supplemental filing that WS-3 was dispatched out-of-merit order on 195 days in the Interim market and 53 days in SMD and has not been mitigated since SMD was implemented in New England - Supplemental Filing, Attachment B at 6-7).

[22] CEEMI provides several caveats to the revenue data from Table 2.a.1 of its July 11 supplemental filing. CEEMI states that because its books are maintained for the entire CEEMI Springfield portfolio (rather than by individual units), only the revenues that could be identified with non-WS-3 facilities were extracted. Further, CEEMI states that for 2003 and 2004, the presented capacity revenues exceed New England market values since the capacity from WS-3 was sold into the rest of the New York State capacity market. Similarly, in its August 12 Answer, CEEMI argues that MMWEC (in arguing that WS-3 has historically been able to recover its costs) mistakenly attributes substantial revenues exclusively to WS-3 when they should be attributed to the entire CEEMI Massachusetts portfolio.

earned in the energy and capacity markets.[23] The Commission's use of this facility cost comparison, however, does not prevent generators who apply for RMR contracts in New England from requesting 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 *Bridgeport*.

35. CEEMI has requested privileged treatment for its requested forecast revenue and cost data, and the ALJ will rule on this request.

36. Based on the presented numbers, it is not clear whether WS-3 meets the Commission standard for approval of an RMR agreement; i.e., that WS-3 *requires* an out-of-market financial arrangement to remain available. It appears that WS-3 has been able to historically recover its facility costs in the market. As we stated in *Bridgeport*, 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. Rather, 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.

37. The issue of whether the proposed RMR Agreement is necessary for CEEMI to recover its facility costs for WS-3 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.

C. Cost of Service

38. CEEMI proposes cost recovery for the term of the RMR Agreement pursuant to the *Pro Forma* COS Agreement. CEEMI proposes a proxy capital structure of 50 percent debt and 50 percent equity and a return on common equity (ROE) of 10.88 percent,

[23] Based upon the facility cost comparison, it appears that in four of the six years (2002-2002, 2004), WS-3 was able to recover its facility costs, variable costs, and earn a return ranging from approximately $310,000 to approximately $3.1 million (and essentially covered its facility costs and variable costs in 1999).

leading to an overall return on rate base. CEEMI proposes a total annual fixed cost of $8,224,343.[24]

1. Comments

39. Various interveners question the presented cost of service. The raised issues include *inter alia*: the proper basis for calculating Accumulated Deferred Income Taxes (ADIT), the source/methodology for the calculation of the Materials and Supplies balance, Cash Working Capital, A&G expenses, the proper rate base for WS-3, allocation of costs among CEEMI's units at the West Springfield site, the use of a proxy capital structure, and the remaining life used to compute depreciation. As the entire cost of service is set for hearing, we will only rule summarily on the issues presented below.

2. Going Forward Costs

40. MMWEC contends that the rates proposed by CEEMI for its RMR Agreement have not been shown to be just or reasonable. MMWEC contends that any RMR Agreement should be limited to the recovery of "going forward" costs under which CEEMI would be able to recover through the RMR Agreement its actual and reasonable out-of-pocket costs incurred during the term of the RMR Agreement. MMWEC defines "going forward" costs for these purposes as fixed O&M and property tax expenses. CEEMI states that it is important to note that the Commission has already approved RMR agreements providing for rates that are not limited to recovery of such going forward costs in recent RMR orders.[25] Further, CEEMI states that RMR agreements should properly be considered as transitional mechanisms pending implementation of more comprehensive reliability compensation mechanisms in the near future. The Commission will reject MMWEC's proposal that the RMR Agreement be limited to going forward costs. We will allow a full cost of service approach as consistent with the cost-of-service provisions of Market Rule 1.[26] In prior RMR proceedings, moreover, the Commission has permitted recovery of both fixed costs and variable costs as essential

[24] Exhibit No. ACH-3, Schedule 1 at 1.

[25] *Devon Power LLC*, 110 FERC ¶ 61,079 (2005) and *Mirant Kendall, LLC* 109 FERC ¶ 61,227 at 36 (2004).

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

costs for the services that the units continue to provide.[27] Additionally, a full cost-of-service approach is appropriate for agreements that mirror Market Rule 1's *pro forma* Cost-of-Service Agreement, because any "other" revenues earned by these units in the market are credited against the monthly charges.

3. Cherry Picking Units

41. MMWEC acknowledges that in both *PSEG* and *PSEG II*, the Commission has rejected a proposed prohibition on "picking and choosing" units for RMR treatment from among an owner's portfolio. However, MMWEC objects to this determination and argues that a resource seeking to exit the market for cost-of-service rate treatment should not be able to do so until all other options have been considered and rejected. MMWEC insists that this consideration should include the revenues generated with respect to the overall portfolio of assets of which the unit is a component. MMWEC argues that since CEEMI states that a significant portion of the stated revenues are either associated with activities outside of what could be attributed to solely energy revenue, or may apply to the entire Springfield CEEMI portfolio, then a specific RMR agreement for WS-3 should be rejected.

42. CEEMI states in its August 12 Answer that the Commission has previously dismissed the argument concerning "cherry-picking" units for RMR treatment. CEEMI contends the calling up of WS-3 by ISO-NE out of merit led to the January 3, 2005 request to ISO-NE that it evaluate whether WS-3 is needed for system reliability.

43. Consistent with prior Commission orders (including *PSEG*), we reject the cherry picking arguments raised by MMWEC. Generating stations may contain units of varying ages and technologies, each of which may have different operating characteristics and costs. Decisions are often made by owners on a unit-specific basis, such as whether to retire or curtail operations. The Commission does, however, share concerns that costs and revenues within the generating stations and within the CEEMI/CEEMX fleet be allocated correctly. The proper allocation of costs and revenues for WS-3 will be determined in the hearing process established in this order.

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[27] *See Mirant*, 105 FERC ¶ 61,359 at P 36; *PSEG Power Connecticut*, 110 FERC 61,020 at P 30 (2005), *order on reh'g*, 110 FERC ¶ 61,441 (2005) (*PSEG*); *Milford I* at P 70; *Bridgeport Energy, LLC*, 112 FERC ¶ 61,077 at P 46.

D. *Pro Forma* Article 2.3

44. As stated elsewhere in this order, the issue of whether the proposed RMR Agreement is necessary for CEEMI'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 Article 2.3 of the *Pro Forma* Agreement will be pertinent.

45. We reject CEEMI's proposed revision to Article 2.3, which essentially permits the potential continuation of the RMR Agreement beyond the implementation of LICAP. CEEMI has not justified the need to depart from ISO-NE's *pro forma* contract language and continue this RMR Agreement indefinitely; this termination date issue has been addressed in prior orders.[28]

E. Waiver Requests

46. As stated elsewhere in this order, the issue of whether the proposed RMR Agreement is necessary for CEEMI'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 waiver will be pertinent.

47. CEEMI requests that the Commission accept its proposed RMR Agreement and grant waiver of the Commission's 60-day prior notice requirement[29] to permit an effective date of May 1, 2005, subject to refund. CEEMI states that ISO-NE has determined that WS-3 must be available to assure system reliability and agrees that it will execute the RMR Agreement effective May 1, 2005 upon the Commission's approval of the rates charged in the RMR Agreement. CEEMI contends that waiver is appropriate so it can collect the appropriate revenue requirements to sustain uninterrupted availability of WS-3 throughout 2005. The Commission has granted waiver where: (1) agreements are intended to permit a generator needed to assure system reliability to operate; (2) the applicant may only learn upon very short notice which units will be RMR units; and (3) the applicant may not be able to file 60 days prior to the commencement of service due to short notice.[30] ISO-NE notified CEEMI of its reliability determination on March 22, 2005, and stated that it would begin negotiations with CEEMI for a prospective RMR Agreement. CEEMI then negotiated the RMR Agreement with ISO-

[28] *See, e.g., PSEG,* 110 FERC ¶ 61,020 at P 56-57.

[29] *See* 16 U.S.C. § 824d (2000); 18 C.F.R. § 35.3 (2005).

[30] *See Mirant Americas Energy Marketing, L.P.*, 105 FERC ¶ 61,359 at P 14-16 (2003) (*Mirant*). *See also Milford I,* 110 FERC ¶ 61,299 at P 25.

NE and filed it April 29, 2005. Consistent with prior orders on such agreements, we will grant waiver of the prior notice requirement.

48. MMWEC protests CEEMI's waiver request for both specific Part 35 filing requirements along with "any of the Part 35 filing requirements that are not applicable to the RMR agreement…."[31] MMWEC contends that CEEMI has offered no basis for differential treatment and it would likely be easier to determine whether certain expenses are legitimate if they are presented in a format consistent with the Uniform System of Accounts. CEEMI answers that it seeks the same broad waiver of the Part 35 filing requirements as other RMR applicants, and supplied abundant data that is more than adequate to appropriate cost-of-service rates. As the hearing process will determine a cost of service rate if the proposed RMR Agreement is determined to be necessary for WS-3, we will grant waiver of the applicable Part 35 requirements.

F. Hearing Procedures

49. CEEMI's proposed RMR Agreement raises issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

50. Our preliminary analysis indicates that CEEMI's filing has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will conditionally accept CEEMI's proposed RMR Agreement for filing, suspend it for a nominal period, make it effective May 1, 2005, subject to refund, and set it for hearing and settlement judge procedures.

51. As we have indicated elsewhere in the order, the hearing and settlement procedures should address whether the proposed RMR Agreement is necessary to prevent deactivation of WS-3; if it is determined that the proposed RMR Agreement is necessary to prevent deactivation of WS-3, 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.

52. 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 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

[31] MMWEC Protest at 16 *citing*, CEEMI Transmittal at 8.

of the Commission's Rules of Practice and Procedure.[32] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.[33] 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 Judge shall provide the 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 proposed Agreement filed by CEEMI is hereby conditionally accepted for filing, as modified, and suspended for a nominal period, to become effective May 1, 2005, subject to refund, as discussed in the body of this order.

(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 regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the proposed Agreement. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (C) and (D).

(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 within five (5) days of the date of this order.

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[32] 18 C.F.R. § 385.603 (2005).

[33] 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 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).

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a 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 at least 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 this proceeding 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.

(F) CEEMI is hereby directed to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.