

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

Devon Power LLC,
Middletown Power LLC,
Montville Power LLC,
Norwalk Power LLC, and
NRG Power Marketing Inc.

Docket No. ER03-563-029

ISO New England Inc.
Devon Power LLC,
Middletown Power LLC,
Montville Power LLC, and
NRG Power Marketing Inc.

Docket Nos. ER04-23-000,
ER04-23-002, ER04-23-003,
ER04-464-000, and ER04-464-001
(consolidated)

ORDER CONDITIONALLY ACCEPTING COST SCHEDULES AND
CONSOLIDATING DOCKETS

(Issued April 1, 2004)

1. On February 6, 2004, Devon Power LLC (Devon), Middletown Power LLC (Middletown), Montville Power LLC (Montville), Norwalk Power LLC (Norwalk), and NRG Power Marketing Inc. (NRG) (collectively, Applicants) submitted for filing updated Schedules 1 and 2 under section 5.1.3 (the Reliability Cost Tracker) of the Cost-of-Service Agreements (COS Agreements) entered into between the Applicants and ISO New England Inc. (ISO-NE) on February 26, 2003. In this order, the Commission will conditionally accept and suspend for one day the updated Schedules 1 and 2, set the maintenance projects and costs in the schedules for hearing, and consolidate the instant proceeding with Docket Nos. ER04-23-000 et al. and ER04-464-000 et al. for inclusion in the hearing and settlement judge procedures that were established in the consolidated dockets. This order benefits customers by further ensuring that generating units needed for grid reliability will continue to operate.

Background

2. In two previous orders,¹ the Commission approved the establishment of the Reliability Cost Tracker to allow the Applicants to collect the costs for performing Reliability Projects² necessary to ensure that the units would operate during summer 2003, as set out in section 5.1.3 of the COS Agreements entered into between the Applicants and ISO-NE on February 26, 2003. At the time the Commission accepted the tracker, NRG was in financial distress. Many parties expressed concern that the revenues collected through the Reliability Cost Tracker could be lost as a pre-petition payment in the event of a bankruptcy filing by NRG.³ To allay these concerns, and to ensure more generally that the funds collected would “in fact be used by the Applicants for the maintenance intended to keep [the] units in service,” the Commission required that the funds collected through the Reliability Cost Tracker “be held in escrow by ISO-NE to be withdrawn by the Applicants as necessary upon showing ISO-NE that the funds are to be used solely for the purpose of maintaining [the] units.”⁴

3. On February 6, 2004, Applicants submitted for filing, pursuant to section 205 of the Federal Power Act (FPA),⁵ Part 35 of the Commission’s regulations,⁶ Rule 205 of the Commission’s Rules of Practice and Procedure,⁷ and section 5.1.3(b) of the COS Agreements, updated Schedules 1 and 2 to the Reliability Cost Tracker. These updated schedules essentially extend the tracker for another year. The updated Schedule 1 shows the Reliability Projects to be performed by Applicants during the 12-month period beginning April 1, 2004, and updated Schedule 2 shows Applicants’ “good faith”

¹ See Devon Power LLC et al., Docket No. ER03-563-000, 102 FERC ¶ 61,314 (2003) (March 25 Order); Devon Power LLC, et al., Docket No. ER03-563-000, 103 FERC ¶ 61,082 (2003) (April 25 Order).

² Under the COS Agreements, section 5.1.3, “Reliability Projects” are the operations and maintenance (O & M) projects listed on Schedule 1, as updated.

³ March 25 Order at P 5-6.

⁴ Id. at P 13.

⁵ 16 U.S.C. § 824d (2000).

⁶ 18 C.F.R. Part 35 (2003).

⁷ 18 C.F.R. § 385.205 (2003).

estimate of the C-2 Costs⁸ for the Reliability Projects, the pro-rata monthly amount of C-1 Costs⁹ and other costs that Applicants intend to collect through the Reliability Cost Tracker. Applicants state that the Reliability Projects listed in Schedule 1 are “needed so that the facilities can continue to contribute to and maintain system reliability in Connecticut,” and that without acceptance of the updated schedules, “Applicants will be unable to move forward with the new Reliability Projects.”¹⁰ Applicants also request expedited approval of the schedules, which they assert is necessary to allow the Reliability Projects to be completed during the spring 2004 maintenance outage.¹¹

4. On March 22, 2004, the Commission conditionally accepted for filing, suspended, and set for hearing and settlement judge procedures Reliability Must Run Agreements (RMR Agreements) between ISO-NE and, individually, Devon, Montville and Middletown.¹² As filed, those contracts did not include in their proposed cost-of-service the costs included in the updated Schedules 1 and 2 submitted in the instant proceeding.¹³ The Commission conditioned the RMR Agreements to terminate on the day the locational installed capacity (LICAP) mechanism sought by ISO-NE in Docket No. ER03-563-030 or a regional deliverability requirement is implemented.¹⁴ The Commission also set the cost-of-service issues underlying the rates in the RMR Agreements for hearing and

⁸ C-2 Costs are defined in section 5.1.3 of the COS Agreements as “the cost of major materials, supplies and services (except utility services) purchased from third parties.”

⁹ C-1 Costs are defined in section 5.1.3(a) of the COS Agreements as “the cost of minor materials, supplies and services purchased from third parties for the operation and maintenance of the Facilities.”

¹⁰ Applicants’ Transmittal Letter at 3.

¹¹ Id. at 4.

¹² See Devon Power LLC et al., Docket Nos. ER04-23-000 et al. and ER04-464-000 et al., 106 FERC ¶ 61,264 (2004) (March 22, 2004 Order.)

¹³ See Motion for Leave to Answer and Answer of Devon Power LLC et al. at 10; see also Direct Testimony of Alan R. Lovinger on Behalf of Applicants, filed January 16, 2004 in Docket No. ER04-464-000, at 6-7.

¹⁴ March 22, 2004 Order at P 28.

settlement judge procedures, and consolidated Docket Nos. ER04-23-000 et al. and ER04-464-000 et al.¹⁵

Notice of Filings, Protests, and Interventions

5. Notice of Applicants' filing was published in the Federal Register,¹⁶ with comments, protests or interventions due on or before February 27, 2004. Timely motions to intervene were filed by the New England Power Pool Participants Committee (NEPOOL) and the Connecticut Municipal Electric Energy Cooperative (CMEEC). Comments were filed by the Connecticut Department of Public Utility Control (CT DPUC), NEPOOL and ISO-NE. The Connecticut Attorney General (CTAG), CMEEC, and CT DPUC submitted protests. Additionally, motions to consolidate were filed by CTAG and CT DPUC. Applicants also filed an answer to the comments of ISO-NE and NEPOOL and the protests of CTAG, CMEEC and CT DPUC. ISO-NE filed an answer to the answer.

6. Along with their answer, Applicants filed a renewed motion for expedited issuance of an order by the Commission. Additionally, on March 25, 2004, CT DPUC, Applicants, and the Connecticut Office of Consumer Counsel (CT OCC) (collectively, Movants) filed a Joint Motion Supporting Expedited Issuance of Order Partially Approving Updated Schedules and Requesting Consolidation of Proceedings. In that motion, Movants request that the Commission issue an order by no later than April 1, 2004 approving the updated Schedules 1 and 2 up to a limited amount,¹⁷ consolidating the instant proceeding with Docket Nos. ER04-23-000 et al. and ER04-464-000 et al.,¹⁸ and accepting the remainder of the schedules, suspending them for

¹⁵ Id. at P 25, 31.

¹⁶ 69 Fed. Reg. 7922 (Feb. 20, 2004).

¹⁷ Movants seek Commission approval with respect to C-1 Costs to be incurred as of June 30, 2004, and C-2 Costs to be incurred for reliability projects to be completed or ongoing as of June 30, 2004, with reimbursement of such costs capped at \$15,268,053.

¹⁸ Movants request consolidation under Rule 602(b)(3) of the Commission Rules of Practice and Procedure, 18 C.F.R. § 385.602(b)(3) (2003), which provides that if an offer of settlement involves multiple proceedings before the Commission, which are in part set for hearing, any participant in the settlement negotiation may move to "consolidate the multiple proceedings and to provide any other appropriate procedural relief for purposes of disposition of the settlement."

one day, and referring them to the ongoing hearing and settlement judge procedures in Docket Nos. ER04-23-000 et al. and ER04-464-000 et al. Movants argue that expedited issuance of an order is necessary to ensure that maintenance work on the facilities is completed during the Spring maintenance outages, and that a delay in issuing an order could result in the deferral of some maintenance until the Fall maintenance outages.

Discussion

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁹ the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. CT DPUC, CTAG and ISO-NE, having filed motions to intervene in Docket No. ER03-563-000, are also proper parties here.²⁰ Rule 213(a)(2) of the Commission's Rules of Practice and Procedure²¹ prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept Applicants' answer because it has provided information that assisted us in our decision-making process. We are not persuaded to accept ISO-NE's answer to the answer and will, therefore, reject it.

Procedural Matters

8. In addition to the joint motion seeking consolidation described above, CT DPUC and CTAG submitted separate motions to consolidate the instant proceeding with Docket Nos. ER04-23-000 et al. and ER04-464-000 et al., which were consolidated in the March 22, 2004 Order. The Commission will grant these motions, and consolidate the instant proceeding with the consolidated proceedings in Docket Nos. ER04-23-000 et al. and ER04-464-000 et al. All of these proceedings concern similar issues regarding the recovery of costs for generating units required to run for reliability purposes, making consolidation appropriate. Additionally, the Commission finds that consolidation is appropriate because it will likely facilitate a settlement of the issues in all of these dockets.²²

¹⁹ 18 C.F.R. § 385.214 (2003).

²⁰ See New England Power Pool/ISO New England Inc., et al., 87 FERC ¶ 61,244 (1999).

²¹ 18 C.F.R. § 385.213(a)(2) (2003).

²² See Rule 602(b)(3) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(b)(3).

Need for the Reliability Cost Tracker

9. CTAG, CT DPUC and CMEEC each protested Applicants' claim that the Reliability Cost Tracker continues to be necessary. They generally argue that changed circumstances since March 2003, when the tracker was first implemented, have reduced or eliminated the necessity of the mechanism. CT DPUC and CMEEC each specifically note NRG's emergence from bankruptcy as a significant changed circumstance that calls into question the continuing need for the tracker. CT DPUC identifies several additional circumstances which have changed, including the implementation of the New England Standard Market Design (SMD) with locational marginal pricing (LMP), the incorporation of Peaking Unit Safe Harbor (PUSH) bidding²³ into the market, and the likely near-term implementation of a locational installed capacity (LICAP) mechanism in New England.²⁴ NEPOOL also suggests that changed circumstances have raised "factual questions" regarding whether the Applicants "still require . . . the special guarantees" provided by the Reliability Cost Tracker.²⁵

10. Commission Response. The Commission recently suspended and set for hearing the RMR Agreements filed by the Applicants (with the exception of Norwalk) for many of the units at issue here. The RMR Agreements did not include the cost of maintenance projects that are to be recovered through the Reliability Cost Tracker under the updated schedules submitted for filing in the instant proceedings. Consequently, without the continuation of the tracker through the updated schedules, the Applicants would not have a mechanism in place for recovery of the cost of these maintenance projects. Therefore, the Commission will conditionally accept the updated Schedules 1 and 2, subject to refund, and set them for hearing and settlement judge procedures. At the hearing the parties may consider whether the maintenance costs should be recovered through a separate tracking mechanism or through the rate provided in the RMR Agreements

²³ In a series of orders in this docket rejecting Applicants first submittal of RMR contracts, the Commission established PUSH bidding as a market-based alternative to cost-of-service agreements for units required to run for reliability purposes. The PUSH mechanism allows peaking units with capacity factors of 10 percent or less during 2002 operating within Designated Congestion Areas to raise their bids so as to allow them the opportunity to recover their fixed and variable costs through the market. See March 22, 2004 Order at P 3.

²⁴ Motion to Consolidate, Comment, and Protest of CT DPUC at 5-6.

²⁵ Motion to Intervene and Comments of NEPOOL at 7-8.

themselves. As discussed above, we will also consolidate the instant proceeding with Docket Nos. ER04-23-000 et al. and ER04-464-000 et al., in which hearing and settlement judge procedures are already taking place. As we did with the RMR Agreements, the Commission will condition the updated Schedules 1 and 2 and the Reliability Cost Tracker to terminate on the day a LICAP mechanism or a regional deliverability requirement is implemented in New England. The Commission has remained committed to a long-term, market-based solution to the problems faced by units in the New England market that must run for reliability purposes. Once a market-based solution is implemented, RMR Agreements and the Reliability Cost Tracker will no longer be necessary. As an interim measure, it is appropriate that the term of the Reliability Cost Tracker continue until the implementation of a LICAP mechanism or a regional deliverability requirement.

Proposed Reliability Projects and Estimate of Costs

11. Several of the parties raise a variety of issues regarding the Reliability Projects and estimated costs included in the updated Schedule 1 and Schedule 2 submitted by the Applicants. CT DPUC argues that some of the costs included in the updated schedules “appear duplicative and excessive” when compared to previous maintenance projects and costs funded through the tracker. CTAG and CMEEC both argue that the Applicants have failed to justify the proposed projects and estimated expenses, having “describe[d] many of the identified expense items in only the most cursory or summary form.”²⁶ They additionally contend that some of the expenses included in the schedules should be amortized because they are more in the nature of long-term capital expenditures, rather than shorter-term reliability projects. NEPOOL also comments, generally, that Applicants’ filing does not present enough information to determine whether the projects included in the schedules are in fact necessary for reliability.²⁷

12. Commission Response. The Commission believes that the protests raise valid questions as to the need for the maintenance projects, the level of costs for such projects included in the updated schedules, and whether such projects and costs are duplicative of those funded through the tracker the previous year. Our preliminary analysis of the maintenance projects and costs indicate that they have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept the proposed costs for filing, suspend

²⁶ See Motion to Consolidate and Protest of CTAG at 2.

²⁷ Motion to Intervene and Comments of NEPOOL at 8.

them for one day to become effective April 1, 2004, subject to refund, and set them for hearing and settlement judge procedures, already underway in the consolidated Docket Nos. ER04-23-000 et al. and ER04-464-000 et al.

Escrow Arrangements

13. As noted above, when the Commission originally approved the Reliability Cost Tracker in the March 25 Order, it required that ISO-NE place the costs collected in escrow, to be withdrawn by the Applicants as needed upon a showing that the funds would be used for reliability maintenance purposes.²⁸ Both ISO-NE and NEPOOL comment on the continuation of this escrow arrangement. ISO-NE states that its role in managing the escrow should cease, given NRG's emergence from bankruptcy.²⁹ If the Commission determines that the escrow arrangements should remain in place, or that expanded oversight is necessary, ISO-NE "requests that the Commission establish a compensation mechanism that allows the ISO to recover the costs of fulfilling its oversight responsibilities."³⁰ NEPOOL asserts that if the Reliability Cost Tracker is continued, it will be necessary for the Commission to continue the escrow arrangements "or to provide some alternative mechanism that assures" that payments made to the tracker "are applied for their intended purposes."³¹

14. Commission Response. The Commission will not continue the escrow arrangements for the Reliability Cost Tracker. In the March 25 Order, the Commission ordered that the payments made in accordance with the Reliability Cost Tracker be placed in escrow in large part to satisfy the concerns of several of the parties regarding the likely bankruptcy filing by NRG.³² That bankruptcy filing did occur, and NRG has now emerged from bankruptcy proceedings. As a result, the Commission does not believe it is necessary to continue the previous escrow arrangements.

15. When requiring the previous escrow arrangements, the Commission also noted more generally that such a mechanism would "ensure . . . that the funds are used for

²⁸ See March 25 Order at P 13.

²⁹ Comments of ISO-NE at 4-5.

³⁰ Id. at 6.

³¹ Motion to Intervene and Comments of NEPOOL at 9.

³² See March 25 Order at P 13.

maintenance.”³³ This general concern regarding the oversight of revenues received through the Reliability Cost Tracker, however, will be addressed in the hearing and settlement judge procedures. Those procedures will allow the parties to fully analyze the maintenance projects and costs in the updated schedules, alleviating any concerns regarding the use of the funds collected through the tracker.

The Commission orders:

(A) The updated Schedules 1 and 2 are conditionally accepted for filing and suspended for one day to become effective April 1, 2004, subject to refund.

(B) Applicants are hereby directed to file revised Schedules 1 and 2, and revisions to section 5.1.3 of the COS Agreements, providing that the Reliability Cost Tracker will terminate upon the implementation of a LICAP mechanism or a regional deliverability requirement, as discussed in the body of this order.

(C) 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 by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission’s Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held in Docket No. ER03-563-029 concerning the justness and reasonableness of the maintenance projects and costs included in the updated Schedules 1 and 2, as discussed in the body of this order. As discussed in the body of this order, the hearing will be held in abeyance to give the parties time to conduct settlement judge negotiations.

(D) Docket No. ER03-563-029 is hereby consolidated with Docket Nos. ER04-23-000 et al. and ER04-464-000 et al., for purposes of hearing and decision.

³³ Id.

(E) The settlement judge in Docket Nos. ER04-23-000 et al. and ER04-464-000 et al., shall determine the procedures best suited to accommodate consolidation of Docket No. ER03-563-029 with Docket Nos. ER04-23-000 et al. and ER04-464-000 et al.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Magalie R. Salas,
Secretary.