

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Milford Power Company, LLC

Docket No. ER05-163-002

ORDER DENYING REQUEST FOR REHEARING AND
GRANTING CLARIFICATION

(Issued August 1, 2005)

1. On November 1, 2004, Milford Power Company, LLC (Milford) submitted for filing in this docket a Reliability Must Run Agreement (RMR Agreement) between itself and ISO New England, Inc. (ISO-NE). In an order issued on March 22, 2005, the Commission conditionally accepted the RMR Agreement for filing, suspended it for a nominal period, and set it for hearing and settlement judge procedures.¹ The Commission also required certain modifications to the RMR Agreement, and directed Milford to submit a compliance filing. On April 21, 2005, the Connecticut Department of Public Utility Control (with the Connecticut Office of Consumer Counsel and Connecticut Attorney General's Office) (Connecticut Parties), Connecticut Municipal Electric Energy Cooperative (CMEEC) and NSTAR Electric and Gas Corporation (NSTAR) submitted timely requests for rehearing of the March 22 Order. In this order, the Commission denies rehearing and grants clarification of the March 22 Order.

I. Background

2. As we noted in the March 22 Order, the Commission has been addressing issues concerning the sufficiency of New England's capacity markets and the use of RMR agreements since 2003.² More recently, the Commission has issued several orders regarding a proposal by ISO-NE to establish a locational installed capacity (LICAP) mechanism in New England to allow capacity located in designated congestion areas to

¹ *Milford Power Company, LLC*, 110 FERC ¶ 61,299 (2005) (March 22 Order).

² *See* March 22 Order at P 2-4.

be more appropriately compensated for reliability through the market.³ When implemented, that mechanism will add a locational element to the current installed capacity (ICAP) markets by establishing five regions with separate ICAP requirements and prices: Maine, Connecticut, Southwest Connecticut, Northeast Massachusetts/Boston, and the remainder of New England.

3. Milford's RMR Agreement covers charges for reliability services provided by Milford to ISO-NE from the Milford Station, a new, two-unit combined cycle baseload generating facility in Southwest Connecticut. Milford and ISO-NE negotiated the RMR Agreement under section 3.3 of Exhibit 2, Appendix A of Market Rule 1.⁴ Milford argued in its filing that the RMR Agreement is necessary to ensure that Milford Station remains in operation to support reliability and is properly compensated for providing reliability services. Milford noted that ISO-NE made the determination that the Milford Station units are needed for reliable system operation. Milford also submitted affidavits in support of its contention that it has under-recovered its costs for operation of the units and expects to receive inadequate revenues from the market to recover the costs of continued operation. Milford submitted a supplemental filing in response to a deficiency letter providing further clarification of cost information and losses sustained in the market.

4. The RMR Agreement submitted by Milford generally took the form of the *pro forma* Cost of Service Agreement contained in Market Rule 1, with some proposed modifications. The RMR Agreement provides that Milford will be paid a fixed monthly charge for providing reliability services. Under the contract, Milford is required to submit bids for the energy and ancillary services generated by the units, with any revenues earned by the units credited against the fixed monthly charge. The RMR Agreement will expire on the implementation date of a LICAP mechanism applicable to the facilities.

5. In the March 22 Order, the Commission conditionally accepted the RMR Agreement for filing, suspended the rates contained in the agreement, and set the RMR Agreement for hearing and settlement judge procedures. In particular, while the Commission accepted Milford's general cost-of-service approach (including fixed and

³ See *Devon Power LLC*, 107 FERC ¶ 61,240, *order on reh'g*, 109 FERC ¶ 61,154 (2004), *order on reh'g*, 110 FERC ¶ 61,315 (2005); see also *Devon Power LLC*, 109 FERC ¶ 61,156 (2004), *order on reh'g*, 110 FERC ¶ 61,313 (2005).

⁴ Market Rule 1 was approved by the Commission in *New England Power Pool and ISO New England, Inc.*, 100 FERC ¶ 61,287, *reh'g granted in part and denied in part*, 101 FERC 61,344 (2002), *order on reh'g*, 103 FERC 61,304 (2003).

variable costs in the RMR Agreement), it set several components of that cost-of-service for hearing, including the treatment of a 90-day outage to upgrade the capacity of one of the Milford Station units and the inclusion of Allowance for Funds Used During Construction (AFUDC). The Commission also granted a request by Milford for waiver of the 60-day prior notice requirement, and made the RMR Agreement effective November 3, 2005.

II. Procedural Matters

6. As noted above, Connecticut Parties, CMEEC and NSTAR filed requests for rehearing. ISO-NE and Milford filed motions for leave to answer and answers to the rehearing requests. Rule 713(d) of the Commission's Rules of Practice and Procedure prohibits answers to requests for rehearing,⁵ and, accordingly, we will reject ISO-NE's and Milford's answers.

III. Requests for Rehearing/Clarification and Commission Conclusions

A. Waiver of 60-day Prior Notice Requirement

7. Connecticut Parties and CMEEC request rehearing of the March 22 Order as to the Commission's grant of waiver of the 60-day prior notice requirement. CMEEC and Connecticut Parties state that the grant of waiver for Milford is inconsistent with the Commission's denial of waiver for PSEG Power Connecticut LLC (PSEG).⁶ CMEEC and Connecticut Parties state that the March 22 Order does not explain the different outcome from *PSEG I* even though both PSEG and Milford received reliability determinations from ISO-NE in August 2004 but did not file their RMR agreements until November 2004.

8. Additionally, CMEEC maintains that the Commission should not grant extraordinary relief such as waiver of the notice when Milford's filing was both late and deficient. CMEEC asserts that Milford's initial filing was patently deficient as shown by Milford's lengthy supplemental filing made in response to the Commission's deficiency letter.

⁵ 18 C.F.R. § 385.713(d) (2005).

⁶ See *PSEG Power Connecticut LLC*, 110 FERC ¶ 61,020 (*PSEG I*), order on reh'g, 110 FERC ¶ 61,441 (2005) (*PSEG II*).

Commission Determination

9. We deny rehearing of the grant of waiver of the 60-day prior notice requirement. In the March 22 Order, the Commission found that the situation in Milford was not comparable with the situation in the *PSEG I* because PSEG neglected to justify a grant of waiver.⁷ In contrast, here, the Commission concluded that Milford provided the necessary justification of extraordinary circumstances, *i.e.*, that Milford filed its proposed RMR Agreement for units needed to maintain reliability on the same day that it received confirmation from ISO-NE that RMR Agreement negotiations were complete. Additionally, we note that, on rehearing of *PSEG I*, we granted waiver after PSEG subsequently provided the necessary justification that would constitute extraordinary circumstances.⁸

10. Furthermore, the Commission is not persuaded that a supplemental filing by Milford, of any length, should automatically trigger denial of waiver of the 60-day prior notice requirement. In *Central Hudson Gas & Electric Corp.*,⁹ we addressed the relationship of deficiency and waiver of the 60-day prior notice requirement, and concluded that deficiency by itself would not warrant denial of waiver. Here, where a supplemental filing is made in a good faith attempt to cure a deficiency, the Commission can, and here reasonably did, allow the applicant to retain its initial filing date as there was good cause shown for the lateness of the initial filing.¹⁰ Moreover, parties were given notice of the proposed rate and the proposed rate did not change between the time of Milford's initial filing and its supplemental filing; we note that, while Milford's supplemental filing did provide additional cost support and more detail on losses experienced in the ISO-NE market, it did not modify the proposed terms and conditions or rates of the RMR Agreement.

B. Need for RMR Units to Maintain Reliability

11. On rehearing, Connecticut Parties argue that the Commission inappropriately abdicated its responsibility by deferring to ISO-NE's reliability determination rather than independently determining whether the Milford RMR agreement is necessary to preserve reliability in Southwest Connecticut. Connecticut Parties assert that the Commission erred in deferring to ISO-NE on its reliability determination rather than evaluating the

⁷ March 22 Order at P 26.

⁸ *PSEG II* at P 49.

⁹ 60 FERC ¶ 61,106, at 61,339 n. 10 (*Central Hudson I*), *reh'g denied*, 61 FERC ¶ 61,089 (1992).

¹⁰ *See Central Hudson I*, 106 FERC at 61,337.

evidence and making an independent Commission finding based on substantive review. Connecticut Parties contend that ISO-NE has a bias toward reliability and may not balance the need for reliability with the resulting costs. Connecticut Parties assert that there is contradictory evidence on the need for Milford's units and that the Commission lacks a factual basis for making the reliability determination. Specifically, Connecticut Parties point to the eight percent surplus of capacity in Southwest Connecticut for the 2005/2006 ICAP planning period. Connecticut Parties assert that the Commission should set the factual issue of whether the Milford units are needed for reliability for hearing.

12. Connecticut Parties and CMEEC also argue that the Commission erred in not requiring ISO-NE to evaluate whether less costly alternatives to the Milford units were available. CMEEC claims that the Milford RMR Agreement is per se unjust and unreasonable because making cost-of-service payments to Milford is not the most cost-effective means of meeting the reliability needs of customers in Southwest Connecticut. Specifically, CMEEC and Connecticut Parties assert that two deactivated units, Devon 7 and 8, present similar reliability benefits at substantially lower fixed unit costs as compared with the Milford units. Connecticut Parties request rehearing of the Commission's preference of the Milford resources over the Devon resources based solely on ISO-NE's reliability conclusions, rather than a Commission comparison of the costs and benefits of both facilities. Since the NEPOOL Participants were not able to review Milford's application pursuant to section 18.4 of the Restated NEPOOL Agreement, CMEEC maintains that the Commission must review the incremental costs and benefits of replacing RMR coverage of the Devon units with the Milford plant.

13. Further, Connecticut Parties assert that, pursuant to *United States Telecom Association v. FCC*,¹¹ the Commission has no power to delegate to ISO-NE the determination that a facility is needed for reliability. Connecticut Parties state that section 205 of the Federal Power Act (FPA),¹² requires that the Commission protect customers against unreasonable rates, including paying for unnecessary reliability that is not cost-effective. They contend that the FPA does not provide for delegation of this authority to a non-governmental entity like ISO-NE, yet the Commission blindly delegated the authority to ISO-NE.¹³

¹¹ 359 F.3d 554 (D.C. Cir. 2004).

¹² 16 U.S.C. § 824d (2000).

¹³ Connecticut Parties Rehearing Request at 5.

Commission Determination

14. In the March 22 Order, the Commission, in accepting the RMR Agreement, noted that the Milford facilities are needed for reliability in Southwest Connecticut and Milford had not earned sufficient revenues in the market to keep the facility operational.¹⁴ The Commission has allowed limited-term RMR agreements like that filed in this proceeding to compensate such units and thus keep them in service given that the current situation in ISO-NE may not allow suppliers in load pockets an opportunity to recover their costs.¹⁵ The Commission further stated that “with the reliability of the electric system in Southwest Connecticut at stake,” it would “not second-guess the reliability determination of ISO-NE, the independent grid operator responsible for ensuring reliability in the region.”¹⁶ The Commission also accepted the Milford facility over the now-deactivated Devon 7 and 8 units due to ISO-NE’s reliability determination.¹⁷

15. The Commission will deny the request for rehearing of these conclusions. We will not set for hearing the issues of reliability in Southwest Connecticut or whether the Milford facility is needed to maintain reliability in Southwest Connecticut. The record shows that ISO-NE complied with Market Rule 1 in entering into the RMR Agreement. Market Rule 1, the currently-effective rate schedule on file with the Commission, permits ISO-NE to enter into reliability agreements with generators, subject to Commission approval, so that generators continue to remain available for reliability purposes. Market Rule 1 provides that ISO-NE, in consultation with the Independent Market Advisor, determines the units that are needed for reliability.¹⁸ The Commission approved these provisions when it accepted Market Rule 1, also referred to as New England’s Standard Market Design.¹⁹

¹⁴ March 22 Order at P 40; *accord id.* at P 43.

¹⁵ *Id.*

¹⁶ *Id.* at P 42.

¹⁷ *Id.* at P 43.

¹⁸ *See* Market Rule 1, Appendix A, Exhibit 2, section 3.3.1(a), FERC Electric Tariff No. 3 Sheet No. 7461.

¹⁹ *See supra* note 4.

16. Connecticut Parties' contention that Southwest Connecticut has a surplus of eight percent for the 2005/2006 ICAP planning period is irrelevant to the determination of whether Milford is needed for reliability in Southwest Connecticut. Planning for ICAP inappropriately counts resources that may not have the actual ability to deliver into a load pocket during constrained periods when those resources are most needed. In fact, a LICAP mechanism is needed in large part because there is no deliverability requirement in the current ICAP program. Moreover, as ISO-NE found, given delivery limitations for generation from outside the Southwest Connecticut load pocket, without the Milford facility Southwest Connecticut would be over 470 MW short of capacity for 2005.²⁰ The Commission finds no persuasive support for the contention that ISO-NE's reliability determination is flawed.

17. As to Devon 7 and 8, they have since been deactivated and there is no basis provided by Connecticut Parties or CMEEC to believe they will be reactivated. Further, Contrary to Connecticut Parties' and CMEEC's assertions, there is no evidence that Devon 7 and 8 have lower per unit fixed costs as compared with the Milford facility; the costs of reactivation of Devon 7 and 8, as well as their RMR rates for the period going forward, are unknown. More importantly, the issue of cost comparison is irrelevant here because, as we stated in the March 22 Order, the Milford facility and Devon 7 and 8 are not comparable resources in terms of their unit characteristics, capacity and reliability benefits.²¹ Even with a reactivation of Devon 7 and 8, and the necessary deactivation of at least one of the Milford units,²² there would still be large capacity deficiencies in Southwest Connecticut.²³

18. Furthermore, the Commission has not delegated its authority under section 205 of the FPA to determine that the RMR agreement filed here is just and reasonable. The Commission has satisfied its responsibilities under the FPA by conditionally accepting the RMR Agreement for filing, suspending it, and setting it for hearing to ensure that the rates contained in it are just and reasonable. We note that the court in *U.S. Telecom*

²⁰ March 22 Order at P 38.

²¹ *Id.* at P 43.

²² We note that Devon 7 and 8 and Milford share substation facilities that limit the output from the station should all of these facilities be used at the same time. *See Id.* at P 5; Milford Supplemental Filing in Docket No. ER05-163-001 at 4 (the maximum amount of generation that can be exported at the Devon bus is 600 megawatts).

²³ *See* ISO-NE Answer in Docket No. ER05-163-000 at 6 (noting that Devon 7 and 8 have a combined capacity of 214 megawatts whereas each Milford unit has a 250 megawatt capacity).

recognized that “a federal agency may use an outside entity . . . to provide the agency with factual information” and that a federal agency “may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decision itself.”²⁴ Here, we required ISO-NE, in consultation with the Independent Market Advisor, to provide factual information on the reliability needs of its system per the terms of its filed tariff and following notice and an opportunity for comments, we reviewed not only this information but also opposing views on the reliability determination before accepting the Milford RMR Agreement. Based on that information, we rendered a decision. Our acceptance of ISO-NE’s reliability determination was not a delegation of any Commission authority.

C. **RMR Agreement Eligibility**

19. Connecticut Parties assert that the Commission inappropriately accepted the Milford RMR Agreement without any reliable evidence that Milford actually experienced a substantial revenue shortfall or that the agreement was necessary to ensure that Milford remains available. Connecticut Parties request that the Commission set these two issues for hearing.

20. CMEEC and NSTAR assert that the Commission erred in allowing generators whose capacity is determined to be needed for system reliability to opt for an RMR agreement without the requirement of seeking permission to deactivate. While NSTAR recognizes that Market Rule 1 does not condition RMR Agreements on retirement, NSTAR asserts that Market Rule 1 also does not provide for payments such as those contained in the Milford RMR Agreement. NSTAR asserts that customers get nothing for the additional payments because here there is no threat of deactivation. NSTAR concludes that compensation beyond going forward costs, absent the threat of retirement, is unjust and unreasonable. Further, CMEEC contends that, to the extent the Commission has previously approved full cost recovery, that approach should be reassessed in New England in light of the Commission's determination that a deactivation request is not a prerequisite for an RMR agreement, and because LICAP will soon be implemented.

Commission Determination

21. We deny Connecticut Parties’ request to set for hearing the issues of whether Milford experienced a revenue shortfall and whether an RMR agreement is needed to ensure Milford remains available. We found in the March 22 Order that Milford qualified for an RMR agreement because: 1) the Milford Facility is needed for reliability in New England; and 2) Milford did not earn sufficient revenues in the markets to keep

²⁴ *U.S. Telecom*, 359 F.3d at 567-68.

the facility in operation.²⁵ Specifically, we found that Milford, after paying its variable fuel expenses, had insufficient revenue to pay the cost necessary to keep the facility in operation, including fixed operations and maintenance costs, administrative and general costs, and taxes.²⁶ Contrary to Connecticut Parties' assertion, Milford submitted testimony and exhibits detailing its costs and losses in the market sufficient to allow the Commission to find that Milford had not earned sufficient revenues in the markets to keep its facility in operation. Furthermore, Milford demonstrated that it was in default on its loans and unable to access additional capital.²⁷ Based on Milford's evidence of its lack of access to capital and its inability to pay its operating costs, the Commission reasonably concluded that Milford would not be able to continue operation absent an RMR agreement.

22. We deny parties requests for rehearing regarding the issues related to a resource's availability status as a prerequisite for an RMR agreement. ISO-NE may negotiate an RMR agreement with a generating resource previously operating under market-based rates where it has determined that the resource is needed for reliability reasons, and may "undertake whatever financial arrangements are necessary to ensure that the facility will be available."²⁸ This language does not require that a resource owner prove that the resource will be deactivated unless an RMR agreement is provided. The Commission has repeatedly clarified that the relevant provisions of Market Rule 1 do not require that a resource apply to deactivate as a prerequisite to entering into an RMR agreement.²⁹ NSTAR's assertion that Market Rule 1 does not provide for payments such as those provided in the Milford RMR Agreement is thus contradicted by Market Rule 1.³⁰

23. 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

²⁵ March 22 Order at P 40; *accord id.* at P 43.

²⁶ *Id.* at P 40 n. 31.

²⁷ *Id.* at P 64.

²⁸ See Market Rule 1, Appendix A, Exhibit 2, section 3.3.1(a), FERC Electric Tariff No. 3 Sheet No. 7461.

²⁹ See *Devon Power LLC*, 109 FERC ¶ 61,154 at P 27.

³⁰ See Market Rule 1, Appendix A, Exhibit 2, section 3.3.1(c), FERC Electric Tariff No. 3 Sheet No. 7461 ("the RMR Seller shall file for cost-based rates under Section 205 with each party free to take any position it determines appropriate regarding return on and of investment").

implemented.³¹ We deny CMEEC's request that the Commission reconsider cost-of-service rates in the Milford RMR Agreement in light of the pending LICAP implementation. CMEEC's argument is misplaced because the agreement will terminate with the implementation of a LICAP mechanism. We also deny CMEEC's request to revisit the decision on cost recovery as it relates to the requirement of deactivation because ISO-NE was within its authority under Market Rule 1 to enter into "whatever financial arrangements are necessary" with Milford to ensure that the units in question remain available, subject, of course, to the Commission's review of the resulting agreements under section 205 of the FPA.

D. Costs Recoverable under the RMR Agreements

24. Connecticut Parties, NSTAR and CMEEC state that the Commission erred in failing to limit Milford's recoveries under the RMR Agreement to its variable or marginal costs of operating the units, or "going forward costs." Connecticut Parties state that RMR payments need only compensate the unit owner sufficiently to maintain and operate the units to avoid their shutting down. NSTAR argues that the RMR Agreement cannot be just and reasonable because it provides guaranteed cost recovery that is more than the minimum necessary to keep the units in service. CMEEC states that limiting recovery under the RMR Agreement to out-of-pocket costs would provide Milford with a strong incentive to keep the facilities in operation and pursue revenues through the market that can be applied against Milford's other costs.

25. Further, CMEEC and NSTAR assert that the Commission's January 25, 2005 ruling in *PJM Interconnection, LLC*³² confirms the validity of a "going forward costs" approach to cost-recovery under an RMR agreement. According to NSTAR, the Commission's approval in that case of a "going forward costs" approach for frequently mitigated units in PJM should also be applied here. NSTAR also elaborates that, under that precedent, since Milford has never been mitigated, Milford is not automatically entitled to its going-forward costs without a showing that it is not recovering its going-forward costs.

26. CMEEC and NSTAR argue that the Milford RMR Agreement impermissibly shifts investment risk away from the owner of the generation to ratepayers, contrary to basic tenets of competitive markets and the consumer protection purposes of the FPA. CMEEC asserts that the March 22 Order effectively ends competition in the wholesale electric generation market in Connecticut in the near term, and reinstates a form of

³¹ *Devon Power LLC*, 107 FERC ¶ 61,240 at P 72, *order on reh'g*, 109 FERC ¶ 61,154 at P 25, 29.

³² *PJM Interconnection, LLC*, 110 FERC ¶ 61,053 (*PJM I*), *order on reh'g*, 112 FERC ¶ 61,031 (2005) (*PJM II*).

traditional cost-of-service regulation, without many of the protections that existed under traditional rate-making and regulation. CMEEC states that even interim RMR agreements can be disruptive to long-term business planning and procurement processes by aggravating transition issues for customers seeking to enter into bilateral contracts during the period prior to LICAP implementation. NSTAR asserts that the Commission has allowed Milford to choose compensation based on market-based rates or cost-of-service, whichever is higher, thereby allowing prices to rise above the zone of reasonableness. Finally, CMEEC asserts that the Commission failed to address in its March 22 Order, ISO-NE's request to set for hearing the issue of whether past sunk costs should be recovered through the RMR agreement.

27. NSTAR states that the Commission erred in departing from past precedent on cost of service regulation established in the natural gas industry, where the Commission adopted ceiling prices based on group averages.³³ NSTAR asserts that the Commission failed to explain why reimbursement under RMR Agreements at cost-of-service rates is consistent with the economic theory of ceiling prices based on group averages and special exceptions for providing high-cost producers with out-of-pocket costs.

Commission Determination

28. The Commission will deny the requests for rehearing of NSTAR, Connecticut Parties and CMEEC regarding permitted cost recovery under the RMR Agreement. In the March 22 Order, we stated that “[i]n 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.”³⁴ This approach is appropriate for RMR agreements because providing only minimal cost recovery to Milford likely would not allow the units to be maintained in such a manner that they can continue to operate reliably, defeating the purpose of the contracts to ensure that the units are “available” to support reliability. Additionally, the full cost of service approach is appropriate for RMR agreements that mirror the *pro forma* Cost of Service Agreement in Market Rule 1, given that revenues earned by these units in the market are credited against the monthly charges. Providing only variable and marginal costs to Milford could also limit the units' ability to operate reliably as in-merit resources and also impair their ability to earn market revenues to be credited against the monthly reliability charge.

29. In the March 22 Order, we also rejected a request to adopt the “going forward costs” methodology adopted in PJM for units required for reliability that seek to

³³ See NSTAR Rehearing Request at 3-4.

³⁴ March 22 Order at P 70.

deactivate.³⁵ We found that the situation in PJM differed substantially from the situation in ISO-NE. The Commission noted that PJM's markets allow for an adequate opportunity to recover costs whereas ISO-NE's markets, as currently structured without a LICAP mechanism, may not allow for such an opportunity. Also, PJM's "going forward costs" mechanism is a market-based mechanism to compensate frequently mitigated units,³⁶ not a contract for reliability services such as ISO-NE's RMR agreements. More importantly, we reject CMEEC's and NSTAR's assertion that the Commission exclusively applies a going forward costs approach in PJM; PJM's tariff does not limit reliability compensation to going forward costs or exclude the option of full cost of service recovery.³⁷

30. Finally, we will deny NSTAR's request for rehearing as it relates to past natural gas precedent. Prior to NSTAR's request for rehearing, NSTAR's only filing in this proceeding was its motion to intervene, which raised no substantive issues. On rehearing, NSTAR raises a new issue that could have been but was not raised in protest to Milford's original filings. In this regard, the Commission has made clear that:

[w]e look with disfavor on parties raising on rehearing issues that should have been raised earlier. Such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision.[³⁸]

E. Termination Date

31. Connecticut Parties argue that the Commission erred in approving a term that ends with the implementation of the LICAP mechanism, rather than establishing a fixed termination date for the RMR Agreement, because the implementation of the LICAP mechanism could be delayed beyond the anticipated January 1, 2006 date. They assert that the RMR Agreement should have a fixed ending date of January 1, 2006, so that if LICAP implementation does not occur or is delayed, Milford will be required to submit a new section 205 application for RMR treatment. Connecticut Parties also contend that

³⁵ *Id.* at P 70-71.

³⁶ *See PJM II* at P 24.

³⁷ *See PJM II* at P 21 (clarifying that "[a] unit in PJM that wishes to deactivate but delays deactivation for reliability reasons . . . can use either the [going forward cost mechanism], negotiate a different rate with PJM, or file a cost-of-service rate with the Commission").

³⁸ *Baltimore Gas and Electric Company*, 92 FERC ¶ 61,043 at 61,114 (2000).

the Commission's approval of a term that ends with the LICAP mechanism implementation is inconsistent with Market Rule 1 since Market Rule 1 provides that the term of RMR agreements "shall be one year from the effective date" and "shall provide for renewal for additional one-year terms so long as the ISO determines that the Resource continues to be an RMR Resource."³⁹

Commission Determination

32. The Commission will deny rehearing on this issue. When we addressed this argument in the March 22 Order, we noted that the Commission has previously stated that it would consider RMR agreements that expire when the LICAP mechanism is implemented.⁴⁰ Additionally, we noted that the termination date was consistent with other Commission orders on the termination date for other RMR agreements.⁴¹ Connecticut Parties' argument that the term of the Milford RMR Agreement is inconsistent with Market Rule 1 is without merit because Milford applied for a reliability agreement under Appendix A, Exhibit 2, section 3.3.1 of Market Rule 1 which allows for negotiation of a cost of service agreement. The term provision of Market Rule 1 cited by Connecticut Parties applies only to resources that are designated as RMR Units pursuant to Appendix A, Exhibit 2, section 3.1 and select payment options that represent less than full cost-of-service cost recovery.

F. Return on Equity

33. Connecticut Parties request rehearing regarding the Commission's determination that the 10.88 percent return on equity (ROE) included in the RMR Agreement is appropriate. They contend that the 10.88 percent ROE is outdated and that Commission should not apply a one-size fits all approach to RMR Agreements, and should instead consider individual circumstances when determining the ROE. Further, they argue that more recent ROE determinations made by the Connecticut Department of Public Utility Control are lower and more indicative of recent financial markets. For these reasons, Connecticut Parties assert that the ROE should be set for hearing.

³⁹ Connecticut Parties Rehearing Request at 19, *citing* Market Rule 1, Appendix A, Exhibit 2, section 3.2.5, FERC Electric Tariff No. 3 Sheet No. 7457.

⁴⁰ March 22 Order at P 81; *see Devon Power LLC*, 107 FERC ¶ 61,240 at P 72, *order on reh'g*, 109 FERC ¶ 61,154 at P 25, 29.

⁴¹ *See* March 22 Order at P 81.

Commission Determination

34. The Commission has explained its rationale for using a standard 10.88 percent ROE for similarly situated units in numerous orders, and addressed the issues raised by Connecticut Parties in the March 22 Order.⁴² Connecticut Parties have presented no new arguments that would justify granting rehearing and including the ROE in the hearing established by the March 22 Order. Nonetheless, we reiterate that these units, along with the other RMR units to which this 10.88 percent has been applied, are operating in the same region with the same market risks and similar operating characteristics that necessitate the need for the agreements in the first instance. Therefore, we continue to find that this is an appropriate, reasonable ROE for facilities providing reliability services to ISO-NE under RMR agreements like the one filed in the instant docket.

G. Crediting Revenues from Other Sources of Income

35. CMEEC asserts that the March 22 Order erred in not conditioning Milford's market-based rate authority on crediting revenues from bilateral energy and other sales to ratepayers during the term of the RMR agreement. CMEEC also contends that Milford should credit the inframarginal revenues it earns from ISO-NE settlements and the bilateral market following the termination of the RMR Agreement against the payments made by entities paying Milford's fixed costs under the RMR Agreement.

Commission Determination

36. Contrary to CMEEC's assertion, Milford was required to credit revenues from ISO-NE's market and bilateral transactions against Milford's costs.⁴³ CMEEC now requests that we also require Milford to credit the revenues it earns in excess of its marginal costs after the expiration of the RMR Agreement to those ratepayers that paid a portion of the fixed costs during the RMR agreement. We note that CMEEC fails to propose any refund mechanism or even guidelines or time periods for instituting such a crediting mechanism. We also will not order a crediting mechanism that leaves a

⁴² See, e.g., *Devon Power Company*, 104 FERC ¶ 61,123 at P 48-49 (2003); March 22 Order at P 72.

⁴³ *Id.* at P 83, 88. Section 3.1.2. of the RMR Agreement provides "[a]ny revenues related to the Resource (including from bilateral Energy, Ancillary or Capacity sales agreements, emissions credits, release of firm transportation agreements, etc.), less any incremental costs directly related to securing additional revenue (i.e., beyond revenues earned in the NEPOOL markets) that are not already accounted for in the Monthly Fixed Cost Charge or Stipulated Bids, will be offset against Monthly Fixed-Cost Charges paid to the Owner." Milford Electric Tariff, First Revised Volume No. 2 Original Sheet No. 8.

reliability resource with no opportunity to earn more than its short-run marginal costs. The crediting mechanism that CMEEC suggests, moreover, would result in a rate that is unjust and unreasonable because it does not provide a structure under which sellers are provided a fair opportunity to recover their costs, including a return of and on investment.⁴⁴

H. Use of Levelized Rates

37. Connecticut Parties request clarification whether the Commission, in approving a traditional cost-of-service approach, set for hearing the issue of Milford's use of a non-levelized rate methodology for the rates in the RMR Agreement. CMEEC and Connecticut Parties argue that the Commission should find that only levelized rates are appropriate here because the Milford units are effectively brand new and should not be treated the same as older, depreciated units for RMR rate-making purposes. Connecticut Parties argue that a merchant facility should be required to use levelized rates because eventually it will return to using market-based regime upon the implementation of LICAP. Further, Connecticut Parties and CMEEC state that the use of a non-levelized rate for a short period of time forces customers to pay a generator's higher initial capital costs, and allows for significant over-recovery of costs by the generator, without the customers receiving the benefit of the lower rate produced by the lower capital costs in later years.

Commission Determination

38. We grant Connecticut Parties' requested clarification. In the March 22 Order, while we accepted a cost-of-service approach for the RMR Agreement that provides an opportunity for Milford to recover fixed and variable costs,⁴⁵ we did not summarily rule on whether the cost-of-service rate in the Milford RMR Agreement should or should not be a levelized rate. CMEEC and Connecticut Parties, in their arguments described in the March 22 Order, raised issues of material fact that could not be resolved on this record, and were and are appropriately addressed in the hearing and settlement judge procedures ordered in the March 22 Order.

⁴⁴ See *Bluefield Water Works & Improvement Co. v. PSC of West Virginia*, 262 U.S. 679, 693 (1923); *FPC v. Hope Natural Gas Co.*, 320 U.S. 391, 603 (1944); *Farmers' Union Central Exchange v. FERC*, 734 F.2d 1486, 1501 (D.C. Cir. 1984).

⁴⁵ March 22 Order at P 70.

I. Waiver of Accounting and Reporting Regulations

39. Connecticut Parties and CMEEC contend that Milford should be required to comply with the Commission's rate filing and record-keeping regulations applicable to entities that charge cost-of-service rates. Specifically, CMEEC asserts that, since Milford has requested a cost-based rate, it should comply with the Commission's accounting and reporting obligations imposed on those with cost-based rates and the Commission should not continue the waivers granted to Milford at the time of Milford's original market-based rate authority approval. Particularly, they note the Commission's regulations requiring an entity seeking a rate change to provide rate comparison data concerning the impact of the change.⁴⁶ Connecticut Parties and CMEEC argue that the data provided pursuant to these regulations are necessary to allow interested parties to scrutinize Milford's rates in the hearing established by the March 22 Order.

Commission Determination

40. The Commission denies parties' rehearing request in this regard. In the March 22 Order, we denied a request to suspend Milford's market-based rate authority.⁴⁷ Milford thus still has its market-based rate authority. In fact, the Commission stated in the March 22 Order that article 3.1.2 of the RMR Agreement provides that any market revenues from the units will be offset against the reliability payments in the RMR Agreement.⁴⁸

41. Furthermore, the Commission is not persuaded that parties at the hearing established in the March 22 Order will not be able to adequately scrutinize the proposed rates in the RMR Agreement without imposing the accounting and reporting requirements from which Milford is exempt. The parties to that hearing will have the full spectrum of discovery rights afforded litigants in hearings at the Commission. Utilizing those discovery tools, Connecticut Parties, CMEEC and others should be able to obtain the facts necessary to analyze Milford's proposed rates during the course of the hearing.

⁴⁶ Specifically, Connecticut Parties point to 18 C.F.R. § 35.13 (2005), as well as 18 C.F.R. Parts 41, 101 and 141 (2005).

⁴⁷ March 22 Order at P 88.

⁴⁸ Furthermore, under the RMR Agreement, Milford must submit bids at the Stipulated Bid Costs. As a result, it cannot adjust its bids to exercise market power, satisfying any market power concerns that might exist.

The Commission orders:

The requests for rehearing and request for clarification are hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.