UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Berkshire Power Company, LLC Docket Nos. ER05-1179-002
ER05-1179-003

ORDER DENYING REHEARING AND ACCEPTING COMPLIANCE

(Issued February 2, 2006)

1. On June 30, 2005, as amended on July 1 and 8, 2005, Berkshire Power Company, LLC (Berkshire) filed a proposed unexecuted Reliability Must Run Agreement (RMR Agreement) between Berkshire and the Independent System Operator New England, Inc. (ISO-NE). In an order issued on September 6, 2005, the Commission conditionally accepted the RMR Agreement for filing, suspended it for a nominal period, set it for hearing and settlement judge procedures, and directed Berkshire to submit a compliance filing.[1] On October 6, 2005, Massachusetts Municipal Wholesale Electric Company (MMWEC) filed a request for rehearing of the September 6 Order and Berkshire submitted a compliance filing in response to the September 6 Order. In this order, the Commission denies rehearing of the September 6 Order and accepts the compliance filing.

Background

2. The Commission has been addressing issues concerning New England's capacity markets and the use of RMR agreements since 2003.[2] Berkshire's RMR Agreement covers charges for reliability services provided by Berkshire to ISO-NE from Berkshire's 245 MW natural gas-fired combined-cycle electric generating facility (Facility) in

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[1] *Berkshire Power Co*., 112 FERC ¶ 61,253 (2005) (September 6 Order).

[2] *See, e.g.*, *Id.* at P 2; *Devon Power LLC*, 102 FERC ¶ 61,314 *and Devon Power LLC*, 103 FERC ¶ 61,082, *reh'g granted in part and denied in part*, 104 FERC ¶ 61,123 (2003); *PPL Wallingford Energy LLC*, 103 FERC ¶ 61,085, *reh'g granted in part and denied in part*, 105 FERC ¶ 61,324 (2003).

Agawam, MA. Berkshire and ISO-NE negotiated the RMR Agreement under section 3.3 of Exhibit 2, Appendix A of Market Rule 1.[3] Berkshire argued in its filing that the RMR Agreement is necessary to permit its Facility to continue providing reliability services, as Berkshire has received insufficient revenue to sustain its operation. It added that ISO-NE had made a determination that the Facility is needed for reliable system operation.

3. The RMR Agreement, which in many respects is substantially similar to the *pro forma* Cost-of-Service Agreement contained in Market Rule 1, provides that ISO-NE will pay Berkshire a monthly fixed cost charge for providing reliability services intended to cover Berkshire's fixed costs. Berkshire, in turn, is required to submit stipulated bids for the energy and ancillary services generated by the Facility, with any revenues earned by the Facility credited against the fixed monthly charge.

4. In the September 6 Order, the Commission conditionally accepted and suspended the RMR Agreement, and set the RMR Agreement for hearing and settlement judge procedures. In particular, the Commission set for hearing the issue of whether the proposed RMR Agreement is necessary for Berkshire to recover its facility costs.[4] Further, the September 6 Order determined that if the hearing finds that the RMR Agreement is necessary for the Facility to maintain operations, then the hearing and settlement judge procedures should determine a just and reasonable rate under the RMR Agreement.[5] Also, the Commission accepted ISO-NE's finding that the Facility is necessary to support reliability in New England.[6]

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[3] Market Rule 1 was accepted 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).

[4] September 6 Order, 112 FERC ¶ 61,253 at P 21-23, 25.

[5] *Id.* at P 23. In determining the just and reasonable rate, the September 6 Order stated that the Commission would consider Berkshire's full cost-of-service. *Id.*

[6] *Id.* at P 32. The Commission noted that this did not mean that an RMR agreement was necessary. *Id.*

Request for Rehearing

A. Procedural Matters

5. As noted above, MMWEC filed a request for rehearing of the September 6 Order. ISO-NE filed an answer to MMWEC's request for rehearing. MMWEC filed an answer to ISO-NE's answer. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2005), prohibits answers to requests for rehearing. We will therefore reject ISO-NE's answer, and dismiss MMWEC's answer.

B. Debt Service

6. MMWEC argues that the Commission erred in providing for the consideration of Berkshire's debt service obligations in determining whether Berkshire's proposed RMR Agreement is necessary for Berkshire's facility to remain operational.[7] MMWEC argues that there is no substantial evidentiary support for the proposition that failure to pay debt service would result in the facility no longer remaining operational. In addition, MMWEC argues that the assumption that covering debt service is necessary to keep a generating facility operational represents a departure from reasoned decision-making: since debt service obligations cannot be avoided by retiring a unit, there is no incentive to retire a unit because of inability to pay debt service. Also, MMWEC argues that consideration of debt service in the facility-cost analysis also departs from precedent that excludes analogous depreciation expenses and rates of return from the analysis.[8] Finally, MMWEC argues that the decision to effectively make RMR agreements more readily available to plants financed primarily with debt instruments as compared to plants financed primarily by equity is unjust, unreasonable, and unduly discriminatory.

7. We deny rehearing on this issue. Initially, we note that we have set for hearing whether the Facility's cost and revenues warrant an RMR agreement; we have not found, at this stage of the proceeding, that an RMR agreement is necessary for the Facility to maintain operations. The Commission also disagrees with MMWEC that debt-service payments should not be included in the facility cost analysis. Berkshire is a debt-financed facility; its debt-service payments are costs that must be paid to avoid foreclosure and to keep a unit in service, and these are costs appropriately considered in this analysis. If Berkshire defaults on its debt-payments and its debt holders foreclose and take the Facility out of service, then reliability, which is at the root of this filing,

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[7] *See Id.* at P 25.

[8] *Citing Bridgeport Energy LLC*, 112 FERC ¶ 61,077 at P 36 (2005) (*Bridgeport*).

would be adversely affected. And if Berkshire defaults on its debt-payments and its debt holder foreclose but seek instead to operate the Facility themselves or to sell the Facility, if it continues to operate at a loss for the debt-holders or for subsequent owners (and there is no reason to believe that either would necessarily be able to operate any more profitably than Berkshire), it would ultimately be shut down, adversely affecting reliability. In short, then, debt-service costs are just as much a cost to be considered in any analysis as other fixed costs.

8. The Commission disagrees that consideration of debt-service in the facility cost analysis departs from precedent. The list of costs found in *Bridgeport* is not an absolute list and *Bridgeport*, in referring to costs "*like* fixed O&M [etc.],"[9] suggests that inclusion of debt-service costs in this analysis may, in fact, be appropriate.

9. The Commission must review each RMR agreement on a case-by-case basis. In this case, the Commission finds that the debt-service payments are real costs and should be included in the cost analysis to determine if Berkshire needs a cost-of-service RMR agreement to remain available to provide reliability service. Including debt-service costs in this analysis is not unjust, unreasonable, or unduly discriminatory.

C. <u>Full Cost-of-Service</u>

10. MMWEC argues that the Commission erred in conditionally accepting Berkshire's proposal to charge rates that guarantee recovery of its full cost-of-service (assuming the RMR Agreement is shown to be necessary).[10] MMWEC states that this decision represents a failure of reasoned decision-making because it separates RMR rate design from the reasons for which RMR Agreements are entered: keeping needed generating units in service, which requires a guarantee only of recovery of going-forward costs. MMWEC also argues that guaranteeing Berkshire's full cost-of-service recovery is

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[9] *Id.* (emphasis added). In fact, *Bridgeport* goes on to state both that the company there sought to included rate of return not otherwise recovered and that rates of return can be included in cost-of-service rates, *see Id.* at P 36 & n.41, and one component used to determine rates of return is debt costs. *Id.* at P 37 (noting that annual facility costs "include[e] fixed O&M, [etc.]" and are not limited only to "fixed O&M, [etc.]").

[10] *See* September 6 Order, 112 FERC ¶ 61,253 at P 29.

unjust, unreasonable, and unduly discriminatory, because it gives Berkshire an undue competitive advantage in comparison to non-RMR facilities and because it distorts markets increasing the likelihood that other generators will seek RMR agreements.[11]

11. We disagree with MMWEC's arguments. Nothing MMWEC presents persuades us that our original analysis was in error.[12] The Commission has historically allowed full cost-of-service recovery for generators under RMR agreements. This approach is appropriate because providing only going forward, or minimum variable, cost recovery to these units may not allow them to be maintained in a manner in which they can continue to operate reliably, and it would defeat the purpose of the contracts which is to ensure that units are, in fact, "available" to support reliability.[13] Additionally, allowing full cost-of-service rates is appropriate for RMR agreements that mirror the *pro forma* Cost-of-Service Agreement in Market Rule 1, because "other" revenues earned by these units in the market are credited against the monthly charges.

D. ISO-NE's Reliability Determination

12. MMWEC argues that the Commission erred in affirming ISO-NE's finding that the Facility is needed for reliability;[14] MMWEC states that ISO-NE's study of Berkshire's request for a determination of need indicates that the need for the Facility is dependent in part on the unavailability of West Springfield 3, a generating station which, like the Facility, is located in the Springfield, Massachusetts area. MMWEC notes that like Berkshire, the owner of West Springfield 3 is seeking approval from this Commission of an RMR agreement for its unit,[15] and so MMWEC challenges the Commission's endorsement of ISO-NE's "need" finding for the Facility, with a resulting increase in rates given the apparent availability of West Springfield 3.

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[11] *Citing Devon Power, LLC*, 103 FERC ¶ 61,082 (2003).

[12] *See* September 6 Order, 112 FERC ¶ 61,253 at P 29.

[13] *E.g., PSEG Power Connecticut, LLC*, 111 FERC ¶ 61,441 at P 21 (2005).

[14] *See* September 6 Order, 112 FERC ¶ 61,253 at P 32.

[15] *Citing, Consolidated Energy Edison Massachusetts Inc.*, 112 FERC ¶ 61,263 (2005) (*Con Ed*).

13. We deny rehearing of this issue. In the September 6 Order, the Commission accepted ISO-NE's determination that Berkshire is needed for reliability; Market Rule 1, the currently-effective rate schedule on file with the Commission, permits ISO-NE to determine whether units are needed for reliability.[16] The Commission's review of the RMR Agreement, under section 205 of the FPA, also included a review of the evidence presented by Berkshire and ISO-NE that the facility is needed for reliability. We are not persuaded that we erred.

14. As to MMWEC's argument that we should not permit both Berkshire and West Springfield 3 to have RMR agreements, we find such an argument to be unpersuasive. A reliability analysis is a resource-based analysis, looking at resources available or needed to meet demand in various scenarios. Reliability may well require the availability of more than one plant in any one area. The fact that there is on plant in a particular area does not mean that a second (or even third or fourth, conceivably) plant is not needed to ensure reliability. ISO-NE concluded that both plants are needed for reliability,[17] and we are not persuaded that ISO-NE erred.

Compliance Filing

15. In the September 6 Order, Berkshire designated the RMR Agreement as Service Agreement No. 1 under Berkshire's market-based rates tariff. The Commission found that the RMR Agreement was not appropriately characterized as containing only market-based rates offered under Berkshire's market-based rates tariff. We directed Berkshire, to make a compliance filing designating the RMR Agreement as a stand alone rate schedule rather than a service agreement under its market-based rates tariff.[18] On October 6, 2005, Berkshire submitted a compliance filing (October 6 Compliance Filing) designating the RMR Agreement as Rate Schedule FERC No. 1.

16. Additionally, in the September 6 Order, the Commission rejected Berkshire's proposed revision to Article 2.3, which permitted the potential continuation of the Agreement beyond the implementation of LICAP.[19] In its October 6 Compliance Filing,

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[16] *Id.* at P 32; *accord, e.g., PSEG Power Connecticut, LLC*, 111 FERC ¶ 61,441 (2005)

[17] *Compare* September 6 Order, 112 FERC ¶ 61,253 at P 30-32 *with Con Ed*, 112 FERC ¶ 61,263 at P 4, 17, 30.

[18] *September 6 Order*, 112 FERC ¶ 61,253 at P 34.

[19] *Id.* at P 33.

Berkshire submits revisions to Article 2.3 and states that the Term of the Agreement set forth in Article 2.1.1 of the RMR Agreement ends no later than "the day before a locational ICAP mechanism applicable to the Resource becomes effective,"[20] and there is nothing in revised Article 2.3 to suggest that the RMR Agreement may continue in effect beyond that date.

17. Notice of Berkshire's compliance filing was published in the *Federal Register*, 70 Fed. Reg. 61,279 (2005), with motions to intervene or protests due on or before October 27, 2005. None was file.

18. The Commission finds that Berkshire's revisions comply with the September 6 Order and accepts Berkshire's compliance filing.

The Commission orders:

(A) MMWEC's request for rehearing is hereby denied.

(B) Berkshire's compliance filing is hereby accepted.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

[20] October 6 Compliance Filing at 2.