

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PPL Wallingford Energy LLC and
PPL EnergyPlus, LLC

Docket No. ER03-421-009

ORDER ON REMAND ESTABLISHING HEARING AND SETTLEMENT JUDGE
PROCEDURES

(Issued April 6, 2006)

1. This order addresses an August 9, 2005 remand from the United States Court of Appeals for the District of Columbia Circuit in these proceedings.¹ In the Remand Order, the court vacated the Commission's orders rejecting a proposed reliability must run agreement (RMR Agreement) between PPL Wallingford Energy LLC, PPL EnergyPlus, LLC (collectively PPL) and ISO New England Inc. (ISO-NE). In this order, the Commission conditionally accepts the RMR Agreement effective February 1, 2003 and establishes hearing and settlement judge procedures.

I. Background

2. On January 16, 2003, PPL submitted, under section 205 of the Federal Power Act (FPA), the proposed RMR Agreement with ISO-NE pertaining to four of the five 45 MW peaking units at its Wallingford Station. PPL stated in its filing that ISO-NE had determined that the units are needed for reliability purposes in Connecticut. PPL and

¹ *PPL Wallingford Energy LLC and PPL EnergyPlus, LLC v. FERC*, 419 F.3d 1194 (D.C. Cir. 2005) (Remand Order).

ISO-NE negotiated the RMR Agreement under then-existing Market Rule 17 of the New England Power Pool (NEPOOL) tariff.²

3. The proposed RMR Agreement generally follows the *pro forma* cost of service RMR Agreement approved by the Commission when it approved Market Rule 1.³ The initial term of the RMR Agreement is one year, from February 1, 2003 to January 31, 2004, with automatic annual extensions unless terminated by notice. Under the RMR Agreement, PPL would submit bids for energy and ancillary services from the units into the New England energy markets using a Stipulated Bid formula included in the agreement. The RMR Agreement provides for PPL to receive a Monthly Fixed Cost Charge from ISO-NE, which is determined using an Annual Fixed Revenue Requirement developed for the PPL units. PPL proposed an Annual Fixed Revenue Requirement for the four units under the RMR Agreement of \$30.7 million (which represents four-fifths of the \$38.4 million proposed revenue requirement for the Wallingford Station), resulting in a proposed monthly charge of \$2.56 million. Pursuant to the RMR Agreement, any inframarginal revenues earned by the units from the energy markets would be credited against these fixed-cost payments.

4. On February 28, 2003, the Commission issued a deficiency letter requesting additional information from PPL regarding the January 16, 2003 filing. PPL filed an amendment to its filing on March 31, 2003 in response to this letter.

5. Prior to issuing its order in this proceeding, the Commission issued an order on April 25, 2003 that rejected, in part, RMR agreements filed by NRG Power Marketing Inc. for four generating units located in the Connecticut and Southwest Connecticut areas in another proceeding.⁴ In that order, the Commission expressed concerns regarding the proliferation of RMR agreements and the effect they have on the energy markets.⁵ The Commission stated that RMR agreements “should be a last resort,” and that ISO-NE,

² Market Rule 17 was replaced when the Commission accepted a new comprehensive tariff implementing energy markets and locational marginal pricing in New England, known as Market Rule 1. *See New England Power Pool and ISO New England, Inc.*, 100 FERC ¶ 61,287 (2002).

³ *See id.*

⁴ *Devon Power LLC*, 103 FERC ¶ 61,082 (*Devon I*), *order on reh’g*, 104 FERC ¶ 61,123 (2003) (*Devon II*).

⁵ *Devon I* at P 29.

rather than using such agreements to assure adequate compensation for generators needed for reliability, should develop a market-type mechanism to compensate such generators.⁶ In accordance with this discussion, the Commission rejected the full cost of service RMR agreements submitted by NRG Power Marketing Inc.⁷ The Commission also directed ISO-NE to temporarily modify its tariff to include a mechanism (the Peaking Unit Safe Harbor (PUSH) mechanism) permitting seldom run units in congested areas to raise their energy market bids to a level that would include both variable costs and a fixed cost adder, to give those units an opportunity to recover their costs through the market.⁸ Further, the Commission directed ISO-NE to file a permanent mechanism implementing location or deliverability requirements in the installed capacity (ICAP) or resource adequacy market to replace the PUSH mechanism. The PUSH mechanism was to be in place for a period of one year until the permanent mechanism was put in place on June 1, 2004.⁹

6. In accordance with *Devon I*, on May 16, 2003, the Commission issued an order rejecting PPL's RMR Agreement.¹⁰ The Commission concluded that the tariff changes it directed in *Devon I* would permit all suppliers, including PPL, to charge higher prices during hours of high demand.¹¹ In the December 22 Order on rehearing, the Commission denied requests for rehearing of the May 16 Order, finding that to a large extent the arguments raised on rehearing were addressed in *Devon II*, including arguments regarding whether the PUSH mechanism is just and reasonable.¹²

⁶ *Id.* at P 29, 31.

⁷ *Id.* at P 32.

⁸ *Id.* at P 32-35. Under the PUSH mechanism, such increased bids would be eligible to determine the locational marginal price.

⁹ *Id.* at P 37.

¹⁰ *PPL Wallingford Energy LLC*, 103 FERC ¶ 61,185 (May 16 Order), *order on reh'g*, 105 FERC ¶ 61,324 (2003) (December 22 Order).

¹¹ May 16 Order at P 13-14.

¹² December 22 Order at P 9-10.

7. In 2004 and 2005, following a report by ISO-NE on the implementation and results of the PUSH mechanism,¹³ the Commission accepted RMR agreements between ISO-NE and certain generators that could not adequately recover their costs under the PUSH mechanism.¹⁴ Additionally, on March 1, 2004, ISO-NE filed a proposed locational installed capacity (LICAP) mechanism to be effective June 1, 2004, in compliance with the Commission's directive in *Devon I*.¹⁵ In a series of orders, the Commission accepted the broad outline of ISO-NE's proposal, but set several matters for hearing, and subsequently delayed the implementation of the LICAP mechanism to no earlier than October 1, 2006.¹⁶

II. Remand Order

8. The court vacated the May 16 and December 22 Orders and remanded this case, concluding that the Commission failed to "respond meaningfully" to three objections raised by PPL during the proceedings before the Commission. First, PPL objected to the

¹³ See ISO-NE, "A Review of Peaking Unit Safe Harbor (PUSH) Implementation and Results," filed December 3, 2003 in Docket No. ER03-563-025 (PUSH Report). The Commission accepted this report for information purposes in *Devon Power LLC*, 111 FERC ¶ 61,486 (2005).

¹⁴ See, e.g., *Devon Power LLC*, 106 FERC ¶ 61,264 (2004) (*Devon Power*); *Mirant Kendall, LLC and Mirant Americas Energy Marketing, L.P.*, 109 FERC ¶ 61,227 (2004), *order on reh'g*, 110 FERC ¶ 61,272 (2005); *PSEG Power Connecticut, LLC*, 110 FERC ¶ 61,020, *order on reh'g*, 111 FERC ¶ 61,441, *order on reh'g*, 111 FERC ¶ 63,023 (2005); *Milford Power Company*, 110 FERC ¶ 61,299, *order on reh'g*, 112 FERC ¶ 61,154 (2005); *Bridgeport Energy, LLC*, 112 FERC ¶ 61,077, *order on reh'g*, 113 FERC ¶ 61,311 (2005), *reh'g rejected*, 114 FERC ¶ 61,265 (2006); *Berkshire Power Company, LLC*, 112 FERC ¶ 61,253 (2005); *Consolidated Edison Energy Massachusetts, Inc.*, 112 FERC ¶ 61,263 (2005).

¹⁵ *Devon I* at P 37.

¹⁶ 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); *Devon Power LLC*, 112 FERC ¶ 61,179 (2005); *Devon Power LLC*, 113 FERC ¶ 61,075 (2005); see also *Devon Power LLC*, 109 FERC ¶ 61,156 (2004), *order on reh'g*, 110 FERC ¶ 61,313 (2005). A proposed settlement of the issues in this proceeding was filed with the Commission on March 6, 2006 in Docket No. ER03-563-055.

Commission's conclusion that the PPL units (and other eligible units) could recover their costs under the PUSH mechanism. Because the PUSH mechanism uses 2002 MWh production data to develop bid thresholds, PPL argued on rehearing that the Commission incorrectly assumed that units would run as often in 2003 (under PUSH bidding) as they did during 2002, pointing out that rising natural gas prices would reduce demand for gas-fired units. The court concluded that the Commission "failed to respond directly to PPL's point about the change in gas prices and consequent reduction in run hours," and "[i]nstead . . . simply asserted that PPL had failed to suggest an alternative to PUSH methodology."¹⁷

9. Second, PPL argued that the Commission incorrectly assumed that peaking units using PUSH could set LMP, giving them a further opportunity to recover their costs. PPL argued on rehearing that ISO New England did not intend to allow PUSH units to set LMP when operating at their low operating limit, undercutting the Commission's rationale. The court stated that the Commission "failed to respond to this objection in any way."¹⁸

10. Third, PPL claimed that its situation met the Commission's requirement (stated in the *Devon* orders) that the RMR agreement could be used as a "last resort" when PUSH bidding would not permit a generator to recover its costs. PPL contended that it presented expert evidence showing that its units would recover only 30 percent of their fixed costs under the PUSH mechanism. The court held that the Commission's orders "contained no response."¹⁹ In light of the Commission's failure to answer these objections, the court remanded the case for further proceedings.

III. Responsive Pleadings

A. Motion for Disposition on Remand

11. On November 29, 2005, PPL submitted a motion for disposition on remand. In light of the Remand Order and the Commission's subsequent approval of several RMR agreements, PPL requests that the Commission accept the RMR Agreement as of February 1, 2003, as PPL requested in its January 16, 2003 filing. PPL argues that the

¹⁷ Remand Order, 419 F.3d at 1199.

¹⁸ *Id.* at 1199-1200.

¹⁹ *Id.* at 1200.

Commission should accept the RMR Agreement as of the originally-requested effective date as “a necessary remedy . . . to put PPL in the position it would have been in had the Commission not erred in initially denying the RMR Agreement.”²⁰

12. In its motion, PPL also offers a proposed procedure for implementing the RMR Agreement with an effective date of February 1, 2003.²¹ PPL notes that its market participation in connection with the RMR Agreement falls into three time periods: (1) the time period from February 1, 2003 to May 17, 2003, during which time PPL was submitting Stipulated Bids in accordance with the RMR Agreement; (2) the time period from May 18, 2003 (when the Commission rejected the RMR Agreement) until the time when the Commission issues its order on remand, during which PPL was not submitting Stipulated Bids under the RMR Agreement; and (3) the time period after the Commission issues its order on remand, assuming that the Commission accepts the RMR Agreement for filing as PPL requests. PPL states that for the first time period, the Monthly Fixed Cost Charge payable to PPL (based on the annual fixed revenue requirement) and any credits due for revenues earned by PPL in excess of variable costs can be calculated by ISO-NE with data it already has, since PPL was submitting Stipulated Bids during this time.

13. For the second time period, PPL proposes an implementation procedure that it states is similar to one developed as part of a settlement in a recent RMR agreement case, which was approved by the Commission.²² During this time period, PPL states that it will be necessary to refund Operating Reserve payments PPL received that were in excess of the amounts it would have received had it been submitting Stipulated Bids.²³

²⁰ Motion for Disposition on Remand of PPL at 5, *citing Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999); *Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 168 (D.C. Cir. 1993); *H.Q. Energy Servs., Inc. v. New York Independent System Operator, Inc.*, 113 FERC ¶ 61,184 at P 36 (2005).

²¹ PPL states that it has discussed its proposed procedure with ISO-NE.

²² Motion for Disposition on Remand of PPL at 19, *citing ISO New England Inc.*, 110 FERC ¶ 61,079 (2005).

²³ PPL proposes to calculate the total Operating Reserve payments the units at issue received during this time period and the difference between those payments and the payments PPL would have received by submitting Stipulated Bids under the RMR Agreement, in consultation with ISO-NE. This difference would then be paid to market participants who paid Operating Reserve charges during this time period. According to PPL, ISO-NE would prepare a spreadsheet showing the share of Operative Reserve

(continued)

PPL states that once the necessary refunds are calculated it would submit a compliance filing setting forth the refund amounts for the market participants ISO-NE has identified as entitled to refunds.²⁴ Once the Commission accepted this compliance, PPL states that it would provide the total refund amount to ISO-NE within 15 days. ISO-NE would then distribute the refunds to market participants within 45 days. Additionally, PPL states that for this time period, it will provide variable cost data to ISO-NE so that the inframarginal revenues received by PPL in excess of what it would have received under the Stipulated Bid formula can be calculated.

14. For the third time period, PPL states that three of the four units that would be covered by the RMR Agreement will be participating in the forward reserve market during the winter period, which ends on May 31, 2006. For the three units, PPL proposes to begin stipulated bidding on June 1, 2006, following the end of its forward reserve market commitment period. PPL states that it will not retain any revenues it receives from the forward reserve market that are in excess of the revenues it would have received through stipulated bidding, and that the excess revenues will be considered inframarginal revenues under the RMR Agreement.

15. PPL also proposes payment arrangements for the past time period, assuming the Commission accepts the RMR Agreement. PPL states that it will accept three months of back payments during each month going forward (*e.g.*, during the first month, PPL would accept payments for February 2003 through April 2003).

B. Answer and Response to Answer

16. On December 14, 2005, Connecticut Parties²⁵ submitted a response to PPL's motion. Connecticut Parties contend that the court's opinion does not direct the Commission to grant PPL's RMR Agreement, as PPL contends. They argue that, at

charges paid by market participants, and develop an allocation percentage to distribute refunds to these market participants.

²⁴ Because the individual refund amounts and percentages are confidential under the NEPOOL information policy, PPL states that ISO-NE would file the exact percentages with the Commission on a confidential basis.

²⁵ Connecticut Parties are the Attorney General for the State of Connecticut, Connecticut Department of Public Utility Control, Connecticut Municipal Electric Energy Cooperative, and Connecticut Office of Consumer Counsel.

most, the Commission should conduct a further fact-finding on remand to either support or modify its previous decision to deny the RMR Agreement.

17. Further, Connecticut Parties contend that PPL's request that the Commission approve its RMR Agreement as of February 1, 2003 raises "significant legal problems" because while RMR agreements impose certain contractual obligations on the generator, PPL admits in its motion for disposition on remand that it has not abided by those commitments during most of the period since the proposed effective date. Connecticut Parties note specifically that PPL submitted stipulated bids only for the period of February 1, 2003 to May 17, 2003 (when the RMR Agreement was rejected), and at all other times "participated fully in the New England markets and [was] obliged to assume none of the obligations imposed under the . . . RMR [A]greement."²⁶ According to Connecticut Parties, if PPL's request is granted, it would receive payments under the RMR Agreement without ever having been held to the performance obligations under that contract. Connecticut Parties contend that at a minimum PPL should be required to show that it met the performance obligations of the RMR Agreement during the time period in question.

18. Connecticut Parties also argue that before receiving approval of the RMR Agreement, PPL must demonstrate that its units meet the Commission's current RMR eligibility requirements. Specifically, Connecticut Parties contend that PPL must demonstrate that the units subject to the RMR Agreement are not recovering their "facilities costs," as the Commission required in *Bridgeport Energy LLC*.²⁷ Connecticut Parties further assert that PPL cannot satisfy the facilities costs test used in that order based on the data submitted in support of the RMR Agreement and the fact that the units have been operated without RMR payments for almost three years since the Commission rejected the RMR Agreement. Finally, Connecticut Parties argue that even if PPL can meet the facilities costs test, the cost of service included in the RMR Agreement should be subject to further investigation in a hearing.

19. On December 28, 2005, PPL submitted a motion for leave to respond and response to Connecticut Parties' answer. PPL contends that Connecticut Parties' mischaracterized the court's opinion as only requiring the Commission to institute further procedures before reinstating its prior denial of the RMR Agreement. PPL states that the court rejected the Commission's entire reasoning, stated no support for the Commission's

²⁶ Answer of Connecticut Parties at 5.

²⁷ 112 FERC ¶ 61,077, *reh'g denied*, 113 FERC ¶ 61,311 (2005), *reh'g rejected*, 114 FERC ¶ 61,265 (2006).

approach, and did not merely remand the Commission's orders, but vacated them. PPL states that the court's decision to vacate the orders "reflects a determination that the order has 'serious deficiencies' and thus 'doubt whether the agency chose correctly.'"²⁸ Additionally, PPL responds that Connecticut Parties, in suggesting that PPL cannot recover revenues under the RMR Agreement for the prior period because it was not held to the obligations under that agreement, ignore the fact that the units in question have remained available for reliability purposes and have operated as Daily RMR Resources during this period, thus "fulfilling the most basic purpose of an RMR agreement."²⁹ PPL also asserts that Connecticut Parties inappropriately seek to apply the *Bridgeport* order to its RMR Agreement, arguing that its RMR Agreement was submitted in 2003, and thus should not be subjected to standards announced in 2005 in a different context. PPL further contends that even were it appropriate to impose the standards announced in *Bridgeport*, those standards would not apply to the PPL units. The PPL units are seldom-run, high-cost peaking units and thus, according to PPL, they are not like the units at issue in *Bridgeport*, which were subject to the facility costs test due to their unique position as new and efficient baseload generators.³⁰

IV. Discussion

20. The Court of Appeals vacated our May 16 Order and December 22 Order, concluding that the Commission had failed to meaningfully respond to three objections raised by PPL regarding the PUSH mechanism. In the period following those orders, it became clear that for many generating units, the PUSH mechanism did not meet the objective of providing an opportunity to recover their fixed costs. In the PUSH Report, for example, ISO-NE reported that while units operating under PUSH were able to recover a greater amount of costs than under the previous market rules, such units were still unlikely to recover all of the fixed costs that PUSH permitted them to recover.³¹ As we also note above, in early 2004 the Commission began conditionally accepting RMR agreements, in light of both the findings of the PUSH Report and the actual financial performance of the unit or units requesting the RMR agreement.

²⁸ Response of PPL at 6, citing *Louisiana Federal Land Bank Association v. Farm Credit Admin.*, 335 F.3d 1077, 1085 (D.C. Cir. 2003).

²⁹ Response of PPL at 7-8.

³⁰ See Response of PPL at 10-11, citing *Bridgeport Energy LLC*, 113 FERC ¶ 61,311 at P 12.

³¹ See PUSH Report, *supra* note 13.

21. In the unique circumstances of this case and as discussed in more detail below, the Commission will conditionally accept the RMR Agreement, suspend it for a nominal period to be effective February 1, 2003, subject to refund and subject to further procedures to determine PPL's need for the RMR Agreement, the justness and reasonableness of PPL's cost of service going forward, and the appropriate amount of compensation due to PPL under the RMR Agreement for the period between the effective date and the date of this order.

22. In taking this approach, we reject in part PPL's request in its motion for disposition on remand that we unconditionally accept the RMR Agreement as of February 1, 2003. We disagree with PPL that unconditionally granting the RMR Agreement is the only remedy that is responsive to the court's remand. On remand, the Commission has significant discretion to "reconsider the whole of its original decision."³² Here, we are requiring PPL to provide additional support for the proposed RMR Agreement that is not present in the previous record. The Commission is well within its authority on remand to reopen the record in this proceeding and take additional evidence.³³ The cases cited by PPL for its contention that the Commission must unconditionally grant the RMR Agreement to put PPL in the position it would have been in had the Commission not erred in its prior orders do not persuade us on this point. Those cases state a "strong equitable presumption in favor of retroactivity," but also note that the Commission is not required to act retroactively in every case "if the other considerations properly within its ambit counsel otherwise."³⁴ We believe the other considerations we lay out in this order³⁵ justify the approach we take here. However, as discussed in more detail below, the Commission conditionally accepts the RMR Agreement effective retroactive to February 1, 2003, meaning that the agreement will be effective as of that date assuming need is established in the hearing and settlement judge procedures. This should address any concerns PPL may have regarding a complete remedy to address the legal error found by the court in the Remand Order.

³² *Southeastern Michigan Gas Co. v. FERC*, 133 F.3d 34, 38 (DC Cir. 1998); *see also Williams Natural Gas Co. v. FERC*, 872 F.2d 438, 450 (DC Cir. 1989) (noting that the Commission "retains wide discretion on remand.")

³³ *See Williams Natural Gas Co. v. FERC*, 872 F.2d at 450 (stating that on remand, the Commission could "solicit new comments in order to obtain updated information.")

³⁴ *Exxon Co., USA v. FERC*, 182 F.3d 30, 49 (1999).

³⁵ In particular, the questions regarding the need for the RMR Agreement, cost of service under the RMR Agreement, and financial accounting for past periods.

A. Need for the RMR Agreement

23. We will not analyze the RMR Agreement on the basis of the PUSH mechanism, as the Commission did in its earlier orders, because of the realities of the market that became apparent upon the issuance of the PUSH Report. However, there is not enough evidence in the record in this case to unconditionally accept the RMR Agreement. In particular, the record lacks convincing evidence regarding the extent of PPL's failure (as well as expected inability) to recover its costs in the market. PPL's original January 16, 2003 filing offered little support to demonstrate financial need for the proposed RMR Agreement on the basis of past losses. The filing included an income statement for the 12 months ended December 31, 2002 that appeared to show total expenses of \$11,572,000 versus operating revenues of \$5,578,000, although no basis was provided for the presented numbers.³⁶

24. The Commission issued a deficiency letter on February 28, 2003 to determine, *inter alia*, why new, efficient units like PPL Wallingford would be unable to obtain sufficient revenues in the New England market. In its March 31, 2003 deficiency response, PPL argued that cost recovery for its units was restricted by mitigation, \$1000 bid caps and other bid thresholds that precluded scarcity prices from being realized, and by ICAP prices that hovered below \$1.00/kW-month since the units came on line.³⁷ As a result, PPL noted that at the time of its deficiency response, the units "have not recovered total operational costs since beginning operations" and incurred an "annual cash loss in 2002 of \$360,000 not including any return on or return of the investment made in the units."³⁸ This cash loss of \$360,000 is tabulated in Exhibit 1 of PPL's deficiency

³⁶ January 16, 2003 filing, Attachment D, Exhibit PPL-11(JMK-5), Page 1.

³⁷ Concurrent with this deficiency response, PPL decided to pursue an application (under Section 18.4 of the NEPOOL Agreement) to put these units under deactivated reserve status.

³⁸ March 31, 2003 deficiency response at 3, 6 (PPL defines total operational costs as the costs incurred by the facility for fuel, variable operations and maintenance, gas transportation, fixed operations and maintenance and administrative and general overhead).

response, but it is not clear why the itemized costs listed under "Actual 2002 Costs" of Exhibit 1 do not correspond with the previously mentioned itemized costs for 2002 from the January 16, 2003 filing.³⁹

25. In addition, protesters questioned several aspects of PPL's Exhibit 1. Protesters noted that Exhibit 1 does not show actual costs and revenues attributable to the four proposed RMR units during 2002, but instead prorates PPL's total revenues and costs by 4/5 (reflecting PPL seeking the RMR Agreement for only 4 of the 5 units) to demonstrate a cash loss without return of and on investment of \$360,000 on total revenues of over \$10 million. Further, protesters questioned the validity of the presented revenues from Exhibit 1, as a footnote to Exhibit 1 states that "the actual per books revenues for PPL Wallingford vary based on inter-company revenues and transfers."

26. In addition, PPL's deficiency response forecasted an annual cash loss in 2003 of \$671,000, not including any return on or return of the investment made in the units.⁴⁰ Protesters questioned PPL's basis for the approximate 60 percent increase in fuel and variable O&M costs between 2002 (Exhibit 1, actual) and 2003 (Exhibit 2, forecast) when compared with increased energy revenues of only approximately 30 percent.

27. Given the deficiencies identified above, we cannot determine on the basis of this record that the RMR Agreement is necessary for the PPL Wallingford units to remain available to provide reliability service. Accordingly, we set for hearing and settlement judge procedures the issue of whether the RMR Agreement is needed to ensure that the PPL Wallingford units remain available to ISO-NE to maintain reliability.

28. As we noted above, and as PPL correctly points out, since our orders denying the PPL RMR Agreement, we have accepted several RMR agreements. We disagree with PPL's apparent contention in its motion for disposition on remand, however, that our recent acceptance of RMR agreements requires that we unconditionally grant its application. We also disagree with PPL's assertion that the financial data requested in the deficiency letter is unnecessary to render a decision on the RMR Agreement. The Commission's standard for approval of RMR agreements is the concern that absent an RMR contract, the facility will be unavailable to provide reliability service. In the recent RMR cases, the evidence submitted either clearly demonstrated the financial losses

³⁹ For example, in the January 16, 2003 filing, Exhibit PPL-11/JMK-5 at 1, "per books" fuel expenses for 2002 were listed as \$7,409,000 while in the deficiency response fuel expenses for 2002 totaled \$4,977,000.

⁴⁰ March 31, 2003 deficiency response, Exhibit 2.

experienced by the applicable units in the market,⁴¹ or the Commission conditioned acceptance of the agreement on hearing procedures to determine whether the units in question were able to demonstrate financial need for RMR Agreements to remain available to provide reliability services.⁴² In the cases that were not set for hearing, which concerned older and inefficient generating units, the evidence clearly demonstrated that the units needed the contracts to remain available to provide reliability service. For the peaking units at issue in *Devon Power*, in fact, the Commission explicitly stated that it was granting the proposed RMR agreements in light of their actual performance under the PUSH mechanism.⁴³ In the cases that were set for hearing, the Commission conditioned its acceptance of the RMR agreements because the units were new, efficient baseload units, and the evidence in the record raised questions regarding the need for the contracts to ensure that the units remained available to provide reliability service.⁴⁴ Here, while the units at issue are peaking units like those in *Devon Power*, they are also new and efficient, and the financial information in the record does not clearly demonstrate the need for an RMR agreement to ensure that they remain available to support reliability.

29. Both CT Parties and PPL raise arguments regarding the applicability of the *Bridgeport* “facilities cost test” to the RMR Agreement. The facilities cost test discussed in that order and subsequent orders is nothing more than an inquiry as to whether the units at issue need RMR agreements to remain available to provide reliability service. Contrary to PPL’s arguments, this is not a new test apart from the normal inquiry into the facts of each RMR agreement to determine whether, judged against the standard of section 205(a) of the FPA, the rates and charges demanded by the RMR applicant for

⁴¹ See, e.g., *Devon Power LLC*, 106 FERC ¶ 61,264 (2004) (*Devon Power*); *PSEG Power Connecticut, LLC*, 110 FERC ¶ 61,020, *order on reh’g*, 111 FERC ¶ 61,441, *reh’g denied*, 113 FERC ¶ 61,210 (2005); *Milford Power Co., LLC*, 110 FERC ¶ 61,299, *order on reh’g and clarification*, 112 FERC ¶ 61,154 (2005).

⁴² See, e.g., *Bridgeport Energy, LLC*, 112 FERC ¶ 61,077, *reh’g denied*, 113 FERC ¶ 61,311 (2005), *reh’g rejected*, 114 FERC ¶ 61,265 (2006); *Berkshire Power Company, LLC*, 112 FERC ¶ 61,253 (2005), *reh’g denied*, 114 FERC ¶ 61,099 (2006); *Consolidated Edison Energy Massachusetts, Inc.*, 112 FERC ¶ 61,263 (2005), *reh’g pending*.

⁴³ See, e.g., *Devon Power*, 106 FERC ¶ 61,264 at P 20.

⁴⁴ See cases cited at note 42, *supra*.

remaining available to provide reliability service will be just and reasonable.⁴⁵ The Commission has examined all RMR agreements under that standard.

30. To reiterate, while we are not analyzing the instant RMR Agreement on the basis of the PUSH mechanism, at this point, PPL has not demonstrated that it is just and reasonable for it to receive an RMR rate to ensure that the units remain available for reliability service. In this case, it is not clear whether the PPL Wallingford units were failing to recover their costs prior to filing the RMR Agreement, nor is it clear whether the costs and revenues PPL expects to incur warrant an RMR agreement. Therefore the Commission requires that these issues of financial need be resolved at hearing.

31. Additionally, in its original filing, PPL included a copy of ISO-NE's determination that the PPL Wallingford units are needed for reliability. PPL's filing also observed that Southwest Connecticut could face significant reliability issues if steps are not taken to ensure generation availability. Given the unique circumstances of this case and the location of the PPL Wallingford units in the highly constrained Southwest Connecticut Designated Congestion Area, we believe that ISO-NE's reliability determination is still relevant. However, we recognize that this determination was not specific to these units and is now several years old. Also, the agreement, had it been in effect from February 1, 2003, would have been subject to termination if the units were no longer needed by ISO-NE to meet regional reliability requirements.⁴⁶ As a result, if parties wish, they may present arguments to the presiding judge regarding the sufficiency of ISO-NE's reliability determination. The presiding judge may address any issues raised at hearing regarding the reliability determination if the arguments and evidence warrant. This may include requiring that an updated reliability determination be placed into evidence.

B. Cost of Service Under the RMR Agreement and Accounting for the Past Period

32. Assuming that need for the RMR Agreement is established at the hearing, we also set for hearing and settlement judge procedures the cost of service under the RMR agreements. The original protests in this case raised several issues regarding the cost of service included in the RMR Agreement. However, because the Commission's rejection of the RMR Agreement was not based on the cost-of-service, but rather on other market

⁴⁵ See *Bridgeport Energy, LLC*, 112 FERC ¶ 61,077 at P 32.

⁴⁶ See article 2.1 of the proposed RMR Agreement (as filed January 16, 2003).

issues as described above, the filed cost-of-service (including information provided in the deficiency response) was not fully evaluated at that time to ensure that it is just and reasonable.

33. The earlier protests raised issues of material fact regarding the justness and reasonableness of the proposed cost of service and resulting rates under the RMR Agreement that we cannot decide on this record. Accordingly, we will set the cost of service included in the RMR Agreement for hearing and settlement judge procedures. We direct PPL to submit an updated cost-of-service with the presiding judge to aid the parties in considering these issues.

34. For the time period from the in-service date of these units (preceding the February 1, 2003 effective date of the proposed RMR Agreement) to the date of this order, PPL's actual costs and revenues are known. Assuming that PPL sufficiently demonstrates need for the RMR Agreement at the hearing, PPL's actual annual revenues (earned both before and after the period in which PPL submitted stipulated bids, and including Forward Reserve Market revenues) can be compared to the actual costs for these units to determine any amounts due to PPL, or that PPL must credit to ratepayers.

C. Effective Date

35. In its January 16, 2003 filing, PPL proposed an effective date for the RMR Agreement of February 1, 2003. PPL requested waiver of the 60-day prior notice requirement, arguing that the Commission had previously granted waivers in analogous situations, and that good cause existed to grant PPL's request for waiver.⁴⁷ In particular, PPL contended that good cause existed because the PPL Wallingford units were needed by ISO-NE to maintain reliability, and because the RMR Agreement is a *pro forma* agreement previously accepted by the Commission.⁴⁸

36. As described elsewhere in this order, we conditionally accept the RMR Agreement for filing with an effective date of February 1, 2003, as originally requested by PPL. As

⁴⁷ January 16, 2003 filing at 5, citing, *inter alia*, *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,984, *order on reh'g*, 65 FERC ¶ 61,081 (1993); *Central Hudson Gas & Electric Corporation*, 60 FERC ¶ 61,106, *order on reh'g*, 61 FERC ¶ 61,089 (1992); *Sithe New Boston, LLC*, 98 FERC ¶ 61,164 (2002) (making RMR agreement filed on December 28, 2001 effective on January 1, 2002).

⁴⁸ January 16, 2003 filing at 5-6.

PPL pointed out in its original filing, and as the Commission has stated in later orders, we have 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.⁴⁹ ISO-NE notified PPL on January 15, 2003 (one day before filing) that the four PPL Wallingford units were needed for reliability, and confirmed that it agreed with PPL's plan to file the *pro forma* RMR Agreement with an effective date of February 1. Consistent with prior orders, we find that waiver is appropriate in these circumstances.⁵⁰ Moreover, the Commission has stated that it will grant waiver of notice for service agreements filed under umbrella tariffs up to 30 days following the commencement of service.⁵¹

37. We will reject the Connecticut Parties' claim that granting the RMR Agreement with a February 1, 2003 effective date raises "significant legal problems" related to PPL's non-performance under the agreement. We cannot require that PPL perform, or have performed, under a contract that was expressly rejected by the Commission. If PPL ultimately demonstrates that it is just and reasonable for the RMR Agreement to be accepted on the basis of need, we will accept that agreement from the original proposed effective date. Additionally, while Connecticut Parties are correct that PPL did not submit stipulated bids for the entire locked-in period, there is no evidence that PPL was unavailable to support reliability as the RMR Agreement would require. While we are not ruling on PPL's proposed procedure for implementing the RMR Agreement with a February 1, 2003 effective date, we do note that any "non-performance" resulting from the fact that PPL did not submit stipulated bids during the entire locked-in period can be remedied through the financial accounting we order for the past period (assuming need for the RMR Agreement is found). The stipulated bids that PPL would have submitted under the agreement had it been accepted can be determined and applied to that accounting, which will in effect result in PPL's performance under the contract.

⁴⁹ See, e.g., *Berkshire Power Company, LLC*, 112 FERC ¶ 61,253 at P 27 (2005); *Mirant Kendall, LLC and Mirant Americas Energy Marketing, L.P.*, 109 FERC ¶ 61,227 at P 15 (2004); *Mirant Americas Energy Marketing, L.P.*, 105 FERC ¶ 61,359 (2003).

⁵⁰ *Id.*

⁵¹ See *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,984 (1993).

E. Hearing and Settlement Judge Procedures

38. On the basis of the foregoing, and as discussed above, we conclude that there are issues of material fact in this proceeding relating to the need for the RMR Agreement, the cost of service under the RMR Agreement, and the accounting for money past due and owing under the RMR Agreement that cannot be resolved on the record before us. These issues are more appropriately addressed in the hearing and settlement judge procedures we order below. PPL should submit an updated RMR Agreement along with any other documentation it believes is responsive to the concerns raised in this order to the presiding judge.

39. Also on the basis of the foregoing, our preliminary analysis indicates that PPL'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 the RMR Agreement for filing, suspend it for a nominal period, make it effective February 1, 2003, as requested, subject to refund, and set it for hearing and settlement judge procedures.

40. 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 of the Commission's Rules of Practice and Procedure.⁵² 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.⁵³ 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.

⁵² 18 C.F.R. § 385.603 (2005).

⁵³ 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 backgrounds and experience (www.ferc.gov – click on Office of Administrative Law Judges).

The Commission orders:

(A) PPL's RMR Agreement is hereby conditionally accepted for filing and suspended for a nominal period, to be effective February 1, 2003, 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 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 concerning the need for the RMR Agreement, the proposed rates under the RMR Agreement, and the financial accounting for past periods under the RMR Agreement, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2005), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the 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 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 these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.