

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Fore River Development, LLC

Docket Nos. ER06-822-000
ER06-822-001
ER06-822-002

ORDER REJECTING FILING AND DIRECTING COMPLIANCE FILING

(Issued August 4, 2006)

1. On March 31, 2006, pursuant to section 205 of the Federal Power Act,¹ Fore River Development, LLC (Fore River) filed a proposed Reliability Must Run Agreement (RMR Agreement) with ISO-New England, Inc. (ISO-NE) for the supply of electric energy at cost-based rates from its 817 MW combined-cycle, dual fuel generation facility located in Weymouth, Massachusetts. In this order, the Commission rejects the filing, as supplemented, as discussed below. Given the specific facts of this case, however, the Commission will allow Fore River to seek additional compensation to the extent it can show that it has not recovered its variable costs.

Background

2. ISO-NE has authority, under Market Rule 1,² to negotiate agreements for the purchase of electric energy at cost-based rates from generation facilities that ISO-NE identifies as being necessary to ensure reliability, but that are unable to recover their operating costs under current market conditions.³

¹ 16 U.S.C. § 824d (2000).

² Market Rule 1 permits ISO-NE to negotiate contracts for the supply of power at cost-based rates to keep a generating facility in operation when the facility is needed for reliability in New England. Market Rule 1, section III, Appendix A at III.A.6.2 and section III, Appendix A, Exhibit 2 at 3.3.

³ See, e.g., *Milford Power Company, LLC*, 110 FERC ¶ 61,299, order on reh'g, 112 FERC ¶ 61,154 (2005).

3. Fore River's facility is located within the Southeast Massachusetts (SEMA) region and began commercial operations in 2003. Fore River states that ISO-NE issued a formal determination of need for Fore River on January 5, 2006, after presenting its finding to the NEPOOL Reliability Committee and the Independent Market Monitor. The finding was based on the conclusion that there is a need for the Fore River unit to support transmission system voltages and reduce thermal loadings in SEMA. Fore River also states that it has not earned and does not expect to earn sufficient revenues to keep the facility in operation. Under the proposed RMR Agreement, Fore River would provide reliability service for ISO-NE in exchange for a Monthly Fixed-Cost Charge. Fore River states that the Monthly Fixed-Cost Charge is approximately \$12,600 per MW (rated capacity) per month.
4. Fore River seeks waiver of the 60-day notice requirement of section 35.3 of the Commission's regulations,⁴ so that the proposed RMR Agreement will become effective on April 1, 2006.
5. On May 26, 2006, Commission Staff issued a deficiency letter to Fore River that included questions regarding cost of service, engineering issues, and the reliability determination.
6. On May 30, 2006, ISO-NE submitted a letter in this proceeding, and in Docket No. EL06-48-001, to inform the Commission that the generating facilities owned by Fore River and Braintree Electric Light Department (Braintree), which had also filed an RMR Agreement, were not needed for reliability.
7. On June 7, 2006, Fore River filed a response to Staff's deficiency letter and additional comments related to the ISO-NE's May 30th letter. Fore River states that, as of June 8, 2006, it will terminate stipulated bidding under the RMR Agreement due to the substantial risk it would face from continued adherence to the stipulated bidding provisions of the RMR Agreement. Fore River states that it has experienced significant economic harm because it relied on ISO-NE's initial reliability determination by immediately providing services under the RMR Agreement. Fore River states that it should be made whole for the costs it incurred as a result of the two-month period during which Fore River operated under the RMR Agreement.

Notices, Interventions, and Protests

8. Notice of Fore River's filing in Docket No. ER06-822-000 was published in the *Federal Register*, 71 Fed. Reg. 23,912 (2006), with comments, interventions, and protests due on or before April 21, 2006. The Massachusetts Department of Telecommunications and Energy (MassDTE) filed a notice of intervention. NSTAR Electric & Gas

⁴ 18 C.F.R. § 35.3 (2006).

Corporation (NSTAR) filed a timely motion to intervene, protest, and request for rejection or for hearing and five-month suspension. The Massachusetts Attorney General (MassAG) filed a timely motion to intervene and protest. The Massachusetts Municipal Wholesale Electric Company (MMWEC), Braintree, Hingham Municipal Lighting Plant (Hingham) and Taunton Municipal Lighting Plant (Taunton) filed a timely motion to intervene and protest. National Grid USA (National Grid) filed a timely motion to intervene, and subsequently amended its pleading to include comments. ISO New England, Inc. and the New England Power Pool Participants Committee filed timely motions to intervene and comments. On May 8, 2006, Fore River filed an answer to the protests; MassAG, NSTAR and MMWEC submitted answers to the answer.

9. Notice of ISO-NE's filing in Docket No. ER06-822-001 was published in the *Federal Register*, 71 Fed. Reg. 34,905-06 (2006), with comments, interventions, and protests due on or before June 20, 2006. National Grid filed comments in support of ISO-NE's revised analysis, and MMWEC filed a renewed protest. Fore River commented on ISO-NE's letter in its June 7, 2006 filing.⁵

10. Notice of Fore River's June 7 filing in Docket No. ER06-822-002 was published in the *Federal Register*, 71 Fed. Reg. 34,915 (2006), with comments, interventions, and protests due on or before June 21, 2006. NSTAR, MMWEC, MassAG, and Braintree, Hingham and Taunton (Braintree, *et al.*) filed comments on Fore River's filing. On July 6, 2006, Fore River filed an answer, and on July 21, 2006, NSTAR submitted a further answer.

Discussion

Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest and/or an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers to protests and to answers filed by Fore River, MassAg, NSTAR, and MMWEC in May 2006, and by Fore River and NSTAR in July 2006, and will, therefore, reject them.

⁵ In addition, NSTAR filed a motion to intervene. NSTAR was already a party to this proceeding by virtue of its timely, unopposed motion to intervene filed on April 21, 2006.

ISO-NE Reliability Determination

12. The ISO-NE's initial reliability determination indicated that the Fore River facility was needed to support transmission system voltages and to reduce thermal loadings. The ISO-NE's initial steady-state analysis showed that there would be fifteen thermal violations and four voltage violations without Fore River operating under the ISO-NE's 2005 Summer Peak scenario, which forecasts 27,986 MW of load. By comparison, with the Fore River facility operating, ISO-NE determined that there would be no thermal or voltage violations.

13. NSTAR's April 21, 2006 pleading maintains that the double circuit tower and stuck breaker contingencies identified by ISO-NE, while violating planning criteria, would not violate operating criteria. NSTAR argues that ISO-NE's voltage and overload findings were significantly overstated and failed to reflect actual 2006 conditions. NSTAR states that ISO-NE's 2005 Study incorrectly models the Somerset 5 generation facility in SEMA as operational when the facility was retired several years ago. NSTAR states that ISO-NE's 2005 Study incorrectly models Fore River providing counter-flow against Somerset 5's generation which no longer exists. NSTAR asserts that correcting this error in the ISO-NE's 2005 study could obviate any reliability need for Fore River. NSTAR also contends that, in 2006, there are no voltage violations, the thermal violations are limited, and these violations are not of a magnitude, scope, or duration that defies correction through operating procedures. NSTAR further states that operating fixes are particularly appropriate in this case since the contingencies addressed, stuck breaker and double circuit tower faults, are not listed in ISO-NE Operating Procedure 19, and thus ISO-NE would not normally dispatch Fore River in real time to address these conditions.

14. In its May 26, 2006 pleading, National Grid states that, under its operating procedures, ISO-NE would never dispatch Fore River out of merit to protect against the consequences associated with the identified contingencies. National Grid further argues that it is confident that, were ISO-NE to update the 2005 Study, it would come to the conclusion that a Fore River RMR Agreement is neither needed nor appropriate.

15. On May 30, 2006, ISO-NE submitted a letter to inform the Commission that its previous finding of need in its reliability determinations for Fore River and Braintree was incorrect and that the Fore River and Braintree facilities are, in fact, not needed for reliability.⁶ In its May 30th letter, ISO-NE states that the stuck breaker and double circuit

⁶ ISO-NE states that its planning department undertook a review of all other reliability determinations to ensure that the circumstances that occurred in the case of Fore River and Braintree do not exist elsewhere, and confirmed that the issue is limited to the Fore River and Braintree reliability reviews.

tower contingencies identified in the December Study for Fore River violate planning criteria, but do not violate Northeast Power Coordinating Council/ISO-NE operating criteria for normal contingencies that involve the loss of multiple elements. This conclusion is based on the fact that the consequences of the multiple element criteria violations are not expected to have an inter-area impact.⁷ Therefore, ISO-NE indicates that it would not dispatch Fore River to address the identified planning criteria violations unless requested to do so as a Special Constraint Resource under Schedule 19 of Part II of the ISO-NE Tariff. If the stuck breaker contingencies were to occur, ISO-NE continues, they would be addressed through special switching arrangements, or by a combination of local area load shedding and generator redispatch.

16. ISO-NE states that it has updated its original studies to include the 2006 summer peak loads and to investigate the effect of Phase 1 of the NSTAR 345-kV Project (Phase 1). According to ISO-NE, after Phase 1 is in service, there is one single element contingency, related to an overload on the 117 Line which can be addressed by an operational solution. Accordingly, ISO-NE's analysis now concludes that Fore River is no longer needed for reliability. On May 26, 2006, ISO-NE provided notice of termination to Fore River pursuant to section 2.2.1 of the RMR Agreement, to the extent the Commission makes the RMR Agreement effective as of the date Fore River requested (April 1, 2006).

Fore River's Economic Harm

17. Fore River states in its June 7 response that it would be within its rights to ask that the RMR Agreement expire of its own terms, 120 days after receipt of ISO-NE's notice of termination, on September 23, 2006. Instead, Fore River proposes that it should be compensated for the reliability services it provided during the locked-in period (April, May, and part of June 2006) during which Fore River operated under the RMR Agreement because it relied on the initial incorrect reliability finding of ISO-NE. Fore River maintains that it has suffered significant economic harm because it relied on ISO-NE's initial reliability determination by immediately providing services under the RMR Agreement. Fore River contends that it incurred significant costs to prepare its March 31 RMR filing and that, in April 2006, it earned only \$500,000 in inframarginal revenues under the RMR Agreement, while it incurred more than \$4 million in facilities costs; therefore, it will suffer \$3.5 million of out-of-pocket cash losses as a result of operating under the RMR Agreement. Fore River also alleges that, during the two-month period, ISO-NE has cycled the facility almost twice as many times as it was cycled as a market

⁷ According to ISO-NE's Planning Procedures, the loss of small portions of the system may be tolerated if the reliability of the overall interconnected system is not jeopardized. ISO New England Planning Procedure No. 3, *available at* http://www.iso-ne.com/rules_proceeds/isone_plan/index-p1.html.

unit during the entire previous calendar year and that this increased cycling has substantially increased the likelihood that Fore River will incur penalties under its maintenance agreement.

18. In its comments on Fore River's response, MMWEC states that Fore River's decision to operate as if the RMR Agreement had already been accepted by the Commission was a risk that Fore River chose voluntarily to undertake. MMWEC further states that Fore River's decision to gamble does not oblige customers to cover any resulting losses the company claims to have incurred. Similarly, MassAG argues that "Fore River imprudently and unreasonably began operating under the RMR Agreement as if the Commission had already determined the financial eligibility issue."⁸

19. NSTAR argues that Fore River incorporated uncured, pre-existing deficiencies from its original filing and created new deficiencies in its June 7 response, and thus the filing must be rejected.⁹ NSTAR notes that Fore River's claim of lost opportunity from foregoing another bidding strategy in favor of stipulated bidding was not supported by any evidence of lost revenues and contends that Fore River established none of the grounds justifying a reliance claim. NSTAR and MMWEC contend that Fore River never provided any reliability service to warrant RMR treatment. NSTAR states that there is not now and has never been an RMR Agreement, noting that prior to the March 31 filing, there was only a proposed RMR Agreement that had never been executed. NSTAR asserts there is a total absence of proof of a reliability need in the pre-June 2006 period since ISO-NE's original reliability determination was based on a 2005 Study that did not reflect 2006 system conditions. NSTAR further argues that Fore River has failed to provide any evidence to quantify and to support a locked-in period revenue recovery by showing the difference between its stipulated bid revenues and the revenues Fore River would have received through an alternative bidding strategy. NSTAR also contends that without an RMR Agreement, there is no basis for the extraordinary step of waiving the FPA advance notice requirements and allowing such a rate to become retroactively effective for the locked-in period.

20. Braintree, *et al.*, suggest that Fore River should not receive any compensation for the period it operated under the RMR Agreement due to the deficiency of the original filing, and they conclude that the earliest the Agreement could be made effective is June 7, the date of Fore River's response to the deficiency letter.

⁸ MassAG at 4.

⁹ See also MMWEC at 10-13 (cataloging uncured deficiencies).

Commission Determination

21. The Commission rejects the proposed RMR Agreement because the ISO-NE's updated and corrected analysis shows that Fore River is not needed to provide reliability in the SEMA region.¹⁰ Market Rule 1 authorizes ISO-NE to identify units that are needed for reliability. Market Rule 1 also authorizes ISO-NE to enter into an RMR cost-of-service agreement (subject to Commission approval)¹¹ with a generator that is needed for reliability. Consistent with Market Rule 1, a generator that is not needed for reliability is not eligible for an RMR Agreement and RMR rate treatment. In this instance, based on the determination in ISO-NE's May 30 letter, Fore River is not entitled to recover cost-based rates under an RMR Agreement. Therefore, the issues related to the cost of service and the facility cost test are moot since Fore River does not qualify for RMR treatment based upon the reliability determination of ISO-NE.

22. Nevertheless, because Fore River relied on the determination of need by the ISO-NE and began operating under the RMR Agreement in the interest of ensuring reliability in the region, we believe that Fore River should be assured of recovering its variable costs for the period that it submitted stipulated bids until the date that the ISO-NE notified the Commission that Fore River was not needed for reliability. Thus, to the extent that Fore River can show that the revenues it received through ISO-NE's markets did not meet its variable costs, during the period April 1 through May 30, 2006, Fore River may seek additional compensation by submitting a compliance filing to the Commission.¹² Fore River must provide enough data to demonstrate any revenue

¹⁰ Furthermore, the Commission agrees with commenters that several deficiencies described in the Division Director's letter of May 26, 2006 were not cured in Fore River's June 7 response. *See, e.g.*, NSTAR at 3 & n.5, MMWEC at 10-12. The Commission will not accept a filing that has not been adequately supported.

¹¹ *See, e.g., Berkshire Power Company, LLC*, 115 FERC ¶ 61,253 at P 10-12 (2006) (holding that ISO-NE reliability determinations are subject to Commission review).

¹² This outcome is consistent with the Commission's refund policy. *See Carolina Power & Light Company*, 87 FERC ¶ 61,083 (1999) (establishing that the Commission will limit the application of the time value refund formula to an amount that permits a public utility to recover its variable costs).

shortfall, excluding fixed costs and opportunity costs. Any compensation that is due to Fore River will be allocated to customers in the same manner as the Monthly Fixed-Cost Charge described in Market Rule 1.¹³

The Commission orders:

(A) Fore River's proposed RMR Agreement is hereby rejected, as discussed in the body of this order.

(B) Fore River may choose to submit a compliance filing within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹³ Market Rule 1 section III.6.4.4(c) states: "Any monthly fixed-cost charges paid to Resources pursuant to Reliability Agreements negotiated under Appendix A, section III.A.6 and Exhibit 2 shall be allocated and charged pro rata to Market Participants and Non-Market Participants with Network Load in proportion to the sum of their Network Load during that month within the affected Reliability Region."