

125 FERC ¶ 61,017
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.

ISO New England Inc.

ER08-950-000
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ORDER ACCEPTING AND SUSPENDING LARGE GENERATOR
INTERCONNECTION AGREEMENT AND ESTABLISHING HEARING AND
SETTLEMENT JUDGE PROCEDURES

(Issued October 6, 2008)

1. On May 13, 2008, ISO New England Inc. (ISO-NE) and Northeast Utilities Service Company (NUSCO), on behalf of its affiliate Western Massachusetts Electric Company (WMECO), (collectively, the Filing Parties) filed pursuant to section 205 of the Federal Power Act¹ an unexecuted large generator interconnection agreement (LGIA) by and among ISO-NE, WMECO and Russell Biomass LLC (Russell Biomass). In this order, the Commission accepts for filing the proposed LGIA, to become effective May 14, 2008, as requested, subject to refund. We also establish hearing and settlement judge procedures regarding the proposed annual, post-construction, non-property tax operating and maintenance (O&M) and administrative and general costs (collectively, O&M Costs).

I. The Interconnection Agreement

2. The Filing Parties state that Russell Biomass is constructing a new 50 megawatt² biomass generating facility in Russell, Massachusetts, which is expected to commence operation in 2011. The generating facility will interconnect to WMECO's existing transmission system via a new, approximately 5.1-mile, 115kv transmission line and a new switching station, which will be constructed and paid for by Russell Biomass and conveyed to WMECO once construction is completed.

¹ 16 U.S.C. § 824d (2006).

² While Russell Biomass states that it is developing a 50 MW generating facility, WMECO contends in its filing that the facility is approximately 55 MW.

3. The Filing Parties state that the LGIA governs the interconnection of Russell Biomass's generating facility to WMECO's transmission system and conforms to ISO-NE's most recent approved *pro forma* LGIA set forth in Schedule 22 of the ISO-NE OATT. They also state that during their negotiations, WMECO and Russell Biomass were able to resolve all issues except for the method used to calculate the O&M Costs. The Filing Parties contend that the O&M costs should be allocated based on the ratio of the capital cost of the Russell Transmission Facilities to WMECO's gross transmission investment, which will result in an estimated annual O&M charge of approximately \$515,200.

4. Although Russell Biomass does not dispute its obligation to pay annual O&M charges, it argues that it should be responsible only for the incremental O&M costs directly incurred by WMECO for the Russell Transmission Facilities, which it estimates will be approximately \$48,000 per year. Russell Biomass also states that it has been advised that WMECO believes that Russell Biomass must pay for WMECO's and ISO-NE's legal fees associated with negotiating the LGIA and litigating this case. It argues that such charges are not authorized under ISO-NE's OATT, create a perverse incentive for transmission utilities to impose barriers to interconnection and are against long standing FERC policy of requiring parties to pay their own legal fees. Russell Biomass asks the Commission to confirm that WMECO and ISO-NE must pay their own legal fees.

5. On July 8, 2008, the Director, Division of Tariffs and Market Development – East issued a deficiency letter seeking additional support for the proposed methodology and level of the estimated 2011 post-construction O&M charges. On August 6, 2008, NUSCO filed a response on behalf of WMECO and requested privileged treatment of the materials.

II. Notice of Filings and Responsive Pleadings

6. Notice of the Filing Parties' filing was published in the *Federal Register*, 73 Fed. Reg. 30,384 (2008), with interventions and protests due on or before June 3, 2008. Russell Biomass and the Attorney General of Massachusetts (Attorney General) both filed motions to intervene and protests. On June 18, 2008, NUSCO filed an answer responding to both protests.

7. Notice of NUSCO's response to the deficiency letter was published in the *Federal Register*, 73 Fed. Reg. 49,178 (2008), with interventions and protests due on or before August 28, 2008. Russell Biomass and the Attorney General both filed comments.

III. Discussion

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed by NUSCO and ISO-NE and will, therefore, reject them.

B. Effective Date

10. The Filing Parties request waiver of the Commission's 60-day notice requirement, 18 C.F.R. (2008), to make the proposed LGIA effective May 14, 2008. We find good cause exists to grant the Filing Parties' request.³

C. Proposed O&M Charge

11. The Filing Parties argue that the proposed cost allocation method is consistent with Schedules 11 and 22 of the ISO-NE OATT, Commission precedent, and prior practices of WMECO and other NU companies. They submit that the Commission recently accepted a similar cost allocation method.⁴ They contend that WMECO and the other NU Companies have consistently allocated O&M costs to generators based on a ratio of the generators' respective transmission investment to the respective NU Company's gross transmission investment, and that the Commission has accepted these interconnection agreements.⁵

³ See *Prior Notice Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (1993), *clarified*, 65 FERC ¶ 61,081 (1993) (explaining that the Commission will grant waiver of notice for a service agreement under an umbrella tariff if the agreement is filed within 30 days after service commences).

⁴ Citing *New England Power Company*, 101 FERC ¶ 61,183 (2002), *order granting clarification*, 102 FERC ¶ 61,002 (2003).

⁵ Citing *Northeast Utilities Svc. Co.*, Docket No. ER03-569-000 (Apr. 7, 2003) (unpublished letter order); *Western Mass. Elec. Co.*, Docket No. ER04-421-000 (Mar. 16, 2004) (unpublished letter order); *Northeast Utilities Svc. Co.*, Docket No. ER04-408-000 (Apr. 8, 2004) (unpublished letter order); *ISO New England, Inc.*, Docket No. ER06-70-001 (Apr. 11, 2006) (unpublished letter order).

12. Russell Biomass states that it has never disputed its responsibility for all reasonable expenses including overheads associated with the operation and maintenance, repair and replacement of relevant interconnection and network upgrade facilities. It contends, however, that like direct expenses, the overhead charged to a customer must be reasonable. It argues that WMECO's proposed cost allocation method is unjust and unreasonable because the resulting O&M Costs bear no resemblance to WMECO's actual costs of operating and maintaining the interconnection and network facilities associated with the Russell generating facility. Russell Biomass argues that the annual O&M costs instead should be based on the actual O&M costs WMECO incurs in operating and maintaining the relevant interconnection and transmission facilities, which it estimates will be \$47,950. Russell Biomass requests that the Commission not accept the LGIA as filed and to send the matter to a settlement judge to resolve the outstanding disputed issues.

13. The Attorney General states that while it would support a cost allocation method that assigns charges properly allocable to Russell Biomass to prevent a subsidy absorbed by WMECO's transmission customers, the filing lacks the detailed cost support needed to properly analyze the proposed O&M Costs to be assigned to Russell Biomass. The Attorney General asks the Commission to direct WMECO to file more detailed cost information and to set the matter for hearing.

14. On August 28, 2008, Russell Biomass and the Attorney General filed further comments contending that NUSCO's response to Commission Staff's deficiency letter provides inadequate cost support and explanation to allow the Commission to determine whether the resulting O&M costs payable by Russell Biomass are just and reasonable.

Commission Determination

15. The Commission finds that the Russell Biomass LGIA raises issues of material fact that cannot be resolved based on the record before the Commission and is more appropriately addressed in the hearing and settlement judge procedures ordered below.

16. The Commission's preliminary analysis indicates that the Russell Biomass LGIA has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, the Commission will accept the Russell Biomass LGIA for filing and suspend it for a nominal period, effective May 14, 2008, subject to refund. As discussed below, the Commission will set the Russell Biomass LGIA for hearing and settlement judge procedures.

17. 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.⁶ 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.⁷ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, 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.

D. Legal Fees

18. In their initial filing, the Filing Parties do not raise the issue of legal fees. However, Russell Biomass states in its protest that it has been advised by WMECO that Russell Biomass must pay WMECO's and ISO-NE's fees and expenses, including their legal fees, for negotiating the LGIA and litigating this case. Russell Biomass contends that such charges are not authorized by the OATT, would create a perverse incentive for transmitting utilities to impose barriers to interconnection, and are against Commission policy requiring parties to pay their own legal fees.

Commission Determination

19. Russell Biomass, in effect, seeks a declaratory order from the Commission stating that Russell Biomass is not obligated, under section 7.1 of the ISO-NE *pro forma* LGIP, to pay WMECO's and ISO-NE's fees and expenses related to this proceeding. The Commission rejects Russell Biomass' request and arguments as outside the scope of the instant proceeding. A determination as to the financial obligations of the parties under the ISO-NE *pro forma* LGIP is not relevant to the justness and reasonableness of the LGIA proposed here. In fact, the proposed LGIA does not contemplate legal fees. If Russell Biomass wishes to pursue its arguments regarding the financial obligations of an interconnection customer under the *pro forma* LGIP, it should file a separate complaint pursuant to section 206 of the Federal Power Act.⁸

⁶ 18 C.F.R. § 385.603 (2008).

⁷ 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 background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

⁸ 16 U.S.C. § 824e (2006).

The Commission orders:

(A) The proposed LGIA is accepted for filing and suspended for a nominal period, to become effective May 14, 2008, 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 justness and reasonableness of the Russell Biomass LGIA, as discussed in the body of this order. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering 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 (2008), 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 thirty (30) days of the appointment of the settlement judge, 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)

Kimberly D. Bose,
Secretary.