

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher

Devon Power, LLC

Docket No. EL04-16-000

ORDER GRANTING DECLARATORY ORDER

(Issued December 23, 2003)

1. On November 5, 2003, Devon Power LLC, Middletown Power LLC, Montville Power LLC, and Norwalk Power LLC (Applicants) filed a Petition for Declaratory Order. In this order, the Commission grants the Applicants' request that prepayments under a Reliability Cost Tracker will not be deemed imprudent or required to be refunded solely because the Cost Tracker is set to expire on March 31, 2004. The Commission further finds that monies expended by the Applicants for reliability projects that will not be completed before March 31, 2004 will not have to be refunded on the basis that the Reliability Cost Tracker is not extended, should that occur. This order benefits customers by clarifying certain issues relating to generators that are needed to maintain reliability.

Background

2. On February 26, 2003, Applicants filed, in Docket ER03-563-000, pursuant to Section 205 of the Federal Power Act (FPA)¹, cost-of-service rates and four separate cost-of-service (COS) Agreements for each of their four generating stations (collectively, the Facilities) located in Connecticut. Applicants state that ISO New England, Inc. (ISO-NE) determined that all of these units would be needed to maintain reliability in the New England Power Pool (NEPOOL).

3. The COS Agreements included provisions for a Reliability Cost Tracker (proposed Section 5.1.3), that provides a mechanism for Applicants to be reimbursed for their actual major maintenance outage expenses, as well as certain other operating expenses (collectively, Reliability Costs), which are described in the COS Agreements. Applicants state that the purpose of the Reliability Cost Tracker is to ensure the full and timely recovery of the Reliability Costs and to permit Applicants to perform all of the needed

¹ 16 U.S.C. 824d (2000).

maintenance work in the scheduled maintenance outages. Applicants state that the projected costs are divided into two categories, C-1 and C-2, estimates of which are detailed in Schedules 1 and 2 of the Agreements.²

4. In response to Applicants' March 12, 2003 Joint Motion for Emergency Expedited Issuance of Order, the Commission issued an order on March 25, 2003³ that accepted for filing, and made the Reliability Cost Tracker effective as of February 27, 2003, subject to refund. The Commission permitted ISO-NE to begin collecting funds to be disbursed to the Applicants, pursuant to Section 5.1.3, to perform specific maintenance on the Facilities. The Commission further held that the funds collected by ISO-NE would be held in escrow by ISO-NE and could be withdrawn upon Applicants' showing that the funds would be used solely for the purpose of maintaining the Facilities.

5. On April 25, 2003, the Commission issued an order⁴ directing Applicants to revise the COS Agreements so that the COS Agreements would provide for the recovery of only forward Reliability Costs under Section 5.1.3. The April 25 Order also directed Applicants to eliminate those provisions providing for the recovery by Applicants of all other costs incurred to own, operate and maintain the Facilities. The April 25 Order additionally reaffirmed the March 25 Order's determinations to put into effect the Reliability Cost Tracker, subject to refund, and the escrow arrangements required by that Order.

6. On May 28, 2003, Applicants filed, in Docket No. ER03-563-006, revised COS Agreements (Revised COS Agreements) (May 28 Compliance Filing) in response to the Commission's April 25 Order. Additionally, on June 4, 2003, pursuant to section 205 of the FPA, Applicants filed the Second Revised COS Agreements (June 4 Filing) that proposed certain changes to the terms of the Agreements.

² C-2 costs for major materials, supplies, and services purchased from third parties that are needed to complete the Reliability Projects are itemized in Schedule 1 of each Agreement. C-1 costs for minor materials, supplies, and services purchased from third parties are included in the cash flow estimate of Schedule 2 of each Agreement. These costs, which were included as Schedules 5 and 6 of the original February 26 Application, are now included as Schedules 1 and 2 of the Agreements currently before the Commission and will be referred to as Schedules 1 and 2 in this Order.

³ 102 FERC ¶ 61,314 (2003) (March 25 Order).

⁴ 103 FERC ¶ 61,082 (2003) (April 25 Order).

7. On July 24, 2003, the Commission issued an order⁵ that responded to rehearing requests of the April 25 Order, and addressed Applicants' May 28 Compliance Filing and the June 4 Filing. In the July 24 Order, the Commission rejected the June 4 Filing and directed Applicants to file revised COS Agreements that deleted certain language regarding Applicants' right to terminate the COS Agreement.

8. On August 5, 2003, Applicants submitted the Third Revised COS Agreements (August 5 Compliance Filing) and certain rate information in response to the July 24 Order. Applicants state that the provisions of the Third Revised COS Agreements were identical to the provisions of the Revised COS Agreements that were filed as part of the May 28 Compliance Filing.

Applicants' Request for Declaratory Order

9. Applicants request that the Commission accept, pursuant to Section 205 of the FPA, the Third Revised COS Agreements, which include the cost reimbursement mechanism of the Reliability Cost Tracker contained in the Agreements. Second, Applicants ask that the Commission determine that advance expenditures made by the Applicants for Reliability Projects that are to be completed after the initial term of the Agreements on March 31, 2004 (Initial Reliability Period) or are not completed because the Applicants are not be reimbursed for the post-March 31, 2004 costs are not deemed to be imprudent or required to be refunded should the Reliability Cost Tracker be terminated on March 31, 2004.

10. Applicants are concerned about the regulatory risk and uncertainty regarding the Reliability Cost Tracker beyond the Initial Reliability Period, i.e., the potential that the Commission may not extend this provision beyond March 31, 2004. The Applicants state that although the Reliability Cost Tracker clearly required that the Applicants be reimbursed for C-2 costs that are incurred during the Initial Reliability Period, they are concerned about the risk that the Commission may require these costs to be refunded or amounts will not be paid solely because the specific Reliability Project was not completed prior to the Termination of the Reliability Cost Tracker.

Motions to Intervene and Comments

11. Notice of Applicants' Petition for Declaratory Order was published in the Federal Register, 68 Fed. Reg. 65,694 (2003), with protests and motions to intervene due on or before November 25, 2003. A timely motion to intervene was filed by Dominion Energy Marketing, Inc. (DEMI). Timely motions to intervene and comments were filed by ISO-NE and New England Power Pool Participants Committee (NEPOOL Participants).

⁵ 104 FERC ¶ 61,123 (2003) (July 24 Order).

12. ISO-NE filed comments supporting the Applicants' Petition stating that granting approval of the Third Revised COS Agreements will protect reliability by providing financial certainty so that the Reliability Projects are completed. However, ISO-NE states that there are other protested issues regarding the Third Revised COS Agreements that have yet to be addressed by the Commission and requests that the Commission acknowledge that granting the requested relief here does not dispose of those issues. The ISO also states that, should the Commission not grant the requested relief, the Commission should reject any language in the Applicants' Petition that indicates that Reliability Projects will not be completed because this would be contrary to the provisions of the Restated NEPOOL Agreement that relate to maintaining and operating generating units.

13. NEPOOL Participants oppose the Applicants' request for a determination of prudence of Reliability Costs incurred during the Initial Reliability Period. NEPOOL Participants state that the Commission does not have all of the necessary facts and circumstances surrounding each of the Reliability Projects to make this determination. NEPOOL Participants also state that the certainty provided to the Applicants from a prudence determination should be accompanied by a guarantee from the Applicants that Reliability Projects be completed with prudence and timeliness to ensure reliability for the summer of 2004.

Commission Response

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁶ the timely unopposed motions to intervene serve to make DEMI, ISO-NE, and NEPOOL Participants parties to the proceeding.

15. The Commission grants Applicants' request for declaratory order. These COS Agreements were entered into by ISO-NE because the ISO determined that, absent any transmission improvements or new resources, continued operation of these resources in Connecticut is necessary to maintain reliability.⁷ Due to the Applicants' financial condition at that time, the Commission also recognized that the Applicants may not have been able to raise the funds to pay for maintenance costs without an assured revenue source.⁸ We approved the Reliability Cost Tracker under section 205 of the FPA as just and reasonable and not unduly discriminatory or preferential because the Reliability Cost Tracker appears to accurately link costs expended to the services rendered for Reliability Projects over certain specified time periods. While we reaffirm here our prior acceptance

⁶ 18 C.F.R. § 385.214 (2003).

⁷ April 25 Order at P 27.

⁸ April 25 Order at P 47.

of the Reliability Cost Tracking mechanism, as well as the Schedule 1 and 2 costs, we note, however, that there are other issues relating to the Third Revised COS Agreements on compliance that the Commission has not yet addressed.⁹ Granting this declaratory order does not mean that we accept the complete Agreements as filed on August 5, 2003.

16. The Commission confirms that any payments made by Applicants for Reliability Projects that are not completed by the end of the Initial Reliability Project will not be deemed to be imprudent or subject to refund solely because (a) the Reliability Cost Tracker is not extended beyond March 31, 2004, or (b) the Reliability Project is not completed due to Applicants not being reimbursed for the remaining costs of the Reliability Project as the result of the termination of the Reliability Cost Tracker. This does not relieve Applicants of their responsibility to comply with the provisions of the restated NEPOOL agreement and the NEPOOL tariff with respect to operation and maintenance of the generators.

17. We disagree with NEPOOL Participants that additional guarantees are needed if the Commission grants this Petition. First, the escrow arrangements were proposed by parties and directed by the Commission in order to ensure that the payments made by NEPOOL participants in accordance with the Agreements are to be used by the Applicants solely for use in maintaining the Facilities. Second, a proposed budget and schedule for use of the funds by the Applicants were included in the February 26, 2003 application and issues related to the schedules attached to the Agreements were dealt with in that proceeding. Third, the Applicants' units, as discussed by ISO-NE in its comments, are governed by provisions of the Restated NEPOOL Agreement that relate to maintenance and operation in accordance with Good Utility Practice and are no different than the provisions ensuring all units operating within NEPOOL are maintained accordingly.

18. The Applicants state that they intend to file updated Schedules 1 and 2 for the reliability period beginning on April 1, 2004 in accordance with the Agreements.¹⁰ According to Section 5.1.3(b), this would be no later than March 1, 2004. The Commission urges the Applicants to make this filing before March 1, 2004 to allow parties sufficient time to comment and for the Commission to decide the matter.

⁹ The Commission is addressing outstanding issues regarding the August 5 compliance filing of the Third Revised COS Agreements in a separate order.

¹⁰ Petition for Declaratory Order at fn 5.

The Commission orders:

Applicants' request for declaratory order is granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.