

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Richard Blumenthal, Attorney General
of the State of Connecticut, and
The Connecticut Department of
Public Utility Control

v.

Docket Nos. EL03-123-001 and
EL03-134-000

NRG Power Marketing, Inc.

Connecticut Light and Power Company

Docket No. EL03-129-000

ORDER APPROVING CONTESTED SETTLEMENT

(Issued December 18, 2003)

1. In this order, we approve a contested settlement agreement (Settlement Agreement) between Connecticut Light and Power Company (CL&P), the Attorney General for the State of Connecticut, the Connecticut Department of Public Utility Control, the Connecticut Office of Consumer Counsel (collectively, the Connecticut Representatives); the Official Committee of Unsecured Creditors for NRG Energy, Inc. and its debtor subsidiaries; and NRG Power Marketing Inc. (NRG) (collectively, the Settling Parties). The Settlement Agreement resolves many of the outstanding issues among the Settling Parties in the above-captioned dockets relating to NRG's provision of wholesale service to CL&P under a Standard Offer Service Wholesale Sales Agreement (SOS Agreement) between NRG and CL&P. As discussed below, we find that the proposed Settlement Agreement is in the public interest and should be approved. This order benefits customers because it provides for NRG's provision of wholesale service to CL&P and its customers for the remainder of the term of the SOS Agreement.

I. Background

2. NRG's and CL&P's SOS Agreement required NRG to provide a fixed amount of energy to CL&P at a fixed price from January 1, 2000 until December 31, 2003. Shortly after NRG commenced supplying services to CL&P under the SOS Agreement a dispute arose as to whether CL&P or NRG was responsible for NEPOOL (New England Power Pool) congestion charges, prior to the implementation of standard market design in the New England Power Pool on March 1, 2003.¹ That dispute is currently pending before the U.S. District Court for the District of Connecticut.² Beginning with the implementation of the NE-SMD, a second dispute arose concerning whether CL&P or NRG was responsible for NE-SMD-related costs for congestion and losses. That dispute is currently set for hearing before an Administrative Law Judge at the Commission.³

3. On May 14, 2003, NRG notified CL&P that it intended to terminate the agreement on May 19, 2003, because CL&P purportedly was in default for failure to pay certain congestion charges. Also on May 14, 2003, NRG filed a Chapter 11 bankruptcy petition

¹ NEPOOL and ISO-NE filed a proposal to replace the design of the then-existing NEPOOL markets with Market Rule 1, commonly referred to as the New England Standard Market Design (NE-SMD). See New England Power Pool and ISO New England, NEPOOL Standard Market Design, Docket No. ER02-2330 (2002). The Commission approved the NE-SMD in a pair of orders issued in 2002. See New England Power Pool and ISO New England Inc., 101 FERC & 61,344 (2002); New England Power Pool and ISO New England Inc., 100 FERC & 61,287 (2002). In addition, the Commission authorized the ISO-NE to implement the NE-SMD on March 1, 2003. New England Power Pool and ISO New England Inc., 102 FERC & 61,248 (2003) (denying stay of the NE-SMD).

² Civil Action No. 01-CV2373 (AWT) (Conn. Super. Ct. 2001) (District Court Proceeding).

³ See Richard Blumenthal, Attorney General of the State of Connecticut, and the Connecticut Department of Public Utility Control v. NRG Power Marketing, Inc., et al., 103 FERC ¶ 61,344 (June 25 Order) (setting the issue of the post SMD congestion charges for hearing in Docket No. EL03-135-000), reh'g denied, 104 FERC ¶ 61,211 (2003) (August 15 Order). The August 15 Order only addressed requests for rehearing that pertain to those portions of the June 25 Order that relate to Docket No. EL03 123-001 (i.e., whether NRG should be required to continue providing service to CL&P under the SOS Agreement). The August 15 Order further stated that a future rehearing order would address requests for rehearing related to other matters in the June 25 Order (i.e., Docket Nos. EL03-134-000, EL03-129-000, and EL03-135-000).

and moved for an order under Section 365(a) of the Bankruptcy Code authorizing NRG to reject the SOS Agreement.

4. On May 15, 2003, the Connecticut Representatives jointly filed a complaint, asking that the Commission stay NRG's proposed termination. On May 16, 2003, the Commission issued an order that found that NRG's proposed deadline of May 19 to terminate the agreement left it with insufficient time to evaluate the effects of the proposed cessation of service. Therefore, pending further Commission notice, NRG was directed to continue to provide service to CL&P pursuant to the rates, terms, and conditions of the SOS Agreement.⁴ On May 22, 2003, the Connecticut Representatives filed an amendment to their complaint. Among other things, they requested that the Commission initiate a proceeding under Sections 205 and 206 of the FPA to determine whether NRG had a contractual right to terminate service with CL&P under the SOS Agreement and, if it does, whether termination of service pursuant to that contract is consistent with the public interest.

5. On June 2, 2003, the Bankruptcy Court found that the money-losing character of the agreement satisfied the business judgment standard for rejection of an executory contract under Section 365 of the Bankruptcy Code. However, the Bankruptcy Court declined to enjoin the Commission or vacate the May 16 Order's requirement that NRG continue to provide service, instructing NRG that it "must seek an order from the [Commission] to vacate that order or to take such other steps down [at FERC] as it thinks are appropriate."⁵ Thereafter, NRG sought declaratory and injunctive relief in the District Court for the Southern District of New York to allow it to cease performance under the SOS Agreement. On June 12, 2003, that court issued a temporary restraining order allowing NRG to cease service and staying any requirement that NRG comply with future Commission orders preventing cessation of service under the agreement. As a result, on June 13, NRG suspended performance to CL&P.

6. Subsequently, the Commission concluded in the June 25 Order that based on the record received to date, it was unable to determine whether NRG's proposed cessation of service meets the Mobile-Sierra⁶ public interest standard.⁷ Accordingly, the Commission

⁴ Richard Blumenthal, Attorney General of the State of Connecticut v. NRG Power Marketing, Inc., et al., 103 FERC ¶ 61,188 (2003) (May 16 Order).

⁵ See NRG Power Marketing, Inc. v. FERC, 2003 U.S. Dist. LEXIS 11111 at 5 (quoting bankruptcy court transcript).

⁶ United Gas Pipe Line Co. v. Mobile Gas Corp., 350 U.S. 332 (1956), and FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (collectively, Mobile-Sierra).

⁷ 103 FERC ¶ 61,344 at P 66.

established procedures for the submission of information (i.e., "paper hearing procedures") regarding that issue. The Commission stated, in that order, that until it reached a final determination on the merits of the public interest issue, it was requiring NRG to provide service to CL&P, pursuant to the agreement.

7. On June 30, 2003, the District Court for the Southern District of New York denied NRG further injunctive relief and lifted its prior relief, agreeing with the Commission that the court lacked subject matter jurisdiction to grant the requested relief and that the Circuit Court of Appeals, rather than the District Court, was the proper forum to review the Commission's actions.⁸ Accordingly, on July 2, 2003, NRG resumed service to CL&P. Thereafter, on July 3, 2003, NRG sought from the Commission a stay of the June 25 Order pending judicial review or, in the alternative, pending entry of a final, reviewable order from the Commission. Without waiting for the Commission to rule on its stay request, on July 8, 2003, NRG also filed a motion with the Court of Appeals for the District of Columbia (D.C. Circuit) seeking an emergency stay of the June 25 Order. On July 9, 2003, the Commission denied NRG's stay request. On July 16, 2003, the D.C. Circuit denied NRG's "emergency motion" for a stay of the June 25 Order.⁹

8. In addition, on July 18, 2003, NRG appealed the District Court's June 30 ruling to the United States Court of Appeals for the Second Circuit. On August 15, 2003, the Commission denied rehearing requests of the June 25 Order.¹⁰ On November 5, 2003, the Second Circuit denied NRG's request for injunctive relief regarding the District Court's June 30, 2003 Order. NRG has also filed a request for rehearing with the Commission relating to the Commission's June 25 and August 15 Orders and, along with the unsecured creditor's committee, has filed a petition for review in the D.C. Circuit of those orders.¹¹

II. Details of the Settlement Agreement

9. The Settlement Agreement resolves the Settling Parties' differences with respect to performance under the SOS Agreement for the remainder of its term, but it leaves

⁸ NRG Power Marketing, Inc. v. FERC, 2003 U.S. Dist. LEXIS 11111.

⁹ In re NRG-PMI, 2003 U.S. App. LEXIS 14485.

¹⁰ Richard Blumenthal, Attorney General of the State of Connecticut, 104 FERC ¶ 61,211 (2003).

¹¹ Official Committee of Unsecured Creditors of NRG Energy Inc. v. FERC, D.C. Cir. No. 03-1341 (2003).

unresolved certain other disputes involving responsibility for congestion costs and losses, which are currently in litigation before the Commission and in the District Court Proceeding. Consequently, the Settlement Agreement resolves all disputed issues in Docket Nos. EL03-123-000, EL03-129-000 (excluding matters addressed in EL03-135-000), and EL03-134-000, as well as all the disputes, involving the Commission, in other forums regarding the question of whether NRG must continue to provide service to CL&P under the terms of the SOS Agreement.

10. The core terms of the Settlement Agreement are as follows: The Settlement Agreement is contingent on obtaining approvals from the Commission and the Bankruptcy Court¹² and will be null and void if such approvals have not been obtained by January 1, 2004. NRG agrees to provide service in accordance with the rates, terms, and conditions of the SOS Agreement, as modified by the Settlement Agreement, until the end of the term of the SOS Agreement. CL&P's and NRG's respective responsibilities for congestion at issue in the District Court Proceeding (*i.e.*, pre-NE-SMD congestion charges) will be determined by and through that proceeding. CL&P's and NRG's respective responsibilities for the NE-SMD-related congestion costs and losses at issue in Docket No. EL03-135-000 will be determined by and through the proceedings in that docket. Within five days after the effectiveness of the Settlement Agreement, NRG and the Committee will withdraw, with prejudice, any request for rehearing, appeal, or petition for review they may have filed as of that date with respect to the Commission's orders and agree that they will not file any other request for rehearing or petition for review of the Commission's orders after the effective date. In addition, within two days after the execution date of the Settlement Agreement, CL&P will pay to NRG all undisputed outstanding amounts (accounts receivable) owed to NRG as of the execution date for all prior service under the SOS Agreement up to and including September 30, 2003. The Settling Parties also agree that in the event that the Commission initiates a proceeding after the effective date of the Settlement Agreement with respect to the SOS Agreement or the NRG entities, which reopens any of the issues resolved by the agreement, the Settlement Agreement will be null and void as of its effective date and will be of no force or effect.

III. Initial and Reply Comments

11. Initial comments on the Settlement Agreement were due by November 18, 2003 and reply comments were due by November 21, 2003. Alternate Power Source Inc. (APS) filed a timely comment, CL&P filed a timely reply comment, and APS filed a reply to CL&P's reply comment.

¹² On November 21, 2003, the Bankruptcy Court approved the Settlement Agreement. See Judge OKs Parts of NRG Reorganization Plan, at <http://www.forbes.com/markets/commodities/newswire/2003/11/21/rtr1157591.html>.

A. APS's Initial Comment on the Settlement Agreement

12. APS states that it opposes the Settlement Agreement because “[t]here is a policy issue that will be overlooked through a straight contract interpretation of the pre-NE-SMD congestion cost allocations in the [District Court Proceeding].”¹³ Specifically, APS argues that, contrary to the terms of the SOS Agreement, CL&P assigned pre-NE-SMD congestion charges to NRG in the SOS Agreement. In this regard, APS states that CL&P is not allowed to modify the SOS Agreement without filing a rate change with the Commission. APS maintains that, consistent with the Commission requiring NRG to abide by the terms of the SOS Agreement (i.e., not allowing NRG to prematurely discontinue providing service under the agreement), the Commission should reject the Settlement Agreement’s proposal to have the dispute regarding the pre-NE-SMD congestion costs litigated in the District Court Proceeding. Therefore, APS asks that the Commission either reject the Settlement Agreement or, in the alternative, approve the agreement subject to a review of the allocation of transmission congestion charges.

B. CL&P's Reply Comment

13. CL&P states that APS is essentially arguing in this proceeding that the Commission erred in another proceeding, in which it held that CL&P’s affiliate, Western Massachusetts Electric Company (WMECo), had the right to assign congestion charges to APS under a bilateral wholesale contract that expired on December 31, 2000. CL&P notes that the Commission issued an order on rehearing rejecting that claim.¹⁴ If APS wants to pursue that matter further, CL&P states that it can appeal that decision.¹⁵ Accordingly, CL&P states that APS “does not have the right to burden this proceeding with its attempt to relitigate what is already final.”¹⁶ Moreover, CL&P states that the Settlement Agreement does not have any bearing on APS’s rights or obligations under its expired wholesale contract with WEMCo. CL&P explains that the Settlement Agreement leaves in place litigation between CL&P and NRG over responsibility for congestion charges under the SOS Agreement that is pending at the Commission and in the District Court Proceeding. Therefore, approval of the Settlement Agreement would not require

¹³ APS’s Comment at 3.

¹⁴ See Alternate Power Source, Inc. v. Western Massachusetts Electric Company, et al., 101 FERC ¶ 61,236 (2002), reh’g denied, 104 FERC ¶ 61,255 (2003) (WEMCo).

¹⁵ In this regard, CL&P notes that APS has, in fact, filed an appeal of that order with the D.C. Circuit.

¹⁶ CL&P’s Reply Comments at 2.

the Commission to make any ruling on issues related to congestion costs or impact APS's ability to pursue its rights under its wholesale contract with WMECo.

IV. Discussion

A. Procedural Matters

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to an answer unless otherwise permitted by the decisional authority.¹⁷ We reject APS's reply to CL&P's reply comment because it does not help us reach our decision here.

B. Commission's Response to the Settlement Agreement

15. Upon review of the Settlement Agreement and the comments, we find that the matters raised by APS do not warrant the Commission either rejecting the Settlement Agreement or making it subject to a review of the pre-NE-SMD congestion costs. The Commission further determines that CL&P has adequately responded to the issues raised by APS. As CL&P points out in its reply comment, the Settlement Agreement has no bearing on APS's claims.

16. The Settlement Agreement expressly does not disturb the litigation between CL&P and NRG over responsibility for congestion charges under the SOS Agreement before the Commission (regarding post NE-SMD congestion costs) and the District Court Proceeding (concerning pre-NE-SMD congestion costs). Therefore, the Settlement Agreement does not impact, directly or indirectly, which party is responsible for pre-NE-SMD-related congestion and losses. As a result, the Settlement Agreement does not prejudice APS's ability to pursue claims concerning its contract with WEMCo. However, in this regard, we note that, insofar as APS is challenging in this proceeding the Commission's determination with regard to its complaint against WEMCo,¹⁸ APS is making an impermissible collateral attack on a final Commission order.¹⁹

¹⁷ 18 C.F.R. § 213(a)(2) (2003).

¹⁸ WEMCo, 101 FERC ¶ 61,236, reh'g denied, 104 FERC ¶ 61,255 at P 9 (rejecting APS's request for rehearing that the Commission erred in holding that WEMCo had the right to assign pre-NE-SMD congestion charges to APS under a bilateral contract).

¹⁹ See, e.g., Dighton Power Associates Limited Partnership v. ISO New England, Inc., 95 FERC ¶ 61,251 at 61,873, reh'g denied, 96 FERC ¶ 61,091 (2001); Old Dominion Electric Cooperative v. Public Service electric & Gas Co., 84 FERC ¶ 61,155 at 61,844 n.16 (1998); Montana-Dakota Utilities co., 81 FERC ¶ 61,298 at 62,407 (1997).

17. For the foregoing reasons, we find that APS has not raised any genuine issue of material fact concerning the Settlement Agreement. Accordingly, we further find that the Settlement Agreement represents a reasonable resolution of the matters at issue in this proceeding and is in the public interest; therefore, we approve the Settlement Agreement as filed.

The Commission orders:

The Settling Parties' Settlement Agreement is hereby accepted, as discussed in the body of this order.

By the Commission. Commissioners Brownell and Kelliher concurring with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

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(Issued December 18, 2003)

Nora Mead BROWNELL, Commissioner, and Joseph T. KELLIHER, Commissioner
concurring:

1. We support the proposed settlement of the contract dispute relating to NRG-PMI's provision of wholesale service to CL&P. We are writing separately to express our view that the Commission should not have involved itself in this dispute in the first place.
2. By ordering NRG-PMI to perform a contract rejected by order of the bankruptcy court, the Commission put itself on a collision course with the bankruptcy court and the district court tasked with interpreting and enforcing the bankruptcy court's rulings. That led to the injunction entered against the Commission in a similar dispute involving Mirant and the Potomac Electric Power Company.²⁰ This collision could have been avoided if the Commission had refrained from ordering the debtor to continue performing the contracts.
3. It is unusual for the Commission to involve itself in contract disputes when the

²⁰See *In re Mirant Corp.*, (Mirant Corp. v. FERC), Adversary Proceeding No. 03-4355 (Bankr. Ct. No. Dist. Tex., Sept. 12, 2003).

parties can avail themselves of any breach of contract claims they might have in court. That was the rule the Commission established in Southern Company Energy Marketing, L.P.²¹, and that rule still makes sense today. If a power seller terminates service in breach of its contract, the issue is whether it should be held liable for specific performance or monetary damages. In the past, the Commission has left that to the courts, and we believe the Commission should have done the same in the dispute between NRG-PMI and CL&P.

Nora Mead Brownell

Joseph T. Kelliher

²¹ 84 FERC ¶ 61,199 (1998), reh'g denied, 86 FERC ¶ 61,131 (1999), affirmed sub nom., Power Company of America v. FERC, 245 F.3d 839 (D.C. Cir. 2001).