

121 FERC ¶ 61,043
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.

The United Illuminating Company

Docket No. EL05-76-002

v.

Dominion Energy Marketing, Inc.

ORDER DENYING REHEARING

(Issued October 18, 2007)

1. This case is before the Commission on rehearing of Opinion No. 493,¹ affirming the Initial Decision issued on May 24, 2006.² Opinion No. 493 addressed whether the Power Supply Agreement (PSA) entered into on December 28, 2001, between Virginia Electric and Power Company (VEPCO), a subsidiary of Dominion Resources, Inc., and the United Illuminating Company (UI) allocates responsibility for reliability cost tracker charges to UI or to Dominion Energy Marketing, Inc. (DEMI).³ In this order the Commission denies rehearing, as discussed below.

¹ *The United Illuminating Co. v. Dominion Energy Marketing, Inc.*, 118 FERC ¶ 61,131 (2007) (Opinion No. 493).

² *The United Illuminating Co. v. Dominion Energy Marketing, Inc.*, 115 FERC ¶ 63,044 (2006) (Initial Decision).

³ In 2002, VEPCO assigned the PSA to Dominion Energy Marketing, Inc. UI and DEMI are collectively referred to as “Parties” in this order.

I. Background

2. On December 28, 2001,⁴ the Parties entered into the PSA at the center of the Parties' present dispute. The issue is whether reliability cost tracker charges, which are fixed charges under Reliability Must-Run (RMR) agreements, should be allocated to UI or to DEMI. The Commission authorized ISO New England, Inc. (ISO-NE) to impose such reliability cost tracker charges to compensate selected RMR peaking units deemed by ISO-NE to be needed for reliability in southwest Connecticut.⁵ Consequently, ISO-NE began billing UI for its share of ISO-NE's payments to the generation units.⁶ UI, in turn, began deducting the reliability cost tracker charges from the amounts in DEMI's billing statements, based on the amount of energy delivered by DEMI to UI, beginning the second month of the implementation of the PSA.⁷ The contested charges amount to approximately \$8.9 million.⁸

3. On February 11, 2005, DEMI filed a breach of contract suit in the United States District Court for the District of Connecticut, alleging that UI's deduction of reliability charges from payments to DEMI was a breach of UI's obligation to pay for all energy provided by DEMI under the PSA. On March 14, 2005, UI filed a complaint with the Commission alleging that DEMI refused to abide by the terms of the PSA. UI specifically cited section 2.1(c) of the PSA, which provides that DEMI is responsible for all costs or charges "associated with the delivery of Energy," including transmission congestion costs. The Commission asserted jurisdiction over the matter, finding that the PSA is a Commission-jurisdictional contract that had been filed with and approved by the Commission.⁹ The Commission also found that it had special expertise regarding the contested issues, that there is a need for consistent application and understanding of

⁴ The PSA was first executed on December 28, 2001, and subsequently amended and restated on January 28, 2002, with changes not at issue in this proceeding.

⁵ See *Devon Power LLC*, 103 FERC ¶ 61,082, at P 47, *order on reh'g*, 104 FERC ¶ 61,123 (2003) (*Devon*).

⁶ Initial Decision, 115 FERC ¶ 63,044 at P 90. In 2002, ISO-NE imposed its first charge for fixed payments under an RMR agreement. See *Sithe New Boston, LLC*, 98 FERC ¶ 61,164 (2002).

⁷ Initial Decision, 115 FERC ¶ 63,044 at P 91, 114, 116. See *The United Illuminating Co. v. Dominion Energy Marketing, Inc.*, 111 FERC ¶ 61,224, at P 6 (2005) (May 13 Order), *reh'g granted*, 112 FERC ¶ 61,279 (2005) (September 15 Order).

⁸ See Letter from DEMI to UI (Dec. 16, 2004); UI-36 at 1.

⁹ *Virginia Elec. & Power Co.*, Docket No. ER02-932-000 (Mar. 8, 2002) (unpublished letter order).

terminology, and that the matters raised in UI's complaint are important to the Commission's regulatory responsibilities.¹⁰

4. In its May 13 Order, the Commission granted UI's complaint. The Commission found that, while the contract is "understandably silent" with regard to which party bears responsibility for reliability cost tracker charges, the language of the PSA is broad enough to indicate that the Parties intended to encompass costs beyond the specific language of section 2.1(c).¹¹ Specifically, the Commission found that the reliability cost tracker charges are costs "associated with the delivery of energy" within the meaning of section 2.1(c) of the PSA.¹² The Commission also found that DEMI failed to demonstrate that the Parties intended to exclude such fixed cost charges from the PSA's broad definition of "Transmission Congestion Costs" and concluded that DEMI must bear responsibility for the charges at issue.¹³

5. On June 13, 2005, DEMI filed a request for rehearing of the May 13 Order, arguing that since the Commission found the PSA "understandably silent" with regard to which party bears responsibility for reliability cost tracker charges, the Commission erred by summarily finding that the terms of the PSA allocate the charges to DEMI. On September 15, 2005, the Commission agreed that DEMI had raised credible arguments that the PSA is ambiguous as to which party bears responsibility for the reliability cost tracker charges, granted rehearing, and instituted hearing procedures.¹⁴

6. On May 24, 2006, the Administrative Law Judge (ALJ) issued an initial decision that found that the reliability cost tracker charges arising under the RMR agreements at issue in this proceeding were properly allocated to DEMI. The Initial Decision specifically addressed three sub-issues: (1) whether "reliability cost tracker" charges are "transmission congestion costs" within the meaning of section 1.90 of the PSA; (2) whether "reliability cost tracker" charges are "associated with the delivery of Energy" within the meaning of section 2.1(c) of the PSA; and (3) what is the proper allocation of reliability cost tracker charges between DEMI and UI if reliability cost tracker charges are found to be associated with the delivery of energy pursuant to section 2.1(c) of the PSA. The ALJ concluded that the reliability cost tracker charges at issue are transmission congestion costs as stated in section 1.90 of the PSA. The ALJ further

¹⁰ May 13, 2005 Order, 111 FERC ¶ 61,224 at P 24-25.

¹¹ *Id.* P 27.

¹² *Id.*

¹³ *Id.* P 29.

¹⁴ September 15 Order, 112 FERC ¶ 61,279 at P 12.

concluded that section 2.1(c) assigns responsibility for those costs to DEMI up to UI's system.¹⁵

7. On February 20, 2007, the Commission adopted the Initial Decision as its own decision. Specifically, after analyzing the contract in its entirety pursuant to New York law, the Commission affirmed the ALJ's Initial Decision that the PSA allocates reliability cost tracker charges to DEMI for the reasons provided in the Initial Decision. The Commission further affirmed that reliability cost tracker charges are within the PSA's definition of "transmission congestion costs" as stated in section 1.90 of the PSA and that section 2.1(c) assigns responsibility for those costs to DEMI up to UI's system.

8. On March 22, 2007, DEMI requested rehearing of Opinion No. 493. On April 6, 2007, UI filed a motion for leave to answer and answer. On April 25, 2007, DEMI filed a motion for leave to reply and reply. The Commission will deny rehearing, as discussed below.

II. Discussion

A. Procedural Matters

9. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2007), prohibits an answer to a request for rehearing unless otherwise ordered by the decisional authority. We are not persuaded to accept UI's answer or DEMI's reply and will, therefore, reject them.

B. Request for Rehearing

10. DEMI contends that Opinion No. 493 does not satisfy the requirements for reasoned decision-making. DEMI states that the Commission must do more than acknowledge issues; it must respond to arguments presented based on evidence in the record. According to DEMI, Opinion No. 493 does not provide enough substantial evidence for the findings it adopts nor engage all the essential arguments and evidence. Specifically, DEMI addresses the issues listed below.

First issue: Whether reliability cost tracker charges arise from or relate to the PSA

11. DEMI contends that in Opinion No. 493 the Commission did not adequately address the question of whether the reliability cost tracker charges arise from or relate to the PSA. DEMI alleges that the Commission failed to address the nature of the reliability cost tracker charges at issue, which comprise a generator's fixed costs (*i.e.*, costs that do not vary with the output of the generator). DEMI maintains that there simply is no nexus

¹⁵ Initial Decision, 115 FERC ¶ 63,044 at P 94.

between DEMI's delivery of energy to UI and costs associated with RMR agreements. According to DEMI, the assertion that the PSA requires DEMI to provide financial support to New England Power Pool (NEPOOL) generators is wholly unfounded and simply absurd. Such a view, DEMI contends, would mean that any supplier that enters into a firm delivery obligation is therefore required to provide financial support to generators operating in that same market. In short, the need to prevent RMR generators from retiring arises from ISO-NE's obligation to meet the governing reliability standards, not to enable DEMI to meet its delivery obligations.¹⁶

Commission Ruling

12. DEMI reiterates the arguments that it made, and that were addressed, previously in this proceeding.¹⁷ DEMI does not present any new, or newly persuasive, arguments or identify additional evidence in support of its position. As discussed by the ALJ and adopted by the Commission, the reliability cost tracker charges at issue fall within the PSA's broad definition of "transmission congestion charge."¹⁸ Sections 1.90 and 2.1(c) of the PSA respectively oblige DEMI to assume "all costs resulting from insufficient transmission capacity" and "all costs or charges ... imposed on or associated with the delivery of Energy..., including Transmission Congestion Costs...." At the time the PSA was negotiated, NEPOOL Market Rule 17 "authorized ISO-NE to enter into individually-negotiated agreements with generators 'to ensure their availability when needed to support system reliability and security.'"¹⁹ Although the RMR agreements and reliability cost tracker charges at issue—and consequently the payments to generators for separate, cost-based, fixed monthly amounts—did not exist when the PSA was negotiated, these were among the foreseeable responses by ISO-NE to deal with the region's transmission congestion issues.²⁰ Reliability cost tracker charges reimburse ISO-NE for payments to generators under RMR agreements entered into to ensure generator availability in order

¹⁶ DEMI Request for Rehearing at 22 (*citing* Tr. 170:18 to 171:14 (Cliff W. Hamal)).

¹⁷ *See, e.g.*, Opinion No. 493, 118 FERC ¶ 61,131 at P 24, 25.

¹⁸ *See* Initial Decision, 115 FERC ¶ 63,044 at 94-96; Opinion No. 493, 118 FERC ¶ 61,131 at P 38-39.

¹⁹ DEMI Request for Rehearing at 62 (*citing* Market Rule 17, § 17.3.2.2(b), Ex. DOM-10 at 13; Ex. UI-43 at 16:9-16 (Hamal); Tr. 116:7 to 120:9 (Hamal)).

²⁰ *See* DEMI Request for Rehearing at 62; *id.* at 70 ("One obvious reason for this broad participation [in the NRG mediation "load" group] was that *a number of options were on the table* in the mediation beyond simply a cost-of-service RMR agreement." (emphasis added)).

to support system reliability,²¹ the costs of which are shared as a transmission-related charge. DEMI previously had been responsible solely for RMR out-of-merit dispatch costs, which was ISO-NE's method of ensuring a reliable system as well as dealing with system congestion. The RMR agreements and associated reliability cost tracker charges at issue are another, foreseeable method that ISO-NE uses to realize the same goals.²² Accordingly, we find that the reliability cost tracker charges at issue arise from or relate to obligations under the PSA.

Second issue: Whether the PSA is an “all-in” full requirements contract

13. DEMI maintains that the record evidence does not support the Commission's determination that DEMI agreed to bear undefined and unknown system-wide costs unrelated to its performance under the PSA, when the PSA was negotiated in December 2001. DEMI asserts that the Commission failed to consider the regulatory environment in which the PSA was negotiated, including the market rules, evidence of industry custom or practice, and the reasonable expectation of the ordinary businessperson in the factual context in which the terms of art and understanding are used.²³ DEMI argues that, at the time the PSA was negotiated, the governing market rules did not treat reliability cost tracker charges as transmission congestion costs. Indeed, DEMI notes that ISO-NE has at all times treated reliability cost tracker charges separately from congestion costs. DEMI contends there is no record evidence to support a “unique” definition of “transmission congestion costs.” With respect to various communications between DEMI and UI about “transmission congestion costs,” DEMI explains that its use of the term is consistent with the ISO-NE tariff and market rules then in effect, namely, that the term refers to out-of-merit dispatch costs.

14. Further, section 1.90 of the PSA should not be the basis for shifting responsibility for reliability cost tracker charges from UI to DEMI because, among other reasons, that section simply defines a term and does not assign such responsibility. DEMI expresses concern that an overly-expansive reading of section 1.90 would impose limitless liability

²¹ See *Devon*, 103 FERC ¶ 61,082 at 47.

²² See Initial Decision, 115 FERC ¶ 63,044 at 97-99. From DEMI's arguments the ALJ concluded, “According to DEMI, transmission congestion affects the costs associated with the delivery of energy to the extent that congestion requires DEMI to pay higher prices for the energy delivered to UI, including charges for out-of-merit dispatch.” *Id.* P 58. One way or another, DEMI would pay for costs relating to transmission congestion associated with its delivery of energy to UI.

²³ DEMI Request for Rehearing at 25.

on DEMI for any cost that can be shown to “result” from insufficient transmission capability.²⁴

15. With respect to the determination that DEMI bear undefined and unknown costs under the PSA, DEMI also contends that the finding that the PSA is an “all-in” full requirements contract is not supported by record evidence, is contradicted by section 17.2 of the PSA, and is refuted by contemporaneous evidence of the Parties’ intent during negotiations. DEMI maintains that the notion of an “all-in” contract is well understood in the wholesale power industry, and “all-in” does not extend to costs unrelated to contract performance.²⁵ The critical error on this issue, DEMI opines, is that the Commission mistakenly converts DEMI’s assumption of market risk with regard to one specific type of costs (*i.e.*, energy and ancillary services, ISO-NE Schedule 2 and 3 costs) into a much broader assumption of responsibility for a much wider range of costs.

Commission Ruling

16. At the outset, we note that this argument depends on the Commission concluding that the reliability cost tracker charges are not transmission congestion costs because, whether or not the PSA is an “all-in” contract, DEMI is explicitly responsible for transmission congestion costs. As discussed herein, the reliability cost tracker charges are transmission congestion costs within the context of the PSA. Notwithstanding the Commission’s finding that such charges are transmission congestion costs under the PSA, however, here we conclude that the PSA is an “all-in” contract.

17. DEMI reiterates the arguments that it made, and that were addressed, previously in this proceeding.²⁶ DEMI does not present any new, or newly persuasive, arguments or identify additional evidence in support of its position.

18. Although the use of the term “transmission congestion costs” in the PSA has presented challenges to interpretation, we find that the preponderance of the evidence indicates that the term here encompasses the reliability cost tracker charges at issue. Prior to the negotiation of the PSA the Parties were aware of transmission congestion problems in southwest Connecticut.²⁷ As early as 1997 there was indication that fixed-price contracts such as the RMR agreements at issue here would be used in New

²⁴ *Id.* at 38.

²⁵ *Id.* at 41 (*citing* Tr. 384:25 to 385:2 (Ronald E. Armstrong)).

²⁶ *See, e.g.*, Opinion No. 493, 118 FERC ¶ 61,131 at P 20, 21.

²⁷ Initial Decision, 115 FERC ¶ 63,044 at P 98-99, 106.

England.²⁸ As discussed above, “[a]t the time the PSA was negotiated ... Market Rule 17 authorized ISO-NE to enter into individually-negotiated agreements with generators ‘to ensure their availability when needed to support system reliability and security.’”²⁹ While Market Rule 17 did not provide for payments to generators for a separate, cost-based, fixed monthly amount, such an arrangement nonetheless was foreseeable in this context.

19. In its request for rehearing, DEMI remarked that the Commission agreed with DEMI that common industry use of the term “transmission congestion costs” did not apply to fixed costs such as the reliability cost tracker charges at issue.³⁰ While the Commission did agree with DEMI regarding the general use of the term, the Commission directed the ALJ to examine the term, stating, “[W]e are concerned that the PSA definition of transmission congestion costs is broader than the industry usage of the term.”³¹ Indeed, because both Parties were aware that transmission congestion would be a material consideration in pricing future energy delivery costs even though reliability cost tracker charges were not established at the time the PSA was negotiated, they broadly defined “transmission congestion costs,” choosing categorical cost allocation

²⁸ *Id.* P 13-16 (*citing* Ex. UI-43 at 13-16 (Hamal)); *see also* Thomas J. Overbye, Reengineering the Electric Grid, 88 (No. 3) Am. Scientist Online 220 (May-June 2000), <http://www.americanscientist.org> (*cited by* witness Hamal as evidence that the problems associated with the need to compensate RMR units to maintain system reliability were well-recognized); *Sithe New England Holdings, LLC*, 88 FERC ¶ 61,080 (1999); DEMI Brief on Exceptions at 29 (*citing* Tr. at 129:18 to 132:22 (Hamal)). Charges on load for costs arising from cost-based RMR agreements between ISO-NE and Sithe New Boston were first imposed in 2002. *Sithe New Boston, LLC*, 98 FERC ¶ 61,164 (2002). This RMR agreement, however, was imminent: the agreement was filed with the Commission on the same day the Parties executed the PSA. DEMI Request for Rehearing at 55.

²⁹ *See supra* note 19; *see also* Initial Decision, 115 FERC ¶ 63,044 at 107-08.

³⁰ DEMI Request for Rehearing at 27 (*citing* *The United Illuminating Co. v. Dominion Energy Marketing, Inc.*, 112 FERC ¶ 61,279, at P 13 (2005) (Hearing Order)). DEMI’s witness Howard W. Pifer, III, however, testified that the term “congestion cost” *generally* refers to variable costs associated with generation dispatched out-of-merit order. Ex. DOM-19 at 14-15. Witness Pifer does not seem to rule out the possibility that congestion costs might encompass fixed costs as well as variable costs.

³¹ Hearing Order, 112 FERC ¶ 61,279 at P 13.

language instead of enumerating specific charges.³² But this broad term is not unlimited. Besides the language of the PSA itself,³³ DEMI's liability for "all costs resulting from insufficient transmission capacity, without regard to the cause of such congestion or how such costs are allocated or assessed" is limited by what costs or charges imposed on or associated with the delivery of energy and market products are reasonably foreseeable, as demonstrated by the Parties' expectations and within the context of the negotiation and execution of the PSA.³⁴ Furthermore, it is noteworthy that if the reliability cost tracker charges associated with the RMR agreements were allocated to neither DEMI nor UI

³² Initial Decision, 115 FERC ¶ 63,044 at P 19 (*citing* Ex. UI-1 at 37-38). The fact that variable *and fixed costs* of some RMR units were being recovered through energy bids at the time the PSA was executed suggests that DEMI was aware that it might be responsible for such fixed costs under the PSA, including the term, "transmission congestion costs." *Id.* P 111-12.

³³ Sections 1.90 and 2.1(c) of the PSA should be read together. Section 1.90 of the PSA, Ex. UI-4 at 18, defines transmission congestion costs as

all costs resulting from insufficient transmission capacity, without regard to the cause of such congestion or how such costs are allocated or assessed, including ... redispatch costs resulting from Reliability Must Run (as such term is defined in the Restated NEPOOL Agreement) requirements or other out of merit order generation dispatch directed by the ISO-NE pursuant to the NEPOOL Rules....

And section 2.1(c) of the PSA, Ex. UI-4 at 20, states that DEMI

shall be responsible for all costs or charges ... imposed on or associated with the delivery of Energy and ... Market Products, delivered, or caused to be delivered, by Seller to UI to the Delivery Point(s), including Transmission Congestion Costs, settlement uplift charges, control area services, inadvertent energy flows, losses and loss charges, each relating to the transmission of Energy, if any, to the Delivery Point(s)....

See also UI-4 at 18 (PSA § 1.90), 20 (PSA § 2.1(c)).

³⁴ Opinion No. 493, 118 FERC ¶ 61,131 at 39-40.

under the PSA, such costs would be the only generator charges not addressed in the contract.³⁵

20. As discussed by the ALJ and adopted by the Commission, UI and DEMI entered into an “all-in,” fixed-price requirements contract whereby DEMI agreed to provide capacity, energy, and ancillary services to UI and to assume all costs associated with providing such capacity, energy, and ancillary services.³⁶ Because of uncertainty about the impact the growing problem congestion would have on the price of wholesale energy, UI intended to shift the burden and risk of evaluating, anticipating, and quantifying future costs.³⁷ UI paid a premium so that its supplier would assume this risk.³⁸ Such a risk premium is associated with not precisely defined yet foreseeable future costs, thus the risk. DEMI’s primary fact witness, one of the principal negotiators of the PSA, agreed that the PSA may be characterized as an “all-in” contract.³⁹ Accordingly, we find that the Parties understood the PSA as an “all-in,” full requirements contract.

Third issue: Whether the reliability cost tracker charges are associated with the delivery of energy

21. DEMI contends that the Commission did not examine whether the reliability cost tracker charges are “associated with the delivery of energy.” DEMI states that the issue of whether reliability cost tracker charges are, in fact, “associated with providing such capacity, energy, and services” is the core issue in dispute.⁴⁰ DEMI further contends that UI provided no colorable basis upon which to find that the reliability cost tracker charges are associated with the delivery of energy and that substantial evidence demonstrates otherwise. DEMI revisits its analysis of the word “delivery,” concluding that costs “associated with the delivery of energy” are those that arise from or have some material connection to the action of transferring specific quantities of energy by DEMI to UI. But RMR agreements, from which the reliability cost tracker charges are derived, are revenue

³⁵ Tr. 327:25 to 328:3; 384:18 to 385:2 (Armstrong).

³⁶ See Initial Decision, 115 FERC ¶ 63,044 at P 97-99; Opinion No. 493, 118 FERC ¶ 61,131 at P 39-40.

³⁷ Initial Decision, 115 FERC ¶ 63,044 at P 96.

³⁸ Ex. UI-1 at 2-7 (Michael A. Coretto); UI Brief Opposing Exceptions at 31-32 (citing Tr. 325:3-12; 326:11-20 (Armstrong)); Initial Decision, 115 FERC ¶ 63,044 at P 119.

³⁹ Tr. 327:25 to 328:3 (Armstrong).

⁴⁰ DEMI Request for Rehearing at 44.

sufficiency agreements; such agreements have no connection with DEMI's supply of energy to UI.

Commission Ruling

22. DEMI reiterates the arguments that it made, and that were addressed, previously in this proceeding.⁴¹ DEMI does not present any new, or newly persuasive, arguments or identify additional evidence in support of its position. As discussed by the ALJ and adopted by the Commission, the reliability cost tracker charges—costs derived from RMR agreements used to ameliorate transmission congestion—are associated with or imposed on DEMI's delivery of energy to UI.⁴² By concluding that the reliability cost tracker charges are transmission congestion costs arising prior to UI's delivery points,⁴³ the ALJ necessarily concluded that those costs are associated with the delivery of energy. Transmission congestion costs are a type of costs *included* among the various “costs or charges ... imposed on or associated with the delivery of Energy and ... Market Products, delivered, or caused to be delivered, by Seller to UI to the Delivery Point(s)....” Transmission congestion costs are not the fundamental or basic type of costs, which then are qualified or limited by the term “imposed on or associated with the delivery of Energy.” Rather, transmission congestion costs are a sub-set of costs imposed on or associated with the delivery of energy. Thus, by finding that the reliability cost tracker charges are transmission congestion costs, the ALJ—and the Commission—necessarily found that the reliability cost tracker charges are imposed on or associated with the delivery of energy.

23. DEMI again reviews definitions of the term “delivery.”⁴⁴ DEMI maintains that “costs that are ‘associated with the delivery of energy’ are costs that arise from or have some material connection to the action of transferring specific quantities of energy by DEMI to UI.”⁴⁵ By focusing exclusively on the term “delivery” and the immediate act of transferring, DEMI concludes that such costs or charges must be tagged to specific quantities or deliveries of energy instead of to the more general action of effecting the transmission of energy or market products. The plain language of the PSA, however, does not emphasize the connection of cost or charge to the actual *delivering* but rather

⁴¹ See, e.g., Opinion No. 493, 118 FERC ¶ 61,131 at P 25.

⁴² Initial Decision, 115 FERC ¶ 63,044 at 104, 106, 118; Opinion No. 493, 118 FERC ¶ 61,131 at 38-40.

⁴³ Initial Decision, 115 FERC ¶ 63,044 at 94, 118.

⁴⁴ DEMI Request for Rehearing at 50.

⁴⁵ *Id.*

presents a slightly broader relationship of the cost or charge to the delivery of energy and market products. The language of the PSA assigns responsibility to DEMI for “all costs or charges ... *imposed on or associated with* the delivery of Energy and ... Market Products....” An example might expose the subtle difference. The cost of five gallons of gasoline is directly related to the actual driving of five gallons’ worth of miles; however, other costs necessarily may be imposed on or associated with the particular miles driven, such as the half-quart of motor oil that the driver is required to pour into the crankcase during the trip to prevent the engine from overheating and possibly seizing or the state-imposed toll that the driver must pay to pass through that particular route. Put simply, DEMI’s reading of “delivery” in the context of section 2.1(c) and the PSA as a whole is too narrow.

24. DEMI does not consider its cost responsibility vis-à-vis all the terms in context. DEMI presents no survey of cited definitions of the term “associated” as it did for “delivery,” but it does independently define “associated” as “aris[ing] from or hav[ing] some material connection to ... specific quantities of energy....” In fact, “associated,” from the Latin *ad* (to, toward) and *sociare* (to join), means “closely connected” or “closely related” to something.⁴⁶ Other costs or charges, besides those directly attributable to delivering specific quantities of energy, might be “closely connected” or “closely related” to—imposed on or associated with—DEMI’s delivery of energy or market products to UI. As discussed above, DEMI’s responsibility for such costs or charges is not open-ended. Such costs or charges are limited by what is reasonably foreseeable, as demonstrated by the Parties’ expectations and within the context of the negotiation and execution of the PSA. For example, DEMI’s transfer of a specific quantity of energy to UI at a given time might augment a localized transmission congestion problem for which, in the past, ISO-NE would have assessed DEMI the costs of an out-of-merit dispatch. Such costs would have been added to DEMI’s delivery costs of that energy, for DEMI is responsible under the PSA for “all costs resulting from insufficient transmission capacity, without regard to the cause of such congestion or how such costs are allocated or assessed.” Now, with the converting of this ad hoc, transaction-based resolution of transmission congestion to a solution that treats the whole system from the start, *i.e.*, by using RMR agreements, DEMI’s energy deliveries participate in the reliability cost tracker charges.⁴⁷ Within ISO-NE’s system, a supplier’s “delivery of Energy” is tagged with its share of the costs associated with reliability and transmission congestion. DEMI’s share is directly tied to actual amounts of energy delivered.⁴⁸

⁴⁶ Merriam-Webster’s Collegiate Dictionary 75 (11th ed. 2003).

⁴⁷ *See supra* note 22.

⁴⁸ Initial Decision, 115 FERC ¶ 63,044 at 114, 116.

25. Further, in its discussion of “delivery,” DEMI neglects to address whether such costs or charges are “imposed on” the delivery of energy. “Imposed,” from the Latin *in* (on) and *ponere* (to put), means “to establish or bring about as if by force.”⁴⁹ Other costs or charges, besides those directly attributable to delivering specific quantities of energy, might be “established” or imposed on DEMI’s delivery of energy or market products to UI. As discussed above, DEMI’s responsibility for such costs or charges is limited by what is reasonably foreseeable, as demonstrated by the Parties’ expectations and within the context of the negotiation and execution of the PSA. Indeed, UI’s witness Hamal explained, “A cost imposed on the delivery of energy doesn’t necessarily have to be an energy charge at all. It just is the mechanics of imposing this on the delivery, which clearly is ... how these charges were recovered in the marketplace.”⁵⁰ Even if the reliability cost tracker charges are not transmission congestion costs and are not associated with DEMI’s delivery of energy to UI, such charges may nonetheless be imposed by ISO-NE on the delivery of energy and, therefore, would be DEMI’s responsibility under the PSA.

26. Accordingly, the Commission finds that the reliability cost tracker charges, which are derived from RMR agreements, are associated with or imposed on DEMI’s delivery of energy to UI.

Fourth issue: Section 17.2 of the PSA and the Parties’ intent

27. DEMI contends that the Commission’s failure to consider section 17.2 of the PSA as evidence of the Parties’ intent amounts to legal error. DEMI explains that section 17.2 shields the Parties from responsibility for new costs that came about as a result of market rule changes. DEMI disputes being aware at the time of the PSA negotiations that RMR-type agreements, and thus the reliability cost tracker charges, were a distinct possibility, as well as being aware that the industry was changing and that costs would be uncertain.⁵¹ In any case, according to DEMI it is undisputed that the reliability cost tracker charges came about as a result of market rule changes after the PSA was negotiated—market rule changes that were necessary to implement the new RMR agreements.⁵²

⁴⁹ Merriam-Webster’s Collegiate Dictionary 625 (11th ed. 2003); *see also* UI Brief Opposing Exceptions at 64.

⁵⁰ Tr. 218:16 to 219:2 (Hamal).

⁵¹ DEMI Request for Rehearing at 54-55.

⁵² *Id.* at 61-63.

28. DEMI also contends that the Commission interpreted section 17.2 as solely a remedial mechanism. Moreover, DEMI avers that the Commission misconstrues the arbitration clause in section 17.2. DEMI maintains that it cannot be said to have waived any rights under section 17.2, as the Commission found, when “UI never gave DEMI the chance to initiate the process contemplated by that provision.”⁵³

Commission Ruling

29. DEMI reiterates the arguments that it made, and that were addressed, previously in this proceeding.⁵⁴ DEMI does not present any new, or newly persuasive, arguments or identify additional evidence in support of its position. As discussed by the ALJ and adopted by the Commission, DEMI was aware of the possibility of RMR agreements during the negotiations of the PSA and specifically section 17.2.⁵⁵ As discussed above, both Parties were aware that the transmission congestion in southwestern Connecticut would be a consideration in pricing future energy delivery costs even though reliability cost tracker charges were not established at the time the PSA was negotiated.⁵⁶ While at that time Market Rule 17 did not provide for payments to generators for a separate, cost-based, fixed monthly amounts, such an arrangement nonetheless was foreseeable in this context.⁵⁷

⁵³ *Id.* at 66.

⁵⁴ *See, e.g.*, Opinion No. 493, 118 FERC ¶ 61,131 at P 13-16, 22, 27-28.

⁵⁵ Initial Decision, 115 FERC ¶ 63,044 at P 95-100, 105-08, 112; Opinion No. 493, 118 FERC ¶ 61,131 at P 39, 41.

⁵⁶ *See supra* P 17-18 and accompanying notes. The ALJ’s decision was based in part on her determination of DEMI’s witnesses’ credibility *vel non*. The ALJ noted that “the Sithe [RMR] Agreement was imminent and [we] do not believe DEMI was clueless.” Initial Decision, 115 FERC ¶ 63,044 at P 98; *id.* P 99 (“In light of the circumstances associated with the negotiation and execution of the PSA, DEMI’s claim now that the contemporaneous industry definition of congestion costs should be controlling rings hollow and is not credible.”); *id.* P 100 (“Mr. Armstrong is not, then, credible [with respect to testimony about the DEMI’s participation in the NRG ‘load’ group mediation]”); *id.* P 101 (“DEMI cannot reasonably claim ignorance [with respect to the reliability cost tracker charges]”).

⁵⁷ DEMI’s witness Armstrong testified that DEMI knew that ISO-NE was considering ways to handle the transmission constraints in the region. Ex. DOM-18 at 13-14 (Armstrong); Initial Decision, 115 FERC ¶ 63,044 at P 98. DEMI’s witness Philip Hanser testified that ISO-NE was in the process of redesigning its market as of December 2001 and a large scale market redesign was proposed in early 2000 and was conditionally

30. Section 17.2 does not necessarily shield DEMI from additional cost responsibility resulting from changes to the market rules. More accurately, section 17.2 requires the Parties to engage in good faith negotiations to amend the PSA so that it eliminates, as far as possible, the effect of the termination or amendment of the Restated NEPOOL Agreement.⁵⁸ The guiding principle for such negotiations and amendment of the PSA is whether the termination or amendment of the Restated NEPOOL Agreement “would eliminate or materially alter a NEPOOL Rule” and “would be reasonably likely to have a material adverse effect” on either of the Parties. DEMI has not demonstrated that there has been any material alteration of a NEPOOL Rule that materially affects DEMI’s rights or responsibilities. As discussed above, the market rule change implementing the RMR Agreements in ISO-NE and consequently the reliability cost tracker costs was a reasonably foreseeable change in cost allocation relating to transmission congestion in a changing industry at the time the PSA, and specifically section 17.2, was negotiated.⁵⁹ Such foreseeable changes and effects are not included within section 17.2, which deals with the unforeseen material market rule changes and material adverse effects.

31. According to DEMI, section 17.2 is more than merely a remedial mechanism; section 17.2 evidences the Parties’ intent with regard to the responsibility for new costs that arise from market rule changes put in place after the PSA was agreed to.⁶⁰ As discussed above, the guiding principle for the good faith negotiations required by section 17.2 and any subsequent amendment of the PSA is whether a market rule has been materially altered and is reasonably likely to have a material adverse effect on either of the Parties. DEMI has not demonstrated that the market rule change, which was

approved by the Commission in June 2000. Ex. DOM-1 at 7-8 (Hanser); Initial Decision, 115 FERC ¶ 63,044 at P 98.

⁵⁸ Section 17.2(b) of the PSA, Ex. UI-4 at 62, states:

If, during the Term, the Restated NEPOOL Agreement is terminated or amended, in a manner that would eliminate or materially alter a NEPOOL Rule and any such aforementioned termination or amendment would be reasonably likely to have a material adverse effect on the rights or responsibilities of either Party under this Agreement, the Parties agree to negotiate in good faith in an attempt to amend this Agreement to incorporate such changes as they deem necessary to eliminate, to the extent possible, the effect of such termination or amendment.

⁵⁹ See *supra* P 12, 17-18 and accompanying notes.

⁶⁰ DEMI Request for Rehearing at 64.

necessary to implement the RMR agreements that were reasonably foreseeable by the Parties as ISO-NE's response to the transmission congestion problem in southwest Connecticut at the time the PSA was negotiated and executed, produced a material adverse effect on DEMI's rights or responsibilities under the PSA.⁶¹ Section 17.2 was included in the PSA to address the unforeseen and unforeseeable market changes that would adversely affect at least one of the Parties in a material way, about which the Parties could not have negotiated. Furthermore, while UI—not DEMI—is directly responsible to ISO-NE for the reliability cost tracker charges associated with energy delivered to UI, DEMI is contractually responsible for such charges according to the terms of the PSA between DEMI and UI.

32. DEMI claims that it did not exercise its rights under section 17.2 because UI did not give DEMI the chance to initiate the negotiation process. However, section 17.2 is only implicated “[i]f ... [the] amendment would be reasonably likely to have a material adverse effect on the rights or responsibilities of either Party....” DEMI has not demonstrated that ISO-NE's alternative method to deal with transmission congestion and the consequent cost allocation, which was reasonably foreseeable during the negotiation and execution of the PSA, has worked a material adverse effect on DEMI. Moreover, section 17.2 provides that both “Parties agree to negotiate in good faith....” DEMI approaches this issue with unclean hands. Although DEMI did not engage in negotiation with respect to the market rule change and its implications but chose instead to file suit in district court, DEMI remarks that “UI never bothered to negotiate....”⁶² If indeed section 17.2 required any negotiation for this market rule change, DEMI waived any rights it had under section 17.2 by not negotiating.

33. Accordingly, we find that section 17.2 of the PSA discloses the Parties' intent to address unforeseen material market rule changes that would materially affect the rights or responsibilities of either Party under the PSA, not, as is the case here, of reasonably foreseeable changes whose effects were considered during the PSA negotiation and execution.

Fifth issue: Course of performance as evidence

34. DEMI contends that the Commission erred in relying on the Initial Decision's interpretation of course of performance evidence. DEMI argues that a mere “smattering of events and statements extracted from selected documents” does not constitute a course

⁶¹ Presumably, foreseeable risk informed the risk premium UI paid to DEMI. But not every change to a market rule that might cause an adverse effect on one of the Parties could be foreseen and negotiated *ex ante*. This provision deals with such unforeseen changes. *See supra* P 16 and accompanying notes.

⁶² DEMI Request for Rehearing at 65-66.

of performance that suggests a systematic pattern of conduct by DEMI.⁶³ DEMI highlights the fact that the audit provision of Article XVI gives a party, here DEMI, two years to contest the application of the reliability cost tracker charges. DEMI concludes that the practical effect of relying on DEMI's course of performance is to read Article XVI out of the PSA.

35. DEMI further contends that there is mistaken reliance on its course of performance because such evidence must include a showing that DEMI was aware of the "nature of the performance and opportunity for objection to it by the other."⁶⁴ For example, DEMI dismisses its participation in the NRG mediation as part of the "load" group, explaining that DEMI was invited to participate by UI whose representatives also participated in the load group. DEMI also dismissed the significance of its acceptance of UI's invoices as course of performance evidence. DEMI stated that it did not know the true nature of the reliability cost tracker charges captured in the invoices because the PSA negotiators on DEMI's side had moved on and were not involved in processing the UI invoices. With respect to the internal market analyses that reference "Potential RMR costs," DEMI contends that it is a mistake to combine RMR costs (relating to out-of-merit unit dispatch) and reliability cost tracker charges. According to DEMI, it is incorrect to assume that DEMI's analyses of "Potential RMR costs" include reliability cost tracker charges. Finally, DEMI states that the communications between the Parties, which were cited as course of performance evidence, are consistent with DEMI's view that the costs associated with RMR agreements arose from out-of-merit dispatch, and thus could be allocated to DEMI under the PSA.

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36. DEMI reiterates the arguments that it made, and that were addressed, previously in this proceeding.⁶⁵ DEMI does not present any new, or newly persuasive, arguments or identify additional evidence in support of its position. As discussed by the ALJ and adopted by the Commission, DEMI's course of performance belies any claim that DEMI did not know that it was liable for the reliability cost tracker charges. Course of performance under a contract is considered the most persuasive evidence of the parties' agreed intent.⁶⁶ How the Parties in this case practically interpreted the PSA for the

⁶³ *Id.* at 66.

⁶⁴ *Id.* at 69 (*citing* N.Y. U.C.C. § 2-208(1)).

⁶⁵ *See, e.g.*, Opinion No. 493, 118 FERC ¶ 61,131 at P 26, 28-29.

⁶⁶ Initial Decision, 115 FERC ¶ 63,044 at P 93; *Federal Ins. Co. v. Americas Ins. Co.*, 258 A.D.2d 39, 44 (N.Y. App. Div. 1999) (citations omitted).

significant period before the dispute arose is “deemed of great, if not controlling influence.”⁶⁷

37. What DEMI characterizes as a mere “smattering of events and statements extracted from selected documents” includes DEMI’s participation in the NRG mediation as part of the “load” group;⁶⁸ DEMI’s acceptance of UI’s invoices that incorporate costs relating to RMR agreements (*i.e.*, CT Reliability COS charges);⁶⁹ DEMI’s internal market analyses that reference “Potential RMR costs”;⁷⁰ and communications between the Parties discussing DEMI’s responsibility for costs relating to RMR agreements.⁷¹ The volume and consistency of this evidence defines the Parties’ course of performance under the PSA. In light of the record as a whole, DEMI’s claim that it was unaware that the reliability cost tracker charges were being counted as DEMI’s cost responsibility from

⁶⁷ Initial Decision, 115 FERC ¶ 63,044 at P 93 (*quoting Federal Ins. Co.*, 258 A.D.2d at 44 (*citations omitted*)).

⁶⁸ DEMI actively participated in the NRG mediation in later 2002 and early 2003. Initial Decision, 115 FERC ¶ 63,044 at P 100; Ex. UI-21; Ex. UI-22; Ex. UI-23; Ex. UI-25; UI-26; UI-29.

⁶⁹ DEMI accepted invoices from UI for fix-payment RMR charges beginning the second month of the implementation of the PSA (*i.e.*, from April 2003 through December 2004). DEMI did not dispute the accuracy of these invoices until December 16, 2004. Initial Decision, 115 FERC ¶ 63,044 at P 90, 101, 114-17; Ex. DOM-34; Ex. DOM-36; Ex. UI-1 at 15-33; Tr. 46. DEMI’s witness Hanser concedes that DEMI’s acceptance of these invoices without question is not consistent with DEMI’s position. Tr. 234:9-13 (Hanser).

⁷⁰ Beginning in October 2002, DEMI’s employee prepared spreadsheets estimating future reliability costs tracker charges. Initial Decision, 115 FERC ¶ 63,044 at P 101; Ex. UI-11; Ex. UI-64 to UI-68; Ex. UI-71 to UI-72; Tr. 311:18 to 312:5; 319:5-22; 360:4-5, 10-15 (Armstrong).

⁷¹ An internal DEMI e-mail dated April 10, 2003, with the subject line stating “Potential RMR cost for UI deal” contained an estimate of DEMI’s exposure for costs resulting from UI’s RMR agreements. Initial Decision, 115 FERC ¶ 63,044 at P 101; Ex. UI-12 to UI-14. DEMI witness Armstrong testified that he (*i.e.*, DEMI) became aware of the reliability cost tracker charges while negotiating an extension of the PSA in the spring of 2003, yet DEMI did not act upon such awareness until November 2004. *Id.*; Ex. DOM-18 at 24-25 (Armstrong).

early 2002 until the end of 2004 may not be implausible but it is much less believable.⁷² DEMI acted as though the reliability cost tracker charges were its responsibility.

38. DEMI concedes, “What the evidence does show is that the NRG mediation became an all-inclusive, market-wide forum for addressing how to address the problems of financially-distressed generators that were needed by ISO-NE to ensure transmission system reliability.”⁷³ We agree. Through its participation in the NRG mediation, DEMI was aware of industry issues and options, which examined a “number of options on the table in the mediation beyond simply a cost-of-service RMR agreement.”⁷⁴ But such RMR agreements were one option on the table at which DEMI sat.

39. Further, the audit provision of Article XVI of the PSA provides the Parties, here DEMI, two years to “verify the accuracy of any statement, charge or computation made pursuant to [the PSA].”⁷⁵ Verification of the accuracy of the billing statements as adjusted by UI for the reliability cost tracker charges is not the same thing as contesting the validity of DEMI’s responsibility for the reliability cost tracker charges themselves. The audit provision of Article XVI would be aptly applied if, for example, UI had deducted \$115,000 from a given billing statement instead of deducting \$100,000, which was the accurate amount for that month. Here, the dispute is not over the accuracy of an amount but rather over the applicability of any reliability cost tracker charges at all. This provision, therefore, is inappropriately used in this context.

40. Accordingly, we find that DEMI’s course of performance illustrates that, prior to December 2004, DEMI understood that the reliability cost tracker charges at issue were its responsibility under the PSA.

41. For the foregoing reasons, we will deny DEMI’s request for rehearing.

⁷² We note that DEMI also has made several statements to the Commission in other proceedings, some of which were introduced in this proceeding by UI, that strongly suggest DEMI assumed its obligation for the reliability cost tracker charges at issue. UI Brief Opposing Exceptions at 38-39 (*citing*, among others, Ex. UI-31 at 3, UI-78 at 6, 12-13).

⁷³ DEMI Request for Rehearing at 70.

⁷⁴ *Id.* at 70-71.

⁷⁵ Ex. UI-4 at 61 (PSA Art. XVI).

The Commission orders:

DEMI's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.