

122 FERC ¶ 61,273
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.

Norwalk Power, LLC

Docket Nos. ER07-799-002
ER07-799-003
EL07-61-001
EL07-61-002

ORDER DENYING REHEARING, GRANTING CLARIFICATION AND
ACCEPTING COMPLIANCE FILING

(Issued March 24, 2008)

1. On April 26, 2007, as supplemented on May 17, 2007, Norwalk Power, LLC (Norwalk) filed a proposed unexecuted Reliability Must Run (RMR Agreement) between itself, NRG Power Marketing Inc. (as Norwalk's agent) and the ISO New England Inc. (ISO-NE), for Norwalk Harbor Units 1 and 2 located in southwest Connecticut. In an order issued July 16, 2007, the Commission conditionally accepted and suspended for a nominal period Norwalk's RMR agreement, effective June 19, 2007, subject to refund, and set it for hearing and settlement judge procedures.¹ On August 15, 2007, Norwalk submitted a timely request for rehearing of the July 16 Order. On the same date, Norwalk submitted a compliance filing pursuant to the Commission's directive in the July 16 Order. For the reasons discussed below, we deny Norwalk's rehearing request, accept Norwalk's compliance filing, and provide clarification.

I. Background

2. As we noted in the July 16 Order, the Commission has been addressing issues concerning the sufficiency of New England's capacity markets and the use of RMR agreements since 2003.² Norwalk's RMR agreement differs from ISO-NE's *pro forma* cost-of-service agreement (*pro forma* COS agreement) with respect to: (1) a proposed management fee; (2) a revised section 5.2.2(d), which establishes an effective date of one day after an FPA section 205³ filing for revision of the Revised Monthly Fixed-Cost

¹ *Norwalk Power, LLC*, 120 FERC ¶ 61,048 (2007) (July 16 Order).

² *Id.* P 2-4.

³ 16 U.S.C. § 824d (2000).

Charge in the event of a shut-down of one of Norwalk's units; and (3) a new section 5.3, which introduces an Environmental Compliance Cost Tracker (ECCT). ISO-NE did not agree to the inclusion of sections 5.2.2(d) and 5.3. Thus, Norwalk submitted both sections pursuant to section 206 of the FPA.⁴ Norwalk's RMR agreement also proposes the recovery of a management fee as part of its annual fixed revenue requirement.

3. In the July 19 Order, the Commission initiated hearing and settlement judge procedures to examine whether Norwalk requires a cost-of-service RMR agreement to remain available to provide reliability service. A settlement judge was appointed to assist the parties with a settlement. The first settlement conference convened on November 8, 2007. Settlement negotiations continue today.

4. The July 19 Order also directed Norwalk to file a compliance filing within 30 days. On August 15, 2007, in Docket No. ER07-799-003, as directed, Norwalk filed a revised RMR agreement to reflect the removal of: (1) the proposed management fee; (2) section 5.3, Environmental Compliance Cost Tracker (ECCT); and (3) section 5.2.2(d) (the revised effective date).

5. Norwalk seeks rehearing on four determinations made in the July 19 Order. First, Norwalk contends that it is not required to satisfy the facility costs test as a condition for its eligibility for an RMR agreement.⁵ Second, Norwalk contends that its inclusion of a management fee in its cost-of-service as a proxy for a traditional rate of return is just and reasonable and should be set for hearing. Third, Norwalk contends that its amendment to section 5.2.2(d) of the *pro forma* COS agreement establishing the day after the shut-down date as the effective date for the revised monthly fixed cost charge if one of the units shuts down is just and reasonable in this case. Finally, Norwalk contends that its proposed addition of an ECCT is just and reasonable.

6. In response to Norwalk's request for rehearing, CT Parties⁶ filed a motion for leave to answer and answer to Norwalk's request for rehearing. Norwalk, in turn, filed a motion for leave to answer and answer.

⁴ 16 U.S.C. § 824e (2000 & Supp. V 2005).

⁵ Under the facility costs test, the Commission evaluates whether a unit has sufficient revenue to pay the costs ordinarily necessary to keep a facility available, such as fixed O&M, administrative and general (A&G), and taxes. *See Bridgeport Energy LLC*, 112 FERC ¶ 61,077 at P 35 (*Bridgeport I*), *reh'g denied*, 113 FERC ¶ 61,311 (2005) (*Bridgeport II*), *reh'g rejected*, 114 FERC ¶ 61,265 (2006).

⁶ CT Parties include: The Connecticut Municipal Electric Energy Cooperative, Connecticut Department of Public Utility Control, Connecticut Office of Consumer Counsel, and Richard Blumenthal, Attorney General for the State of Connecticut.

II. Discussion

A. Procedural Matters

7. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2007), prohibits answers to requests for rehearing. Accordingly, we reject the answers.

B. The Commission's Application of the Facility Costs Test

1. Rehearing Request

8. Norwalk offers three basic arguments in its request for rehearing of the Commission's determination that Norwalk must satisfy the facility costs test to be eligible for a cost-of-service RMR agreement. First, the Commission's application of the facility costs test violates the filed rate doctrine because Market Rule 1 authorizes generators needed for reliability to file for full cost-of-service rates.⁷ Second, the facility costs test is confiscatory, violating Norwalk's right to file and charge a just and reasonable rate under section 205 of the FPA⁸ to the extent that it results in Norwalk being required to provide reliability service to ISO-NE at a rate less than its cost-of-service. Third, the Commission's application of the facility costs test to Norwalk is contrary to its prior holdings that generators like Norwalk do not have a reasonable opportunity to recover their costs in the existing market.⁹

9. First, Norwalk contends that because the facility costs test is not an element of the standard eligibility for an RMR agreement as set forth in Market Rule 1, its application to Norwalk violates the filed rate doctrine. According to Norwalk, under Market Rule 1, the Commission can implement a financial eligibility threshold requirement for RMR Agreements, like the facility costs test, only after it first makes a determination under

⁷ *Citing*, ISO New England Inc., FERC Electric Tariff No. 3, section III, Appendix A, Exhibit 2, § 2.3 (Jun. 19, 2007).

⁸ *Citing*, 16 U.S.C. § 824(d); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989); *Bluefield Water Works & Improvement Co. v. Public Service Commission*, 262 U.S. 679 (1923).

⁹ *Citing*, *Devon Power, et al.*, 104 FERC ¶ 61,123, at P 33 (2003); *Devon Power, et al.*, 107 FERC ¶ 61,240, at P 72 (2004); *Devon Power*, 115 FERC ¶ 61,340, at P 203-4 (FCM Settlement Order), *reh'g denied*, 117 FERC ¶ 61,133 (2006), *appeal pending sub nom. Maine Public Utilities Commission v. FERC*, No. 06-1403, *et al* (D.C. Cir.).

section 206 of the FPA¹⁰ that the current eligibility requirements are unjust and unreasonable and that the eligibility threshold requirement it proposes will produce just and reasonable rates.

10. Moreover, Norwalk states that Market Rule 1 authorizes ISO-NE, not the Commission, to make a determination whether it requires a particular unit to stay in service for reliability reasons. Norwalk states that Market Rule 1 does not require a resource to demonstrate that it has not recovered its facility costs during past periods, or that it will not recover them in the future. Norwalk contends that the facility costs test is inappropriately applied to Norwalk because the test was developed to determine RMR eligibility for new and efficient baseload generators, and was not intended for units like Norwalk that were seldom run and frequently subject to mitigation under the current market rules.¹¹

11. In its second argument, Norwalk states that public utilities have a right to file just and reasonable rates of their own design,¹² including cost-based rates, even where there are functioning centralized markets.¹³ Norwalk argues that even if Market Rule 1 did not specifically authorize a generator to charge a cost-of-service rate, the Commission cannot rely upon Market Rule 1, or its interpretation of that tariff as embodied in the facility costs test, to trump Norwalk's statutory right to obtain a fully-compensatory rate.¹⁴ Norwalk contends that the facility costs test infringes on a seller's right to file and obtain a fully-compensatory rate by requiring that a seller continue to suffer losses unless and until revenues are insufficient to recover a subset of its full cost-of-service (i.e., its facility costs).

12. Finally, Norwalk states that the FCM will not begin compensating generators until 2010 and that the Commission has acknowledged that the transition payments are well below the costs of new entry.¹⁵ Norwalk argues that even if the Commission were authorized to restrict Norwalk's right to file a full cost-of-service rate under Market Rule 1 and section 205 in a competitive market, the Commission has not made the necessary

¹⁰ 16 U.S.C. § 824e (2000 & Supp. V 2005).

¹¹ *Citing, Bridgeport II*, 113 FERC ¶ 61,311 at P 12.

¹² *See Commonwealth of Massachusetts v. United States*, 729 F.2d 886, 888 (1st Cir. 1984).

¹³ *See, e.g., San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Service Into Markets*, 99 FERC ¶ 61,159, at 61,641 (2002).

¹⁴ *Citing, Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002).

¹⁵ *Citing, FCM Settlement Order*, 115 FERC ¶ 61,340 at P 101.

finding that the current market is competitive. Without such a Commission determination, Norwalk contends that it is entitled to a full cost-of-service rate until such an opportunity exists and for so long as it is required to provide RMR service.

2. Commission Determination

13. We deny rehearing of the Commission's determination that Norwalk must demonstrate its RMR eligibility through the facility costs test as a prerequisite of the Commission's acceptance of the RMR agreement. The Commission has established in numerous previous orders the process it uses in evaluating RMR agreements with ISO-NE. Part of that evaluation is assessing whether a seller that is participating in the ISO-NE markets receives sufficient revenues from those markets to cover the costs ordinarily necessary to keep a facility available. Thus, the Commission's articulation of the process it uses in determining whether rates to be charged under an RMR agreement are just and reasonable is not inconsistent with the filed rate doctrine or with Market Rule 1. To the contrary, the Commission is providing transparency in its processes, is not precluding the filing of any particular agreement, and is ensuring that the agreement in the context of ISO-NE markets is producing just and reasonable rates. As we noted in the July 16 Order, designation of a reliability need by ISO-NE does not guarantee Commission approval of the rates or terms proposed in any specific RMR agreement.¹⁶

14. Market Rule 1 is part of the ISO-NE filed rate that provides, among other things, procedures for the negotiation of a cost-of-service agreement, but which does not guarantee any specific rates.¹⁷ It does not require Commission approval of an RMR agreement upon a determination by ISO-NE that a generator is needed for reliability – nor could it (since the Commission must review and approve the agreement's rates and terms). Rather, Market Rule 1 authorizes ISO-NE, in consultation with the Independent Market Monitoring Unit, to make a determination that a particular generator is needed for reliability purposes and, once that determination is made, to pursue “whatever financial arrangements are necessary to ensure that the facility will be available.”¹⁸ ISO-NE therefore has the authority to make an initial reliability determination, subject to Commission review, and to negotiate a proposed RMR agreement. As we have explained in other orders, the Commission has a statutory obligation under section 205(a) of the FPA to review every proposed RMR agreement to determine whether the rates and terms

¹⁶ July 16 Order, 120 FERC ¶ 61,048 at P 27 (*citing Bridgeport I*, 112 FERC ¶ 61,077 at P 35).

¹⁷ ISO New England Inc., FERC Electric Tariff No. 3, Third Revised Sheet Nos. 7461-62.

¹⁸ *Id.* at 7461.

proposed are just and reasonable, and not unduly discriminatory or preferential.¹⁹ Thus, although Market Rule 1 authorizes ISO-NE to negotiate RMR agreements as it deems necessary, any resulting agreements must be filed with the Commission and, as such, are subject to the review of the Commission.²⁰

15. The Commission has previously stated in the context of reviewing potential RMR agreements that “we must examine the facts in each instance against the standard of section 205(a) of the FPA that all rates and charges demanded by any public utility for the sale of electric energy subject to the Commission’s jurisdiction shall be just and reasonable.”²¹ The Commission has developed and uses the facility costs test to help determine the justness and reasonableness of proposed RMR agreements.²² In determining whether a proposed RMR agreement is necessary to keep a generator available to provide reliability service, the Commission will compare facility costs like fixed operation and maintenance, administrative and general, and taxes to revenues earned in the energy and capacity markets.²³ Norwalk questions whether the Commission should apply the facility costs test to older generators. Addressing precisely this argument, the Commission has explained previously that “we did not state that the Facility Costs Test was *only* applicable to the *Milford* and *Bridgeport* RMR proceedings, or to new, efficient baseload generators.”²⁴ The Commission has consistently applied the

¹⁹ *E.g.*, *Bridgeport Energy, LLC*, 118 FERC ¶ 61,243, at P 61 (2007) (*citing Devon Power LLC*, 107 FERC ¶ 61,240, at P 72, *order on reh’g*, 109 FERC ¶ 61,154 (2004), *order on reh’g*, 110 FERC ¶ 61,315 (2005)).

²⁰ *New England Power Pool*, 100 FERC ¶ 61,287, at 62,268 (2002); *see also Bridgeport I* at P 32 (stating that the Commission “[does] not take the position that designation of a need for reliability from ISO-NE guarantees Commission approval of an RMR contract”).

²¹ *Bridgeport I*, 112 FERC ¶ 61,077 at P 32.

²² *See, e.g.*, *Bridgeport Energy*, 118 FERC ¶ 61,243 at P 61; *Mystic Development, LLC*, 116 FERC ¶ 61,168, at P 20-21 (2006); *Pittsfield Generating Company, L.P.*, 115 FERC ¶ 61,059, at P 39 (2006)(*Pittsfield I*), *settlement accepted and reh’g denied*, 119 FERC ¶ 61,001 (2007); *Consolidated Edison Energy Massachusetts, Inc.*, 112 FERC ¶ 61,253, at P 25, 32 (2005), *reh’g denied*, 114 FERC ¶ 61,099 (2006), *settlement accepted*, 116 FERC ¶ 61,311 (2006); *Consolidated Edison Energy Massachusetts, Inc.*, 116 FERC ¶ 61,180, at P 39-46 (2006); *Bridgeport I* at P 36-37, *reh’g denied*, *Bridgeport II* at P 26-30 (2005), *reh’g denied*, 114 FERC ¶ 61,265 (2006).

²³ *Bridgeport I*, 112 FERC ¶ 61,077 at P 36.

²⁴ *Pittsfield I*, 115 FERC ¶ 61,059 at P 39.

facility costs test to all generators seeking RMR agreements post-*Milford*, including Consolidated Edison, which was not a new, efficient baseload generator.²⁵ The facility cost test looks to the ability of generators to earn revenues through the market in considering the rates to be charged under proposed RMR agreements and is not simply for older, inefficient units.

16. We note that the Commission did accept some limited RMR agreements without applying the facility costs test prior to *Milford* and *Bridgeport*.²⁶ However, as demonstrated by the support provided in those prior filings (including formal requests to deactivate), it was clear that these peaking units were not able to earn sufficient revenues to remain in the market.²⁷ As we noted in the July 16 Order, Norwalk's filing represents the first application for RMR treatment from a generation facility that is currently receiving transition payments under the terms of the FCM settlement.²⁸ Norwalk failed to provide adequate evidence to demonstrate that, in addition to market revenues, these transition payments²⁹ are insufficient for Norwalk to remain available to provide reliability service from its units. The fact that Norwalk's units are old and inefficient does not excuse Norwalk from demonstrating its eligibility through the facility costs test.³⁰ Norwalk has not persuaded us to depart from this precedent.

17. Norwalk also contends that the Commission is required to find the market competitive and without such a determination it is entitled to a full cost-of-service rate. Norwalk is mistaken. The FPA requires the Commission to ensure that rates are just and reasonable, i.e., that rates be neither too high nor too low to be confiscatory, and does not prescribe one particular method of doing so. Under section 205 of the FPA, the burden is on Norwalk to demonstrate the justness and reasonableness of its proposed RMR agreement. As stated above, the Commission in several previous orders articulated the process by which it would evaluate RMR agreements with ISO-NE, and Norwalk failed to meet its burden.

²⁵ *Id.*

²⁶ *Bridgeport II*, 113 FERC ¶ 61,311 at P 12.

²⁷ *Id.*

²⁸ July 16 Order, 120 FERC ¶ 61,048 at P 27.

²⁹ Under the terms of the FCM Settlement Agreement, current transition payments equal \$3.05 kW/month and will increase annually until capping at \$4.10 kW/month during the 2009-2010 period. For Norwalk, this amounts to an additional annual cost recovery of approximately \$12 - \$17 million.

³⁰ *See Pittsfield I*, 115 FERC ¶ 61,059 at P 39.

C. Norwalk's Proposed Management Fee

1. Rehearing Request

18. Norwalk claims that the Commission erred in finding that Norwalk is not entitled to a management fee under the *pro forma* cost-of-service agreement in Market Rule 1, while it allows such fees for traditional cost-of-service rates. Norwalk states that the recovery of a management fee is not excessive because the ISO-NE market design has been found to be unjust and unreasonable and there is no alternative form of cost recovery creating a reasonable opportunity for the RMR unit to earn a return on its investment while being required to provide reliability service.³¹ Norwalk states that the proposed management fee is appropriate since circumstances beyond its control, such as forced outages could result in Norwalk's inability to recover its fixed costs under the RMR Agreement.

19. Norwalk contends that the proposed management fee is a just and reasonable proxy for traditional rates of return, and the Commission's rejection of it was discriminatory and confiscatory where it has approved rates of return for other RMR generators in New England.³² Norwalk notes that the July 16 Order did not reject the principle that it is appropriate for a generator to recover a management fee as a proxy for, and in lieu of, a return on rate base where the generator's plant is fully depreciated. Norwalk also states that Market Rule 1 draws no distinction between cost-of-service RMR agreements and traditional cost-of-service rates and that, therefore, the distinction the Commission has drawn here is contrary to the filed rate.

20. Norwalk contends that it is entitled to a reasonable rate of return including both a return on investment in the physical plant, as well as compensation for the risks of owning and operating an electric generating plant.³³ Thus, even though its plant is fully depreciated, Norwalk contends that its owners are still entitled to compensation for the risks of owning and operating the units. Norwalk also states that the Commission erred in considering additional recovery available from capacity transition payments. Norwalk

³¹ Norwalk Rehearing at 16.

³² *Id.* at 17 (citing *PSEG Power Connecticut, LLC*, 110 FERC ¶ 61,020, at P 30 (2005)) (“In *Mirant*, we rejected the exclusion of operations and maintenance, administrative and general, depreciation, and property tax expenses and further clarified that the Commission has permitted the recovery of these costs during the period the units operate under RMR agreements including taxes and a reasonable rate of return.”).

³³ *Id.*

states that this was a mistake because Norwalk will get no additional recovery from capacity transition payments because they are offset against, and thereby reduce, its Monthly Fixed Cost Charge.

21. Norwalk states that the Commission recently approved a Facilities Agreement between Southern Carolina Electricity & Gas (SCE&G) and New Horizon for the construction of an additional delivery point which included, as part of the monthly operations and management charge a management fee to be paid to SCE&G based on the equity component of its rate of return.³⁴ Norwalk states that its business risks are identical to SCE&G's purported risks. Norwalk also notes that SCE&G relied upon the Commission's decision in *Tarpon Transmission Company*,³⁵ just as Norwalk did in its April 26 filing.

2. Commission Determination

22. We deny rehearing on Norwalk's use of a management fee for the same reasons we articulated in our July 16 Order.³⁶ As stated in the July 16 Order, the Commission's benchmark for granting RMR agreement approval is the concern that, absent an RMR agreement, the facility will be unable to continue operation.³⁷ Contrary to this standard, Norwalk asks the Commission to accept a fee it admits would compensate its owners over and above the *pro forma* cost-of-service RMR agreement for business risks associated with operation and management costs.

23. As we noted in the July 16 Order, Norwalk misconstrues the intent of RMR agreements. Addressing Norwalk's identification of forced outage risk as a basis for the proposed management fee, Norwalk is under no obligation to pursue an RMR agreement for these units. Further, similar older, depreciated units in New England have not been granted the recovery of a management fee, even before the approval of capacity transition payments in New England. Norwalk is presently eligible for \$12 million to \$17 million of additional annual cost recovery through capacity transition payments as part of the FCM settlement. Thus, an additional incentive payment, such as a management fee, is not needed to make such units economically viable. Moreover, our conditional approval

³⁴ *Id.* at 18 (*citing South Carolina Elec. & Gas Company*, Docket No. ER07-423-000 (Apr. 20, 2007) (unpublished letter order)).

³⁵ *Tarpon Transmission Co.*, 57 FERC ¶ 61,371 (1991).

³⁶ July 16 Order, 120 FERC ¶ 61,048 at P 42-44.

³⁷ *Id.* at P 42 (*citing Bridgeport I*, 112 FERC ¶ 61,077 at P 39).

of the instant RMR agreement reduces operating risk faced by Norwalk, by allowing for the recovery of fixed and variable costs for these units, making the requested management fee unnecessary.

24. The Commission did not err in the consideration of transition payments as alleged by Norwalk. We are aware that, upon approval of an RMR agreement, these transition payments are netted out of any approved RMR revenues. However, these payments *are* relevant in the Commission's assessment of Norwalk's initial eligibility for an RMR contract, because we approve RMR contracts only on a last resort basis. Norwalk's application for RMR treatment represents the first post-transition payment RMR application, and thus consideration of transition payments is appropriate in applying the just and reasonable standard.

25. The only new support Norwalk offers is a delegated letter order accepting for filing – not “approving” as Norwalk contends – an uncontested Facilities Agreement submitted by South Carolina Gas & Electric. Not only does Norwalk misstate the Commission's action on this precedent, it also errs in relying upon action taken by Commission staff in a letter order that explicitly disclaims any Commission approval of any service, rate, charge, classification, or any rule, regulation, or practice affecting such rate or service provided for in the filed documents. Further, we find no basis for the assertion that Norwalk's business risks are identical to SCE&G's risks, since SCE&G is not a generator in New England operating under the ISO-NE tariff. For all the foregoing reasons, we deny rehearing on Norwalk's proposed inclusion of a management fee.

D. Norwalk's Proposed Effective Date Under Single Unit Shut-Down

1. Rehearing Request

26. Norwalk contends that section 5.2.2(d) of the *pro forma* RMR agreement is unjust and unreasonable because it may result in Norwalk not recovering its costs of operating a single unit for the period when its amended monthly fixed-cost charge filing is pending before the Commission. Norwalk claims that if one of its two units were to be shut down, Norwalk would continue to receive the full amount of the monthly fixed-cost charge, but the charge itself would be reduced by at least half because of the non-availability of the shut-down unit. Norwalk explains that the costs of running a single unit would be substantially higher because of the loss of economies of scale and cost-sharing between the units. Norwalk argues that it has met its burden under section 206 to revise section 5.2.2(d) of the *pro forma* cost-of-service agreement to establish the day after the shut-down date of the other unit as the effective date for the amended monthly fixed-cost.

27. Norwalk contends that an earlier effective date is necessary because it is unable to anticipate a forced outage leading to a shutdown. Without an earlier effective date, Norwalk states that it will be at risk of not recovering its costs for at least the sixty-day

notice period following the filing of the amended monthly fixed-cost charge. Norwalk claims that there would be no prejudice in accepting the proposed revision establishing an earlier effective date since the amendment to the monthly fixed-cost charge would be subject to refund.

2. Commission Determination

28. We deny rehearing for the same reasons we expressed in our July 16 Order.³⁸ In its request for rehearing, Norwalk did not provide any additional support for revising section 5.2.2(d) of the *pro forma* cost-of-service agreement to establish an effective date of one day after a section 205 filing for revisions of the Revised Monthly Fixed-Cost Charge in the event of the shut-down of one of the Norwalk Harbor Units. Norwalk simply states that the current effective date in section 5.2.2(d) is unjust and unreasonable because it *may* result in Norwalk not recovering its costs of operating a single unit for the period when its amended Monthly Fixed-Cost Charge is pending before the Commission. Similarly unpersuasive is Norwalk's proposition that the cost of running a single unit, in the event of a shutdown, will be substantially greater than half of the Monthly Fixed-Cost Charge, because of the loss of economies of scale and cost-sharing. Norwalk would be receiving a fixed-cost charge for the operation of a single unit just as any other qualifying generator operating a single unit. Norwalk has again failed to meet its burden under section 206 of the FPA,³⁹ and we deny rehearing.

E. Norwalk's Proposed Environmental Compliance Cost Tracker

1. Rehearing Request

29. Norwalk contends that the Commission misunderstood the nature of the proposed ECCT provision and, thus, seeks rehearing on the Commission's decision to reject Norwalk's inclusion of the ECCT in its proposed RMR agreement. Norwalk states that the ECCT simply establishes a framework for filing a future 205 filing much like the one for forced outages in section 5.2.2(e). Norwalk notes that the ECCT does not commit the Commission to approve any particular expenditure and any payments Norwalk receives under the ECCT would be subject to refund. Norwalk states that the expenditures will be identified in detail in the section 205 filing under proposed section 5.3.2 and that they will be designed to satisfy the environmental compliance requirements in the most cost effective manner possible.

30. Norwalk also contends that the environmental compliance costs are not entirely speculative, nor is the ECCT premature. Norwalk states that, in order to meet a

³⁸ July 16 Order, 120 FERC ¶ 61,048 at P 60.

³⁹ See 16 U.S.C. § 824e (2000 & Supp. V 2005).

May 2009 compliance date for NOx emission standards on generators, it expects it will have to schedule two extended outages, one for each unit, which cannot overlap. To complete engineering, design, procurement, outage scheduling and installation milestones, Norwalk contends that it will be necessary to start incurring environmental compliance costs no later than upon issuance of Connecticut Department of Environmental Protection regulations, which Norwalk states were expected to issue in December 2007.⁴⁰ Norwalk contends that it may be unable to comply with the regulations if it is unable to secure funding for such compliance expenditures.

31. In addition, Norwalk argues that the Commission should grant rehearing and find that the ECCT is just and reasonable for the same reasons that section 5.2.2(e) of the *pro forma* cost-of-service agreement is just and reasonable. Norwalk points out that under section 5.2.2(e) of the *pro forma* cost-of-service agreement, if a generator issues a notice of shut-down because of a forced outage, ISO-NE could approve the disbursement of additional expenses to recover from the forced outage. Norwalk contends that the ECCT operates in very much the same manner but obviates the need to first declare a forced outage and shutdown.

32. Alternatively, Norwalk requests clarification that nothing in Market Rule 1 or the Norwalk RMR agreement on file with the Commission will preclude Norwalk from recovering, through post hoc section 205 filings, new environmental compliance costs once they become more certain.

2. Commission Determination

33. We deny rehearing but grant clarification on Norwalk's proposed ECCT. We clarify that nothing in Market Rule 1 or the Norwalk RMR agreement on file with the Commission precludes Norwalk from seeking recovery through a *post hoc* section 205 filing of new environmental compliance costs once they become more certain. We find that *post hoc* section 205 filings offer an appropriate mechanism to recover just and reasonable environmental costs, including the potential costs associated with the pending regulations cited by Norwalk. Thus, Norwalk failed to meet its burden under section 206 to revise the *pro forma* COS agreement to include the ECCT.⁴¹

⁴⁰ We are unable to confirm whether these regulations have issued because Norwalk failed to identify with specificity which proposed regulations it is contemplating.

⁴¹ *See* 16 U.S.C. § 824e(b) (2000 & Supp. V 2005) (stating that “the burden of proof to show that any rate, charge, classification, rule, regulation, practice or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon ... the complainant”).

F. Norwalk's Compliance Filing

34. In the July 16 Order, the Commission directed Norwalk to submit a compliance filing within 30 days, i.e., by August 15, 2007, removing all proposed modifications to ISO-NE's *pro forma* COS agreement. We find that Norwalk has complied with the Commission's directives in the July 16 Order. Consistent with our decision to deny Norwalk's rehearing request, we will accept for filing the set of tariff sheets reflecting the removal of its proposed management fee, revisions to section 5.2.2(d) and proposed section 5.3, effective June 19, 2007.

The Commission orders:

(A) The request for rehearing is hereby denied, as discussed in the body of this order.

(B) The request for clarification is hereby granted, as discussed in the body of this order.

(C) Norwalk's compliance filing is accepted as filed, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.