

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PSEG Power Connecticut, LLC

Docket No. ER05-231-004

ORDER DENYING REHEARING

(Issued November 28, 2005)

1. On July 20, 2005, the Connecticut Department of Public Utility Control, Connecticut Office of Consumer Counsel, Richard Blumenthal, Attorney General for the State of Connecticut, and Connecticut Municipal Electric Energy Cooperative (collectively Connecticut Parties) filed a request for rehearing of the Commission order issued June 20, 2005 in this proceeding.¹ In that order, the Commission granted in part and denied in part requests for rehearing of the Commission's January 14, 2005 Order.² The January 14 Order accepted, suspended and set for hearing and settlement judge procedures reliability must run (RMR) agreements between PSEG Power Connecticut, LLC (Power Connecticut) and ISO New England, Inc. (ISO-NE). In this order, the Commission denies rehearing.

Background

2. As we noted in the Order on Rehearing, the RMR agreements filed by Power Connecticut in the instant docket cover charges for reliability services provided by Power Connecticut to ISO-NE from the New Haven Harbor Generating Station (New Haven) and Unit 2 of the Bridgeport Harbor Generating Station (Bridgeport Harbor). Power Connecticut and ISO-NE negotiated the RMR agreements under section 3.3 of Exhibit 2,

¹ *PSEG Power Connecticut, LLC*, 110 FERC ¶ 61,441 (2005) (Order on Rehearing).

² *PSEG Power Connecticut, LLC*, 110 FERC ¶ 61,020 (2005) (January 14 Order).

Appendix A of Market Rule 1.³ Power Connecticut argued in its filing that the RMR agreements are necessary to ensure that the New Haven and Bridgeport Harbor facilities remain in operation to support reliability and are properly compensated for providing reliability services. Power Connecticut noted that ISO-NE made the determination, on two separate occasions, that the New Haven and Bridgeport Harbor units are needed for reliable system operation. Power Connecticut also submitted affidavits in support of its contention that it has under-recovered its costs for operation and maintenance of the RMR units.

3. The RMR agreements submitted by Power Connecticut generally took the form of the *pro forma* Cost of Service agreement contained in Market Rule 1, with some proposed modifications. The RMR agreements provide that Power Connecticut will be paid a fixed monthly charge for providing reliability services. Under the contracts, Power Connecticut is required to submit bids for the energy and ancillary services generated by the units, with any revenues earned by the units credited against the fixed monthly charge. The RMR agreements will expire on the implementation date of a locational installed capacity (LICAP) mechanism applicable to the facilities.

4. In the January 14 Order, the Commission accepted the RMR agreements for filing with certain modifications, suspended the rates contained in the agreements for one day, and set several matters related to the agreements for hearing and settlement judge procedures. In particular, while the Commission accepted Power Connecticut's general cost-of-service approach (including fixed and variable costs in the RMR agreements), it set several components of the cost-of-service for hearing, including claimed environmental remediation costs and Spring 2005 maintenance costs. The Commission also rejected certain proposed deviations from the *pro forma* Cost of Service agreement. The Commission also rejected a request by Power Connecticut for waiver of the 60-day notice requirement, and accepted the RMR agreements effective January 17, 2005.

5. In the Order on Rehearing, the Commission granted in part and denied in part several requests for rehearing and clarification of the January 14 Order. Among others, the Commission denied a rehearing request of Connecticut Parties that argued that the Commission erred in allowing Power Connecticut to file the RMR agreements for only the New Haven Harbor plant and unit 2 of the Bridgeport Harbor plant, and not instead requiring that revenues from its other units (including unit 3 of the Bridgeport Harbor plant) offset the costs of the units placed under the RMR agreements. The Commission

³ Market Rule 1 was approved by the Commission in *New England Power Pool and ISO New England, Inc.*, 100 FERC ¶ 61,287 (2002).

noted that it had addressed this argument in the January 14 Order, reasoning that generation owners often make decisions on a per-unit basis, and that in the cost of service era, wholesale power sales were often tied to the costs and availability of specific units.⁴ Additionally, the Commission concluded in the Order on Rehearing that combining the revenues of all of Power Connecticut's units for purposes of making RMR contract determinations would not be appropriate, since in New England each unit is bid into the market individually, and generating companies will therefore make investment and deactivation decisions based on the financial position of each individual unit.⁵ Further, the Commission rejected assertions by Connecticut Parties that federal case law requiring the Commission to review "the entire range" of a utility's costs and revenues dictated that the Commission consider all of Power Connecticut's revenues from all of its facilities in the analysis.⁶ The Commission also stated that the cost-of-service issues that were set for hearing in the January 14 Order included the determination of whether costs and revenues within the Power Connecticut generating fleet are allocated correctly, and that information regarding costs shared between units that are under the RMR agreements and those that are not was relevant to this determination.⁷ Finally, the Commission noted that it recognized the need to address the revenues received by Power Connecticut under its Standard Offer Service contract with United Illuminating, and had accordingly set that issue for hearing in the January 14 Order.⁸

6. In the Order on Rehearing, the Commission also granted rehearing regarding its denial in the January 14 Order of Power Connecticut's request for waiver of the 60-day notice requirement in section 205 of the Federal Power Act (FPA)⁹ and section 35.3 of the Commission's regulations.¹⁰ The Commission noted that it had denied Power Connecticut's waiver request out of concern over the unexplained elapse of time between the August 2004 determination by ISO-NE that the units were needed for reliability and

⁴ Order on Rehearing at P 29, *citing* January 14 Order at P 33.

⁵ January 14 Order at P 30.

⁶ *Id.* at 31.

⁷ *Id.* at P 32.

⁸ *Id.* at P 33.

⁹ 16 U.S.C. § 824d (2000).

¹⁰ 18 C.F.R. § 35.3 (2005).

the November 17, 2004 filing of the RMR agreements. On rehearing, Power Connecticut explained that after receiving the reliability determination from ISO-NE, it negotiated the RMR agreements with ISO-NE up until the date of filing. In the Order on Rehearing, the Commission granted waiver, finding that Power Connecticut's discussion of the process leading up to the filing of the RMR agreements had adequately explained why it could not file the agreements with 60 days notice.¹¹ Accordingly, the Commission revised the RMR agreements to become effective November 18, 2004.

Request for Rehearing

7. On rehearing, Connecticut Parties state that the Commission, in the Order on Rehearing, relied on a new rationale in rejecting their argument that Power Connecticut should not have been permitted to file the RMR agreements for only select units, and should have been required to use revenues from other units to offset the costs of the RMR units. According to Connecticut Parties, two lines of the Commission's reasoning represented different grounds from those relied on the January 14 Order: (1) bidding in New England is conducted on a per unit basis, thereby leading generators to make investment and operation decisions on a per unit basis and making consolidation of revenues for RMR analysis inappropriate;¹² and (2) Connecticut Parties incorrectly applied the cases regarding review of the "entire range" of a utility's costs and revenues because under the RMR agreements, Power Connecticut was providing a particular reliability service from particular units, unlike traditional bundled service.¹³

8. Connecticut Parties state that by assessing the need for RMR agreements only for the New Haven Harbor plant and unit 2 of the Bridgeport Harbor plant and permitting Power Connecticut to "cherry pick" those plants for RMR coverage, the Commission has excluded unit 3 of the Bridgeport Harbor plant (not under an RMR contract) from consideration. According to Connecticut Parties, this unit represents "a significant part of [Power Connecticut's] overall financial picture," and when its revenues and expenses are included in the analysis, Power Connecticut's financial condition is "wholly inconsistent with any assertion that [the units in question] should be under RMR contract coverage."¹⁴ To support this claim, Connecticut Parties provide data presenting a "rough

¹¹ January 14 Order at P 49.

¹² Order on Rehearing at P 30.

¹³ *Id.* at P 31.

¹⁴ Request for Rehearing of Connecticut Parties at 9.

approximation” of the combined returns for the New Haven Harbor plant and units 2 and 3 of Bridgeport Harbor plant.¹⁵ This data, Connecticut Parties contend, show an overall rate of return on equity for Power Connecticut of 20.79 percent without the RMR agreements, and a 35.21 percent rate of return with the RMR agreements.¹⁶ Connecticut Parties assert that these data show that Power Connecticut’s operations in Connecticut, overall, are receiving an “extraordinarily excessive” rate of return on total investment, fundamentally undercutting any claim that Power Connecticut is unable to recover the fixed costs of the generating units under the RMR agreements.¹⁷ Connecticut Parties argue that the Commission, under the FPA, must fully investigate the circumstances of Power Connecticut’s entire Connecticut operations.

9. Further, Connecticut Parties state that in light of these circumstances, the acceptance of the RMR agreements is arbitrary, capricious and contrary to law. Connecticut Parties reiterate their earlier contention that long-standing judicial precedent and Commission policy provides that a utility may not seek to collect regulated rates (like those provided by the RMR agreements) by choosing only certain expense and revenue categories, and that a complete analysis of all the revenues and expenses of a utility’s business operations is required to set a just and reasonable rate. Excluding unit 3 of Bridgeport Harbor from the analysis, they assert, is contrary to this policy.

10. Connecticut Parties also object to the Commission’s comparison of the RMR agreements to unit-specific contracts utilized during the era when most utility services were bundled.¹⁸ They argue that this analogy is misplaced because the earlier “unit-contingent” contracts were entered into bilaterally by the load serving entity and were generally part of a larger portfolio of resources. Connecticut Parties contest that this makes such contracts different from the RMR agreements, which are involuntarily imposed on load serving entities, and impose costs that consumers cannot hedge or

¹⁵ *Id.* at 10, n. 9.

¹⁶ *Id.* at 10.

¹⁷ *Id.* at 8, 10.

¹⁸ *See* Order on Rehearing at P 31, *citing* January 14 Order at P 33 (“[E]ven during the era when utilities generally provided bundled services, particular services offered from particular units were not uncommon, and in such situations, the Commission required that only the costs and revenues from those particular units be included when developing the rate.”)

otherwise avoid. Furthermore, they argue that the nature of RMR agreements as a “last resort” make them unlike the earlier unit-contingent contracts.

11. Connecticut Parties also challenge the Commission’s reasoning that combining the revenues of all of Power Connecticut’s units for purposes of making RMR contract determinations would not be appropriate, since in New England each unit is bid into the market individually, leading generators to make investment and deactivation decisions on a unit-by-unit basis. They argue that this analysis is misplaced because RMR agreements are attempts to opt out of the market, and thus the method of operation of the market is of no significance. Also, Connecticut Parties argue that it cannot be determined if an RMR agreement is the only option for ISO-NE to ensure that a unit remains in operation and that out-of-market financial arrangements are necessary to keep the unit in operation (two prerequisites for RMR agreements established by the Commission) without considering all the revenues of a generating unit owner.

12. Furthermore, Connecticut Parties assert that Power Connecticut views these units as a single enterprise, undercutting the Commission’s rationale that generating unit owners will make decisions on a unit-by-unit basis. To support this assertion, they point to the fact that New Haven Harbor and Bridgeport Harbor units 2 and 3 were purchased in a single transaction, and to a power purchase agreement that Power Connecticut has with its affiliate that, according to Connecticut Parties, does not differentiate between the three units.¹⁹ In addition, Connecticut Parties again note that Bridgeport Harbor is a single generating station, and Power Connecticut uses all of the units at the station to serve the standard offer contract between it and United Illuminating (UI). They contend that these units are “tightly knitted together,” and that there is a nexus between Power Connecticut’s units in Connecticut and the UI standard offer contract, given that UI’s peak load is only slightly more than the total megawatts of Power Connecticut generation under the RMR agreements. Connecticut Parties also cite statements from Power Connecticut’s Securities and Exchange Commission (SEC) 10-K as evidence of the nexus between the units and the UI contract.²⁰ They assert that allowing Power Connecticut to choose certain units for RMR coverage is contrary to the economic reality of the units at issue and their relationship to the UI standard offer contract, and that by entering into the RMR agreements, Power Connecticut is effectively renegeing on the UI contract.

¹⁹ Connecticut Parties state that this agreement was produced during discovery in the hearing procedures established in this proceeding.

²⁰ Request for Rehearing of Connecticut Parties at 15.

13. Connecticut Parties also seek rehearing of the Commission's decision to, on rehearing, grant Power Connecticut's request for waiver of the 60-day notice requirement. Connecticut Parties argue that Power Connecticut's assertion that the delay in filing the RMR agreements was due to the actions of ISO-NE is "untenable," since ISO-NE first determined in 2003 that all generating units in Connecticut (including the units at issue here) are needed for reliability and therefore Power Connecticut could have applied for the RMR agreements at any time since that determination. Additionally, Connecticut Parties contend that Power Connecticut's explanation that it was negotiating the RMR agreements with ISO-NE between August and November 2004 is similarly flawed, because a *pro forma* RMR agreement is already on file with the Commission, and, therefore, the only delay was the negotiation of deviations from that *pro forma* agreement requested by Power Connecticut. Finally, Connecticut Parties note that the Commission's grant of waiver will require two months of retroactive rate recovery from customers by load-serving entities.

Responsive Pleadings

14. On August 4, 2005, Power Connecticut submitted a motion to answer and answer and motion to strike. With regard to waiver of the 60-day notice requirement, Power Connecticut objects to the Connecticut Parties' assertion that the RMR agreements could have been filed earlier, and that the delay in filing the contracts was due to Power Connecticut's choice to seek modifications to the *pro forma* RMR agreement. Power Connecticut states that this assertion is misleading and fails to recognize that several sections of the *pro forma* RMR agreement in ISO-NE's tariff must be negotiated.²¹ Power Connecticut also states that certain provisions of the *pro forma* RMR agreement required modification as a result of discussions with ISO-NE to ensure that both parties had a common understanding of the requirements of the contract, and that the resulting modifications were either requested by ISO-NE or were modifications previously found acceptable by the Commission.

15. In response to Connecticut Parties' arguments on rehearing regarding the revenues from its other generating units, Power Connecticut asserts that the Commission has already addressed these arguments in both the January 14 Order and the Order on Rehearing, and should therefore deny the instant request for rehearing. Power Connecticut also contends that the revenue data presented by Connecticut Parties in their

²¹ Specifically, Power Connecticut notes that schedule 1 (stipulated bid costs), schedule 3 (operational characteristics) and schedule 4 (annual fixed revenue requirement) must be negotiated.

request for rehearing is “wholly inappropriate to be filed at this stage of the proceeding” because Commission precedent prohibits parties from using requests for rehearing to amend their original pleadings and offer new evidence. Accordingly, Power Connecticut also submitted a motion to strike this new data, arguing that Connecticut Parties have offered no justification for submitting it at this stage of the proceeding.

16. On August 19, 2005, Connecticut Parties filed a reply opposing Power Connecticut’s motion to answer, answer and motion to strike. Connecticut Parties argue that the motion to answer should be denied because the Commission’s rules do not permit answers to requests for rehearing, and because the answer does not respond to the point raised in the request for rehearing and makes the same arguments Power Connecticut has previously presented in answers. Connecticut Parties also oppose the motion to strike, arguing in part that the revenue data presented in their request for rehearing were not inappropriately raised at this point in the proceeding, since, they argue, these data respond to a rationale expressed by the Commission for the first time in the Order on Rehearing, and thus Connecticut Parties did not have an earlier opportunity to present such evidence.

Discussion

Procedural Matters

17. Rules 213(a)(2) and 713(d)(1) of the Commission’s Rules of Practice and Procedure generally prohibit answers to requests for rehearing unless otherwise ordered by the decisional authority.²² We will accept the answer of Power Connecticut because it has provided information that assisted us in our decision making process. Rule 213(a)(2) also prohibits answers to answers. We will accept the reply of Connecticut Parties because it has provided information that assisted us in our decision making process.

Substantive Matters

18. The Commission denies Connecticut Parties’ requests for rehearing. In both the January 14 Order and the Order on Rehearing, the Commission fully addressed Connecticut Parties’ contentions that the Commission may not allow Power Connecticut to file RMR agreements for only certain units and must consider the revenues from other Power Connecticut units.²³ In the Order on Rehearing, the Commission did not change

²² 18 C.F.R. §§ 385.213(a)(2) and 385.713(d)(1) (2005).

²³ January 14 Order at P 33-34; Order on Rehearing at P 29-33.

or modify the conclusion it reached on this issue in the January 14 Order. Therefore, Connecticut Parties have not justified submitting the “rough” data regarding Power Connecticut’s overall revenues at this point in the proceeding. As a result, we will grant Power Connecticut’s motion to strike.

19. Furthermore, we note that Connecticut Parties base their assertions on rehearing in large part on a claim that by permitting Power Connecticut to file the RMR agreements for only the New Haven Harbor plant and unit 2 of the Bridgeport Harbor plant, the Commission has “excluded” unit 3 of the Bridgeport Harbor plant from consideration. This claim ignores, however, our statements in both the January 14 Order and Order on Rehearing that the costs and revenues must be allocated correctly among all of Power Connecticut’s generating facilities to determine a just and reasonable rate for the units covered by the RMR agreements.²⁴ As the Commission stated in the Order on Rehearing, this will require consideration of the revenues and costs of unit 3 of the Bridgeport Harbor plant if all the units in that plant share costs. Therefore, the Commission has not excluded consideration of unit 3 as Connecticut Parties assert.

20. The Commission has stated repeatedly in this proceeding that addressing RMR agreements (including the costs pertaining to them) on a unit-by-unit basis is appropriate because historically generation owners often made wholesale sales and operating decisions on a unit-specific basis, and today in New England each unit is bid into the market individually and receives revenues on an individual basis for the services it provides.²⁵ Connecticut Parties have not presented any new arguments that convince the Commission to revisit this reasoning. Connecticut Parties’ arguments that RMR agreements cannot be compared to unit-specific contracts in the bundled cost-of-service era and that the method of operation of the New England market is of no significance to out-of-market arrangements ignore the basic nature and purpose of RMR agreements. RMR agreements are intended to ensure that generating units that are needed for reliability are available, and do not retire or otherwise cease operation because they are not recovering their costs. ISO-NE determines on a unit by unit basis whether a facility is needed to maintain reliability; if a unit is not earning sufficient revenues to cover operating costs, it may be placed under an RMR agreement subject to Commission approval to assure that it remains available. To prevent specific units that are needed for

²⁴ January 14 Order at P 34; Order on Rehearing at P 32.

²⁵ *See* January 14 Order at P 33; Order on Rehearing at P 30.

reliability from shutting down, it is appropriate and necessary to consider the costs and revenues of the specific unit at issue.²⁶

21. The Commission again rejects Connecticut Parties' attempt to rely on the cases regarding review of the "entire range" of a utility's costs and revenues. As we stated in the Order on Rehearing, these individual units are providing a particular reliability service, and in similar situations the Commission has required that only the costs and revenues from the particular units in danger of exiting the market be included when developing the rates.²⁷ Connecticut Parties have presented no new arguments on this point, and simply rehash the arguments that the Commission rejected in the Order on Rehearing.

22. We also again reject Connecticut Parties' contentions related to the UI standard offer service contract. The Commission fully addressed the relationship between this contract and the units subject to the RMR agreements by recognizing the need to consider the revenues Power Connecticut receives from that contract to ensure that such revenues are appropriately allocated to the units covered by the RMR agreements, and set the issue for hearing.²⁸ Additionally, we find no merit in Connecticut Parties' assertion that Power Connecticut's purchase of the units in a single transaction shows that they are treated as a single entity. How these units were purchased has no bearing on how they are operated by their owner today or how they are analyzed for purposes of determining just and reasonable rates.

²⁶ Even if the Commission were to accept the new evidence proffered by Connecticut Parties at this stage in the proceeding and were to accept the admittedly rough data as accurate, such data do not overcome the fact that the owner of a generating unit earning insufficient revenues may seek to deactivate that unit individually, apart from any other units it may own. For this reason, ISO-NE and the Commission must analyze individual units when considering RMR agreements.

²⁷ See Order on Rehearing at P 31, citing *Central Maine Power Co.*, 57 FERC ¶ 61083 at 61,304 (1991) (finding that in certain agreements for short-term sales, which identified the units used to provide the energy, the demand charge must be based on the fixed costs of the units providing the energy), citing *Indiana & Michigan Electric Co.*, 10 FERC ¶ 61,295 at 61,590-592 (1980) (stating principle in fuel conservation energy rates proceeding that capacity charges "shall not exceed the annualized costs of the units expected to be employed.")

²⁸ See January 14 Order at P 34; Order on Rehearing at P 33.

23. The Commission also denies Connecticut Parties' request for rehearing of our grant of waiver of the 60-day notice requirement. Connecticut Parties' assertion that waiver is inappropriate because Power Connecticut could have filed the agreements any time since ISO-NE determined in 2003 that all New England generators are needed for reliability is not persuasive. Power Connecticut is not seeking to have the RMR agreements become effective as of 2003, but instead sought and was granted an effective date of November 18, 2004, one day after the RMR agreements were filed. Additionally, we reject Connecticut Parties' argument that waiver should be denied because the delay in filing the agreements due to negotiation of certain provisions was caused by Power Connecticut. As Power Connecticut correctly points out in its answer, certain provisions of the *pro forma* RMR agreement require negotiation. Additionally, it was appropriate for the parties to negotiate and confer regarding other parts of the RMR agreements to confirm their understanding of the requirements of the contracts and avoid later disputes. We also note that the period of time between the August 31, 2004 date of ISO-NE's confirmation that the New Haven Harbor and Bridgeport Harbor units were needed for reliability purposes and the November 17, 2004 filing of the RMR agreements seems reasonable, given the amount of negotiation that Power Connecticut states took place.

The Commission orders:

The request for rehearing of Connecticut Parties is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.