

121 FERC ¶ 61,042
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.

Milford Power Company, LLC

Docket Nos. ER05-163-005
ER05-163-006

ORDER DENYING REHEARING AND ACCEPTING COMPLIANCE FILING

(Issued October 18, 2007)

1. On June 15, 2007, Richard Blumenthal, Attorney General for the State of Connecticut (Connecticut Attorney General), filed a request for rehearing of the Commission's May 18, 2007 order¹ approving in part, and rejecting in part, the contested Settlement Agreements² filed by the Settling Parties³ in this proceeding. On June 18, 2007, Milford Power Company, LLC (Milford) filed a separate request for rehearing of the May 18 Order. On July 18, 2007, the Settling Parties submitted a compliance filing pursuant to the Commission's directive in the May 18 Order. For the reasons discussed below, we deny Milford's rehearing request, deny the Connecticut Attorney General's rehearing request, and accept the Settling Parties' compliance filing.

I. Background

2. On November 1, 2004, Milford submitted for filing an unexecuted Reliability Must Run (RMR) agreement between Milford and ISO-NE.⁴ The RMR agreement states that Milford will collect a fixed monthly payment, based on its Annual Fixed Revenue

¹ *Milford Power Co., LLC*, 119 FERC ¶ 61,167 (2007) (May 18 Order).

² The Joint Offer of Partial Settlement Agreement (Partial Settlement Agreement) and the Joint Offer of Defined Cost of Service Settlement Agreement (Defined COS Settlement Agreement) (collectively, Settlement Agreements).

³ The Settling Parties are Milford, ISO New England Inc. (ISO-NE), the Connecticut Department of Public Utility Control (CT DPUC), and the Connecticut Office of Consumer Counsel (CT OCC).

⁴ Commission staff issued a deficiency letter on December 22, 2004. In response, Milford made a supplemental filing on January 21, 2005.

Requirement (AFRR), for providing reliability services from Milford Station—a relatively new, approximately 555 MW, two-unit, combined cycle generating facility in Southwest Connecticut.⁵

3. In *Milford I*, the Commission accepted Milford’s RMR agreement for filing, suspended it for a nominal period, effective November 3, 2004, subject to refund, ordered hearing and settlement judge procedures, and directed a compliance filing.⁶ The Commission held the hearing in abeyance pending the outcome of settlement discussions. In *Milford II*, the Commission denied rehearing.⁷ On April 19, 2006, the Settling Parties filed the Partial Settlement Agreement, which purported to resolve all issues except for Milford’s cost-of-service. On October 27, 2006, the Settling Parties filed the Defined COS Settlement Agreement, which purported to resolve the cost-of-service issues. Commission Trial Staff (Trial Staff), the Connecticut Attorney General, and the Connecticut Municipal Electric Energy Cooperative (CMEEC) contested the Settlement Agreements.⁸

4. Trial Staff opposed adding section 2.2.3 to the RMR Agreement. Section 2.2.3 gave Milford the ability to unilaterally terminate the RMR agreement on 30 days’ notice. Trial Staff argued that this provision would allow Milford to “whipsaw” between a guaranteed cost-of-service payment and a lucrative market-based rate.

5. CMEEC and the Connecticut Attorney General challenged the Settling Parties’ proposal to add section 9.6.1⁹ to the RMR agreement. Section 9.6.1 would have made

⁵ Milford Station shares use of a substation with two deactivated units, Devon 7 and 8. Devon 7 and 8 formerly provided reliability services under an RMR agreement with ISO-NE.

⁶ *Milford Power Co., LLC*, 110 FERC ¶ 61,299 (2005) (*Milford I*), *reh’g denied and clarification granted*, 112 FERC ¶ 61,154 (2005) (*Milford II*).

⁷ In a separate order, the Commission accepted Milford’s compliance filing made pursuant to the Commission’s directive in *Milford I*. See *Milford Power Co., LLC*, Docket No. ER05-163-003 (October 11, 2005) (unpublished delegated letter order).

⁸ CMEEC has not filed for rehearing.

⁹ The proposal to add section 9.6.1 was contained in section 5(u) of the Partial Settlement Agreement, as modified by section 4(c) of the Defined COS Settlement Agreement.

challenges to the RMR agreement by the Commission or a non-party under section 206 of the Federal Power Act (FPA)¹⁰ subject to the “public interest” standard of review.¹¹

6. The Connecticut Attorney General also made several arguments challenging Milford’s eligibility for RMR treatment. Specifically, the Connecticut Attorney General argued that Milford did not need an RMR agreement, that the Commission improperly deferred to ISO-NE’s conclusion that Milford is needed for reliability, that the Commission should have considered the Devon 7 and 8 units as reliability alternatives to a Milford RMR agreement, and that Milford should not be allowed to recover all of its fixed and variable costs. Additionally, the Connecticut Attorney General raised the possibility that once Milford began receiving transition payments under the Forward Capacity Market Settlement, its financial condition would improve to the point that it would most likely fail to qualify for RMR treatment under the Commission’s Facility Costs Test.¹²

II. The May 18 Order

7. In the May 18 Order, the Commission approved the Settlement Agreements in part, rejected the Settlement Agreements in part, and directed the Settling Parties to submit a compliance filing. The Commission agreed with Trial Staff, and rejected section 2.2.3 because it would have allowed Milford to switch between RMR treatment and market-based rates at will, depending on which regime produced a higher income.¹³ The Commission also held that the standard of review applicable to the Commission’s review of the RMR agreement and to any challenges to the RMR agreement by the Commission or non-parties is the just and reasonable standard.¹⁴ Accordingly, the Commission directed the Settling Parties to submit a compliance filing within 30 days of the May 18 Order removing all language that would allow Milford unilaterally to

¹⁰ 16 U.S.C. § 824e (2000).

¹¹ See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344-45 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353-55 (1956) (*Sierra*).

¹² See *Bridgeport Energy, LLC*, 112 FERC ¶ 61,077, at P 35, *reh’g denied*, 113 FERC ¶ 61,311 (2005) (*Bridgeport Energy*), *order rejecting reh’g*, 114 FERC ¶ 61,265 (2006).

¹³ May 18 Order, 119 FERC ¶ 61,167 at P 52. The Commission also noted that it rejected a similar provision in *Bridgeport Energy LLC*, 118 FERC ¶ 61,243 (2007) (*Bridgeport*) because of the potential for such abuse.

¹⁴ May 18 Order, 119 FERC ¶ 61,167 at P 31.

terminate the RMR agreement¹⁵ and replacing provisions specifying use of the public interest standard of review with provisions specifying the use of the just and reasonable standard of review.¹⁶

8. The Commission also found that, with the exception of the transition payments issue, the Commission had previously decided each issue raised by the Connecticut Attorney General.¹⁷ Accordingly, the Commission dismissed these previously-rejected arguments as impermissible collateral attacks on prior Commission orders.¹⁸

9. With respect to the transition payments issue, the Commission held that although it had not previously been addressed, it was outside the scope of the instant proceeding because it was not relevant to whether the Settlement Agreements were just and reasonable.¹⁹ The Commission distinguished this proceeding from *Bridgeport*, where the Commission ordered the Presiding Judge to consider the impact of the transition payments on Bridgeport's RMR eligibility.²⁰ The Commission explained that, unlike Milford, Bridgeport had never demonstrated its threshold eligibility for RMR treatment—that is, Bridgeport had not shown that it was eligible for RMR treatment before it started collecting transition payments—and as such, the Commission remanded the issue of Bridgeport's threshold RMR eligibility to the Presiding Judge. Because the hearing on Bridgeport's threshold RMR eligibility would take place after Bridgeport began to collect the transition payments, and the Connecticut Attorney General raised the issue of Bridgeport's continuing RMR eligibility—that is, Bridgeport's RMR eligibility in light of the transition payments—the Commission directed the Presiding Judge to evaluate Bridgeport's continuing RMR eligibility as part of the hearing examining its threshold RMR eligibility.

10. In contrast, the Commission stated that Milford had already demonstrated its threshold RMR eligibility, making any challenge to its continuing eligibility beyond the scope of the instant proceeding. The Commission further noted that Milford is not entitled to retain any transition payments above its AFRR under the terms of the Settlement Agreements, since such payments will be credited against the Monthly Fixed

¹⁵ *Id.* P 52, 56, Ordering Paragraph (B).

¹⁶ *Id.* P 32, 56, Ordering Paragraph (B).

¹⁷ *See Id.* P 46 & nn.82, 83, 84, 85.

¹⁸ *Id.* P 46.

¹⁹ *Id.* P 47-49.

²⁰ *Bridgeport*, 118 FERC ¶ 61,243 at P 62.

Cost Charge it collects under the RMR agreement.²¹ The Commission further stated that if the Connecticut Attorney General has evidence indicating that the transition payments will render Milford financially ineligible for RMR treatment, he may file a separate section 206 complaint proceeding.²²

III. Milford's Request for Rehearing and Compliance Filing

A. Rehearing Request

11. Milford requests rehearing of the Commission's directive that the Settling Parties remove all language in the Settlement Agreements that would allow Milford to unilaterally terminate the RMR agreement. Instead, Milford proposes that the Commission allow Milford to retain a modified version of section 2.2.3—one which would permit Milford to unilaterally terminate the RMR agreement on thirty days notice, but add the stipulation that if Milford exercises this right, it will not be permitted to seek a new RMR agreement for what would have been the remainder of the RMR term.²³

²¹ May 18 Order, 119 FERC ¶ 61,167 at P 48.

²² *Id.* P 49.

²³ Proposed section 2.2.3 states:

After 30 days notice to the ISO, the Owner may unilaterally terminate this Agreement prior to the end of the term provided for in section 2.1, provided that the Resource remains a Listed Resource until the earlier of the end of the operating hour beginning 11:00 p.m. on the day before (1) June 1, 2011; or (2) the first day of the first Commitment Period of a Forward Capacity Market as described in the LICAP [Locational Installed Capacity] Settlement Agreement; or (3) the date on or after which the Resource is no longer needed for system reliability as determined by the Commission in a proceeding pursuant to § 206 of the FPA or by ISO. Upon termination pursuant to this section 2.2.3, Owner shall not be permitted to file for a new COS agreement until the earlier of the end of the operating hour beginning at 11:00 p.m. on the day before: (1) June 1, 2011; or (2) the first day of the first Commitment Period of a Forward Capacity Market as described in the LICAP Settlement Agreement.

12. Milford contends that its proposed revision adequately addresses what Milford identifies as the Commission's objection to section 2.2.3 in the May 18 Order; namely, the potential for Milford to switch between cost-of-service and market-based rates. Milford argues that retaining the unilateral right to terminate the RMR agreement, as modified by the instant proposal, is consistent with the Settling Parties' intent, facilitates the Commission's objective of eliminating RMR treatment by permitting Milford to take advantage of market opportunities as they arise, and benefits Connecticut ratepayers by reducing "the market-distorting impact" of RMR agreements.²⁴ Moreover, Milford observes that neither the Connecticut Attorney General nor CMEEC objected to the original unilateral termination provision.

B. Compliance Filing

13. Milford's compliance filing contains two sets of revised tariff sheets: one set in anticipation that the Commission will grant Milford's request for rehearing and one set in anticipation that the Commission will deny rehearing. In both sets, Milford has revised section 9.6.1 to state that the Commission shall apply the just and reasonable standard of review when acting on proposed modifications or challenges to the RMR agreement either on the Commission's own motion or on a request or complaint pursuant to section 205²⁵ or 206 of the FPA. In one set, Milford has deleted section 2.2.3. In the other, it has revised section 2.2.3 according to its proposal in its rehearing request. Milford requests an August 1, 2007 effective date.

C. Notice of Compliance Filing and Responsive Pleadings

14. Notice of Milford's compliance filing was published in the *Federal Register*,²⁶ with interventions and comments due on or before August 8, 2007. No comments or interventions were filed.

D. Commission Determination

1. Rehearing Request

15. We deny rehearing. In the May 18 Order, the Commission rejected section 2.2.3 because it would create an opportunity for abuse by permitting Milford to repeatedly switch between cost-of-service and market-based rates, depending on which produced a higher income.

²⁴ Milford's Rehearing Request at 6.

²⁵ 16 U.S.C. § 824d(a) (2000).

²⁶ 72 Fed. Reg. 41,728 (2007).

16. On rehearing, Milford does not challenge the Commission's finding that section 2.2.3 could lead to abuse. Moreover, Milford does not argue that the Commission erred in its interpretation of section 2.2.3 or misapplied Commission policy in rejecting section 2.2.3. Rather, Milford proposes for the first time on rehearing an amended version of section 2.2.3 that retains its unilateral termination right, but adds additional language prohibiting it from switching back to RMR treatment during the remainder of the RMR agreement's term. As such, Milford is not really asking the Commission to rehear its previous decision; it is actually requesting that the Commission accept an amended filing. Commission policy is not to permit a utility to amend its filing on rehearing.²⁷ The Commission looks with disfavor on amendments filed on rehearing in order to avoid creating a continually moving target for parties seeking a final administrative decision, and to ensure that interested parties are given an opportunity to respond.²⁸ Accordingly, we deny Milford's request for rehearing. Our denial of rehearing, however, is without prejudice to Milford submitting its unilateral termination provisions and the revisions proposed in its compliance filing in a separate FPA section 205 filing.

2. Compliance Filing

17. In the May 18 Order, the Commission directed the Settling Parties to submit a compliance filing within 30 days, i.e., by June 18, 2007, removing all language that would allow Milford unilaterally to terminate the RMR agreement and replacing provisions specifying use of the public interest standard of review with provisions specifying the use of the just and reasonable standard of review. However, the Settling Parties filed their compliance filing on July 18, 2007, 30 days after the deadline specified in the May 18 Order. Moreover, the Settling Parties have offered no explanation for their late filing. Although in this instance we will not reject the compliance filing, we remind the Settling Parties that an entity that fails to comply with Commission directives by submitting untimely compliance filings risks being found in violation of the FPA.²⁹

18. Apart from their late submission, we find that the Settling Parties have otherwise complied with the Commission's directives in the May 18 Order. Consistent with our decision to deny Milford's rehearing request, we will accept for filing the set of tariff sheets revising section 9.6.1 and deleting section 2.2.3, effective August 1, 2007.

²⁷ *Sierra Pacific Power Co.* 99 FERC ¶ 61,135, at P 11 (2002).

²⁸ *Id.*

²⁹ 16 U.S.C. § 825o-1 (2000), *amended by*, Energy Policy Act of 2005, Pub. L. No. 109-58, § 1284(e), 119 Stat. 594, 980 (2005).

IV. Connecticut Attorney General's Request for Rehearing

A. Rehearing Request

19. The Connecticut Attorney General argues that the Commission should grant rehearing of the May 18 Order because it adopts and reaffirms prior Commission rulings that are in error.³⁰ To that end, the Connecticut Attorney General raises the same arguments on rehearing that were raised in comments opposing the Settlement Agreements and at earlier stages in this proceeding.

20. First, the Connecticut Attorney General claims that Milford is ineligible for RMR treatment because RMR agreements are intended to provide appropriate compensation for older, seldom run generators that are necessary for reliability, and Milford Station is a relatively new and efficient baseload generation facility that operates at a high capacity factor.³¹ The Connecticut Attorney General further argues that Milford has not shown that an RMR agreement is necessary to ensure Milford Station's continued availability, as is required by Market Rule 1 of ISO-NE's tariff,³² and that any financial difficulty Milford is experiencing is unrelated to the problems RMR agreements are designed to address.³³

21. Next, the Connecticut Attorney General argues that the Commission has failed to make an independent determination that Milford Station is needed for reliability, that the Commission improperly delegated whatever authority it has to make reliability determinations to ISO-NE, and that the Commission is obligated to independently verify that Milford Station meets the Commission's reliability and financial requirements for an RMR agreement.³⁴ The Connecticut Attorney General argues that the Commission recognized its obligation to conduct an independent review of ISO-NE's reliability determinations in *Bridgeport Energy*,³⁵ where it set the matter for hearing, but did not do so in the May 18 Order.

³⁰ Connecticut Attorney General's Request for Rehearing at 3.

³¹ *Id.* at 6.

³² Market Rule 1 was approved by the Commission in *New England Power Pool*, 100 FERC ¶ 61,287, *reh'g granted in part and denied in part*, 101 FERC ¶ 61,344 (2002), *order on reh'g*, 103 FERC ¶ 61,304 (2003).

³³ Connecticut Attorney General's Request for Rehearing at 6-8.

³⁴ *Id.* at 9-10.

³⁵ *See Bridgeport Energy*, 113 FERC ¶ 61,311 at P 10.

22. The Connecticut Attorney General next argues that ISO-NE and the Commission should have considered reactivating the Devon 7 and 8 units as an alternative means of ensuring reliability in Southwest Connecticut. The Devon 7 and 8 units are connected to the grid through the same substation as Milford Station. The Connecticut Attorney General asserts that the Devon 7 and 8 units were adequate to meet ISO-NE's reliability needs before Milford Station came online, that there has been no showing that they are no longer adequate, and that they "are substantially cheaper to operate than the Milford units."³⁶ The Connecticut Attorney General further claims that the Commission is obligated to evaluate the possibility of reactivating these lower cost alternatives.

23. The Connecticut Attorney General also argues that Milford should not be entitled to recover all of its fixed and variable costs under the RMR agreement. The Connecticut Attorney General argues that Milford Station has not been significantly depreciated because it is a relatively new facility, and as a consequence, Milford's costs are dominated by return of and on rate base. In the Connecticut Attorney General's view, the Commission should limit any RMR cost recovery to going-forward costs or require a form of levelized costs that emulates the recovery of a merchant generator in a competitive market.

24. Finally, the Connecticut Attorney General argues that the Commission has not determined that Milford is eligible for RMR treatment since Milford began collecting transition payments. According to the Connecticut Attorney General, the transition payments could range from more than \$20 million per year in 2006-2007 to more than \$27 million per year in 2009-2010.³⁷ The Connecticut Attorney General speculates that because of these transition payments, Milford will most likely fail to qualify for an RMR agreement under the Commission's Facility Costs Test.³⁸ The Connecticut Attorney General claims that the Commission has an obligation to review Milford's continuing RMR eligibility in light of these revenues.

B. Commission Determination

25. We deny rehearing. In the May 18 Order, the Commission found that, with the exception of the transition payments issue, each issue raised by the Connecticut Attorney General had been previously addressed by the Commission and decided against the Connecticut Attorney General in *Milford I* and *Milford II*. Accordingly, the Commission rejected the Connecticut Attorney General's arguments on whether the Commission would permit RMR contracts for new, efficient baseload units, whether the Commission

³⁶ Connecticut Attorney General's Request for Rehearing at 11.

³⁷ *Id.* at 13.

³⁸ *Id.* at 12.

should have relied on ISO-NE's reliability determination, whether the Commission should have considered the Devon 7 and 8 units as reliability alternatives to a Milford RMR agreement, and whether Milford should be allowed to recover all of its fixed and variable costs under the RMR agreement as impermissible collateral attacks on prior Commission orders.

26. On rehearing, the Connecticut Attorney General has not challenged the Commission's ruling that these previously-rejected arguments are impermissible collateral attacks on prior Commission orders. Rather, the Connecticut Attorney General merely repeats his previous arguments without addressing the Commission's finding in the May 18 Order. Accordingly, we remain convinced that these arguments are impermissible collateral attacks on prior Commission orders and, as such, deny rehearing.³⁹

27. Similarly, the Connecticut Attorney General's rehearing request does not actually contest the Commission's holding on the transition payments issue. In the May 18 Order, the Commission held that the effect of the transition payments on Milford's continuing RMR eligibility was outside the scope of this proceeding. The Commission distinguished this case from *Bridgeport*, where the Commission set Bridgeport's continuing RMR eligibility for hearing.

28. On rehearing, the Connecticut Attorney General has neither disputed the Commission's determination that this issue is outside the scope of this proceeding, nor alleged that the Commission erred in distinguishing this case from *Bridgeport*. Rather, the Connecticut Attorney General has merely repeated the unsubstantiated and tentative claim that the transition payments will make it "quite unlikely" that Milford will continue to qualify for RMR treatment.⁴⁰ In doing so, the Connecticut Attorney General has failed to challenge or even address the Commission's reasons for holding that this issue is outside the scope of this proceeding. Moreover, the Connecticut Attorney General has failed to address the Commission's statement that Milford is not entitled to retain any transition payments under the terms of the Settlement Agreements since such payments

³⁹ We note that the Connecticut Attorney General identifies his general objection to the May 18 Order as the fact that the Commission "explicitly adopted and reaffirmed its prior rulings in the March 22 Order [*Milford I*], which the Connecticut Attorney General has opposed and believes are in error." Connecticut Attorney General's Request for Rehearing at 3. The Connecticut Attorney General had the opportunity to, and in fact did, seek rehearing of these rulings. As we have noted, the Commission denied the Connecticut Attorney General's rehearing requests in *Milford II*. See *supra* n.18.

⁴⁰ Connecticut Attorney General's Request for Rehearing at 12.

will be credited against the Monthly Fixed Cost Charge it collects under the RMR agreement. Accordingly, we remain convinced that this issue is outside the scope of this proceeding, and therefore we deny rehearing.⁴¹

The Commission orders:

(A) Milford's request for rehearing is hereby denied.

(B) Milford's compliance filing is hereby accepted, as discussed in the body of this order.

(C) The Connecticut Attorney General's request for rehearing is hereby denied.

By the Commission.

(S E A L)

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

⁴¹ We also repeat our statement from the May 18 Order that if the Connecticut Attorney General has evidence indicating that the transition payments will render Milford financially ineligible for RMR treatment, such evidence should be offered in a separate section 206 complaint.