

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

102 FERC ¶ 61,294

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Town of Wallingford, Connecticut
Department of Public Utilities, Electric
Division; and Connecticut Municipal
Electric Energy Cooperative

Docket No. EL03-28-000

v.

Connecticut Light and Power Company;
Select Energy, Inc.; and Northeast Utilities
Service Company

ORDER SETTING COMPLAINT FOR HEARING
AND SETTLEMENT JUDGE PROCEDURES

(Issued March 14, 2003)

1. On December 4, 2002, the Town of Wallingford, Connecticut, Department of Public Utilities, Electric Division (Wallingford), and Connecticut Municipal Electric Energy Cooperative (CMEEC) (collectively, Complainants) filed a complaint in this proceeding against the Connecticut Light and Power Company (CL&P), Select Energy, Inc. (Select), and Northeast Utilities (collectively, NU) asking the Commission to find that the provisions of a power sales agreement require NU to participate in arbitration with Complainants. For the reasons set forth below, the Commission will set the complaint for hearing and settlement judge procedures. This order benefits customers by vindicating the terms of their agreements, and also providing an opportunity for consensual resolution of complaints.

BACKGROUND

2. Wallingford is a full requirements customer of CMEEC. Under the parties' System Power Sales Agreement (SPSA), CL&P sells system capacity and energy to CMEEC for the benefit of Wallingford. The SPSA requires CL&P to make available to CMEEC wholesale bulk power to serve Wallingford's electric power requirements. CL&P and Select are both affiliates of NU, and while CL&P is the party to the SPSA, Select currently has the day-to-day responsibility for the power supply obligations and administration of the SPSA. The initial term of the SPSA is for a period commencing January 1, 1995 and terminating December 31, 2004.¹

3. On July 15, 2002, the New England Power Pool Participants Committee (NEPOOL) and ISO-New England, Inc. (ISO-NE) jointly filed a proposal to restructure the New England electricity markets through implementation of a new Standard Market Design (NE-SMD) for the New England region. Most significantly, NE-SMD will result in the implementation of (a) locational marginal pricing (LMP), as a result of which parties moving energy through congested areas will pay prices that reflect that congestion; and (b) the allocation on a locational basis of the costs of reserve services, including costs incurred under reliability must-run (RMR) contracts. The NE-SMD proposal, with modifications, was approved by FERC on September 20, 2002 and confirmed, in substantial part, in its order on rehearing issued on December 23, 2002,² and ISO-NE plans to make NE-SMD effective as of March 1, 2003.

4. In a complaint filed on December 4, 2002, Complainants assert that they will incur substantial new costs as a result of the implementation of NE-SMD in the New England region. The Town of Wallingford is located in southwestern Connecticut, a region whose transmission facilities are highly congested. Complainants allege that the

¹NU states that while the power supplied under the SPSA is used to meet a portion of the Complainants' total power supply requirements, the SPSA is not a requirements contract, and the parties did not contract for NU to assume any of the Complainants' load serving obligations and related responsibilities, such as arranging and paying for transmission service or congestion costs.

²New England Power Pool and ISO New England, Inc., 100 FERC ¶ 61,287 (2002), order on reh'g, 101 FERC ¶ 61,344 (2002).

implementation of LMP and locational allocation of RMR costs is likely to impose a significant financial burden on them.³

5. Complainants state that the SPSA provides for the manner in which the parties must accommodate such structural changes in the market as follows. Section 15 of the SPSA states that:

The Parties agree to negotiate substitute arrangements to put themselves in substantially the same relative economic position in the event of the occurrence of any of the following events: (1) . . . if NEPOOL rules, procedures or criteria are changed in a way that renders inapplicable the arrangements in this Agreement . . . or (4) any other organization, arrangement, condition or circumstance contemplated by the arrangements described in this Agreement ceases to exist or be available.

6. Complainants further state that, if the parties fail to reach agreement on the "substitute arrangements" called for in Section 15 within a specified period of time, Section 16 of the SPSA then requires the parties to engage in arbitration, as follows:

In the event that the provisions of this Agreement require agreement by the Parties regarding resolution of matters (such as . . . substitute arrangements pursuant to Section 15) and the Parties fail to reach such agreement within a period of thirty (30) days, unless otherwise precluded by law, the resolution of such matter or matters shall be referred to arbitration (emphasis supplied).

7. Complainants state that they have met with NU several times between December 2001 and December 2002 to seek to address the impact of NE-SMD on the SPSA arrangements, and that while the parties have exchanged settlement proposals, they have not resolved their disagreements. Complainants therefore allege that the prerequisite of Section 16 have been met, because the parties have engaged in negotiations for over 30 days and have failed to reach agreement. Complainants further state that they have informed NU of their desire to engage in arbitration, and NU has taken the position that

³Complainants note that, although they cannot quantify the financial impact specifically on themselves, ISO-NE has estimated that new congestion costs in the southwestern Connecticut and Norwalk areas of the state could range from \$50 million to \$300 million per year. Complaint at 12.

the parties are not yet at a point at which arbitration is necessary. Complainants therefore ask the Commission to direct NU to participate in an arbitration with Complainants.

Notice, Answers, and Motions to Intervene

8. Notice of the Complainants' filing was published in the Federal Register, 67 Fed. Reg. 76,170 (2002), with the answer to the complaint and all comments, interventions or protests due by December 20, 2002.

9. NU filed a timely answer to the complaint. ISO-NE filed a timely motion to intervene.

10. NU states that the issue presented for Commission determination in this proceeding is a narrow but straightforward question of contract interpretation -- namely, whether the specific conditions under the SPSA that require the parties to negotiate substitute arrangements are broad enough to include a proposed change in the congestion management system in New England. NU argues that this is not the case, and that the circumstances that would require the parties to negotiate "substitute arrangements" under the SPSA are very narrowly defined, and do not cover New England's proposed adoption of a new congestion management methodology. NU states that contrary to the Complainants' suggestion, Section 15 is not a general provision requiring the parties to negotiate substitute arrangements whenever there are changes in market rules and structure, nor is it a hold-harmless provision designed to insulate the Complainants from any and all market risks. Instead, NU argues that Section 15 may be invoked only when an arrangement that is an essential element of the SPSA (such as a pricing adjustment factor or cost-of-service methodology) ceases to exist. NU also states that the Complainants have not demonstrated how the implementation of LMP has caused any arrangement described in the SPSA to cease to exist or to be rendered inapplicable.

11. NU also requests that, in conjunction with denying the relief sought by the Complainants, the Commission direct the parties to participate in a Commission-sponsored ADR process with the assistance of Commission Staff well-versed in the NEPOOL congestion management system such as either an Administrative Law Judge (ALJ) or members of the Commission's DRS. NU states that while it disagrees with the Complainants' contention that arbitration is required under the SPSA, it is committed to resolving this issue without resorting to litigation, and believes that a Commission-sponsored ADR process will provide the best opportunity for the parties to resolve their disputes. Accordingly, NU requests that the Commission refer all disputed issues between the parties for settlement discussions.

12. On January 3, 2003, Complainants filed a response in opposition to NU's proposal to refer this matter to ADR. Further, on January 7, 2003, Complainants filed a motion to lodge an arbitration demand that was filed by Complainants with the American Arbitration Association (AAA). On January 13, 2003, NU filed an answer in opposition to the Motion to Lodge, arguing that Complainants' actions are premature.

13. On February 27, 2003, Complainants filed a status report, stating that NEPOOL had initiated the auction of Financial Transmission Rights (FTRs), and that, while the AAA had originally indicated that it would proceed with the arbitration initiated by the Complainants' arbitration demand, on February 21, 2003 the AAA chose to hold the arbitration in abeyance principally pending action by the Commission in this proceeding. Complainants urge the Commission to act as promptly as possible.

DISCUSSION

Procedural matters

14. ISO-NE's timely, unopposed motion to intervene serves to make it a party to this proceeding. See 18 C.F.R. § 385.214 (2002).

Analysis

15. The fundamental question before us at this point is whether, when the parties entered into their service agreement, the implementation of NE-SMD was the type of change that they envisioned would trigger the requirements to negotiate and arbitrate, and, if so, whether negotiations between the parties have broken down so as to trigger arbitration. This is a matter that we cannot resolve on the record before us, and accordingly will set it for investigation and trial-type evidentiary hearing under Section 206 of the Federal Power Act (FPA).⁴

16. The Commission believes, however, that it would be in the best interests of the parties to resolve this dispute expeditiously and consensually, rather than through litigation.⁵ Accordingly, we will hold the hearing in abeyance and direct settlement judge procedures pursuant to Rule 603 of the Commission's Rules of Practice and

⁴16 U.S.C. § 824e (2000).

⁵Indeed, we would hope that the parties might not only resolve the matter that we are setting for trial-type evidentiary hearing, but the underlying substantive matter as well.

Procedure.⁶ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge.⁷

17. In cases where, as here, the Commission institutes an investigation on complaint under Section 206 of the FPA, Section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy,⁸ we will set the refund effective date 60 days after the date of the filing of this complaint, i.e., February 2, 2003.

18. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to Section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the presiding judge to provide a report to the Commission in advance of the refund effective date. Here, given that the refund effective date has passed, the Commission cannot follow its normal procedure.

19. Although we do not have the benefit of the presiding judge's report, based on our review of the record, we expect that the presiding judge would be able to issue an initial decision within approximately eight months of the commencement of hearing procedures, or, if hearing procedures were to commence immediately, by October 31, 2003. If the presiding judge is able to render a decision within that time, and assuming the case does not settle, we estimate that we will be able to issue our decision within approximately three months of the filing of briefs on and opposing exceptions, or, assuming the case goes to hearing immediately, by March 31, 2004.

The Commission orders:

⁶18 C.F.R. § 385.603 (2002).

⁷If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. FERC's website contains a listing of Commission Judges and a summary of their background and experience. (www.ferc.gov - click on Office of Administrative Law Judges.)

⁸See, e.g., *Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413 at 63,139 (1993); *Canal Electric Company*, 46 FERC ¶ 61,153 at 61,539, reh'g denied, 47 FERC ¶ 61,275 (1989).

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and the Federal Power Act, particularly Section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning this complaint, as discussed in the body of this order. As discussed in the body of this order, we will hold the hearing in abeyance to provide time for settlement judge procedures.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603, the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. To the extent consistent with this order, the designated settlement judge shall have all power and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable.

(C) Within sixty (60) days of the date of this order, the settlement judge shall issue a report to the Chief Judge and the Commission. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this proceeding to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall issue a report every thirty (30) days thereafter, apprising the Chief Judge and the Commission of the parties' progress toward settlement.

(D) If the settlement discussions fail, and the proceeding goes to hearing, a presiding administrative law judge, to be designated by the Chief Judge, shall convene a prehearing conference in this proceeding, to be held within approximately 15 days of the designation of the presiding judge, in a hearing room of the Federal Energy Regulatory Commission, 888 First St., N.E., Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

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(E) The refund effective date established pursuant to Section 206(b) of the Federal Power Act is February 2, 2003.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.