

103 FERC ¶ 61,188
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Richard Blumenthal, Attorney General
of the State of Connecticut and
The Connecticut Department of
Public Utility Control

v.

Docket No. EL03-123-000

NRG Power Marketing, Inc.

ORDER REQUIRING COMPLIANCE WITH CONTRACT

(Issued May 16, 2003)

1. This order addresses the Complaint and Emergency Request for Order Staying Contested Termination of Wholesale Power Contract filed by Richard Blumenthal, Attorney General for the State of Connecticut (CTAG) and the Connecticut Department of Public Utility Control (CDPUC). The Federal Energy Regulatory Commission (Commission) directs the seller under this contract to continue to provide service to Connecticut Light and Power Company (CL&P) pursuant to the rates, terms and conditions under the contract until the Commission has an adequate opportunity to evaluate its proposed termination of the contract and the opposition to such action.

Background

2. Under Connecticut retail choice law and CDPUC rules, CL&P was required to divest its generation and competitively procure wholesale power supply to serve the Standard Offer Service¹ (SOS) load. On October 29, 1999, CL&P and NRG Power Marketing, Inc. (NRG-PMI) entered into a Standard Offer Service Wholesale Sales Agreement (SOS Agreement). The SOS Agreement requires NRG-PMI to provide

¹According to Connecticut's electric industry restructuring law, Standard Offer Service refers to the electric service provided to retail customers who do not actively choose an alternate electric generation services supplier or are unable to choose one.

power supply for a specified percentage of CL&P's SOS load during the term of the contract.² The SOS Agreement is for a four-year term that ends on December 31, 2003. The price set forth in the SOS Agreement is the same price that NRG-PMI voluntarily bid in the competitive procurement process. CL&P states that because NRG-PMI did not own generation assets, then-applicable Commission rules did not require NRG-PMI to make a Section 205 filing for the SOS Agreement.³ NRG-PMI was instead required to reflect its wholesale sales to CL&P in its quarterly marketing reports to the Commission.

3. CL&P asserts that NRG-PMI paid CL&P the congestion costs imposed by New England Power Pool for the first two months of the SOS Agreement but subsequently claimed that it was not responsible for such charges under the contract. CL&P filed a breach of contract complaint against NRG-PMI in Connecticut Superior Court seeking recovery for unpaid congestion charges from NRG-PMI as well as a declaration that NRG-PMI would be responsible for future congestion charges. The case was removed to and is pending before the U.S. District Court for the District of Connecticut, Civil Action No. 01-CV2373. In August 2002, CL&P, pursuant to Section 5.4 of the SOS Agreement, began to withhold the contested amounts until the dispute was resolved.

4. On August 13, 2002, NRG-PMI informed CL&P that its failure to pay constituted a default under the SOS Agreement. On May 1, 2003, the CDPUC issued an order stating that it believed that strong arguments existed that NRG-PMI and other SOS sellers were responsible for all congestion costs and losses under the Standard Market Design market rules.⁴

5. On May 14, 2003, NRG-PMI notified CL&P that it considered CL&P in default of the SOS Agreement because (1) CL&P continued to withhold payments due for congestion costs beginning in August 2002; and (2) CL&P decided to withhold congestion costs and losses after the implementation of Standard Market Design. NRG-PMI stated that, pursuant to Section 5.5 of the SOS Agreement, it intended to terminate

²See Section 3.5 of the SOS Agreement: 35% in 2000, 40% in 2001 and 2002, and 45% in 2003.

³ Federal Power Act, 16 U.S.C. §824d (2000).

⁴Interim Decision in Application of the Connecticut Light and Power Company Concerning Recovery of SMD-Related Costs for March 1, 2003 through December 31, 2003 - Petition of the Attorney General for a Declaratory Ruling Regarding the Legality and Prudence of CL&P's Application, Docket No. 03-04-017 (May 1, 2003).

service at midnight five days after the receipt of the letter unless CL&P cured the defaults. On the same date, NRG-PMI filed for bankruptcy court protection under Chapter 11 of the U.S. Bankruptcy Code.

Instant Pleading

6. On May 15, 2003, CTAG and CDPUC submitted a filing asking the Commission to issue an order staying the termination of the contract entered into by CL&P and NRG-PMI. CL&P claims that NRG-PMI is obligated to provide the power supply for 45 percent of CL&P's retail electrical load at the fixed prices under the SOS Agreement. CL&P argues that NRG-PMI may not terminate the SOS Agreement before the end of the contract term absent the CL&P's consent without first filing a notice with the Commission, pursuant to 18 C.F.R. § 35.15 (2003). CL&P also argues that NRG-PMI is responsible for the congestion costs and losses and that NRG-PMI has failed to comply with the dispute resolution provision under Section 16 of the SOS Agreement. CL&P further argues the Commission should exercise its jurisdiction under FPA Section 205 to protect the public from exorbitant wholesale power rates and from contracts and practices that are unjust and unreasonable. CL&P contends that the Commission has jurisdiction over this matter notwithstanding NRG-PMI's filing for bankruptcy protection.

7. CTAG and CDPUC ask the Commission to issue an order prior to May 20, 2003 taking jurisdiction over NRG-PMI's termination of service under the SOS Agreement. They request that the Commission state that NRG-PMI may not unilaterally terminate its wholesale contract before December 31, 2003 without prior Commission review. CTAG and CDPUC also ask the Commission to initiate a proceeding under FPA Sections 205 and 206 to determine: (a) whether NRG-PMI has the contractual right to terminate service in these circumstances, and (b) if it does, whether termination of service under the SOS Agreement is consistent with the public interest.

Discussion

8. NRG-PMI proposes to terminate its contract on May 19, 2003, a deadline which leaves the Commission with insufficient time to evaluate its proposed action. Accordingly, the Commission directs NRG-PMI, until further notice, to continue to provide service to CL&P pursuant to the rates, terms and conditions of the SOS Agreement. NRG-PMI shall file its answer to the complaint, and interested persons may file interventions and protests, within ten (10) days from the date of this order. The Commission intends to act as expeditiously as possible in this proceeding.

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9. Any person desiring to be heard or to protest this filing should file with the Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.211 and § 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. The answer to the complaint and all comments, interventions or protests must be filed on or before ten (10) days from the date of this order. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website at <http://www.ferc.gov> using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll-free at (866)208-3676, or for TTY, contact (202)502-8659. The answer to the complaint, comments, protests and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR § 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

The Commission orders:

- (A) Until further notice, NRG-PMI is directed to continue to provide service to CL&P pursuant to the rates, terms and conditions of the SOS Agreement.
- (B) NRG-PMI shall file its answer to the complaint, and interested persons may file interventions and protests, within ten (10) days from the date of this order.
- (C) The Secretary is directed to publish this order in the Federal Register.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.