104 FERC ¶ 61, 030
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Town of Norwood, Massachusetts

v. Docket No. EL03-37-000

National Grid USA
New England Electric System
Massachusetts Electric Company, and
Narragansett Electric Light Company

ORDER SETTING COMPLAINT FOR HEARING IN PART AND DISMISSING IT IN PART AND ESTABLISHING SETTLEMENT JUDGE PROCEDURES

(Issued July 2, 2003)

Summary

1. This order sets for hearing in part and dismisses in part a complaint that the Town of Norwood, Massachusetts (Norwood) filed against National Grid USA, et al. (National Grid) concerning a contract termination charge (CTC) that New England Power Company (NEPCO) seeks to collect from Norwood. This order benefits customers by ensuring that the CTC is calculated correctly.

Background

The Parties

2. Norwood is a municipality that owns and operates a municipal utility that distributes retail electric energy to residents and businesses in the town. National Grid is an electric utility that sells, transmits and distributes electric energy. In 1998, National Grid acquired the New England Electric System and its subsidiaries.

20030703-3006 Issued by FERC OSEC 07/02/2003 in Docket#: EL03-37-000

3. New England Power Company (NEPCO) is a subsidiary of the New England Electric System, which also owns four retail distribution companies, including Massachusetts Electric Company, (Mass Electric) serving Massachusetts, and Narragansett Electric Company (Narragansett), serving Rhode Island. NEPCO sells wholesale electric energy that it generates or buys from others to both affiliates, such as Mass Electric and Narragansett, and to other wholesale customers (with which it is not affiliated), such as Norwood.

The CTC

4. The CTC arose out of a series of transactions in which NEPCO restructured itself to accommodate customer choice and market-based pricing in New England at both the wholesale and retail levels.[1] A knowledge of this history is essential to understanding the parties' arguments regarding the CTC.

5. For many years NEPCO provided wholesale requirements service under its Tariff No. 1 to its retail distribution affiliates, Mass Electric and Narragansett. In 1983, the Commission accepted a service agreement under Tariff No. 1 for full requirements service between NEPCO and Norwood, which placed Norwood on a comparable basis with Mass Electric in Massachusetts and Narragansett in Rhode Island.[2] Although under Tariff No. 1 Norwood received its electric energy from NEPCO, it received its transmission services from Boston Edison.

6. The service agreement between NEPCO and Norwood under Tariff No.1 obligated NEPCO to supply full requirements electric service to Norwood under the tariff, "as [it] may be amended from time to time."[3] Norwood's service agreement was for an initial term of fifteen years, terminating on October 31, 1998, with a requirement

---

[1]See Town of Norwood v. FERC, 202 F.3d 392, 396-97 (1st Cir. 2000), cert. denied, 531 U.S. 818 (Norwood I); Town of Norwood v. FERC, 212 F.3d 24, 26 (1st Cir. 2000), cert. denied, 532 U.S. 993 (2000) (Norwood III); Answer to Complaint at 7.

[2]See New England Power Company, 83 FERC ¶ 61,174 at 61723-24, reh'g denied, 84 FERC ¶ 61,175 (1998); aff'd Norwood I. The service agreement resolved an antitrust case that Norwood brought against Boston Edison Company (Boston Edison) (from whom Norwood had been purchasing electric energy) and NEPCO. See Town of Norwood v. New England Power Company, 202 F.3d 408, 412 (1st Cir. 2000) (Norwood II).

[3]See Town of Norwood v. FERC, 217 F.3d 24, 25 (2000) (Norwood IV).

20030703-3006 Issued by FERC OSEC 07/02/2003 in Docket#: EL03-37-000

for seven years' prior notice to effect a termination. In 1989, the parties amended their contract to permit Norwood at its election to extend the earliest date on which either party could give notice of termination from November 1, 1991 to November 1, 2001.

7. On July 25, 1990, Norwood sent a letter to New England Power stating that it "hereby gives notice . . . that it extends the date" for giving notice of termination of the service agreement from November 1, 1991, to November 1, 2001.[4] Norwood further stated that "the effect of this [letter] is that the Power Contract between [NEPCO] and Norwood would be extended for [ten] years to midnight, October 31, 2008."[5]

8. In December 1996, NEPCO made several filings with the Commission to: (a) restructure itself; (b) revise its wholesale power sales tariff; (c) sell its non-nuclear generating facilities; (d) release its affiliates from their long-term requirements contracts with NEPCO (on payment of termination charges); and, (d) in general, revise its rates so as to facilitate customer choice and market-based pricing, in accordance with the directives of the public utility commissions in its service areas.[6]

9. As part of this restructuring, NEPCO proposed to temporarily sell wholesale electric energy at non-cost-based rates under an offering called the "standard offer of service." The rates under this offer began at 3.2 cents per kilowatt hour in 1998 and increase to 5.1 cents per kilowatt hour in 2004. NEPCO made this offer to those retailers that the state public utility commissions had required to offer retail standard offer rates to their own customers.[7] Such retailers included NEPCO's affiliates, Mass Electric and Narragansett, but did not include Norwood, which has no obligation to allow competitive access to its customers.[8] Over Norwood's objections, the Commission approved: (a) NEPCO's restructured rates, as well as a freeze on the rates that NEPCO charged

---

[4]Norwood IV, 217 F.3d at 25-26.

[5]Id. at 26.

[6]See Norwood I, 202 F.3d at 396-97; Norwood IV, 217 F.3d at 25-26.

[7]The states were introducing competition at the retail level and wanted retail purchasers to have an initial low-rate offering as a backup while competitive sources of supply developed. See Norwood II, 202 F.3d at 413.

[8]Id.

20030703-3006 Issued by FERC OSEC 07/02/2003 in Docket#: EL03-37-000

wholesale customers such as Norwood;[9] and (b) the divestiture of NEPCO's non-nuclear generation.[10] The Court of Appeals for the First Circuit upheld the Commission's orders.[11]

10. On March 4, 1998, Norwood notified NEPCO that it was terminating service under its service agreement with NEPCO, effective April 1, 1998, and would, on that date, begin taking service from Northeast Utilities Service Company. On March 18, 1998, NEPCO filed an amendment to FERC Tariff No. 1, permitting customers such as Norwood to terminate their contracts early, on only thirty days' notice (compared to seven years' notice), conditioned on the customers paying a contract termination charge (the CTC that is the subject of Norwood's complaint).[12] The CTC was based on an avoided cost concept[13] that is similar to the lost revenues approach that the Commission

---

[9]See New England Power Company, 78 FERC ¶ 61,080 (1997); New England Power Company, 81 FERC ¶ 61,281 (1997), reh'g denied, 83 FERC ¶ 61,265 (1998); reh'g denied, 84 FERC ¶ 61,175 (1998); New England Power Company, 82 FERC ¶ 61,179 (1998), reh'g denied, 83 FERC ¶ 61,275 (1998).

[10]New England Power Company, Narragansett Electric Company, AllEnergy Marketing Company, L.L.C., and USGen New England, Inc., 82 FERC ¶ 61,179, order on clarification and reh'g, 83 FERC ¶ 61,275 (1998).

[11]Norwood I, 202 F.3d at 398-405.

[12]NEPCO offered its Tariff No. 1 customers an open season in which to terminate their service under the tariff. NEPCO stated that the proposed amendment would afford Norwood the ability, which it otherwise did not have, to terminate its service under the tariff on April 1, 1998, conditioned on its paying the CTC. NEPCO emphasized that it stood ready to negotiate termination agreements with its wholesale requirements customers on mutually agreeable terms. See New England Power Company, 83 FERC ¶ 61,174 (1998); New England Power Company, 83 FERC ¶ 61,265 (1998); reh'g denied 84 FERC ¶ 61,175 (1998).

[13]NEPCO calculates the CTC based on the difference between the revenues that NEPCO would have received had the customer continued to take service for the applicable notice period (reduced by the portion of those revenues attributable to transmission costs) and the estimated market value of the power the customer would have received in that circumstance, Norwood estimates that the CTC will exceed seven million dollars per year until 2008. See New England Power Company, 83 FERC

(continued...)

20030703-3006 Issued by FERC OSEC 07/02/2003 in Docket#: EL03-37-000

approved in Order No. 888.[14] Norwood has terminated its contract with NEPCO but has not paid the CTC.

11. Norwood brought a breach of contract and antitrust action against NEPCO and others in the U.S. District Court for the District of Massachusetts, alleging that NEPCO had breached the 1983 power purchase contract and that the CTC resulted in anticompetitive effects. The District Court dismissed the action.[15] The court of appeals affirmed the District Court's order, except that it remanded one antitrust claim to the District Court for further proceedings.[16]

12. Norwood also sought a declaratory order from the Commission that its July 25, 1990 letter did not extend the term of its contract with NEPCO to October 31, 2008 (the contract expiration date that NEPCO uses in its calculation of the CTC). The Commission denied Norwood's petition.[17] The court of appeals upheld the Commission's decision, expressly finding that the 1990 letter extended the contract, and

---

[13](...continued)
¶ 61,174, reh'g denied, 84 FERC ¶ 61,175 (1998).

[14]Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles, January 1991-June 1996 ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg., 12,274 (March 4, 1997), FERC Stats. & Regs., Regulations Preambles, July 1996-December 2001 ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group, et al., v. FERC, 225 F. 3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 122 S. Ct. 1012 (2002).

[15]Town of Norwood, Mass. v. New England Power Company, 23 F. Supp. 2d 109 (D. Mass. 1999).

[16]Norwood II, 202 F. 2d at 414-424.

[17]Town of Norwood, Mass., 87 FERC ¶ 61,341 (1999), reh'g denied, 88 FERC ¶ 61,187 (1999).

20030703-3006 Issued by FERC OSEC 07/02/2003 in Docket#: EL03-37-000

thus extended Norwood's obligation to purchase electric energy from NEPCO to October 31, 2008.[18]

The Complaint

13. On December 23, 2002, Norwood filed a complaint against National Grid, et al., attacking the CTC as unjust and unreasonable and unduly discriminatory and preferential or otherwise unlawful under the Federal Power Act (FPA). In support of its complaint, Norwood makes the following claims:

(A) NEPCO charges a CTC to Norwood that is higher than the CTC that it charges to its affiliated distribution systems and thus is unduly discriminatory and preferential and places Norwood in an unlawful price squeeze, in violation of sections 205 and 206 of the FPA.

(B) NEPCO bases the CTC that it charges Norwood on an erroneous calculation of the estimated market value of the load that NEPCO would have had to supply absent early termination of the contract ("the customer's released load").

(C) The revenue factor that NEPCO relies on to calculate the CTC is incorrect.

(D) The rate of return that NEPCO uses in the CTC calculation is excessive.

(E) NEPCO's deduction for transmission revenues misapplies the Order No. 888 formula and results in an overcharge to Norwood.

(F) NEPCO has understated its fixed power supply costs relating to Norwood, resulting in a CTC that is unjust and unreasonable.

(G) NEPCO's use of October 31, 2008 as the earliest date on which Norwood could have unilaterally terminated the contract is incorrect and results in a CTC that is unreasonably high.

(H) The CTC in conjunction with the rates that Norwood pays Northeast Utilities results in discriminatory and unduly preferential rates in violation of Sections 205 and 206 of the FPA.

---

[18] Norwood IV, 217 F.3d at 27-30.

20030703-3006 Issued by FERC OSEC 07/02/2003 in Docket#: EL03-37-000

(I) NEPCO's denial of standard offer wholesale service ("the standards offer of service," discussed above) to Norwood, while offering it to NEPCO's affiliates, was discriminatory and preferential, in violation of Sections 205 and 206 of the FPA.

(J) NEPCO's charging Norwood a CTC, while not imposing the same charge on its affiliates, constitutes undue discrimination and preferential treatment, in violation of Sections 205 and 206 of the FPA.

(K) NEPCO's failure to offer an open season without a CTC charge as part of its divestiture of non-nuclear generation results in a CTC charge that is not a just and reasonable condition for termination of service.

(L) The CTC violates 18 C.F.R. § 35.26 (2003), which precludes stranded cost recovery in new contracts that do not contain an exit fee or explicit stranded cost provision.

(M) The CTC is unlawful because NEPCO did not provide Norwood with an opportunity to market or broker the capacity that Norwood released when it terminated its contract with NEPCO.

The Answer

14. On January 1, 2003, National Grid filed an answer and motion to dismiss. National Grid claims that Norwood's obligation to pay the CTC is beyond doubt. It also asserts that the Commission and the courts have already decided all of the issues that Norwood raises in its complaint. It asks the Commission to summarily dismiss all of Norwood's claims. In the alternative, it asks the Commission to either: (a) insist that Norwood pay the full amount of its current obligation under the CTC into escrow before it can raise its claims; or (b) refer the matter to a settlement judge for prompt resolution. Finally, National Grid argues that Norwood has failed to state a claim against National Grid, New England Electric System, Massachusetts Electric or Narragansett.

Norwood's Reply

15. On February 24, 2003, Norwood filed an answer to the National Grid's answer, largely repeating the arguments in its complaint.

20030703-3006 Issued by FERC OSEC 07/02/2003 in Docket#: EL03-37-000

Discussion

A. Procedural Matter

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2002), prohibits an answer to an answer, unless otherwise permitted by the decisional authority. We are not persuaded to allow Complainant's answer and will, therefore, reject it.

B. The Motion to Dismiss

17. National Grid asks that we dismiss the complaint as to National Grid, New England Electric System, Massachusetts Electric and Narragansett. We find that the motion is premature. NEPCO, New England Electric System, Massachusetts Electric and Narragansett are all affiliates of National Grid and the complaint raises claims against all of these entities. It would be premature to dismiss these entities from the complaint proceeding without further examination of their respective functions and interrelationships and their connection (or not) with the CTC. To eliminate any of these entities at this juncture would potentially unnecessarily restrict the relief that the Commission may, if necessary, be able to fashion.

C. The CTC

18. Claims (B) to (F) of Norwood's complaint relate to the way in which NEPCO calculates the CTC. The Commission has approved the use of a CTC for the early termination of a contract and has accepted NEPCO's CTC formula, but has not accepted the individual components of the CTC calculation.[19] While the court of appeals upheld the Commission's orders, it noted that Norwood could bring a complaint regarding the way in which NEPCO has calculated the CTC.[20] As the Commission has not approved

---

[19]In accepting the CTC, the Commission found, among other things, that the proposed formula for calculating the CTC would recover the revenues lost over the existing seven-year notice of the termination term, less an estimate of the market value of the released capacity and energy, and that Norwood would avoid payment of the full demand charges over the remainder of the contract term. See New England Power Company, 83 FERC ¶ 61, 174 at 61,723; reh'g denied, 84 FERC ¶ 61,175 at 61,919 (1998).

[20]See New England Power Company, 83 FERC ¶ 61,174 at 61,7121-24 (1998),

(continued...)

20030703-3006 Issued by FERC OSEC 07/02/2003 in Docket#: EL03-37-000

the individual components used in NEPCO's calculation of Norwood's CTC, the Commission will set these claims (B through F) for hearing. Norwood will, of course, have the burden of proof on each and every element of these claims.

19. National Grid is correct that the Commission and the courts have conclusively adjudicated all of the other claims that Norwood raises in its complaint. For example, claims (A), (H), (I) and (J) charge that the standard offer rates either alone or in combination with the CTC result in rates that are unduly discriminatory and preferential and place Norwood in an unlawful price squeeze, in violation of sections 205 and 206 of the FPA. The court of appeals has held that "the mere disparity in Norwood's contract termination charge vis-a-vis that of other companies is not a per se violation of the undue preference prohibition."[21] It has also found that Norwood was not similarly situated to NEPCO's affiliates because Norwood did not have an obligation under state law to provide standard offer service to its customers, and that this difference justifies the different treatment.[22] The Commission will not, therefore, set these claims for hearing.

20. Claim (G) relates to the earliest date on which Norwood could have unilaterally canceled its contract with NEPCO. Both the Commission and the court of appeals have held that Norwood's June 25, 1990 letter to NEPCO extended its contract to purchase electric energy from NEPCO until October 31, 2008, the date that NEPCO uses in calculating the CTC.[23] Accordingly, the Commission will not set this claim for hearing.

21. Claims K, L and M relate to: (a) NEPCO's failure to offer an open season without a CTC in which to terminate the requirements contract; (b) the possibility that the CTC violates the prohibition against recovery of stranded costs in new contracts that do not contain exit fees or explicit stranded cost provisions; and (c) the absence of an opportunity for Norwood to market or broker the capacity that it released when it terminated its contract with NEPCO. Both the Commission and the court of appeals

---

[20](...continued)
aff'd Norwood I, 202 F. 2d at 401.

[21]Norwood I, 202 F.3d at 402. NEPCO offered to negotiate a similar termination agreement with Norwood. New England Power Company, 83 FERC ¶ 61,174, n.13 (1998). Norwood did not accept the offer.

[22]Id. at 402-023.

[23]See Town of Norwood, 87 FERC ¶ 61,341 (1999), aff'd Norwood IV. See also New England Power Company, 83 FERC ¶ 61,174 at 61,722 & n. 7

20030703-3006 Issued by FERC OSEC 07/02/2003 in Docket#: EL03-37-000

have found that: (a) the imposition of a CTC when a customer terminates a contract before its expiration date is reasonable;[24] (b) the rules relating to stranded cost recovery do not apply to a charge for premature termination of a contract;[25] and (c) the rules allowing customers to market or broker released capacity do not apply to premature contract termination.[26] Consequently, the Commission will not set these claims for hearing.

D. Hearing and Settlement Judge Procedures

1. Hearing Procedures

22. In cases where, as here, the Commission institutes an investigation on complaint under Section 206 of the Federal Power Act, 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 of providing maximum protection to customers,[27] we will set the refund effective date as of the date 60 days after the date of the filing of the complaint, or February 21, 2003.

23. 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

---

[24]See New England Power Company, 83 FERC ¶ 61,174 at 61723-24, reh'g denied, 84 FERC ¶ 61,175 (1998); Norwood I, 202 F3d at 400. The Massachusetts Superior Court found that the CTC is "akin to a quid pro quo for terminating the contract early." New England Power Company v. Town of Norwood, 2000 WL 292974 at 10.

[25]New England Power Company, 83 FERC ¶ 61,174 at 61,273; reh'g denied 84 FERC ¶ 61,175 (1998); Norwood I, 202 F3d at 398-399.

[26]Norwood I, 202 F.2d at 399 (Commission may allow the recovery of foregone revenues "whenever a customer purports to disregard an existing obligation").

[27]See, 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).

20030703-3006 Issued by FERC OSEC 07/02/2003 in Docket#: EL03-37-000

the refund effective date. Here, given that the refund effective date for the complaint has passed, the Commission cannot follow its normal procedure.

24. Although we do not have the benefit of the presiding judge's report, based on our review of the record, we expect that, assuming the case does not settle, the presiding judge should be able to render a decision within eight months of the commencement of hearing procedures. After the presiding judge renders an initial decision, assuming the case does not settle, we estimate that we will be able to issue our decision within approximately five months of the filing of briefs on and opposing exceptions.

2. Settlement Judge Procedures

25. While we are setting this proceeding for a trial-type, evidentiary hearing, we encourage the parties, before hearing procedures are commenced, to first make every effort to settle their dispute. To aid the parties in their settlement efforts, the hearing we have ordered shall be held in abeyance and a settlement judge shall be appointed to assist the parties in reaching a settlement.[27] 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.[28]

The Commission orders:

(A) The motion to dismiss is hereby granted in part and denied in part, as discussed in the body of this order.

(B) 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 1), a public hearing shall be held in Docket Nos. EL03-37-000 into the justness and reasonableness of the calculation of the CTC, as discussed in the body of this order.

---

[27] 18 C.F.R. § 385.603 (2003).

[28] If 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 backgrounds and experience (www.ferc.fed.us - click on the Office of Administrative Law Judges).

20030703-3006 Issued by FERC OSEC 07/02/2003 in Docket#: EL03-37-000

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and procedure, 18 C.F.R. § 385.603 (2001), 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 powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable.

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

(E) If settlement discussions fail, a presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in this proceeding, to be held within approximately fifteen days of the settlement judge's report to the Commission, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E. Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding administrative law 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.

(F) The refund effective date in Docket No. EL03-37-000 established pursuant to Section 206(b) of the Federal Power Act is February 21, 2003.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.