119 FERC ¶ 61,150
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Devon Power LLC Docket Nos. ER03-563-030
ER03-563-060

ORDER DENYING STAY

(Issued May 17, 2007)

1. In this order, the Commission denies the motion for stay filed by Richard Blumenthal, Attorney General of Connecticut (CTAG), of the Commission's prior orders in this proceeding authorizing transition payments by ISO New England, Inc. (ISO-NE) to capacity providers during the transition to New England's new Forward Capacity Market (FCM). We take this action on the basis that (a) the Commission no longer has jurisdiction to issue a stay, and (b) CTAG has failed to meet the criteria for obtaining a stay.

I. BACKGROUND

A. FCM

2. The FCM is the result of a settlement of the requirement placed by the Commission on ISO-NE in 2003 that ISO-NE develop a new Installed Capacity (ICAP) market that contained a locational element. The Commission issued this order under section 206 of the Federal Power Act (FPA)[1] out of concern that the large number of capacity providers being compensated on a cost of service basis under Reliability Must Run (RMR) contracts could adversely affect the competitive market for capacity in New England. In response, ISO-NE proposed a locational ICAP (LICAP) mechanism, which was ultimately resolved by the Settlement Agreement implementing FCM accepted by the Commission in its FCM Orders.[2] Under the FCM, New England's load serving

[1] 16 U.S.C. § 824e (2000).

[2] *Devon Power LLC*, 115 FERC ¶ 61,340 (FCM Order), *order on reh'g*, 117 FERC ¶ 61,133 (2006) (FCM Rehearing Order), *appeal pending sub. nom. Maine Public Utilities Commission* v. *FERC*, No. 06-1403 (D.C. Cir. filed

entities (LSEs) will enter into commitments for capacity, either bilaterally or through an auction conducted by ISO-NE. The FCM establishes annual auctions for capacity, pursuant to which resources will submit bids to provide capacity three years in advance, for a year-long commitment period. All capacity resources will receive a single clearing price, as determined through the auction. While the price paid to existing resources may change from year to year, new resources entering the market at this time will be able to opt to lock in prices for up to five years. As the Commission noted, "[t]his design element is intended to provide predictable revenues and facilitate financing for new capacity."[3] The FCM will also take into account specific locational constraints.

3. As discussed in the FCM Order, "[w]hile the region has sufficient capacity to meet reliability requirements today, reserve margins are barely adequate, and deficits are predicted in the very near future," and "[t]he record . . . is replete with virtually unchallenged statements that existing generators needed for reliability are not earning sufficient revenues (and are in fact losing money), and that additional infrastructure is needed soon to avoid violations of reliability criteria."[4] The Commission found that the FCM "provides necessary solutions" to these problems and approved the Settlement Agreement.[5]

B. Transition Provisions of FCM

4. Payments to participants that supply capacity in the FCM will begin in June 2010. The level of those payments will be determined via annual Forward Capacity Auctions conducted by ISO-NE. The Settlement Agreement that proposed the FCM also provided for a transition period beginning December 1, 2006, and ending June 1, 2010 during which ISO-NE will make fixed payments to all installed capacity. The Commission noted that, according to the settling parties, "such transition payments serve as a bridge to the implementation of the FCM and as a means to help ensure that existing generators remain available until new resources can be built."[6] The transition payments will be allocated to LSEs according to their customers' proportionate share of peak load. All

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Dec. 12, 2006), consolidated with *Richard Blumenthal, Attorney General of the State of Connecticut* v. *FERC*, No. 06-1427 (D.C. Cir. filed Dec. 29, 2006).

[3] FCM Order at P 16.

[4] *Id*. at P 63, footnotes omitted.

[5] *Id*. at P 64, footnotes omitted.

[6] *Id.* at P 30.

suppliers will receive transition payments, though these payments will be netted against RMR payments, as well as adjusted to account for outages.[7]

5. ISO-NE began making transition payments in December 2006, as provided in the Settlement Agreement.

C. Request for Stay

6. On April 5, 2007, CTAG filed the instant request for a stay. It states that under the FCM Orders, New England customers will be required to pay $5 billion in transition payments to existing capacity between 2006 and 2010. CTAG notes that the FCM Orders are currently on appeal, and that the requirement for transition payments may, therefore, be overturned. CTAG asserts, however, that unless the Commission stays the effect of the FCM Orders pending appeal, New England ratepayers will be charged for these transition payments, even if the transition payments provision is ultimately overturned on appellate review, and that under the Federal Power Act (FPA), the right to refunds may be limited. Thus, CTAG argues, the Commission should stay the effect of the FCM Orders to minimize their adverse impact on the residents of Connecticut.

7. CTAG asserts that its request meets the standard for issuance of a stay. According to CTAG, the factors to consider before granting a stay are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. According to CTAG, all four of these factors point to the granting of a stay.

1. Likelihood of prevailing on the merits

8. CTAG states that its appeal is likely to succeed on the merits. It first argues that the Commission had no jurisdiction under the FPA to establish resource adequacy requirements for Connecticut or other New England states, and therefore could not approve the FCM Settlement Agreement. CTAG argues that, in approving FCM, the Commission trespassed on the authority of the states to set their own resource adequacy requirements (and that, in the recent Energy Policy Act of 2005, Congress explicitly stated that it did not grant FERC the authority to require enlargement or construction of new transmission or generation facilities).[8]

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[7] *Id.* at P 75.

[8] *Id.* at 10.

9. CTAG also argues that the Commission did not justify its approval of the transition payments. According to CTAG, the Commission erred in finding that the rates under the transition mechanism were just and reasonable because they were lower than the rates that might have resulted if the case resulting in the FCM Settlement Agreement had proceeded through litigation, since the Commission never determined that those latter rates that would have resulted from litigation were themselves just and reasonable. Additionally, CTAG argues, the transition payments are not payments for any capacity product and customers receive nothing in return for those payments; rather, they were simply an inducement to generators not to oppose the Settlement Agreement.

2. Irreparable injury

10. CTAG argues that New England ratepayers will be irreparably harmed absent a stay of the transition payments. CTAG states that the transition payments serve no legitimate regulatory function and will cause consumers to be charged unreasonably high electric rates, thus causing hardship to customers and rendering the region uncompetitive for business. CTAG states that this harmful impact to New England's economy cannot be undone. It also states that refunds of the transition payment amounts are not available to address this injury, because, under section 206 of the FPA, refunds may be ordered beginning no earlier than 60 days after a third-party complaint is filed, or after the Commission has published notice of its intention to act under section 206; CTAG states that neither of these eventualities has occurred.

3. Harm to other parties

11. CTAG states that the granting of a stay of the FCM Orders will not harm other parties. CTAG notes that the reason for the creation of a capacity market or for transition payments was the necessity for compensating those generators who, absent FCM, required RMR contracts to stay in operation. However, as CTAG states, those generators are already receiving full cost-of-service compensation under RMR contracts.

4. Public interest

12. CTAG states that the granting of a stay is in the public interest, in that the Commission violated the FPA by issuing the FCM Orders despite its lack of jurisdiction to do so, and in that the FCM Orders will require payments that have no legitimate regulatory purpose and are causing hardship and irreparable injury to New England consumers.

D. Responses

13. The New England Power Pool Participants Committee (NEPOOL) and ISO-NE (collectively, ISO-NE), Capacity Suppliers[9] and Milford Power Company (Milford) filed answers to CTAG's motion.

14. ISO-NE states in its response that the FCM was the product of extensive negotiations, in which the State of Connecticut's interests were represented by the Connecticut Department of Public Utility Control (CT DPUC) and the Connecticut Office of Consumer Counsel (CT OCC), both of which agencies ultimately signed onto the Settlement Agreement. ISO-NE states that, after issuance of the two FCM Orders, on September 1, 2006, it filed tariff revisions implementing the transition payment arrangements, that transition payments began on December 1, 2006, and CTAG filed its appeal of the FCM Orders roughly a month after that. ISO-NE contends that, on this basis, CTAG's motion to stay the transition payments is "grossly untimely."[10] ISO-NE states that, under section 705 of the Administrative Procedure Act (APA),[11] an agency "may postpone the effective date of action taken by it, pending judicial review." Here, however, it is too late to postpone the effective date, since ISO-NE has already begun making transition payments; thus, according to ISO-NE, CTAG's motion is out of time.

15. ISO-NE then states that CTAG's motion does not meet the standards for granting a stay. It disagrees that CTAG has shown that its appeal is likely to succeed on its merits. ISO-NE states that CTAG mischaracterizes the FCM Orders as trespassing on the states' jurisdiction to set resource adequacy requirements. Rather, ISO-NE states, the FCM orders simply provide a mechanism by which the resource adequacy requirement for New England can be met. ISO-NE further states that CTAG has not established irreparable

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[9] Capacity Suppliers are Boston Generating, LLC, Dominion Energy Brayton Point, LLC, Dominion Energy Manchester Street, Inc., Dominion Energy New England, Inc., Dominion Energy Salem Harbor, LLC, Dominion Nuclear Connecticut, Inc. and Dominion Energy Marketing, Inc. (collectively, Dominion), Entergy Nuclear Generation Company, LLC, Entergy Nuclear Vermont Yankee, LLC, (collectively, Entergy), FPL Energy, LLC (FPLE), and Mirant Energy Trading, LLC, Mirant Canal, LLC, and Mirant Kendall, LLC (collectively, Mirant). Capacity Suppliers state that they are joined in this pleading are FirstLight Power Resources Management, LLC, FirstLight Hydro Generating Company and Mt. Tom Generating Company LLC (collectively, the FirstLight Parties), Casco Bay Energy Company, LLC, and Bridgeport Energy, LLC.

[10] ISO-NE answer at 6.

[11] 5 U.S.C. § 705 (2000).

harm, since the only harm that could result is economic, and economic loss is, in itself, insufficient to establish irreparable injury.[12] As to harm to other parties, ISO-NE states that CTAG has failed to address the possibility that, absent transition payments, capacity providers needed to meet reliability standards for the New England region could cease providing capacity during the transition period; thus, ISO-NE asserts, the granting of the stay could cause significant harm. And finally ISO-NE states that granting the stay would not be in the public interest, since the overall package approved in the FCM Orders, including the transition payments , is just and reasonable, and will maintain the resources necessary to ensure reliability. ISO-NE notes in this regard that the CT DPUC and CT OCC both considered the transition payments to be reasonable, and to be planned for the shortest time possible to carry out the transition to a capacity market.[13]

16. Capacity Suppliers and Milford similarly argue that CTAG has not met the standards for granting a stay. Capacity Suppliers states that granting the stay at this point, at which implementation of the FCM Orders have begun, including the payment of transition payments,[14] could undo the settlement and once again subject New England parties to a market design that is unjust and unreasonable. Capacity Suppliers further state that the Commission no longer has jurisdiction to issue a stay:

> [Section 313(b) of t]he Federal Power Act[[15]] provides that "[u]pon the filing" of an appeal with an appeals court, "such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part." CTAG and others have appealed the [FCM] Orders approving the FCM and transition payments to the D.C. Circuit. FERC certified the record on January 29, 2007, and the D.C. Circuit now has exclusive jurisdiction.[16]

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[12] ISO-NE answer at 9, *citing Wisconsin Gas Co*. v. *FERC* (*Wisconsin Gas*), 758 F.2d 669, 674 (D.C. Cir. 1985).

[13] ISO-NE comments at 11, *citing* Load Supporters' Initial Comments in favor of the FCM Settlement Agreement.

[14] The Commission recently issued an order approving, in part, the market rules filed by ISO-NE to implement the FCM, and ISO-NE has already begun the process of accepting Show of Interest forms from parties interested in providing new capacity to New England. *ISO New England*, 119 FERC ¶ 61,044 (2007).

[15] 16 U.S.C. 825*l* (2000).

[16] Capacity Suppliers answer at 11 (footnotes omitted).

17. Milford characterizes CTAG's motion for a stay as a prohibited request for rehearing of a denial of rehearing, since it is raising the same arguments – namely, that the Commission lacks jurisdiction over resource adequacy – that it raised in its earlier request for rehearing which the Commission denied in the FCM Rehearing Order.

II. DISCUSSION

18. The Commission denies CTAG's motion for a stay.

A. The Commission Has No Jurisdiction to Grant a Stay

19. As noted by Capacity Suppliers, the Commission no longer has jurisdiction to issue a stay of the FCM Orders. Section 313(b) of the FPA provides that "Upon the filing of such petition such court shall have jurisdiction, *which upon the filing of the record with it shall be exclusive*, to affirm, modify, or set aside such order in whole or in part" (emphasis added). Now that the record has been filed with the D.C. Circuit, the Commission no longer has jurisdiction to issue a stay of those orders.[17]

B. CTAG Has Not Met the Criteria for Granting a Stay

20. Even assuming *arguendo* that the Commission had jurisdiction to issue a stay, we find that CTAG has not met the standard for a stay.

21. The APA provides that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review."[18] In deciding whether justice requires a stay, the Commission generally considers several factors, which typically include: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.[19] If the party requesting a stay is unable to

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[17] As Capacity Suppliers further point out, this jurisdictional problem is of CTAG's own making, since CTAG could have requested a stay at the same time that it filed its request for rehearing of the FCM Orders, well before the record was filed with the D.C. Circuit.

[18] 5 U.S.C. § 705 (2006).

[19] *MidAmerican Energy Holdings Company* (*MidAmerican Energy*), 118 FERC ¶ 61,003 at P 22 (2007); *CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership* (*CMS Midland*), 56 FERC ¶ 61,177 at 61,630-31 (1991), *aff'd sub nom., Michigan Municipal Cooperative Group* v. *FERC*, 990 F.2d 1377 (D.C. Cir.), *cert denied*., 510 U.S. 990 (1993); *Boston Edison Company*, 81 FERC ¶ 61,102 at 61,377 (1997).

demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.[20] CTAG's motion does not meet the burden under the factors considered by the Commission.

1. Irreparable injury

22. CTAG states that, unless a stay of the transition payment provision is granted, the New England region will suffer economic harm due to excessive electricity prices. It also states that refunds of the transition payment amounts are not available to address this injury, because under section 206 of the FPA, refunds may be ordered beginning no earlier than 60 days after a third-party complaint is filed, or after the Commission has published notice of its intention to act under section 206; CTAG states that neither of these eventualities has occurred.

23. Neither of these assertions demonstrates irreparable injury. First, as noted above, economic loss alone is insufficient to establish irreparable injury.[21] Second, CTAG alludes broadly to economic harm to the New England region, but it provides no specifics as to the monetary extent of that harm; nor does it provide any evidence showing that such economic harm is the result of excessive electricity prices resulting from the FCM Settlement Agreement. Such a claim is too broad and speculative to justify the granting of injunctive relief.[22]

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[20] *CMS Midland*, 56 FERC at 61,631 ("The key element in our inquiry is irreparable injury to the moving party. If such party is unable to demonstrate that it will suffer irreparable harm if we do not grant a stay, we need not examine the other factors").

[21] *Wisconsin Gas* 758 F.2d at 674.

[22] In *Wisconsin Gas*, 758 F2d at 674, the court stated that, to meet the irreparable injury test for granting a stay:

> First, the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time," *Connecticut* v. *Massachusetts*, 282 U.S. 660, 674, 75 L. Ed. 602, 51 S. Ct. 286 (1931); the party seeking injunctive relief must show that "the injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Ashland Oil, Inc*. v. *FTC*, 409 F. Supp. 297, 307 (D.D.C.), *aff'd*, 179 U.S. App. D.C. 22, 548 F.2d 977 (D.C. Cir. 1976) (citations and internal quotations omitted).

24. With regard to the question of refunds, CTAG is incorrect in stating that refunds of the transition payment amounts will be unavailable to customers. It would be premature at this time, in advance of a court's remanding the case back to the Commission, to opine on the question of refunds. Should a court remand the case back to the Commission, the Commission will at that time and in light of the court's directions to the Commission determine what refunds may be appropriate.

2. Whether there is harm to other parties and whether a stay is in the public interest

25. As discussed above, the Settlement Agreement approved in the FCM Orders addressed the inability of certain generators needed for reliability to receive sufficient compensation for the capacity that they provided to ISO-NE, absent cost-of-service RMR contracts. This, in turn, undercut the market mechanisms pursuant to which ISO-NE sought to ensure that its prices to customers were just and reasonable.[23]

26. CTAG's suggestion of terminating the transition payments (without, in any other way, recalibrating the balance of concessions sought and given during the negotiating process) could well destroy the balancing of interests achieved in the Settlement Agreement. As the Commission found, the Settlement Agreement will benefit New England parties by providing that existing capacity providers will remain in the market and continue to provide their capacity product to customers, and new entrants will similarly seek to enter the market, and thus enabling market mechanisms to render the price of capacity just and reasonable.[24] A stay of a part of that settlement, and the undoing of the delicate balancing of all interests that made that settlement possible, has the potential to harm both other New England parties, and the public interest as a general matter. We therefore find that a stay would harm other parties, and would not be in the public interest.

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[23] *See* FCM Order at P 71:

> The settlement package, including both the FCM and the interim transition mechanism, resolves the issues raised in this proceeding concerning the under-compensation of capacity resources in New England, and provides the appropriate market structure to ensure that generating resources are appropriately compensated based on their location and contribution to system reliability and provides incentives to attract new infrastructure where needed.

[24] *Id.* at P 71.

3. Likelihood of prevailing on the merits

27. CTAG also asserts, in its request for a stay, that its request should be granted because there is a strong likelihood that it will prevail on the merits of its appeal. While courts have traditionally examined this factor in their consideration as to whether a stay of agency action should be granted,[25] and the Commission has done so in the past, the Commission's recent precedent omits it. Under the "justice so requires" standard of section 705 of the Administrative Procedure Act, we may properly grant stay requests based on our consideration of injury to the moving party, harm to other parties, and the public interest, without also attempting to predict how a court may rule on the merits of our underlying decision.[26] We will, therefore, not address in detail CTAG's allegations in that regard.

28. Briefly, however, we note in response to CTAG's jurisdictional argument that the Commission has jurisdiction to approve ISO-NE's FCM because it "establish[es] a mechanism and market structure for the purchase and sale of installed capacity at wholesale in interstate commerce and to determine the prices for those sales, bringing it squarely within the Commission's jurisdiction under the FPA."[27] Further, in response to CTAG's claim that the Commission has failed to justify the transition payments to current capacity providers, the provision for transition payments was part of a settlement agreement which the Commission approved pursuant to the second *Trailblazer* approach,[28] under which the Commission can approve a settlement based on a finding that the overall settlement as a package is just and reasonable. Under this second *Trailblazer* approach, the Commission examines whether the overall package falls within a zone of reasonableness, and, in this instance, the Commission found that it did.[29]

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[25] *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*Virginia Petroleum Jobbers*).

[26] *See City of Tacoma*, 89 FERC ¶ 61273 at 61,795 n.10 (1999).

[27] FCM Order at P 201; *accord ISO New England*, 118 FERC ¶ 61,157 at P 15 (2007).

[28] *Trailblazer Pipeline Company*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110 (1999) (*Trailblazer*). *Trailblazer* provides four possible approaches for deciding a contested settlement, including the second approach discussed above.

[29] FCM Order at P 68; *Trailblazer*, 85 FERC at 62,342.

The Commission orders:

CTAG's request for a stay is hereby denied.

By the Commission.

(S E A L)

Philis J. Posey,
Deputy Secretary.