

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

New England Power Company

Docket No. ER05-500-000

ORDER ACCEPTING REVISED UNEXECUTED INTERCONNECTION
AGREEMENT

(Issued March 24, 2005)

1. In this order, we accept the Second Revised Service Agreement No. 214 (Agreement) between New England Power Company (NEP) and Lake Road Generating Company, L.P. (Lake Road). In addition, we grant waiver of the Commission's 60-day prior notice requirement to permit an effective date of December 29, 2004, as requested. This action benefits customers because it assures that changes to the terms, conditions, and rates for interconnection service are consistent with the terms of the agreement that was previously filed with and accepted by the Commission.

Background

2. On March 6, 2003, the Commission accepted for filing, effective November 19, 2002 a revised service agreement (Underlying Agreement) between NEP and Lake Road in compliance with Commission's order in *New England Power Company*, 101 FERC ¶ 61,183 (2002).

3. On January 27, 2005, NEP filed, in the instant proceeding, the Second Revised Service Agreement No. 214 between NEP and Lake Road (Revised Agreement). NEP states that the parties have revised the Underlying Agreement in three respects. First, the parties have replaced the estimate of the costs of the upgrades with final, actual costs as reflected in Table No. 1 to the Agreement. Second, section 1 of the Underlying Agreement has been revised to reflect Lake Road's adoption of one of two options for payment and security. The proposed payment and security provision in section 1 of the Revised Agreement requires that: (i) Lake Road shall pay \$497,310 to NEP representing fifty percent of the final cost of the work; and (ii) because NEP has received approval from NEPOOL to roll 50 percent of the cost of the work into the Regional Network Service rate, Lake Road is not required to provide NEP with any further security, or Letter of Credit (LOC), for the cost of the work. Third, the parties have made revisions to reflect new contact information for both parties.

4. NEP also proposes changes to sections 6 and 8 of the Underlying Agreement to reflect the removal of the requirement for Lake Road to maintain a LOC as security. The proposed revision to section 6 removes a provision allowing for NEP to draw on the LOC, if either party terminates the Agreement for reason other than breach by NEP, for all unrecovered costs including taxes applicable to facilities installed pursuant to the Revised Agreement. In section 8(b) of the Revised Agreement, NEP proposes to delete the provision requiring NEP to report amounts drawn upon the LOC as income or, if it determines that such amounts are not required to be reported as taxable income, to amend its tax return, request a refund from the IRS and pass the refund to Lake Road.

Notice and Responsive Pleadings

5. Notice of the filing was published in the *Federal Register*, 70 Fed. Reg. 6,644 (2005), with comments, protests, and motions to intervene due on or before February 17, 2005. On February 17, 2005, Lake Road filed a timely motion to intervene and protest. NEP filed an answer to Lake Road's protest on March 4, 2005. Lake Road filed a motion for leave to answer and answer on March 9, 2005.

Discussion

A. Procedural Matters

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene and notice of intervention, serve to make the entities that filed them parties to the proceeding.

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answers of NEP and Lake Road since they have provided information that has assisted us in our decision-making process.

B. Protest

8. In its protest, Lake Road asserts that NEP has not met its burden of proof to show that the Revised Agreement is just and reasonable. Lake Road argues that NEP has not shown why it should be required to pay the tax gross-up amount (rather than secure it through an LOC or other means), or why it was just and reasonable to eliminate the refund provision formerly contained in the Underlying Agreement. Lake Road asks the Commission to require NEP to conform the tax gross-up provisions of the Revised

Agreement to the tax gross-up provisions contained in Order No. 2003,¹ and to the ISO-NE Tariff. Moreover, Lake Road requests that the Commission rule as a summary matter that Lake Road is entitled to a refund, with interest, of the tax gross-up amount it has paid to NEP upon receipt by NEP from Lake Road of adequate security or, if Lake Road does not substitute security for its tax gross-up payment, upon expiration of the ten year tax gross-up testing period and the applicable statute of limitation or upon receipt by NEP of a refund of any tax paid or of information indicating that no tax is due with respect to the cost reimbursements made by Lake Road to NEP. Further, Lake Road states that to the extent the Commission believes that there are any unresolved factual issues, Lake Road requests that the Commission set this matter for hearing.

C. Commission Determination

9. The Commission finds that NEP's proposed revisions to the Underlying Agreement to either be in accordance with the express terms of that agreement or necessary as a result of implementation of the Underlying Agreement. Section 1 of the Underlying Agreement provided that "NEP shall modify the Agreement to reflect Lake Road's [payment and security option] selection, and file the modified Agreement" with the Commission. Accordingly, the Commission will grant waiver of our prior notice requirements² and accept them effective December 29, 2004, as requested.

10. Lake Road requests that the Commission not accept the Revised Agreement unless the tax gross-up provisions are revised to be consistent with Order No. 2003. Lake Road argues that since NEP filed the Revised Agreement after the issuance Order No. 2003, the agreement should conform to the requirements of Order No. 2003, even if it was

¹ See *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs., ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats & Regs. ¶ 31,171 (2004), *reh'g pending*; see also *Notice Clarifying Compliance Procedures*, 106 FERC ¶ 61,009 (2004).

² See *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,984, *reh'g denied*, 65 FERC ¶ 61,081 (1993).

negotiated prior to Order No. 2003.³ Lake Road states that even though the Revised Agreement “is not technically subject to the requirements of Order No. 2003, the Commission’s determinations in Order No. 2003” are appropriate to be substituted for provisions in the Revised Agreement. While Order No. 2003 is an appropriate indicator of what the Commission finds just and reasonable, that is not to say that a previously filed and accepted agreement is not just and reasonable. The circumstances in this proceeding are unique because the Underlying Agreement specifically stated in section 1 that the agreement would be refiled as modified to reflect Lake Road’s selection of Option A or Option B. The Revised Agreement now reflects the selection of Option A.

11. Lake Road protests the Revised Agreement because it does not include a provision to obtain a refund in the event that it provides security as a substitute for the payment or if NEP does not owe tax on the contributions it received from Lake Road. However, NEP states that if the “IRS determined that NEP was not subject to taxation for the lump-sum payment, the NEP, of course, would pass along to Lake Road any amounts it received from the IRS as a result of the IRS determination, provided that Lake Road provide NEP with adequate security for any future potential tax liability as required by Order No. 2003.”⁴

12. We find that Lake Road has not shown that the Revised Agreement as filed is unjust or unreasonable. NEP is correct that if Lake Road wishes to change the filed rate, Lake Road has the burden of proof under section 206 of the Federal Power Act. Lake Road has not met that burden. NEP’s revisions to section 1 of the Underlying Agreement and to Table 1 were made pursuant to the express provisions of section 1 of the

³ Section 5.17.3 of the Large Generator Interconnection Agreement (LGIA) in Order No. 2003 states the following:

Transmission Provider shall not include a gross up for the cost consequences of any current tax liability in the amounts it charges Interconnection Customer under this LGIA unless (i) Transmission Provider has determined, in good faith, that the payments or property transfers made by Interconnection Customer should be reported as income subject to taxation or (ii) any Governmental Authority directs the Transmission Provider to report payments or property as income subject to taxation; provided, however, that Transmission Provider may require Interconnection Customer to provide security for Interconnection Facilities, in a form reasonably acceptable to Transmission Provider (such as a parental guarantee or a letter of credit), in an amount equal to the cost consequences of any current tax liability under this Article 5.17.

⁴ NEP Answer, pages 8-9.

Underlying Agreement. NEP's revisions to sections 6 and 8 of the Underlying Agreement were likewise required by the revision to section 1. While Lake Road does not protest the changes to sections 1, 6 and 8 per se, it does object to the absence of a provision in the Revised Agreement that would conform the tax gross-up provisions to those contained in Order No. 2003 and thereby allow Lake Road to secure the amount of the tax gross-up (approximately \$66,000) with a LOC and require NEP to refund the tax gross-up if no tax is due. However, since there was no provision in the Underlying Agreement that the Commission accepted in Docket No. ER02-2568 et al. or any proposal by NEP to revise the Underlying Agreement with respect to the tax gross-up provision, any revision of the Underlying Agreement to incorporate new provisions either similar to those in Order No. 2003 or in any other manner, must be done pursuant to section 206 of the Federal Power Act and requires the Commission to determine that the Revised Agreement is not just and reasonable.⁵ Lake Road has not made such a showing. We cannot accept, in the guise of a protest to NEP's section 205 filing, Lake Road's attempt to modify the terms of an agreement that has been effective since the Commission accepted it in 2002.

The Commission orders:

(A) NEP's request for waiver of the Commission's 60-day prior notice requirement is granted.

(B) NEP's Second Revised Service Agreement No. 214 is hereby accepted.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

⁵ Even if we were to determine that the Revised Agreement should be modified to reflect Order 2003 (which we are not), NEP has substantially complied with the provisions of Order 2003 by determining, in good faith, that it has a tax liability and consequently including the lump sum payment that it received from Lake Road in its quarterly income tax payment calculation. *See* NEP Answer at page 7.