UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Mirant Kendall, LLC and
Mirant Americas Energy Marketing, L.P. Docket No. ER05-26-001

ORDER DENYING REQUEST FOR REHEARING

(Issued March 8, 2005)

1. In this order, the Commission denies a request by NSTAR Electric and Gas Corporation (NSTAR) for rehearing of the Commission's November 26, 2004 Order.[1] That order set for hearing and settlement discussions the rates proposed in a Reliability Must Run Agreement (RMR Agreement) and rejected certain requests by NSTAR pertaining to the terms and conditions of the RMR Agreement. This order benefits customers by further ensuring that generating units needed for grid reliability will continue to operate.

I. Background

2. On October 7, 2004, Mirant Kendall, LLC (Mirant Kendall) and Mirant Americas Energy Marketing, L.P. (MAEM) (collectively, Mirant) filed an unexecuted RMR Agreement between Mirant and the Independent System Operator New England, Inc. (ISO-NE), concerning Mirant Kendall's 19 megawatt steam turbine, 22 megawatt steam turbine and 20 megawatt jet turbine (collectively, Kendall RMR Units) located at a generating facility, Kendall Station, in Cambridge, Massachusetts. Prior to filing with the Commission, Mirant Kendall filed applications pursuant to section 18.4 of the Restated NEPOOL Agreement to deactivate the three steam units and the combustion turbine located at the Kendall Station as of October 1, 2004 and to deactivate the remaining two jet turbines located at the Kendall Station as of August 9, 2004. On June 25, 2004 and July 27, 2004, ISO-NE approved the deactivation of the units with the exception of two of the steam units and one jet turbine respectively, concluding that these Kendall RMR Units were needed to ensure the reliability of the NSTAR Electric and Gas Corporation (NSTAR) system until completion of certain proposed distribution improvements. On

[1] *Mirant Kendall, LLC and Mirant Americas Energy Marketing, L.P.*, 109 FERC ¶ 61,227 (2004) (November 26 Order).

June 25, 2004, ISO-NE directed Mirant Kendall and NSTAR to agree on the selection of which two of the three steam units would remain in operation, thus permitting the deactivation of the remaining steam unit as requested.

3. In the November 26 Order, the Commission accepted and suspended for a nominal period Mirant's RMR Agreement, set the proposed rates for hearing and held the hearing in abeyance so that the parties could engage in settlement discussions. The Commission directed Mirant to file updated tariff sheets 30 days after the completion of the settlement and hearing proceedings to correctly refer to "Applicable Participant" throughout the RMR Agreement and to comply with Order No. 614. The Commission granted waiver of the 60-day prior notice requirement to allow the RMR Agreement to become effective October 8, 2004.

4. Additionally, in the November 26 Order, the Commission found that the RMR Agreement was substantially similar to the Form of Cost-of-Service Agreement attached as Exhibit 4 to ISO-NE's Market Rule 1 (the Pro Forma COS Agreement).[2] Also, the Commission rejected NSTAR's requests to: (1) designate NSTAR as a third-party beneficiary of the RMR Agreement; (2) revise the performance penalty to take into account that the RMR units are peaking resources; (3) change the termination provisions to allow termination on 30 days notice; (4) allow NSTAR to audit Mirant's cost data.

III. Request for Rehearing

A. Procedural Matters

5. NSTAR seeks rehearing of the November 26 Order as to the Commission's grant of waiver of the 60-day prior notice requirement and the rejection of NSTAR's request for third-party beneficiary status, auditing rights and revision of the performance penalty.

6. On January 11, 2005, Mirant filed an answer to NSTAR's rehearing request. The Commission's Rules of Practice and Procedure prohibit answers to requests for rehearing,[3] and, accordingly, we will reject Mirant's answer.

[2] November 26 Order at P 23.

[3] 18 C.F.R. § 385.713(d)(1) (2004).

B. Waiver of 60-day Prior Notice Requirement

7. In the November 26 Order, the Commission granted waiver of the 60-day prior notice requirement allowing the proposed RMR Agreement to become effective, subject to refund, on October 8, 2004. In doing so, the Commission relied in part on its earlier order in *Mirant Americas Energy Marketing L.P., et al.*, 105 FERC ¶ 61,359 (2003) (*Mirant Remand Order*).

8. NSTAR states that the Commission erred in relying on the *Mirant Remand Order* because that order is the subject of a pending request for rehearing and has not been affirmed by a court. NSTAR alleges that, as a result, the *Mirant Remand Order* does not provide the requisite support for granting waiver in this proceeding.

9. The Commission will not grant rehearing and will not deny waiver. The Commission's reliance on the *Mirant Remand Order* as support for waiver in this proceeding is appropriate. Orders are effective in accordance with their terms.[4] Further, Rule 713(e) of our Rules of Practice and Procedure, 18 C.F.R. § 385.713(e) (2004), clearly states that the filing of a request for rehearing does not by itself operate to stay an order. As the *Mirant Remand Order* has not been stayed and remains effective, the Commission may rely upon it.

C. Third-party Beneficiary Designation

10. In the November 26 Order, the Commission rejected NSTAR's request that the RMR Agreement be amended to designate it as a third-party beneficiary. The Commission stated that although NSTAR is a beneficiary of the agreement, NSTAR is not a party to the agreement and provided no support for its request to amend the RMR Agreement. The Commission further stated that NSTAR had the opportunity to negotiate a bilateral agreement with Mirant, but instead chose to rely on the regulatory solution that ensures reliability for the entire ISO-NE grid. The Commission concluded that as a result, NSTAR is not in the same position as a party to the RMR Agreement.

11. In its Request for Rehearing, NSTAR asserts that under contract law, an entity that is not a party to a contract may be benefited by the contract and have enforceable rights under the contract. NSTAR argues that it qualifies as such an entity because it is required to pay all of the costs of the RMR contract and the reliability services provided under the contract will benefit, for the most part, NSTAR's customers. Further, NSTAR argues that the RMR Agreement should be amended to designate it as a third-party beneficiary

[4] Section 309 of the Federal Power Act (FPA), 16 U.S.C §825h (2000), provides that orders of the Commission will be effective on the date and in the manner the Commission prescribes. Section 313(c) of the FPA, 16 U.S.C §825l(c) (2000), provides that the filing of an application for rehearing will not, unless specifically ordered by the Commission, operate as a stay of the Commission order.

because ISO-NE does not have an incentive to ensure that a least-cost approach is adopted with respect to costs under the agreement. NSTAR concludes that since it will pay the costs under the agreement it has the appropriate incentives to make sure the least cost alternative is pursued whenever possible and thus should be designated a third-party beneficiary.

12. The Commission denies NSTAR's request for rehearing. The fact that NSTAR may benefit from the agreement does not confer third-party beneficiary status upon NSTAR. The Commission has found that "[t]hird parties are not beneficiaries unless the contracting parties have clearly expressed their intention that the third parties have rights conferred upon them."[5] Simply being the named recipient of some of the subject reliability services does not make NSTAR a third-party beneficiary of the agreement. If this were the case, then every customer would be a third-party beneficiary to every contract entered into by every utility that generates or transmits power or energy to that customer. In this case, neither ISO-NE nor Mirant has expressed an intent to confer third-party beneficiary status upon NSTAR. Therefore, NSTAR is an incidental beneficiary of the RMR Agreement.

13. In response to NSTAR's assertion that ISO-NE does not have an incentive to ensure that costs under the agreement are controlled, we note that ISO-NE's objectives, as expressed in its tariff, include creating and sustaining open, competitive markets for energy, capacity and ancillary services that are economically efficient and balanced between buyers and sellers and providing market rules that compensate at fair value any required service, subject to the Commission's jurisdiction and review.[6] We find that these objectives contradict NSTAR's assertion as to ISO-NE's cost control incentives.

D. Non-Performance Penalty Provisions

14. Under the Mirant RMR Agreement, if one of the Kendall RMR Units fails to fully comply with the dispatch ordered by ISO-NE, ISO-NE may apply a non-performance penalty. In the November 26 Order, the Commission rejected NSTAR's request to create a different non-performance penalty based, in part, on capacity factors for peaking units. The Commission found that the formula for the pro-forma non-performance penalty is not based on capacity factors and the formula in the Mirant RMR Agreement is sufficient. The Commission also found that "[t]he penalty is intended to apply in times when any generating unit does not perform during requested dispatch periods, and [the]

[5] *Power Authority of the State of New York, et al. v. Long Island Lighting Company*, 60 FERC ¶ 61,069 at 61,236 (1992), *rev'd and remanded sub nom. on other grounds Long Island Lighting Company v. FERC*, 20 F.3d 494, 497-501 (D.C. Cir. 1994), o*rder on remand*, 68 FERC ¶ 61,116 (1994), *reh'g granted in part*, 71 FERC ¶ 61,126 (1995).

[6] ISO New England Electric Tariff No. 3, section I.1.3, Original Sheet No. 6 -7.

intended consequence for non-performance under these types of agreements is the same regardless of the nature of the unit."[7]

15. NSTAR argues that the Commission erred in rejecting NSTAR's proposed revision to the non-performance penalty. NSTAR recognizes that the pro forma agreement does not directly mention the term "capacity factor", but argues that the pro forma non-performance penalty nonetheless is affected by capacity factors. NSTAR asserts that the proposed non-performance penalty is rendered meaningless because it fails to provide incentive to peaking units for the desired performance. NSTAR provides one example in which a unit is called on for a single hour in a month and the unit does not meet the dispatch instruction for that hour due to an operational problem. NSTAR asserts that under the existing penalty, a peaking unit's penalty for one hour is diluted by 719 hours of presumed full compliance. NSTAR asserts that in this manner, such a unit is assumed to have met its dispatch instruction requirements in all other hours of the month and is not penalized although the unit in the example did not resolve its operational problem. NSTAR concludes that since the unit is not penalized for non-performance when it is *not* called on the rest of the month, the unit has no incentive to fix its operational problem.

16. We deny rehearing. NSTAR has failed to show that the non-performance penalty provision in the Mirant RMR agreement differs substantially from the penalty provision accepted by the Commission in the Pro Forma COS Agreement. Instead, NSTAR argues that the non-performance penalty contained in the Pro Forma COS Agreement is not adequate for one class of generators, namely, peaking units. NSTAR failed to make these arguments when the Commission was considering the justness and reasonableness of the Pro Forma COS Agreement and making them in this proceeding amounts to a collateral attack on our decision in *NEPOOL* to accept the Pro Forma COS Agreement.[8]

17. The Commission has the responsibility of examining whether penalty provisions are just and reasonable, necessary and appropriate to protect against system reliability problems. Penalties should be narrowly designed to balance the need to deter conduct that is harmful to the system with the need to limit excessive and unnecessary costs. We find that the existing provisions maintain this balance for both peaking units and baseload units. Moreover, ISO-NE, the entity charged with maintaining reliable operations of the New England grid, has an incentive to ensure that the penalty is sufficient to provide

[7] November 26 Order at P 21.

[8] *See New England Power Pool and ISO New England, Inc.*, 100 FERC ¶ 61,287 (*NEPOOL*), *reh'g denied in part and granted in part*, 101 FERC ¶ 61,344 (2002), *reh'g denied in part and granted in part*, 103 FERC ¶ 61,304, *reh'g denied in part and granted in part*, 103 FERC ¶ 61,211 (2003).

peaking unit availability. NSTAR does not demonstrate that this negotiated penalty is insufficient to deter conduct that is harmful to the system, nor does NSTAR demonstrate that its own alternative proposal would not result in excessive penalties.

E. Audit Rights

18. Finally, in the November 26 Order, the Commission rejected NSTAR's request to require Mirant to file monthly reports, stating costs actually incurred, and NSTAR's request for audit rights. The Commission found that NSTAR had failed to meet the burden of showing that the provisions of the Pro Forma COS Agreement are not just and reasonable as applied to the Kendall RMR Units. Additionally, the Commission rejected NSTAR's request because NSTAR is not a party to the RMR Agreement and because the Pro Forma COS Agreement appropriately provides for reporting requirements and audit rights by ISO-NE.

19. NSTAR asserts that the additional cost information and audit rights it seeks would provide the transparency required for a cost-of-service agreement. NSTAR argues that since Mirant filed a cost-of-service agreement, Mirant should be prepared and required to make transparent the costs underlying the rates in the agreement. NSTAR reiterates that cost-of-service rates and transparency of cost data go hand in hand. NSTAR adds that there are no commercially sensitive aspects to the information because Mirant by the act of filing the cost-based RMR Agreement concedes that it cannot be a participant in the competitive market. In fact, NSTAR asserts, Mirant cannot credibly claim prospective commercial injury since Mirant has a present intent to abandon the facilities at issue. NSTAR concludes that the present reporting requirements for the Mirant RMR Units do not satisfy the requirements of the Federal Power Act (FPA) because they are not public filings, do not provide full disclosure and do not provide for ongoing prudency review. NSTAR asserts that giving it audit rights and requiring additional cost reporting by Mirant provides the transparency required for a cost-of-service agreement under the FPA.

20. The Commission denies NSTAR's request for rehearing. We found in the November 26 Order that the audit provisions in Mirant's RMR Agreement were substantially similar to the audit provisions contained in the Pro Forma COS Agreement. Further, we find that NSTAR has access to the cost information supporting the rates proposed in this section 205 proceeding. NSTAR also has access to cost information through the ongoing evidentiary proceedings affecting the Mirant RMR Agreement. More importantly, these rates will have undergone the crucible of these section 205 proceedings in determining their justness and reasonableness. Parties are also not precluded from challenging the accuracy of the subsequent RMR revenues through section 206 proceedings. Further, section 4.3 of the agreement[9] clearly provides that ISO-NE has the right, at any time, to audit and verify all reports, statements, invoices,

[9] This agreement, which was accepted in *NEPOOL*, was developed through an extensive stakeholder process.

charges, or computations pursuant to the agreement. NSTAR has not provided a compelling justification to change the auditing provisions of the Pro Forma COS Agreement.

The Commission orders:

The request for rehearing of NSTAR is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.