

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Vermont Electric Cooperative, Inc.

Docket Nos. ER04-694-003
ER04-694-004

ORDER ON REHEARING AND REFUND REPORT

(Issued March 4, 2005)

1. In an order issued on September 7, 2004,¹ the Commission accepted Vermont Electric Cooperative, Inc.'s (VEC) request for authorization to sell power at market-based rates and directed VEC to make refunds with interest because it had charged market-based rates without prior Commission authorization. In this order, we deny the requests for rehearing of the September 7 Order, respond to the request for clarification and accept VEC's refund compliance report. This order benefits customers by allowing VEC to provide reliable and economical electricity service to its cooperative members and by enforcing the filing requirements of the Federal Power Act (FPA) and the Commission's policies thereunder.

Background

2. On March 31, 2004, as amended on July 9, 2004, pursuant to section 205 of the FPA, VEC filed a request for authorization to sell power at market-based rates, effective January 1, 2003.

3. In the September 7 Order, the Commission accepted for filing, without suspension or hearing, VEC's proposed market-based rate tariff, to become effective on May 31, 2004. The Commission also found that VEC had charged market-based rates without prior Commission authorization to enter into market-based rate sales and, therefore, required VEC to make refunds with interest. The Commission directed VEC to file a refund report with the Commission within 15 days of the date refunds were made.

¹ *Vermont Elec. Coop., Inc.*, 108 FERC ¶ 61,223 (2004) (September 7 Order).

4. On October 6, 2004, VEC filed a request for rehearing and a refund compliance report. On October 7, 2004, the New England Power Pool (NEPOOL) Participants Committee (NEPOOL Participants Committee) filed a request for clarification or, in the alternative, rehearing.

Notice of Filing and Responsive Pleadings

5. Notice of VEC's refund compliance report was published in the *Federal Register*, 69 Fed. Reg. 61,368 (2004), with protests and interventions due on or before October 27, 2004. None were filed.

Discussion

A. Requests for Rehearing and Clarification

Waiver of Prior Notice Requirement

6. In its market-based rate filing, VEC requested waiver of the Commission's prior notice requirement and any potential liabilities associated with failure to file its rate schedule pursuant to that requirement. VEC argued that it should not be penalized for believing that, as a NEPOOL participant, VEC was entitled to sell into the NEPOOL markets under NEPOOL Market Rule 1 (Market Rule 1).

7. In the September 7 Order, the Commission did not grant the request. The Commission found that Market Rule 1 does not convey authority for NEPOOL members to sell energy at market-based rates and that *NEPOOL Power Pool Agreement* does not provide support to the contrary.² The Commission stated that it is each utility's responsibility to provide support to satisfy the Commission's four-part market-based rate analysis.³ The Commission noted that it had encouraged each public utility supplier that did not yet have a market-based rate schedule on file with the Commission for each of the markets administered by ISO New England, Inc. (ISO) and wished to sell into those markets to file an appropriate market-based rate schedule.⁴ The Commission also found that VEC had failed to demonstrate extraordinary circumstances warranting waiver of

² September 7 Order, 108 FERC ¶ 61,223 at P 19.

³ *Id.*

⁴ *Id.* at P 20.

prior notice.⁵ As a result, the Commission did not grant the waiver of the prior notice requirement and concluded that refunds were due, plus interest.⁶

a. Market Rule 1

8. VEC argues that the Commission erred in finding that Market Rule 1 does not authorize sales into the NEPOOL markets. VEC claims that sections 1.7.7 and 1.10.1(b) and (c) of Market Rule 1 establish rates and terms of purchases and sales in the NEPOOL markets and authorize VEC to buy and sell in these markets. VEC states that the Commission has acknowledged that NEPOOL was authorized to file Market Rule 1 on behalf of VEC and asserts that Market Rule 1 does not require that a participant obtain market-based rate authority as a condition precedent to participating in the NEPOOL markets. Therefore, VEC concludes that, when VEC transacted to balance loads and resources during the refund period, VEC was simply operating under the filed rate.

9. We reiterate that Market Rule 1 does not convey authority for NEPOOL members to sell energy at market-based rates. As we stated in the September 7 Order, Market Rule 1 only “sets forth the scheduling, other procedures, and general provisions applicable to the operation of the NEPOOL market within the NEPOOL control area.”⁷ The fact that sections 1.7.7 and 1.10.1(b) and (c) of Market Rule 1 set out the terms for energy pricing and the functioning of the day-ahead energy market does not confer upon NEPOOL members the authority to sell energy at market-based rates; those sections merely set out the terms and procedures for the sale of energy in the NEPOOL market once an entity has authority to transact at market-based rates. Accordingly, we deny rehearing on this issue.

b. Effective Date

10. VEC also argues that the Commission erred in declining to grant the requested January 1, 2003 effective date and ordering refunds with interest. VEC contends that the extraordinary circumstances required to grant the requested effective date exist because (1) in October 2003, NEPOOL confirmed VEC’s belief that it did not have to obtain separate market-based rate authority as a NEPOOL participant; (2) VEC’s rates were based upon the NEPOOL filed rate (*i.e.*, Market Rule 1 and its predecessor) which were

⁵ *Id.* at P 22.

⁶ *Id.* at P 22 and 24.

⁷ *Id.* at P 19.

de facto just and reasonable; and (3) VEC's use of Market Rule 1 to balance its power supply portfolio, as required by the filed NEPOOL rate schedule, is not akin to a market participant seeking to make sales at market-based rates for profit. VEC adds that, by allowing all other NEPOOL participants to transact at the prevailing energy clearing price when resources exceeded load or the relevant nodal price, the Commission had already made a determination that the underlying market which was operated under Market Rule 1 produced rates that were just and reasonable. Thus, VEC states that the sales for which VEC will now be required to make refunds were at prices that were *perforce* just and reasonable. VEC adds that it incurred a loss on the sales that occurred during the refund period.

11. Alternatively, VEC argues that an effective date of October 28, 2003 is appropriate. It states that, on that date in Docket No. ER04-89-000, VEC brought the circumstances surrounding VEC's sales under Market Rule 1 to the Commission's attention.

12. Pursuant to section 205 of the FPA, VEC was required to make a timely filing before the Commission for market-based rate authority. Only the Commission has the statutory authority to grant authorization to transact at market-based rates. VEC's argument that it failed to make a timely filing due to erroneous assumptions does not amount to the extreme or extraordinary circumstances required for the Commission to grant waiver of prior notice for proposals to charge market-based rates.⁸ Consequently, the Commission's imposition of a refund obligation was appropriate.⁹ Since VEC has failed to convince us otherwise, we deny rehearing on this issue.

c. Financial Settlement Process

13. The NEPOOL Participants Committee requests that the Commission clarify its conclusion that Market Rule 1 does not convey authority for NEPOOL members to sell energy at market-based rates. Specifically, the NEPOOL Participants Committee requests clarification that transactions in which a NEPOOL participant with a zero bid in

⁸ *Central Maine Power Co.*, 56 FERC ¶ 61,200, *order on reh'g*, 57 FERC ¶ 61,083 (1991); *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *clarified*, 65 FERC ¶ 61,081 (1993).

⁹ We note that neither VEC nor its customers are harmed by the May 31, 2004 effective date due to our determination below that no refunds are due for the refund period.

the NEPOOL market for energy is entitled to the settlement treatment required by Market Rule 1 for its surplus energy are properly authorized by the NEPOOL Market Rule and do not require participants receiving payments to first receive further authority. The NEPOOL Participants Committee does not dispute that Market Rule 1 does not allow participants to sell their power to others at rates, terms and conditions they seek to establish unilaterally in the market. The NEPOOL Participants Committee states that clarification is needed to ensure that the financial settlement process under Market Rule 1, which details how payments for balancing transactions in the NEPOOL markets will be determined and made, is fully authorized by Market Rule 1, particularly when a participant is a price taker under the filed rate.

14. Alternatively, the NEPOOL Participants Committee seeks rehearing on this point. It argues that the Commission erred in concluding that Market Rule 1 does not allow for the transactions and financial settlements that Market Rule 1 specifically requires. The NEPOOL Participants Committee states that, if the Commission intends to limit NEPOOL energy settlement payments to participants with separate market-based rate authority, then the requirements of the FPA should be satisfied and the change to Market Rule 1 should be applied prospectively only. The NEPOOL Participants Committee adds that NEPOOL and the ISO will need to determine how to settle the energy market for participants who have surplus energy but do not have separate market-based rate authority.

15. We clarify that the Commission's ruling in the September 7 Order does not affect NEPOOL's ability to conduct the financial settlement process set forth in Market Rule 1. We reiterate, however, that any jurisdictional public utility that intends to make sales of energy and capacity at market-based rates, regardless of whether or not such an entity participates in the market as a price taker, is required to obtain Commission authority to transact at market-based rates. In this regard, such an entity must make a showing before the Commission that it meets the standards for such authority (*i.e.*, it does not have, or has adequately mitigated, market power in generation and transmission; cannot erect other barriers to entry; and cannot engage in affiliate abuse/reciprocal dealing). An entity with market-based rate authority then must meet certain reporting requirements, including filing electric quarterly reports, in order to maintain its ability to make market-based rate sales. Since the NEPOOL Participants Committee has failed to convince us otherwise, we deny rehearing on this issue.

B. Refund Compliance Report

16. In its refund compliance report, VEC states that the funds collected on a monthly settlement basis from NEPOOL from sales during the refund period were less than VEC's actual cost for the purchased power resources that were resold into the day-ahead

and real-time markets. VEC states that it lost \$414,488.88 on these sales. We have reviewed the refund compliance report and find that on these facts no refunds are due. Accordingly, we accept the refund report for filing.

The Commission orders:

(A) The requests for rehearing are hereby denied, as discussed in the body of this order.

(B) The refund compliance report is hereby accepted, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.