108 FERC ¶ 61,212
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Connecticut Yankee Atomic Power Company Docket No. ER04-981-000

Connecticut Department of Public Utility Counsel And Connecticut Office of Consumer Counsel Docket No. EL04-109-000

ORDER ACCEPTING FOR FILING AND SUSPENDING REVISED RATE SCHEDULES, SUBJECT TO REFUND, ESTABLISHING A HEARING, AND DENYING PETITION FOR DECLARATORY ORDER

(Issued August 30, 2004)

1. This order addresses two recent filings addressing decommissioning expenses to be incurred by the Connecticut Yankee Atomic Power Company (CY). The first is a rate proceeding filed on July 1, 2004, in Docket No. ER04-981-000, that involves revised rate schedules[1] filed by CY proposing to increase annual collections for decommissioning by $76.3 million, from $16.7 million annually to $93 million annually, beginning January 2005 through December 2010. CY states that this increase is necessary to complete the decommissioning of its retired nuclear generating plant located in Haddam Neck, Connecticut (Plant), and for storage costs for spent nuclear fuel through 2023. CY also proposes additional collections of $6.4 million from January 2005 through June 2007 in order to supplement the funding of its employee pensions and post retirement benefits other than pensions.

2. The second is a request for declaratory order filed in Docket No. EL04-109-000 by the Connecticut Office of Consumer Counsel (COCC) and the Connecticut Department of Public Utility Control (CT DPUC) (collectively, Connecticut Parties), asking the

[1] The proposed rate schedules are designated as Rate Schedule FERC No. 10 (Original Sheet Nos. 1-21) and Rate Schedule FERC No. 11 (Original Sheet Nos. 1-16) (Superseding Rate Schedule FERC No. 1, as supplemented) (Power Contracts).

Commission to determine that: (1) Commission-approved Power Contracts and a Commission-approved Settlement Agreement[2] provide that CY may charge its wholesale purchasers (Purchasers)[3] for all decommissioning costs associated with the Plant, including those determined by the Commission to result from imprudence; and (2) those wholesale purchasers may only pass on to retail customers those costs that are prudently incurred.

3. The Commission accepts and suspends the proposed revised rate schedules for five months, to become effective February 1, 2005, subject to refund, and establishes hearing procedures. This order benefits customers by providing a forum to evaluate the reasonableness of the proposed rate schedules.

4. The Commission will also deny the petition for declaratory order, because it asks the Commission to take actions that would be contrary to our statutory duty under the Federal Power Act (FPA) and precedent. In effect, the petition requests that the Commission: (1) disregard our statutory duty to ensure that wholesale rates are just and reasonable and (2) determine what costs wholesale purchasers under jurisdictional rate schedules may, in turn, charge retail customers through retail rates when the Commission's ratemaking authority is limited to rates at wholesale and does not reach power sales at retail.

I. Background

5. In 1962, Purchasers,[4] a group of New England utilities, formed CY to construct the Plant and demonstrate the feasibility of nuclear power technology. The Plant commenced commercial operations on January 1, 1968, and power from the Plant was sold at wholesale to Purchasers. Purchasers agreed to purchase their ownership shares of

[2] *See infra* notes 6-7 and accompanying text.

[3] *See infra* note 5 and accompanying text.

[4] Purchasers, who are also the owners, and their respective percent purchase/ownership shares are as follows: Connecticut Light and Power Company (34.5 percent); New England Power Company, for itself and as successor in interest to Montaup Electric Company (19.5 percent); Boston Edison Company, United Illuminating Company, and Western Massachusetts Electric Company (each 9.5 percent); Central Maine Power Company (6 percent); Public Service Company of New Hampshire (5 percent); Cambridge Electric Light Company (4.5 percent); and Central Vermont Public Service Corporation (2 percent).

the capacity and output from the Plant and pay a like percentage of CY's costs and expenses, including costs to decommission the Plant. On December 4, 1996, CY's Board of Directors unanimously voted to permanently cease operations at the Plant and commence the process of decommissioning the Plant.

6. Pursuant to a partial[5] Settlement Agreement approved by the Commission,[6] the parties agreed to an annual collection of $16.7 million commencing September 2000 and extending through June 2007, based on a cost estimate of $393.3 million for all remaining decommissioning activities after January 2000 (2000 Estimate).[7] The 2000 Estimate reflected CY's undertaking of a competitive bid process to engage a Decommissioning Operations Contractor (DOC) to perform the major decommissioning and dismantlement operations at the Plant on a fixed-price, turnkey basis.[8] The DOC Contract, among other things, provided for construction of an Independent Spent Fuel Storage Installation ("ISFSI") on-site, and completion of major decommissioning activities and site restoration by June 30, 2004. The Settlement Agreement also provided that, with some exceptions, additional costs, if prudent, might be recovered by subsequent filings with the Commission.

[5] The only issue severed from the Settlement Agreement was the "Decommissioning Only Argument," which was whether, under the Power Sale agreements that were in effect when the Plant permanently ceased operations on January 1, 1998, CY is entitled only to costs directly related to decommissioning the Plant and may not collect any of the remaining unamortized investment in the Plant or any return on equity. On September 28, 2000, the Commission resolved this issue in favor of CY. *See* Connecticut Yankee Atomic Power Company, Opinion No. 449, 92 FERC ¶ 61,269 (2000).

[6] *See* Connecticut Yankee Atomic Power Company, 92 FERC ¶ 61,055 (2000).

[7] Offer of Settlement, Docket No. ER97-913-001, II. Terms of Settlement, Section B, Decommissioning Issues (2) (filed April 7, 2000).

[8] *Id.*, I. Background. Thus, it was assumed in the 2000 Estimate that major dismantlement activities would be independently performed, including the burden of all risks related thereto, under the DOC Contract at fixed-prices, and, after the DOC completed the decontamination and dismantlement activities, to the satisfaction of CY, the facilities would be handed back over to CY free of contamination.

7. In addition, CY agreed to commence a proceeding with the Commission no later than July 1, 2004, for purposes of examining: (1) the status of the decommissioning expenditures and expected remaining decommissioning costs and collections; (2) the status of litigation with the Department of Energy (DOE) and cost recovery of the DOE obligation for pre-1983 spent nuclear fuel; (3) the status of legislation affecting the spent fuel storage costs; (4) the status of the DOE obligation for pre-1983 spent nuclear fuel; (5) and any other decommissioning or non-decommissioning rate issues that CY considers appropriate for filing with and reporting to the Commission.

II. Description of Filings

A. Docket No. ER04-981-000

1. Decommissioning and Spent Fuel Storage Expense

8. On July 1, 2004, CY filed a revised 2003 decommissioning cost estimate (2003 estimate) and requested approval for the $93 million decommissioning annual collection, to become effective January 2005 through December 2010. In support of its proposal, CY advises that the $16.7 million annual collection in the 2000 Settlement was based on a decommissioning cost estimate of $410.1 million in 2000 dollars ($435.7 million in 2003 dollars). In contrast, CY advises that its 2003 Estimate projects an increase of $395.6 million in 2003 dollars and total cost to complete decommissioning of $831.3 million in 2003 dollars.

9. In support of its 2003 Estimate, CY explains that the following significant events and factors have affected the cost of decommissioning since 2000, and are projected to further significantly affect CY's decommissioning costs in the future: (1) the alleged default of the United States Department of Energy (DOE) in its obligation to remove the spent nuclear fuel and other wastes from the site; (2) the September 11, 2001 terrorist attacks, which have increased the costs of maintaining security for spent fuel at the Plant site and increased insurance premiums; (3) the July 2003 termination of the DOC Contract for default, which has left CY with the responsibility to manage directly many of the decommissioning activities that were within the scope of the DOC Contract; and (4) the negative impact of declining financial markets in the 2000 to 2002 period on the decommissioning fund investment earnings.

10. CY explains that these events and factors have resulted in the existing decommissioning fund being insufficient to complete decommissioning the Plant, including the costs relating to long-term storage of spent nuclear fuel and other waste, which are projected to extend through 2023. CY states that increasing annual collections to $93 million and extending the collection period by three and one-half years (July 1, 2007 to December 31, 2010) should ensure that sufficient funds will be available to support ongoing decommissioning work without unduly burdening CY's customers.

2. Pension Costs and Post Retirement Benefits Other than Pensions

11. CY proposes additional collections for employee pensions and post-retirement benefits other than pensions (PBOP) of $1.4 million in 2005, $2.1 million in 2006 and $2.8 million through June 2007. CY explains that in its last rate case filing actuarial studies showed that the Company's pension and PBOP plans were fully and adequately funded. Accordingly, the 2000 Settlement did not provide for any further collections for pension and PBOP costs. However, recent studies by CY's actuaries show that these plans are no longer adequately funded. CY explains that a primary reason for why the pension fund has become under funded is the extension of the period during which CY will continue to have employees on its payroll.

3. Effective Date and Request for Waivers

12. CY proposes an effective date for its revised decommissioning charges and for the PBOP and pension charges of September 1, 2004. However, CY consents to the suspension to January 1, 2005. CY explains that suspension will enable Purchasers to take the steps necessary to reflect the revised charges in their own retail rates. CY also advises that if there is any suspension beyond January 1, 2005, it would expect to be unable to maintain the current schedule for decommissioning of the Plant, require the suspension of decommissioning activities, and would lead to an increase in decommissioning costs.

B. Docket No. EL04-109-000

13. Connecticut Parties state that, in an attempt to absolve Purchasers from anticipated liability, CY contends that the Power Contracts shield Purchasers from responsibility for any increased costs that the Commission may determine resulted from CY's imprudence. Connecticut Parties maintain that Purchasers should not be shielded from such liability and instead ask that the Commission determine that: (1) the Power Contracts and Settlement Agreement require Purchasers to pay all decommissioning costs, including imprudently incurred costs; and (2) Purchasers may only charge their retail ratepayers prudently-incurred costs.

14. Because CY's sole asset, the Plant, no longer operates and is being decommissioned, Connecticut Parties contend that it is unlikely there will be sufficient equity to pay costs if the Commission finds that CY imprudently incurred such costs during the decommissioning of the Plant. According to Connecticut Parties, this situation is likely to occur because CY seeks to return its remaining equity to its shareholders (other than the segregated decommissioning trust funds to which ratepayers have

contributed), thereby depleting funds that would otherwise be available to pay imprudently-incurred costs. Specifically, Connecticut Parties state that CY, at the time of Connecticut Parties' filing, filed a Form U-1 with the Securities and Exchange Commission (SEC)[9] seeking permission to return 95 percent of its outstanding common stock and thereafter maintain minimal equity in the company until CY ultimately liquidates and wraps up the company's affairs.[10]

15. Connecticut Parties claim that, if CY returns all except minimal equity to the shareholders, CY will have virtually nothing left with which to pay refunds to ratepayers and, in addition, Purchasers can "hide behind their corporate veil" to disavow any responsibility to reimburse ratepayers for costs caused by CY's mismanagement of the decommissioning of the Plant. Thus, according to Connecticut Parties, any refund condition imposed by the Commission would be meaningless if there is no liable party with sufficient assets to pay those refunds. They assert that permitting the distribution of CY's equity would enable CY and its Purchasers to avoid any financial responsibility for imprudently managing decommissioning, ultimately leaving ratepayers responsible for all costs of the decommissioning.

16. Furthermore, Connecticut Parties argue that the Power Contracts[11] and the Settlement Agreement[12] make Purchasers fully responsible for all decommissioning

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[9] We note that in CY's answer in Docket No. ER04-981-000, CY states that it withdrew its Form U-1 to the SEC on August 5, 2004. *See* CY's Answer at 29 & n. 34. CY explains that it withdrew the Form U-1 to eliminate "any potential concern that [CY's] equity will not be available to meet decommissioning expenses that are not recoverable in wholesale rates." *Id.* at 29.

[10] Petitioners claim that $50 million would be returned to Purchasers, while the SEC filing indicates that, as of November 30, 2003, the sum of the common equity and capital surplus was $53.31 million.

[11] For instance, Section 4 of the Additional Power Contract, which is dated April 30, 1984, states, in relevant part: "It is contemplated that sufficient funds will be accumulated pursuant to those contracts and paragraph 7 hereof to make payment to reimburse [CY] for the full cost of decommissioning the Unit."

[12] For example, Article B (1) of the Settlement Agreement, which details the decommissioning cost collection (*i.e.*, the collection of $16.742 million annually for decommissioning costs), provides, in part: "[N]othing in this Offer shall waive, discharge or otherwise relieve the obligation of the Customers to pay the total decommission costs . . . , as set forth in the Power Contracts."

costs. Connecticut Parties further argue that, until recently, CY agreed that it was responsible for all decommissioning costs and even sought to reassure the SEC that all such costs would be paid, even after redeeming 95 percent equity. Specifically, CY stated in its SEC filing that: "[i]n the event additional cost of service (operating expense and decommissioning funding) requirements are needed at any future period, the Power Contracts impose a non-cancelable obligation on the sponsoring utilities to pay such cost of service expenses."

17. Connecticut Parties also state that the Power Contracts are unique in the sense that they provide that the public utilities that own CY, Purchasers, sit on the board of directors of CY and also authorize the manner in which CY decommissions the unit. Therefore, Connecticut Parties argue that the "incestuous nature" of the Power Contracts require the Commission to construe them in a way that protects the retail ratepayers who, by virtue of the filed rate doctrine, are the parties that ultimately pay the decommissioning costs.

III. Notices, Interventions, and Protests

18. Notice of CY's filing was published in the *Federal Register*, 69 Fed. Reg. 42,051, (2004), with protests and interventions due on or before July 22, 2004. By notice issued on July 14, 2004, the Commission extended the time to and including July 30, 2004. On July 2, 2004, Connecticut Parties filed motions to intervene. Also on July 2, 2004, Connecticut Parties filed a motion for expeditious entry of a protective order in order to obtain confidential information filed under section 388.112 of the Commission's Rules in this proceeding.

19. On or before July 30, 2004, Central Maine Power Company, Northeast Utilities Service Company, New England Power Company, the Attorney General of the Commonwealth of Massachusetts (Mass AG), the Massachusetts Department of Telecommunications and Energy, the Maine Public Advocate, NSTAR Electric & Gas Corporation, and United Illuminating Company filed motions to intervene and raised no substantive issues. On July 30, 2004, motions to intervene and/or protests were filed by the Attorney General of Rhode Island and the Rhode Island Division of Public Utilities and Carriers (collectively, Rhode Island); Bechtel Power Corporation (Bechtel); Connecticut Parties; and the Mass AG.

20. Notice of Connecticut Parties' petition for declaratory order was published in the *Federal Register*, 69 Fed. Reg. 35,388 (2004), with protests and interventions due on or before June 29, 2004. Purchasers and CY filed motions to intervene and protest. The New Hampshire Public Utilities Commission (NHPUC) filed a notice of intervention and comments. Bechtel filed an *amicus* brief.[13] In addition, Connecticut Parties' filed an answer.

A. Docket No. ER04-981-000

21. Bechtel advises that it entered into the DOC Contract with CY to oversee decommissioning of CY's Plant. Bechtel notes that it has instituted a wrongful termination lawsuit against CY in Connecticut Superior Court in which it seeks $93.5 million in damages. Bechtel also notes that it filed an *amicus* brief in Docket No. EL04-109-000, in which it supported that CY's Owners/Purchasers should be liable for the payment of all decommissioning costs whether they be deemed prudently or imprudently incurred by CY. Bechtel requests that it be allowed to answer CY's repeated and erroneous assertions that Bechtel failed to perform its obligations under the DOC Contract. In addition, Bechtel seeks to ensure that the rates established herein will adequately provide for the payment of all CY's decommissioning obligations.

22. Specifically, Bechtel claims that CY's characterization of its performance under the DOC Contract is biased and inaccurate. Bechtel protests CY's claim that approximately $252 million of the increase is purportedly related to CY's completion of the physical work of decommissioning. Bechtel explains that it is uniquely situated to assist the Commission in making prudence determinations and revealing the true state of affairs regarding Bechtel's performance. Finally, Bechtel urges the Commission to evaluate both CY's ability to pay for all decommissioning obligations, and the policy implications of issuing an order that would leave CY unable to complete decommissioning of the Plant.

23. Connecticut Parties, Mass AG, and Rhode Island note that CY proposes to increase collections after January 2005 from $16.7 million annually for two and one-half years ($41.8 million) to $93 million annually for six years ($558 million), reflecting a staggering 1,234 percent increase for the years 2005 through 2010. Protestors suggest that this staggering increase raises serious questions on its face about the reasonableness of these substantial additional costs.

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[13] Bechtel acknowledges that its *amicus* brief is being filed after the June 29, 2004 comment date and therefore does not seek to intervene in this proceeding.

24. Connecticut Parties strongly protest CY's attempt to have New England's retail ratepayers pay for its imprudence in mismanaging decommissioning of its Plant. Connecticut Parties contend that only a small portion of the approximate $400 million increase and delay can be outside Connecticut Yankee's control (*e.g.*, dictated by the Nuclear Regulatory Commission's (NRC's) post-September 11, 2001 security measures, and by the Town of Haddam's zoning restrictions for the Independent Spent Fuel Storage Installation (ISFSI)). For the reasons stated in its protest and accompanying affidavits, and because suspension subject to refund may be an ineffective remedy in this case, Connecticut Parties suggest that the Commission should reject CY's requested rate. Alternatively, Connecticut Parties request that the Commission suspend the rates for the full statutory period of five months (as it claims CY has conceded), require unequivocal assurance that any refunds ordered will be paid, and set this case for expedited hearing to minimize the impact on retail rates.

25. According to Connecticut Parties, most of CY's projected cost increase is attributable to CY's unreasonable management decisions over decommissioning of the Plant. In support, Connecticut Parties raise allegations of imprudence with respect to: (1) contaminated groundwater; (2) reactor pressure vessel removal and disposal; (3) spent nuclear fuel transfers to the ISFSI; and (4) CY's oversight of the DOC, Bechtel. For example, they note that the DOC found (and CY failed to reveal in its request for proposal) significant levels of groundwater contamination below the Plant. Further, they argue that CY ignored the DOC's recommendation and delayed groundwater testing for hard-to-detect radionuclides such as strontium-90. Connecticut Parties argue that a prudent utility would have performed groundwater characterization for hard-to-find radionuclides early on in the decommissioning process, and during Plant operations in light of CY's previous operating history.

26. Connecticut Parties also contend that rather than addressing well-documented problems with decisive actions, CY delayed decisions for years and permitted disputes with the DOC to fester and obstruct the decommissioning objectives, until it was too late to avoid calamitous consequences. Connecticut Parties have quantified on a preliminary basis that CY's imprudence has caused between $153 million and $234 million in 2003 dollars of the incremental costs required to decommission the Plant.[14]

[14] *See* Volume 1 Public Intervenor's July 30, 2004 Filing, Protest at 72; Affidavit of Michael A. Laros at 19-20. Approximately $148 million of the proposed increase, we note, does not appear to be contested in the filing by the CT DPUC and COCC. *See* Laros affidavit at 21, Table MAL-3, line 11.

27. Connecticut Parties note that CY is no longer an ongoing business and it has initiated steps to distribute its few remaining assets back to its Owners/Purchasers. Connecticut Parties contend that CY's single purpose scheme is designed to insulate its Owners/Purchasers from any liability and to pass decommissioning costs onto the retail ratepayers. In order to protect retail ratepayers from having to pay imprudent decommissioning costs, Connecticut Parties request that the Commission reject CY's filing because CY has failed to provide support commensurate with the magnitude of its rate increase, and it offers no effective remedy for imprudent decommissioning management. In the event that the Commission accepts the proposed rates, Connecticut Parties request that the Commission should require ironclad assurances from CY and its Owners/Purchasers that refunds will be paid if ordered, and set the issue of CY's prudence on a track to produce an expedited hearing and final decision.

28. On August 16, 2004, Connecticut Parties filed an answer to Bechtel's motion to intervene, and CY filed an answer to the motions to intervene, motion to reject, requests for additional relief, protests, and motion for leave to answer protests. Connecticut Parties and CY note that Bechtel intends to focus in this proceeding on securing its ability to collect from CY $93.5 million in damages for the allegedly wrongful termination of Bechtel under the DOC Contract. Specifically, Connecticut Parties and CY protest if Bechtel seeks to increase CY's rates for any possible speculative damages.[15] In addition, CY contends that Bechtel hopes to obtain a Commission ruling that will serve as a helpful precedent in the state court litigation.[16] Accordingly, CY requests that the Commission deny Bechtel's motion to intervene; and Connecticut Parties request that, if Bechtel is permitted as a party to this proceeding, the Commission should find that it may not seek to increase CY's proposed rates to cover these damages.

29. Moreover, CY contends that its filing meets all applicable regulatory requirements and does not violate its obligations under the Settlement Agreement. CY also contends that Connecticut Parties' imprudence allegations are unfounded and unsupportable. With respect to the inadequate refund protection for customers, CY notes that, as of year-end 2003, it has $46 million total capitalization, including capital stock, paid in capital, and retained earnings, which will be available to meet decommissioning expenses that are not recoverable in wholesale rates. Further, CY notes that it could recover damages from Bechtel in its counterclaim for breach of the DOC Contract, or it could receive other

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[15] *Citing, e.g.*, Louisiana Power and Light Co., 50 FERC ¶ 61,040 (1990).

[16] *Citing* Kansas-Nebraska Natural Gas Co., 21 FERC ¶ 61,285 (1982), *reh'g denied*, 22 FERC ¶ 61,085 (1983). Accord Northeast Utilities Serv. Co., 53 FERC ¶ 61,135 (1990).

relief from DOE for breach of DOE's contract to remove spent nuclear fuel from the Plant. CY therefore requests that the Commission not reject its filing because normal Commission processes are adequate to protect customers in the event that some portion of its decommissioning expenditures is found to be imprudent. CY also requests that the Commission deny the Connecticut Parties' request that it be required to post a financial guarantee or bond for any Commission-ordered refunds.[17]

30. CY agrees that the protestors raise factual issues that must be resolved through evidentiary hearings. However, with respect to Connecticut Parties' request for an unduly hurried hearing schedule, CY requests that the Commission reject an expedited schedule and allow the assigned administrative law judge to determine an appropriate schedule. In support of a longer schedule, CY contends that it would be inappropriate to establish arbitrary accelerated deadlines for the conduct of a hearing when this proceeding will involve extremely complex technical issues. In the event that the Commission feels it necessary to provide guidance to the presiding judge, CY suggests that the Commission employ its standard timeline for "exceptionally complex" cases.[18] Under such a schedule, CY estimates that an initial decision could be issued in mid-November 2005.

B. Docket No. EL04-109-000

31. CY states that Connecticut Parties ask the Commission to turn the FPA "on its head" by having the Commission both disregard its statutory duty to ensure that wholesale rates and charges are just and reasonable and authorize state regulatory authorities to disregard the Commission's determination of just and reasonable wholesale charges in setting retail electricity rates. In particular, CY maintains that Connecticut Parties' request that the Commission subvert these well-settled legal principles for the express purpose of "trapping" a portion of CY's wholesale decommissioning charges (*i.e.*, those that are imprudently incurred) with Purchasers.

32. Purchasers state that the Commission has no authority to grant the relief that Connecticut Parties seek, because the Commission does not have the authority to trap a portion of CY's decommissioning costs that Purchasers must pay under the Power Contracts and the Settlement Agreement with them. According to Purchasers, by approving the Power Contracts, the Commission determined that the rates to be paid by

[17] *Citing* Columbia Gas Transmission Corp., 75 FERC ¶ 61,206 (1992); and TranscontinentalGas Pipe Line Corp., 61 FERC ¶ 61,074 (1992).

[18] *Citing* standard schedule for extremely complex cases (Track III) posted on the Commission's internet website, www.ferc.gov/legal/admin-lit/time-sum.asp.

Purchasers under the contracts are just and reasonable. Accordingly, if the terms of the Power Contracts require that the rates Purchasers are to pay CY include all decommissioning costs, then Purchasers maintain that all such costs may be passed through to retail ratepayers as Commission-approved wholesale costs. In this regard, Purchasers state that the Commission has no authority to regulate retail rates or to deny pass-through to retail ratepayers of just and reasonable rates.

33. Both CY and Purchasers also maintain that the issues raised by Connecticut Parties are premature. Specifically, they argue that unless and until there has been a finding of imprudence, there is no reason for the Commission to address the merits of the petition. They state that if Connecticut Parties are of the belief that some of the projected decommissioning costs are imprudent, they can pursue that issue in CY's rate filing. In addition, according to CY, it is premature to speculate about whether CY's resources will be adequate for the purpose of meeting decommissioning expenses not covered by the charges it is authorized to collect in its rate filing.

34. NHPUC states that it supports the relief requested by Connecticut Parties and urges the Commission to grant the petition. According to NHPUC, the unusual circumstances of this case, the large increase in decommissioning expenses now anticipated and the existence of a utility with a defunct nuclear plant as its sole asset warrant the relief requested in order to protect retail ratepayers.

35. Bechtel states that the plain language of the Power Contracts establishes an unqualified obligation on the part of Purchasers to bear responsibility for all decommissioning costs. Bechtel maintains that, whatever the merits of the abstract contentions of CY and Purchasers regarding the Commission's authority to establish wholesale rates that include imprudent costs, such claims miss the essential point of the petition: the express terms of the Power Contracts between CY and Purchasers require Purchasers to pay all decommissioning obligations and therefore there is no "prudence" exception. Furthermore, according to Bechtel, this reading of the Power Contracts is supported by a host of representations made over many years by CY and Purchasers in multiple administrative proceedings regarding the unqualified liability of the latter to pay for all decommissioning costs; therefore, CY and Purchasers should be estopped from arguing to the contrary. In addition, Bechtel maintains that if the Commission were to adopt the position of CY and Purchasers (*i.e.*, to disallow the pass-through to Purchasers of any imprudent decommissioning obligations incurred by CY), the end result of such a determination could be that the only entity liable for CY's decommissioning obligations, CY, has no means to pay for them.

IV. Discussion

A. Procedural Matters

36. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceeding in which they move to intervene. Rule 213(a) (2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 384.213(a) (2) (2003) prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Connecticut Parties' answer to the protests in Docket No. EL04-109-000 and will, therefore, reject it. CY filed an answer on August 16, 2004 to answer the protests, to contest Bechtel's intervention, and to respond to the motions to reject its filing. CY is entitled to protest the intervention of a party and to answer a motion for Commission action. We will therefore accept CY's answer in Docket No.ER04-981-000. On August 16, 2004, Connecticut Parties filed an answer requesting that the Commission limit the scope of Bechtel's intervention by prohibiting Bechtel from obtaining any additional funds from CY. These parties are also entitled to comment on the intervention of another party.

37. With regard to Connecticut Parties' motion for expeditious entry of a protective order, the information obtained to date has proven sufficient for this phase of the proceeding. Any further confidentiality issues can be handled by the Administrative Law Judge in the hearing established by this order. Regarding Bechtel's intervention, given its interest in Docket No. ER04-981-000, the early stage of this proceedings, and the absence of undue prejudice or delay, we will grant Bechtel's motion to intervene in Docket No. ER04-981-000.

B. Substantive Issues

1. Docket No. ER04-981-000

38. Our preliminary analysis indicates that CY's proposed revised rate schedules have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept the revised rate schedules, and suspend the proposed decommissioning charges and the proposed PBOP and pension charges for five months, to become effective February 1, 2005, subject to refund, and set them for hearing.

39. Connecticut Parties' seek an enforceable refund requirement. The Commission concludes that it would be premature to impose such a remedy at this time. While collections under the proposed revised rate schedules will run approximately $7.75 million per month beginning on February 1, 2005, Connecticut Parties do not protest the

prudence of some $148 million of the total proposed costs. Thus, approximately 19 months of collection can occur before the sum collected equals $148 million. Since the proposed revised rate schedules will not become effective until February 1, 2005, this allows 24 months for a hearing, initial decision, briefs on and opposing exceptions, and a Commission order.

40. This time frame should permit the Commission to resolve the matters at issue here and still provide Connecticut Parties with protection against the collection of imprudent decommissioning costs. As noted above, CY has also withdrawn its request to the SEC to distribute CY's remaining equity to its shareholders. This should provide additional funds to meet any refund obligation that the Commission might impose. The Commission will leave it to the parties and the ALJ to determine the schedule in light of this time frame.

2. Docket No. EL04-109-000

41. Connecticut Parties ask that the Commission declare that: (1) the Power Contracts between CY and Purchasers and a Settlement Agreement provide that CY may charge Purchasers for all decommissioning costs related to the Plant that are both prudently and imprudently incurred; and (2) Purchasers may pass on to their retail customers only such costs that are prudently incurred. We deny the petition, because, as discussed further below, it asks us to take actions that would be contrary to the Commission's statutory duty and precedent.

42. The FPA vests the Commission with the responsibility to ensure that wholesale power sales are just and reasonable[19] and to review questions concerning whether or not the recovery of particular costs violate that statutory standard. As part of that oversight, the Commission "has applied the 'prudence' test to determine the recoverability of a utility's expenses. Under this test, [a utility] is entitled to recover its costs from

[19] *See* 16 U.S.C. § 824d(a) (2000); Entergy Louisiana, Inc. v. Louisiana Public Service Commission, *et al.*, 539 U.S. 39, 41 (2003) ("FERC must ensure that wholesale rates are 'just and reasonable.'").

consumers if it acted 'prudently' in incurring those costs, or stated conversely, [a utility] may not recover its costs if those costs were incurred 'imprudently.'"[20] Thus, the Commission is not permitted, under the FPA, to allow CY to charge imprudently incurred costs to Purchasers, as purchasers under jurisdictional rate schedules.[21]

43. In this regard, we emphasize that Connecticut Parties' request that the Commission declare that Purchasers can only recover prudently-incurred costs from retail customers ignores the fact that the Commission's ratemaking authority "is limited to wholesale rates and does not reach sales at retail," as the "Commission has no power to prescribe the rates for retail sales of power companies."[22] Indeed, the "Federal Power Act's saving clause . . . reserves to the States the regulation of local retail electric rates."[23]

44. In any event, with regard to Connecticut Parties' request that we declare that Purchasers can only pass on to retail ratepayers those costs that are prudently incurred, that issue is moot. Because CY's decommissioning charges to Purchasers, as purchasers under jurisdictional rate schedules, will only reflect the costs that the Commission determines to be prudently incurred, Purchasers will only have prudently-incurred costs to pass on to retail ratepayers.

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[20] Violet v. FERC, 800 F.2d 280, 282 (1st Cir. 1986).

[21] *See, e.g.*, Massachusetts Municipal Wholesale Electric Company v. Northeast Utilities Service Company, 58 FERC ¶ 61,202 at 61,629 & n.59 (1992) ("It is well established that the Commission has the general obligation to promote and respect the sanctity of contracts. However, we cannot ignore our statutory mandate . . . to assess the continuing justness and reasonableness of existing rates"), *reh'g denied*, 63 FERC ¶ 61,217 (1993); Florida Power Corporation, 70 FERC ¶ 61,321 at 61,980 & n.9 (1995); Southern Company Services, Inc., *et al.*, 57 FERC ¶ 61,035 at 61,125, *order on reh'g*, 57 FERC ¶ 61,284 at 61,929 n.29 (1991); Northeast Utilities Service Company, 53 FERC ¶ 61,159 at 61,579 (1990).

[22] Federal Power Commission v. Conway Corp., 426 U.S. 271, 275, 276 (1976); *see also, e.g.*, New York v. FERC, 535 U.S. 1, 23 (2002).

[23] Wyoming v. Oklahoma, 502 U.S. 437, 439 (1992); *see also* Town of Norwood v. FERC, 202 F.3d 392, 396 (1st Cir. 2000) ("wholesale sales in interstate commerce are subject to regulation by FERC under the Federal Power Act, while retail rates . . . are subject to state regulation") (internal citations omitted); Cities of Anaheim, et al. v. FERC, 669 F.2d 799, 801 (1981) ("The only costs recoverable under federal rates are those allocable to the wholesale transactions, subject to federal jurisdiction, and not those allocable to retail sales, regulated by the state.").

The Commission orders:

(A) CY's proposed revised decommissioning charges and the proposed PBOP and pension charges are hereby accepted for filing and suspended for five months, to become effective February 1, 2005, subject to refund, 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 by the Federal Power Act, particularly sections 205 and 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 I), a public hearing shall be held concerning the justness and reasonableness of the proposed revised rate schedules submitted in CY's Filing.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2004), a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding 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.

(D) Connecticut Parties' petition for declaratory order is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.