

121 FERC ¶ 61, 197
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Mirant Americas Energy Marketing, L.P.
Mirant New England, LLC
Mirant Kendall, LLC
and Mirant Canal, LLC

Docket No. EL01-93-013

v

ISO New England Inc.

ISO New England Inc.

Docket No. ER03-631-004

ORDER ON REHEARING

(Issued November 21, 2007)

1. On October 22, 2007, ISO New England Inc. (ISO-New England) filed a request for clarification and rehearing, and the NRG Companies¹ and the Mirant Parties² filed a joint request for clarification and rehearing, of the Commission's September 21, 2007 order.³ The parties requesting rehearing argue, inter alia, that the Commission included what they characterize as an extraneous docket number in the order's caption, Docket No. ER03-631-003, and that the order went beyond the scope of the remand ordered by the D.C. Circuit by setting for hearing the justness and reasonableness of certain mitigation agreements. In this order the Commission grants rehearing in part and denies

¹ The NRG Companies consist of NRG Power Marketing, Inc.; Connecticut Jet Power LLC; Devon Power LLC; Middletown Power LLC; Montville Power LLC; Norwalk Power LLC; and Somerset Power LLC.

² The Mirant Parties consist of Mirant Canal, LLC and Mirant Kendall, LLC. Mirant Parties note that Mirant Americas Energy Marketing, LP and Mirant New England, LLC are no longer in existence.

³ *Mirant Americas Energy Marketing, LP*, 120 FERC ¶ 61,264 (2007) (September 21 Order).

rehearing in part, finding that the September 21 Order mistakenly included Docket No. ER03-631-003, but did not go beyond the scope of the D.C. Circuit's remand.

Background

2. In the September 21 Order in Docket Nos. EL01-93-012 and ER03-631-003, the Commission addressed the March 9, 2007 remand from the United States Court of Appeals for the District of Columbia Circuit.⁴ Specifically, in response to the court's directive, the Commission set for hearing whether the rates in certain so-called mitigation agreements at issue were just and reasonable, and whether the purchasers charged the mitigation rates were entitled to any refunds of amounts charged under those agreements.

Requests for Rehearing

3. Parties requesting rehearing argue that the Commission erred by including Docket No. ER03-631-003 along with Docket No. EL01-93-012.

4. ISO-New England argues that the court's decision only remanded the mitigation agreements discussed in Docket No. EL01-93-012, and notes that the September 21 Order never states that Docket No. ER03-631-003 is set for hearing. ISO-New England also argues that even if the Commission intended to include Docket No. ER03-631-003, it is not permitted to do so. It notes that the earlier order issued by the Commission in ER03-631-002 was an order on rehearing issued on July 11, 2005. ISO-NE argues that because no party petitioned the court for review, the earlier order became final and non-appealable over two years ago.

5. NRG Companies and Mirant Parties argue that the Commission erred in setting for hearing the substantive issue of whether the underlying rates in the mitigation agreements were just and reasonable. They contend that the D.C. Circuit's remand addressed only the Commission's *procedure* for determining whether the mitigation agreements at issue were just and reasonable.⁵ NRG Companies and Mirant Parties point to the D.C. Circuit's statement that "NSTAR does not mount – and thus we do not consider – any substantive challenge to the reasonableness of the agreements' formulas or rates."⁶ They argue that the issue of whether the rates under the mitigation agreements were just and reasonable was not properly before the court, and, accordingly, the scope of the D.C. Circuit's remand is narrower. They argue that the only issue before the court was whether the Commission adequately explained its procedure for reviewing ISO-NE's mitigation agreements. They add that, because agency determinations not put to the test

⁴ *NSTAR Electric & Gas Corp. v. FERC*, 481 F.3d 794 (D.C. Cir. 2007) (*NSTAR*).

⁵ NRG Companies and Mirant Parties Request for Rehearing at 9.

⁶ *Id.* (citing *NSTAR*, 481 F.3d at 802).

of judicial review are final, and because the Commission is not permitted to address issues beyond the scope of an ordered remand, the Commission has impermissibly expanded the scope of the remand.⁷

6. NRG Companies and Mirant Parties further argue that the Commission's review pursuant to the D.C. Circuit's remand does not require an evidentiary hearing, and that the Commission's decision to set the matter for hearing should be reconsidered. They contend that there are no factual issues that would necessitate a trial-type hearing, which is only required when written submissions are not adequate to resolve disputes about material facts.⁸

7. Lastly, NRG Companies and Mirant Parties argue that, if the Commission continues to believe that an evidentiary hearing is necessary, it should confirm that any determination of whether the mitigation agreements were just and reasonable is not limited to a review of marginal costs. They point to the Commission's statement in the September 21 Order that a hearing was necessary in part because the D.C. Circuit expressed concern regarding the lack of cost data provided to the Commission,⁹ and express concern that this statement could be interpreted to mean that a generator's short-term marginal costs is the primary factor in determining whether mitigation agreements are just and reasonable.¹⁰

Commission Determination

8. First, the parties are correct that Docket No. ER03-631-003 was mistakenly included in the caption of the September 21 Order. The July 11, 2005 order in that proceeding is final and non-appealable, and the proceeding should not have been set for hearing with Docket No. EL01-93-012. Accordingly, this order terminates Docket No. ER03-631-003. The settlement and/or hearing judge, as appropriate, is directed to

⁷ New England Power Pool (NEPOOL) filed comments in support of clarification of the scope of matters set for hearing. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2007), prohibits an answer to a request for rehearing.

⁸ *Id.*

⁹ NRG Companies and Mirant Parties Request for Rehearing at 12-13 (citing September 21 Order, 120 FERC ¶ 61,264 at P 9).

¹⁰ NSTAR Electric and Gas Corporation (NSTAR) filed comments in opposition to the petitions for rehearing. As noted above, Rule 713(d) prohibits an answer to a request for rehearing.

continue with settlement and/or hearing proceedings for Docket No. EL01-93-012 as directed in the September 21 Order.

9. However, we disagree with NRG Companies and the Mirant Parties that the Commission erred in setting for hearing the issue of whether the rates were just and reasonable. In finding that the Commission failed to satisfy “its statutory obligation to ensure that rates are just and reasonable,” the D.C. Circuit has inexorably called into question the issue of whether the rates are, in fact, just and reasonable. Indeed, the last paragraph of the D.C. Circuit’s remand leaves little room for doubt that the justness and reasonableness of the rates charged under the mitigation agreements is within the scope of the court’s remand: “In sum, we . . . *remand to the Commission for additional consideration of whether the rates adopted in the mitigation agreements were just and reasonable*, and . . . whether petitioners are entitled to any refund of amounts charged under those agreements.”¹¹ We therefore decline to narrow the scope of the issues set for hearing in the September 21 Order.

10. Further, because we find it necessary, in order to satisfy the court's directive, to set for hearing the issue of whether the rates in the mitigation agreements were just and reasonable, we must disagree with NRG Companies and the Mirant Parties that there are no factual issues in dispute. Particularly given the court’s concern regarding the lack of supporting cost data, the most appropriate way to determine whether the mitigation agreements are just and reasonable was to set them for hearing.

11. Finally, NRG Companies and the Mirant Parties ask the Commission to clarify that any determination of whether the mitigation agreements were just and reasonable is not limited to a review of marginal costs. We agree that the hearing is not so limited; no such limitation was imposed in the September 21 Order. Instead, the parties may argue for or against reliance on short-run marginal costs or any other support for the justness and reasonableness of the mitigation agreements that the parties believe is appropriate.

¹¹ *NSTAR*, 481 F.3d at 803 (emphasis added); *accord id.* (“if on remand some of the rates are found unjust and unreasonable, presumably the Commission would go on to consider an award of refunds”).

The Commission orders:

The requests for clarification and rehearing are hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary