

December 3, 2007

**VIA HAND DELIVERY & ELECTRONIC MAIL**

Luly E. Massaro, Commission Clerk  
Rhode Island Public Utilities Commission  
89 Jefferson Boulevard  
Warwick, RI 02888

**RE: Docket 3902 – 2008 Electric Retail Rates Filing  
Response to Commission Data Requests – Set 1**

Dear Ms. Massaro:

Enclosed please find ten (10) copies of National Grid's<sup>1</sup> responses to the first set of data requests issued by the Commission on November 20, 2007, in the above-captioned proceeding.

Thank you for your attention to this filing. If you have any questions, please feel free to contact me at (401) 784-7667.

Very truly yours,



Laura S. Olton

cc: Docket 3902 Service List

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<sup>1</sup> Submitted on behalf of Narragansett Electric, d/b/a National Grid.

## Certificate of Service

I hereby certify that a copy of the cover letter and / or any materials accompanying this certificate have been hand-delivered, electronically transmitted, or mailed to the individuals listed below.



\_\_\_\_\_  
Joanne M. Scanlon  
National Grid

December 3, 2007  
Date

**Narragansett Electric d/b/a National Grid**  
**Annual Reconciliation Rate Filing – Docket No. 3902**  
**Service list as 12/4/07**

<b>Name/Address</b>	<b>E-mail Distribution</b>	<b>Phone/FAX</b>
Laura S. Olton, Esq. National Grid. 280 Melrose St. Providence, RI 02907	<a href="mailto:Laura.olton@us.ngrid.com">Laura.olton@us.ngrid.com</a>	401-784-7667 401-784-4321
	<a href="mailto:Joanne.scanlon@us.ngrid.com">Joanne.scanlon@us.ngrid.com</a>	
Paul Roberti, Esq. Dept. of Attorney General 150 South Main St. Providence, RI 02903	<a href="mailto:Proberti@riag.ri.gov">Proberti@riag.ri.gov</a>	401-222-2424 401-222-3016
	<a href="mailto:Steve.scialabba@ripuc.state.ri.us">Steve.scialabba@ripuc.state.ri.us</a>	
	<a href="mailto:RDIMeglio@riag.ri.gov">RDIMeglio@riag.ri.gov</a>	
	<a href="mailto:David.stearns@ripuc.state.ri.us">David.stearns@ripuc.state.ri.us</a>	
John Stutz Tellus Institute 11 Arlington St. Boston MA 02116-3411	<a href="mailto:Jstutz@tellus.org">Jstutz@tellus.org</a>	
Jean Rosiello, Esq. 340 Olney St. Providence, RI 02906	<a href="mailto:jeanrosiello@cox.net">jeanrosiello@cox.net</a>	401-751-5090 401-751-5096
John Farley, Executive Director The Energy Council of RI One Richmond Square Suite 340D Providence RI 02906	<a href="mailto:jfarley316@hotmail.com">jfarley316@hotmail.com</a>	401-621-2240 401-621-2260
Michael McElroy, Esq. Schacht & McElroy PO Box 6721 Providence RI 02940-6721	<a href="mailto:McElroyMik@aol.com">McElroyMik@aol.com</a>	401-351-4100 401-421-5696
Henry Shelton George Wiley Center. 32 East Ave. Pawtucket RI 02860	<a href="mailto:jeanrosiello@cox.net">jeanrosiello@cox.net</a>	401-728-5555 401-725-1020
<b>Original &amp; nine (9) copies file w/:</b> Luly E. Massaro, Commission Clerk Public Utilities Commission 89 Jefferson Blvd. Warwick RI 02889	<a href="mailto:Lmassaro@puc.state.ri.us">Lmassaro@puc.state.ri.us</a>	401-941-4500 401-941-1691
	<a href="mailto:Cwilson@puc.state.ri.us">Cwilson@puc.state.ri.us</a>	
	<a href="mailto:Anault@puc.state.ri.us">Anault@puc.state.ri.us</a>	

Commission Data Request 1-1

Request:

Referring to Schedule JAL-6, please explain why the October 2007 Renewable Energy Standard (RES) Charge revenue for Standard Offer Service (SOS) and Last Resort Service (LRS) are not the same on pages one and two.

Response:

The Renewable Energy Standard (“RES”) revenue collected from Standard Offer Service and Last Resort Service customers shown on page 2 of Schedule JAL-6 reflects total revenue booked during the revenue month of October 2007. The footnote reference (1) indicating that the revenue reflects September usage billed in October is incorrect. A revised Schedule JAL-6, page 2 of 2 is attached to this response.

The RES revenue reflected on page 1 of Schedule JAL-6, column (b) of Sections 1 and 2, is revenue billed in October for kWhs consumed in September, as the footnote on that page indicates.

Renewable Energy Standard Charge Revenue  
for the period January 2007 through September 2007

	Standard Offer RES <u>Revenue</u> (a)	Last Resort RES <u>Revenue</u> (b)	Total RES <u>Revenue</u> (c)
Oct-06	\$0	\$0	\$0
Nov-06	\$0	\$0	\$0
Dec-06	\$0	\$0	\$0
Jan-07	\$142,505	\$2,999	\$145,504
Feb-07	\$332,222	\$8,544	\$340,767
Mar-07	\$336,693	\$8,132	\$344,825
Apr-07	\$300,867	\$7,869	\$308,736
May-07	\$291,906	\$7,404	\$299,310
Jun-07	\$320,850	\$8,568	\$329,418
Jul-07	\$355,691	\$9,766	\$365,457
Aug-07	\$401,191	\$10,406	\$411,597
Sep-07	\$372,834	\$14,554	\$387,388
Oct-07	\$326,873	\$15,682	\$342,555
	\$3,181,633	\$93,923	\$3,275,557

Column Notes:

Column (a) from SMZ991-02 Monthly Report  
Column (b) from SMZ991-01 Monthly Report  
Column (c) Column (a) + Column (b)

Commission Data Request 1-2

Request:

Although National Grid (NGrid or Company) has not yet recorded the purchase of any of the contracted Renewable Energy Certificates (RECs), Ms. Lloyd's testimony indicates that the first two RES solicitations conducted in 2007 resulted in the execution of agreements to purchase virtually all of the 2007 obligation.

- a. Please indicate the cost associated with the procurement of RECs for the period January 1, 2007 through October 2007 pursuant to the first two RES solicitations in 2007 (consistent with the revenues stated in JAL-6).
- b. Please indicate the projected cost associated with the procurement of RECs for November and December 2007 based on the projected usage in those two months.
- c. Is there an estimated/projected over- or under-collection in that account for 2007?

Response:

- a & b. As a result of the two solicitations performed, the Company has contracted for a total of 203,400 calendar year 2007 Renewable Energy Certificates ("REC") at a total cost of \$3,274,025. As of the filing of this data response, the Company has received no RECs from the suppliers but expects to receive RECs in either the third or fourth quarter trading periods of the NEPOOL Generation Information System ("GIS").

RECs are transferred to the Company through the NEPOOL GIS system. NEPOOL GIS trading periods for calendar year 2007 production are as follows:

Q1 2007 = July 15 - Sept 15, 2007  
Q2 2007 = Oct 15 - Dec 15, 2007  
Q3 2007 = Jan 15 - March 15, 2008  
Q4 2007 = April 15 - June 15, 2008

Thus, unless a supplier uses the forward certificate transfer mechanism to transfer RECs following their production in a given calendar month, RECs for 2007 may not be received by the Company until as late as June 15, 2008.

Commission Data Request 1-2 (continued)

The Company estimates that it will need an additional 15,900 RECs to meet its 2007 RES obligation. These RECs may either be purchased as part of upcoming solicitations or by making an Alternative Compliance Payment (“ACP”) to the Renewable Energy Development Fund of the Rhode Island Economic Development Corporation. The additional RECs are forecasted to cost approximately \$737,000 based on the highest cost for RECs from prior solicitations or approximately \$908,000 at the ACP rate.

- c. Schedule JAL-6, page 1 indicates that as of September 30, 2007, a total of \$3,163,699 has been collected from Standard Offer Service and Last Resort Service customers pursuant to the Renewable Energy Standard (“RES”) Charge. An estimated \$1.2 million of additional RES revenue will be collected for the period October 1, 2007 through December 31, 2007 for a total estimated RES revenue of \$4.4 million for 2007. Parts a and b to this response indicate that the Company expects to incur approximately \$3.3 million in expense associated with 2007 contracted RECs and approximately \$737,000 to \$908,000 associated with the currently unmet 2007 obligation, for a total estimated 2007 expense of between \$4.0 million and \$4.2 million. Therefore, the Company estimates that it will over recover the expense associated with the 2007 RES obligation by approximately \$200,000 to \$400,000, not including interest.

Commission Data Request 1-3

Request:

With regard to disputed fuel index payments being made to a Standard Offer supplier:

- a. When did the disputed payments commence?
- b. What is the amount of disputed payments made to date?
- c. If disputed payments continue through December 2008, what is the estimate of total disputed payments from commencement through December 2008?
- d. Please provide the status of the litigation in Massachusetts District Court.

Response:

- a. The Company began making disputed fuel index payments to this supplier in January 2005.
- b. Actual disputed payments made for the period January 2005 through October 2007 are \$20,986,830.
- c. If the disputed payments continue through December 2008, the total estimated payments for the period January 2005 through December 2008 will be approximately \$32.5 million, including the \$21.0 million of actual payments as indicated in part b.
- d. The Massachusetts District Court heard arguments on the parties' cross motions for summary judgment on November 1, 2007 and has taken the motions under advisement for disposition. Trial is scheduled to commence on May 5, 2008.

Commission Data Request 1-4

Request:

Please update Schedule MPH-1 to include a comparison between 2007 data and 2008 data.

Response:

Please see the attachment to this response which is a Summary Comparison of Schedule MPH-1 between 2007 data and 2008 data.

As referenced in my testimony on page 19 of 25, the estimated 2008 Narragansett transmission and ISO expenses of \$72 million represents a net increase of \$10.4 million from the 2007 forecast of transmission expenses for Narragansett. This net increase is primarily due to additional transmission plant investment forecasted to go “in-service” in 2008 across New England which is resulting in a \$9.7M increase in Narragansett’s Regional Network Service transmission charges. Additionally, NEP is forecasting \$4.1M in local Non-PTF investment in 2008 resulting in a \$3M increase in Narragansett transmission expenses. These increases are partially being offset by a decrease in Reactive Power charges and local transformation and metering expenses.



National Grid: Narragansett Electric Company  
Summary Comparison of Estimated Transmission Expenses  
2007 and 2008

		<u>2008</u> <u>Forecast</u>	<u>2007</u> <u>Forecast</u>	<u>Forecast</u> <u>Comparison</u>
	<b>NEP Charges</b>			
1	Non-PTF	\$17,258,101	\$13,260,726	\$3,997,375
2	Other NEP Charges	<u>1,827,913</u>	<u>\$2,764,023</u>	<u>(\$936,110)</u>
	Sub-Total NEP Charges	\$19,086,014	\$16,024,749	\$3,061,265
	<b>ISO-NE Charges</b>			
3	PTF	\$45,428,982	\$35,693,455	\$9,735,527
4	Scheduling & Dispatch	1,788,478	\$1,454,235	\$334,243
5	Load Response	866,671	\$1,268,800	(\$402,129)
6	Black Start	641,150	\$525,765	\$115,385
7	Reactive Power	<u>2,580,867</u>	<u>\$5,185,058</u>	<u>(\$2,604,191)</u>
	Sub-Total ISO Charges	\$51,306,148	\$44,127,313	\$7,178,835
	<b>ISO-NE Charges</b>			
8	Sch. 1 - Scheduling & Dispatch	1,511,302	\$1,304,781	\$206,521
9	Sch. 2 - Energy Administration	49,358	\$76,355	(\$26,997)
10	Sch. 3 - Reliability Administration	<u>51,782</u>	<u>\$59,844</u>	<u>(\$8,062)</u>
	Sub-Total ISO-NE Charges	\$1,612,442	\$1,440,980	\$171,462
11	Total Expenses in Current Rates	\$72,004,604	\$61,593,043	\$10,411,562

Commission Data Request 1-5

Request:

With regard to Schedule MPH-3, please explain the Estimated Increase in ISO Rate Effective June 1, 2008. Ms. Haines' testimony explains the difference between the rates in effect for January – February 29, 2008 and March 1, 2008 through May 31, 2008, but does not discuss a change on June 1, 2008.

Response:

As referenced on Page 13 of 25 in my testimony at line 8: The ISO rate effective June 1, 2008, as shown in Schedule MPH-3, Page 1, line 9 includes an estimated rate increase to the PTF Rate to reflect a forecast of capital expenditures for New England of \$1,001,077,614 as shown on line 5 of Schedule MPH-3, and provided by the New England transmission owners and the NE-ISO Regional System Plan which can be found in Schedule MPH-7.

Commission Data Request 1-6

Request:

Have or will Rhode Island SOS ratepayers experience increased rates before January 1, 2010 as a result of the Forward Capacity Market which became effective December 1, 2006? If so, how much of an increase can Rhode Island SOS ratepayers expect to see?

Response:

No. However, one Standard Offer Service wholesale supplier has made a claim that is the subject of litigation in federal court regarding responsibility for FCM costs. See the response to 1-7.

Commission Data Request 1-7

Request:

What is the status of the litigation referenced in Docket No. 3788 between National Grid and one of the Wholesale Standard Offer Service Suppliers regarding the dispute in the US District Court for the District of Rhode Island regarding Forward Capacity payments referenced in COMM DR 1-6?

Response:

On October 23, 2006, the supplier filed a motion to dismiss or stay the litigation in Rhode Island District Court, asserting in essence that FERC had exclusive jurisdiction over the underlying dispute. On January 9, 2007, the State of Rhode Island and the Rhode Island Division of Public Utilities and Carriers ("Rhode Island Parties") moved to intervene in the District Court proceeding. On March 1, 2007, the supplier petitioned FERC essentially asking FERC to assert its exclusive jurisdiction which would prevent the Court's disposition of the litigation. On June 21, 2007, following opposition papers filed by the company and the Rhode Island Parties, FERC denied the supplier's request for a declaratory order attached hereto as Attachment 1. On July 23, 2007, the supplier requested rehearing. On August 22, 2007, FERC granted itself additional time to consider the request attached hereto as Attachment 2. In the meantime, the Court has not yet ruled on the motions pending in the federal litigation.

119 FERC ¶ 61,292  
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.

Constellation Energy Commodities Group, Inc.

Docket No. EL07-42-000

ORDER DENYING DECLARATORY ORDER

(Issued June 21, 2007)

1. On March 1, 2007, Constellation Energy Commodities Group, Inc. (Constellation) filed a petition for a declaratory order requesting that the Commission declare that Section VIII (A) of the Forward Capacity Market (FCM) Settlement Agreement has no effect on Constellation's rights to renegotiate the prices in its four wholesale power purchase agreements with The Narragansett Electric Company (Narragansett).<sup>1</sup> As discussed below, we deny Constellation's petition.

**Background**

2. Constellation is a wholesale power supplier. Narragansett is a retail electric distribution company that delivers electricity to approximately 478,000 retail customers in Rhode Island.<sup>2</sup> Constellation supplies Narragansett with wholesale energy and capacity at fixed prices<sup>3</sup> under four separate power purchase agreements<sup>4</sup> negotiated under Constellation's market-based rate authority.<sup>5</sup>

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<sup>1</sup> The Commission approved the FCM Settlement Agreement in *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) (*Devon Power*).

<sup>2</sup> Narragansett Electric Company's Motion to Intervene and Protest at 3 (Narragansett's Protest).

<sup>3</sup> The power purchase agreements state that Constellation will supply Narragansett capacity at a stipulated base price plus a fuel adjustment factor covering the entire quantity that Constellation delivers under the purchase power agreements. *See* Petition for Declaratory Order of Constellation Energy Commodities Group, Inc. at 15 (Constellation's Petition).

3. Constellation claims that each power purchase agreement contains an “equitable adjustment clause” entitling it to renegotiate the price whenever any regulatory change materially alters the economic benefits and burdens contemplated by the parties at the time they executed the agreement.<sup>6</sup> Constellation states that these equitable adjustment clauses were intended to ensure that neither party is “forced to bear solely the risk of material regulatory changes.”<sup>7</sup> Narragansett responds that these clauses appear in only three power purchase agreements,<sup>8</sup> and contests Constellation’s description of their legal consequences. In Narragansett’s view, Constellation must supply Narragansett with the

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<sup>4</sup> Constellation identifies the four power purchase agreements, executed between 1998 and 2002, as follows:

- (1) Wholesale Standard Offer Service Agreement between Blackstone Valley Electric Company, Eastern Edison Company, Newport Electric Corporation and Constellation Power Source, Inc. (the 20 percent contract). This agreement is dated December 21, 1998, and was amended on January 27, 2003 and June 3, 2003. It is in effect until midnight on December 31, 2009.
- (2) Wholesale Standard Offer Service Agreement between Blackstone Valley Electric Company, Eastern Edison Company, Newport Electric Corporation and Constellation Power Source, Inc. (the 36 percent contract). This agreement is dated December 21, 1998, and was amended on January 27, 2003 and June 3, 2003. It is in effect until midnight on December 31, 2009.
- (3) Power Supply Agreement between the Narragansett Electric Company and Constellation Power Source, Inc. (the 2001 contract). This agreement is dated October 5, 2001 and is in effect until December 31, 2009.
- (4) Power Supply Agreement between the Narragansett Electric Company and Constellation Power Source, Inc. (the 2002 contract). This agreement is dated August 23, 2002 and is in effect until midnight on December 31, 2009.

<sup>5</sup> Constellation’s Petition at 15.

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.*

<sup>8</sup> Narragansett’s Protest at 5.

capacity required to serve Narragansett's retail load "at the fixed prices specified in the PPAs [power purchase agreements], regardless of the prices Constellation must pay to secure that capacity."<sup>9</sup>

4. Constellation alleges that its costs for securing capacity have increased as a result of the FCM Settlement Agreement.<sup>10</sup> The FCM Settlement Agreement establishes a capacity auction in New England beginning on June 1, 2010. In the interim, the FCM Settlement Agreement establishes a transition period during which capacity will be sold according to fixed prices. Constellation states that these fixed transition prices are "dramatically higher" than the prices that existed when Constellation and Narragansett agreed to the fixed prices in the power purchase agreements.<sup>11</sup> Constellation argues, therefore, that the FCM Settlement Agreement constitutes significant regulatory change triggering its renegotiation rights.

5. On August 1, 2006, Constellation attempted to invoke its alleged renegotiation rights. Narragansett terminated negotiations after one meeting. Narragansett thereafter filed an action in the United States District Court for the District of Rhode Island (District Court) seeking, inter alia, a declaratory judgment that Section VIII (A) of the FCM Settlement Agreement precludes Constellation from renegotiating the power purchase agreements.<sup>12</sup> Section VIII (A) deals with arrangements for unforced capacity (UCAP), which is the amount of installed capacity (ICAP) available for purchase after calculating a generating unit's forced outage rate. UCAP is the capacity required by a load serving entity (LSE), such as Narragansett, to serve its load. Section VIII (A) states that:

The current UCAP products shall be retained for the period commencing on December 1, 2006 and ending on May 30, 2010 (the "Transition Period") as provided for in Part VIII. Payments will be made to UCAP entitlement holders, and made by UCAP obligation holders including wholesale standard offer suppliers in Rhode Island as under the current Market Rules and tariffs; it being understood that the agreement of wholesale standard

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<sup>9</sup> *Id.* at 8.

<sup>10</sup> Constellation neither signed nor protested the FCM Settlement Agreement.

<sup>11</sup> Constellation's Petition at 3. All of the power purchase agreements terminate before the June 1, 2010 start of the capacity auction.

<sup>12</sup> Narragansett's Protest at 8.

offer suppliers in Rhode Island to make UCAP payments is contingent upon the agreement of the state of Rhode Island utility regulatory authorities to support the settlement.<sup>13</sup>

On January 9, 2007, the Rhode Island Attorney General, on behalf of several Rhode Island agencies, filed a motion to intervene and join Narragansett's claim.

### **Petition for Declaratory Order**

6. In the instant petition, Constellation is not asking the Commission to determine whether Constellation has renegotiation rights under the power purchase agreements, or to confirm Constellation's view that its renegotiation rights are triggered by the FCM Settlement Agreement. Rather, Constellation is asking the Commission to declare that Section VIII (A) does not preclude Constellation from exercising whatever renegotiation rights the District Court determines that Constellation has under the power purchase agreements.

7. As a threshold issue, Constellation argues that the Commission has exclusive jurisdiction over this case.<sup>14</sup> Constellation maintains that the Federal Power Act<sup>15</sup> grants the Commission exclusive jurisdiction to determine the rates for the sale of wholesale power,<sup>16</sup> and that the filed rate doctrine bars courts from entering any judgment that materially alters a contract provision affecting a rate filed with the Commission.<sup>17</sup> Constellation characterizes Narragansett's action before the District Court as an action for contract reformation, stating that Narragansett is seeking a declaration that the FCM Settlement Agreement has abrogated Constellation's right to negotiate equitable price adjustments in response to significant regulatory action.<sup>18</sup> Constellation claims that Narragansett is asking the court to exceed its authority by materially altering a contract provision directly affecting the rate on file with the Commission.

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<sup>13</sup> See Constellation's Petition at 3-4.

<sup>14</sup> *Id.* at 13-16.

<sup>15</sup> 16 U.S.C. § 824-824(m) (2000).

<sup>16</sup> Constellation's Petition at 13-14.

<sup>17</sup> *Id.* at 14-16.

<sup>18</sup> *Id.* at 15.



8. In the alternative, Constellation argues that if the Commission determines that it shares concurrent jurisdiction with the District Court, the Commission should assert primary jurisdiction under *Arkansas Louisiana Gas Co. v. Hall*.<sup>19</sup> In that case, the Commission established three factors to consider when deciding whether or not to assert primary jurisdiction. These factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.<sup>20</sup>

9. Constellation argues that each of the *Arkla* factors supports the Commission asserting primary jurisdiction here. First, Constellation states that the Commission has special expertise concerning matters related to capacity markets and to settlement agreements managed, administered, and approved by the Commission.<sup>21</sup> Next, Constellation claims that uniformity of interpretation “is crucial” in this case, because this case raises the issue of whether a Commission-approved settlement agreement can implicitly and indirectly modify a non-signatory’s bilateral contract rights.<sup>22</sup> Finally, Constellation argues that its petition presents several issues that are important to the Commission’s regulatory responsibilities, including whether settlement agreements can modify bilateral contracts without the agreements explicitly identifying the contracts, and without the Commission making particularized findings regarding the contracts, and whether courts or the Commission should clarify and interpret Commission-approved settlement agreements.<sup>23</sup> Constellation speculates that permitting courts to clarify and interpret settlement agreements could “significantly compromise” the settlement privilege under Section 602 of the Commission’s regulations because courts may allow discovery regarding how the settlement was reached and what it intended to accomplish.<sup>24</sup>

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<sup>19</sup> *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175, at 61,322 (1979) (*Arkla*), *reh’g denied*, 8 FERC ¶ 61,031 (1979).

<sup>20</sup> *Arkla*, 7 FERC ¶ 61,175, at 61,322.

<sup>21</sup> Constellation’s Petition at 17.

<sup>22</sup> *Id.* at 18.

<sup>23</sup> *Id.*

<sup>24</sup> 18 C.F.R. § 385.602 (2006).

Constellation also expresses concern that judicial interpretation of Commission-approved settlement agreements will undermine faith in the utility and efficacy of the Commission's settlement process.<sup>25</sup>

10. As to the merits of its petition, Constellation states that Section VIII (A) of the FCM Settlement Agreement "does not purport to amend Constellation's bilateral contract rights."<sup>26</sup> In Constellation's view:

[T]he natural and reasonable construction of Section VIII (A) provides that, the obligation of load-serving entities to pay UCAP entitlement holders may be satisfied (where applicable) by allowing the LSE to contract with a wholesale standard offer supplier to procure the requisite capacity, as the then-current rules allowed. . . . [It] further identifies the parties from whom generators providing capacity may look for payment. . . . [It] does not address, in any way, bilateral contractual provisions allowing Constellation or Narragansett to return to the economic balance struck between the parties at the time of contract formation.<sup>27</sup>

Constellation further states that since it did not sign the FCM Settlement Agreement, the provision making wholesale standard offer suppliers' consent contingent on Rhode Island utility regulatory authorities agreeing to the Settlement does not apply to Constellation.<sup>28</sup> Constellation also notes that Section VIII (A) contains no language amending or waiving particular bilateral contract rights, that Constellation did not receive consideration in exchange for waiving or abrogating its rights, that no party to the FCM Settlement Agreement raised the issue of its impact on equitable adjustment rights, and that the Commission did not specifically find that abrogating Constellation's contractual rights is in the public interest.<sup>29</sup> Finally, Constellation maintains that its failure to protest the FCM Settlement Agreement may not be regarded as evidence that it waived or acquiesced to any change in its rights under the power purchase agreements.<sup>30</sup>

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<sup>25</sup> Constellation's Petition at 18.

<sup>26</sup> *Id.* at 19.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 20.

<sup>29</sup> *Id.* at 20-21.

<sup>30</sup> *Id.* at 22-23.

### **Notice of Filing and Responsive Pleadings**

11. Notice of Constellation's filing was published in the *Federal Register*, with interventions and comments due on April 2, 2007.<sup>31</sup> TransCanada Power Marketing Ltd. (TransCanada) filed a timely motion to intervene. Narragansett filed a timely motion to intervene and comments opposing Constellation's petition. The Attorney General of Rhode Island, on behalf of the State of Rhode Island and Providence Plantations Carriers and the Rhode Island Division of Public Utilities and Carriers (collectively, Rhode Island) filed a timely motion to intervene and comments opposing Constellation's petition. Constellation filed an answer to the protests. Narragansett and Rhode Island filed answers to Constellation's answer.

### **Narragansett's Protest**

12. Narragansett characterizes its action in the District Court as an action to enforce the power purchase agreements and the FCM Settlement Agreement.<sup>32</sup> Narragansett argues that the filed rate doctrine has no applicability in the instant case because Narragansett is not challenging the justness or reasonableness of any provision in the power purchase agreements, not even the provision that Narragansett describes as "the limited renegotiation provision" it states is present in three of the four power purchase agreements.<sup>33</sup> Narragansett asserts that under these circumstances the Commission does not have exclusive jurisdiction under the filed rate doctrine.<sup>34</sup> In any event, Narragansett argues that it is for the District Court, not the Commission, to determine whether the filed rate doctrine precludes the District Court from exercising jurisdiction over this case.<sup>35</sup>

13. Narragansett next argues that the Commission should refrain from exercising primary jurisdiction in this case.<sup>36</sup> Narragansett states that the District Court is fully capable of resolving the contract interpretation and enforcement issues in Narragansett's

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<sup>31</sup> *Federal Register*, 72 Fed. Reg. 11,856-11,857 (2007).

<sup>32</sup> Narragansett's Protest at 10.

<sup>33</sup> *Id.* Constellation contends that the provision is present in all four agreements.

<sup>34</sup> *Id.* at 13.

<sup>35</sup> *Id.* at 14.

<sup>36</sup> *Id.* at 15.

complaint, and notes that the District Court has not requested the Commission's assistance in resolving this case.<sup>37</sup> Narragansett further claims that the *Arkla* factors counsel against the Commission asserting primary jurisdiction.

14. Narragansett first argues that the Commission's special expertise is not needed to resolve this dispute. Narragansett states that the Commission and the courts have repeatedly held that "interpretation of wholesale power contracts is an appropriate and proper function of the courts,"<sup>38</sup> and that here, Constellation has failed to offer any reason why the Commission's special expertise is needed to interpret the power purchase agreements. Similarly, Narragansett maintains that the Commission's special expertise is not required to address Narragansett's claim that Constellation has waived its renegotiation rights or to interpret Section VIII (A).<sup>39</sup> Narragansett further claims that this case presents no occasion for the Commission to utilize its special expertise in interpreting its own orders because the Commission did not discuss Section VIII (A) in *Devon Power*.<sup>40</sup> Narragansett points out that neither Constellation nor any other party filed comments objecting to Section VIII (A). Narragansett maintains that Section VIII (A) is "clear and unambiguous"<sup>41</sup> and that "Constellation's failure to avail itself of its rights when the Settlement Agreement was before the Commission does not render the clear terms of Section VIII (A) so ambiguous as to require Commission clarification."<sup>42</sup>

15. Narragansett next argues that this dispute is merely a matter of significance between the parties and does not require the Commission to assert primary jurisdiction to ensure a unified outcome with a large number of similar cases.<sup>43</sup> In Narragansett's view, the issues Narragansett presented to the District Court in its complaint are "narrowly tailored to the specific facts of the case" and "turn on the particular contracts between Constellation and [Narragansett] and the provision of the Settlement Agreement directed specifically to the parties and the State of Rhode Island."<sup>44</sup> Narragansett asserts that

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 16.

<sup>39</sup> *Id.* at 17.

<sup>40</sup> *Id.* at 18-19.

<sup>41</sup> *Id.* at 17.

<sup>42</sup> *Id.* at 19.

<sup>43</sup> *Id.* at 20.

<sup>44</sup> *Id.*

Commission intervention is “especially inappropriate” because Constellation has admitted that its petition only involves the relationship between the FCM Settlement Agreement and the power purchase agreements.<sup>45</sup>

16. Finally, Narragansett argues that this case does not implicate any of the Commission’s important regulatory responsibilities.<sup>46</sup> Narragansett asserts that the policy issues Constellation raised to support its petition have no bearing on this case. Narragansett maintains that “this dispute does not implicate concerns of settlement agreements modifying bilateral contracts” because Section VIII (A) explicitly confirmed Constellation’s obligation to supply Narragansett with capacity under the power purchase agreements.<sup>47</sup> According to Narragansett, the power purchase agreements require Constellation to supply capacity to Narragansett “with any modification in the price of capacity being a bargained-for-risk that Constellation assumed under the [power purchase agreements].”<sup>48</sup> Narragansett further claims that this case does not threaten the sanctity of Commission settlement agreements.<sup>49</sup> In Narragansett’s view, this case “is nothing more than a contract dispute between two parties,” and granting Constellation’s petition “would be to condone Constellation’s blatant attempt at forum-shopping.”<sup>50</sup>

### **Rhode Island’s Protest**

17. Rhode Island likewise argues that the Commission does not have exclusive jurisdiction over this case because it involves “nothing more than [a] simple matter of contract interpretation, the outcome of which hinges upon the meaning of Section VIII (A).”<sup>51</sup> Rhode Island asserts that “[a]s long as the principal nature of the action is one of contract interpretation,” Commission and court precedent dictate that “the filed rate

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 21.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Motion to Intervene and Protest of the State of Rhode Island and Providence Plantations and the Rhode Island Division of Public Utilities and Carriers at 10 (Rhode Island’s Protest).

doctrine does not divest the federal courts of jurisdiction.”<sup>52</sup> Rhode Island further argues that the Commission does not possess primary jurisdiction under *Arkla*. Rhode Island cites Commission precedent stating that straightforward matters of contract interpretation do not require the Commission’s special expertise and are better handled by a court.<sup>53</sup> Rhode Island next claims that this case does not implicate considerations of uniformity because “the unique circumstances giving rise to the inclusion of Section VIII (A) in the Settlement make it highly unlikely that a similar scenario will ever reoccur.”<sup>54</sup> Rhode Island explains that:

At a critical point in the negotiations [of the FCM Settlement Agreement], only two New England states supported the [FCM] Settlement. Without [Rhode Island’s] agreement to become a Settling Party, ISO-New England would not recommend the FCM reflected in the Settlement to the Commission. The State, thus, became a “swing” settlement participant. Settlement participants, including Rhode Island standard offer wholesale suppliers, included Section VIII (A) in the Settlement to induce the State to become a Settling Party, thereby giving ISO-New England the three New England states that it needed to recommend the Settlement to the Commission.<sup>55</sup>

Rhode Island further maintains that it would not have supported the FCM Settlement Agreement had it known that Constellation opposed Section VIII (A), and that it agreed to the FCM Settlement Agreement in reliance on Constellation’s failure to inform both the Settlement Judge and the Commission about its objections.<sup>56</sup> Finally, Rhode Island claims that the issue of whether Section VIII (A) abrogates Constellation’s rights under the power purchase agreements does not raise broad policy or regulatory issues because Section VIII (A) “represents a single, contractual inducement to one settling party... and does not implicate the FCM.”<sup>57</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 13-14.

<sup>54</sup> *Id.* at 15.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 5.

<sup>57</sup> *Id.* at 16.

18. Rhode Island makes two additional arguments urging the Commission to dismiss Constellation's petition on procedural grounds. First, Rhode Island argues that the Commission should not exercise its discretion to issue a declaratory order because Rhode Island has additional claims that will not be resolved even if the Commission grants Constellation's petition for a declaratory order.<sup>58</sup> Second, Rhode Island offers several theories asserting that Constellation has either waived its right to challenge the FCM Settlement Agreement, is precluded or estopped from challenging the FCM Settlement Agreement, or implicitly supported the FCM Settlement Agreement by failing to articulate opposition at appropriate times in the settlement process.<sup>59</sup>

19. Addressing the merits of Constellation's petition, Rhode Island maintains that Section VIII (A)'s "plain and unambiguous" language precludes Constellation from renegotiating the prices in the power purchase agreements.<sup>60</sup> Rhode Island also claims that this interpretation is consistent with the intentions of the parties responsible for drafting and including Section VIII (A) in the FCM Settlement Agreement.<sup>61</sup> Narragansett and Rhode Island assert that Section VIII (A) was added, at Rhode Island's specific request, with the express intention of preventing Constellation and other wholesale capacity providers from passing on increased costs resulting from the FCM Settlement Agreement.

## **Discussion**

### **A. Procedural Matters**

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>62</sup> the timely, unopposed motions to intervene serve to make TransCanada, Narragansett, and Rhode Island parties to this proceeding.

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<sup>58</sup> *Id.* at 8-9.

<sup>59</sup> *Id.* at 22-30.

<sup>60</sup> *Id.* at 18-19.

<sup>61</sup> *Id.* at 19-20.

<sup>62</sup> 18 C.F.R. § 385.214 (2006).

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,<sup>63</sup> prohibits an answer to a protest unless otherwise ordered by a decisional authority. We are not persuaded to accept Constellation's answer to Narragansett's and Rhode Island's protests, and will, therefore, reject it. Rule 213(a)(2) also prohibits an answer to an answer unless otherwise ordered by a decisional authority. We are not persuaded to accept either Narragansett's or Rhode Island's answer to Constellation's answer, and will, therefore, reject them.

**B. Constellation's Petition**

22. We will deny Constellation's request for a declaratory order. As a preliminary matter, we find that this case does not fall within the Commission's exclusive jurisdiction. Constellation's dispute with Narragansett is a dispute over the meaning of Section VIII (A) of the FCM Settlement Agreement. It is well established that courts and the Commission have concurrent jurisdiction over cases interpreting contracts and settlement agreements.<sup>64</sup>

23. We will also decline to assert primary jurisdiction based on our evaluation of the case according to the factors set forth in *Arkla*. The issues here are the proper interpretation of Section VIII (A) and its relationship to the power purchase agreements. We find that we do not possess special expertise beyond that of the District Court in this matter. Construing contractual and settlement agreement provisions and inquiring into the parties' intent are straightforward matters of contract interpretation that in these circumstances are better left to the District Court.<sup>65</sup> Contrary to Constellation's assertion, there is no need for uniformity here. This is merely a dispute between Constellation and Narragansett over the effect that the FCM Settlement Agreement has on their power purchase agreements. Finally, while this is a matter of significance to the parties, the resolution of this contract interpretation dispute is not important in relation to the Commission's regulatory responsibilities.

24. We are satisfied that analysis of each *Arkla* factor leads to the conclusion that this dispute does not require the Commission to assert primary jurisdiction. Therefore, we deny Constellation's petition for a declaratory order.

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<sup>63</sup> 18 C.F.R. § 385.213(a)(2) (2006).

<sup>64</sup> See *Portland General Elec. Co.*, 72 FERC ¶ 61,009 at 61,021 (1995); *Kentucky Utilities Co.*, 109 FERC ¶ 61,033 (2004), *reh'g denied*, 110 FERC ¶ 61,285 at P 10-11 (2005) (*Kentucky Utilities*).

<sup>65</sup> *Kentucky Utilities*, 109 FERC ¶ 61,033, at P 15.



Docket No. EL07-42-000

The Commission orders:

Constellation's petition for a declaratory order is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Constellation Energy Commodities Group, Inc.

Docket No. EL07-42-001

ORDER GRANTING REHEARING FOR  
FURTHER CONSIDERATION

(August 22, 2007)

Rehearing has been timely requested of the Commission's order issued on June 21, 2007, in this proceeding. *Constellation Energy Commodities Group, Inc.*, 119 FERC ¶ 61,292 (2007). In the absence of Commission action within 30 days, the request for rehearing (and any timely requests for rehearing filed subsequently)<sup>1</sup> would be deemed denied. 18 C.F.R. § 385.713 (2007).

In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing requests will be entertained.

Nathaniel J. Davis, Sr.,  
Acting Deputy Secretary

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<sup>1</sup>See *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange*, 95 FERC ¶ 61,173 (2001) (clarifying that a single tolling order applies to all rehearing requests that were timely filed).

Commission Data Request 1-8

Request:

For the period October 1, 2006 through September 30, 2007, with regard to electricity, please provide the following information if it is available:

- a. Amount of LIHEAP funds used to offset the bills of residential customers.
- b. Amount of Good Neighbor Energy Fund Money used to offset the bills of residential customers.
- c. The total amount of the subsidy to customers under the Discounted A-60 rate.
- d. The amount of funds from the \$2,000,0000 dedicated to low income customers per Order 18510 in Docket 3710 used to offset the bills of low income customers.
- e. The amount of funds utilized to aid low income customers through the company's Demand Side Management Programs.
- f. The amount of total net write-offs.
- g. If available, the amount of total net write-offs for the residential class broken down by A-60 vs. non A-60 residential customers.
- h. The amounts of any other programs, discounts, assistance that were utilized to aid low income customers.

Response:

The information provided is for the period October 2006 through September 2007 unless otherwise indicated and relates to service provided to electric service customers:

- a. The amount of LIHEAP funds used to offset the bills of residential customers for the period was \$877,739.
- b. The total dollars provided by the Good Neighbor Energy Fund to offset the bills of residential customers was \$32,463.
- c. The total amount of the subsidy provided to customers under discounted Low Income Rate A-60 was approximately \$6.2 million. This includes the amount associated with the credit approved by the Commission in Dockets 3710 and 3788.
- d. The amount of credit provided to customers taking service on the Company's Low Income Rate A-60 pursuant to the credit approved by the Commission in Dockets 3710 and 3788 was \$2,028,126.
- e. The Company tracks and reports information about its Demand Side Management programs on a calendar year basis. For calendar year 2006, National Grid spent

Commission Data Request 1-8 (continued)

- \$3,140,243 to aid low income customers through the Company's Demand Side Management Programs
- f. The Company's total net write-offs were approximately \$11.9 million.
  - g. Net write-offs for Rate Class A-16 (Regular Residential) were approximately \$7.5 million and for Rate class A-60 (Low Income) were approximately \$1.8 million.
  - h. No other programs are currently available to low income customers.