

UNITED STATES OF AMERICA 100 FERC ¶ 61,245  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, Linda Breathitt,  
and Nora Mead Brownell.

ISO New England Inc.

Docket Nos. EL00-62-047,  
EL00-62-048, and  
EL00-62-049

New England Power Pool

Docket Nos. ER98-3853-014,  
ER98-3853-015, and  
ER98-3853-016

ORDER ON COMPLIANCE FILING AND REQUESTS FOR REHEARING

(Issued September 4, 2002)

1. In this order, the Commission rejects rehearing of the Commission's July 3, 2002 order regarding ISO New England Inc.'s (ISO-NE's) interim method of allocating energy uplift costs,<sup>1</sup> and conditionally accepts a compliance filing by ISO-NE.

**BACKGROUND**

2. Over the course of the past two years, the Commission has issued multiple orders addressing ISO-NE's efforts to develop a Congestion Management System/Multi-Settlement System (CMS/MSS) for the New England Power Pool (NEPOOL). This effort has required the Commission in a series of orders beginning in June 2000 to consider an appropriate interim mechanism for allocating uplift costs<sup>2</sup> incurred prior to

---

<sup>1</sup>New England Power Pool, *et al.*, 100 FERC ¶ 61,029 (2002) (July 3 Order).

<sup>2</sup>When ISO-NE needs to obtain energy at times when the applicable market clearing prices produce revenues that are less than a particular supplier's total bid, ISO-NE pays that supplier the difference between the energy clearing price and the supplier's bid. ISO-NE subsequently recovers these additional costs through "uplift" charges on  
(continued...)

Docket No. EL00-62-047, et al.

- 2 -

the implementation of CMS/MSS or a long-term standard market design. This is the sixth order the Commission has issued addressing this question.<sup>3</sup>

3. In the July 3 Order, the Commission denied several requests for rehearing and rejected NEPOOL's proposed compliance with the Commission's June 13, 2001 and February 15, 2002 orders. The July 3 Order stated that NEPOOL's compliance filing did not fully comply with the Commission's prior directives requiring ISO-NE or NEPOOL either to adjust the mechanism to allocate energy uplift costs so as to remove certain bilateral contracts from liability for those costs, or to explain why removing those contracts would not be possible. The Commission therefore rejected NEPOOL's proposal and required a further compliance filing from ISO-NE that implemented a revised interim energy uplift cost allocation mechanism, effective July 1, 2001.<sup>4</sup>

4. Requests for rehearing. PG&E, the Mirant Companies (Mirant) and American National Power, Inc. (ANP) filed timely requests for rehearing of the July 3 Order. Sithe filed a timely request for rehearing and a motion for an emergency stay of that order. On August 19, 2002, National Grid filed an answer to the requests for rehearing and motion for stay.

5. Compliance filing. On July 9, 2002, ISO-NE submitted the required compliance filing in Docket Nos. EL00-62-047 and ER98-3853-014.<sup>5</sup> On July 12, 2002, ISO-NE refiled the tariff sheets in Docket Nos. EL00-62-048 and ER98-3853-015, as its original

---

<sup>2</sup>(...continued)  
market participants.

<sup>3</sup>The five prior orders are ISO New England Inc., 91 FERC ¶ 61,227 (2001)(June 1 Order); ISO New England Inc., Inc., 91 FERC ¶ 61,311 (2000) (CMS/MSS Order); ISO New England Inc., 95 FERC ¶ 61,384 (2001) (June 13 Order); ISO New England Inc., 98 FERC ¶ 61,173 (2002) (February 15 Order); and New England Power Pool, et al., 100 FERC ¶ 61,029 (2002) (July 3 Order).

<sup>4</sup>July 3 Order, 100 FERC ¶ 61,029 at PP 23, 26.

<sup>5</sup>NEPOOL's FERC Electric Rate Schedule No. 6, Substitute 3rd Revised Sheet No. 512B and Substitute Original Sheet No. 510C.

compliance tariff sheets reflected an older version.<sup>6</sup> PG&E filed a protest, incorporating by reference the arguments it makes in its rehearing petition.

## **DISCUSSION**

### **PROCEDURAL MATTERS**

6. Under Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.213(a) (2) (2001), an answer may not be made to a protest unless permitted by the decisional authority. The Commission will reject National Grid's answer, as it does not contribute additional facts necessary to resolve this case.

### **REQUESTS FOR REHEARING**

#### **Due Process**

7. PG&E, Mirant and ANP raise, in essence, due process issues. ANP and PG&E argue that, prior to the July 3 Order, generators had no notice that the Commission would change the allocation of interim energy uplift costs so that parties that "self-supply" would be liable for such costs. According to ANP, both when the Commission addressed the question of allocation of interim energy uplift costs under the Net Hourly Load Obligation (NHLO) mechanism in the CMS/MSS Order, and when it then considered the Electrical Load mechanism in the February 15 Order, the Commission did not address the issue of uplift costs for self-supplying generators. ANP asserts that when, due to the ambiguity of the Commission's orders, PG&E sought clarification of the February 15 Order, the Commission at that time stated for the first time that self-supplying parties would be allocated energy uplift costs. Thus, ANP claims, the Commission's decision to

---

<sup>6</sup>ISO-NE named these substitute sheets NEPOOL's FERC Electric Rate Schedule No. 6, Substitute 3rd Revised Sheet No. 512B and Substitute Original Sheet No. 510C, even though the material on these sheets was not the same as on those filed on July 9, 2002. This proposed pagination does not comport with Order No. 614, FERC Stats. & Regs., Regulations Preambles July 1996 - December 2000 ¶ 31,096 (March 31, 2000), and the *Rate Schedule and Service Agreement Pagination Guidelines* identified in section 35.9(b)(2) of the Commission's regulations, 18 C.F.R. § 35.9(b)(2) (2002). The *Guidelines* require the use of unique pagination for every sheet filed with the Commission. The Commission will require ISO-NE to re-file these tariff sheets as First Substitute 3rd Revised Sheet No. 512B and First Substitute Original Sheet No. 510C.

Docket No. EL00-62-047, et al.

- 4 -

make the tariff sheets filed by ISO-NE on July 9, 2002 effective on July 1, 2001 is arbitrary and capricious.<sup>7</sup>

8. PG&E states that, in the CMS/MSS Order, the Commission directed ISO-NE to exempt from liability for uplift costs all entities that were "completely self-sufficient" as to ISO-NE's markets and that "acquire all of their energy bilaterally and that self-supply all of their spinning reserve ancillary service requirements."<sup>8</sup> Thus, PG&E and Sithe argue that parties' expectations have been upset by the Commission's ruling in the July 3 Order, and the application of the new policy to contracts executed before July 1, 2001, since prior to July 1, 2001, parties executed contracts under the understanding that the seller provided energy and nothing more, and those contracts did not shift responsibility for energy uplift costs to the seller.<sup>9</sup>

9. PG&E and Mirant similarly argue that generators did not have sufficient notice that they would be liable for energy uplift costs so that they could take action to reduce their exposure. They argue that a generator with a sales contract entered into prior to July 1, 2001 could not have shifted the responsibility for energy uplift costs contractually, because it did not know prior to July 3, 2002, that it would be responsible for energy uplift costs.

10. PG&E further argues that the Commission's new position, under which generators will bear the majority of the costs of interim energy uplift, is a reversal of its prior policy. According to PG&E, prior to July 3, 2002, the Commission allocated energy uplift costs

---

<sup>7</sup>ANP and Sithe state that prior to the July 3 Order, generators believed that, if a supplier bids generation into the energy market, but only to cover its own load or its obligation to supply the load of a counter-party, it is "self-supplying" rather than making use of the energy market, and would be exempt from the Commission's energy uplift cost allocation methodology. In the July 3 Order, the Commission had stated that it did not consider such conduct to be "self-supplying," and that such parties would be subject energy uplift costs. July 3 Order, 100 FERC ¶ 61,029 at P 13.

<sup>8</sup>PG&E request for rehearing at 4, citing CMS/MSS Order, 91 FERC at 62,062.

<sup>9</sup>PG&E also asserts that the Commission indicated in orders issued in April and May of 2001 that it would not change this allocation of interim energy uplift cost responsibility. PG&E request for rehearing at 10-11, citing New England Power Pool, 95 FERC ¶ 61,123 at 61,385 (April 26, 2001) and New England Power Pool, 95 FERC ¶ 61,253 at 61,876-77 (May 18, 2001).

broadly to Electrical Load, but in the July 3 Order, the Commission transferred that responsibility to generation, thus reversing the principle of cost causation: thus, PG&E states, the Commission's new policy shifts all uplift costs to a small group of generators at the bottom of the supply chain, rather than leaving those costs with the entities that serve a broad array of retail load. Sithe similarly argues that the July 3 Order sweeps aside existing rules. Mirant argues that retroactive reallocation is inappropriate, given that the Commission initially stated that it would not change its methodology for allocating uplift cost, and deferred market redesign issues to the filing of New England's Standard Market Design (SMD).

### **Commission Response**

11. The Commission rejects the requests for rehearing. Initially, the Commission notes that the ruling as to which rehearing is now sought was part of the Commission's response to, and denial of, PG&E's request for rehearing of the February 15 Order. Accordingly, it is not properly subject to further requests for rehearing.<sup>10</sup> Even if the Commission were to consider the merits of the parties' requests for rehearing, however, it would nevertheless deny them, as explained below.

12. The parties' principal argument is that the Commission failed to provide proper notice that certain generators might be subject to uplift costs, and therefore those parties did not have an opportunity to raise objections or properly participate in the creation of the record of this proceeding, or to take other actions to reduce their exposure. This is far from the case. The Commission has not deviated from its consistent position that energy uplift costs should be allocated solely to those parties who enter and benefit from New England's energy markets. To demonstrate this, a brief history of this lengthy proceeding is in order.

13. -- June 1 Order. The complaint proceeding that initiated the review of ISO-NE's interim uplift cost allocation methodology was filed March 31, 2000, and properly noticed. The question before the Commission was how to allocate among New England market participants the uplift costs incurred during the interim period until NEPOOL developed its CMS/MSS. In the June 1 Order, the Commission stated that it would not

---

<sup>10</sup>See, e.g., Annual Charges Under the Omnibus Budget Reconciliation Act of 1986, 95 FERC ¶ 61,234 at 61,807 & n.15 (2001) (denying request for rehearing of order denying rehearing); Florida Power Corp., 66 FERC ¶ 61,200 at 61,453 & nn. 5-6 (1994) (same); Southwestern Public Service Co., 65 FERC ¶ 61,088 at 61,533 (1994) (same).

permit the then-effective socialization of uplift costs<sup>11</sup> to continue indefinitely, and established procedures in the same proceeding through which the Commission intended to resolve the issue.<sup>12</sup> Thus, parties were on notice that the continued socialization of interim uplift costs would not continue, and that a process had been established to determine a new method of interim cost allocation.

14. -- CMS/MSS Order. On March 31, 2000, in response to a directive from the Commission, ISO-NE filed a proposed CMS/MSS which the Commission accepted in part and rejected in part on June 28, 2000. In the CMS/MSS Order, the Commission stated, with regard to the allocation of one type of uplift costs – Net Supply Offer Shortfall (NSOS) costs – that it would not permit those costs to be allocated to "participants that are completely self-sufficient of the ISO's energy and spinning reserve markets – that acquire all of their energy bilaterally and that self-supply all of their spinning reserve ancillary service requirements."<sup>13</sup> At that time, several generators<sup>14</sup> further argued that the Net Hourly Load Obligation (NHLO) mechanism proposed by ISO-NE to allocate uplift costs unfairly shifted the burden of those costs to them by attaching uplift costs to certain bilateral transactions which are undertaken for the sake of hedging rather than physical delivery. The generators proposed instead that uplift payments be allocated on the basis of the Electrical Load allocation mechanism. In the CMS/MSS Order, the Commission stated in response that no party had as yet provided sufficient information to enable the Commission to accept NHLO, as proposed by ISO-NE, as an allocation method, and that "[no party has] adequately explained why the holder of the bilateral contract should bear a portion of the relevant categories of uplift."<sup>15</sup> The Commission therefore directed ISO-NE to submit a more complete description of NHLO, and a more complete discussion regarding why ISO-NE believed that the holders of the applicable bilateral contracts should bear a portion of uplift charges. As the CMS/MSS Order shows, over two years ago, many parties to bilateral

---

<sup>11</sup>In the June 1 Order, the Commission used the term "congestion costs" for uplift costs.

<sup>12</sup>June 1 Order, 91 FERC at 61,380-81.

<sup>13</sup>CMS/MSS Order, 91 FERC at 62,062.

<sup>14</sup>This group included two of the rehearing petitioners here: PG&E Generating, USGen New England, Inc., and PG&E Energy Trading-Power. L.P. (PG&E), and Sithe New England Holdings, LLC (Sithe). Id., 91 FERC at 62,058, n.1.

<sup>15</sup>Id., 91 FERC at 62,068 (emphasis added).

contracts had concerns with the proposed replacement interim uplift cost allocation methodologies, and the Commission expressed the need for additional information to resolve these concerns.

15. -- June 13 Order. In its order on rehearing of the CMS/MSS Order, issued on June 13, 2001, the Commission again addressed the allocation of uplift costs. It noted that "the principal dispute raised by the parties concerns [the NHLO mechanism's] ability to transfer uplift settlement obligations within bilateral transactions. This is a dispute as to which party under a bilateral contract should bear the risk of uplift costs, once costs have been assigned and billed by ISO-NE. This is not the same as allocating the costs themselves."<sup>16</sup> The Commission found that this issue was a private contractual matter and need not be addressed by either NEPOOL or ISO-NE in their tariffs.<sup>17</sup>

16. The Commission drew a distinction between costs related to transmission uplift (which benefitted all pool members) and costs related to energy uplift, and found that energy uplift should be allocated based on a mechanism that "reflects the loads that use ISO-NE's energy markets," since those were the loads who benefitted from such energy markets.<sup>18</sup> The Commission therefore rejected ISO-NE's allocation proposal, because "it would allocate a portion of interim energy uplift costs to participants that do not transact in ISO-NE's market," and required ISO-NE to modify its allocation methodology by removing from the Electrical Load allocation mechanism those bilateral contracts "in which the participants have energy settlement obligations based on a percentage of their electrical load (adjusted for external sales) through System and Firm Contracts (Percentage Contracts)." The Commission found that those "[b]ilateral participants, to the extent that they do not resort to the spot market, do not impose additional stress on the spot market, and these services should not be subject to energy uplift costs incurred by that market."<sup>19</sup> The Commission directed NEPOOL to file tariff sheets implementing the revised interim uplift cost allocation method, effective as of the first day of the calendar month following this order (in other words, July 1, 2001). The Commission does not believe there is any ambiguity in the June 13 Order as to this finding, or to whom the finding would apply.

---

<sup>16</sup>June 13 Order, 95 FERC at 62,428.

<sup>17</sup>Id.

<sup>18</sup>No party requested rehearing on the Commission's interim transmission uplift cost allocation findings.

<sup>19</sup>June 13 Order, 95 FERC at 62,428-29, footnotes omitted.

17. -- February 15 Order. In its compliance filing to the June 13 Order, although the Commission had ordered NEPOOL to adjust Electrical Load by removing so-called Percentage Contracts from Electrical Load, NEPOOL proposed instead to adjust Electric Load by removing self-scheduled units from Electrical Load, so as to exempt from energy uplift costs that portion of a participant's load served by its own self-scheduled resources. NEPOOL stated that it would also be appropriate to exempt parties from energy uplift if they had entered into bilateral arrangements where energy obligations, including uplift, were transferred to the supplier if the supplier meets its obligations through self-scheduling. But, NEPOOL stated, ISO-NE had indicated that such a provision would not be administratively feasible.

18. The Commission in its February 15 Order stated that it would accept NEPOOL's proposal to remove self-scheduled units from interim energy cost allocation. but noted that there was still a question as to whether NEPOOL could remove additional bilateral contracts from liability for interim energy uplift costs. Thus, the Commission found that NEPOOL's proposal did not comply with the June 13 Order, because "it does not remove at least . . . those bilateral contracts in which the participants have energy settlement obligations based on a percentage of their electrical load . . . through Percentage Contracts."<sup>20</sup> The Commission then reiterated that the June 13 Order "rejected the notion that either NEPOOL rules or the Commission should determine which party to a bilateral contract should bear responsibility for any energy uplift," since the allocation of uplift costs "is a matter of contract interpretation, and neither NEPOOL nor ISO-NE need become involved in issues of contract interpretation."<sup>21</sup> The Commission therefore

---

<sup>20</sup>February 15 Order, 98 FERC ¶ 61,173 at P 30 (emphasis added).

<sup>21</sup>Id., 98 FERC ¶ 61,173 at P 41. As to issues raised by some parties that the removal of Percentage Contracts from Electrical Load could lead to "participants signing new bilateral contracts for all of their respective loads, with the result that the entire amount of the pool-generated uplift would be paid by the last participant in the spot market," the Commission found that the proper allocation of costs had already been covered in the CMS/MSS Order and the June 13 Order, and that those parties had not sought rehearing of that issue. The Commission also noted that it was "aware that cost allocation and rate design methods may lead to unreasonable results if taken to their logical extremes, and cost allocation and rate design is not an exact science. But such speculative difficulties should not prevent the imposition of an otherwise useful regulatory scheme. If problems arise with an allocation scheme due to changed

(continued...)



conditionally accepted NEPOOL's proposed interim energy uplift allocation tariff sheets, effective July 1, 2001, but required NEPOOL or ISO-NE to exempt the additional bilateral contracts from uplift responsibility, as discussed in the June 13 Order, or more fully explain why it would not be administratively feasible to do so.<sup>22</sup> This order did not change any findings of the Commission's June 13 Order, but simply inquired why the June 13 Order's findings could not be implemented.

19. -- July 3 Order. In its March 18, 2002 compliance filing to the February 15 Order, NEPOOL proposed to adjust the interim energy uplift cost allocation mechanism to provide that a participant would be responsible for energy uplift costs unless it could show that it met all of its needs either through self supply, or through bilateral contracts, and that therefore it had not entered the energy market. NEPOOL proposed to include in this interim mechanism only those Percentage Contracts that were entered into after July 1, 2001, and such inclusion would be prospective only. National Grid USA (National Grid) protested the compliance filing, asserting that it did not remove from uplift cost responsibility all the bilateral contracts that ISO-NE was administratively able to identify. To support this argument, National Grid submitted documents in which ISO-NE informed NEPOOL that it would be administratively feasible to allocate interim energy uplift costs solely to the loads that use ISO-NE's markets, effective July 1, 2001, including draft tariff language accomplishing this goal. On this basis, the Commission found that NEPOOL's proposal was not in compliance with the February 15 Order, and directed ISO-NE to file its draft tariff language accomplishing this purpose as a tariff sheet, effective July 1, 2001.<sup>23</sup> Thus, the July 3 Order found that the June 13 Order's findings could be implemented, and required ISO-NE to file implementing tariff language.

20. The Commission also addressed a question raised by PG&E as to whether, when the Commission referred to parties that "entered" the energy market, that included parties that "self-supplied" a contract obligation. PG&E defined "self-supply" as including a party that bids generation into the energy market, but does so only to cover its own load

---

<sup>21</sup>(...continued)

circumstances, the Commission will address them at that time." Id., 98 FERC ¶ 61,173 at P 46.

<sup>22</sup>Id., 98 FERC ¶ 61,173 at P 48.

<sup>23</sup>July 3 Order, 100 FERC ¶ 61,173 at PP 15, 19, 24 (footnotes omitted).

or its obligation to supply the load of a counter-party. The Commission responded that such a participant

is, in fact, offering energy into the market. It is therefore 'using' the market, no matter what the participant's intent. A supplier may have sufficient supply to satisfy its bilateral contract (because it owns or has a contractual entitlement to generation), but choose to bid that supply into the market in the hope that it can meet its contract obligation by purchasing cheaper power from another supplier bidding into the market. That supplier may also, simultaneously, sell its own supply to another load for a higher price. This process, however, still equates to participating in the market.<sup>24</sup>

21. -- Conclusion. As the above history demonstrates, the Commission has not deviated from its position that energy uplift costs should be allocated solely to those parties who enter and benefit from New England energy markets. All the parties requesting rehearing have been parties to this proceeding since the beginning, and PG&E and Sithe in particular have made numerous proposals and comments on every aspect of the issue from the beginning.

22. The arguments as to the "ambiguity" of the Commission's prior orders raised by rehearing petitioners are red herrings. ANP implies that the mere fact that PG&E sought clarification of the February 15 Order demonstrates that the Commission's prior rulings were ambiguous. But a statement is not rendered ambiguous simply because one party makes self-serving representations that it is.<sup>25</sup> And if, in fact, PG&E or ANP or other parties believed when the Commission issued the CMS/MSS Order that the Commission's statement regarding self-supplying parties was ambiguous, they should have requested rehearing at that time. In this regard, Dominion Resources, Inc. v. FERC,<sup>26</sup> cited by ANP, supports the Commission rather than the rehearing petitioners. As the court stated there, in a case involving an initial order and a second order on the same subject:

---

<sup>24</sup>Id., 100 FERC ¶ 61,173 at P 13, footnotes omitted.

<sup>25</sup> Southern California Gas Company v. FERC, 2002 U.S. App. LEXIS 15040 at 4 (9<sup>th</sup> Cir. July 22, 2002), citing Prairie Producing Co. v. Schlachter, 786 S.W.2d 409 (Tex. App. 1990) ("An ambiguity exists only where there is a genuine uncertainty as to whether one of two reasonable meanings is the proper one").

<sup>26</sup>286 F.3d 586 (D.C. Cir. 2002) (Dominion Resources).

If [the second order] was merely a "clarification," then Dominion was not aggrieved by it and is indeed engaging in a collateral attack. . . . The answer depends on whether a reasonable firm in Dominion's position "would have perceived a very substantial risk that [the first order] meant" what the Commission now says it meant. . . . Mere ambiguity in the [first order] is not enough to excuse Dominion's previous failure to challenge it.<sup>27</sup>

23. Similarly here, if PG&E or other parties had truly believed that the Commission's definition of "self supply" was subject to more than one interpretation, the time to seek clarification on that question was after the CMS/MSS Order, not now. The Commission made its finding as to the appropriate replacement interim uplift cost allocation methodology in the June 13 Order. This order did not accept ISO-NE's replacement interim allocation methodology as proposed. Rather, the Commission required certain modifications, effective July 1, 2001. Parties had opportunities to request rehearing of the Commission's findings. PG&E, Sithe and others did request rehearing of the Commission's findings, and the Commission addressed these requests for rehearing in the February 15 order.

24. Since issuance of its June 13 Order, the Commission has been seeking to obtain NEPOOL's compliance in developing an allocation mechanism which will allocate the costs of energy uplift solely to those parties who transact in the New England markets. When NEPOOL made its July 13, 2001 compliance filing, the Commission ruled in its February 15 Order that NEPOOL's filings failed to comply with the Commission's directive in the June 13 Order to remove all possible bilateral contracts from uplift responsibility, and that NEPOOL must either comply completely, or explain why such removal would be infeasible. At that point, and certainly at this point, any broader attempt to relitigate the policy call that the Commission made – to exempt those parties who do not transact in the New England markets from uplift cost responsibility – is an impermissible collateral attack.

25. The Commission also rejects these parties' argument that it was inappropriate for the Commission to make the allocation mechanism effective as of July 1, 2001, since parties could not have known that the Commission would eventually resolve the issue in the manner in which it was finally resolved. From issuance of the CMS/MSS Order on June 28, 2000, New England market participants were on clear notice that the Commission would accept only an allocation mechanism which removed bilateral

---

<sup>27</sup>Dominion Resources, 286 F.3d at 590, citing ANR Pipeline Co. v. FERC, 988 F.2d 1229, 1234 (D.C. Cir. 1993).

contracts from responsibility for energy uplift costs.<sup>28</sup> It is thus inaccurate for generators to claim that they had no notice that NEPOOL or ISO-NE might eventually develop, and the Commission might eventually accept, an allocation mechanism which accomplished this goal. After issuance of the CMS/MSS Order on June 28, 2000, and certainly after issuance of the June 13 Order on June 13, 2001, generators could have begun negotiating with their counter parties or seeking to avail themselves of whatever contract remedies were available to them to re-allocate the risk of incurring energy uplift costs for transactions occurring after July 1, 2001. It appears that they did neither, but rather preferred to continue to litigate the question before the Commission. Having made that choice, they must now bear the consequences. They may not claim, however, that they were without notice, or that it is improper for the Commission to require resettlement of transactions back to July 1, 2001.

### **Other Arguments**

26. Sithe states that the July 3 Order is backward on its merits, in that suppliers who sell their entire output through bilateral contracts will now be required to pay energy uplift costs on this entire quantity. Sithe states that this contradicts the Commission's intent that participants who do not transact in New England energy markets should not pay energy uplift. Mirant similarly states that the Commission's new rule regarding the allocation of energy uplift costs will create both unnecessary windfalls and unfair exposures.

27. Sithe asserts that the purpose of energy uplift is to reimburse generators who provide needed services to the markets; yet, under the Commission's approach, generators will become liable for the majority of uplift costs. Sithe and PG&E further argue that the Commission's position will cause an extensive and inappropriate resettlement of the market by ISO-NE, and extensive litigation among contract parties.

28. Sithe also argues that, as a consequence of the Commission's position, generators will view their only option to protect themselves against energy uplift costs to be self-scheduling. Sithe asserts that this will cause market inefficiencies, citing to a report by ISO-NE's independent market advisor finding that "unnecessary" self-scheduling can drive down the energy clearing price to inefficient levels.<sup>29</sup> Mirant also argues that the Commission's assumption that uplift costs will decrease if more entities self-schedule is

---

<sup>28</sup>CMS/MSS Order, 91 FERC at 62,062.

<sup>29</sup>Sithe request for rehearing at 7.

incorrect, since energy uplift arises from the need of the system operator to ensure reliability, rather than being a function of how many parties are active in the spot market.

29. PG&E asserts that load-serving entities (LSEs) have already signed long-term contracts for power supply, partly to hedge risk, but the Commission's decision here deprives generators of that same option with regard to the risk of energy uplift costs for future periods. PG&E, Sithe and Mirant therefore argue that the Commission should, at a minimum, make its policy effective only for transactions under contracts executed after July 1, 2001.

### **Commission Response**

30. The Commission rejects PG&E's, Sithe's and Mirant's requests for rehearing as untimely and not raising any issue not previously considered and addressed. As described above, the July 3 Order did not adopt a new policy or remedy from that adopted by the June 13 Order. The June 13 Order addressed whether bilateral contracts could be subject to interim energy uplift costs.<sup>30</sup> PG&E's, Mirant's and Sithe's allegations as to generator liability under pre-July 1, 2001 contracts for interim energy uplift simply repeat the contract dispute issue previously addressed by the June 13 Order. The Commission found that these issues are not an appropriate subject for tariff language or other codification by ISO-NE or NEPOOL,<sup>31</sup> and it continues to take this view.

### **Erroneous Treatment of National Grid's Protest**

31. PG&E states that the Commission did not grant interested parties a sufficient opportunity to comment on the policy adopted in the July 3 Order. The tariff sheets drafted by ISO-NE were provided to the Commission as an attachment to a protest by National Grid, and PG&E and Mirant argue that it was inappropriate for the Commission to order ISO-NE to file those sheets without giving parties an opportunity to comment.

---

<sup>30</sup>June 13 Order, 95 FERC at 62,429.

<sup>31</sup>[S]haring the risk of incurring cost responsibility under bilateral transactions, including uplift cost responsibility, is a private contractual matter. . . . [T]he Commission does not believe it is necessary for NEPOOL or ISO-NE to establish a default allocation of risk." June 13 Order, 95 FERC at 62,428.

### **Commission Response**

32. Using ISO-NE's draft language, as provided by National Grid, was simply a means of achieving an end. If National Grid had not provided the draft language, the Commission would still have made the ruling that it did and simply directed ISO-NE or NEPOOL to make yet another compliance filing that reflected the Commission's findings and conclusions. Moreover, PG&E's and Mirant's arguments amount to a claim that the Commission may not adopt a recommendation by a protestor, because answers to a protest are not normally permitted – in other words, that the Commission cannot adopt a protestor's recommendation without permitting the filing public utility or other parties to answer. The Commission has never taken this position before, and will not do so now. In any event, now that ISO-NE has made the filing required by the Commission in Docket Nos. EL00-62-047 and ER98-3853-014, and Docket Nos. EL00-62-048 and ER98-3853-015, addressed below, PG&E has exercised its right to protest that filing and make arguments against it that PG&E believes appropriate. Other parties to this proceeding could similarly have filed protests, but chose not to. Thus, no party has been deprived of an opportunity to participate in the Commission's decision-making process here.

### **REQUEST FOR STAY**

33. Sithe moves for an emergency stay of the Commission's order to prevent the "irreparable harm" to the New England market that it claims will occur otherwise. Sithe asserts that excessive self-scheduling is continuing to depress the energy clearing price in New England, thus causing harm to Sithe and other sellers through rendering prices inefficient and excessively low. Additionally, Sithe states that a stay would enable the Commission to further consider the appropriateness of requiring ISO-NE to reallocate previously-settled uplift payments dating back to July 1, 2001.

### **Commission Response**

34. Because the Commission is rejecting rehearing, Sithe's emergency motion for a stay is moot.

### **COMPLIANCE FILING**

35. The Commission denies PG&E's protest for the reasons provided above in our discussion of its request for rehearing. The Commission conditionally accepts ISO-NE's July 12, 2002 tariff sheets as in compliance with the Commission's orders, effective July 1, 2001.

Docket No. EL00-62-047, et al.

- 15 -

The Commission orders:

(A) The requests for rehearing are hereby rejected.

(B) The request for stay is hereby dismissed as moot.

(C) NEPOOL's FERC Electric Rate Schedule No. 6, Substitute 3rd Revised Sheet No. 512B and Substitute Original Sheet No. 510C, as filed July 12, 2002, are hereby conditionally accepted for filing, subject to ISO-NE refiling, within 10 days of the date of this order, the sheets paginated as NEPOOL's FERC Electric Rate Schedule No. 6, First Substitute 3rd Revised Sheet No. 512B and First Substitute Original Sheet No. 510C, effective July 1, 2001.

(D) NEPOOL's FERC Electric Rate Schedule No. 6, Substitute 3rd Revised Sheet No. 512B and Substitute Original Sheet No. 510C, as filed July 9, 2002, are hereby rejected as moot.

By the Commission.

( S E A L )

Linwood A. Watson, Jr.,  
Deputy Secretary.