

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Mirant Americas Energy Marketing, L.P., et al.

Docket No. EL01-93-007

ORDER ON REQUEST FOR CLARIFICATION OR WAIVER

(Issued April 16, 2004)

1. On October 26, 2001, the Commission issued an order that required ISO New England Inc. (ISO-NE) to file all mitigation agreements it negotiated pursuant to NEPOOL's Market Rule and Procedure 17 (Market Rule 17).<sup>1</sup> ISO-NE seeks clarification or waiver concerning notices of termination with respect to those mitigation agreements. This order grants ISO-NE's request that the Commission waive the requirement that it must file notices of termination under section 35.15 of the Commission's Rules of Practice and Procedure for mitigation agreements that have expired.<sup>2</sup>

---

<sup>1</sup> *Mirant Americas Energy Mktg., L.P., et al. v. ISO New England Inc.*, 96 FERC ¶ 61,201 (August 10 Order), clarification granted and reh'g denied, 97 FERC ¶ 61,108 (October 26 Order), clarifications granted and reh'g denied, 97 FERC ¶ 61,360 (2001) (December 21 Order), clarification and reh'g denied, 99 FERC ¶ 61,003 (2003) (April 1 Order), clarification granted, 103 FERC ¶ 61,018 (April 9 Order), remanded sub nom. NSTAR Elec. & Gas Corp. v. FERC, No. 02-1047, 2003 U.S. App. LEXIS 8078 (D.C. Cir. Apr. 28, 2003), order on remand, 105 FERC ¶ 61,359 (2003) (Order on Remand), 106 FERC ¶ 61,243 (2004) (Order Accepting Compliance Filing).

<sup>2</sup> Section 35.15 of the Commission's regulations provides: "When a rate schedule or part thereof required to be on file with the Commission is proposed to be cancelled or is to terminate by its own terms and no new rate schedule or part thereof is to be filed in its place, each party required to file the schedule shall notify the Commission . . . at least sixty days . . . prior to the date such cancellation or termination is proposed to take effect. . . ." 18 C.F.R. § 35.15 (2003).

## I. Background

### A. Market Rule 17

2. Prior to the effective date of the New England Standard Market Design (NE-SMD),<sup>3</sup> Market Rule 17 set forth the procedures for ISO New England, Inc. (ISO-NE) to mitigate generation resources that run out-of-economic merit order<sup>4</sup> during periods of transmission constraints.<sup>5</sup> Initially, Market Rule 17 provided that bids by owners of resources that seldom run in economic merit order would be subject to mitigation down to default reference prices unless the owners agreed with ISO-NE through voluntary arrangements to restrict their bids (mitigation agreements). Market Rule 17 provided that: “The ISO may enter into negotiation with a resource owner for any reasonable payment terms if the ISO reasonably expects the markets will function more reliably, competitively or efficiently as a result [i.e., to ensure that the generator remains available during transmission constraints].”<sup>6</sup> ISO-NE passes through to load the cost of the difference between the mitigation agreement price and a lower energy clearing price as a component of an “uplift” charge.

---

<sup>3</sup> The Commission authorized ISO-NE to implement the NE-SMD on March 1, 2003. See *New England Power Pool and ISO New England Inc.*, 102 FERC ¶ 61,248 (2003). As a result, ISO-NE no longer negotiates mitigation agreements under Market Rule 17. Instead, pursuant to the NE-SMD, any mitigation agreements that ISO-NE enters into must comply with the negotiating authority given to ISO-NE under Appendix A of Market Rule 1. See *ISO New England, Inc.*, 103 FERC ¶ 61,320 at P 2 n.3 (2003).

<sup>4</sup> In a system in which generation is normally dispatched in economic order beginning with the lowest cost generation, an out-of-merit generator is dispatched not because it is economic to do so, but rather for reliability reasons.

<sup>5</sup> Transmission constraints limit a system’s capability to import electricity into a particular area (load pocket) and thereby require ISO-NE to dispatch a generator located within the load pocket out of economic merit order to serve load, to protect the system from voltage collapse, or to prevent some other instability.

<sup>6</sup> Market Rule 17.3.3(b) n.9.

**B. Relevant Orders**

3. The August 10 Order<sup>7</sup> determined that ISO-NE's Modified Procedures<sup>8</sup> were material changes to Market Rule 17 and therefore required them to be filed under section 205 of the Federal Power Act (FPA).<sup>9</sup> On September 10, 2001, NSTAR Electric & Gas Corporation (NSTAR) filed a motion for expedited clarification, arguing that, because the existing mitigation agreements between ISO-NE and generators must be filed under section 205, absent such a filing, the operative rate should be the existing default formula rate, as provided in Market Rule 17.3.2.2(b). Addressing that request, the October 26 Order required the filing, pursuant to section 205, with the Commission of all mitigation agreements negotiated under Market Rule 17.<sup>10</sup>

4. In response to the October 26 Order's directive, on February 25, 2002, ISO-NE submitted a compliance filing containing all of the mitigation agreements it had negotiated under Market Rule 17 (February 25 Filing). ISO-NE sought confidential treatment for these agreements under section 388.12 of the Commission's regulations.<sup>11</sup> However, on April 9, 2003, the Commission denied ISO-NE's request for confidential treatment of the mitigation agreements and directed ISO-NE to file them in unredacted and non-confidential form.<sup>12</sup> Pursuant to that order, on April 22, 2003, ISO-NE filed an unredacted and non-confidential version of the mitigation agreements that it had entered into with generators under Market Rule 17. In the Order Accepting Compliance Filing, the Commission stated: "To lay to rest the issue of whether the mitigation agreements are reasonable, the Commission has reviewed the agreements, and, based on that review, as explained below, we find that they are reasonable."<sup>13</sup>

---

<sup>7</sup> 96 FERC ¶ 61,201 at 61,860.

<sup>8</sup> On May 31, 2001, ISO-NE proposed a revised Market Rule 17 (Modified Procedures), providing that all existing mitigation agreements would terminate on June 30, 2001. See August 10 Order, 96 FERC ¶ 61,201 at 61,858 (explaining the Modified Procedures in further detail).

<sup>9</sup> 16 U.S.C. § 824d (2000).

<sup>10</sup> 97 FERC ¶ 61,108 at 61,556.

<sup>11</sup> 18 C.F.R. § 388.112 (2003).

<sup>12</sup> April 9 Order, 103 FERC ¶ 61,018 at P 7.

<sup>13</sup> 106 FERC ¶ 61,243 at P 14.

### **C. Request for Clarification or Waiver**

5. ISO-NE states that several of the mitigation agreements included in the February 25 Filing expired before they were filed or expired by their own terms after they were filed.<sup>14</sup> According to ISO-NE, all generators operating under these agreements have been notified of the expiration of their agreements by ISO-NE, and it has not taken any services under these agreements after their expiration dates. Therefore, ISO-NE states that there is no regulatory purpose to be served by requiring ISO-NE to also file notices of termination upon the expiration of the mitigation agreements.<sup>15</sup>

6. ISO-NE maintains that the Commission has not treated mitigation agreements as rate schedules under its regulations. In addition, ISO-NE argues that mitigation agreements are not rates and they neither receive rate schedule designations when they are filed nor become part of ISO-NE's tariff upon their filing. Since the mitigation agreements are not included in the formal tariffs administered by ISO-NE, it states that their expiration should not trigger the termination notice requirement under section 35.15 of the Commission's regulations.

7. For these reasons, ISO-NE requests that the Commission clarify that the mitigation agreements negotiated under Market Rule 17 may be terminated according to their terms without requiring ISO-NE to file notices of termination. In the alternative, if the Commission determines that its regulations require that termination notices be filed for mitigation agreements, ISO-NE requests that the Commission waive that requirement.

### **D. Answers to ISO-NE's Request for Clarification**

8. Massachusetts Municipal Wholesale Electric Company, Braintree Electric Light Department, Reading Municipal Light Department, and Taunton Municipal Lighting Plant (collectively, Public Systems) and NSTAR both filed answers, asking that ISO-NE's request for clarification and request for waiver be denied. Specifically, the Public Systems and NSTAR state that the Commission repeatedly has held that mitigation agreements must be filed pursuant to section 205 of the FPA. In addition, they maintain that ISO-NE's position that the mitigation agreements are not rate schedules is not

---

<sup>14</sup> In particular, several of those agreements expired upon the implementation of the NE-SMD on March 1, 2003. ISO-NE states that it has on file with the Commission all the mitigation agreements it has entered into with market participants pursuant to Market Rule 17 that have expired.

<sup>15</sup> In this regard, ISO-NE points out that the terms of the mitigation agreements have expired and service is no longer being provided under these agreements.

supported by the Commission's definition of rate schedules.<sup>16</sup> They assert that the mitigation agreements are rate schedules, pursuant to section 35.15(a) of the Commission's regulations, and, therefore, ISO-NE is required to file a notice of termination for each mitigation agreement that has terminated.

9. With regard to ISO-NE's contention that the agreements at issue have already expired and therefore there is no purpose to filing the termination notices, the Public Systems and NSTAR maintain that there are important purposes to be served in requiring submission of the notices of termination for the mitigation agreements. In particular, they state that ISO-NE's determination of when mitigation activities are needed and when they can be relaxed is potentially relevant information, especially to those who are compelled to fund ISO-NE's bid mitigation activities and want to assess the reasonableness of those activities.

## II. Discussion

10. Although the notices of termination apply to the mitigation agreements, we find good cause to grant ISO-NE's request that we waive this requirement in the unusual circumstances presented here. Therefore, the Commission will not require ISO-NE to file termination notices regarding the mitigation agreements.

11. Since April 22, 2003, ISO-NE has had on file with the Commission twenty-nine (unredacted) mitigation agreements. In a compliance filing, ISO-NE reviewed the mitigation agreements and provided a summary of them that detailed their histories.<sup>17</sup> Furthermore, the Commission has reviewed those agreements and found that they are reasonable.<sup>18</sup> In addition, several of these agreements expired upon the implementation of the NE-SMD on March 1, 2003, while others expired according to their terms before that time. As a result, ISO-NE no longer provides service under these agreements. According to ISO-NE, all generators operating under these agreements have been notified of the expiration of their agreements by ISO-NE.

12. The controversy surrounding these mitigation agreements has resulted in six Commission orders, and all the interested parties have had actual notice of the terminations of the mitigation agreements. In these unique circumstances, it would put

---

<sup>16</sup> See, e.g., Public Systems Answer at 2 (quoting 18 C.F.R. § 35.2(b) (2003)).

<sup>17</sup> See Docket No. EL01-93-008.

<sup>18</sup> Order Accepting Compliance Filing, 106 FERC ¶ 61,243 at P 14.

form over substance to require ISO-NE to file notices of termination for the mitigation agreements.

The Commission orders:

The Commission hereby grants ISO-NE's request for waiver, as discussed in the body of this order.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.