

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc.

Docket No. ER03-631-002

ORDER DENYING REHEARING AND CLARIFICATION,
AND GRANTING WAIVER

(Issued July 11, 2005)

1. This order denies rehearing requests and a request for clarification of the Commission's June 10, 2003 Order issued in this proceeding, which accepted for filing three Mitigation Agreements and deferred decision on waiver of the 60-day prior notice requirement.¹ This order grants waiver of the prior notice requirement because the Mitigation Agreements were necessary to compensate sellers for critical generation services needed to assure reliability. This decision benefits customers because it ensures that certain generators receive appropriate compensation so they remain available to supply services needed for system reliability and security.

¹ See *ISO New England Inc.*, 103 FERC ¶ 61,320 (2003) (June 10 Order).

Background

2. Market Rule 17² set the procedures for ISO New England Inc. (ISO-NE) to mitigate generation resources that run out-of-economic merit order³ during periods of transmission constraints.⁴ 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 (*i.e.*, mitigation agreements). In this regard, Market Rule 17 further provided that ISO-NE “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].”⁵ ISO-NE passed through to load the difference between the mitigation agreement price and a lower energy clearing price, as a component of an “uplift” charge.

3. On March 18, 2003, ISO-NE filed three, executed Mitigation Agreements with the following generators: Mirant Kendall, LLC (Kendall Mitigation Agreement); Devon Power, LLC, Connecticut Jet Power, LLC, Middletown Power, LLC, Montville Power, LLC, and Norwalk Harbor Power, LLC (collectively, NRG Mitigation Agreement); and PG&E Energy Trading Power, L.P (PGET Mitigation Agreement). ISO-NE requested that the Commission accept the proposed Mitigation Agreements for filing without reviewing the agreements under section 205 of the Federal Power Act (FPA), 16 U.S.C. § 824d (2000), for their justness and reasonableness, arguing that such treatment would be consistent with the Commission’s prior treatment of other mitigation agreements

² ISO-NE no longer negotiates mitigation agreements under Market Rule 17. The Commission authorized ISO-NE to implement the new Standard Market Design for New England (NE-SMD) on March 1, 2003. *See New England Power Pool and ISO New England Inc.*, 102 FERC ¶ 61,248 (2003). Pursuant to the NE-SMD, any ISO-NE mitigation agreement now must comply with the negotiating authority given to ISO-NE under Appendix A of Market Rule 1. *See* June 10 Order at P 2 n.3.

³ In a system in which generation is normally dispatched in order of economics beginning with the lowest cost generation, an out-of-merit generator is dispatched not because it is economic to do so, but for reliability reasons.

⁴ 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.

⁵ Market Rule 17.3.3(b) n.9.

under Market Rule 17.⁶ In addition, because the Mitigation Agreements had expired by their terms on March 1, 2003, the implementation date for the NE-SMD, ISO-NE requested waiver of the 60-day prior notice requirement in order to allow each of the Mitigation Agreements to become effective on the date on which service commenced under them.

4. In the June 10 Order, the Commission accepted the Mitigation Agreements for filing. With regard to review under section 205 of the FPA, the Commission stated that, “[b]ecause the Commission has granted ISO-NE blanket authority to enter into mitigation agreements under Market Rule 17, a separate determination under section 205 of the FPA concerning the justness and reasonableness of each individual mitigation agreement is unnecessary.”⁷ The Commission deferred action on ISO-NE’s request for waiver of the 60-day prior notice requirement, pending its decision on remand in the *Mirant* proceeding.⁸

5. On June 23, 2003, Mirant Americas Energy Marketing, L.P., Mirant New England, LLC, Mirant Kendall, LLC, and Mirant Canal, LLC (collectively, Mirant) filed a request for clarification. Mirant states that it supports the Commission’s holding in the June 10 Order that it is not required to make separate determinations under section 205 of the FPA with regard to the Mitigation Agreements, because those agreements were entered into pursuant to ISO-NE’s blanket authority under Market Rule 17. However, Mirant requests that the Commission clarify the basis for that holding.

⁶ See April 22 Amended Filing at 3 n.6 (citing *Mirant Americas Energy Mktg., L.P. v. ISO New England Inc.*, 96 FERC ¶ 61,201, *clarification granted and reh’g denied*, 97 FERC ¶ 61,108, *clarifications granted and reh’g denied*, 97 FERC ¶ 61,360 (2001), *clarification and reh’g denied*, 99 FERC ¶ 61,003 at P 16 (April 1 Order), *clarification granted*, 103 FERC ¶ 61,018 (2003), *remanded sub nom. NSTAR Elec. & Gas Corp. v. FERC*, No. 02-1047, 2003 U.S. App. LEXIS 8078 (D.C. Cir. 2003) (*Mirant Remand Order*), *order on remand*, 105 FERC ¶ 61,359 (2003) (*Mirant Order on Remand*), *order on compliance filing*, 106 FERC ¶ 61,243 (2004) (*Mirant Order Accepting Compliance Filing*) (collectively, *Mirant*). The Commission is issuing concurrently an order denying rehearing of the *Mirant Order on Remand* and *Mirant Order Accepting Compliance Filing*.

⁷ June 10 Order at P 20, *citing* April 1 Order at P 16.

⁸ *Id.* at 23. In the *Mirant Remand Order*, the court directed the Commission to further explain its waiver of the 60-day prior notice requirement for certain mitigation agreements entered into by ISO-NE other than those at issue in this proceeding

6. On July 10, 2003, Massachusetts Municipal Wholesale Electric Company (MMWEC),⁹ NSTAR Electric & Gas Corporation (NSTAR), and New England Consumer-Owned Entities (N.E. Consumer) each filed requests for rehearing of the June 10 Order. NSTAR, N.E. Consumer, and MMWEC maintain that the Commission's failure to review the Mitigation Agreements is inconsistent with section 205, because the Commission is required to ensure that the rates, terms, and conditions for jurisdictional services are just and reasonable. Furthermore, NSTAR and N.E. Consumer argue that the Commission cannot delegate its section 205 authority to ISO-NE, and that the Commission, not ISO-NE, must decide whether rates are just and reasonable.¹⁰ In this regard, N.E. Consumer maintains that, although Market Rule 17 sets up a zone of reasonableness within which ISO-NE may negotiate mitigation agreements, the Commission must determine whether the Mitigation Agreements are within that zone.¹¹ N.E. Consumer also argues that the Commission erred by failing to enforce Market Rule 17's limitations on ISO-NE's discretion. Specifically, N.E. Consumer contends that the June 10 Order failed to determine whether, as required by Market Rule 17, the payment terms negotiated by ISO-NE were "reasonable," and whether ISO-NE's decision that the mitigation agreements would make the markets function "more reliably, competitively or efficiently" was "reasonable."¹²

Discussion

7. For the reasons explained below, we will deny the requests for rehearing and clarification. Contrary to NSTAR's, N.E. Consumer's, and MMWEC's assertions, the Commission did not delegate to ISO-NE the Commission's authority under section 205 to determine whether the agreements were just and reasonable. Rather, the Commission pre-authorized ISO-NE to enter into mitigation agreements, and found that all such agreements would be just and reasonable.

8. Pursuant to Market Rule 17, ISO-NE was permitted to negotiate payment terms for certain generators if it reasonably expected that markets would function more reliably as a result. As explained by Market Rule 17, each of these generating resources usually runs only to ensure reliability. Thus, it was reasonable for ISO-NE to determine that

⁹ Although MMWEC styled its pleading an answer to Mirant's request for clarification, the pleading is, in fact, a discussion of "why the June 10 Order was mistaken." MMWEC Request for Rehearing at 1.

¹⁰ NSTAR Request for Rehearing at 5-11.

¹¹ N.E. Consumer Rehearing at 14.

¹² *Id.* at 13-14 (quoting Market Rule 17.3.3(b) n.9).

these resources should be entitled to receive prices under special contractual arrangements, which were above the levels specified in Table 1 or Table 2 of Market Rule 17, to ensure the availability of these units when needed to protect system reliability.

9. As we explained in the *Mirant* Order on Remand, “[a]bsent the mitigation agreements (and the prices allowed in the agreements) there would be little incentive for generators to continue to make their generation available to supply services needed for system reliability and security and thus provide a needed benefit to the entire market and electricity customers.”¹³

10. The NRG Mitigation Agreement provided that, when a unit’s per-MW bid for a block of energy exceeded its Proxy Combustion Turbine (CT) Reference Price, mitigation of that unit would be based on the applicable price screen tables of Market Rule 17.¹⁴ The Kendall Mitigation Agreement provided that, whenever the resource was used out-of-merit order to relieve transmission congestion, it would be paid the highest of: (1) the Energy Clearing Price for that hour; (2) its Stipulated Marginal Cost; or (3) the lower of the Supply Offer Price or the price for the applicable Market Rule 17 price screen tables.¹⁵ The PGET Mitigation Agreement allowed PGET to receive the higher of the Energy Clearing Price or its bid price when it was called upon to run to relieve transmission congestion, so long as its total earnings from all markets and products remained below the total earnings cap set by the agreement. Also, after the annual cap was met (on a rolling basis), it could bid only its marginal costs. Thus, all three Mitigation Agreements ensured that the units were available for reliability purposes, yet also set ceilings on the prices paid, also ensuring that prices paid under the agreements were within a zone of reasonableness.

11. Moreover, NSTAR, N.E. Consumer, and MMWEC have not provided any evidence that shows either that ISO-NE acted imprudently in negotiating the Mitigation Agreements or that the mitigation imposed by ISO-NE, pursuant to Market Rule 17, failed to keep the prices paid under the agreements within a zone of reasonableness.

¹³ *Mirant* Order on Remand at P 14.

¹⁴ Specifically, under the agreement, each unit’s Proxy CT Reference Price was based on a formula that took into account the incremental costs of a hypothetical Proxy CT unit, the net annual fixed costs of the actual unit, and the total number of expected constrained hours in the region where the unit is located.

¹⁵ That resource’s stipulated marginal cost formula takes into consideration such factors as operating and maintenance costs and fuel usage costs.

Furthermore, none of the requests for rehearing objects to any of the criteria or formulas contained in the Mitigation Agreements for calculating the compensation for affected generating units.

12. N.E. Consumers also states that the June 10 Order failed to determine whether the Mitigation Agreements were consistent with Market Rule 17. In particular, N.E. Consumers states that, in negotiating the Mitigation Agreements, ISO-NE acted in a manner that was impermissible under Market Rule 17.

13. Market Rule 17 placed the following limits on the types of agreements ISO-NE could enter into: “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.”¹⁶ The Mitigation Agreements at issue here are consistent with these criteria; the units seldom ran in economic merit order, were necessary for reliability purposes, and contained terms that ensured that only reasonable compensation was paid. Thus, ISO-NE’s decision that the Mitigation Agreements would cause the markets to function more reliably was reasonable.

14. Finally, in the June 10 Order, we deferred the issue of whether to grant waiver of the 60-day prior notice requirement pending the *Mirant* Order on Remand. We issued the *Mirant* Order on Remand on December 23, 2003. We explained there that “extraordinary circumstances are present [with regard to the mitigation agreements] that justified the Commission concluding . . . that good cause was met for granting waiver of the 60-day prior notice requirement with respect to the mitigation agreements.”¹⁷ We identified the extraordinary circumstances; the mitigation agreements were required to compensate sellers for critical generation services needed to assure reliability (at mitigated prices) and, because of their nature, these agreements do not always lend themselves to being filed 60 days before service commenced.¹⁸ (Moreover, we further explain our determination in the order denying rehearing of the *Mirant* Order on Remand, which we are issuing concurrently with this order.)

15. The same reasoning applies in this case and we likewise grant ISO-NE’s request for waiver of the 60-day prior notice requirement for these Mitigation Agreements. The Mitigation Agreements were designed to allow a generator needed to assure system reliability and security to run, and yet still mitigate, consistent with the intent of Market Rule 17, the potential exercise of market power by that generator during periods of transmission constraints. Because these agreements were for critical services, under

¹⁶ Market Rule 17.3.3(b) n.9.

¹⁷ *Mirant* Order Accepting Compliance Filing at P 14.

¹⁸ *Id.* at P 14-15.

Market Rule 17, ISO-NE was authorized to enter into such mitigation agreements for “any reasonable payment terms,” to ensure both that the generator remained available during transmission constraints and customers were protected from an exercise of market power.¹⁹ As we explained in the *Mirant* Order on Remand:

Absent the mitigation agreements (and the prices allowed in the agreements) there would be little incentive for generators . . . to make their generation available to supply services needed for system reliability and security and thus provide a needed benefit to the entire market and electricity customers.[²⁰]

16. Moreover, in *Central Hudson Gas and Electric Corporation*,²¹ we explained that, in deciding waiver cases, the Commission should balance the need to deter violations of the FPA filing requirements with the requirement that rates not be confiscatory.²² Here, not granting waiver would inequitably penalize the resource owners, who ran those resources at ISO-NE’s direction to meet a reliability need.

17. Section 205(d) of the FPA expressly confers on the Commission the discretion to waive the prior notice requirement and to determine the effective date of proposed rate changes.²³ Section 205(d) of the FPA, in short, allows waiver of the prior notice

¹⁹ See Market Rule 17.3.3.

²⁰ *Mirant* Order on Remand at P 14.

²¹ 60 FERC ¶ 61,106, *reh’g denied*, 61 FERC ¶ 61,089 (1992) (*Central Hudson*).

²² *Central Hudson*, 61 FERC at 61,357.

²³ Section 205(d) provides:

The Commission, for good cause shown, may allow changes to take effect without requiring the sixty day’s notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

See also 18 C.F.R. §§ 35.3, 35.11 (2003); *Mirant* Order on Remand at P 10 (describing the Commission’s prior notice policy). Indeed, as observed in *Gulf States Utilities Company v. FERC*, 1 F.3d 288, 293 (5th Cir.1993), waiver necessarily presupposes a failure to timely file.

requirement and allows rates to become effective on less than 60 days' notice once waiver is granted.²⁴ And section 205 nowhere prohibits the Commission's granting waiver to allow an effective date that pre-dates the filing date. If it did, then buyers arguably would *never* be able to buy and sellers arguably would *never* be able to sell unless they first filed; transactions now routinely undertaken "quickly" to take advantage of favorable price fluctuations arguably would become impossible.²⁵

18. Here, Market Rule 17 allowed ISO-NE to do what it did, and Market Rule 17 was the subject of Commission proceedings and Commission approval, including express authorization for ISO-NE to negotiate mitigation agreements, well before the particular agreements at issue here were executed.²⁶ ISO-NE's authority to negotiate mitigation agreements was part of a filed and accepted tariff, and market participants were on notice of its provisions.

19. Accordingly, because the explanation for ISO-NE's lateness in filing the Mitigation Agreements meets the statute's and the Commission's more specific requirements,²⁷ waiver of the prior notice requirement is appropriate in this case.

²⁴Courts have expressly affirmed the Commission's authority to deem rates effective as of the date agreed upon by the parties, even though they are not filed until months or years later. *See, e.g., City of Holyoke Gas & Electric Department v. FERC*, 954 F.2d 740, 744 (D.C. Cir. 1992) (affirming in pertinent part Commission orders waiving 60-day prior notice requirement and allowing rate to become effective in 1988, even though contract was not filed until 18 months later); *accord Barton Village, Inc., et al. v. Citizens Utilities Co.*, 99 FERC ¶ 61,111 (2002) (granting waiver of prior notice requirement and not ordering refunds for previously-unfiled, pre-1983 agreements), *reh'g denied*, 100 FERC ¶ 61,244 (2002) (same), *aff'd in relevant part*, No. 02-4693 (2d Cir. June 17, 2004) ("we do not find that FERC's refusal to grant refunds is an abuse of discretion that we can rectify while granting proper deference to FERC").

²⁵ *See Prior Notice & Filing Requirement Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,982-84, *order on reh'g*, 65 FERC ¶ 61,081 (1993).

²⁶ *See New England Power Pool*, 85 FERC ¶ 61,379 (1998).

²⁷ The jurisdictional guidance in *Central Hudson* was general, rather than case-specific. As the Commission stated there, "we will continue to consider requests for waiver of the notice requirement based on the specific factual circumstances of each filing." *Central Hudson*, 61 FERC at 61,356.

The Commission orders:

(A) The requests for rehearing are hereby denied, as discussed in the body of this order.

(B) Mirant's request for clarification is hereby denied, as discussed in the body of this order.

(C) ISO-NE's request for waiver of the 60-day notice requirement is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Kelliher dissenting with a separate statement attached.

(S E A L)

Linda Mitry,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England, Inc.

Docket No. ER03-631-002

(Issued July 11, 2005)

Joseph T. KELLIHER, Commissioner *dissenting*:

I disagree with the Commission's decision to deny rehearing of an earlier order that accepted for filing three mitigation agreements and to grant waiver of the 60-day prior notice requirement.

In my view, Market Rule 17 was an improper delegation of the Commission's ratemaking authority to ISO-NE. Section 205 of the FPA vests exclusive authority with the Commission to set the rates and charges for wholesale electric sales of energy.¹ In doing so, the Commission must determine that the rates and charges approved are just and reasonable. Under *U.S. Telecomm. Ass'n v. FCC*,² federal agencies such as the Commission cannot delegate their authority to outside entities--private or sovereign--absent an affirmative showing of congressional authorization.³ The FPA contains no provision authorizing the Commission to delegate its ratemaking authority. Since ISO-NE is an outside party, the Commission cannot lawfully delegate its ratemaking authority to the ISO.

In this instance, the Commission accepts mitigation agreements the ISO-NE negotiated and entered into pursuant to Market Rule 17, even though the Commission never reviewed the agreements to determine that they are just and reasonable. In these circumstances, I believe the conclusion is inescapable that by authorizing the ISO-NE to enter into mitigation agreements that were not reviewed by the Commission and found to be just and reasonable, the Commission improperly delegated its authority under section 205 of the FPA.

¹ 16 U.S.C. § 824d (2000).

² 359 F.3d 554 (D.C. Cir. 2004)

³ *Id.* at 565-66.

The Commission's position that it pre-authorized ISO-NE to enter into mitigation agreements under Market Rule 17 is not persuasive. Market Rule 17 permitted ISO-NE to negotiate and enter into mitigation agreements for "any reasonable payment terms."⁴ As section 205 makes clear, it is the Commission's duty to determine whether the terms of these agreements are just and reasonable, and that duty cannot be vested in the ISO.

I also disagree with the Commission's determination that extraordinary circumstances exist to grant waiver of the 60-day prior notice requirement for these mitigation agreements. In October 2001, the Commission required that all mitigation agreements negotiated under Market Rule 17 needed to be filed with the Commission pursuant to section 205 of the FPA.⁵ Yet the three agreements involved here were executed January 7, January 23 and January 30, 2003 for service that expired on March 1, 2003, and none of the agreements were filed with the Commission until March 18, 2003. In these circumstances, it is an inappropriate exercise of the Commission's waiver authority to give retroactive effect to mitigation agreements the Commission has neither reviewed nor found to be just and reasonable.

Accordingly, I dissent from the Commission's order.

Joseph T. Kelliher

⁴ Market Rule 17.3.3(b) n.9.

⁵ *Mirant Americas Energy Marketing, L.P., et al. v. ISO New England Inc.*, 97 FERC ¶ 61,108 at 61,556 (2001).