

127 FERC ¶ 61,232
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Integrys Energy Services, Inc.

Docket Nos. EL09-32-000

v.

New Brunswick Power Generation Corporation

New Brunswick Power Generation Corporation

ER08-1439-000

ORDER ON COMPLAINT

(Issued June 10, 2009)

1. On February 2, 2009, Integrys Energy Services, Inc. (Integrys) filed a complaint against New Brunswick Power Generation Corporation (New Brunswick Power), under section 206 of the Federal Power Act (FPA).¹ In its complaint (Complaint), Integrys requests the Commission to order New Brunswick Power to cease market-based rate sales in the Northern Maine Independent System Administrator, Inc. (Northern Maine ISA) region until New Brunswick Power demonstrates that it does not possess market power in the area where New Brunswick System Operator is the balancing authority.² As discussed below, the Commission dismisses the Complaint in part and grants the Complaint in part, to the extent of requiring New Brunswick Power to submit a horizontal market power study of an additional geographic market.

¹ 16 U.S.C. § 824e (2006).

² We note that, although the parties in this proceeding refer to this balancing authority area as the “Maritimes balancing authority area,” in this order, we refer to this area as the “New Brunswick System Operator balancing authority area.”

I. Background

2. In Order No. 697,³ the Commission codified its standards for obtaining and retaining market-based rate authorization. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.⁴ The Commission has adopted two indicative screens for assessing horizontal market power in relevant geographic markets, the pivotal supplier screen and the wholesale market share screen.⁵ With regard to vertical market power, in cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved Open Access Transmission Tariff (OATT) on file before granting a seller market-based rate authorization. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.⁶

3. On October 6, 2008, the Director, Division of Tariffs and Market Development – West, acting pursuant to delegated authority, issued an order granting New Brunswick Power's request for market-based rate authorization.⁷ New Brunswick Power is a Canadian corporation wholly owned by the New Brunswick Power Corporation and New Brunswick Electric Finance Corporation, an agent of the crown.

4. New Brunswick Power and one of its affiliates own generation in the New Brunswick System Operator balancing authority area.⁸ The New Brunswick System

³ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055 (2008), *order on reh'g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008).

⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

⁵ *Id.* P 62.

⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 440.

⁷ *New Brunswick Power Generation Corporation*, Docket No. ER08-1439-000 (Oct. 6, 2008) (unpublished letter order) (October 6, 2008 Order).

⁸ New Brunswick Power and its affiliate NB Power Nuclear Corporation, own 16 generating facilities with an aggregate capacity of 3,879 MW in the New Brunswick System Operator balancing authority area. New Brunswick Power's affiliate, NB Power

(continued)

Operator balancing authority area includes parts of Canada and the United States.⁹ Specifically, the New Brunswick System Operator balancing authority area includes the Canadian Provinces of New Brunswick and Prince Edward Island, as well as a portion of northern Maine in the United States including the Northern Maine ISA.¹⁰

5. In support of its application requesting market-based rate authorization, New Brunswick Power submitted a horizontal market power analysis, including the pivotal supplier and wholesale market share screens, for the ISO New England market, the first-tier market, to demonstrate that it does not possess market power in the ISO New England market. However, New Brunswick did not submit a horizontal market power analysis for the New Brunswick System Operator balancing authority area.

II. The Complaint

6. Integrys states that it provides wholesale and retail electric service to customers throughout the United States. Integrys states that, as relevant to its complaint, it is a retail provider of electric service to local utilities in northern Maine. It states that, when deregulation in Maine required electric utilities subject to the jurisdiction of the Maine Public Utilities Commission (Maine Commission) to divest their generation, Integrys purchased the majority of the assets of one of those utilities located in the region now administered by the Northern Maine ISA. Integrys states that it is an active participant in both the retail standard offer service markets and competitive retail supply markets in Northern Maine.¹¹ Integrys states that, in order to participate in the retail Standard Offer Service markets and competitive retail supply markets in northern Maine, Integrys purchases power from a number of entities, including New Brunswick Power.¹²

Transmission Corporation, owns transmission lines in New Brunswick, Canada, which are directly interconnected with ISO New England.

⁹ New Brunswick System Operator is independent from New Brunswick Power and its affiliates.

¹⁰ *Boralex Livermore Falls LP*, 122 FERC ¶ 61,033, at P 4 n.6 (2008) (*Boralex*).

¹¹ Integrys states that standard offer service is the provision of default electricity service to Maine customers who have not entered into competitive supply contracts. It states that Chapter 301 of the Rules of the Maine Commission authorizes a bidding process administered by the Maine Commission by which retail suppliers bid to provide standard offer service to customers in three size classes.

¹² Complaint at 5.

7. Integrys explains that it recently participated in the Maine Commission's solicitation to serve standard offer service customers for the next one to three years, commencing March 1, 2009, and the Maine Commission awarded Integrys the right to serve the large non-residential class of retail customers in the Maine Public Service territory. New Brunswick Power was given the right to serve residential and small commercial and medium customers.

8. Integrys argues that serving retail customers via the Northern Maine ISA requires market-based rate authorization from the Commission. Integrys asserts that, despite owning generation in the New Brunswick System Operator balancing authority area, New Brunswick Power improperly failed to submit a horizontal market power analysis for the New Brunswick System Operator balancing authority area when it applied for market-based rate authorization. According to Integrys, because New Brunswick Power never disclosed the New Brunswick System Operator balancing authority area as a relevant geographic area, any sales into the New Brunswick System Operator balancing authority area would be in violation of both the Commission order authorizing market-based rates, as well as section 5 of New Brunswick's market-based rate tariff, which obligates it to comply with Commission requirements.¹³ Therefore, until New Brunswick Power also prepares a horizontal market power analysis, including the pivotal supplier and wholesale market share screens, for the New Brunswick System Operator balancing authority area market to demonstrate that it does not possess market power in that market, Integrys argues that New Brunswick Power should not be authorized to engage in market-based rate transactions in the Northern Maine ISA area. Accordingly, Integrys requests that the Commission order New Brunswick Power to cease any market-based sales in the Northern Maine ISA area until it obtains explicit Commission authorization to do so. Integrys argues that, as a competitor of New Brunswick Power for serving customers in

¹³ Section 5 of New Brunswick's market-based rate tariff provides the following:

Seller shall comply with the provisions of 18 CFR Part 35, Subpart H, as applicable, and with any conditions the Commission imposes in its orders concerning seller's market-based rate authority, including orders in which the Commission authorizes seller to engage in affiliate sales under this tariff or otherwise restricts or limits the seller's market-based rate authority. Failure to comply with the applicable provisions of 18 CFR Part 35, Subpart H, and with any orders of the Commission concerning seller's market-based rate authority, will constitute a violation of this tariff.

Northern Maine including standard offer service, Integrys is harmed by the market power of New Brunswick Power.

III. Notice and Responsive Pleadings

9. Notice of the Complaint was published in the *Federal Register*,¹⁴ with interventions and protests due on or before February 23, 2009. Boralex Industries Inc. (Boralex),¹⁵ Maine Public Service Company, and Northern Maine ISA filed motions to intervene. The Maine Commission filed a notice of intervention, motion to dismiss the complaint, and protest.

10. On February 23, 2009, New Brunswick Power filed an answer to the complaint. On March 2, 2009, Integrys filed an answer to New Brunswick Power's answer and to the Maine Commission's filing. On March 11, 2009, New Brunswick Power filed an answer to Integrys' March 2, 2009 answer. On March 11, 2009, Integrys filed an answer to New Brunswick Power's March 11, 2009 answer.¹⁶ On March 18, 2009, the Maine Commission filed an answer to Integrys' March 2, 2009 answer. Also on March 18, 2009, the Northern Maine ISA filed an answer to New Brunswick's March 11, 2009 answer. On March 19, 2009, Integrys filed an answer to the Maine Commission's March 18, 2009 answer.

A. New Brunswick Power's Answer to the Complaint

11. New Brunswick Power argues that the Complaint is a collateral attack on the October 6, 2008 Order granting New Brunswick Power market-based rate authority. New Brunswick Power also argues that the Complaint effectively seeks a finding that New Brunswick Power is prohibited from engaging in retail sales in the Northern Maine ISA, a finding which is beyond the Commission's jurisdiction.

12. New Brunswick Power maintains that no horizontal market power analysis of the New Brunswick System Operator balancing authority area was required because the New

¹⁴ 74 Fed. Reg. 6621 (2009).

¹⁵ Boralex filed comments and a request for a show cause order, which it subsequently withdrew on March 9, 2009. Pursuant to Rule 216 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.216 (2008), the withdrawal became effective on March 24, 2009.

¹⁶ While Integrys filed this pleading as a "supplement" to its earlier answer, we view it as an answer to answer.

Brunswick System Operator balancing authority area is not a relevant geographic market. New Brunswick Power argues that, in its application for market-based rate authority, it only submitted an analysis for ISO New England because that is the only “relevant geographic market,” as that term is used in Order No. 697 and associated regulations. New Brunswick Power claims that there is also no indication that the Commission intended to require market power analyses of foreign balancing authority areas.

13. New Brunswick Power argues that Integrys’ allegation that New Brunswick Power has or will violate its tariff or the October 6, 2008 Order is wrong for two reasons. First, it cannot be a tariff violation to make retail sales of electric energy in the Northern Maine ISA, since a market-based rate sales tariff does not cover retail sales under section 201(b)(1) of the FPA.¹⁷ Second, New Brunswick Power’s market-based rate tariff fails to place any restrictions on any jurisdictional sales.

14. New Brunswick Power further argues that the sales that motivate the Complaint are retail sales, over which the Commission lacks jurisdiction. According to New Brunswick Power, its sales to standard offer services customers are retail sales, not wholesale sales.

15. New Brunswick Power argues that Integrys incorrectly asserts that serving retail customers in northern Maine via the Northern Maine ISA requires market-based rate authority from the Commission. Moreover, it states that “the jurisdiction of the Commission under the FPA extends only to ‘the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce...’”¹⁸ New Brunswick Power states that the electric grid in the northern Maine portion of the New Brunswick System Operator balancing authority area is electrically isolated from the rest of the United States and interconnected only with the New Brunswick, Canada grid. It claims that no transmission or sale for resale of electric energy in interstate commerce occurs in the New Brunswick System Operator balancing authority area, and that “electrical isolation means, *per se*, a lack of transmission or sales for resale in interstate commerce and, therefore, under a plain reading of the FPA, no FPA Section 205 jurisdiction.”¹⁹ New Brunswick Power states that, when the Commission accepted the Northern Maine ISA’s tariff for filing in 1999, it did not express a determination as to whether the Northern Maine ISA is Commission-jurisdictional. However, the Commission did note that:

¹⁷ 16 U.S.C. § 824 (2006).

¹⁸ New Brunswick Power’s February 23, 2009 Answer at 13.

¹⁹ New Brunswick Power’s February 23, 2009 Answer at 15.

The electric system in Northern Maine is not directly interconnected with the rest of New England, any New England Power Pool (NEPOOL) participant, or any other domestic electric system; its participants are not NEPOOL participants and do not participate in ISO New England. The region's only access to the electric system that serves the remainder of New England is through the transmission facilities of Canada's New Brunswick Power...^[20]

16. New Brunswick Power states that section 202(f) of the FPA indicates Congress' intent not to regulate transactions that cross international boundaries but do not otherwise flow in interstate commerce.²¹ New Brunswick Power maintains that its sales of power to retail customers in the Northern Maine ISA are such transactions. In support, New Brunswick Power points to *Sharyland Utilities, L.P.* It states that, in that case, the Commission found that Sharyland, the Electric Reliability Council of Texas (ERCOT), and ERCOT's market participants will not become subject to Commission jurisdiction as "public utilities" by virtue of a new transmission interconnection between ERCOT and Mexico's Commission Federal de Electricidad (CFE).²²

17. Finally, New Brunswick Power argues that the remedies Integrys seeks (including suspension of market-based rate authority) are inconsistent with Commission policy. New Brunswick Power states that Commission policy is clear that when an applicant fails one of the indicative generation market power screens it has three options: (a) submit a more detailed generation market power study in the form of a Delivered Price Test analysis; (b) propose tailored market power mitigation measures; or (c) agree to implement cost-based rates. Upon an applicant's screen failure, the Commission does not automatically revoke an entity's market-based rate authority. New Brunswick adds that, should the Commission find that a generation market power analysis for the New Brunswick System Operator balancing authority area is necessary, the Commission must follow its regulations and direct New Brunswick to submit such a filing. Additionally, New Brunswick Power argues that any refund effective date established to cover any future wholesale sales which New Brunswick Power may make should be no earlier than the date the Commission issues an order on a filing of the indicative screens for the New Brunswick System Operator balancing authority area.

²⁰ *Northern Maine Independent System Administrator, Inc.*, 89 FERC ¶ 61,179, at 61,544 (1999).

²¹ 16 U.S.C. § 824a (2006).

²² *Sharyland Utilities, L.P.*, 121 FERC ¶ 61,006 (2007) (*Sharyland*).

B. Maine Commission Comments

18. The Maine Commission requests that the Commission dismiss the Complaint. The Maine Commission argues that the Commission lacks subject matter jurisdiction over the retail sales that are the cause of Integrys' concerns. In addition, it states that, because these standard offer sales are retail in nature, they are not subject to the Commission's market-based rate jurisdiction. Alternatively, it states that, even if the Commission has jurisdiction, the Complaint should still be denied because it constitutes a collateral attack on the Commission's October 6, 2008 Order. The Maine Commission argues that Integrys' complaint is an effort to eliminate a competitor in Maine's retail standard offer service program.

IV. Discussion**A. Procedural Matters**

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. Accordingly, we will reject the March 11, 2009 answer filed by New Brunswick Power, and the answers of Integrys Energy, the Maine Commission, and the Northern Maine ISA.

B. Commission Determination

21. Integrys, in its Complaint, explains that New Brunswick Power has been awarded the right by the Maine Commission to participate in the Northern Maine ISA market to serve certain retail loads. The focus of the Complaint appears to be a challenge to New Brunswick's authority to make such retail sales. In response to Integrys' Complaint, New Brunswick Power correctly states that the Commission does not have jurisdiction over end-use, retail sales. Accordingly, to the extent that Integrys is challenging New Brunswick Power's authority to make retail sales in northern Maine, we will dismiss the Complaint as beyond the Commission's jurisdiction.²³

²³ Pursuant to section 201(a) of the FPA, the Commission has jurisdiction over the "transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. 824(a) (2006).

22. However, as noted above, in Docket No. ER08-1439-000 New Brunswick Power received authority to make wholesale sales of energy, capacity and ancillary services at market-based rates under a Commission-jurisdictional market-based rate tariff. Integrys alleges as part of its Complaint that New Brunswick should have studied the New Brunswick System Operator balancing authority area in order to support its request for market-based rate authority. As discussed below, we agree that New Brunswick Power should be required to provide a horizontal market power analysis that includes the New Brunswick System Operator balancing authority area for purposes of its market-based rate authority. Accordingly, we will grant the Complaint in part and direct New Brunswick Power to submit such an analysis within 60 days from the date of this order.

23. In Order No. 697, we explained that we will allow sales at market-based rates if a seller affiliated with a foreign utility selling in the United States (and each of its affiliates) demonstrates that it does not have, or has adequately mitigated, horizontal and vertical market power in every relevant geographic market.²⁴ With regard to horizontal (generation) market power, we stated that should any of the seller's first-tier markets include a United States market, the seller should perform the market power screens in that market.²⁵ We also stated that we do not consider generation facilities that are located exclusively outside of the United States and that are not directly interconnected to the United States.²⁶ However, where generation facilities are located outside of the United States and are directly interconnected to the United States, they should be studied. Because New Brunswick Power owns generation in the New Brunswick System Operator balancing authority area,²⁷ it is one of New Brunswick Power's relevant geographic

²⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 1001, 62, 399, 408, 440.

²⁵ *Id.* P 1002.

²⁶ *Id.*

²⁷ In its application for market-based rate authorization, New Brunswick Power stated that its generation was exclusively located in Canada, without stating that New Brunswick is part of the New Brunswick System Operator balancing authority area, a portion of which is in the United States. The Commission therefore has not reviewed whether New Brunswick Power has horizontal market power within the New Brunswick System Operator balancing authority area, and thus Integrys' request is not a collateral attack on the October 6, 2008 Order. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). *See also Northeast Utilities Service Co.* 74 FERC ¶ 61,065, at 61,173 n.10 (1996) ("the issue raised by the parties here was not raised in those [previous] cases and thus was not affirmatively decided by the Commission").

markets. The New Brunswick System Operator balancing authority area is a unique balancing authority area that includes portions of both Canada and the United States. Although New Brunswick's generation is located exclusively outside of the United States, it is directly interconnected to ISO New England and to northern Maine. As a result, the New Brunswick System Operator balancing authority area is a relevant geographic market for which New Brunswick Power must demonstrate, through a horizontal market power analysis, that it does not possess market power in order to have market-based rate authority.

24. Accordingly, if New Brunswick Power wishes to retain its market-based rate authority in the U.S. portion of the New Brunswick System Operator balancing authority area, it must demonstrate that it does not have horizontal market power in the New Brunswick System Operator balancing authority area. Specifically, we direct New Brunswick Power to file a horizontal market power analysis, including the pivotal supplier and wholesale market share screens, for the New Brunswick System Operator balancing authority area, within 60 days of the date of this order.²⁸

25. In cases where, as here, the Commission institutes a proceeding on complaint under section 206 of the FPA, section 206(b) requires that the Commission establish a refund effective date that is no earlier than the filing of the complaint, but no later than five months subsequent.²⁹ Consistent with our general policy of providing maximum protection to customers,³⁰ we will set the refund effective date at February 2, 2009.

26. We disagree with New Brunswick Power's claim that wholesale sales into northern Maine are non-jurisdictional, and we find its reliance on *Sharyland* in support of that claim to be misplaced. In *Sharyland*, the Commission addressed the issue of whether sales by Sharyland, a utility in ERCOT, to the Mexican CFE's transmission system would subsequently flow into another state and thus subject Sharyland and other ERCOT utilities to Commission jurisdiction as public utilities. The Commission concluded that it did not because, given the configuration of CFE's transmission system, power would not regularly flow from Texas into another state (or vice versa) and any "commingling of

²⁸ See also Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 853, where the Commission stated that it will continue to reserve the right to require an updated market power analysis from any market-based rate seller at any time.

²⁹ 16 U.S.C. § 824e (2006).

³⁰ See, e.g., *Seminole Electric Cooperative, Inc. v. Florida Power & Light Co.*, 65 FERC ¶ 61,413, at 63,139 (1993); *Canal Electric Co.*, 46 FERC ¶ 61,153, at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

electric energy generated in the United States with electric energy on the CFE transmission grid . . . will occur on an unplanned and infrequent basis.” The Commission noted that “should the configuration or operation change, or should Sharyland own or operate additional facilities that interconnect with CFE or with another State, our determination of lack of jurisdiction may no longer apply.” In contrast, here power is regularly transmitted between northern Maine and ISO New England.

27. As a result, we disagree with New Brunswick Power’s claim that wholesale sales into northern Maine are non-jurisdictional because the northern Maine electric grid interconnects only with the New Brunswick, Canada grid and therefore there is a lack of transmission or sales for resale of electric energy in interstate commerce. Northern Maine is in interstate commerce by virtue of its connection with the rest of the United States through the transmission facilities of New Brunswick’s affiliate, NP Power Transmission. Moreover, the lines linking northern Maine with New Brunswick are frequently and intentionally used to transmit power between northern Maine and ISO New England by way of New Brunswick.

28. Moreover, for purposes of obtaining market-based rate authority, the Commission has previously found the New Brunswick System Operator balancing authority area to be the relevant geographic market for entities located in northern Maine and that participate in the Northern Maine ISA.³¹ The Commission does not consider the Northern Maine ISA as being exclusively part of the Canadian electrical grid because electricity customers in northern Maine have access to generation from the ISO New England market.

29. Accordingly, as discussed above, we dismiss the Complaint in part and grant the Complaint in part and direct New Brunswick Power to file a horizontal market power analysis, including the pivotal supplier and wholesale market share screens, for the New Brunswick System Operator balancing authority area, within 60 days of the date of this order.

³¹ *Boralex*, 122 FERC ¶ 61,033 at P 32, *order denying reh’g*, 123 FERC ¶ 61,279 (2008). *Wisconsin Pub. Serv. Corp.*, 110 FERC ¶ 61,353 (2005).

The Commission orders:

(A) Integrys' complaint is hereby dismissed in part, and granted in part, as discussed in the body of this order.

(B) The refund effective date established in this proceeding pursuant to section 206(b) of the FPA is February 2, 2009.

(C) New Brunswick Power is hereby required to submit a filing, within 60 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.