

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

January 28, 2004

In Reply Refer To:
New England Power Pool
Docket No. ER04-110-000

Day, Berry & Howard LLP
CityPlace I
Hartford, CT 06103-3499

Attention: Patrick M. Gerity
Counsel for New England Power Pool

Reference: Ninety-Ninth Agreement Amending New England Power Pool Agreement

Dear Mr. Gerity:

1. On October 31, 2003, you submitted on behalf of New England Power Pool (NEPOOL), the Ninety-Ninth Agreement Amending New England Power Pool Agreement (Ninety-Ninth Agreement). The purpose of the Ninety-Ninth Agreement was to address various issues raised by the potential participation by Market Participant End Users (MPEUs) in the NEPOOL Market.
2. Notice of the filing was published in the Federal Register, 68 Fed. Reg. 64,881 (2003), with comments, protests, and interventions due on or before November 21, 2003. The Massachusetts Department of Telecommunications and Energy filed a notice of intervention raising no substantive issue. ISO New England Inc. (ISO-NE), the New England Conference of Public Utilities Commissioners, and Northeast Utilities Service Company on behalf of Northeast Utilities Operating Companies and Select Energy, Inc. filed timely motions to intervene raising no substantive issues. Pursuant to Rule 214 of the Commission's rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.
3. NEPOOL asks for an effective date that is the later of: (1) January 1, 2004; (2) the Commission's issuance of final, non-appealable ruling indicating that participation in the NEPOOL Market by MPEUs will not jeopardize the exempt wholesale generator status of any Participant; or (3) such later date as the Commission shall provide.

4. NEPOOL states that the retail sale of power to Participants under the NEPOOL arrangements raises questions about whether Participants that currently are Exempt Wholesale Generators (EWGs) would lose their exempt status.¹ NEPOOL further states that neither NEPOOL nor ISO-NE takes title to the power traded through the NEPOOL Market, and that “Participants that are long in Energy at any time are deemed to have sold to Participants that are short in Energy at that time.”² NEPOOL points out that there is at least a theoretical chance that “energy sold by an EWG into the NEPOOL Market could ultimately be purchased by a MPEU and thereby raise an argument that the EWG is no longer selling exclusively at wholesale.”³

5. NEPOOL notes that the Commission has addressed this concern already in a similar, but not identical, situation.⁴ In the Declaratory Order, the Commission concluded that the California Power Exchange (PX) acted as an intermediary contracting with the entities that sell into the PX as well as with the wholesale and retail customers that purchase from the PX, and that it was “reasonable to construe both the bidding participants and the PX to be engaged in sales of electric energy.”⁵ The Commission stated that “the bidding PX participants will be engaged in sales of electric energy at wholesale to the PX, who will then resell that energy to wholesale and retail customer participants. Because the bidding PX participants will be selling energy at wholesale . . . entities . . . that bid energy into the PX will maintain their EWG status.”⁶

6. The NEPOOL market is a bid-based market administered by ISO-NE. The NEPOOL market consists of both a day-ahead and a real-time market for energy. The NEPOOL market operates as a pool. Participants can bid to sell electricity as well as to buy electricity from the pool. As the administrator of the market, ISO-NE calculates the market-clearing prices for energy sold and bought through the NEPOOL market. Neither NEPOOL nor ISO-NE takes title to energy that is sold through this market. Buyers and sellers in the NEPOOL market do not contract directly with each other. Rather, these

¹ Section 32(a)(1) of the Public Utility Holding Company Act of 1935 (PUHCA) defines an EWG as any person determined by the Commission to be engaged “exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale.” See 15 U.S.C. § 79z-5a(a)(1) (2000).

² NEPOOL Transmittal Letter at 10.

³ Id.

⁴ See Southern California Edison Company, 80 FERC ¶ 61,262 (1997) (Declaratory Order).

⁵ Id. at 61,946.

⁶ Id.

participants contract with NEPOOL to buy or sell power through the pool. Additionally, deliveries that are made to customers are made from the supplies available to the pool and cannot be traced to an individual generator.

7. As such, the circumstances presented by the NEPOOL market are similar to the circumstances addressed by the Commission in its ruling on sales into the California PX. In that case the issue raised was whether the ability of certain direct access retail customers to purchase power directly from the PX affected the EWG status of entities selling into the PX. The Commission determined that participants selling into the PX were engaged in wholesale sales and that entities that otherwise met the EWG criteria of section 32 of PUHCA and that bid energy into the PX would maintain their EWG status. We find that the same determination should apply in this case. Thus, direct participation by MPEU's in the NEPOOL market will not jeopardize the EWG status of an entity selling into the NEPOOL market.

8. The Ninety-Ninth Agreement is hereby accepted, effective thirty-one days after the date of issuance of this order, absent a request for rehearing. In the event that rehearing of this order is sought, the effective date will be determined in the order on rehearing. NEPOOL is directed to file tariff sheets reflecting the correct effective date within 45 days of the date of this order, or of any future rehearing order. This action does not constitute approval of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such rate or service provided for in the filed documents; nor shall such action be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate; and such action is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against any of the applicant(s).

By direction of the Commission.

Magalie R. Salas,
Secretary.

cc: All Parties