

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

Docket No. EL01-93-008

ORDER ACCEPTING COMPLIANCE FILING

(Issued March 9, 2004)

1. On April 22, 2003, pursuant to the Commission's directive in the April 9, 2003 Order,¹ the ISO New England, Inc. (ISO-NE) filed an unredacted and non-confidential version of the mitigation agreements (April 22 Filing) that it had entered into with generators under Market Rule 17, which it had previously filed with the Commission in non-public form. In this order, the Commission accepts the April 22 Filing. This decision benefits customers because it preserves certain generators' ability to recover legitimate costs of providing critical generation services during transmission constraints.

¹ Mirant Americas Energy Mktg., L.P., et al. v. ISO New England Inc., 96 FERC ¶ 61,201 (August 10, 2001 Order), clarification granted and reh'g denied, 97 FERC ¶ 61,108 (October 26, 2001 Order), clarifications granted and reh'g denied, 97 FERC ¶ 61,360 (2001) (December 21, 2001 Order), clarification and reh'g denied, 99 FERC ¶ 61,003 (2003) (April 1, 2003 Order), clarification granted, 103 FERC ¶ 61,018 at 61,072 at P 7 (April 9, 2003 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).

I. Background

A. Market Rule 17

2. Prior to the effective date of the NE-SMD,² Market Rule 17 set forth the procedures for ISO-NE to mitigate generation resources that were run out-of-economic merit order³ during periods of transmission constraints.⁴ 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.*, will ensure that the generator remains available during transmission constraints].”⁵ 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.

B. Relevant Orders

3. The August 10, 2001 Order determined that certain proposed modifications to Market Rule 17 were material changes to that rule (*i.e.*, NEPOOL’s rate schedule) and therefore required them to be filed under Section 205 of the Federal Power Act (FPA).⁶ In response to a request for clarification of that order, the October 26, 2001 Order

² The Commission authorized ISO-NE to implement the New England Standard Market Design (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).

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 the 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 or to protect the system from voltage collapse or other instability.

⁵ Market Rule 17.3.3(b) n.9.

⁶ 96 FERC ¶ 61,201 at 61,860.

required the filing, pursuant to Section 205 of the FPA, with the Commission of all mitigation agreements negotiated under Market Rule 17.⁷ In addition, citing Central Hudson Gas and Elec. Corp.,⁸ the Commission granted ISO-NE a waiver of the 60-day prior notice requirement.⁹ The April 1, 2003 Order further explained that, because the 60-day prior notice requirement had been waived, the contracts would not be considered to be filed late and therefore time-value refunds, which are based on a late filing, were not in order.¹⁰

4. Prior to the Commission issuing the April 1, 2003 Order, NSTAR Electric & Gas Corporation (NSTAR) challenged the Commission's decision to grant waiver of the 60-day notice requirement and its refusal to require ISO-NE to pay refunds. On April 28, 2003, the Court of Appeals for the District of Columbia Circuit vacated the Commission's prior orders and remanded the proceeding to the Commission, directing the Commission to further explain its decisions to grant waiver and not to order refunds.¹¹ In the Order on Remand, the Commission explained in greater detail that its waiver of the 60-day prior notice requirement was properly granted because of the "extraordinary circumstances" presented by this proceeding and, as a result, stated that time-value refunds were not in order.¹²

II. Notice of Filing and Responsive Pleadings

5. Notice of the April 22 Filing was published in the Federal Register, 68 Fed. Reg. 23,297 (2003), with interventions and protests due on or before May 22, 2003. Massachusetts Municipal Wholesale Electric Company and Connecticut Municipal Electric Energy Cooperative (Massachusetts/Connecticut Municipals) and NSTAR filed protests to the April 22 Filing, and Northeast Utilities Operating Companies¹³ and Select

⁷ 97 FERC ¶ 61,108 at 61,556.

⁸ 60 FERC ¶ 61,106, reh'g denied, 61 FERC ¶ 61,089 (1992).

⁹ October 26, 2001 Order, 97 FERC ¶ 61,108 at 61,554.

¹⁰ 99 FERC ¶ 61,003 at 61,019 n.8.

¹¹ NSTAR Elec. & Gas Corp. v. FERC, No. 02-1047, 2003 U.S. App. LEXIS 8078 at 3-4.

¹² Order on Remand, 105 FERC ¶ 61,359 at P 14-15.

¹³ The Northeast Utilities Operating Companies are the Connecticut Light and Power Company, Western Massachusetts Electric Company, Holyoke Power and Electric Company, Holyoke Water Power Company, and Public Service Company of New Hampshire.

Energy, Inc (collectively, Northeast) filed an untimely protest to that filing. Mirant Americas Energy Marketing L.P., Mirant New England, LLC, Mirant Kendall, LLC, and Mirant, LLC (collectively, Mirant) filed comments in support of the filing. In addition, ISO-NE filed an answer to the protests and Massachusetts/Connecticut Municipals filed an answer to ISO-NE's answer.

A. The April 22 Filing

6. ISO-NE explains that the mitigation agreements, as well as a summary of each of the agreements, are identical to those that it filed on February 25, 2002 on a non-public basis. ISO-NE states that most of the twenty-nine units listed in its April 22 Filing are located in either northeast Massachusetts or southwest Connecticut, which are the principal congested areas in New England. According to ISO-NE, all of the units that are subject to the agreements were needed for dispatch to ensure reliability and security of the system.

7. ISO-NE maintains that its approach for each agreement has been similar: (1) to identify the actual variable costs and, when relevant, the total costs (including return on and of equity); (2) to require units to bid on a cost basis (variable up to total cost) when bid mitigation includes non-variable cost elements; and (3) to ensure that no uplift payment beyond variable cost is paid if the unit has already collected its full revenue requirements. In addition, ISO-NE states that, at the time of the April 22 Filing, it had not negotiated any new mitigation agreements with generators¹⁴ and it had filed with the Commission (in this docket and others) all of the mitigation agreements it has negotiated with generators. ISO-NE also notes that all of the mitigation agreements either expired on March 1, 2003 (with the implementation of the NE-SMD) or expired according to their own terms on earlier dates.

B. Protests and Comment

8. Massachusetts/Connecticut Municipals, Northeast, and NSTAR (collectively, Protestors) state that ISO-NE's filing lacks the supporting data and explanation needed to determine whether the mitigation agreements are just and reasonable, as required by Section 205 of the FPA, and whether these agreements comply with the terms of Market Rule 17. In particular, the Protestors maintain that the filing fails to provide any cost or other justification for the amounts actually bid and paid and therefore does not afford the parties ultimately responsible for paying the costs of the mitigation agreements the ability to determine the rate impacts of these agreements.

¹⁴ As discussed above, any new mitigation agreement entered into by ISO-NE will have to comply with the provisions of Appendix A to Market Rule 1. See supra note 2.

9. The Protestors ask that the Commission engage in a separate determination under Section 205 concerning the justness and reasonableness of each agreement. According to the Protestors, Market Rule 17 allows ISO-NE to enter into mitigation agreements only when the terms of such agreements are “reasonable” and when the market will function “more reliably, competitively or efficiently” as a result. The Protestors assert that the April 22 Compliance Filing does not demonstrate that the payment terms are reasonable or that the market will function more effectively as a result of any of the mitigation agreements.

10. In addition, NSTAR claims that the agreements are not contracts, as required by Market Rule 17, which allows ISO-NE to enter into “special contracts.” NSTAR maintains that most of the mitigation agreements included in the April 22 Filing do not represent any form of enforceable contractual agreement under any construction of commercial law.¹⁵ Rather, NSTAR states that the majority of the agreements submitted by ISO-NE are memoranda summarizing oral agreements between ISO-NE and an applicable generator. NSTAR also states that Market Rule 17 provides that mitigation agreements normally will be entered into on a prospective basis. NSTAR maintains that ISO-NE violated this obligation with respect to the agreements because none of the agreements was negotiated prospectively.

11. For these reasons, the Protestors ask that the Commission subject the mitigation agreements to review under Section 205 of the FPA and grant refunds for any amounts paid under the agreements that are found to be unlawful, unjust, or unreasonable (i.e., any sums paid by ISO-NE to generators in excess of the applicable default rates set forth in Tables 1 or 2 of Market Rule 17). At a minimum, the Protestors maintain that the Commission should find that the April 22 Filing is inadequate and therefore require a detailed accounting of the amounts paid under the mitigation agreements and a statement of how these costs were allocated to customers in New England. In the alternative, Northeast maintains that the Commission should establish a hearing or other procedures that require ISO-NE to justify and explain the mitigation agreements.

12. Mirant filed comments in support of ISO-NE, stating that ISO-NE has the authority under Market Rule 17 to negotiate bid mitigation agreements for any reasonable payment terms to ensure that resources that seldom run in economic merit order remain available during transmission constraints. Mirant notes that the Commission has rejected the assertion that it is required to individually review each bid mitigation agreement for justness and reasonableness, because the Commission has already granted ISO-NE blanket authority to enter into mitigation agreements under Market Rule 17.

¹⁵ NSTAR states that parties to a contract must indicate their intention to be bound by the terms of the contract, usually by executing the contract, and a contract should include terms as to pricing and duration of the performance under the agreement, as well as provisions governing the obligations of each of the parties.

Accordingly, Mirant supports ISO-NE's request that the Commission accept the agreements without any further review.

III. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 384.213(a)(2) (2003), generally prohibits an answer to a protest or an answer to answer, unless otherwise permitted by the decisional authority. We find that good cause exists to grant the untimely protest filed by Northeast, given its interest in this proceeding and the absence of any undue prejudice or delay. We are not persuaded to allow ISO-NE's answer and Connecticut/Massachusetts Municipals' answer to ISO-NE's answer and will, therefore, reject them.

B. The Commission's Response

1. Whether the Mitigation Agreements Should be Subject to Review Under Section 205

14. The Protestors argue that the Commission must individually review each mitigation agreement under Section 205 of the FPA to determine whether the agreements are just and reasonable; on the other hand, Mirant maintains that the Commission has rejected the assertion that it must do so, because the Commission has already granted ISO-NE blanket authority to enter into mitigation agreements under Market Rule 17.¹⁶ 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.

2. The Mitigation Agreements Are Just and Reasonable

15. For the reasons stated herein, we are satisfied that ISO-NE provided reasonable compensation for units under the negotiated agreements. By asking the Commission to review specific cost data relating to the mitigation agreements, the Protestors seem to

¹⁶ We note that, in the April 1, 2003 Order, the Commission specifically rejected the contention that it must review the mitigation agreements individually under Section 205 to determine whether they are just and reasonable, because ISO-NE had been granted blanket authority to enter into mitigation agreements when Market Rule 17 was approved. April 1 Order, 99 FERC ¶ 61,003 at P 16.

suggest that the agreements should be rejected by the Commission unless they can be justified on a cost-of-service basis. In fact, ISO-NE was permitted to negotiate payment terms 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 these resources should be entitled to receive prices under special contractual arrangements, which were above the levels specified in Table 1 or Table 2, to ensure the availability of these units when needed to protect system reliability.

16. As the Commission explained in the Order on Remand: “Absent 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.”¹⁷

17. The mitigation agreements were negotiated following principles that support reliability as well as overall competitive goals. For instance, the mitigation agreements required the generators to supply power based on average variable costs or marginal costs, plus an adder. The adders were reasonable compensation for such units¹⁸ to reflect lost opportunity costs. The Commission does not agree with the implication of the Protestors that a recovery of any fixed costs is per se inappropriate for essential units that run for reliability purposes and only rarely run in economic merit order.

18. In addition, ISO-NE states that it has followed rigorous procedures in applying Market Rule 17 and that it has gathered and analyzed all relevant cost data in the course of conducting its negotiations with generators.¹⁹ Although some of those procedures were not specifically required by Market Rule 17, the fact that ISO-NE applied these further “checks and balances” to the negotiation of the mitigation agreements only serves to strengthen our judgment that the agreements were negotiated in a manner that produced reasonable results.

¹⁷ Order on Remand, 105 FERC ¶ 61,359 at P 14.

¹⁸ In most of the mitigation agreements included in the April 22 Filing, the adder is a percentage of variable costs (usually ten percent). For example, the memorandum of understanding between ISO-NE and Sithe New England Holdings, LLC (Sithe), concerning Sithe’s New Boston units, contains a formula that compensates the units with a payment equal to 110% of its fuel, compressor fuel, variable operation and maintenance, and fuel transportation costs. See ISO-NE Filing, Attachment 4.

¹⁹ ISO-NE further states that it has requested periodic updates from the generators with whom it has negotiated mitigation arrangements.

19. Moreover, the Protestors have not provided any evidence that either shows 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.

20. Furthermore, we note that none of the Protestors filed any objections in this proceeding to any of the criteria or formulas contained in the mitigation agreements for calculating the compensation for affected generating units.

3. Whether the Mitigation Agreements Are Consistent with Market Rule 17

21. The Protestors also state that ISO-NE in negotiating the mitigation agreements acted in a manner that is impermissible under Market Rule 17. Market Rule 17 placed the following specific 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.”²⁰ The mitigation agreements listed in the April 22 Filing are consistent with these criteria: the units seldom run in economic merit order, are necessary for reliability purposes, and improve market functioning.

22. NSTAR argues that the mitigation agreements violate Market Rule 17 because they were not negotiated prospectively. Although we agree that none of the filed mitigation agreements in the April 22 Filing was negotiated prospectively, we do not agree that this violates Market Rule 17. That rule states that “normally” mitigation agreements will be negotiated prospectively²¹ and therefore contemplates that ISO-NE may be required to negotiate retrospective agreements to compensate generators for previously-supplied reliability services. Furthermore, as ISO-NE pointed out, “the delay by ISO-NE in identifying the constrained units and applying the price screens due to the implementation of the markets” often makes prospective negotiations impossible.²² Indeed, “[A] generator may only learn on very short notice (i.e., without sufficient advance notice to negotiate and file a mitigation agreement) that it is being dispatched out-of-merit order for system reliability and security and that its bid is being mitigated.”²³

23. With regard to NSTAR’s claim that the agreements are not contracts, as required by Market Rule 17, we note that the mitigation agreements should not be viewed in isolation but as complements to Market Rule 17. When looked at in conjunction, the

²⁰ Id. at 17.3.3(b) n.9.

²¹ Id.

²² See April 22 Filing, Attachment 5, at 2(G).

²³ Order on Remand, 105 FERC ¶ 61,359 at P 15.

mitigation agreements and Market Rule 17 provide enough information concerning the terms and conditions (such as price) in the agreements. For instance, each of the mitigation agreements provides objective criteria for calculating the price that was to be paid under the agreement.²⁴ Therefore, the agreements, consistent with Market Rule 17, allow the Commission to determine that they contain reasonable payment terms.

4. Whether the Commission Should Order Refunds

24. The Protestors seek refunds of the difference between the price received by generators and the reference price under the Market Rule 17 default formula rates. As noted above, the prices received by the generators under the agreements at issue are reasonable, and so there is no basis to order refunds.²⁵ We thus find that ordering refunds in this matter is not appropriate.

25. Moreover, as the Commission stated in the Order on Remand, given the Commission's waiver of the 60-day prior notice requirement, time-value refunds are not called for.²⁶ In that order, the Commission explained its rationale for granting waiver in this matter, stating that "extraordinary circumstances are present here that justified the Commission concluding in the October 26 Order that good cause was met for granting waiver of the 60-day prior notice requirement with respect to the mitigation agreements."²⁷ The Commission further explained that the extraordinary circumstances were that the mitigation agreements at issue are required to compensate sellers for critical generation services needed to assure reliability at mitigated prices and that, because of

²⁴ See, e.g., April 22 Filing, Attachment 6 (stating that the New Boston unit will be entitled to a mitigated price equal to 110% of its fuel, compressor fuel, variable operating and maintenance, and fuel transportation costs).

²⁵ Moreover, Market Rule 17 provides: "Until the resource owner and the ISO reach agreement, the default price screen will enable the resource to be paid for running in the short term, while providing a strong incentive to negotiate an appropriate arrangement with the ISO (or another willing buyer) as the screen price rapidly and progressively drops to just 5% above the higher of the same-hour [clearing price] or applicable Reference [clearing price] in the unconstrained market." The default reference price thus is not an absolute determinant of what rates are acceptable, but serves to provide an incentive for negotiation of rates that are acceptable.

²⁶ 105 FERC ¶ 61,359 at P 9 (citing April 1, 2003 Order, 99 FERC ¶ 61,003 at 61,019 ("[B]ecause of the Commission's waiver of the 60-day prior notice in the October 26[, 2001] Order, the mitigation agreements would not be considered to be filed late and therefore there would be no time-value refunds due to ISO-NE's late filing.")).

²⁷ Id. at P 14.

their nature, these agreements do not always lend themselves to being filed 60 days before service commences.²⁸

The Commission orders:

The Commission hereby accepts ISO-NE's compliance filing, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

²⁸ Id. at PP 14-15.