

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

ISO New England, Inc.

Docket Nos. ER03-631-000 and
ER03-631-001

ORDER DEFERRING ACTION ON REQUEST FOR WAIVER AND
ACCEPTING PROPOSED BID MITIGATION AGREEMENTS
FOR FILING, SUBJECT TO FURTHER ORDERS

(Issued June 10, 2003)

I. Introduction

1. ISO New England, Inc. (ISO) has filed three proposed bid mitigation agreements (mitigation agreements) that it executed under New England Power Pool (NEPOOL) Market Rule and Procedure 17 (Market Rule 17) with a group of generators after the generators had commenced providing service. The ISO requests waiver of the 60-day prior notice requirement in order to allow each of the mitigation agreements, which expired by their own terms before the ISO filed them, to become effective retroactive to the date that service commenced. As explained below, this order defers action on the ISO's request for waiver of the 60-day prior notice requirement and accepts the ISO's proposed mitigation agreements for filing, subject to the outcome of an order on remand in a pending proceeding, which also concerns a request by the ISO for waiver of the 60-day prior notice requirement. This order benefits the public interest by allowing the waiver issue to be addressed in an orderly manner.

II. Background

2. On March 18, 2003, as amended on April 22, 2003, pursuant to Section 205 of the Federal Power Act (FPA),¹ the ISO filed executed mitigation agreements with the following generators: Mirant Kendall, LLC (Mirant Kendall); Devon Power, Connecticut Jet Power, Middletown Power, Montville Power, and Norwalk Harbor Power (collectively,

¹16 U.S.C. § 824d (2000).

the NRG Entities); and PG&E Energy Trading – Power, L.P. (PGET). The ISO requests that the proposed mitigation agreements be accepted for filing as negotiated agreements within its authority as system operator and not be subject to additional Commission review, consistent with the Commission's prior treatment of mitigation agreements under Market Rule 17.² The ISO states that the mitigation agreements provide the terms by which the generators' bids were mitigated when the applicable generating units were operated to provide transmission support. The ISO states that it determined that each facility was needed to maintain reliability and security of the NEPOOL system and that special bidding arrangements were appropriate. All three of the mitigation agreements expired by their terms on March 1, 2003, the date of implementation of a new standard market design in New England.³

3. Specifically, the proposed mitigation agreement with Mirant Kendall is a new agreement covering 63 MW oil-fired boilers and steam turbine generating units located in the transmission-constrained area of Cambridge, Massachusetts, which the ISO seeks to make effective for the period from August 13, 2002 to March 1, 2003. The ISO executed the proposed mitigation agreement with Mirant Kendall on January 7, 2003.

4. The proposed mitigation agreement with the NRG Entities is a new agreement covering five generating stations located in transmission-constrained areas of Connecticut, which the ISO seeks to make effective for the period from September 5, 2002 to March 1, 2003. The ISO executed the proposed mitigation agreement with the NRG Entities on January 30, 2003.

5. The ISO proposes to amend its Memorandum of Understanding (*i.e.*, its mitigation agreement) with PGET to extend the term of that agreement from January 1, 2003 to March 1, 2003.⁴ The ISO executed the proposed extension of the mitigation agreement with PGET on January 23, 2003.

²Market Rule 17.3.3.2(b), footnote 9, provides that "the ISO may enter into negotiations 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."

³The ISO states that it no longer negotiates mitigation agreements under Market Rule 17. The ISO further states that under the new standard market design in New England, any mitigation agreements entered into by the ISO will have to comply with the negotiating authority given to the ISO under Appendix A of Market Rule 1.

⁴The ISO's pre-existing Memorandum of Understanding with PGET would have expired by its own terms on December 31, 2002.

6. In the March 18, 2003 filing, the ISO requested that the mitigation agreements with Mirant Kendall and the NRG Entities be afforded confidential treatment. However, in the April 22, 2003 amendment, it re-submitted the mitigation agreements in unredacted, non-confidential form. The ISO withdrew its request for confidential treatment in light of the Commission's recent denial of confidential treatment of another set of its mitigation agreements.⁵

7. The ISO requests waiver of the 60-day prior notice requirement⁶ so that the mitigation agreements can be made effective retroactive to their start dates. Thus, for the agreement with Mirant Kendall, the ISO requests an effective date of August 13, 2002. For the agreement with the NRG Entities, the ISO requests an effective date of September 5, 2002. For the amendment to the agreement with PGET, the ISO requests an effective date of January 1, 2003. The ISO argues that good cause exists for granting waiver of the prior notice requirement because no NEPOOL Participant will be unreasonably prejudiced by allowing the mitigation agreements to become effective retroactive to their start dates. Further, the Commission has held that mitigation agreements do not need to be reviewed by the Commission to determine their justness and reasonableness.

III. Notice of Filing and Responsive Pleadings

8. Notice of the ISO's filing was published in the Federal Register,⁷ with motions to intervene and protests due on or before April 8, 2003. Keyspan-Ravenswood, LLC filed a timely motion to intervene, raising no substantive issues.

9. Mirant Americas Energy Marketing, L.P., Mirant New England, LLC, Mirant Kendall, LLC (Mirant Kendall) and Mirant Canal, LLC (collectively, Mirant) filed a timely motion to intervene and comments supporting the ISO's filing.

10. NSTAR Electric & Gas Corporation (NSTAR) filed a timely motion to intervene and protest. Northeast Utilities Service Company, on behalf of the Northeast Utilities Operating Companies and of Select Energy, Inc. (collectively, NU and Select Energy) filed a timely motion to intervene and protest. New England Consumer-Owned Entities (NECOE) filed a timely motion to intervene and motion to reject filing, or in the

⁵See ISO New England, Inc., 103 FERC ¶ 61,018 at P 7 (2003) (April 9 Order) (determining that the ISO's mitigation agreements must be filed in unredacted form and on a non-confidential basis).

⁶See 16 U.S.C. 824d(d) (2000); 18 C.F.R. §§ 35.3(a), 35.11 (2003).

⁷68 Fed. Reg. 15,443 (2003).

alternative, protest, request for suspension, and opposition to requests for confidential treatment and for waiver.

11. Notice of the ISO's April 22, 2003 amendment was published in the Federal Register,⁸ with motions to intervene and protests due on or before May 13, 2003. The Maine Public Utilities Commission filed a notice of intervention, raising no substantive issues. Timely motions to intervene, raising no substantive issues, were filed by PG&E National Energy Group, PG&E Generating, USGen New England, Inc., and PGET (collectively, PG&E National Energy Group Companies)⁹ and the NRG Entities. NSTAR filed a timely protest of the ISO's April 22, 2003 amendment. On May 28, 2003, the ISO filed an answer to NSTAR's protest.

IV. Discussion

A. Procedural Matters

12. 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 those who filed them parties to this proceeding. The Commission's Rules of Practice and Procedure prohibit answers to protests and answers to answers unless otherwise ordered by the decisional authority.¹⁰ We will permit the ISO's answer to NSTAR's protest, because it has provided information that has aided us in understanding matters at issue in this proceeding.

B. Substantive Matters

1. The ISO's Original Request for Confidential Treatment

a. Comments

⁸68 Fed. Reg. 23,298 (2003).

⁹PG&E National Energy Group Companies filed a motion to intervene out-of-time on April 11, 2003. However, because they filed their motion to intervene prior to the due date for interventions established in the notice of the ISO's April 22, 2003 amendment, we deem their motion to intervene to be timely.

¹⁰18 C.F.R. § 385.213(a)(2) (2003).

13. In response to the ISO's March 18, 2003 filing, the protesters oppose the ISO's request for confidential treatment of the mitigation agreements. NU and Select Energy further request that the Commission declare that all mitigation agreements negotiated under Market Rule 1 must be filed in unredacted form.

b. Commission Determination

14. In view of the ISO's withdrawal of its request for confidential treatment and re-filing of the mitigation agreements in unredacted, non-confidential form, the ISO's original request for confidential treatment is now moot. Regarding NU and Select Energy's request, no mitigation agreements negotiated under Market Rule 1 are before us in this proceeding, but we note that the April 9 Order held that the ISO must file its mitigation agreements in unredacted, non-confidential form.¹¹

2. The ISO's Request for Waiver of Prior Notice Requirement and Other Issues Raised by the Protests

a. Comments

15. The protesters oppose waiver of the 60-day prior notice requirement. They argue that, although Section 17.3.2.2 of Market Rule 17 provides that mitigation agreements will normally be negotiated prospectively, a provision the ISO acknowledges in its filing, none of the mitigation agreements was entered into prospectively. They further argue that the ISO has failed to demonstrate good cause for waiver. Further, NECOE argues that if mitigation agreements are negotiated prospectively, then customers would be entitled to seek relief at the outset under Section 206 of the FPA, or otherwise request expedited Commission action. However, a determination that already-expired agreements are unreasonable would have little practical effect for customers because the ISO, as a non-profit entity, would have no funds with which to pay "refunds."

16. The protesters also request that the Commission order that mitigation agreements filed under Market Rule 1 must be effective prospectively, in the absence of unusual circumstances.

¹¹See supra note 5.

17. In its protest of the ISO's April 22, 2003 amendment,¹² NSTAR argues that under Market Rule 17, if a generator with market power and the ISO have not filed a mitigation agreement, and the Commission has not accepted it for filing, the generator must be compensated at the mitigated price from the applicable price screen table in Tables 1 and 2 of Market Rule 17, which is the rate on file with the Commission. The same applies if an approved mitigation agreement has expired, according to NSTAR. It argues that refunds are required if the ISO collects monies in excess of the filed rates. It further argues that, under the FPA, the ISO cannot make the mitigation agreements applicable back to their start dates. NSTAR further argues that mitigation agreements with Mirant Kendall and the NRG Entities are flawed because they do not give the ISO an enforceable right to call upon designated capacity in defined circumstances at specified prices.

18. In response to NSTAR, the ISO argues that, while Market Rule 17.3.2.2(b) provides that mitigation agreements should "normally" be negotiated prospectively, nothing in Market Rule 17 prohibits the ISO from entering into mitigation agreements retroactively to compensate generators for reliability services already provided at the request of the ISO. According to the ISO, there are many times when reliability services from generators are needed on an expedited basis and, therefore, must be provided before a fully formed mitigation agreement can be completed. The ISO argues that, under such circumstances, it is reasonable for it to procure reliability services from generators with the assurance that proper compensation terms will be negotiated as soon as practical after the fact. The ISO states that, in this case, it filed the mitigation agreements with the Commission as soon as it was practical to do so. With respect to waiver of the 60-day prior notice requirement, the ISO states that the Commission has previously granted retroactive effectiveness to mitigation agreements entered into by the ISO under Market Rule 17. The ISO further argues that the NSTAR court did not rule that such waivers could not be granted, only that the Commission had not properly justified its decision to do so in that case. The ISO argues that the practical circumstances discussed above constitute good cause for waiver in this case. In addition, it argues that waiver is necessary in order to ensure that the settled expectations of the affected generators, who in good faith provided NEPOOL with a needed and valuable reliability service, are not unjustly disturbed.

19. The ISO further argues that the mitigation agreements do not need to contain a clause giving the ISO the right to dispatch the generators for reliability purposes because,

¹²NSTAR's renewed protest concerns only the mitigation agreements with Mirant Kendall and the NRG Entities. It states that it will comment on the ISO's Memorandum of Understanding with PGET in the Mirant proceeding, Docket No. EL01-93-008, in which the ISO also filed an unredacted, non-confidential version of that agreement pursuant to the April 9 Order.

under various sections of the NEPOOL Agreement, the generators, as members of NEPOOL, were required to maintain their units and make them available to the ISO for dispatching when needed. It further asserts that any generator abusing its market power by economically withholding its output would have been subject to the provisions of Market Rule 17 that prohibit such conduct.

b. Commission Determination

20. We will not entertain the protesters' arguments that the costs under the mitigation agreements should be set for hearing and NSTAR's argument that the mitigation agreements do not contain an enforceable right to call upon designated capacity. Because the Commission has granted the ISO 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.¹³

21. With respect to the ISO's request for waiver of the 60-day prior notice requirement, we note that NSTAR appealed the Commission's orders in the Mirant proceeding,¹⁴ raising arguments similar to those that it raises in this case. In the Mirant proceeding, NSTAR opposed the Commission's grant of waiver of the prior notice requirement to allow the ISO's mitigation agreements to become effective retroactively. NSTAR argued that the default rates in Tables 1 and 2 of Market Rule 17 should apply and that the ISO should be ordered to refund the difference between the rates under the mitigation agreements and the default rates under Tables 1 and 2.

22. In NSTAR Electric & Gas Corporation v. FERC,¹⁵ the United States Court of Appeals for the District of Columbia Circuit remanded the Mirant orders to the Commission for further explanation, holding:

Section 205(d) [of the FPA] provides that public utilities must give notice to the Commission sixty days before implementing rate changes unless the Commission waives the sixty days' notice "for good cause shown." 16 U.S.C.

¹³See Mirant Americas Energy Marketing, L.P., et al., 99 FERC ¶ 61,003 at P 16 (2002).

¹⁴See Mirant Americas Energy Marketing, L.P., et al. v. ISO New England, Inc., 96 FERC ¶ 61,201 at 61,860, order on reh'g, 97 FERC ¶ 61,108 at 61,556, order on reh'g, 97 FERC ¶ 61,360 (2001) (Mirant III).

¹⁵No. 02-1047 (D.C. Cir. 2003) (unpublished) (NSTAR).

§ 824d(d). In Central Hudson,¹⁶ the Commission stated that it would generally find good cause to justify a waiver for "filings that increase rates when the rate change and the effective date are prescribed by" a contract already on file with the Commission because, "[i]n [those] instances, there is a contractual commitment as to the effective date which the Commission has already accepted." [60 FERC at 61,338.] Market Rule 17 does not set forth rate changes or effective dates; instead, it permits the New England ISO to enter into mitigation contracts, the terms of which are to be determined by the New England ISO. Therefore, the Commission's citation to Central Hudson neither explained, nor in itself supported, the Commission's waiver decision. Cf. *Exxon Corp. v. FERC*, 206 F.2d 47, 53 (D.C. Cir. 2000). As to the refusal to order refunds, the Commission offered no rationale for its decision other than that it has granted waivers to the New England ISO.¹⁷

23. The issue of whether the Commission may grant waiver of the 60-day prior notice requirement to allow the ISO's mitigation agreements to become effective retroactively is pending in the NSTAR remand proceeding. Accordingly, we will defer action on the ISO's request for waiver of the 60-day prior notice requirement and accept the ISO's proposed mitigation agreements for filing, subject to the outcome of the NSTAR remand proceeding, as ordered below. Our decision in the NSTAR remand will be applied here as well.

The Commission orders:

(A) The Commission hereby defers action on the ISO's request for waiver of the 60-day prior notice requirement, subject to the outcome of the NSTAR remand proceeding, as discussed in the body of this order.

(B) The ISO's proposed mitigation agreements are hereby accepted for filing, subject to the outcome of the NSTAR remand proceeding, as discussed in the body of this order.

By the Commission.

¹⁶Central Hudson Gas Electric Corp., 60 FERC ¶ 61,106, reh'g denied, 61 FERC ¶ 61,089 (1992).

¹⁷Slip op. at 2.

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(S E A L)

Linda Mitry,
Acting Secretary.