

120 FERC ¶ 61,264  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Mirant Americas Energy Marketing, L.P.  
Mirant New England, LLC  
Mirant Kendall, LLC  
and Mirant Canal, LLC

Docket No. EL01-93-012

v.

ISO New England, Inc.

ISO New England, Inc.

Docket No. ER03-631-003

ORDER ON REMAND ESTABLISHING HEARING  
AND SETTLEMENT JUDGE PROCEDURES

(Issued September 21, 2007)

1. This order addresses the March 9, 2007 remand from the United States Court of Appeals for the District of Columbia Circuit in these proceedings.<sup>1</sup> In the Remand Order, the court affirmed in part the Commission's underlying decisions and reversed in part the Commission's underlying decisions, remanding for additional consideration whether the rates in the so-called mitigation agreements at issue were just and reasonable, and whether the purchasers charged the mitigation rates were entitled to any refunds of amounts charged under those agreements.<sup>2</sup> In this order, the Commission sets the issues remanded by the court for hearing and settlement judge procedures.

**Background**

2. In 1998, the New England Power Pool (NEPOOL) proposed, and the Commission ultimately accepted, comprehensive market reforms including a shift of the New England

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<sup>1</sup> *NSTAR Electric & Gas Corp. v. FERC*, 481 F.3d 794 (D.C. Cir. 2007) (Remand Order).

<sup>2</sup> *Id.* at 803.

wholesale power market from cost-based prices toward market pricing, and the creation of ISO-New England (ISO-NE), a private, non-profit entity to administer New England energy markets and operate the region's bulk transmission system.<sup>3</sup>

3. Prices in the restructured market are governed by ISO-NE rules filed with the Commission under section 205 of the Federal Power Act (FPA).<sup>4</sup> During normal system operation, ISO-NE sets a market-clearing price by working up the range of generators' bids to find the lowest bid to supply the load for the period in question, which becomes the market clearing price. All suppliers receive the same market clearing price. During times of transmission constraints, however, generators whose bids exceed the market-clearing price may need to be called into service notwithstanding their higher bids; they are often referred to as "out of merit" generators.<sup>5</sup> Under ISO-NE's Market Rule 17, in effect during the period in dispute,<sup>6</sup> these "reliability must run" units did not affect the market-clearing price paid to in-merit generators; any cost in excess of the market clearing price was charged to transmission customers as a "congestion uplift" charge.<sup>7</sup>

4. Market Rule 17 also contained procedures for mitigating these out of merit bids either according to a predetermined formula or at a higher alternative price agreed to by ISO-NE and the generator; they were capped at a default price that could range from 105 percent to 500 percent of the market clearing price.

5. The Commission concluded that the mitigation agreements at issue here were just and reasonable.<sup>8</sup> The Commission stated in the Compliance Order that it reviewed the

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<sup>3</sup> See *New England Power Pool*, 83 FERC ¶ 61,045 (NEPOOL I), *order on reh'g*, 85 FERC ¶ 61,379 (1998) (NEPOOL II), *order on reh'g*, 95 FERC ¶ 61,074 (2001).

<sup>4</sup> 16 U.S.C. § 824d (2000).

<sup>5</sup> See *NEPOOL II*, 85 FERC at 62,461.

<sup>6</sup> Market Rule 17 was subsequently replaced when the Commission accepted a new comprehensive tariff implementing energy markets and locational marginal pricing in New England, known as Market Rule 1. See *New England Power Pool and ISO New England, Inc.*, 100 FERC ¶ 61,287 (2002), *order on reh'g and compliance*, 101 FERC ¶ 61,287 (2002).

<sup>7</sup> *NEPOOL II*, 85 FERC at 62,463.

<sup>8</sup> *Mirant Americas Energy Marketing, L.P. v. ISO New England Inc.*, 99 FERC ¶ 61,003 at P 16 (2002); *Mirant Americas Energy Marketing, L.P.*, 106 FERC ¶ 61,243 (2004) (Compliance Order), *aff'd*, *Mirant Americas Energy Marketing, L.P.*, 112 FERC ¶ 61,056 (2005) (Rehearing Order).

agreements, and, based on that review, found that they were reasonable.<sup>9</sup> The Commission rejected NSTAR's claim that the agreed upon rates could survive only if they were based on cost. Instead, the Commission found it reasonable for ISO-NE to have negotiated prices aimed at assuring the availability of the generators in question when needed to protect system reliability. The Commission noted that the agreements compensated the generators based on "average variable costs or marginal costs, plus an adder" and that, in most of the agreements, the adder was "a percentage of variable costs (usually ten percent)."<sup>10</sup> The Commission concluded that such adders were reasonable compensation for lost opportunity costs, and rejected the contention that recovery of fixed costs would be *per se* inappropriate, given that the generators were essential for reliability purposes and only rarely run in economic merit order.<sup>11</sup>

### **Remand Order**

6. In the Remand Order, the court first stated that the fact that the mitigation agreements set compensation at a percentage of the generators' fixed or variable costs did not support the conclusion that the rates contained in the agreements were just and reasonable given the lack of data concerning the generators' costs. The court added that many of the agreements "contained no actual cost data for relevant time periods."<sup>12</sup>

7. The court noted that the Commission's primary response to NSTAR's complaint that the Commission had not independently assessed whether the mitigation agreements were just and reasonable was that, under Market Rule 17, ISO-NE was authorized to negotiate payment terms only where it reasonably expected the markets would function more reliably, competitively or efficiently as a result.<sup>13</sup> The court added that the record gave reason to believe that the generators had filed cost data with ISO-NE for its review. However, the court found that the Commission did not explain its basis for believing that ISO-NE had the incentive to bargain for "reasonable" rates. The court added that the Commission had not identified any incentives driving ISO-NE to bargain for low prices. The court stated that while it was not foreclosing the possibility of Commission reliance on a market participant with appropriate incentives, it found that the Commission had made no showing that such circumstances existed here (the court noted that it was not

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<sup>9</sup> Compliance Order, 106 FERC ¶ 61,860 at P 14.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at P 17.

<sup>12</sup> Remand Order, 481 F.3d at 803.

<sup>13</sup> *Id.*

suggesting that only prices in line with historic accounting costs could qualify as just and reasonable).<sup>14</sup>

8. The court concluded that neither the Commission's reasonableness analysis nor its stated reliance on ISO-NE's actions satisfied its statutory obligation to ensure that rates are just and reasonable.<sup>15</sup>

### **Commission Determination**

9. In the Remand Order, the court remanded for additional consideration whether the rates in the mitigation agreements at issue were just and reasonable, and, if not, whether purchasers charged the mitigation rates were entitled to refunds. Particularly given the court's concerns regarding the lack of cost data provided to the Commission, it appears that the most appropriate way to examine the justness and reasonableness of the mitigation agreements at issue is to set them for hearing. Accordingly, we set the remanded issues for hearing.

10. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures commence. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>16</sup> If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.<sup>17</sup> The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

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<sup>14</sup> *Id.* at 803-04.

<sup>15</sup> *Id.* at 804.

<sup>16</sup> 18 C.F.R. § 385.603 (2007).

<sup>17</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience ([www.ferc.gov](http://www.ferc.gov) – click on Office of Administrative Law Judges).

The Commission orders:

(A) Pursuant to the directives of the District of Columbia Circuit Court of Appeals, and the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of the rates charged pursuant to the mitigation agreements at issue, and refunds of amounts collected pursuant to the mitigation agreements at issue. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (B) and (C) below.

(B) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2007), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(C) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(D) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a conference in these proceedings in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish

procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.  
Acting Deputy Secretary