

102 FERC ¶ 61,248  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

New England Power Pool  
and  
ISO New England, Inc.

Docket No. ER02-2330-009

ORDER DENYING STAY

(Issued February 28, 2003)

1. In this order, the Commission denies the motion for stay filed by Richard Blumenthal, Attorney General of the State of Connecticut (CTAG) of the Commission's prior orders in this proceeding authorizing the implementation a new Standard Market Design for New England (NE-SMD) by ISO New England, Inc., (ISO-NE). We do so on the basis that CTAG has failed to meet the criteria for obtaining a stay.

**BACKGROUND**

2. On July 15, 2002, New England Power Pool (NEPOOL) and ISO-NE filed an application requesting acceptance of their new standard market design for New England. The Commission accepted these proposed changes in orders issued on September 20, 2002, and December 20, 2002.<sup>1</sup> Pursuant to those orders, ISO-NE is preparing to implement NE-SMD on March 1, 2003.

3. Most significantly, under NE-SMD, ISO-NE will immediately implement Locational Marginal Pricing (LMP) and a multi-settlement (Day-Ahead and Real-Time) market. ISO-NE proposes to implement other elements of NE-SMD, such as its proposed mitigation measures for generators within Designated Congestion Areas (DCAs), at a later time.

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<sup>1</sup>New England Power Pool and ISO New England, Inc., 100 FERC ¶ 61,287 (2002)(Initial Order), order on rehearing, 101 FERC ¶ 61,344 (2002) (Rehearing Order).

4. On February 28, 2003, CTAG filed a motion for stay of the Commission's orders approving implementation of NE-SMD. CTAG asserts that the Commission's acceptance of NE-SMD violates the Federal Power Act (FPA) because it will result in rates that are not just and reasonable. CTAG specifically points to adverse affects that it claims will be caused by the implementation of LMP pricing, particular mitigation measures for generators within DCAs, and the Reliability Must Run (RMR) contracts into which ISO-NE will be able to enter.

5. With regard to the implementation of LMP pricing, CTAG states that generators within transmission-constrained areas are able to exercise market power, due to the transmission constraints, and that, while the previous market rules contained provisions to mitigate that market power, in the absence of those mitigation provisions, those generators will now be able to charge excessive rates as a result of LMP pricing.<sup>2</sup> CTAG further asserts that, where a single generator has control over a large share of production in a load pocket (such as southern Connecticut), it could raise the price of power delivered into that area above competitive levels. CTAG charges that this possibility will result in rates that are more than just and reasonable. See Motion for Stay at 10-11.

6. With regard to DCAs,<sup>3</sup> CTAG states that the DCA mechanism will improperly sanction the exercise of market power and lead to unjust and unreasonable rates. According to CTAG, if the hours during which actual transmission constraints occur in

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<sup>2</sup> Currently, there is a single price for electricity purchased through the spot market run by ISO-NE. Under LMP, there will be different prices throughout New England when transmission congestion prevents customers from importing lower cost power into a region such as Southwest Connecticut. At those times, Southwest Connecticut's needs will be supplied by higher cost generation, often generation located within Southwest Connecticut. Wholesale customers within Southwest Connecticut will pay the higher costs of serving their needs. Wholesale customers in other areas of New England that are not affected by transmission congestion will pay prices based on the lower cost power that can be imported into their own areas. Thus, LMP is based on cost causation principles that customers that use the higher cost generation should be the customers that pay for it.

<sup>3</sup>NE-SMD's new Market Rule 1 authorizes ISO-NE to establish DCAs each year. Generators within these DCAs may submit bids which fall below a "safe harbor" hourly bid threshold administratively set by ISO-NE. That "safe harbor" is developed using a replacement cost methodology based on the fixed and variable costs of a new proxy generating plant. The safe harbor bid thresholds, once set, apply during all hours of the year whether or not transmission constraints actually occur.

the DCA exceed the level estimated by ISO-NE in initially setting the "safe harbor" bid threshold, generators operating within the DCA will be able to continue to bid at that level and thus recover costs which are more than the calculated permissible "margin" of fixed costs, and also are unrelated to the generator's own actual variable costs. Thus, CTAG argues, the DCA mechanism permits prices in excess of the market price that would prevail in non-scarcity periods, and those prices are therefore unjust and unreasonable.

7. With regard to RMR contracts,<sup>4</sup> CTAG states that generators that hold RMR contracts are opting out of the competitive market back into the regulated market with a guarantee of cost recovery. Thus, according to CTAG, an RMR generator is able to use its status as a necessary plant to exercise market power, and to obtain fixed cost recovery guarantees.

8. CTAG argues that the Commission should grant a stay because implementation of NE-SMD will cause harm to energy customers in Connecticut in particular, and in New England generally, because it will permit the exercise of market power by generators within transmission-constrained areas, and also relax or eliminate the rules designed to mitigate the exercise of such market power. CTAG alleges that it is likely to succeed on the merits, as the Commission's orders approving NE-SMD are plainly contrary to law and exceed the Commission's statutory authority. It also states that the failure to grant the stay will result in irreparable harm to electric consumers in Connecticut in particular. CTAG additionally states that granting of the stay will preserve the status quo, or the current market rules, and ensure that the rates charged are just and reasonable; thus, CTAG argues that the granting of this stay will not harm any others. Finally, CTAG states that the public interest strongly supports granting a stay in this matter, because the Commission's orders plainly violate the FPA.

## DISCUSSION

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<sup>4</sup>Market Rule 1 gives ISO-NE the authority to enter into RMR contracts with generators that are deemed necessary for reliability and that cannot recover their going forward costs if allowed to collect only the clearing prices in the market. ISO-NE and generators may obtain contracts that are based on the individual generating plant's costs of service.

9. Under Section 705 of the Administrative Procedure Act (APA), the standard for granting a stay by an administrative agency is whether "justice so requires."<sup>5</sup> In deciding whether justice requires a stay, the Commission generally considers several factors, which typically include: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.<sup>6</sup> If the party requesting a stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.<sup>7</sup> CTAG's motion meets none of these standards.

10. **CTAG has not made a sufficient showing that customers will be irreparably harmed.** CTAG states that no adequate remedy exists to protect ratepayers from the effects of NE-SMD, because even if CTAG or some other party initiates a complaint under Section 206 of the FPA, the Commission may only institute refunds from 60 days after the filing of the complaint (or, if the Commission itself initiates a Section 206 proceeding, the refund date is 60 days after publication by the Commission of notice of its intention to initiate the proceeding). CTAG notes that neither a complaint nor a Commission-instituted proceeding is pending; thus, any refund for rates charged beginning on March 1, 2003 is foreclosed for at least 60 days. CTAG states that since the probability of unjust and unreasonable rates being charged during this 60-day period is very high, this constitutes irreparable harm to Connecticut ratepayers for which an adequate remedy does not exist. CTAG also asserts that once the new market rules go into effect, it will be impossible to measure the harm to consumers, because it will be impossible to determine what generators' bids might have been under the former New England market rules.

11. This alleged harm is uncertain and theoretical, not concrete and certain. CTAG offers no specific evidence to show that the new rules will lead to excessively high rates. While LMP is, in fact, likely to increase rates in certain parts of Connecticut and of New England, that is because the cost of providing service in those areas is higher because of transmission congestion that prevents the importation of low cost power into these areas. CTAG's statement that the possibility that a single entity with control over a large share

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<sup>5</sup>5 U.S.C. § 705 (2003).

<sup>6</sup>See, e.g., CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership, 56 FERC ¶ 61,177 at 61,630-31 (1991), aff'd sub nom., Michigan Municipal Cooperative Group v. FERC, 990 F.2d 1377 (D.C. Cir.), cert denied., 510 U.S. 990 (1993); Boston Edison Company, 81 FERC ¶ 61,102 at 61,377 (1997).

<sup>7</sup>Id.

of the generation in a load pocket could raise prices above competitive levels ignores the market mitigation measures that are currently in effect and will continue to be in effect under NE-SMD. Under these measures, ISO-NE may cap the prices of generators in load pockets to mitigate the exercise of market power. CTAG does not identify any entity that could engage in such conduct, much less make a showing that any such entity or entities have done so or could do so under the market mitigation measures contained in Market Rule 1.

12. As to the implementation of LMP pricing in New England, the Commission expressly found (Rehearing Order at P 35) that it would, in fact, be just and reasonable, as it would send "more accurate prices [that] will encourage more efficient supply and demand decisions in both the short and long run."<sup>8</sup> An inevitable consequence of moving from a pricing model in which the costs of higher cost generation dispatched because of transmission congestion are socialized across the entire New England system to a pricing model in which costs are allocated to those parties purchasing that generation is that some parties will pay less than they paid before, and other parties will pay more. The removal of these existing subsidies is not, however, enough to render LMP pricing unjust and unreasonable.

13. CTAG further claims that it would be impossible to measure harm to consumers because no means exist to determine what might have happened if the new regime was not put in place. This is incorrect. The pricing process involves stacking bids against load requests to determine the price at which all load requests are satisfied (clearing price). Should refunds become an issue, the Commission could reasonably approximate what would have happened by making certain assumptions and requiring that the stacking data be rerun via computer. No more is required to satisfy the zone of reasonableness standard.<sup>9</sup>

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<sup>8</sup>The Commission has previously found LMP pricing to be just and reasonable. See Pennsylvania-New Jersey-Maryland Interconnection, et al., 92 FERC ¶ 61,282 at 61,952-53 (2002) (Commission affirmed earlier order finding that "the LMP model . . . was just and reasonable. The Commission found that LMP will promote efficient trading and reflect the opportunity costs of using congested transmission paths. The Commission also found that the LMP model will encourage efficient use of the transmission system, facilitate the development of competitive electric markets and send signals that are likely to encourage efficient location of new generation resources," footnotes omitted).

<sup>9</sup>In any event, difficulty in determining refunds does not constitute irreparable injury. "Mere injuries, however substantial, in terms of money, time and energy

(continued...)

14. As to CTAG's contentions regarding DCAs, ISO-NE has stated that it will not implement its DCA proposal on March 1, and will only do so after the Commission issues an order on the filings still outstanding regarding DCAs.<sup>10</sup> Thus, no injury that could arise from the implementation of the DCA proposal is imminent. Further, while CTAG claims that the DCA provisions will allow generators to exercise market power, this claim ignores the fact that the generators would be subject to bid caps that are based on the replacement cost of new generation in the area, a way of mitigating market power.

15. Finally, as to RMR contracts, NE-SMD provides for Commission review of those contracts, and enables parties (such as CTAG) to participate in the Commission's consideration of individual contracts. CTAG has already sought intervention in one such proceeding, PPL Wallingford Energy LLC, Docket No. ER03-421-000. Thus, CTAG and other parties may make a showing, with regard to any specific proposed RMR contract, that it will result in unjust and unreasonable rates. Thus, there is no irreparable harm currently from NE-SMD's RMR provisions. Moreover, contrary to the assertions of the CTAG, the use of a cost service rate is a method for mitigating the market power of generators located within the load pockets.

16. **Granting the stay will substantially harm other parties.** First, as noted above, LMP pricing will introduce a greater degree of fairness into energy pricing in New England. Under New England's current market rules, customers in other regions of New England are, in essence, subsidizing customers in load pockets such as southern Connecticut. It would harm such other customers to require continuation of such subsidy.

17. Moreover, as Exelon New England Holdings, LLC (Exelon) points out in its response to the Motion for Stay, other market participants have undertaken significant activities in reliance on the implementation of NE-SMD on March 1. Exelon states that it purchased Sithe New England Holdings, LLC in the expectation that NE-SMD would be implemented on schedule. Exelon further notes that, in preparation for the

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<sup>9</sup>(...continued)

necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Virginia Petroleum Jobbers v. FPC*, 259 F.2d 921, 925 (D.C.Cir. 1958).

<sup>10</sup>See ISO-NE's February 25, 2003 Response to Protests in ER03-2330-009 at 8.

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implementation of LMP, many market participants have entered into bilateral contracts to hedge their risk.

18. **Granting a stay is not in the public interest.** In light of the Commission's finding that implementation of NE-SMD will send better price signals, create new incentives for investment, and promote greater efficiency than the prices currently being charged in New England, and in light also of the actions that market participants have taken in reliance on the implementation of NE-SMD, we find that denial of the motion for stay is in the public interest.

**The Commission orders:**

The Commission hereby denies the stay requested by CTAG.

By the Commission.

(S E A L)

Magalie R. Salas,  
Secretary.