

**ORAL ARGUMENT IS SCHEDULED FOR APRIL 17, 2003**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

\_\_\_\_\_  
**No. 02-1047**  
\_\_\_\_\_

**NSTAR ELECTRIC & GAS CORPORATION,  
PETITIONER,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

\_\_\_\_\_  
**ON PETITION FOR REVIEW OF ORDERS OF  
THE FEDERAL ENERGY REGULATORY COMMISSION**

\_\_\_\_\_  
**INITIAL BRIEF OF INTERVENOR  
ISO NEW ENGLAND INC.**  
\_\_\_\_\_

**James H. Douglass  
ISO New England Inc.  
One Sullivan Road  
Holyoke, MA 01040-2841  
(413) 540-4559**

**Howard H. Shafferman  
Craig Galligan  
Ballard Spahr Andrews & Ingersoll, LLP  
601 13<sup>th</sup> Street, N.W., Suite 1000 South  
Washington, D.C. 20005  
(202) 661-2200**

***COUNSEL FOR ISO NEW ENGLAND  
INC.***

**JANUARY 10, 2003**

**CIRCUIT RULE 28(a)(1) CERTIFICATE AS TO PARTIES, RULINGS,  
AND RELATED CASES**

A. Parties and Amici

The parties before this Court are identified in the brief of Petitioner.

B. Rulings Under Review

1. *Mirant Americas Energy Marketing, L.P., et al. v. ISO New England Inc.*, 96 FERC ¶61,201 (2001);
2. *Mirant Americas Energy Marketing, L.P., et al. v. ISO New England Inc.*, 97 FERC ¶61,108 (2001); and
3. *Mirant Americas Energy Marketing, L.P., et al. v. ISO New England Inc.*, 97 FERC ¶61,360 (2001).

C. Related Cases

This case has not previously been before this Court or any other court.

Counsel is not aware of any other related cases pending before this or any other court.

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Howard H. Shafferman  
I.D. No. 28285  
Ballard Spahr Andrews & Ingersoll, LLP  
601 13<sup>th</sup> Street, N.W., Suite 1000 South  
Washington, D.C. 20005  
(202) 661-2200

*Counsel for ISO New England Inc.*

**CORPORATE DISCLOSURE STATEMENT OF  
ISO NEW ENGLAND INC.**

Pursuant to Circuit Rule 26.1, counsel for ISO New England Inc. hereby certifies that:

ISO New England Inc. is a private, not-for-profit corporation organized under the laws of the State of Delaware that is responsible for operation of New England's bulk power system. The New England region controlled by ISO New England Inc. encompasses Connecticut, Maine (portions), Massachusetts, New Hampshire, Rhode Island and Vermont. ISO New England has no corporate parents and no publicly held company owns a 10% or more interest in ISO New England Inc.

Respectfully submitted,

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Howard H. Shafferman  
I.D. No. 28285  
Ballard Spahr Andrews & Ingersoll, LLP  
601 13<sup>th</sup> Street, N.W., Suite 1000 South  
Washington, D.C. 20005  
(202) 661-2205

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... v

GLOSSARY .....vi

STATEMENT OF ISSUES.....2

STATUTES AND REGULATIONS .....3

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS.....3

SUMMARY OF ARGUMENT .....3

ARGUMENT .....4

I. The Mitigation Agreements Do Not Need To Be Individually Reviewed  
For Justness And Reasonableness Under Section 205 Of The FPA.....4

II. The Refund Remedy Sought By NSTAR Would Result In Confiscatory  
Penalties Being Levied On Market Participants Who Provided Needed  
Services Under The Mitigation Agreements .....7

III. ISO-NE, As The Non-Profit Administrator Of NEPOOL’s Tariffed Rates, Is  
Not In A Position To Issue The Refunds Requested By NSTAR Without  
Corresponding Refunds From Generators.....10

CONCLUSION.....12

CERTIFICATE OF COMPLIANCE WITH WORD COUNT.....13

CERTIFICATE OF SERVICE.....14

## TABLE OF AUTHORITIES

### COURT CASES:

* <i>Public Utilities Commission of California v. FERC</i> , 254 F.3d 250 (D.C. Cir. 2001) .....	5-6
* <i>Town of Concord v. FERC</i> , 955 F.2d 67 (D.C. Cir. 1992) .....	9

### ADMINISTRATIVE CASES:

<i>Mirant Americas Energy Marketing, L.P., et al.</i> <i>v. ISO New England Inc.</i> , 97 FERC ¶ 61,108 (2001).....	7
<i>Mirant Americas Energy Marketing, L.P., et al.</i> <i>v. ISO New England Inc.</i> , 96 FERC ¶ 61,201 (2001).....	5
<i>New England Power Pool</i> , 85 FERC ¶ 61,379 (1998), <i>on reh'g.</i> , 95 FERC ¶ 61,074 (2001) .....	5
<i>Ocean State Power II</i> , 69 FERC ¶ 61,146 (1994) .....	6

### STATUTES:

Federal Power Act, Section 205, 16 U.S.C. § 824d (2002).....	9
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\* Cases chiefly relied upon are marked with an asterisk.

## **GLOSSARY**

Pursuant to Circuit Rule 28(a)(3), below is a list of defining abbreviations and acronyms used in this Brief.

Commission	Federal Energy Regulatory Commission
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
ISO-NE	ISO New England Inc.
MPUC	Intervenor Maine Public Utilities Commission
NEPOOL	New England Power Pool
NSTAR	NSTAR Electric & Gas Corporation

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**ON PETITION FOR REVIEW OF ORDERS OF  
THE FEDERAL ENERGY REGULATORY COMMISSION**

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**INITIAL BRIEF OF INTERVENOR  
ISO NEW ENGLAND INC.**

Intervenor ISO New England Inc. (“ISO-NE”) hereby submits its Initial Brief in the captioned proceeding. ISO-NE agrees with the position of Respondent Federal Energy Regulatory Commission (“FERC” or the “Commission”) that a full review of the agreements at issue in this case (the “Mitigation Agreements”) under Section 205 of the Federal Power Act (“FPA”) was not necessary because the Mitigation Agreements are not themselves rates, but rather, contracts affecting rates, for which individualized review by the Commission is not required. When dealing with contracts affecting rates, the filed rate doctrine embodied in Section 205 of the FPA does not apply and the Commission has the authority to

waive filing requirements as it did here. ISO-NE also concurs with the Commission's determination that it has broad discretion to waive the 60-day prior filing requirement associated with the Mitigation Agreements, that a waiver was properly granted in this case, and that as a result of the waiver granted in this case, refunds on the Mitigation Agreements are inappropriate.

ISO-NE submits this separate Intervenor Brief to address three key issues: (1) the fact that the filing of the Mitigation Agreements did not necessitate a Section 205 review by the Commission; (2) the remedy requested by NSTAR Electric & Gas Corporation ("NSTAR"), if granted, would result in a harsh and confiscatory penalty being levied on several market participants who have operated in good faith under the Mitigation Agreements; and (3) ISO-NE, as the settlements administrator for the New England Power Pool ("NEPOOL"), is not in a position (without corresponding refunds from the generators providing services under the Mitigation Agreements) to pay refunds if they are required in this case.

### **STATEMENT OF ISSUES**

ISO-NE concurs in the Statement of Issues set forth in the Initial Brief of Respondent FERC.

## **STATUTES AND REGULATIONS**

All applicable statutes and regulations are contained in the addendum to the Initial Brief of Respondent FERC.

## **STATEMENT OF THE CASE AND STATEMENT OF THE FACTS**

ISO-NE concurs in the Statement of the Case and the Statement of Facts set forth in the Initial Brief of Respondent FERC.

## **SUMMARY OF ARGUMENT**

Both NSTAR and the Maine Public Utilities Commission (“MPUC”) incorrectly assert that the Mitigation Agreements must be subjected to a full Section 205 rate review by the Commission. The Mitigation Agreements are not jurisdictional rates, but instead are contracts affecting the jurisdictional rate of NEPOOL. While the Commission was within its statutory authority to require ISO-NE to file the Mitigation Agreements with the Commission, because they were contracts affecting NEPOOL’s rates, the Commission correctly determined that a full Section 205 rate review was not required.

NSTAR and MPUC also challenge the Commission’s decision to grant a waiver of the 60-day prior notice requirement and deny refunds for ISO-NE’s late filing of the Mitigation Agreements. The contention that such a waiver and denial

of refunds is precluded by the filed rate doctrine is incorrect. Refunds of the type sought are not mandatory under the FPA and are granted at the discretion of the Commission. Under the Mitigation Agreements, the generators provided valuable services that supported the reliability of NEPOOL's power grid. A grant of refunds in this case would deprive these generators of a recovery of the costs they incurred in providing these services, and therefore, the Commission properly exercised its discretion to deny refunds.

Finally, ISO-NE, as the non-profit administrator of NEPOOL's rates, is not in a position to pay any ordered refunds without corresponding refunds from the generators providing service to NEPOOL under the Mitigation Agreements.

## **ARGUMENT**

### **I. The Mitigation Agreements Do Not Need To Be Individually Reviewed For Justness And Reasonableness Under Section 205 Of The FPA**

The arguments presented by NSTAR and the MPUC rely on the assumption that the Mitigation Agreements must each be separately reviewed for justness and reasonableness under Section 205 of the FPA. *See* NSTAR Br. at 37; MPUC Br. at 12. This assumption is incorrect. As contracts affecting rates, rather than rates themselves, the Mitigation Agreements could be accepted by the Commission without an independent determination of their justness and reasonableness.

While the Commission has ruled that ISO-NE must file the Mitigation Agreements with the Commission under Section 205 of the FPA,<sup>1</sup> such contracts have never been equated with the “rates and charges for jurisdictional services” that the FPA requires the Commission to review for their justness and reasonableness. *See Public Utilities Commission of California v. FERC*, 254 F.3d 250 (D.C. Cir. 2001) (finding that Reliability Must Run contracts negotiated by the California ISO under its tariff did not constitute rates that required a Section 205 filing because they were not themselves rates but merely contracts affecting the California ISO’s jurisdictional rate).

The Mitigation Agreements at issue were entered into by ISO-NE pursuant to its authority under Market Rule 17. *See* R. 8 at 5-6, JA\_\_\_\_-\_\_ (quoting Market Rule 17). The NEPOOL Market Rules, including Market Rule 17, are part of the market rates for NEPOOL that have been approved by the Commission and are administered by ISO-NE. *See Mirant Americas Energy Marketing, L.P., et al. v. ISO New England Inc.*, 96 FERC ¶ 61,201 at p. 61,858 n.2 (2001), JA\_\_ (citing *New England Power Pool*, 85 FERC ¶61,379 (1998)). Market Rule 17 specifically contemplates that some generators that seldom run except during constrained conditions may not be able to recover their costs under normal circumstances and

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<sup>1</sup> Section 205(c) of the FPA requires the filing of all “contracts which in any manner affect or relate to [] rates....”

therefore authorizes ISO-NE, as agent for the NEPOOL Participants, to negotiate contracts with these generators to ensure their availability when needed.<sup>2</sup> These negotiated arrangements entered into with generators are not themselves “rates and charges” under Section 205 of the FPA, they are merely contracts affecting the jurisdictional rates, specified in the tariffs and market rules filed by NEPOOL under Section 205. The fact that these Mitigation Agreements negotiated by ISO-NE will have an impact on the rates charged to NEPOOL Participants does not mean that they must be filed with the Commission and undergo a full Section 205 review. *See, e.g. Public Utilities Commission of California v. FERC*, 254 F.3d 250 (D.C. Cir. 2001) (finding that RMR contracts negotiated pursuant to the filed rate of the California ISO did not require a full Section 205 review); *see also Ocean State Power II*, 69 FERC ¶ 61,146 at p. 6,1544-44 (1994) (noting that periodic rate adjustments made in accordance with Commission-approved formulas do not constitute changes in the rate itself and therefore do not require Section 205 rate filings).

Furthermore, the assertion by NSTAR that ISO-NE’s negotiation of the Mitigation Agreements was somehow an unauthorized act or a violation of Market

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<sup>2</sup> In the absence of these Mitigation Agreements, many generation resources that operated primarily to support the reliability and security of NEPOOL would be paid the default reference prices contained in Market Rule 17 for these services.

Rule 17 is incorrect. NSTAR Br. at 7 (claiming that in negotiating the Mitigation Agreements, ISO-NE had “disregarded the objective criteria of Market Rule 17”). The Mitigation Agreements were entered into under the specific authority granted to ISO-NE under Market Rule 17, which is the rate on file with the Commission.

**II. The Refund Remedy Sought By NSTAR Would Result In Confiscatory Penalties Being Levied On Market Participants Who Provided Needed Services Under The Mitigation Agreements.**

NSTAR and MPUC seek in this case an order requiring ISO-NE to refund the difference between the price received by generators under the Mitigation Agreements and the reference prices listed in Market Rule 17’s default formula rate. NSTAR Br. at 26-32; MPUC Br. at 5. If required, these refunds would have the effect of substantially disrupting the settled expectations of many generators who provided NEPOOL with needed reliability services under the Mitigation Agreements. These services were provided under the reasonable assumption that payment for them would be received in the amounts specified in the Mitigation Agreements negotiated in good faith with ISO-NE.

As explained above, Market Rule 17 specifically contemplated the negotiation of the Mitigation Agreements by ISO-NE to meet NEPOOL’s reliability and security needs. *See Mirant Americas Energy Marketing, L.P., et al. v. ISO New England Inc.*, 97 FERC ¶61,108 at p. 61,555 n. 2 (2001), JA \_\_\_\_ (quoting Market Rule 17, § 17.3.2.2(b)). Most, if not all, of the generators

operating under the Mitigation Agreements would not be able to survive in the NEPOOL markets if they were required to accept Market Rule 17's default reference prices for the times they were called upon by ISO-NE to run for NEPOOL reliability protection. The default reference prices of Market Rule 17 are designed to provide generators that seldom run except when needed to relieve transmission constraints with a nominal economic recovery for providing this reliability service.

For most generators, the Market Rule 17 reference prices would not even cover the short-run marginal costs associated with running when needed. *See* R. 1 at 2, JA\_\_\_. Accordingly, Market Rule 17 is designed to give these generators an incentive to negotiate with ISO-NE special contractual arrangements to ensure that they remain economically viable. R. 8 at 5-6, JA\_\_\_-\_\_\_ (quoting Market Rule 17). By helping to keep these generators economically viable, the Mitigation Agreements provided a critical reliability and security benefit to the entire market and electricity consumers.

To require the generators to refund the payments they received under the Mitigation Agreements that were in excess of the Market Rule 17 reference prices would be a very harsh result. As explained above, the Market Rule 17 reference prices for most of these generators would not even cover the actual costs incurred

by them in providing these needed services to New England. If such refunds were ordered, generators would be forced to disgorge payments received under the Mitigation Agreements from as far back as two years ago that they had no notice would be subject to future uncertainty.

Not only would this result disrupt the settled expectations that these generators had under the Mitigation Agreements, it would also threaten the future reliability of New England by casting doubt on the continued viability of these needed generation resources. If these generators are forced to disgorge the revenues they received under the Mitigation Agreements in favor of the Market Rule 17 reference prices, many of these generators could face large financial losses for prior years' activities and as a result their ability to stay in business may be placed in jeopardy. It has long been established that the decision to grant refunds under the FPA is a form of equitable relief that is within the discretion of the Commission. *See, e.g., Town of Concord v. FERC*, 955 F.2d 67 72-76 (D.C. Cir. 1992); *see also* FPA § 205(d); 16 U.S.C. § 824d (2002) (allowing the Commission to waive the filing requirements of the FPA "for good cause shown"). Given the harsh results that would be visited on these generating resources if refunds were issued, the Commission's exercise of discretion in granting ISO-NE a waiver of the timely filing requirement and the resulting order that no refunds would be required was appropriate in this case and should be upheld.

### **III. ISO-NE, As The Non-Profit Administrator of NEPOOL's Tariffed Rates, Is Not In A Position To Issue The Refunds Requested By NSTAR Without Corresponding Refunds From Generators**

In their prayers for relief, both NSTAR and the MPUC ask the Court to order ISO-NE to issue refunds for the amounts collected under the Mitigation Agreements. NSTAR Br. at 49; MPUC Br. at 13. While ISO-NE negotiated the Mitigation Agreements, it did so as agent for the NEPOOL Participants under the filed rates (*i.e.*, the Market Rules of NEPOOL). Similarly, ISO-NE collected the funds from NEPOOL Participants required to satisfy the obligations of the Mitigation Agreements and paid them to the pertinent generators, in the centralized NEPOOL settlements process as the agent of NEPOOL and not on its own behalf. The money used to pay for the reliability services procured under the Mitigation Agreements came from NEPOOL Participants and was not collected by ISO-NE under its own tariff or for any other purpose than to simply distribute it to the required generators as NEPOOL's agent.

Accordingly, contrary to the characterizations made by NSTAR in its brief, ISO-NE has no financial interest in the outcome of this matter. *See* NSTAR Br. at 42 (characterizing ISO-NE as “an interested participant to the contracts in question”). ISO-NE, in collecting the funds necessary to pay generators under the Mitigation Agreements merely acted as the billing, collection and disbursing agent of NEPOOL. As NEPOOL's billing agent, ISO-NE collects from NEPOOL

Participants the amounts necessary to pay generators under the Mitigation Agreements and distributes the payments to the generators as required by contract. None of the funds collected by ISO-NE from NEPOOL Participants and paid to generators are retained by ISO-NE for its benefit nor are they collected by ISO-NE on its own account. As a result, ISO-NE would not be in a position to pay any ordered refunds unless the generators previously receiving payments under the Mitigation Agreements were required to make refunds to ISO-NE. Without recoupment of any ordered refunds from NEPOOL Participants, ISO-NE would not have access to the funds necessary to make the required refund payments. Therefore, ISO-NE requests that, if the Court chooses to order refunds in this case, any refund order directed to ISO-NE be fashioned in a manner that would require the pertinent generators to reimburse ISO-NE for the entire amount of ordered refunds.

## CONCLUSION

For the reasons set forth above, ISO-NE requests that the Commission's orders be affirmed in all respects.

Respectfully submitted,

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Howard H. Shafferman  
I.D. No. 28285  
Craig Galligan  
Ballard Spahr Andrews & Ingersoll, LLP  
601 13<sup>th</sup> Street, N.W., Suite 1000 South  
Washington, D.C. 20005  
(202) 661-2200

---

James H. Douglass  
ISO New England Inc.  
One Sullivan Road  
Holyoke, MA 01040-2841  
(413) 540-4559

*Counsel for ISO New England Inc.*

January 10, 2003

**CERTIFICATE OF COMPLIANCE WITH WORD COUNT**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), I hereby certify that the Brief of Intervenors ISO New England Inc. contains 2,370 words, including headings, footnotes, and quotations. Not included in the word count are the corporate disclosure statements, certificate as to parties, rulings and related cases, glossary, table of contents, table of authorities, certificate of compliance with work count, and certificate of service.

Dated at Washington, D.C., this 10<sup>th</sup> day of January, 2003.

Respectfully submitted,

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Howard H. Shafferman  
I.D. No. 28285  
Ballard Spahr Andrews & Ingersoll, LLP  
601 13<sup>th</sup> Street, N.W., Suite 1000 South  
Washington, D.C. 20005  
(202) 661-2200

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the Brief of Intervenors ISO New England Inc. by first-class mail upon the parties to this case. The names and addresses of the parties served are attached.

Dated at Washington, D.C., this 10<sup>th</sup> day of January, 2003.

Respectfully submitted,

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Howard H. Shafferman  
I.D. No. 28285  
Ballard Spahr Andrews & Ingersoll, LLP  
601 13<sup>th</sup> Street, N.W., Suite 1000 South  
Washington, D.C. 20005  
(202) 661-2200

Federal Energy Regulatory Commission  
Solicitor of the Federal Energy Regulatory  
Commission  
Attn: Lona T. Perry  
888 First Street, N.E.  
Washington, DC 20426

John N. Estes III  
Skadden, Arps, Slate, Meagher & Flom LLP  
1440 New York Avenue, N.W.  
Washington, DC 20005-2111

Joseph Edward Stubbs  
David B. Raskin  
Stephoe & Johnson  
1330 Connecticut Ave., N.W.  
Washington, DC 20036-1795

Fredric Lee Klein  
Northeast Utilities Service Company  
107 Selden Street  
Berlin, CT 06037

Richard P. Bress  
Latham & Watkins  
555 Eleventh Street, N.W.  
Suite 1000  
Washington, DC 20004-1304

Stephen L. Teichler  
Duane Morris LLP  
1667 K Street, N.W.  
Suite 7000  
Washington, DC 20006

Harvey L. Reiter  
John E. McCaffrey  
Stinson, Morrison, Hecker  
1150 Eighteenth Street, N.W.  
Suite 800  
Washington, DC 20036-3816

Robert Y. Hirasuna  
Leonard, Street & Deinard  
1701 Pennsylvania Ave., N.W.  
Washington, DC 20002