

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Sithe New England Holdings, LLC** )

)

v. )

)

**ISO New England, Inc.** )

**Docket No. EL02-128**

**NOTICE OF INTERVENTION AND PROTEST OF  
THE MAINE PUBLIC UTILITIES COMMISSION**

Pursuant to Rules 211 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), 18 C.F.R. § 385.214, and the Commission’s Notice of Filing issued on September 23, 2002, the Maine Public Utilities Commission (“MPUC”) hereby submits its Notice of Intervention and Protest in the above-captioned proceeding. Sithe’s complaint seeks compensation equal to that which it alleges was foregone in NCPC payments between July 1 and December 27, 2001. Complaint at 19. Sithe estimates that this requested compensation would amount to approximately \$2.7 million.<sup>1</sup>

As discussed below, MPUC protests Sithe’s complaint for the following reasons: (1) The matter of retroactively changing the DDP rule has already been ruled on by the Commission and thus Sithe’s complaint is no more than a collateral attack on the prior Commission decision denying ISO’s request to implement the DDP rule change retroactively; (2) Sithe’s claim that there was no rule change, only a new interpretation of an existing rule is contrary to the filings made by NEPOOL and the ISO in the prior proceeding and is contrary to the Commission’s own analysis in the prior case; and (3) even if ISO’s software malfunctioned, such malfunctioning is

---

<sup>1</sup> No estimate is provided of the amount of total NCPC compensation that would be refunded to other generators if Sithe’s complaint is successful. The MPUC understands from ISO New England, however, that the additional uplift payments that would result from applying the new rule retroactively are broadly estimated to be about \$7 million. . In addition, no estimate is provided of the cost to ISO-NE (which would ultimately be paid by all NEPOOL

not considered a violation of the filed rate under the Commission's holding in *Bangor Hydro-Electric v. ISO New England*.<sup>2</sup>

**I.**

The MPUC designates the following persons for service and communications with respect to this matter and requests that their names be placed on the official service list for this proceeding:

Lisa Fink  
Staff Attorney  
State of Maine  
Public Utilities Commission  
242 State Street  
18 State House Station  
Augusta, ME 04333-0018  
(207) 287-1389

Harvey L. Reiter  
John E. McCaffrey  
M. Denyse Zosa  
STINSON MORRISON & HECKER LLP  
1150 18<sup>th</sup> Street, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 785-9100

**II.**

Under Maine law, the MPUC is the state commission designated by statute with jurisdiction over rates and service of electric utilities in the state. *See* 35-A M.R.S.A. § 101 *et seq.*

---

participants) of recalculating the amounts of uplift that would be provided to generators during the six-month period at issue.

<sup>2</sup> 97 FERC ¶ 61,339 (2001).

### III.

#### PROTEST

A. In a Prior Litigated Case, the Commission Already Denied the Relief Now Sought by Sithe.

The issue brought by Sithe in its complaint — a request that the ISO retroactively recalculate whether certain generators met their DDP under the less stringent standards now in effect -- has already been decided by the Commission. Therefore, Sithe's complaint is simply an effort to relitigate the earlier case. Such relitigation, as discussed *infra*, is barred by the principle of res judicata.

On October 29, 2001, the New England Power Pool Participants Committee (NEPOOL), filed proposed changes to Market Rule 5, amending the formula used to calculate whether a generator is operating at its Desired Dispatch Point (DDP). NEPOOL proposed an effective date of December 28, 2001. If a generator is not operating at its DDP, it is not eligible to receive energy or transmission uplift. *New England Power Pool*, 97 FERC ¶ 61,338 at 62,585 (2001).

The ISO supported the filing but asked the Commission to implement the rule change retroactively to July 1, 2001. The Commission declined, accepting NEPOOL's proposed tariff revisions and giving them effect on the date requested. *New England Power Pool*, 97 FERC ¶61,338 at 62,586 (2001). Sithe requested rehearing of the Commission's decision not to impose the rule change retroactively. The Commission denied the rehearing, finding that the proponents of the earlier date had not justified imposing a date earlier than the effective date proposed by the filing party (NEPOOL). 98 FERC ¶ 61,299 (2002). Sithe subsequently sought court review of the Commission's decision in a case pending in the D.C. Circuit. *Sithe New England Holdings, LLC v. FERC*, No. 02-1113 (D.C. Cir.).

Because Sithe was a litigant in the earlier case, and the relief sought here is identical to the outcome it supported in the prior case, it is barred, under the principles of res judicata from now seeking the same relief. *See, Greensboro Lumber Co. v. Rayle Electric Membership Corp.*, 40 FERC ¶ 61,283 (1987) (party barred from raising claim where same claim, involving same parties, was previously raised *or could have been raised*, in earlier proceeding, absent changed circumstances). *See also, Transcontinental Gas Pipe Line Corp.*, 85 FERC ¶ 61,357 at 61,386 (1998) (“The doctrine of res judicata precludes the relitigation of a claim or issue that was the subject of a prior cause of action between the parties.”) Here, Sithe alleges no change of circumstances. Rather it seeks to make arguments that it states it raised in the prior proceeding but which were not addressed by the Commission. Sithe states that it “is raising those points in this new complaint proceeding to give the Commission a clean slate upon which to resolve the DDP problem, free of the procedural setting of the prior case.” Complaint at 2. Sithe should not have another opportunity to receive the relief it sought and was denied in the prior case. The Commission should, therefore, refuse Sithe’s invitation to relitigate the same issue already decided by the Commission and on appeal in the D.C. Circuit. In fact, once the record in that case was certified to the D.C. Circuit, on May 28, 2002, the court obtained exclusive jurisdiction over the case. 16 U.S.C. § 8251(b). Thus, even if the Commission were inclined to change its position (and there is no sound basis to do so), it lacks the authority to modify its prior order.

B. Sithe’s Characterization of the Issue as a Misapplication by ISO of an Existing Rule is at Odds with both NEPOOL’s and FERC’s filings in the Prior Case and Conflicts with FERC’s findings in that Case.

Nothing in NEPOOL’s filing, the ISO’s filing or FERC’s decision in the earlier case supports Sithe’s characterization of the issue in its Complaint as one of ISO misapplication of the rule. NEPOOL’s section 205 filing clearly proposes a rule change and discusses the

requirements of the former rule and the less stringent requirements of the new rule. Transmittal Letter to NEPOOL's Section 205 filing, Docket No. ER02-185 at pp. 3-4 (Oct. 29, 2001). ISO-NE's filing also clearly characterizes NEPOOL's filing as a rule change. Motion to Intervene, Comments and Emergency Motion for Expedited Implementation of ISO-NE, Docket No. ER02-185 at pp. 3-5, (November 16, 2001). Similarly, the Commission states that NEPOOL "filed proposed tariff changes to NEPOOL Market Rule 5, *amending the formula* used to calculate whether a generator is operating at its Desired Dispatch Point (DDP)." 97 FERC at 62,584 (emphasis added). Nowhere in the decision is there any determination that ISO improperly applied the rule. In addition, Sithe's comments in the earlier case in fact appear to be consistent with the view that NEPOOL's proposal constituted a rule change, not simply a new interpretation of an existing rule. Sithe stated:

*As currently written, few generators can ever comply with Market Rule 5.3(d).*

\*\*\*

The current DDP standard disqualifies resources from setting the clearing price or receiving uplift for an entire hour if they deviate from the DDP by a total of one percent in three consecutive five minute dispatch periods. The proposed changes adjust the tolerance level to three percent, a far more realistic and reasonable level.

\*\*\*

Some parties may file in opposition to a July 1, 2001 effective date, or even to NEPOOL's filing. These will likely be buying interests who benefit from artificially low prices. These will be many of the same stakeholder entities *that voted in favor of the original unreasonably low 1% bandwidth in the first place.*

*Sithe New England Holdings, LLC'S Motion to Intervene, Supporting Comments and Answer in Support of ISO-NE's Emergency Motion for July 2001 Effective Date*, Docket No. ER02-185 (Nov. 19, 2001) (emphasis added).

Even if Sithe's new argument is not deemed inconsistent with its earlier averments, however, the principles of res judicata bar Commission reconsideration of these arguments in a new proceeding (without making and supporting any claim of a change in circumstances). If such relitigation were permitted, new cases could be filed any time a party is dissatisfied with the outcome of a case. To allow that would ensure that no case at the Commission could ever be put to rest.

C. The Commission's Decision in *Bangor Hydro-Electric Company v. ISO-NE* Militates Against the Correction Sought by Sithe.

In *Bangor Hydro-Electric Company v. ISO-NE*, 97 FERC 61,339 (2001), the Commission denied a complaint by Bangor Hydro-Electric Company (Bangor Hydro). There the Commission held that there was no violation of the filed rate *even when the electronic dispatch software incorrectly dispatched unneeded high priced units*. Because the clearing prices that were calculated for the period were the result of a formula that was prescribed by the market rules, malfunctioning software, even if it results in incorrect inputs into the formula, the Commission found, does not result in a violation of the filed rate. *Id* at 62,589.

The same analysis is applicable here. Sithe asserts that "the disqualifications had started at the same time that ISO-NE *automated* its flagging review process (effective July 1) –which determined when a generator would be flagged (and thus disqualified from uplift) for deviating from its Desired Dispatch Point. Miniscule DDP deviations had not triggered the manual flags used before July 2001, but when the process became software based it suddenly began disqualifying resources from uplift for virtually any variation from their precise DDP."

Complaint at 4-5. If Sithe's failure to meet its DDP was a result of software error rather than a function of the stringent requirements of the existing rule, the alleged software error does not amount to a violation of the filed rate under *Bangor Hydro, supra*. Thus, the retroactive relief sought by Sithe is not appropriate.

As a matter of fundamental fairness, the Commission should evenhandedly apply the rule against retroactive corrections on which it relied in *Bangor Hydro*, when consumers were hurt and generators enriched as a result of incorrect software operation. While Sithe may argue that the adjustment sought by it will not cause as much disruption as a recalculation of a clearing price, it will nevertheless require a significant amount of effort by the ISO (the costs of which will be passed on to all Participants in NEPOOL) to determine what entities are entitled to uplift payments under the new rule during the six-month period in question. More important, consumers who expected to pay prices in accordance with the rule then in effect would now be charged additional amounts through no fault of their own. To allow that would be create an unwarranted double standard to the detriment of consumers.

**IV.**

WHEREFORE, MPUC hereby submits its Notice of Intervention and Protest in the captioned proceeding.

Respectfully submitted,

MAINE PUBLIC UTILITIES COMMISSION

Lisa Fink  
Staff Attorney  
State of Maine  
Public Utilities Commission  
242 State Street – 18 State House Station  
Augusta, ME 04333-0018  
(207) 287-1389

By: \_\_\_\_\_  
Harvey L. Reiter  
John E. McCaffrey  
M. Denyse Zosa  
Stinson Morrison Hecker LLP  
1150 18<sup>th</sup> Street, N.W., Suite 800  
Washington, D.C. 20036  
(202) 785-9100

Its Attorneys

Dated: October 16, 2002

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing document by first class mail upon each party on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 16th day of October, 2002.

\_\_\_\_\_  
Harvey L. Reiter

WDCDOCS 49123v1