SCHEDULED FOR ORAL ARGUMENT APRIL 17, 2003

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 MAINE PUBLIC UTILITIES COMMISSION

Lisa Fink
State of Maine
Public Utilities Commission
242 State Street
18 State House Station
Augusta, ME 04333-0018
(207) 287-1391 (phone)

Harvey L. Reiter
John E. McCaffrey
STINSON MORRISON HECKER LLP
1150 18th Street, N.W., Suite 800
Washington, DC 20036
(202) 785-9100

Counsel for Maine Public Utilities Commission

DATED: November 26, 2002

CERTIFICATE OF COUNSEL FOR INTERVENOR AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a), counsel for Intervenor Maine Public Utilities Commission ("MPUC") hereby certifies that the following information required by Rules 12(c) and 28(a)(1) of the rules of this Court is true and correct to the best of counsel's knowledge.

A. **Parties and Amici**

All parties, intervenors and amici appearing before the Federal Energy Regulatory Commission ("FERC") and in this Court are listed in the Initial Brief of Petitioner NSTAR Electric & Gas Corporation ("NSTAR").

B. **Rulings Under Review**

References to the rulings at issue appear in the Initial Brief of NSTAR.

C. **Related Cases**

To the best of counsel's knowledge, no related cases have been or are currently before this Court or any other court.

Respectfully submitted,

____
Harvey L. Reiter
John E. McCaffrey
STINSON MORRISON HECKER LLP
1150 18th Street, N.W., Suite 800
Washington, DC 20036
(202) 785-9100
Counsel for Maine Public Utilities Commission

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GLOSSARY

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

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

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INITIAL BRIEF OF INTERVENOR MAINE PUBLIC UTILITIES COMMISSION

Intervenor Maine Public Utilities Commission ("MPUC") hereby submits its Initial Brief in the captioned proceeding. The MPUC agrees with the position of Petitioner NSTAR Electric & Gas Corporation ("NSTAR") that the Federal Energy Regulatory Commission ("FERC" or "Commission") has unlawfully given retroactive effect to unfiled rate agreements between certain power producers and ISO New England, Inc. FERC's orders have resulted in more than $10 million in added power costs to consumers in Maine. The MPUC submits this separate Intervenor Brief to elaborate on one key issue, namely, FERC's lack of authority to give retroactive effect to unfiled rates where customers did not otherwise have

notice of the rate to be charged and to underscore that FERC cannot delegate to ISO New England Inc. ("ISO-NE") its authority under the Federal Power Act to approve just and reasonable rates.

STATEMENT OF THE ISSUES

The MPUC concurs in the Statement of the Issues set forth in the Initial Brief of NSTAR.

STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The MPUC concurs in the Statement of the Case and Facts set forth in the Initial Brief of NSTAR.

SUMMARY OF THE ARGUMENT

The Commission found that agreements ("Mitigation Agreements") entered into between ISO New England Inc. ("ISO-NE") and owners of certain electric generators pursuant to Rule 17.3 of the New England Power Pool ("NEPOOL") Market Rules must be filed with the Commission pursuant to Section 205(d) of the Federal Power Act ("FPA"), 16 U.S.C. § 824d(d). The necessary implication of FERC's ruling was that the existing (unfiled) Mitigation Agreements contained "rates and charges" required to be just and reasonable under the FPA and, thus,

should have been filed with the Commission. Before the Mitigation Agreements were filed with FERC, the rates in those Agreements could not be legally charged, and rates charged in excess of the filed rates must be refunded to consumers.

FERC's effort to sidestep this straightforward application of the filed rate doctrine is based entirely on its purported authority to waive the sixty-day notice requirement set out in Section 205(d) of the FPA. This Court has made clear, however, that under the filed rate doctrine FERC may not use its Section 205(d) authority to waive notice of rate filings to give effect to a rate before the rate is filed where, as here, those customers paying the rate were not on notice of it. Because the sole rationale on which FERC relies to deny refunds in this case cannot be supported, the Court should vacate the challenged orders and require that FERC comply with the requirements of the Federal Power Act by ordering ISO-NE to issue refunds for rates unlawfully collected in excess of the filed rates.

FERC's error in relying on its "waiver authority" to give effect to a rate before the rate is filed is compounded by its failure to evaluate the justness and reasonableness of the rates in the mitigation agreement. In this regard, FERC has the sole authority and obligation to ensure just and reasonable rates and cannot delegate that core function to ISO-NE as it has done in this case.

ARGUMENT

I. FERC May Not Use its 60-Day Waiver Authority to Make The Mitigation Agreement Rates at Issue Here Effective Prior to the Date of the Filing of the Agreements.

In its October 26, 2001 Order, FERC granted a request for clarification filed by NSTAR and ruled that Mitigation Agreements must be filed with the Commission pursuant to Section 205 of the FPA. *Mirant Americas Energy Marketing, L.P.*, 97 FERC (CCH) ¶ 61,108 at p. 61,556 (2001). The Commission later confirmed this conclusion in its December 21, 2001 Order. *Mirant Americas Energy Marketing, L.P.*, 97 FERC (CCH) ¶ 61,360 (2001). In both orders, FERC announced that its finding was in the public interest "because it protects consumers by ensuring that all jurisdictional contracts are filed with the Commission." *See Mirant Americas*, 97 FERC (CCH) at p. 61,555 and *Mirant Americas*, 97 FERC (CCH) at p. 62,663.

The necessary implication of the Commission's ruling was that the Mitigation Agreements, once filed, would constitute the filed rate for sales of energy under NEPOOL Market Rule 17.3.2.2 other than those sales for which the prices set forth in Tables 1 and 2 of Market Rule 17 were applicable. A further implication of the Commission's conclusion was that the Mitigation Agreements that established the rates and charges for past power sales should have been – but were not – filed with the Commission. *See* 16 U.S.C. § 824d. As NSTAR

explains, because these rates were not filed with the Commission, they could not be legally charged, and rates charged in excess of the filed rate (*i.e.,* the Table 1 and Table 2 prices) must be refunded to consumers.

The Commission's sole rationale for departing from this straightforward application of the filed rate doctrine was a terse statement in the October 26 Order that, "pursuant to *Central Hudson*, we will grant ISO-NE a waiver of the 60-day notice requirement." *Mirant Americas*, 97 FERC (CCH) at p. 61,556 (citing *Central Hudson Gas and Electric Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992)) (footnote omitted); *see also Mirant Americas*, 97 FERC (CCH) at p. 62,666 (noting simply that "refunds will not be required with respect to mitigation agreements . . . because the Commission granted waiver of the prior notice requirement in the October 26 Order"). The Commission's orders must be vacated because, as discussed below, the Commission lacked the authority under the FPA to allow rates to become effective prior to the filing of the rates where the affected parties did not have prior notice of the rate change. Specifically, the Commission erred in relying on *Central Hudson Gas and Electric Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992) for the authority to allow the Mitigation Agreement rates to go into effect prior to the filing of the rates. The Commission failed to explain how the facts of this case warrant waiver under *Central Hudson*. Of even greater significance, however, FERC simply has no

authority to waive the notice requirement, whether or not it finds good cause, if waiver would give effect to a rate prior to the date by which affected customers had received notice.

The Commission has failed to demonstrate how the facts of this case justify a waiver under the policy set forth in *Central Hudson*. Indeed the Commission's grant of a waiver appears inconsistent with the waiver policy set forth in *Central Hudson*:

> We will generally grant waiver of the 60-day prior notice requirement in the following instances: (1) uncontested filings that do not change rates—such as notices of cancellation when the contract expires by its own terms and the customer does not desire an extension, changes in delivery points, and changes in non-rate terms; and (2) filings that reduce rates and charges—such as rate decreases or new services that provide the customer of a utility with an opportunity to reduce its purchases of other, more expensive service from the same utility.
>
> * * *
>
> We will also generally grant waiver of the 60-day prior notice requirement for filings that increase rates when the rate change and the effective date are prescribed by contract, such as annual rate revisions required by contract to become effective on a date specified in the contract, or a new service filed to comply with requirements of an accepted settlement if the settlement specified the effective date. In these instances, there is a contractual commitment as to the effective date which the Commission has already accepted.
>
> * * *
>
> On the other hand, absent a strong showing of good cause, we will deny requests for waiver of notice of rate increases that do not implement a contract requirement, such as increases in requirements, coordination or transmission rates.

*   *   *

> Lastly, we address filings that provide for new service that is not pursuant to an accepted contract or settlement. When considering requests for waiver related to the provision of new service, we must balance the requirement that utilities promptly file their rates as embodied in the Federal Power Act and the need of utilities to transact business on short notice. Accordingly, we will grant waiver of notice if good cause is shown *and the agreement is filed with the Commission prior to the commencement of service.* We will continue to determine whether an agreement is filed prior to the commencement of service based on the original filing date (unless a filing is a patent nullity).

Central Hudson, 60 FERC at 61,338-61,339 (emphasis added).

Even if FERC had shown how the facts of this case warranted application of its waiver policy under *Central Hudson,* which as NSTAR points out, FERC failed to do, the case law in this circuit is clear. FERC simply has no authority to waive the notice requirement, whether or not it finds good cause, if waiver would give effect to a rate prior to the date by which affected customers had received notice of the rate change. Under the facts of this case, the Commission was without the authority to allow the Mitigation Agreement rates to become effective prior to filing because of the lack of notice.

While the Commission can, for good cause, grant non-consensual waivers to give effect to a filing on less than sixty days' notice, 16 U.S.C. § 824d(d), it cannot give filings an effective date prior to the date of the filing where affected parties have no notice of the new rate. *Columbia Gas Transmission Corp. v. FERC,* 895

F.2d 791, 796 (D.C. Cir.), *cert. denied,* 490 U.S. 907 (1990). The Commission can never give a rate retroactive effect (except in exercising its refund authority under Section 205 of the FPA or Section 4 of the Natural Gas Act ("NGA")). As this Court has explained, "[r]etroactive changes in rates violate the filed rate doctrine, by allowing the collection of rates other than the ones that were on file at the time of purchase, and, *as a general rule,* are not authorized by the Natural Gas Act." *East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 941 (D.C. Cir. 1988) (citations omitted).[1] "The only statutory exception to the rule prohibiting retroactive rate changes," the Court added, "arises in order to accommodate the realities of administrative delay. When a pipeline proposes rate changes under § 4, the Commission is authorized by the Act to suspend the rates for five months pending administrative review." *Id.* at 942.

While this Court has found in certain limited circumstances that a rate may take effect prior to the date of its filing at FERC, the rate must still take effect prospectively from the date affected parties receive notice. In *City of Piqua v. FERC*, 610 F.2d 950 (D.C. Cir. 1979), the Court held that the Commission could use its authority to waive the notice requirements under Section 205(d) of the FPA to allow a rate increase to become effective prior to the date of filing where the

[1] The Supreme Court has noted that cases analyzing the equivalent provisions, including notice provisions, of the FPA and NGA may be cited interchangeably. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).

parties to the contract had agreed on new rate schedules and on the effective date for the new contract. *See City of Piqua*, 610 F.2d at 954. The Court acknowledged the bar on retroactive ratemaking, but concluded that "[i]n this case, two parties agreed on new rate schedules and on the effective date for the new contract. The negotiated rate change was not retroactive; it was prospective from the date of the contract." *Id.* at 954.

In *Columbia Gas Transmission Corp.,* 895 F.2d at 796, the Court elaborated that a key aspect of the rates at issue in *City of Piqua* was that "because of pre-existing agreements between the parties *and the notice that went automatically with them*, those rates were not in fact retroactive." (Emphasis added). This Court explained

> Notice does *not* relieve the Commission from the prohibition against retroactive ratemaking. Instead, it changes what would be purely retroactive ratemaking into a functionally prospective process by placing *the relevant audience* on notice at the outset that the rates being promulgated are provisional only and subject to later revision. This in no way dilutes the general rule that once a rate is in place with ostensibly full legal effect and is not made provisional, it can then be changed only prospectively.

Id. (emphasis added).

Thus, in *Columbia*, the Court rejected the Commission's assertion that *for good cause* it could waive the filed rate doctrine and found that the Commission had failed to provide adequate notice to the purchasers that the price they would be paying for a given period would be subject to adjustment. The Court

unequivocally concluded that where adequate notice of the rate change to the affected parties is lacking, the Commission cannot use its waiver authority to give retroactive effect to unfiled rates, for whatever cause. *See Columbia Gas Transmission Corp. v. FERC*, 895 F.2d at 795-97. The clear rule of these cases is that the Commission's waiver authority to allow rates to become effective *prior to filing* turns on whether the purchasers had notice of the rate revision.[2]

Here, there was no evidence, and FERC made no finding, that the purchasers of the energy sold by suppliers pursuant to the Mitigation Agreements were given notice of the revised rates that they would be charged or an opportunity to contest these rates. While Market Rule 17.3.2.2 refers to generating resources having "special contractual arrangements to ensure their availability when needed to support system reliability and security," purchasers received no notice of such agreements, let alone notice of the rates, terms and conditions of the energy sales made under the Agreements. Quite the contrary, ISO-NE declared in its September 25, 2001 Answer to NSTAR's clarification request that "MRP 17 does not require the filing, *or even the disclosure*, of the results of the ISO's negotiations of bid mitigation agreements." *See Mirant Americas Energy*

[2] FERC followed this Court's holding in *Texas Gas Transmission Corporation*, 56 FERC ¶ 61,409 (1991) (affirming on rehearing that allowing utility's proposed rates to be placed into effect as of a date prior to the filing of the rates would violate the filed rate doctrine and finding that the Commission had not provided notice that the rates might be changed retroactively.)

Marketing, L.P., Docket No. EL01-93-000, "Answer of ISO New England, Inc. to Request for Expedited Clarification" at 2 (September 25, 2001) R.25, J.A. _____ (emphasis added). As NSTAR avers, ISO-NE's policy of not disclosing Mitigation Agreements led parties to assume that no such contracts existed. *See* NSTAR Initial Brief at 7. Moreover, as NSTAR notes, ISO-NE continued to pay rates contained in certain of the Agreements even though the Agreements had *expired*, calling into question whether there could even be any basis for the rate, whether filed or not. *See* NSTAR Initial Brief at 24-25 (citing Compliance Filing of ISO New England Inc., Docket No. EL01-93-005 (February 25, 2002)).

While ISO-NE knew and agreed to the alternate rates, it was not the real party in interest. *See, e.g., NRG Power Marketing, Inc. v. New York Ind. System Operator, Inc.*, 91 FERC ¶ 61,346 at p. 62,165 (2000) (explaining that the New York ISO "acts as an administrator of the spot energy market. In this role, it neither purchases nor sells energy. It facilitates the sale of energy by calculating market clearing energy prices consistent with the market rules and the bids received from buyers and sellers."). The real purchasers are the market participants that paid the increased rates through "uplift" charges that may well be higher than was justified. *See* NSTAR Initial Brief at 27-28. These purchasers did not have notice or an opportunity to contest the rates they would be required to pay. Thus, the filed rate doctrine prohibits prices specified in the Mitigation

Agreements from becoming effective until they are filed. Accordingly, the Commission erred in concluding that it could give retroactive effect to rates and dispense with refunds by "waiving" the 60-day notice requirement under Section 205(d) of the FPA.

II. FERC's Authority and Obligation to Approve the Mitigation Agreement Rates As Just And Reasonable Cannot Be Delegated To ISO-NE.

The Commission compounded its error of trying to waive the notice mandated by the FPA by failing to perform its statutory obligation to ensure that the rates in the Mitigation Agreements are just and reasonable. *See* NSTAR Initial Brief at 32-44. FERC shirked this duty in the instant case by simply pointing (in a later order that is not in the record) to the NEPOOL Market Rules, which, as noted above, permit ISO-NE to enter into Mitigation Agreements. *See Mirant Americas Energy Marketing, L.P.*, 99 FERC (CCH) ¶ 61,003 at p. 61,019 (2002). FERC's response is equivalent to a claim that it has delegated to ISO-NE its authority to ensure just and reasonable rates, and, as NSTAR cogently argues, the Commission has no authority to delegate that responsibility to private parties. *See* NSTAR Initial Brief at 41-44.[3]

[3] NSTAR's brief refers to ISO-NE as a "participant" in the New England energy markets (NSTAR Br. at 32-34), but it is more accurately characterized as an independent operator of those markets. MPUC wholly agrees with NSTAR's central contention, however, that FERC cannot delegate its core responsibility to determine the reasonableness of jurisdictional rates to *any* private party, even to an independent entity such as the ISO.

CONCLUSION

Based on the foregoing, the Court should grant NSTAR's petition for review, vacate the challenged orders and require that FERC comply with the requirements of the Federal Power Act by ordering ISO-NE to issue refunds for rates unlawfully collected in excess of the filed rates.

Respectfully submitted,

Lisa Fink State of Maine Public Utilities Commission 242 State Street 18 State House Station Augusta, ME 04333-0018 (207) 287-1391 (phone)	____________________________ Harvey L. Reiter John E. McCaffrey STINSON MORRISON HECKER LLP 1150 18th Street, N.W., Suite 800 Washington, DC 20036 (202) 785-9100 *Counsel for Maine Public Utilities Commission*

DATED: November 26, 2002

CERTIFICATE OF LENGTH

In accordance with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 32(a)(3)(C), I hereby certify that the foregoing Initial Brief of Intervenor Maine Public Utilities Commission contains 3,094 words (including headings, citations and footnotes).

Respectfully submitted,

____

Harvey L. Reiter
STINSON MORRISON HECKER LLP
1150 18th Street, N.W. Suite 800
Washington, DC 20036
(202) 785-9100

Counsel for Maine Public Utilities Commission

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document via first-class United States Mail on all parties to these proceedings, as listed below.

Dated at Washington, D.C., this 26th day of November, 2002.

____

Harvey L. Reiter
STINSON MORRISON HECKER LLP
1150 18th Street, N.W.
Suite 800
Washington, DC 20036
(202) 785-9100 (phone)
(202) 785-9163 (fax)

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

Stephen L. Teichler
Duane Morris LLP
1667 K Street, N.W.
Suite 700
Washington, DC 20006

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

Howard Haswell Shafferman
Ballard Spahr Andrews & Ingersoll
601 Thirteenth Street, N.W.
Suite 1000 South
Washington, DC 20005-3807

Joseph Edward Stubbs
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, DC 20036-1795

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

Robert Y. Hirasuna
Leonard, Street & Deinard
1701 Pennsylvania Avenue, N.W.
Suite 1045
Washington, DC 20002