

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

Richard Blumenthal, Attorney)	
General for the State of)	
Connecticut,)	
)	
Petitioner,)	
)	
v.)	Case No. 03-1032
)	
Federal Energy Regulatory)	
Commission,)	
)	
Respondent.)	

**RESPONSE OF
MAINE PUBLIC UTILITIES COMMISSION,
MAINE PUBLIC ADVOCATE,
RHODE ISLAND PUBLIC UTILITIES COMMISSION,
INDUSTRIAL ENERGY CONSUMERS GROUP,
NEW HAMPSHIRE OFFICE OF CONSUMER ADVOCATE AND
VERMONT DEPARTMENT OF PUBLIC SERVICE
TO RENEWED EMERGENCY MOTION FOR STAY
OF THE CONNECTICUT ATTORNEY GENERAL**

In accordance with Federal Rules of Appellate Procedure 27(a)(3) and Circuit Rule 27, the Maine Public Utilities Commission (“MPUC”), the Maine Public Advocate, the Industrial Energy Consumers Group, the New Hampshire Office of Consumer Advocate, Vermont Department of Public Service and the Rhode Island Public Utilities Commission (collectively “MPUC”) hereby oppose the Connecticut Attorney General’s Renewed Emergency Motion For A Stay Pending Review (“CTAG Motion”). The Connecticut Attorney General (“CTAG”) has failed to meet any of the requirements for a stay. First, he has failed to demonstrate a likelihood that he will prevail on the merits because the system that he alleges is untested, unjust and unreasonable has been in effect

in PJM Interconnection, L.L.C. (“PJM”) for several years and is now successfully operating in New England. Second, he has failed to show that Connecticut consumers will be irreparably harmed by the continued operation of Locational Marginal Pricing (“LMP”) in New England. Third, the CTAG has neglected even to acknowledge that a stay will harm other consumers by requiring consumers in non-congested areas to continue to subsidize costs in areas like Connecticut that have imposed the cost of their failure to build adequate generation or transmission on customers in other areas of New England. Finally, the CTAG has failed to show that the requested stay is in the public interest. On the contrary, stopping the well functioning new pricing system will cause major market disruptions, impose unnecessary costs on ISO New England (“ISO-NE”) which are passed through to all consumers and will reintroduce a pricing system that the Federal Energy Regulatory Commission (“FERC”) has found to be unjust and unreasonable.

I. PROCEDURAL HISTORY

On July 15, 2002, the New England Power Pool (“NEPOOL”) Participants Committee, joined by ISO-NE, submitted Market Rule 1 and related materials for filing at the Commission. Market Rule 1 implements a revised wholesale market design, commonly referred to in New England as the “standard market design” (“SMD”), the main features of which are locational marginal pricing and a multi-settlement system. The New England SMD is modeled after the market design of PJM and uses software that is substantially the same as that used by PJM. *New England Power Pool*, 100 FERC ¶ 61,287 at P 4 (2002)(“September 20 Order”).

On September 20, 2002, the Commission approved most features of the proposed SMD rule. September 20 Order at P 1. The Commission’s September 20 Order brought New England closer to the end of an arduous and lengthy journey toward the implementation of a locational marginal pricing congestion management system and a day ahead market. This journey began with the Commission’s orders approving wholesale competition in NEPOOL, the creation of ISO-NE and the approval of the NEPOOL market rules. As early as 1998, the Commission required NEPOOL to develop a congestion management system and multi-settlement system. *New England Power Pool*, 85 FERC ¶ 61,379 at 62,462 (1998). NEPOOL continually delayed making the required filing due to the inability of the various stakeholders to reach agreement on key points. Finally, on March 31, 2000, ISO-NE submitted a system proposing (1) the implementation of a system of LMP and (2) the implementation of a day ahead market.

On June 28, 2000, the Commission issued an Order Conditionally Accepting Congestion Management and Multi-Settlement Systems. *ISO New England, Inc.*, 91 FERC ¶ 61,311 (2000) (“June 28 Order”). Among other things, the Commission directed ISO-NE to explore ways to implement LMP more quickly than its projected implementation time frame, which would have had LMP in place by June 2002.

In its September 20 Order, the Commission commended NEPOOL and ISO-NE and other stakeholders for “their extensive efforts in developing standard market design.” It noted that “NEPOOL and ISO-New England have developed a standard market design that is superior to the market design in place in New England now, particularly in its

treatment of congestion management problems through LMP and its superior allocation of congestion costs.” September 20 Order at P 27.

Between September 30, 2002 and the March 1, 2003 implementation date, ISO-NE subjected the SMD software to strenuous testing, has supplied extensive training for market participants and regulators and has provided opportunities for market participants to experiment with the new system. *See*, Press Release of ISO New England, dated February 7, 2003, attached hereto as Appendix A.

On December 20, 2002, FERC issued its Order on Rehearing and Accepting Compliance Filings. *New England Power Pool* 101 FERC ¶ 61,344 (2002) (“ December 20 Order”). In that Order, FERC rejected the CTAG’s Request to delay implementation of LMP in New England. On February 19, 2003, the CTAG filed a Petition for review of the September and December Orders in the United States Court of Appeals for the District of Columbia Circuit, Case No. 03-1032 and on February 20, 2003, the CTAG filed an Emergency Motion for Stay to request that the March 1, 2003 implementation date for SMD in New England be stayed. On February 27, 2003, this Court denied the stay, finding that the CTAG had not shown that it was impracticable to first seek a stay from FERC as required under Fed.R.App.P. 18. The Order allowed the CTAG to renew his motion for stay if FERC denied the stay request. On February 28, 2003, the CTAG filed a motion for stay at FERC and on the same day FERC denied the motion. *New England Power Pool, et al*, 102 FERC ¶ 61,248 (2003) (February 28 Order). In the order denying the stay, FERC found that the harm alleged by the CTAG was “uncertain and

theoretical.” FERC stated:

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 those areas.

February 28 Order at P 11. FERC also found that the CTAG had failed to show that market power could be exercised under the mitigation measures provided under Market Rule 1. *Id.* Further, FERC found that it had earlier concluded that implementing LMP is just and reasonable because it will send more accurate price signals “that will encourage more efficient supply and demand decisions in both the short and long run.” *Id.* at P 12. As to CTAG’s concerns about power pricing in areas experiencing acute transmission congestion, FERC concluded that any injury that could result from the DCA proposal¹ was not imminent because the proposal was still pending at FERC. *Id.* at P 14. Finally, it concluded that the CTAG’s contentions regarding the impact of “RMR” contracts² was without merit; the approved rules provide for Commission review of RMR contracts, and the CTAG had already intervened in one such proceeding and could make a showing there (or in any similar case) that the specific RMR contract at issue will result in unjust and unreasonable rates. *Id.* at P 15.

FERC unequivocally determined that a stay would harm customers in other parts of New England because it would require these customers to continue to subsidize customers in load pockets such as Southern Connecticut and would further harm market

¹ DCA refers to “designated congestion area.” The ISO had proposed to implement a mechanism for pricing electricity in DCAs, but as noted above, the DCA proposal is still before FERC.

² “RMR contracts” refer to contracts entered into with owners of reliability must run units. These contracts help ensure local reliability by allowing the ISO to require these generation facilities to operate “to support

players who made business decisions in reliance upon SMD implementation on March 1st. Finally, FERC found that the stay is not in the public interest in light of actions taken by market participants in reliance on SMD implementation on March 1, 2003 and because it would delay the implementation of a more efficient pricing system.

ISO-NE implemented LMP on March 1, 2003. On March 7, 2003, the ISO issued a Standard Market Design Implementation Report, a copy of which is attached as Appendix B to this response. The report analyzes the first 100 hours of market performance after SMD implementation. The CTAG filed a Renewed Emergency Motion For A Stay Pending Review on March 11, 2003.

II. ARGUMENT

A. Standard for Granting a Stay

In considering whether a stay is warranted, the court considers the following four factors:

1. the likelihood that the party seeking the stay will prevail on the merits;
2. the likelihood that the moving party will be irreparably harmed absent a stay;
3. the prospect that others will be harmed if the court grants the stay; and
4. the public interest in granting the stay.

Wisconsin Gas Company v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985). The CTAG has failed to meet any of these factors and his attempt to halt the operation of a market design that the FERC has repeatedly found to be superior to the one in effect prior to March 1, 2003 should be rejected.

load in a local area.” The specific price negotiated by ISO-NE remains subject to review by FERC as discussed *infra*. Comments of ISO New England are filed in ER02-2330 on July 22, 2003.

1. The CTAG Has Failed To Demonstrate That It Is Likely That A Pricing Methodology That Has Been In Effect In PJM For Several Years Will Be Found To Be Unjust And Unreasonable.

The CTAG has supplied only conclusory statements that the SMD rules are unreasonable because they will allegedly facilitate and encourage the exercise of market power in transmission constrained load pockets. The CTAG further asserts that SMD is “untested.” Neither of these allegations remotely approaches a demonstration of likelihood of success on the merits.

The CTAG first argues that suppliers within a transmission-constrained area may “raise their bids to supra-competitive levels.” This statement misrepresents the SMD rules. The SMD rules contain provisions for mitigating market power in transmission-constrained areas. The Commission described the market mitigation rules as follows:

NEPOOL’s plan takes the approach that as transmission becomes more constrained, opportunities to exercise market power increase, and hence, regulatory oversight should become tighter. Thus, it adopts the tightest restrictions on bidding behavior in chronically constrained areas.

September 20 Order at P 40.³ Thus, contrary to the CTAG assertion, suppliers inside constrained areas are sharply limited in their bidding behavior: their bids will be mitigated (i.e., reduced to levels consistent with their costs) in circumstances where the constraint provides the opportunity to exercise market power. *See also* February 28 Order at P 11.

Next, the CTAG argues that LMP is unjust and unreasonable because a generator within a transmission constrained area is eligible to set the clearing price. According to

³ The Designated Congestion Area (DCA) proposal, which as discussed below will not be implemented on March 1, sought to address concerns by generators that such tight restrictions might discourage new entry of generation in a load pocket.

the CTAG “this would increase the benefits that a company with control over a large share of production in a load pocket would receive if it increased the price paid for the last unit of energy supplied in the load pocket.” CTAG Motion at 12. Again, the CTAG fails to acknowledge that bids within load pockets are subject to mitigation by ISO-NE; thus, to the extent that a supplier seeks to exercise market power (the situation described by the CTAG), ISO-NE has the authority, and obligation, under the rules to ensure that bids (and thus prices) are mitigated. FERC’s order confirms that ISO-NE has such authority and is expected to exercise it. February 28 Order at P 11.

The CTAG further suggests that the combination of LMP with the proposal for safe harbor mitigation levels in designated congestion areas (“DCA”) and ISO-NE’s authority to enter Reliability Must Run (“RMR”) contracts justify delaying SMD. As discussed below, however, there is no likelihood of the DCA proposal becoming effective until after FERC approves the proposal. If that occurs, then the CTAG can try to make his case for a stay on the basis of his DCA claim. Moreover, ISO-NE’s authority to enter into RMR contracts predates the orders on review. The CTAG does not suggest any reason why this authority should now be found to be unjust and unreasonable simply because it is continued as part of SMD implementation.⁴

Finally, the CTAG asserts that Market Rule 1 is unreasonable because it is “untested.” CTAG Motion at 16. This is simply not true. As the FERC noted in its September 20 Order, the New England SMD is based on the PJM market design. In fact,

⁴ There have been previous challenges to ISO’s exercise of its RMR authority in other proceedings. *See, e.g., Sithe New Boston, LLC*, 100 FERC ¶61,106 (2002), settlement approved, 101 FERC ¶ 61,323 (2002). These types of proceedings afford the CTAG the opportunity to address his concerns about the ISO’s exercise of its RMR authority. *See also* December 20 Order at P 33.

ISO-NE, after careful consideration, abandoned its original March 31, 2000 LMP proposal in favor of adopting PJM's design *because* the PJM design and software had been thoroughly tested. Preliminary Report of ISO New England, Inc. Regarding Standard Market Design, attached to Comments of ISO New England, Inc. with Respect to Motion for Technical Conference, filed on March 29, 2001, in Docket No. RM99-2-000 (Appendix B). Further, the Commission has stated that LMP, as adopted by PJM, meets the requirements set forth in Order No. 2000 for a congestion pricing system. *See, PJM Interconnection L.L.C.*, 96 FERC ¶ 61,061 at 61, 235 (2001). A very similar LMP system is also in place in the New York control area. The CTAG's concern that the "ISO's proposed LMP mechanism will allow an increased scope for the exercise of market power in transmission constrained areas of the New England region," simply has not been found by FERC to be an issue in PJM or New York, where similar designs have been in operation for years.⁵ Further, the new pricing system has now been tested and found to be successful in New England. On March 7 2003, the ISO issued a report on the first 100 hours of SMD in New England. The ISO concluded that the "implementation of Standard Market Design (SMD) proceeded smoothly" and that the electricity prices in the first 100 hours of SMD in New England "have been consistent with the cost of fuel and other wholesale electric markets in the Northeast." Standard Market Design Implementation Report at 2 (Appendix B).

⁵ In his renewed motion, the CTAG now argues that FERC was required to provide analysis or evidence "to show that ISO-NE has a similar market structure to PJM, especially with respect to the presence and extent of transmission constrained areas." Renewed Emergency Motion for Stay at 10. The CTAG's effort to transfer his burden of proof to FERC should be rejected. Since the ISO changed its plans in May 2001 from developing a New England specific LMP system and day ahead market, "to the SMD system based on the PJM market model," *ISO New England, Inc.*, 100 FERC ¶ 61,130 at P 2, there has been no question that the ISO-NE system is based on the PJM market model and software. If the CTAG seeks to argue that there are substantive differences in the two systems that would be likely to lead to a conclusion that New England SMD is "untested," he should provide more than bare allegations to support his claim.

2. The CTAG's Vague Allegations of Injury Do Not Meet the Test for Irreparable Harm And, In Any Event, Are Outweighed by the Harm to Other Ratepayers that Would Result from a Stay.

This Court has stated several requirements for the showing of irreparable harm:

First, the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief 'will not be granted against something merely feared as liable to occur a some indefinite time;' the party seeking the injunctive relief must show that 't]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm.'

* * * *

Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.

Wisconsin Gas, 758 F.2d at 674. (citations omitted) (emphasis in original).

As noted above, CTAG alleges three types of harm: (1) that implementation of LMP pricing will facilitate the exercise of market power, (2) that the ISO's mitigation measures within and outside designated congestion areas (DCAs) are insufficient to mitigate exercises of market power and (3) that there are inadequate constraints on the RMR contracts into which the ISO can enter. (CTAG Motion at 15-19). The first alleged harm does not remotely meet the test of irreparable injury and the latter two alleged harms are not even products of the orders on review.

With respect to the first alleged harm, FERC's orders explain that the purpose of LMP pricing is to ensure that the costs of transmission congestion are properly reflected and that those parties responsible for congestion pay the resulting costs.⁶ September 20 Order at PP 71-72. The CTAG fails to (1) show how this change in cost allocation methodology increases opportunities for the exercise of market power and (2) recognize that where there otherwise would be an opportunity for generators in load pockets to exercise market power, the mitigation rules give ISO-NE the authority to eliminate such opportunities. The ISO-NE's DCA proposal has not been implemented and will not be implemented until FERC issues an order allowing ISO-NE to implement the DCA proposal. *See* February 28 Order at P 14 (any harm from the DCA proposal is not imminent because ISO will not implement the proposal until FERC issues an order on the pending DCA filings). As to the harm said to arise from RMR contracts, ISO-NE's ability to enter into RMR contracts predated the orders under review. *See* September 20 Order at P 51. Moreover, parties objecting to those RMR contracts have the ability to complain about their terms to FERC and the CTAG is in fact doing just that in a pending proceeding. February 28 Order at P. 6.

On the other hand, ratepayers in other areas would suffer actual and substantial harm if the stay is granted. FERC has already determined that the system in effect before March 1st, which spread the costs of supplying power in transmission constrained areas to

⁶ As a practical matter, the ISO's implementation report does not substantiate claims of dramatically high congestion costs in Southwest Connecticut. Connecticut's real time LMPs during the first four days of LMP implementation were actually slightly lower than the price at the hub (a set of nodes chosen to be relatively free of congestion). Implementation Report at 2 (Appendix B). In the day ahead market, Connecticut's average LMP for the four-day period was also slightly below the hub price. In fact, even two weeks after implementation, Connecticut costs have not risen due to congestion costs (even though costs in other regions such as Northeast Massachusetts did increase slightly due to congestion). *See* Weekly Market Summary attached hereto as Appendix C.

all of New England, is unjust and unreasonable and it expressed its concern as early as June 2000 about the impact of delay in implementing LMP. In the June 28 Order, the Commission stated,

In the First Order, the Commission stated that, given the increase in congestion in New England and significant planned generation additions, it is essential that the ISO implement a new CMS that relies on market mechanisms to establish price signals that will serve to allocate constrained transmission to the highest valued users and give generation an incentive to locate in appropriate areas. Given the circumstances in New England, socialization of congestion costs does not send the correct price signals to transmission customers or market participants for the siting of new transmission facilities or new generation. We are disappointed with the ISO's current projection that full implementation is 16 to 24 months away, especially in light of the substantial delay that has elapsed in filing the market redesign. As noted earlier, we encourage the ISO to explore ways to achieve faster implementation.

91 FERC ¶ 61,311 at 62,072. Thus, contrary to the CTAG's glib assurance that returning to the status quo *ante* does not result in any harm, FERC has recognized that the system that LMP replaced is unjust and unreasonable⁷ and that implementation of LMP in New England is just and reasonable. FERC recently reaffirmed that LMP in New England is just and reasonable:

As to the implementation of LMP pricing in New England, the Commission expressly found 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.' An inevitable consequence of moving from a pricing model in which the costs of higher cost generation dispatched because of transmission constraints are socialized across

⁷ Since 1999, ratepayers in non-congested regions such as Maine, Rhode Island and New Hampshire have paid millions of dollars of transmission congestion uplift incurred by load pockets in Southwestern Connecticut and Northeast Massachusetts. See letter from ISO-New England to the Massachusetts Attorney General, attached as Appendix D.

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.

February 28 Order at P 12. The CTAG's motion, if granted, would force New England to terminate a pricing system that FERC has found to be just and reasonable and return to one that FERC has rejected as unreasonable and inefficient.

Halting, even for a brief period, the successful operation of SMD would have two other adverse effects. First, ISO-NE deliberately chose a March 1 implementation date so that it could fix any possible implementation flaws before the summer peak season begins, at which time power systems are more stressed and the impact of those flaws might be considerably greater. *See* ISO-NE Press Release, dated February 6, 2002 attached as Appendix A. Second, market participants who buy and sell power in advance have made business decisions based on the change to the new pricing system. *See* February 28 Order at P 17. Further, although Connecticut LMPs have not noticeably increased under SMD, prices for consumers in other areas, such as Maine, New Hampshire and Rhode Island have generally decreased. *See* Weekly Market Summary for March 9-15 at 3 (Appendix C). Consumers in states such as Maine are finally seeing lower costs resulting from siting new generation in their state; a stay would not only be a step away from a cost (and benefit) pricing methodology, but will eliminate these long-awaited benefits for consumers in low cost states.

3. The Public Interest Would Not Be Served by Granting the CTAG's Renewed Motion for Stay

The Commission issued its Order on Rehearing on December 20, 2001, more than three months ago. Yet the CTAG chose to wait until a week before the date for SMD implementation to file his Stay Motion. Having failed in his last minute effort to delay SMD implementation, the CTAG wants this Court to stop the operation of SMD now that it is successfully underway. The public interest would not be served by allowing the CTAG to disrupt the successful operation of the new market design. Responsible parties such as ISO-NE and stakeholders across the region have worked diligently for several years to implement SMD, and finally began operating the system on March 1, 2003 after prolonged vetting and testing. Now that the new system is working, halting its implementation even for a short period would make a mockery of the hard work done by the ISO and others to ensure the smooth and timely implementation of SMD. Finally, halting SMD, even for a short period, would likely make it more difficult for ISO-NE to fix any possible implementation flaws before peak demands of spring and summer exacerbate any negative impacts from such flaws.

The CTAG argues that this Court must stop SMD to avoid projected increased prices for Connecticut consumers. However, to the extent that prices to Connecticut consumers increase under SMD, these increased costs reflect the cost, sans subsidies, of providing power to congested areas. Providing these price signals is exactly what SMD is designed to do and what it should do. Under SMD, electricity prices will be set by the forces of supply and demand in the local market and will not be artificially suppressed in congested areas by subsidies imposed on consumers outside those areas. Furthermore, congested areas will no longer be able to ignore the costs of their congestion, but will be

required to bear those costs or take the steps necessary to alleviate the congestion. This is how markets are supposed to work. Indeed, CTAG's objection appears to be not really with SMD, but with the very notion of a competitive market for electricity. And he is raising that objection not only at the wrong time but in the wrong forum.

III. CONCLUSION

For all the reasons above, the MPUC respectfully requests that the CTAG Renewed Emergency Motion For A Stay Pending Review be denied.

Respectfully submitted,

Dated: March 24, 2003

By: _____
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CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure, I hereby certify that I have this 24th day of March, 2003 served a copy of the foregoing Response to Renewed Emergency Motion for Stay by first-class mail, postage prepaid, upon each party to this proceeding, as listed below.

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