UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Investigation of Terms and Conditions of	)	Docket No. EL01-118-000
Public Utility Market-Based Rate Authorizations	)	

LATE-FILED COMMENTS OF THE NEW ENGLAND CONFERENCE OF PUBLIC UTILITIES COMMISSIONERS ON PROPOSED REVISIONS TO MARKET-BASED RATE TARIFFS AND AUTHORIZATIONS

Pursuant to Rule 212 and the Commission's June 26, 2003 order requesting further comments on its November 2001 proposal to revise market-based rate tariffs in light of changes it was making to its proposal "to identify more precisely and comprehensively …. the transactions and practices that would be prohibited under sellers' market-based tariffs and authorizations,"[1] the New England Conference of Public Utilities Commissioners (NECPUC) hereby submits these supplemental comments and requests permission to file its comments one day out of time[2]. As discussed below, the changes proposed by the Commission respond, in large measure, to the concerns expressed by NECPUC. These comments, therefore, focus on two issues: (1) clarification regarding the time limits on the initiation of private complaints and (2) the need for effective remedies when the violating seller's conduct causes harm to the market beyond any excessive charges the seller may have collected.

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[1] *Investigation of Terms and Conditions of Market-Based Rate Authorizations,*103 FERC ¶ 61,349 (2003)("June 26 Order") at ¶ 6.

[2] Due to the national NARUC conference it was not possible to obtain approval from NECPUC members in time to meet yesterday's filing deadline. NECPUC submits, however, that no party would be prejudiced by this filing one day out of time.

BACKGROUND

In January, 2002, NECPUC filed comments on FERC's initial proposal in Docket No. EL01-118 to include specific refund conditions in market-based rate schedules for instances where sellers had engaged in market manipulation or the exercise of market power. The comments addressed three concerns relevant to the proposal contained in the Commission's June 26 Order: (1) that the tariff changes should apply to all parties holding market based rate authority, irrespective of whether they sell into markets operated by an RTO or ISO; (2) that any tariff changes should not limit the Commission's already extant power to order relief where sellers had acted inconsistent with their filed rates and (3) that the desire for market certainty notwithstanding, remedies should be available to customers where the rates charged by sellers were the product of collusion. NECPUC noted, in particular, the need for a tariff provision that would make collusion a tariff violation. Without a provision of that type, NECPUC warned there might not be any recourse for collusive overcharges --even under the antitrust laws for price fixing -- because the *Keough* doctrine limits relief in price-regulated markets to prospective, injunctive type remedies and because at least one court has concluded that this doctrine should be applied to *market-based* rates because they are still technically *regulated* rates.[3]

[3] *See* , e.g., January 7, 2002 Initial Comments of NECPUC at p. 5 n. 4. There, NECPUC noted that "under the *Keough* doctrine, the Supreme Court has held that while collusive conduct by companies subject to the Interstate Commerce Act is not immune from the antitrust laws, private remedies for price fixing are limited to injunctive relief. *See Keough v. Chicago & Northwestern R. Co*., 260 U.S. 156 (1922). NECPUC also noted that, while there is a split among the circuits, the First Circuit has applied the *Keough* doctrine to the electric industry, indicating that even the existence of a rate regulatory regime under the FPA may foreclose monetary damages for Sherman Act violations even where the regulated rate consisted of a market-based rate. *See Town of Norwood, v. FERC*, 202 F.3d 408, 418-19 (1st Cir. 2000).

COMMENTS

The Commission's proposed rule largely addresses NECPUC's critical concerns. As urged by NECPUC, FERC would extend the tariff condition to all sellers, irrespective of whether they participate in an RTO or ISO-run market. June 26 Order at ¶ 41. In this regard, the Commission correctly observes, "organized, bid-based markets, even those with approved market monitoring and mitigation procedures, remain vulnerable to anticompetitive behavior and the exercise of market power." *Id.* The proposal also expressly defines market manipulation, under Market Behavior Rule # 2, to include "collusion with another party for the purpose of creating market prices at levels differing from those set by market forces." June 26 Order at ¶ 19. The express inclusion of collusive conduct among the practices barred under FERC's proposal adds needed clarity to the proposed tariff and addresses NECPUC's concerns about the *Keough* limits on relief under the antitrust laws. There are several respects, however, in which the Commission's proposal is either unclear or provides an insufficient remedy.

<u>Time limits on Complaints</u>. Like FERC, NECPUC was concerned that the types of remedies available for tariff violations be measured in light of, and weighed against, the salutary effects of market certainty. FERC's chosen approach is twofold in nature. First, it proposes to place a time limit on complaints "initiated by market participants and not those initiated by the Commission." June 26 Order at ¶ 40. Second, FERC has stated that the time limit – "60 days after the end of the calendar quarter in which the violation

is alleged to have occurred" (*Id.* at ¶ 38) -- will not begin to run until "the time when the market participant knew or should have known of the behavior." *Id.*

Commission-initiated Complaints. With respect to the first aspect of the time limit, it is unclear what FERC means by complaints "initiated by the Commission." NECPUC is in full agreement that FERC should not disable itself from prosecuting tariff violations with an artificial time limit, particularly in light of its observation in several fuel clause cases that it "could not conceive of a reasonable basis" to limit the period for correcting filed rate violations. *See, e.g., Cities and Villages of Albany and Hanover, Ill. et al.*, 61 FERC ¶ 61,037 at 61,186 (1992); *North Carolina Electric Membership Corp., et al. v. Carolina Power & Light Co.*, 57 FERC ¶ 61,332 (1991). The proposal does not explain, however, how the Commission distinguishes between complaints it has initiated and those initiated by market participants. Nor does it explain how it would treat allegations of tariff violations brought to its attention by state or federal governmental authorities that are not market participants (e.g, the FTC, the Justice Department, state consumer advocates, state attorneys general or state commissions).

NECPUC recommends that the Commission make the following clarifications. (1) A complaint would be considered to be initiated by a market participant if the market participant filed a formal complaint using the Commission's complaint procedures. (2) On the other hand, if a market participant brought a concern about a possible violation to the Commission's attention through the Commission's hotline or other informal means and the Commission then decided to initiate a formal investigation, that proceeding would be considered Commission-initiated. In other words, a Section 206 investigation can be initiated by the Commission regardless of how the potential violation comes to its attention. (3) Finally, the Commission should clarify that if an allegation of tariff violation were brought to its attention by a non-market participant state or federal governmental unit, whether informally or in a formal complaint, the Commission would treat the complaint as if the Commission had initiated the complaint on its own and no time limit would apply.

Commencement of Clock. The Commission's proposal to place a time limit on complaints commencing 60 days after the end of a calendar quarter in which a market participant knew or should have known that a tariff violation occurred is conceptually sound. It balances the desirability for market certainty with recognition that market participants need a reasonable time to prepare complaints once they learn of the existence of a violation. NECPUC, however, urges one clarification and one minor modification to the proposal.

It is a virtual certainty that, in cases of collusion, market participants will not know of the violation until some time after it has occurred. And, since collusive activity is meant to be concealed, market participants, by definition, "should not have known" of the collusion until its existence became public. NECPUC, accordingly, asks the Commission to clarify that in such instances the clock will not run from the date of the violation. Instead, NECPUC urges the Commission to adopt a rebuttable presumption that the complainant did not know and should not have known of the conspiracy or collusion until after its details had become known to the public.

NECPUC also urges one minor change to the time period in which a timely complaint can be filed. As drafted, the Commission's proposed time period can run anywhere from 61 to 180 days after a violation should have been known to a market participant. The time a market participant has to submit a complaint depends entirely on when, within a calendar quarter, the violation occurs. The wide variation created by the Commission's approach seems unnecessarily arbitrary – a market participant that uncovers a violation on the last day of the calendar quarter has only one third the amount of time to prepare a complaint as a market participant who happens to find evidence of a violation on the first day of the calendar quarter. Accordingly, NECPUC recommends that FERC give all market participants 180 days from the date they know, or should have known of a violation, to submit their complaints.

<u>Scope of Remedy</u>. In his concurrence to the June 26 Order, Commission Massey raises a concern that FERC's proposed remedy would only require the violators to return the amounts that they had overcollected as a product of their unlawful activity. "Market manipulation," he observed, "can raise the market prices paid by all market participants and collected by all sellers." *Id.* "Simply requiring that bad actors disgorge their individual profits does not make the market whole because all sellers received the unlawful price caused by the manipulation." *Id.* While it would be unfair to seek recovery from sellers who were not in violation of their tariffs, Massey raised the option of requiring the violating sellers to make the *market* whole -- a remedy that he points out had been applied before, as part of the settlement approved in *Fact-Finding Investigation into Possible Manipulation of Electric and Natural Gas Prices*, 102 FERC ¶ 61,108 (2003).

NECPUC shares Commissioner Massey's concerns. The problem is best illustrated in the case of collusion. One form of collusive conduct is rotating bids, i.e., a would-be seller stays on the sideline to inflate the prices earned by other sellers, with the promise that other sellers will do likewise at the next bidding opportunity. In other word, the conspirators “take turns” withholding supply. In such a case the party withholding supply may not have benefited from the higher resulting market price and so would have *no* refund obligation. That seller would profit only when it benefited from the agreement of other sellers to withhold the next time. Accordingly, NECPUC supports Commissioner Massey’s suggestion that the Commission include as a possible remedy the requirement that a violator make the market whole for increases in market price resulting from its tariff violations.

Alternatively, NECPUC urges the Commission to consider a remedy akin to that it has adopted for a seller’s failure to file a market-based rate schedule with proper notice. In such cases the Commission has ordered the seller to refund the time value of the charges collected for the period the service was provided without a rate filing, plus the difference between a cost-based rate and the rate it charged. *Prior Notice and Filing Requirements Under Part II of the Federal Power Act,*64 FERC ¶61,139 at 61,980 (1993). A variant on that remedy – a refund of the time value of the charges imposed unlawfully, plus disgorgement of any unlawful profits, might be appropriate. The key point is that simply requiring sellers who are caught to return the overcharges (and allowing them to keep the amount that could have been properly charged), as the

Commission currently proposes, in unlikely to have a sufficient deterrent effect, as it creates no real incentive for offending sellers to desist from improper conduct.

Respectfully submitted,

NEW ENGLAND CONFERENCE OF
PUBLIC UTILITIES COMMISSIONERS

/s/ Harvey L. Reiter

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Its Attorneys

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 29th day of July, 2003.

/s/ Harvey L. Reiter

Harvey L. Reiter