UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Bangor Hydro-Electric Company	**)**	
	)	
v.	**)**	**Docket No. EL01-92-000**
	)	
ISO New England Inc.	**)**	

REQUEST FOR REHEARING OF THE MAINE PUBLIC UTILITIES COMMISSION AND BANGOR HYDRO-ELECTRIC COMPANY

Pursuant to Rule 713, the Maine Public Utilities Commission (MPUC) and Bangor Hydro-Electric Company (collectively MPUC), hereby request rehearing of the Commission's December 21, 2001 order in the above-captioned proceeding, *Bangor Hydro-Electric Co. v. ISO New England, Inc.*, 97 FERC ¶ 61,339 (2001) (December 21, 2001 Order). As discussed below, the Commission erred in failing to enforce NEPOOL's Market Rules, resulting in charges to consumers that exceeded the filed rates.

SPECIFICATION OF ERRORS

1. The Commission erred in concluding that the clearing prices in question did not violate the filed rate even though they were the result of an implementation error within the meaning of Market Rule 15.1.a.i. and produced market clearing prices in conflict with Market rule 2.3.1. In so acting, moreover, the Commission departed without acknowledgment or explanation from its own precedent.
2. Even if ISO New England had no power to correct its admitted implementation errors, the Commission erred by failing to exercise its authority and meet its obligation to ensure that the charges paid by consumers are consistent with the filed rate.

3. The Commission erred in treating protection of price certainty to the seller as a factor that could permissably be considered in application of the filed rate doctrine.

ARGUMENT

A. The Commission Erred In Concluding That The Clearing Prices In Question Did Not Violate The Filed Rate Even Though They Were The Result Of An Implementation Error Within The Meaning Of Market Rule 15.1.A.I. And Produced Market Clearing Prices In Conflict With Market Rule 2.3.1. In So Acting, Moreover, The Commission Departed Without Acknowledgment Or Explanation From Its Own Precedent.

The Commission found that the formula prescribed by the market rules "in conjunction with ISO-NE's new dispatch software resulted in, as ISO-NE concedes, an implementation error, because the dispatch software algorithm treated the forecast demand for the next five minutes as a firm target, causing very expensive units to be dispatched to meet the five-minute forecast demand and thereby producing volatility." The Commission also acknowledged that the implementation error "gave rise to clearing prices that were, in instances, inconsistent with the "Dispatch Principles" of Market Rule 2.3.1 (i.e., the dispatch software did not minimize the system energy production costs. " December 21 Order at 62,589 . These implementation errors resulted in increased prices to Bangor Hydro and its customers of about $1 million, according to Bangor-Hydro. December 21 Order at 62,587.

However, the Commission maintains that in spite of these implementation errors, the clearing price was calculated according to the filed rate. Apparently, the Commission reasons that since the clearing price was calculated (albeit erroneously) at five-minute intervals, as required by Appendix 5-C, the implementation errors resulting from the malfunctioning software, which resulted in high cost units being unnecessarily dispatched, do not violate the market rules. This conclusion is illogical. That one requirement--the five-minute interval calculation--was met does

not cure the miscalculation of the clearing price.[1] The heart of the filed rate is the formula that actually produces the market price "*using correct inputs.*" *NRG Power Marketing, Inc v. New York Independent System Operator, Inc.*, 91 FERC ¶ 61,346 at 62,165 (2001) (*NRG)* (emphasis added). "Any other result is not an approved rate." *Id.* Thus when an implementation error occurs, the resulting price is not consistent with the file rate. *Id.*

Further, the Commission's analysis is inconsistent with Market Rule 15, which defines "Implementation Error" as (in relevant part):

> i) the design or implementation of software that is *inconsistent with the Market Rules and Procedures, including, in the energy market, prices calculated in real time that do not reflect the appllication of the Market Rules to the resources actually dispatched.*

Market Rule 15.1.a.i. (emphasis added). An implementation error by its very terms involves a misapplication or inconsistency with the market rules. Thus, the finding that implementation errors occurred and the determination that these implementation errors were not violations of the market rules cannot be reconciled.

Finally, the Commission erred by failing to follow its own precedent that requires correction of prices that resulted from a misapplication of the market rules. The Commission here faced virtually the same issue in *NRG, supra*, and reached the opposite of its conclusion in *NRG.*

[1] The illogic of this rationale is made even clearer if one changes the facts slightly to that dispatch is manually rather than electronically calculated. Under the Commission's rationale, if an operator *manually*, but erroneously, dispatches a high cost unit when a lower cost unit is available but does so at five-minute intervals, there would be no remedy for the erroneous dispatch. The Commission should not adopt a view of compliance with market rules that is not only illogical but results in consumers paying unjust and unreasonable rates resulting from computational errors. Further such a view of compliance with the filed rate is inconsistent with the requirement that the filed rate doctrine must be strictly construed. *Cities of Anahiem, et al. v. California Independent System Operator Corp.*, 95 FERC ¶ 61,197 at 61, 687 (2001) (the filed rate doctrine is strictly construed and "deviation from it is not permitted upon any pretext.") quoting *Maislin Industries, U.S. Inc. v. Primary Steel, Inc., et al,*. 497 U.S. 116 at 127 (1990), *quoting, Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 at 97 (1915).

NRG involved a complaint against the New York Independent System Operator, Inc. (NYISO) alleging that the NYISO reduced energy clearing prices "in violation of its own rules," and therefore in contravention of the filed rate doctrine. 91 FERC at 62,163. There, as here, the ISO had permitted charges to be assessed that, as a result of "undetected software flaws," (*Id.*) were inconsistent with its pricing methodology. And, as in this case, the ISO's market rules placed a time limit on its ability to make price corrections.

Unlike this case, however, the ISO took actions to correct the prices charged. NRG's complaint was that the corrections took place after the period for correction had passed, actions it said were inconsistent with the filed rate. *Id.* This Commission emphatically rejected that argument. It stated:

> …..To comply with the provisions of the tariff, the formula must be applied as intended using the correct inputs. Any other result is not an approved rate.
>
> It is undisputed that the recalculation of the energy prices which are the subject of this complaint was the result of computational errors in the calculation of LBMP in several time periods caused by faulty computer software, which resulted in the originally posted energy prices not reflecting the market bidding. Specifically, in calculating the originally posted real time energy prices the SCD used by the NYISO ignored a number of low cost bids thus resulting in posted prices that exceeded the prices needed to clear the market. The originally posted LBMP's did not accurately reflect the short run marginal cost of real time energy nor did they minimize the total Bid Production Costs of meeting the system load as required by the market rules[2]. Moreover, the generators that set the erroneously high price were never actually dispatched to a level corresponding to that price. In other words, the originally posted prices did not even accurately reflect the actual dispatch of energy. As a result, those posted energy prices were not the correct results of the prescribed formula using the actual market data. For the recalculation, the actual energy bids that were submitted to the NYISO during those periods were used as well as the correct formula to calculate energy market clearing prices. Thus, the corrected and reposted prices represented the actual result of the market bidding and the only approved tariff rates.

[2] In NRG, the units that set the high price were not dispatched. However, since the units if they had been dispatched would have received their bids, this was not a deciding factor.. Market Rule 15 has a similar provision to ensure that dispatched entities receive their bid price if the clearing price as recalculated is below the bid price. MR 15. 4

Id. at 62,165-66. FERC added, directly contrary to its holding in this case, that the time limit for ISO computational corrections did not prevent NYISO from correcting the incorrect clearing prices.

> *Under these circumstances involving the erroneous calculation of a formula rate, the NYISO did not have to rely on any temporary authority or interim procedures to correct incorrect energy clearing prices.* In *ISO New England, Inc.*, the Commission held that consistent with the filed rate doctrine, the ISO has the authority, and is required to correct all prices that do not reflect operation of the ISO market rules (which are the filed rate). *This ensures that both buyers and sellers are protected if the ISO makes computational errors and thus fails to fully follow the market rules.* The NYISO has that same authority and is required to promptly correct its errors. In the instant case, the original posted prices did not reflect the operation of the NYISO's market rules. *If the original prices were allowed to stand, buyers would be required to pay higher prices than required by the market rules.*

Id., **(**emphasis added). *See also ISO New England*, 90 FERC ¶ 61,141 at 61,425 (Consistent with the filed rate doctrine, the ISO already has the authority, and is required to correct all prices that do not reflect operation of the NEPOOL market rules (which are the filed rate)).

B. Even If ISO New England Had No Power To Correct Its Admitted Implementation Errors, The Commission Erred By Failing To Exercise Its Authority And Meet Its Obligation To Ensure That The Charges Paid By Consumers Are Consistent With The Filed Rate.

The Commission asserted that it may not change the clearing price because such an action goes "against the express design of Market Rule 15, because [Market Rule 15] provides a specific, brief time window for ISO-NE to make any decisions to mitigate clearing prices." December 21 Order at 62,590. Even if, contrary to the Commission's holding in *NRG, supra*, ISO New England were barred by Rule 15(4) from correcting its conceded computational errors, however, the Commission itself has the power and obligation to make such corrections to ensure that charges to consumers comport with the filed rate. Both MPUC and Bangor Hydro made this

point in their pleadings. Although the Commission recounts this in its December 21 Order at 62,588, it does not give the argument any consideration.[3]

The Commission's authority and obligation to correct prices to ensure that they are consistent with the filed rate is not, and cannot be restricted by a provision in the market rules. The filed rate doctrine is intended to ensure that customers pay and sellers receive payments of the rate specified in the tariff. In *Cities of Anaheim* the Commission stated:

> Regardless of what the ISO intended the tariff language to be, *the filed rate doctrine mandates that the ISO charge its customers the actual rate specified in its tariff*. Courts have strictly construed the doctrine. "Deviation from it is not permitted under any pretext . . . .Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed."

95 FERC at 61,687, *quoting, Maislin,* 497 U.S. at 127. The Commission should reject a tariff interpretation that prevents it from meeting its obligation under the filed rate doctrine. Further, the Commission should not now countenance a tariff interpretation that strips it of the power to enforce that same market rule by implication especially where, as here, its interpretation would lead to unjust or unreasonable results. *See, e.g., Texas Eastern Transmission Corp.*, 49 FERC ¶61,395 at 62, 458 (1989) (rejecting tariff interpretation that would produce unjust and unreasonable result); *Texas Gas Transmission Corp.*, 70 FERC ¶61,088 at 61,254 (1995) (same); *Indicated Shippers v. Natural Gas Pipeline Company of America***,** 89 FERC ¶61,142 at 61,416 (1999)(same).

[3] This failure in itself provides a basis for rehearing. *See Nor Am Gas Transmission Co. v. FERC,* 148 F.3d 1158, 1165 (D.C. Dir. 1988).

C. The Commission's Decision to Give Weight to Price Certainty As An Equitable Factor Conflicted With Its Legal Obligations Under The Filed Rate Doctrine.

In contrast to the above-cited decisions which look at the harm to market participants from having to pay a rate calculated in a manner inconsistent with the market rules, the Commission here appears to base its decision, in part, on its concern that correcting the clearing prices would be "fundamentally unfair" to generators "who responded in good faith to ISO-NE's dispatch instructions with the expectation that they would be paid their bid price." December 21 Order at 61,590. Consideration of what the Commission characterized as fairness to generators who received the erroneous clearing prices, however, was improper, as equitable considerations have no role in enforcement of the filed rate doctrine. [4] *Maislin Industries, U.S., Inc. v. Primary Steel, Inc., et al.*, 497 U.S. 116 at 126-7 (1990) (filed rate doctrine found "to forbid equitable defenses to the collection of the filed rate."); *See* also *Public Utilities Commission of the State of California v FERC*, 894 F.2d 1372, 1384 (D.C. Cir. 1990). The public policy underlying the filed rate doctrine is not to provide certainty that the prices of completed transactions cannot later be amended but to provide certainty that the filed rate will always be charged, even where settled expectations are upset as a result.[5] *Maislin Industries, U.S., Inc., supra* at 126-7 (1990).[6] *See*

[4] Had the ISO corrected, the implementation errors within the timeframe set forth in the rule, the erroneously dispatched generators would have received their bids and the difference between the bids and the clearing prices would be paid by all NEPOOL participants as uplift. Market Rule 15.4 Thus, an argument could be made that the Commission could still order such a result consistent with Market Rule 15.4.

[5] FERC suggests that the strict time limit on ISO-NE's ability to correct pricing errors was intended to provide increased price certainty, and that ordering refunds of the charges at issue would run counter to the purpose of the limitation. December 21 Order at 10. One could as easily conclude that the limits on the ISO's powers were intended to limit *its* discretion to make unilateral tariff corrections and to leave responsibility for tariff enforcement where it traditionally lies, with FERC itself. *See ISO New England*, 90 FERC at 61,425 (Under the proposed rule, ISO does not have the discretion to correct prices simply because it does not like the results) The latter explanation, moreover, is the only one consistent with the purpose of the filed rate doctrine.

[6] The circumstances in *Maislin* were particularly harsh. There, the Supreme Court upheld the right of a bankruptcy trustee to rebill shippers for the difference between the rates they had negotiated and the defunct carrier's filed rate –

also, Cities of Anaheim, et al. v. California Independent System Operator Corp., 95 FERC ¶ 61,197 at 61,687 (2001).

The Commission therefore erred by elevating price certainty and participants' expectation that they would receive the clearing price over its policy of strict adherence to the filed rate. *See Cities of Anaheim, et al v. California Independent System Operator*, 95 FERC ¶ 61,197 at 61,687 (2001) (the filed rate is to be construed strictly). *See also Public Utilities Commission of the State of California v FERC*, 894 F.2d 1372, 1384 (D.C. Cir. 1990). The public policy underlying the filed rate doctrine is not to provide certainty that the prices of completed transactions cannot later be amended but to provide certainty that the filed rate will always be charged, even where settled expectations are upset as a result.[7] *See Maislin Industries, U.S., Inc. v. Primary Steel, Inc., et al.*, 497 U.S. 116 at 126-7 (1990)[8]. *See also, Cities of Anaheim, et al. v. California Independent System Operator Corp.*, 95 FERC ¶ 61,197 at 61,687 (2001). Thus, as FERC has elsewhere stated, it "could not conceive of a reasonable basis" for limiting the period during which violations of the filed rate doctrine can be corrected. *Cities and Villages of Albany, and Hanover, III. et al.* 61 FERC ¶ 61,197 at 61,186 (2001). The Commission's "equity" rationale flies in the face of court precedent and its own prior pronouncements.

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years after the transactions had ended. The Court however, as noted above, interpreted the filed rate doctrine "to forbid equitable defenses to the collection of the filed rate." Id. at 127.

[7] FERC suggests that the strict time limit on ISO-NE's ability to correct pricing errors was intended to provide increased price certainty, and that ordering refunds of the charges at issue would run counter to the purpose of the limitation. December 21 Order at 10. This explanation is purely speculative and, as noted, does not explain why the Market Rules were not expressly written to forbid *any* corrections that were not undertaken by the ISO within 75 minutes. One could as easily conclude that the limits on the ISO's powers were intended to limit *its* discretion to make unilateral tariff corrections and to leave responsibility for tariff enforcement where it traditionally lies, with FERC itself. The latter explanation, moreover, is the only one consistent with the purpose of the filed rate doctrine.

[8] The circumstances in *Maislin* were particularly harsh. There, the Supreme Court upheld the right of a bankruptcy trustee to rebill shippers for the difference between the rates they had negotiated and the defunct carrier's filed rate – years after the transactions had ended. The Court however, interpreted the filed rate doctrine "to forbid equitable defenses to the collection of the filed rate." Id. at 127.

In any event, even if there were some ambiguity in the Market Rules, ie, a question whether limits on the ISO should be construed as limits on the Commission, established rules of tariff construction require that "any doubt as to the meaning should be resolved against the filing utility." *Jersey Central Power & Light Co. v. FERC*, 589 F. 2d 142, 145 (3d Cir. 1979). The importance of that principle is underscored where, as here, the Commission's interpretation will allow wholesale sellers – utilities under the FPA – to charge rates inconsistent with Market Rule 2.3.1 solely because undisputed implementation errors escaped the ISO's immediate attention. This has led to what the Commission itself characterizes as erroneous, ie, unreasonable, prices. Had the tariff *expressly* limited the Commission's authority to enforce Market Rule 2.3.1, such a limit would have been loudly protested by MPUC and likely would have drawn objections from FERC itself.[9] In fact, the order approving the tariff changes expresses exactly the opposite intent. *ISO New England,* ¶ 90 FERC at 61,425. The Commission should not now countenance a tariff interpretation that strips it of the power to enforce that same market rule by implication especially where as here its interpretation would lead to unjust or unreasonable results. *See, e.g*., *Texas Eastern Transmission Corp*., 49 FERC ¶61,395 at 62, 458 (1989) (rejecting tariff interpretation that would produce unjust and unreasonable result); *Texas Gas Transmission Corp*., 70 FERC ¶61,088 at 61,254 (1995) (same); *Indicated Shippers v. Natural Gas Pipeline Company of America***,** 89 FERC ¶61,142 at 61,416 (1999)(same).

[9] See, e.g., *Niagara Mohawk Power Corp***.,** 97 FERC ¶61,018 at 61,060 (2001) (settlement would not be interpreted to preclude FERC from conducting its own Section 206 investigation); *High Island Offshore System*, 18 FERC ¶61,274 at 61,570 (1982)(same); *Michigan Wisconsin Pipe Line Co***.,** 25 FERC ¶61,082 at 61,260 (1982)(holding that settlement provision that would limit future claims, not only by parties, but "by the Commission itself," was "inappropriate").

CONCLUSION

For the reasons stated above the MPUC requests that the Commission grant its rehearing request.

Respectfully submitted,

MAINE PUBLIC UTILITIES COMMISSION

By:_____

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
Morrison & Hecker L.L.P.
1150 18th Street, N.W., Suite 800
Washington, D.C. 20036
(202) 785-9100

Its Attorneys

BANGOR HYDRO-ELECTRIC COMPANY

By:_____

Michael E. Small
Wendy N. Reed
WRIGHT & TALISMAN, P.C.
1200 G Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 393-1200 (phone)
(202) 393-1240 (fax)

Its Attorneys

Dated: January 18, 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 18th day of January, 2002.

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Harvey L. Reiter

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