UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Mirant Americas Energy Marketing, L.P., *et al.*) Docket No. EL01-93-009

REQUEST FOR REHEARING OF THE MAINE PUBLIC UTILITIES COMMISSION

Pursuant to Rule 713, the Maine Public Utilities Commission hereby requests rehearing of the Commission's December 23, 2003 Order On Remand in the above-captioned proceeding. *Mirant Americas Marketing, L.P., et al*., 105 FERC ¶ 61,359 (2003) (Rehearing Order). As discussed below, the Commission's Remand Order granting waiver of the 60 day prior notice provision violates the rule against retroactive ratemaking by giving effect to rates prior to the date affected market participants received actual notice of the change in rates.

SPECIFICATION OF ERRORS

The Commission erred in the following respects:

1. The Commission violated the rule against retroactive ratemaking by giving effect to rate increases prior to the date that affected customers had actual notice of those increases.

2. The Commission erred in asserting that its previously unexplained waiver of the FPA's prior notice requirements was based on the "extraordinary circumstances" standard articulated in *Central Hudson I*; such an interpretation of its extraordinary circumstances standard is unreasonable on its face, since there are no circumstances under which, absent prior actual notice, FERC can give effect to a rate change prior to the date of the filing.

3. Since the Commission's decision denying refunds was based exclusively on its illegal grant of a prior notice waiver, it acted arbitrarily in denying refunds.

BACKGROUND

Market Rule 17 of the New England Power Pool Market Rules, as the D.C. Circuit Court noted in its opinion vacating this Commission's order in *Mirant Americas Energy Mktg., L.P.*, 97 F.E.R.C. ¶ 61,360 (Dec. 21, 2001), "does not set forth rate changes or effective dates; instead it permits the New England ISO to enter into mitigation agreements, the terms of which are to be determined by the New England ISO." *NSTAR v. FERC*, No. 02-1047, (D.C. Cir. April 28, 2003) (*Remand Opinion*), Slip. Op. at 2. This case concerns FERC's ability to give effect, by waiver of the Federal Power Act's prior notice provisions, to Market Rule 17 mitigation agreements not filed with FERC until long after service thereunder commenced. In its opinion vacating and ordering a remand of FERC's earlier waiver order, the D.C. Circuit stated, *inter alia*, that "the Commission's citation to *Central Hudson* neither explained, nor itself supported, the Commission's waiver decision." *Remand Opinion, S*lip. Op. at 2. Focusing on this passage, FERC concludes (1) that the fault the Court found with its order was FERC's failure to explain what portion of *Central Hudson* it had relied on and (2) that what it should have better explained was that the waiver qualified as an "extraordinary circumstances" waiver under *Central Hudson I and II*. Remand Order, P. 11; P. 13 n. 28. The extraordinary circumstances, it explains, are that (1) the mitigation agreements at issue are required to compensate sellers for generation "needed to assure reliability" at mitigated prices (Order on Remand, P. 14) and (2) that, because of their "very nature," these agreements "do not always lend themselves to being filed 60 days before service commences." *Id.* at P. 15.

As to its refusal to order refunds, the Commission explains that, since it has found good cause for waiver of the prior notice requirements, "time-value refunds are not called for." *Id.* at 11.

ARGUMENT

I. The Commission Violated The Rule Against Retroactive Ratemaking By Giving Effect To Rate Increases Prior To The Date That Affected Customers Had Actual Notice Of Those Increases.

There is no dispute, and never has been a dispute, that the Commission has permitted the mitigation agreements at issue in this case to take effect prior to the date the agreements were actually filed. In fact, the Commission granted a prior notice waiver to give these agreements a retroactive effective date before it ever saw them, since the agreements were not even filed for months after the waiver had been granted. There are only two circumstances, however, under which the Commission is permitted to give rates an effective date earlier than the filing date, and the "extraordinary circumstances" described in the Remand Order are not among them.

The rule against retroactive ratemaking is plain. As the D.C. Circuit stated last November in *upholding* another FERC order, "FERC's good cause waiver authority does not permit it to make a retroactive rate adjustment." *Consolidated Edison Co. of NY, Inc. v. FERC,* 347 F.3d 964, 969 (D.C. Cir. 2003). As the Court went on to note:

> Courts have recognized only two circumstances in which a rate adjustment may take effect prior to a section 205 filing: when parties have notice that a rate is tentative and may be later adjusted with retroactive effect, or when they have agreed to make a rate effective retroactively.

Id. The *Con Edison* decision was simply a reiteration of settled law under *Columbia Gas Transmission Corp. v. FERC,* 895 F. 2d 791 (D.C. Cir. 1990). *Con Edison,* 347 F.3d at 969. The Commission itself had correctly applied that law in the decision upheld in *Con Edison*. As the Court observed, "[a]lthough FERC found good cause to waive the 60-day notice period, thus allowing the bid cap to become effective the day after NYISO's filing, it concluded that it had no authority to grant retroactive relief for the two months prior to the filing. . . ." *Con Edison,* 347 F.3d at 969. Not only did FERC apply the proper analysis in the *Con Edison* case, its brief to the

Court preceding the *Remand Opinion* in *this* case also acknowledged that its prior notice waiver authority could not be used to give a rate retroactive effect absent actual notice to affected parties. *See NSTAR v. FERC*, No. 02-1047, Brief of Respondent FERC at p. 28.

Inexplicably, FERC's remand order, issued more than a month after the *Con Edison* decision, ignores the *Con Edison* decision and its own representations to the Court regarding the limitations on its waiver authority. Instead, the Commission announces, contrary to the *Con Edison* decision, that it can give rate changes an effective date prior to the date of filing in "extraordinary circumstances" which, as noted above, it defines as (1) the need to compensate sellers for power supply required to maintain reliability and (2) the fact that some agreements "do not always lend themselves to being filed 60 days before service commences." *Remand Order* at P. 15**.**

The problem with this rationale, of course, is that the "extraordinary circumstances" FERC relies upon are not any of the two legally cognizable grounds for making a retroactive rate adjustment. Simply put, the Commission does not assert, nor could it plausibly assert, that NSTAR or other affected parties either (1) had notice that the mitigation agreements made their existing rates tentative and subject to later retroactive adjustment or (2) had *agreed* to make the rate effective retroactively. In fact, the Commission's remand order expressly eschews the argument that waiver was either based on the agreement of the parties or the proposition that Market Rule 17 provided the requisite prior notice. Noting the D.C. Circuit's statement in the *Remand Opinion* that *Central Hudson* permits "waiver for 'filings that increase rates when the rate change and the effective date are prescribed by' a contract already on file with the Commission," and that "Market Rule 17 does not set forth rate changes or effective dates," *Remand Order* at P. 8 (quoting Remand Opinion at 2), the Commission asserts that the *Central*

Hudson rationale cited by the Court "*was not the basis for the Commission granting waiver in this case*." *Remand Order* at P. 13. (emphasis added).[1] The circumstances make clear therefore, that on rehearing the Commission should simply confess its error and reverse its decision to give the mitigation agreements retroactive effect.

II. The Commission Erred In Asserting That Its Previously Unexplained Waiver Of The FPA's Prior Notice Requirements Was Based On The "Extraordinary Circumstances" Standard Articulated In *Central Hudson I*; Such An Interpretation Of Its Extraordinary Circumstances Standard Is Unreasonable On Its Face, Since There Are No Circumstances Under Which, Absent Prior Actual Notice, FERC Can Give Effect To A Rate Change Prior To The Date Of The Filing.

The dispositive nature of *Con Edison* aside, the Commission's explanation is not even a plausible interpretation of its earlier orders. The Commission asserts in its *Remand Order* that while it "could have been clearer" (Remand Order at P. 13 n. 27) about the grounds for its prior notice waiver, its basis, all along, for granting the waiver was not the *Central Hudson* conditions recited by the Court, but the "extraordinary circumstances" test described elsewhere in *Central*

[1] The Commission's conclusion that the *Central Hudson* waiver conditions cited by the Court in the *Remand Opinion* could not justify waiver were well-founded. In the *Con Edison* case, as here, there was an issue raised as to the effective date that could be given to market mitigation measures by the independent system operator. As the court observed in the *Con Edison* case, the market rules did not provide the requisite actual notice to market participants that their rates were tentative and subject to retroactive adjustment:

> NYISO argues that this case falls under the notice exception. It points to its Market Monitoring Plan and Temporary Extraordinary Procedures as sources of notice to suppliers that rates might be adjusted retroactively. Although the MMP authorizes NYISO to undertake remedial measures to correct problems associated with the exercise of market power, NYISO points to nothing in the MMP suggesting that such measures may have retroactive effect. *See* MMP Order, 89 F.E.R.C. at 61,601–02. We thus see no way that the MMP could have provided the requisite notice to market participants.

Con Edison, supra, 347 F.3d at 970. Although the effect in *Con Edison* was to preclude a retroactive rate *reduction* proposed by ISO, the court's rationale is equally applicable to the retroactive rate increase proposed by ISO-NE. Market Rule 17 does not provide the requisite "notice to market participants" either. (Of course the mitigation agreements likewise could not have provided the actual notice. Their existence was not even known to affected market participants until after they were executed and their terms were not known until long after the waivers were granted.)

Hudson. The Commission surely is entitled to deference in interpreting its own orders, but its assertion on remand is simply not plausible for two reasons. First, the Court had sound grounds to believe that the Commission was relying on the *Central Hudson* rationale quoted in the Court's opinion and not an "extraordinary circumstances" test; the Commission told it so. *See NSTAR v. FERC*, No. 02-1047, Brief of Respondent FERC at pp. 25-6. In fact, while the Commission says that its asserted earlier reliance on the "extraordinary circumstances" rationale "could have been clearer," it offers no citation to any of its earlier orders in which it even mentioned that test. Second, *Central Hudson*, by definition, cannot give the Commission power to grant prior notice waivers that violate the rule against retroactive ratemaking. Therefore, FERC's assertion that the *Central Hudson* "extraordinary circumstances" test could justify an effective date for the mitigation agreements that preceded their filing constitutes a reading of *Central Hudson* that is inconsistent with the Federal Power Act.[2]

III. Since The Commission's Decision Denying Refunds Was Based Exclusively On Its Illegal Grant Of A Prior Notice Waiver, It Acted Arbitrarily In Denying Refunds.

The Commission offers as its only reason for denying customers refunds in this case that "waiver of the 60-day prior notice requirement was properly granted and, as result, time value refunds are not called for." *Remand Order,* P. 9. That the Commission offers no other explanation for denying refunds is plain enough. As it also explains, "If the utility files late (i.e.,

[2] The *Central Hudson* orders, in any event, do not remotely suggest that "extraordinary circumstances" were intended to include cases in which the Commission could ever give effect to a rate change prior either to agreement of the affected parties or their receipt of actual notice. On the contrary, the Commission states its reference in *Central Hudson I* to "extraordinary circumstances" in starkly negative terms: "Absent extraordinary circumstances, we will *not* grant waiver of notice when an agreement for new service is filed on or after the day service has commenced." *Central Hudson I*, 60 FERC ¶ 61,106 at 61,339 (1992) (emphasis added). It then goes on to reject the argument that good cause could exist, *even in the case of an agreement between the parties*, where the asserted reason is that the agreement "could not be negotiated and prepared for filing in time to comply with the 60-day prior notice requirement." *Id. See also, Central Hudson II*, 61 FERC ¶ 61,089 at 61,356 (1992). In *this* case, by contrast, FERC now claims that, even in the absence of an agreement between the affected parties, it can give retroactive effect to a rate filing on grounds that the filings "do not always lend themselves to being filed 60 days before service commences." Remand Order at P. 15.

gives the Commission less than sixty days notice) and the Commission does not find good cause warranting a waiver, the Commission requires it to refund to its customers the *time value* of the revenues collected for the entire period that the rate was collected before the agreement was made effective." *Remand Order* at P. 10.[3] (emphasis added)

In this case, as MPUC has shown above, the prior notice waivers granted by the Commission flout settled law "holding that FERC's good cause waiver authority does not permit it to make a retroactive rate adjustment." *Con Edison, supra* at 347 at 969. Therefore, to paraphrase the Commission's *Remand Order*, "waiver of the 60-day prior notice requirement was [*not*] properly granted and, as result, refunds *are* [] called for." Remand Order, P. 9 (emphasis added).

[3] The Commission's order refers to the denial of "time value" refunds and paraphrases its order in *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at p. 61,975, *clarified*, 65 FERC ¶ 61,081 (1993)(*Prior Notice*). In limiting its reference to "time value" refunds, however, the Commission inadvertently omits a critical qualifier contained in the *Prior Notice* order, namely that the refund is limited to the time value of "an *otherwise* just and reasonable cost-based rate." *Id*. In other words, refunds would also include any difference between the unfiled rate and a cost-based rate the Commission determined to be just and reasonable. As the Commission explained in describing the "similar" refund remedy for unfiled market-based rates, the seller refund would not be limited to the time value of the unfiled charges. "In addition, the utility will be required to refund all revenues resulting from the difference, if any, between the market-based rate and a cost-justified rate." *Prior Notice*, 64 FERC at 61,780. MPUC assumes that the reference to "time value" refunds was simply imprecise. If, as MPUC has shown, the waiver was unlawful, then customers would be entitled to *all* appropriate refunds under the *Prior Notice* order, not simply time value refunds.

CONCLUSION

For the reasons stated above, the Commission should reverse its *Remand Order* and direct that affected customers be provided refunds as required by Commission policy.

Respectfully submitted,

MAINE PUBLIC UTILITIES COMMISSION

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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 21st day of January 2004.

/s/ Harvey L. Reiter