

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

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

**NOTICE OF INTERVENTION AND COMMENTS OF
THE MAINE PUBLIC UTILITIES COMMISSION**

In accordance with Rule 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.214 (2000), and the Commission’s June 20, 2001 Notice of Complaint, the Maine Public Utilities Commission (“MPUC”) hereby submits its notice of intervention and comments in the captioned proceeding. As set forth below, the MPUC supports the June 15, 2001 complaint of Bangor Hydro-Electric Company (“Bangor Hydro”) which requests the Commission to issue an order directing ISO New England Inc. (“ISO-NE” or “the ISO”) to recalculate Energy Clearing Prices (“ECPs”) that resulted from a design flaw in the ISO’s Electric Dispatch software implemented on December 9, 2000.

**I.
NOTICE OF INTERVENTION**

The MPUC designates the following persons for service and communications with respect to this matter and requests that their names be placed on the official service list for this case:

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Under Maine law, the MPUC is the state commission designated by statute with jurisdiction over rates and service of electric utilities in the state. *See* 35-A M.R.S.A. § 101 *et seq.* Accordingly, the MPUC hereby provides its notice of intervention pursuant to Rule 214(a)(2), 18 C.F.R. § 385.214(a)(2) (2000).

II. COMMENTS

The MPUC supports Bangor Hydro's request for a Commission order directing ISO-NE to recalculate erroneous ECPs occurring from December 9, 2000 through late March 2001. The Commission clearly has the authority, and, indeed, the obligation, to order the ISO to recalculate prices because Bangor Hydro has shown that the ECPs set by the ISO during this period were often inconsistent with the filed rate, *i.e.*, the Market Rules. The public interest in price finality does not trump the public interest in ensuring adherence to filed, just and reasonable rates. Commission action to correct overcharges resulting from misapplication of the filed rate is especially important, moreover, during the transition to a competitive wholesale market to ensure that consumer confidence is maintained.

As the MPUC has explained in its pending complaint in Docket No. EL00-99-000, the filed rate doctrine requires that regulated utilities charge only the filed rate. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-79 (1981). The filed rate can take two forms:

it can be reflected in a formula or as a stated rate. *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 577-79 (D.C. Cir. 1990). In either case, if the rate charged is inconsistent with the rate on file, the Commission is empowered to order that a correction be made, irrespective of when the incorrect charge is discovered. *Public Service Co. of New Hampshire*, 6 FERC ¶ 61,299 (1979); *Cities and Villages of Albany and Hanover, Ill. et al.*, 61 FERC ¶ 61,037 at 61,186 (1992). Indeed, the Commission has stated that it “could not conceive of a reasonable basis” for limiting the period during which violations of the filed rate can be corrected. *Cities and Villages of Albany, supra* at 61,186 (citing *North Carolina Electric Membership Corp., et al. v. Carolina Power & Light Co.*, 57 FERC ¶ 61,332 (1991)).

In the NEPOOL markets, the market rules constitute the mechanism to ensure that the clearing prices are the product of lawful market forces, and thus can be relied upon to conclude that prices are “just and reasonable.” See *New England Power Pool*, 90 FERC ¶ 61,141 at 61,425 (2000) (Market Rules are the filed rate); see also *Farmers Union Central Exchange v. FERC*, 734 F.2d 1486, 1509 (D.C. Cir. 1984). If the clearing price is determined in a manner inconsistent with the market rules, then the clearing price must be corrected to ensure that it is consistent with the filed rate (*i.e.*, the market rules). In fact, the Commission has already spoken to the ISO’s authority and obligation to make after-the-fact corrections to the clearing price if that price does not reflect the operation of the market rules: “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).” *New England Power Pool*, 90 FERC at 61,425 (emphasis added). Similarly the Commission has determined that the NYISO does not have to rely on its temporary authority or interim

procedures to correct incorrect clearing prices. Citing its earlier statement that ISO-NE has both the authority and the obligation “to correct all prices that do not reflect operation of the ISO market rules (which are the filed rate),” the Commission stated:

The NYISO has that same authority [as ISO-NE] 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.*

NRG Power Marketing, Inc. v. New York Independent System Operator, Inc., 91 FERC ¶ 61,346 at 62,166 (2000) (emphasis added).

Here, recalculation of the ECPs is required because they were set in a manner inconsistent with the filed rate. According to Bangor Hydro, on March 29, 2001, the ISO provided notification that its Electronic Dispatch software is flawed because, in certain situations, the software does not minimize system energy costs as required by Market Rule 2.3.1. *See* Bangor Hydro Complaint at 4. Thus, there does not appear to be any dispute that at certain times, a computer software flaw resulted in the ISO setting prices that were inconsistent with Market Rule 2.3.1, and thus inconsistent with the filed rate. Under the authority discussed above, the Commission is obligated to ensure that consumers such as Bangor Hydro do not pay more than the filed rate by ordering recalculation of the ECPs consistent with the Market Rules and directing that any resulting refunds or surcharges be made. *See, e.g., NRG Power Marketing, Inc. v. New York Independent System Operator, Inc.*, 91 FERC at 62,166.

Importantly, Market Rule 15 does not in any way restrict the Commission’s authority to order recalculation of the prices consistent with the filed rate. Market Rule 15 governs *the*

ISO's ability to recalculate incorrect prices resulting from implementation errors. That Rule does not, and could not, restrict the Commission's authority to adjust prices that were charged inconsistent with the filed rate. In this case, a software flaw resulted in ECPs that were established contrary to the requirement of Market Rule 2.3.1 that dispatch be performed so as to minimize system energy costs. Accordingly, the Commission should order adjustments.

In fact, as explained by Bangor-Hydro, the ECPs set by the ISO are also inconsistent with the filed rate because, according to the Complaint, the ISO did not adhere to the requirements of Market Rule 15. Where, as here, there is an implementation error, Market Rule 15 imposes upon ISO-NE a duty to correct market clearing prices that "deviate from prices that would be derived absent" the implementation error. Although Market Rule 15 also specifies that the ISO may only take such corrective action if it posts notice within seventy-five minutes after an implementation error occurs, Bangor Hydro has adduced evidence indicating that the ISO-NE was aware of the admitted software implementation errors and failed to provide the requisite notice and adjustments under Market Rule 15 for all the implementation errors. The MPUC submits that, implicit in Market Rule 15, is an obligation on the ISO to post notice and take corrective action where it has reason to believe that an implementation error has occurred. Failure to fulfill this obligation results in the ECP's being set in a manner inconsistent with the Market Rules.

In closing, the MPUC notes that Bangor Hydro's complaint is similar in many respects to the August 17, 2000 complaint filed by the MPUC in Docket No. EL00-99-000. In that proceeding, the MPUC asserts that the ISO calculated a \$6000/MWh market clearing price for several hours on May 8, 2000 in contravention of Market Rules 4 and 5 and Operating

Procedure 9, and, therefore, in violation of the filed rate. The MPUC also asserted that the ISO further diverged from the filed rate by failing to mitigate the improper clearing price pursuant to its authority under Market Rule 17. The MPUC explained in its complaint that, because the excess clearing price resulted from a failure to apply the filed rate, recalculation of the price and refunds are required to be made. To date, the Commission has not acted on the MPUC's complaint in Docket EL00-99-000. The MPUC urges the Commission to act favorably on the MPUC's complaint and Bangor Hydro's complaint in the instant docket to make clear that calculation of market clearing prices in a manner inconsistent with the filed rate will not be condoned, and will be subject to adjustment by the Commission.

WHEREFORE, for the reasons set forth above, the MPUC hereby submits its notice of intervention in this proceeding and urges the Commission to grant the complaint filed by Bangor Hydro.

Respectfully submitted,

MAINE PUBLIC UTILITIES
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Dated: July 5, 2001

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 5th day of July, 2001.

John E. McCaffrey

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