

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

Richard Blumenthal, Attorney General for the State of Connecticut, the Connecticut Office of Consumer Counsel, the Connecticut Municipal Electric Energy Cooperative, and the Connecticut Industrial Energy Consumers

Docket No. EL05-150-000

**MOTION TO INTERVENE AND COMMENTS OF THE
ELECTRICITY CONSUMERS RESOURCE COUNCIL (“ELCON”),
MULTIPLE INTERVENORS, AND THE
NEPOOL INDUSTRIAL CUSTOMER COALITION (“NICC”)**

Pursuant to Rules 211 and 214 of the Federal Energy Regulatory Commission (“FERC”), and in accordance with the Commission’s September 13, 2005 “Notice of Complaint Requesting Fast track Processing” and the September 15, 2005 “Notice of Extension of Time,” the Electricity Consumers Resource Council (“ELCON”), Multiple Intervenors, and the NEPOOL Industrial Customer Coalition (“NICC”) (collectively, “Industrial Consumers”) move to intervene in the above-noted docket in support of the September 12, 2005 complaint and requested relief of the Connecticut Attorney General, Connecticut Office of Consumer Counsel, Connecticut Municipal Electric Energy Cooperative, and Connecticut Industrial Energy Consumers (“Connecticut Representatives”).

SUMMARY OF COMMENTS

Just and reasonable rates cannot result from Market Rule No. 1. The Rule allows generators to charge the higher of market-based rates or cost-based rates with the result that

high-cost generators charge cost of service compensation and thus receive compensation above what they would receive in a competitive region-wide market while lower-cost variable operating units charge what the market will bear and thus collect profits in excess of cost of service.

Industrial Consumers are on record advocating a return to cost of service when markets become dysfunctional or unduly punitive to consumers because of the exercise of market power or other market dysfunctions.¹ Extending this relief to a general market failure is just and reasonable because it is a hold-harmless policy that can afford the Commission the opportunity to reassess the situation in its Organized Markets and to determine whether the hybrid SMD/capacity market construct remains viable. Industrial Consumers support the complaint of the Connecticut Representatives and urge the Commission to provide the requested relief.

COMMENTS ON THE CONNECTICUT REPRESENTATIVES' COMPLAINT

1. Dysfunctionality of ISO-NE Markets

On September 12, 2005, the Connecticut Representatives filed a Complaint and Request for Order (“Complaint”) to amend the ISO New England Inc.’s (“ISO-NE”) Market Rule 1 with regard to the compensation of electric generation facilities in Connecticut, subject to specific remedial conditions detailed in their complaint.

Connecticut Representatives allege that the FERC-approved wholesale market design and ISO-NE’s rules for implementing that market design:

¹ See, e.g., Motion to Intervene and Comments of the Electricity Consumers Resource Council, Docket No. ER97-4166-015 (“Southern Company Services, Inc.”), August 30, 2004 at 3n.

Taken as a whole ... are ‘lose-lose’ for consumers and ‘win-win’ for generators, in violation of the FPA [Federal Power Act]. Consumers are forced to pay the most that can possibly be paid to those generators choosing a ‘regulated’ pricing system and the most that can possibly be paid to generators choosing a ‘market’ pricing system—all in violation of the Commission’s fundamental mission and purpose to protect consumers from unjust and unreasonable rates.

Complaint at 3.

The Connecticut Representatives’ Complaint is the latest—and perhaps the most compelling—evidence of growing disenchantment with the state of wholesale electric market restructuring in the United States. In April 2005, ELCON published a Special Report, *Problems in the Organized Markets*, in which we assert that certain essential preconditions are absent in an Organized Markets such as New England and that the “market that is emerging is a contrived, hybrid market with final prices paid by consumers set by a complex combination of short-term auctions (with supplier-only offers) and regulatory ratemaking.”²

The Connecticut Representatives’ Complaint documents the critical flaws and dysfunctions that are preventing the New England market from becoming an effective and efficient competitive marketplace. Because ISO-NE has deemed that all generation in Connecticut is needed for reliability, generation owners are able to choose between compensation based upon the “higher of” market-based rates or cost-based rates.³ This situation

² Electricity Consumers Resource Council, *Problems in the Organized Markets*, April 2005, at 8. At 10-15, the report identifies the following preconditions to wholesale competition: (1) nondiscriminatory ISO/RTO stakeholder process, (2) energy-only spot markets with fixed cost recovery in liquid forward markets, (3) access to market by price-responsive loads, (4) market monitoring and comprehensive rules for market power mitigation, (5) adequate transmission infrastructure, and (6) federal-state consensus on the objectives of restructuring.

³ Complaint at 8. The consequence of this “higher of” right is shown in Attachment 1-1 to the Complaint, which shows that 57 out of 61 generating units are receiving compensation or seeking to receive compensation outside the market. Three of the four units that remain in the market are earning estimated returns on equity of 123, 44 and 53%, respectively. Complaint Attachment 2-1.

results in an outcome where total costs recovered from consumers exceed both what would be expected in a truly competitive market in which all generators are in the market bidding their marginal costs and what would be expected under the traditional regulatory pricing regime in which all generators are subject to cost of service. This result is not a market, but a serious market failure. Such rates simply cannot be just and reasonable under the Federal Power Act.

ISO-NE's solution to this problem is its well-known LICAP proposal, which is premised on the assumption that if enough money is thrown at a problem, the problem will be fixed.⁴ The Connecticut Representatives say enough is enough—end-use consumers should not be required to bail out the flawed market design. The Connecticut Representatives propose that ISO-NE's Market Rule 1 be amended to require all electric generation in Connecticut henceforth to be compensated on a cost-of-service basis until the Commission “is able to make and support affirmative findings that re-introduction of market-based revenue streams is consistent with the just and reasonable standards of the Federal Power Act.” Complaint at 35.

2. **FERC May Not Charge Market-Based Rates Where Markets Are Not Workably Competitive**

In interpreting Section 205 of the Federal Power Act, the courts have stated that the overriding purpose of prohibiting unjust and unreasonable rates and charges is “to protect consumers from exorbitant prices and unfair business practices.”⁵ The primary goal of the FPA is “to protect consumers against exploitation.” FPC v. Hope Natural Gas, 320 U.S. 591, 610 (1944).

⁴ The Connecticut Representatives and their counterparts in the other five New England States oppose the LICAP proposal.

⁵ Public Systems v. FERC, 606 F.2d 973, 979, n.27 (D.C. Cir. 1979).

Courts have stated that to be “just and reasonable,” rates must fall within a “zone of reasonableness” where they are neither “less than compensatory” to producers nor “excessive” to consumers.⁶ Rates must fall within a “zone of reasonableness” which is “bounded at one end by the investor interest against confiscation and at the other by the consumer interest against exorbitant rates.”⁷

When the Commission authorizes market-based rates, it is under a continuing duty to ensure that the relevant market remains sufficiently competitive to prevent unjust and unreasonable prices.⁸ See California ex rel. Lockyer v. FERC, 383 F.3d 1006, 1012-13 (9th Cir. 2004). Where markets are not sufficiently competitive, market-based rates may not be authorized.

In Farmers Union, the court rejected the Commission’s reliance on a cost-based cap for oil transportation rates, because the Commission did not have “empirical proof” that market forces could be relied on to keep prices at reasonable levels in the pipeline industry. In Elizabethtown Gas Co. v. FERC,⁹ the D.C. Circuit upheld a market-based rate for the sale of natural gas, indicating that “*when there is a competitive market* the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a “just and reasonable” result.” See Louisiana Energy and Power Authority v. FERC, 141 F.3d 364, 365 (D.C. Cir 1998) (applying Elizabethtown to analysis of market-based tariffs charged by wholesale sellers of power).

Market-based rates simply cannot be justified in ISO-NE under this precedent.

⁶ Farmers Union Central Exchange v. FERC, 734 F.2d 1486 (D.C. Cir. 1984), cert denied, 469 U.S. 1034 (1984).

⁷ Jersey Central Power & Light v. FERC, 810 F.2d 1168 (D.C. Cir. 1987).

⁸ Process Gas Consumers v. FERC, 177 F.3d 995 (D.C. Cir. 1999) (“FERC must remain attuned to the status of the affected market vis-à-vis monopoly and competition.”).

⁹ 10 F.3d 866 (D.C. Cir. 1993).

3. **Statement of Issues**

- 1) Whether ISO-NE's Market Rule No. 1 for Compensation of Electric Generating Facilities in Connecticut violates the "just and reasonable" standard of the Federal Power Act by authorizing every generator in Connecticut to charge the higher of either cost of service or market-based rates of electricity in prices charged for electricity under Reliability Must-Run Contracts. Hope Natural Gas and Farmers Union cases discussed supra.
- 2) Whether market-based rates can be charged in the absence of a demonstration that the market at issue is workably competitive under the precedent of Lockyer, Farmers Union, Tejas, and Elizabethtown cases discussed in this intervention.

PROCEDURAL MATTERS

Industrial Consumers note that the September 13, 2005 Notice of Complaint in this docket indicated the deadline for comments was October 3, 2005. However, the September 15, 2005 Notice of Extension of Time sets the deadline "for filing answers to the Complaint" as October 20, 2005. If it was not the Commission's intention to extend the deadline to all intervenors, Industrial Consumers respectfully move to intervene out of time in this proceeding. There would be good cause for late intervention due to the confusion engendered by the Notice. Moreover, the proceeding is at an early stage.

DESCRIPTION OF INTERVENORS

ELCON is the national association of industrial consumers of electricity organized to promote the development of coordinated and rational federal and state policies that will assure an

adequate, reliable, and efficient electricity supply for all users at competitive rates. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. The member companies of ELCON consume approximately five percent of all electricity in the United States. Many members also generate some of their power requirements. ELCON members have major manufacturing facilities in all regions of the country including Connecticut and New England.

Multiple Intervenors is an unincorporated association of approximately 55 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State, including the service territories of all of the State's major regulated electric utilities. Some members of Multiple Intervenors also have facilities located in the New England area. Multiple Intervenors have an interest in the outcome of this proceeding not only because it will directly affect members who participate in the New England power market, but also because the resolution is likely to have an impact in the neighboring NYISO and potentially in other regions of the country as well.

NICC is an *ad hoc* coalition of industrial customers with manufacturing facilities located in New England, including Connecticut. NICC members consume large quantities of electricity, and electricity comprises a substantial part of many NICC members' manufacturing costs. As end-use customers participating in New England's power market, NICC members will be directly impacted by the Commission's disposition of the Complaint. NICC, through two of its members, actively participates in the NEPOOL stakeholder process. Accordingly, good cause exists to grant NICC full-party status in this proceeding.

NOTICES AND COMMUNICATIONS

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Comments were today mailed to parties on the service lists of these proceedings by U.S. mail, postage prepaid, or by electronic mail service, where available.

Dated at Washington, D.C., this 20th day of October 2005.

/s/ Jennifer Morrissey

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