**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**Nos. 05-1362, *et al.***

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**NSTAR ELECTRIC & GAS CORPORATION, *ET AL.*,**
**PETITIONERS,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,**
**RESPONDENT.**

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**ON PETITION FOR REVIEW OF ORDERS OF THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

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# BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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**COMMISSION**
**WASHINGTON, D.C. 20426**

**OCTOBER 2, 2006**

## CIRCUIT RULE 28(a)(1) CERTIFICATE

### A. Parties and Amici

All parties appearing before the Commission and this Court are listed in Petitioners' Rule 28(a)(1) certificate.

### B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *Mirant Americas Energy Marketing, L.P*, 105 FERC ¶ 61,359 (December 23, 2003);

2. *Mirant Americas Energy Marketing, L.P*, 106 FERC ¶ 61,243 (March 9, 2004); and

3. *Mirant Americas Energy Marketing, L.P*, 112 FERC ¶ 61,056 (July 11, 2005).

### C. Related Cases:

This case is on remand as ordered in *NSTAR Electric & Gas Corp. v. FERC*, 64 F. App'x 786, 2003 U.S. App. Lexis 8078 (D.C. Cir. April 28, 2003), in which this Court reviewed and vacated the following orders: *Mirant Americas Energy Marketing, L.P. v. ISO New England Inc.*, 96 FERC ¶ 61,201 at 61,857, *order on*

*clarification and reh'g*, 97 FERC ¶ 61,108, *order on clarification and reh'g*, 97 FERC ¶ 61,360 (2001). There are no related cases pending judicial review.

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October 2, 2006

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|---|---|
| April 9, 2003 Order | *ISO New England, Inc.*, 103 FERC ¶ 61,018 (2003) |
| Commission | Federal Energy Regulatory Commission |
| Companion Rehearing Order | *ISO New England Inc.*, 112 FERC ¶ 61,057 (2005) |
| Compliance Order | *Mirant Americas Energy Marketing, L.P.*, 106 FERC ¶ 61,234 (2004) |
| FERC | Federal Energy Regulatory Commission |
| FPA | Federal Power Act |
| ISO New England | ISO New England, Inc. |
| Mirant I Orders | *Mirant Americas Energy Marketing, L.P. v. ISO New England Inc.*, 96 FERC ¶ 61,201 at 61,857, *order on clarification and reh'g*, 97 FERC ¶ 61,108, *order on clarification and reh'g*, 97 FERC ¶ 61,360 (2001) |
| *NSTAR I* | *NSTAR Electric & Gas Corp. v. FERC*, 64 F. App'x 786, 2003 U.S. App. Lexis 8078 (D.C. Cir. April 28, 2003) |
| Rehearing Order | *Mirant Americas Energy Marketing, L.P.*, 112 FERC ¶ 61,056 (2005) |
| Remand Order | *Mirant Americas Energy Marketing, L.P.*, 105 FERC ¶ 61,359 (2003) |
| Southern Proceeding | Southern Company Services, Inc., Docket No. ER00-2998 |

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## STATEMENT OF THE ISSUES

The issues presented for review are:

1. Whether the Federal Energy Regulatory Commission ("FERC" or "Commission") reasonably determined that good cause existed to waive the prior filing requirement regarding certain mitigation agreements where the service underlying the mitigation agreements was critically needed, the Tariff under which the mitigation agreements were negotiated expressly permitted them to be negotiated after service was provided, and equitable considerations favored waiver.

2. Whether the Commission reasonably determined that the rates in the mitigation agreements were just and reasonable.

3. Whether the Commission reasonably determined that refunds were inappropriate in the circumstances here.

## STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the Appendix to this Brief.

## INTRODUCTION

This proceeding involves challenges to Commission determinations regarding certain mitigation agreements entered into in accordance with the previously Commission-approved ISO New England, Inc. ("ISO New England") Market Rule 17. In an earlier appeal, this Court determined that the Commission failed to explain adequately its decisions to waive the prior notice and filing requirement, *see* Federal Power Act § 205(d), 16 U.S.C. § 824d(d), for these agreements and to deny refunds. *See NSTAR Electric & Gas Corp. v. FERC,* 64 F. App'x 786, 2003 U.S. App. Lexis 8078 (D.C. Cir. April 28, 2003) ("*NSTAR I*").

On remand, the Commission provided the previously-missing explanation. Specifically, after reviewing the entire record, including the mitigation agreements (all of which already had expired on their own terms or were terminated when Market Rule 17 was superseded on March 1, 2003), the Commission determined

that good cause existed to waive the prior filing requirement, that the rates in the mitigation agreements were just and reasonable, and that it would be inappropriate to order refunds in the circumstances here. *Mirant Americas Energy Marketing, L.P.*, 105 FERC ¶ 61,359 (2003) ("Remand Order"), JA 291-94, *order accepting compliance filing*, 106 FERC ¶ 61,243 (2004) ("Compliance Order"), JA 319-23, *order on reh'g*, 112 FERC ¶ 61,056 (2005) ("Rehearing Order"), JA 345-50.

## STATEMENT OF FACTS

### I. Statutory And Regulatory Background

Federal Power Act ("FPA") section 205(c), 16 U.S.C. § 824d(c), provides that, "[u]nder such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, . . . schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission . . . ." In addition, FPA Section 205(d), 16 U.S.C. § 824d(d), requires that public utilities file rates for FERC-jurisdictional service 60 days before any proposed rate becomes effective, but expressly provides the Commission discretion to waive the 60-day prior filing requirement for good cause:

> Unless the Commission otherwise orders, no change shall be made by any public utility in any . . . rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. . . . The Commission, for good cause shown, may allow changes to take effect

> without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

Consistent with these statutory provisions, the Commission's regulations require all rate schedules to be filed with the Commission not less than 60 days prior to their effective date, "unless a different period of time is permitted by the Commission." 18 C.F.R. § 35.3(a). The regulations further provide that the Commission may, "for good cause shown," waive the 60-day prior filing requirement and "provide that a rate schedule, or part thereof, shall be effective as of a date prior to the date of filing or prior to the date the rate schedule would become effective in accordance with these rules." 18 C.F.R. § 35.11.

## II. Events Leading To The Challenged Orders

### A. Market Rule 17

In 1998, the Commission granted the New England Power Pool's request for recognition as an Independent System Operator, to be called ISO New England. *New England Power Pool*, 83 FERC ¶ 61,045, 85 FERC ¶ 61,379 (1998), *order on reh'g*, 95 FERC ¶61,074 (2001), *order on reh'g*, 95 FERC ¶61,074 (2001). As part of this authorization, the Commission approved ISO New England's proposed Market Rules.

Under the Market Rules, ISO New England applied an hourly single clearing price to the bids in each energy market. *See New England Power Pool*, 85 FERC at 62,461. Recognizing, however, that, "when transmission congestion exists, the ISO may need to dispatch some generators whose bids exceed the market clearing price because the constraint limits the amount of less expensive energy that can be delivered to serve all load on the import side of the constraint," ISO New England proposed, and the Commission approved, Market Rule 17. *Id.*

Market Rule 17 applied both structural and price screens to resources dispatched to alleviate transmission constraints. *See New England Power Pool*, 85 FERC at 62,481. The structural screen determined whether sufficient out-of-economic-merit bids were available to ensure that accepted bids were not the result of market power. *Id.* If so, the dispatched resource's bid price was not mitigated, *i.e.*, the resource received its bid price. *Id.* If insufficient bids were available to ensure market power did not play a part in the out-of-economic-merit order bid price, however, the bid was mitigated. *Id.*

For resources that generally ran in economic merit order, the mitigated price would be either a weighted average of the resource's in-merit bids over the most recent 30 day period (per Table 1 of ISO New England's Tariff) or a level agreed to by ISO New England and the resource. *Id.* For resources that seldom ran in economic merit order, however, the bid price would be mitigated either to a default

price set out in Table 2 of ISO New England's Tariff (between 105 percent and 500 percent of the current market clearing price), or to a level agreed to by ISO New England and the resource. *Id.* As Market Rule 17.3.2.2(b), JA 4-5, provided:

> There may be some Resources that lack a history of operation in economic merit order. For example, some generators were built primarily to ensure transmission system stability. Each such Resource is likely to present a unique situation. The ISO may determine that some of these Resources should be entitled to receive a very high bid price or have a special contractual arrangement to ensure their availability when needed to support system reliability and security. Normally, such arrangements will be negotiated prospectively.

*Sithe New Boston, LLC*, 98 FERC ¶ 61,164 at 61,608-09 (2002) (emphasis by Commission omitted); *see also New England Power Pool*, 85 FERC at 62,481 (noting that a higher mitigation price is justified for resources that seldom run in merit order "because they would not be expected to recover fixed costs in a competitive market.").

Moreover, Market Rule 17.3.3(b) n.9, JA 6, provided that "the ISO may enter into negotiations with a resource owner for any reasonable payment terms if the ISO reasonably expects the markets will function more reliably, competitively or efficiently as a result." *Sithe*, 98 FERC at 61,609. In this way, Market Rule 17 assured the availability of generation during transmission constraints while simultaneously mitigating any potential exercise of market power. *New England Power Pool*, 85 FERC at 62,461, 62,481.

### B. The Commission Rejects ISO New England's Unilateral Attempt To Amend Market Rule 17

On May 31, 2001, ISO New England notified its participants that, effective July 1, 2001, it intended to modify Market Rule 17's mitigation procedures. R. 1 Attachment A at 1, JA 31.[1] In response, certain market participants filed a complaint with the Commission alleging that the proposed modified procedures were substantive and material changes to Market Rule 17 and, therefore, had to be filed for Commission review and approval. R. 1 at 1-2, JA 7-8. NSTAR intervened, asserting that mitigation agreements cannot become effective until after they are filed with the Commission. R. 14 at 4-5, JA 93-94.

The Commission found that ISO New England "must file the proposed tariff sheets under section 205 of the FPA if it wishes to implement its Modified Procedures." *Mirant Americas Energy Marketing, L.P. v. ISO New England Inc.*, 96 FERC ¶ 61,201 at 61,857, *order on clarification and reh'g*, 97 FERC ¶ 61,108, *order on clarification and reh'g*, 97 FERC ¶ 61,360 (2001) (collectively, "Mirant I Orders"). Furthermore, the Commission found that, pursuant to FPA § 205, ISO New England must file with the Commission all mitigation agreements negotiated

[1] Citations to the record will follow the designations used in Petitioners' Brief. Accordingly, record items listed in the certified index filed in the instant remand case will be referred to as "RR.," and record items listed in the certified index previously filed in *NSTAR I*, D.C. Cir. No 02-1047, and incorporated as part of the instant certified index, will be referred to as "R."

under Market Rule 17, and directed ISO New England to do so. *Mirant*, 97 FERC ¶ 61,108 at 61,555, 61,556; *Mirant*, 97 FERC ¶ 61,360 at 62,663, 62,666.

Citing *Central Hudson Gas and Electric Corporation*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992), however, the Commission waived the requirement that ISO New England file the mitigation agreements at least 60 days before service commenced. *Mirant*, 97 FERC ¶ 61,108 at 61,556. Accordingly, the Commission found, no refund of the difference between the default Table 2 prices and the negotiated mitigation agreement prices was appropriate. *Mirant*, 97 FERC ¶ 61,360 at 62,666.

### C. NSTAR's Appeal Of The Mirant I Orders

On February 5, 2002, NSTAR filed a petition for review of the Mirant I Orders, which the Court granted in *NSTAR I*. After noting that FPA "Section 205(d) provides that public utilities must give notice to the Commission sixty days before implementing rate changes unless the Commission waives the sixty days' notice 'for good cause shown,'" the Court found that: (1) "the Commission's citation to *Central Hudson* neither explained, nor itself supported, the Commission's waiver decision;" and (2) "[a]s to the refusal to order refunds, the Commission offered no rationale for its decision other than that it has granted waivers to the New England ISO." *NSTAR I*, 64 F. App'x at 787.

### D. ISO New England Files The Mitigation Agreements

The Mirant I Orders directed ISO New England to file all mitigation agreements negotiated under Market Rule 17 and denied ISO New England's request for confidential treatment of those agreements, but held the filing requirement in abeyance pending issuance of an order in another proceeding (Southern Company Services, Inc., Docket No. ER00-2998 ("Southern Proceeding")) involving a similar confidential treatment issue. *Mirant*, 97 FERC ¶ 61,108 at 61,555, 61,556; *Mirant*, 97 FERC ¶ 61,360 at 62,663, 62,666. In compliance with the Mirant I Orders, therefore, on February 25, 2002, ISO New England filed a non-public version of the mitigation agreements. RR. 4, JA 159-71; *see* RR. 17, *ISO New England, Inc.*, 103 FERC ¶ 61,018 at P 1 (2003) ("April 9, 2003 Order"), JA 175.

On April 9, 2003, after the pending order issued in the Southern Proceeding, the Commission directed ISO New England, "within 15 days from the date of this order, to refile its Compliance Filing in an unredacted and non-confidential form." *Id.* at P 7, JA 176. ISO New England did so on April 22, 2003. JA 177-255.[2]

[2] As Petitioners' Brief at p. 20 n. 10 explains, the April 22, 2003 filing was inadvertently omitted from the Certified Index to Record in this case, but is part of the administrative record.

## III. The Challenged Orders

In the challenged orders, the Commission: (1) found that there was good cause to waive the 60-day prior filing requirement in the circumstances here; (2) accepted ISO New England's filing of the mitigation agreements, and found those agreements to be just and reasonable; and (3) determined that it would be inappropriate to order refunds for the out-of-economic-merit order transactions at issue.

### A. Waiver, For Good Cause, Of The 60-day Prior Filing Requirement

In determining whether there was good cause to waive the 60-day prior filing requirement, the Commission first explained that, while rates and charges for jurisdictional service, such as mitigation agreements, generally must be filed 60 days before service commences, "Section 205 of the FPA expressly confers on the Commission the discretion to waive the prior notice requirement and to determine the effective date of proposed rate changes." Rehearing Order at P 17, JA 348 (also citing 18 C.F.R. §§ 35.3, 35.11); *See also* Remand Order at P 10, JA 293. Moreover, the Commission found:

> section 205 nowhere prohibits the Commission's granting waiver to allow an effective date that pre-dates the filing date. If it did, then buyers arguably would *never* be able to buy and sellers arguably would *never* be able to sell unless they first filed; transactions now routinely undertaken "quickly" to take advantage of favorable price fluctuations arguably would become impossible.

Rehearing Order at P 17, JA 348.

Furthermore, the Commission noted, under longstanding precedent, it will find good cause to waive the 60-day prior filing requirement for agreements filed on or after the day service has commenced only in extraordinary circumstances. Remand Order at P 13 and n.23 (citing *Central Hudson*, 60 FERC at 61,339, *order on reh'g*, 61 FERC at 61,355), JA 293-94; Rehearing Order at P 13, JA 347. This means that, "when a filing is made after the commencement of service (and thus the Commission has no prior notice), the filing utility must make a stronger showing of good cause for waiver than if the filing had been made prior to the commencement of service." Rehearing Order at n.20 (citing *Central Hudson*, 61 FERC at 61,355), JA 347.

The Commission found extraordinary circumstances present here. Remand Order at PP 14-16, JA 294; Rehearing Order at PP 13-15, JA 347-48. First, the service underlying the mitigation agreements was critical to system reliability and security. Remand Order at P 14, JA 294.

> Because these agreements are for critical services, under Market Rule 17, [ISO New England] is authorized to enter into a mitigation agreement with a generator for "any reasonable payment terms" to ensure both that the generator remains available during transmission constraints and that customers are protected from an exercise of market power.[[3]] Absent the mitigation agreements (and the prices

[3] Citing Market Rule 17.3.3, JA 6.

> allowed in those agreements) there would be little incentive for generators to continue to make their generation available to supply services needed for system reliability and security and thus provide a needed benefit to the entire market and electricity customers.

*Id.*; *see also* Rehearing Order at P 14, JA 347-48.

In addition, the Commission explained, Market Rule 17 expressly permitted ISO New England to negotiate mitigation agreements after-the-fact. Compliance Order at P 22, JA 322. Market Rule 17 "states that 'normally' mitigation agreements will be negotiated prospectively and therefore contemplates that [ISO New England] may be required to negotiate retrospective agreements to compensate generators for previously supplied reliability services." Compliance Order at P 22 (footnote with citation omitted), JA 322; *see also* Remand Order at P 15, JA 294. Indeed, the Commission noted, "mitigation agreements by their very nature do not always lend themselves to being filed 60 days before service commences," because "a generator may only learn on very short notice (*i.e.*, without sufficient advance notice to negotiate and file a mitigation agreement) that it is being dispatched out-of-merit order for system reliability and security and that its bid is being mitigated." Remand Order at P 15, JA 294; Compliance Order at P 22, JA 322. The time it takes ISO New England to identify constrained units and apply the price screens "often makes prospective negotiations impossible." *Id.*

Furthermore, the Commission pointed out, "*Central Hudson*[, 61 FERC at 61,357] also instructs that, in deciding waiver cases, the Commission should balance the need to deter violations of the FPA filing requirements with the requirement that rates not be confiscatory." Rehearing Order at P 15, JA 348. After considering the equities here, the Commission determined that "not granting waiver would inequitably penalize the resource owners, who ran those resources at [ISO New England]'s direction to meet a reliability need, because [ISO New England] in good-faith, albeit erroneously, determined that the mitigation agreements did not need to [be] filed." *Id.*

**B. Acceptance Of The April 22, 2003 Compliance Filing**

On April 22, 2003, ISO New England filed the unredacted mitigation agreements in compliance with the April 9, 2003 Order, 103 FERC at P 7. JA 177-255. The "mitigation agreements, as well as [the] summary of each of the agreements, [were] identical to those that [ISO New England] filed on February 25, 2002 on a non-public basis." Compliance Order at PP 1, 6, JA 319, 320. All of the mitigation agreements had expired either on March 1, 2003, (the date New England Standard Market Design was implemented, superseding Market Rule 17), or on earlier dates according to their own terms. *Id.* at P 7, JA 320.

The Commission determined that the filed mitigation agreements were consistent with Market Rule 17 criteria. Compliance Order at P 21, JA 322. Not

only did they involve units that "seldom [ran] in economic merit order, [were] necessary for reliability purposes, and improve[d] market functioning," but Market Rule 17 expressly permitted ISO New England to negotiate mitigation agreements after-the-fact. *Id.* at PP 6, 21-22, JA 322; Remand Order at P 15, JA 294.

In addition, the Commission found no merit to NSTAR's claim that the mitigation agreements did not constitute contracts. Compliance Order at P 23, JA 322. "When looked at in conjunction, the mitigation agreements and Market Rule 17 provide[d] enough information concerning the terms and conditions (such as price) in the agreements" to "allow the Commission to determine that they contain[ed] reasonable terms." *Id.*; *see also id.* ("each of the mitigation agreements provide[d] objective criteria for calculating the price that was to be paid under the agreement.").

Turning to the issue of whether the mitigation agreements were just and reasonable, the Commission found no substance to the contention that "the agreements should be rejected by the Commission unless they can be justified on a cost-of-service basis." Compliance Order at P 15, JA 321. Market Rule 17 contained no such requirement. Compliance Order at PP 15, 18, JA 321, 322. Rather, Market Rule 17 stated only that ISO New England could "enter into a *negotiation* with a resource owner *for any reasonable payment terms* if the ISO reasonably expect[ed] that markets [would] function more reliably, competitively

or efficiently as a result." *ISO New England Inc.*, 112 FERC ¶ 61,057 at P 13 (2005) ("Companion Rehearing Order"), JA 353 (rationale adopted by Commission in Rehearing Order at P 26, JA 349) (quoting Market Rule 17.3.3(b) n.9, JA 6 (emphases added)); *see also* Compliance Order at P 15, JA 321.

Additionally, the Commission concluded, as "each of these generating resources usually r[an] only to ensure reliability . . . it was reasonable for [ISO New England] to determine that these resources should be entitled to receive prices under special contractual arrangements, which were above the levels specified in Table 1 or Table 2, to ensure the availability of these units when needed to protect system reliability." *Id.*; *see also* Companion Rehearing Order at P 8, JA 352-53; Compliance Order at P 16, JA 321 ("Absent the mitigation agreements (and the prices allowed in the agreements)[,] there would be little incentive for generators to continue to make their generation available to supply services needed for system reliability and security and thus provide a needed benefit to the entire market and electricity customers"); Remand Order at P 14, JA 294 (same); Companion Rehearing Order at P 9, JA 353 (same). As the mitigation agreements involved "units that seldom ran in economic merit order, were necessary for reliability purposes, and contained terms that ensured that only reasonable compensation was paid[,] . . . ISO New England's decision that the Mitigation Agreements would cause the markets to function more reliably was reasonable." *Id.* at P 13, JA 353.

The "mitigation agreements ensured that the units were available for reliability purposes, yet also set ceilings on the prices paid, . . . ensuring that prices paid under the agreements were within a zone of reasonableness." *Id.* at P 10, JA 353.

Furthermore, the Commission noted, although not required by Market Rule 17 to do so, ISO New England considered a unit's costs (variable and non-variable) in negotiating the mitigation agreements. Compliance Order at PP 7, 17-18, JA 320, 322.[4] As the "mitigation agreements required the generators to supply power based on average variable costs or marginal costs, plus an adder," the Commission found they "were negotiated following principles that support reliability as well as overall competitive goals." Compliance Order at P 17, JA 322. Moreover, the Commission determined, the "adders were reasonable

[4] ISO New England's approach for each agreement was similar:

> (1) [it] identif[ied] the actual variable costs and, when relevant, the total costs (including return on and of equity); (2) [it] require[d] units to bid on a cost basis (variable up to total cost) when bid mitigation include[d] non-variable cost elements; and (3) [it] ensure[d] that no uplift payment beyond variable cost [was] paid if the unit ha[d] already collected its full revenue requirements.
>
> *Id.* at P 7, JA 320.

compensation for such units[5] to reflect lost opportunity costs." *Id.*

Thus, although some of the rigorous procedures ISO New England followed in applying Market Rule 17 (*i.e.*, gathering and analyzing cost data in the course of conducting negotiations and requesting periodic cost updates) were not specifically required under that rule, "the fact that [ISO New England] applied these further 'checks and balances' to the negotiation of the mitigation agreements only serve[d] to strengthen [the Commission's] judgment that the agreements were negotiated in a manner that produced reasonable results." Compliance Order at P 18 and n.19, JA 322.

By contrast, the Commission pointed out, parties protesting the compliance filing had presented nothing to show either that ISO New England had acted imprudently in negotiating the mitigation agreements or that the mitigation agreements contained prices outside the zone of reasonableness. Compliance Order at P 19, JA 322. Nor did protestors object "to any of the criteria or formulas contained in the mitigation agreements for calculating the compensation for affected generating units." *Id.* at P 20, JA 322.

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[5] Noting that, in most of the mitigation agreements, the adder was a percentage of the unit's variable costs (usually ten percent). Compliance Order at n. 18, JA 322 (citing, for example, the mitigation agreement for the New Boston units, which contained a formula that provided a payment equal to 110% of the fuel, compressor fuel, variable operation and maintenance, and fuel transportation costs, April 22, 2003 Compliance Filing at Att. 4, JA 205-17).

### C. Refunds

In the specific circumstances presented here, the Commission determined that it would be inappropriate to order either time-value refunds or other refunds for the transactions at issue.

#### 1. Time-Value Refunds

Under longstanding Commission policy, if a utility files a rate less than 60 days before its proposed effective date **and** the Commission denies waiver of the prior filing requirement, the Commission will require the utility to refund to its customers the time value of the revenues collected for the period the rate was collected without Commission authorization, calculated pursuant to section 35.19a of the Commission's regulations, 18 C.F.R. § 35.19a. *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,979-80, *order on reh'g*, 65 FERC ¶ 61,081 (1993); *see also El Paso Electric Company*, 105 FERC ¶ 61,131 at PP 19, 21 (2003); *Montana-Dakota Utilities Company*, 81 FERC ¶ 61,298 at 62,407 (1997). Time-value refunds are provided in addition to any refunds that may be required if a rate is found to be unjust and unreasonable. *Prior Notice and Filing*, 64 FERC at 61,979 n.11.

After reiterating its policy, the Commission found that, "given [its] waiver of the 60-day prior notice requirement, time-value refunds [were] not called for." Remand Order at P 10, JA 293 (citing *Prior Notice and Filing*, 64 FERC at

61,979-80; *El Paso*, 105 FERC at PP 19, 21; and *Montana-Dakota*, 81 FERC at 62,407); *id.* at P 11, JA 293; Compliance Order at P 25, JA 323. Because the Commission exercised its discretion to waive the prior filing requirement, "there was never a time the rates were charged without the Commission's authorization," and, therefore, no time-value refunds were due. Remand Order at P 11, JA 293; Rehearing Order at P 22, JA 349 (citing *Carolina Power & Light Company*, 84 FERC ¶ 61,103 at 61,522 (1998), *order on reh'g*, 87 FERC ¶ 61,083 (1999), where the Commission explained that a time-value refund computes a refund that is directly proportional to the amount of money billed without authorization).

**2. Other Refunds**

Parties protesting the April 22, 2003 compliance filing requested refunds of: (1) the difference between the price the out-of-economic-merit order generators received under the mitigation agreements; and (2) the reference prices under Market Rule 17 Tables 1 or 2. *See* Compliance Order at P 24, JA 322. As the Commission had determined that "the prices received by the generators under the agreements at issue [were] reasonable," however, the Commission found that there was "no basis to order refunds." *Id.*

Nor was there merit to the claim that refunds were appropriate because ISO New England purportedly charged rates in excess of the filed rate. ISO New England "did not charge rates in excess of the filed rate." Rehearing Order at P 23,

JA 349. Rather, "the rates, terms, and conditions on file allowed [ISO New England] to negotiate pursuant to Market Rule 17, and so [ISO New England] was authorized to charge rates that reflected its negotiations pursuant to Market Rule 17." *Id.* As the Commission expounded:

> [T]he D.C. Circuit noted in [*Consolidated Edison Company of NY, Inc. v. FERC*, 347 F.3d 964 (D.C. Cir. 2003)] that courts have recognized that a rate may take effect prior to a section 205 filing. In this regard, Market Rule 17 allowed [ISO New England] to do what it did, and Market Rule 17 was the subject of Commission proceedings and Commission approval, including express authorization for [ISO New England] to negotiate mitigation agreements, well before the particular agreements at issue here were executed.[[6]] [ISO New England]'s authority to negotiate mitigation agreements was part of a filed and accepted tariff, and market participants were on notice of its provisions.

Rehearing Order at P 19, JA 348.

Furthermore, the Commission continued:

> [E]ven if, arguendo, the rates charged could be said to exceed those on file, the FPA does not mandate refunds whenever the rate charged exceeds that on file. *See, e.g., Towns of Concord v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992) (rejecting argument that the filed rate doctrine compels refunds of amounts charged in excess of the filed rate). Instead, 'refunds are a form of equitable relief, akin to restitution, and the general rule is that agencies should order restitution only when money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it.' *Id.* at 75 [internal quotation marks omitted].

Rehearing Order at n. 33, JA 349.

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**6** Citing *New England Power Pool*, 85 FERC ¶ 61,379 (1998).

Then, the Commission found that "the equities weigh strongly against" awarding refunds of the difference between the mitigation agreements' price and the default formula price in Tables 1 and 2 of Market Rule 17. Rehearing Order at P 24 and n. 33, JA 349.

> The default price was determined as a percentage of the current hourly energy clearing price for [ISO New England]. That clearing price applies to all bidding units and, thus, will almost invariably be well below the actual costs of running a seldom-run unit. Not ordering refunds preserves the generators' ability to recover legitimate costs of supplying, at [ISO New England]'s request, needed reliability service. Requiring generators to refund the payments they received under the mitigation agreements, to the extent they were in excess of the Market Rule 17 default formula rates, could even reduce their payments to levels below their variable costs for providing a necessary reliability service.[7] . . . Market Rule 17 provides that resources lacking a history of operating in economic order, such as generators built primarily to ensure reliability, 'should be entitled to receive a very high bid price or have a special contractual arrangement [such as a negotiated mitigation agreement] to ensure their availability when needed to support system reliability and security.'

Rehearing Order at P 24, JA 349 (quoting Market Rule 17.3.2.2(b) (alteration by Commission).

The petitions for review followed.

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[7] "In *Prior Notice*, 64 FERC at 61,979-80, in the context of establishing a remedy to address late filings, the Commission reversed its policy of ordering refunds down to the amount of a utility's variable costs, finding that remedy too harsh, and instead imposing a remedy based on the time value of the additional revenues collected. Here, NSTAR's proposed refunds may be even more extreme, as it might not allow many generators recovery of even their variable costs."

## SUMMARY OF ARGUMENT

After reviewing the entire record, including the mitigation agreements, the Commission reasonably determined that good cause existed to waive the prior filing requirement in the circumstances here. First, as the record established, the service underlying the mitigation agreements was needed for system reliability and security. Without the mitigation agreements, there would be little incentive for reliability-must-run generators to continue to make this needed generation available. In addition, ISO New England's Tariff expressly permitted mitigation agreements to be negotiated after service was provided. Furthermore, the equities weighed strongly in favor of waiver, as denying waiver would penalize generators who provided a reliability need because ISO New England erroneously believed, in good faith, that it did not need to file the mitigation agreements.

The Commission also appropriately found that the mitigation agreements were just and reasonable. Market Rule 17 did not require the mitigation agreements to be cost-based. Rather, in accordance with Market Rule 17, the mitigation agreements, which were necessary for reliability purposes, contained terms that ensured only reasonable compensation was paid.

Finally, the Commission reasonably determined that refunds were not appropriate in the circumstances here. Because the filing requirement was waived, no time-value refunds were due. Nor were parties due refunds of the difference

between the negotiated mitigation agreement rates and the default table rates, as the mitigation agreement rates were just and reasonable, and Market Rule 17 provided notice that its default rates were provisional. In any event, because ordering refunds could prevent the generators from recovering legitimate costs they incurred in supplying the critical reliability services at issue, the equities weighed strongly against awarding refunds.

## ARGUMENT

### I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *E.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under that standard, the Commission's decision must be reasoned and based upon substantial evidence in the record. For this purpose, the Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b).

In addition, the Court gives substantial deference to the Commission's interpretation of its own orders, *Entergy Services, Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004), and of ambiguous tariff provisions, *Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14, 20 (D.C. Cir. 2006). The Court also gives substantial deference to the Commission's expertise in ratemaking

matters. *See, e.g., Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996).

## II. THE COMMISSION REASONABLY DETERMINED THAT GOOD CAUSE EXISTED, IN THE CIRCUMSTANCES HERE, TO WAIVE THE PRIOR FILING REQUIREMENT

Under Commission policy, the Commission will find good cause to waive the 60-day prior filing requirement for agreements filed on or after the day service has commenced only in extraordinary circumstances. Remand Order at P 13 and n.23 (citing *Central Hudson*, 60 FERC at 61,339, *order on reh'g*, 61 FERC at 61,355), JA 293-94. This standard requires the filing utility to "make a stronger showing of good cause for waiver than if the filing had been made prior to the commencement of service." Rehearing Order at P 13 and n.20 (citing *Central Hudson*, 61 FERC at 61,355), JA 347.

Several factors caused the Commission to determine that extraordinary circumstances supporting waiver existed under the specific facts here: (1) the critical nature of the service underlying the mitigation agreements (*see supra* pp. 11-12); (2) ISO New England's Tariff expressly permitted mitigation agreements to be negotiated after service was provided (*see supra* p. 12);[8] and (3) equitable

[8] The portion of Petitioners' brief challenging the Commission's determination that extraordinary circumstances existed here, Br. at 43-46, ignores this factor.

considerations (*see supra* p. 13). Remand Order at PP 14-16, JA 294; Rehearing Order at PP 13-15, JA 347-48; Compliance Order at P 22, JA 322.

### A. The Mitigation Agreements Were For Critical Services

Petitioners contend that the record did not establish "that the agreements were for 'critical services' and [that] the need for the service became apparent on 'short notice,' Remand Order at P 14, JA [294] . . . ." Br. at 45. Petitioners are wrong.

"Market Rule 17 was established to provide market power monitoring and mitigation procedures for units that provide system reliability during periods when transmission is constrained." Remand Order at P 2, JA 292; *see also* Remand Order at n. 4 (explaining that an "out-of-merit generator is dispatched not because it is economic to do so but for reliability reasons"); Compliance Order at n.3, JA 319 ("In a system in which generation is normally dispatched in order of economics beginning with the lowest cost generation, an out-of-merit generator is dispatched not because it is economic to do so, but for reliability reasons."); *id.* at n.4, JA 319 ("Transmission constraints limit the system's capability to import electricity into a particular area (load pocket) and thereby require [ISO New England] to dispatch a generator located within the load pocket out of economic merit order to serve load or to protect the system from voltage collapse or other instability."); Remand Order at P 14, JA 294 ("Absent the mitigation agreements

(and the prices allowed in the agreements) there would be little incentive for generators to continue to make their generation available to supply services needed for system reliability and security"); Rehearing Order at P 14, JA 348 (same).

Moreover, as ISO New England explained, most of the units for which mitigation agreements were negotiated were located in either Northeast Massachusetts or Southwestern Connecticut, "which are the principal congested areas in New England." April 22, 2003 Compliance Filing Summary at 1, JA 182. In addition, ISO New England "determined that these units [were] needed for dispatch to ensure the reliability and security of the system." *Id.*

Furthermore, the Commission found, Market Rule 17 allows mitigation agreements to be negotiated after-the-fact because "mitigation agreements by their very nature do not always lend themselves to being filed 60 days before service commences." Remand Order at P 15, JA 294. "Indeed," the Commission explained, "a generator may only learn on very short notice (*i.e.*, without sufficient advance notice to negotiate and file a mitigation agreement) that it is being dispatched out-of-merit order for system reliability and security and that its bid is being mitigated." Remand Order at P 15, JA 294.

Thus, contrary to Petitioners' assertion, Br. at 45, the Commission adequately explained why mitigation agreements could not be filed in advance of service: "[A]s [ISO New England] pointed out, 'the delay by [ISO New England]

in identifying the constrained units and applying the price screens due to the implementation of the markets' often makes prospective negotiations impossible." Compliance Order at P 22, JA 322 (quoting April 22, 2003 Compliance Filing Att. 4 at p.2 P (G), JA 206).

Petitioners next assert that extraordinary circumstances did not exist because "Market Rule 17, which was the filed rate, already envisioned that the generators would provide the service at issue and it contained default rates that would apply to that service if the generators and [ISO New England] could not agree on terms of a mitigation agreement." Br. at 45. This assertion is inapposite, as ISO New England and the generators here were able to "agree on terms of a mitigation agreement."

Furthermore, while in Petitioners' view, "[b]ecause Market Rule 17 already set forth a rate for the provision of the service, the critical services argument fails, by definition, to constitute an extraordinary circumstance," Br. at 45-46, the Commission reasonably found otherwise. "[E]ach of these generating resources usually r[an] only to ensure reliability." Compliance Order at P 15, JA 321. Because the "default price was determined as a percentage of the current hourly energy clearing price for [ISO New England,] [t]hat clearing price applie[d] to all bidding units and, thus w[ould] almost invariably be well below the actual costs of running a seldom-run unit," preventing the generators from "recover[ing] the

legitimate costs of supplying, at [ISO New England]'s request, needed reliability service." Rehearing Order at P 24, JA 349.

### B. The Determinations Here Were Not Inconsistent With *Central Hudson*

Petitioners attempt to undercut the Commission's good cause finding by pointing out that *Central Hudson* rejected the argument that good cause could exist "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.'" Br. at 44 (quoting *Central Hudson*, 60 FERC at 61,339). That rejection was limited, however, to a circumstance very different from the one here.

In *Central Hudson*, the only proffered justification for why the filing could not be made 60 days prior to the commencement of service was "the press of other business." *See* Br. at 44 (quoting *Central Hudson*, 60 FERC at 61,339) ("In support of waiver, Montaup states only that the agreement with MMWEC could not be negotiated and prepared for filing 60 days prior to the commencement of service. We have stated, however, that the press of other business does not provide good cause for waiver of the Central Maine policy or, in general, for waiver of the 60-day prior notice requirement."). Here, by contrast, it was not the press of other business that prevented the filings from being made 60 days before the commencement of service, but the critical nature of the service underlying the

mitigation agreements, as well as ISO New England' good-faith, but erroneous, belief that it did not need to file the mitigation agreements. Remand Order at PP 14-16, JA 294; Rehearing Order at PP 13-15, JA 347-48.

Petitioners also attempt to upset the extraordinary circumstances finding by citing a statement in *Central Hudson*, 61 FERC at 61,356, that, "if power is flowing, the parties have come to terms on all material aspects of the transactions and there is no reason to delay filing a rate schedule." Br. at 45. Unlike in *Central Hudson*, where "Montaup [did] not explain why it delayed filing . . . with the Commission," 61 FERC at 61,356, however, ISO New England explained that it did not file the agreements until the Commission instructed it to do so because it believed it did not need to do so. Although that belief was erroneous, the Commission found it to be in good faith, and reasonably concluded that it would be inequitable to deny waiver, as doing so would penalize the resource owners who had run their resources at ISO New England's direction to meet a reliability need. Rehearing Order at P 15, JA 348.

In addition, while it was true in *Central Hudson* that, "if power is flowing, the parties have come to terms on all material aspects of the transactions," the same was not necessarily true here. ISO New England's Tariff expressly permitted ISO New England "to negotiate retrospective agreements to compensate generators for previously supplied reliability services." Compliance Order at P 22 (footnote with

citation omitted), JA 322; *see also* Remand Order at P 15, JA 294; Market Rule 17.3.2.2(b), JA 4.

### C. The Commission Appropriately Considered ISO New England's Good Faith, Yet Erroneous, Belief That The Mitigation Agreements Did Not Need To Be Filed

Petitioners next contend that the Commission should not have considered ISO New England's good faith, but erroneous, belief that it did not need to file the mitigation agreements. Br. at 46 n.17. To the contrary, Commission policy required the Commission to consider the equities in deciding whether to grant waiver in this case. Rehearing Order at P 15, JA 348 (citing *Central Hudson*, 61 FERC at 61,357).

Petitioners' citation to *Prior Notice and Filing*, 64 FERC at 61,977-78, as standing for the proposition that "in cases of uncertainty the utility is obligated to 'assume the initiative to seek a specific ruling' by 'fil[ing] the agreement,'" Br. at 46 n.17, does not help them either. ISO New England, the entity required to file the mitigation agreements with the Commission, *Mirant Americas Energy Marketing, L.P.*, 99 FERC ¶ 61,003 at P 17 (2002), was not "uncertain" as to whether it needed to file the mitigation agreements; rather, in good faith, ISO New England was certain in its erroneous belief that it did not need to do so. Rehearing Order at P 15, JA 348.

### D. The Mitigation Agreements Were Filed Months Before Any Of The Challenged Orders Issued

Petitioners also argue that the "waiver in this case was arbitrary because it was granted before FERC even saw the mitigation contracts." Br. at 46; *see also* Br. at 46-48. This argument is baseless. ISO New England filed non-public, RR. 4, JA 159-71, and then public, JA 177-255, versions of the mitigation agreements on February 25, 2002 and April 22, 2003, respectively. Both filings were made months before the first order challenged in the instant petitions (the Remand Order, JA 291-94) issued on December 23, 2003, and, after reviewing the mitigation agreements, the Commission found them to be just and reasonable, Compliance Order at PP 7, 13, 15-20, JA 320-22.

## III. THE COMMISSION APPROPRIATELY DETERMINED THAT THE RATES IN THE MITIGATION AGREEMENTS WERE JUST AND REASONABLE

There is no merit to Petitioners' claim that "the Commission has not ensured that the prices charged to customers are just and reasonable as required by section 205 of the FPA." Br. at 54. After reviewing the entire record, including the mitigation agreements, the Commission concluded that the generating resources at issue usually ran only to ensure reliability, and that the mitigation agreements were needed for reliability purposes and contained terms that ensured only reasonable compensation was paid. Compliance Order at P 15, JA 321; Companion

Rehearing Order at P 13, JA 353. The "mitigation agreements ensured that the units were available for reliability purposes, yet also set ceilings on the prices paid, . . . ensuring that prices paid under the agreements were within a zone of reasonableness." *Id.* at P 10, JA 353; *see also* Compliance Order at P 24, JA 322.

Moreover, while Market Rule 17 did not require ISO New England to gather and analyze cost data, "the fact that [ISO New England] applied these further 'checks and balances' to the negotiation of the mitigation agreements only serve[d] to strengthen [the Commission's] judgment that the agreements were negotiated in a manner that produced reasonable results." Compliance Order at P 18 and n.19, JA 322. No one, on the other hand, had presented anything to show that the mitigation agreements' rates were outside the zone of reasonableness. Compliance Order at PP 19-20, JA 322.

Citing a statement in an order not under review in the instant petitions, Petitioners contend that the Commission improperly delegated its authority "when it ruled that 'a separate determination under section 205 of the FPA concerning the justness and reasonableness of each individual mitigation agreement' was 'unnecessary' because it had already 'granted [ISO New England] blanket authority to enter into mitigation agreements under Market Rule 17.'" Br. at 50-51 (quoting *Mirant*, 99 FERC ¶ 61,003 at P 16). In the orders under review, however, "the Commission . . . reviewed the agreements, and, based on that review, . . .

[found] that they [were] reasonable." Compliance Order at P 14, JA 321; *see also* Compliance Order at Section III.B.2 Heading, JA 321 ("The Mitigation Agreements Are Just and Reasonable"). The Commission did not delegate its authority to ISO New England; rather, both the ISO, in its negotiation of the mitigation agreements, and the Commission, in reviewing the filings, acted entirely in accord with the procedures in the Commission-approved Market Rule 17. *See, e.g.*, Compliance Order at PP 6, 7, 15, 17-23, JA 320-22; Companion Rehearing Order at PP 8-10, 13, JA 352-53.

Petitioners attempt to disparage the Commission's review by asserting that the mitigation agreements had to contain cost-based rates, Br. at 52, and, therefore, that the Commission needed to independently review the generating units' cost data. Br. at 53-54. The Commission found otherwise, explaining that Market Rule 17 did not require mitigation agreement rates to be cost-based. Compliance Order at PP 15, 18, JA 321, 322. Rather, Market Rule 17 stated only that ISO New England could "enter into a *negotiation* with a resource owner *for any reasonable payment terms* if the ISO reasonably expect[ed] that markets [would] function more reliably, competitively or efficiently as a result." Companion Rehearing Order at P 13, JA 353 (quoting Market Rule 17.3.3(b) n.9, JA 6) (emphases added); *see also* Remand Order at P 14, JA 294; Compliance Order at P 15, JA 321.

Perhaps recognizing this, Petitioners rely on another order not on review here, the April 9, 2003 Order, 103 FERC at PP 4 and 7, JA 175-76, to assert that the mitigation agreements were "*supposed* to be cost-based filings." Br. at 52; *see also* Br. at 53. That order addressed a clarification request by ISO New England "whether [it] should refile unredacted, public versions of the mitigation agreements that were previously filed" with the Commission, April 9, 2003 Order, 103 FERC at P 4, JA 175; it did not address whether Market Rule 17 mitigation agreements were required to be cost-based.

Petitioners also cite Remand Order at P 2, JA 292, as "describ[ing] the mitigation agreements as similar to another 'cost-based regulatory agreement between [ISO New England] and Devon Power LLC." Br. at 52. Neither this order, nor any of the other orders challenged in the instant petitions, includes the proffered statement.

## IV. THE COMMISSION REASONABLY DETERMINED THAT REFUNDS WERE INAPPROPRIATE IN THE CIRCUMSTANCES HERE

Petitioners contend that the Commission's waiver determination violated the filed rate doctrine and the rule against retroactive ratemaking because, while "this Court has found in certain limited circumstances that a rate may take effect prior to the date of its filing at FERC, the rate must still take effect prospectively from the date affected parties receive notice." Br. at 37; *see also* Br. at 34-43. Thus,

Petitioners assert, the Commission was required to order refunds for the difference between the rates charged under the Market Rule 17 mitigation agreements and the Market Rule 17 default rates.[9] Br. at 48-50.

### A. Market Rule 17 Provided Notice That Its Default Rates Were Provisional And Subject To Change

As the Commission found, Market Rule 17, which was the subject of Commission proceedings and approval long before the service at issue was provided, *see New England Power Pool*, 85 FERC ¶ 61,379 (1998), expressly authorized ISO New England "to do what it did" -- enter into mitigation agreements after-the-fact. Rehearing Order at P 19, JA 348. In other words, "[ISO New England]'s authority to negotiate mitigation agreements was part of a filed and accepted tariff, and market participants were on notice of its provisions." *Id.* *See also* Rehearing Order at P 23, JA 349 (ISO New England "did not charge rates in excess of the filed rate." Rather, "the rates, terms, and conditions on file allowed [ISO New England] to negotiate pursuant to Market Rule 17, and so [ISO New England] was authorized to charge rates that reflected its negotiations pursuant to Market Rule 17.").

[9] Petitioners do not challenge on appeal the Commission's determination, Remand Order at PP 10-11, JA 293; Compliance Order at P 25, JA 323, that time-value refunds should not be ordered here.

Petitioners' brief recognizes that notice "changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision." Br. at 37 (quoting *Columbia Gas Transmission Co. v. FERC*, 895 F.2d 791, 797 (D.C. Cir. 1990) (Petitioners' emphasis omitted)). That is just what occurred here.

Market Rule 17 put Petitioners on notice that its default rates would apply provisionally; that is, unless ISO New England and the supplier negotiated a mitigation agreement, in which case the mitigation agreement rate would apply. *See* Market Rule 17.3.2.2(b), JA 4-5 ("The ISO may determine that some of these Resources should be entitled to receive a very high bid price or have a special contractual arrangement to ensure their availability when needed to support system reliability and security. Normally, such arrangements will be negotiated prospectively."); Market Rule 17.3.3(b) n.9, JA 6 ("the ISO may enter into negotiations with a resource owner for any reasonable payment terms if the ISO reasonably expects the markets will function more reliably, competitively or efficiently as a result"). Thus, the Commission reasonably found that neither the filed rate doctrine nor the rule against retroactive ratemaking was violated and, therefore, that no refunds were due. *See Consolidated Edison*, 347 F.3d at 969-70;

*Public Utilities Comm'n of California v. FERC*, 988 F.2d 154, 163-66 (D.C. Cir. 1993).

Petitioners claim, for the first time on appeal, that the Commission's determination that Market Rule 17 provided sufficient prior notice is inconsistent with the Commission's determination, in the Mirant I Orders, that ISO New England must file the actual mitigation agreements. Br. at 41-42. Because Petitioners did not raise this claim on rehearing to the Commission (RR. 32, JA 295-302; RR. 33, JA 303-18; RR. 37, JA 324-44), they are jurisdictionally barred from raising it on appeal. *See* FPA § 313(b), 16 U.S.C. § 825*l*(b).

Under FPA §313(b), "[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so." As this Court has explained, "[e]nforcement of this provision, which [the Court] ha[s] considered to pose a jurisdictional bar, enables the Commission to correct its own errors, which might obviate judicial review, or to explain why in its expert judgment the party's objection is not well taken, which facilitates judicial review." *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (citations omitted); *see also California Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *Town of Norwood v. FERC*, 906 F.2d 772, 774-75 (D.C. Cir. 1990). Moreover, the "reasonable ground for failure"

to raise an objection exception "is reserved for extraordinary situations," *Sebasticook,* 431 F.3d at 381-82 (citing *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 460 (D.C. Cir. 2004)), not present here.

This claim fails substantively as well. It was sufficient, when service was provided, that Petitioners were on notice that the default mitigation rates were provisional and subject to later revision. *See, e.g.*, *Columbia Gas*, 895 F.2d at 797. Because the FPA requires that all rates be filed with the Commission and published for public view "within such time and in such form as the Commission may designate," FPA §205(c), 16 U.S.C. § 824d(c), however, the Commission appropriately determined, as a separate matter in orders not on review here, *Mirant*, 97 FERC ¶ 61,108 at 61,556, that ISO New England was required to file the mitigation agreements after they were negotiated so that the exact rate charged would be on file with the Commission.

### B. Even If The Rates Charged Had Exceeded Those On File, Refunds Would Be Inappropriate

"[E]ven if, arguendo, the rates charged could be said to exceed those on file," the Commission explained, this Court has determined, contrary to Petitioners' claim otherwise (Br. at 49), that "the FPA does not mandate refunds whenever the rate charged exceeds that on file." Rehearing Order at n. 33, JA 349 (citing, *e.g.*, *Towns of Concord v. FERC*, 955 F.2d 67, 72-73 (D.C. Cir. 1992)).

"The Federal Power Act does not explicitly deprive the Commission of remedial discretion with respect to refunds; in fact the Act quite clearly confers it." *Concord*, 955 F.2d at 73. Moreover, "refunds are a form of equitable relief, akin to restitution, and the general rule is that agencies should order restitution only when money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it." Rehearing Order at n.33 (quoting *Concord*, 955 F.2d at 75) (internal quotation marks omitted).

Here, the Commission found, "the equities weigh strongly against" awarding refunds of the difference between the Market Rule 17 mitigation agreements' prices and the Market Rule 17 default formula prices. Rehearing Order at P 24 and n. 22, JA 349. "The default price was determined as a percentage of the current hourly energy clearing price for [ISO New England]," which "applie[d] to all bidding units and, thus, will almost invariably be well below the actual costs of running a seldom-run unit." Rehearing Order at P 24, JA 349. In fact, "[r]equiring generators to refund the payments they received under the mitigation agreements, to the extent they were in excess of the Market Rule 17 default formula rates, could even reduce their payments to levels below their variable costs for providing a necessary reliability service." *Id.* Thus, "[n]ot ordering refunds preserve[d] the generators' ability to recover legitimate costs of supplying, at [ISO New England]'s request, needed reliability service." *Id.*

Petitioners challenge this finding for the first time on appeal, arguing that "FERC's conclusion that the payment based on the rates set forth in Table 1 and Table 2 would be below the generator's variable costs is not supported by the record" and "is in direct conflict with FERC's determination that Market Rule 17, including the rates therein, was just and reasonable." Br. at 49-50. Petitioners' failure to present these arguments to FERC on rehearing (RR. 32, JA 295-302; RR. 33, JA 303-18; RR. 37, JA 324-44) jurisdictionally bars Petitioners from presenting them to this Court. FPA § 313(b).

These arguments do not, in any event, have merit. In evaluating the equities to determine whether refunds were appropriate, the Commission reasonably considered the concern, based on its ratemaking experience and expertise, that the default price would not cover the seldom-run resource units' actual, or even variable, costs. Rehearing Order at P 24, JA 349. The Commission is granted particular deference regarding its expertise in ratemaking matters such as this. *See, e.g.*, *Ass'n of Oil Pipe Lines*, 83 F.3d at 1431.

Moreover, while the Commission previously found Market Rule 17, including the rates therein, . . . just and reasonable," Br. at 50, that finding was based on the entirety of Market Rule 17, which allowed ISO New England and the seldom-run resource units' owners to negotiate mitigation agreements, such as the ones at issue here. Compliance Order at n.25, JA 323 ("The default reference price

thus is not an absolute determinant of what rates are acceptable, but serves to provide an incentive for negotiation of rates that are acceptable.").

The "breadth of agency discretion is, if anything, at [its] zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions." *Connecticut Valley Electric Co. v. FERC*, 208 F.3d 1037, 1044 (D.C. Cir. 2000) (quoting *Niagara Mohawk Serv. Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (alteration by Court)). Accordingly, the Commission's reasonable exercise of its remedial discretion in the circumstances here should be upheld.

## CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

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