

UNITED STATES OF AMERICA
Before the
FEDERAL ENERGY REGULATORY COMMISSION

New England Power Pool : Docket No. ER02-2330
ISO New England :
: February 28, 2003

MOTION FOR A STAY

Pursuant to Rule 212 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice, 18 C.F.R. § 385.212, Richard Blumenthal, Attorney General for the State of Connecticut (“CTAG”), respectfully requests that the FERC stay the orders issued in the above-captioned proceedings authorizing and approving the implementation of standard market design (“SMD”) in New England dated September 20, 2002 and confirmed upon rehearing on December 20, 2002 (collectively, the “2002 FERC Orders”).

As the Commission is aware, on February 21, 2003 the CTAG filed an emergency motion to stay the implementation of SMD at the United States Court of Appeals for the District of Columbia Circuit. On February 27, 2003, the court denied that motion stating that an:

[a]pplication for stay of an agency order must ordinarily be made to the agency in the first instance, and petitioner has not shown that seeking a stay from the Federal Energy Regulatory Commission was not practicable. See Fed. R. App. P. 18. Petitioner may, however, renew his motion in the event that the Commission denies a request for a stay.

The CTAG respectfully requests that the Commission act on this motion as expeditiously as possible in order to minimize the adverse impact of these orders on the people of the State of Connecticut.

I. Summary of Argument

The FERC’s approval of SMD in the 2002 FERC Orders violates the Federal Power Act (“FPA”). The FERC is allowing the implementation of an untested plan in New England while

its plans for a nationwide SMD have been put on hold. Moreover, because of the unique circumstances in Connecticut and New England, these rules will serve to both encourage and reward the exercise of market power among electric generators in the transmission constrained areas that the FERC acknowledged exist and at the same time relax or eliminate the rules designed to mitigate the exercise of such market power. The combined result of these rule changes will be a dramatic increase in the exercise of market power in these constrained areas and rates that are more than just and reasonable in plain violation of the FPA. Because the harmful impact of these rule changes cannot be undone once they have been imposed, the CTAG respectfully requests the FERC stay the implementation of SMD pending the court's review of this matter.

II. Procedural History

On July 15, 2002, the Independent System Operator – New England, Inc. (“ISO-NE”) filed with the FERC an application requesting approval of ISO-NE's proposed Market Rule 1. Market Rule 1 effects substantial and unlawful modifications to the design of the wholesale market for electric generation in the six-state New England region. FERC approved these proposed changes, in substantial part, in its order issued on September 20, 2002, and confirmed this approval in its order on rehearing issued on December 20, 2002. Pursuant to the 2002 FERC Orders, Market Rule 1 is to be implemented on March 1, 2003.

The effect, combined and individually, of three specific aspects of Market Rule 1 as approved in the 2002 FERC Orders violate the FPA in that they facilitate and promote the exercise of market power by generators in transmission constrained areas, including those in Connecticut, resulting in rates that will be more than just and reasonable in those areas. Specifically, the CTAG challenges the impact, in combination and individually of: (1) the

adoption of locational marginal pricing (or “LMP”); (2) the modifications of the market power mitigation rules, including procedures for exempting bidding by electric generators in transmission constrained areas from the operation of such rules in certain circumstances (the so-called “Designated Congestion Area” or “DCA” procedure); and (3) instituting “reliability must-run” (or “RMR”) arrangements with selected electric generators.

III. A Stay of the FERC Orders is Appropriate

The legal standards for issuing a stay pending review of the FERC’s orders are well established.

The factors to be considered in determining whether a stay is warranted are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Wisconsin Gas Company v. F.E.R.C., 758 F.2d 669, 673-74 (D.C. Cir. 1985). See also

Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C.

Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958).

The CTAG has met the requirements for the issuance of a stay of the 2002 FERC Orders. First, this appeal is likely to succeed on the merits as the 2002 FERC Orders are plainly contrary to law and exceed the FERC’s statutory authority. Second, the failure to grant the CTAG’s request for relief will result in irreparable harm to electric consumers in Connecticut on whose behalf the CTAG brings this appeal. This harm is actual, imminent and substantial and the CTAG has no adequate legal remedies to recover for this harm. Third, the granting of the stay will preserve the status quo, or the current market rules, and ensure that the rates charged are just and reasonable. The granting of this stay will therefore not harm any others. Finally, the public interest strongly supports granting a stay in this matter. The 2002 FERC Orders are plainly

contrary to law and are beyond the FERC's statutory authority and, if implemented, will cause substantial hardships and irreparable injury to Connecticut electricity consumers.

A. CTAG's Appeal is Likely to Succeed on the Merits

1. The FPA Requires That Rates be Just and Reasonable and That Market Structures be Workably Competitive

The FPA establishes and limits the FERC's authority. The FPA grants FERC the authority to regulate the purchases and sales of electric power and natural gas in interstate commerce and the interstate transmission of these commodities. Under the FPA, rates for wholesale power must be "just and reasonable."¹ 16 U.S.C. §§ 824d² and 824e. In enforcing this mandate, FERC can exercise some flexibility in setting rates, but the end result must be that rates remain within a "zone" that is just and reasonable.³ While rates cannot be so low as to be confiscatory, the primary purpose of rate setting is to protect consumers against excessive rates.⁴ Rates that fall outside the resulting "zone of reasonableness" are illegal and FERC is obliged, on its own initiative if necessary, to take corrective action.

The just and reasonable standard was instituted to address the complete market break-down occurring before the passage of the FPA resulting from the unfettered exercise of market

¹ See, F.P.C. v. Hope, 320 U.S. at 610; Atlantic Refining Co. v. Public Utility Commission of the State of New York, 360 U.S. 378 (1959). These seminal cases were decided under the Natural Gas Act; but the cognate provisions of the FPA cited in text have been given a parallel interpretation. See, e.g., Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956).

² Specifically, 16 U.S.C. § 824d(a) provides as follows:

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

³ See, e.g., Alabama Electric Cooperative v. FERC, 684 F. 2d 20, 27 (D.C. Cir. 1982).

⁴ Pennsylvania Water & Power Co. v. Federal Power Commission, 343 U.S. 414, 418 (1952); Sierra Pacific, 350 U.S. at 355; Atlantic Refining, 360 U.S. at 388.

power in the special context of the electric utility industry. See generally, Gulf States Utilities Co. v. FPC, 411 U.S. 747, 758 (1973); Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944). It was generally recognized that rates resulting from the exercise of market power are injurious to consumers and to the economy. Rates that embody the exercise of market power, and therefore allow for the collection of monopoly rents, are per se outside the permissible zone of reasonableness.

Since the passage of the FPA, two methods of permissible regulation have evolved, the “traditional” cost of service regulation of rates and, more recently, a regime of “market-based” rates within a market structure that is demonstrably “workably competitive.” In both regimes, the resulting rates must be “just and reasonable.” With respect to market based rate authority, the FERC may not defer to the market when the prevailing market structure allows for the exercise of undue market power because such a market cannot be relied on to fulfill the statutory mandate that rates be just and reasonable.

In Farmers Union Central Exchange v. FERC, 734 F. 2d 1486 (D.C. Cir. 1984), cert. den. sub nom., Williams Pipe Line Co. v. Farmers Union Cent. Exch. Inc., 469 U.S. 1034 (1984) (“Farmers Union”), the court considered the permissible context for the charging of market-based rates.⁵ In that case, FERC presumed that if it simply established ceiling prices, albeit at very high levels, “market forces could be relied upon to keep prices at reasonable levels throughout the oil pipeline industry.” Id. at 1510. The court rejected this reasoning stating that:

⁵ The court noted FERC’s recognition of the lower level of regulatory scrutiny afforded rates charged by oil pipeline companies when compared with rates for the sale of electric power subject to the more exacting requirements of the FPA. Farmers Union, 734 F.2d at 1493. Notwithstanding this difference in legal contexts, the existence of a workably competitive market structure was still given central importance. The link between a workably competitive electric market and the exercise of market-based rate authority in that market should be even more compelling under the FPA.

[w]ithout empirical proof that it would, this regulatory scheme, however, runs counter to the basic assumption of statutory regulation that ‘Congress rejected the identity between the ‘true’ and the ‘actual’ market price. [citation omitted]. In fact, FERC’s regulation by such novel ‘standards’ is worse than an *exemption simpliciter*. Such an approach retains the false illusion that a government agency is keeping watch over rates, pursuant to the statute’s mandate, when it is in fact doing no such thing. [citation omitted].

Id. See also, Tejas Power Corp. v. FERC, 908 F. 2d 998, 1005 (D.C. Cir. 1990). Subsequent court cases emphasize that market-based rate authority (such as that currently exercised by generators in New England within the market structure promulgated by ISO-NE) should only be exercised where the market structure is “workably competitive.” See, e.g., Elizabethtown Gas Company v. FERC, 10 F. 3d 866, 871 (D.C. Cir. 1993).

2. Background to the 2002 FERC Orders

The current market regime for electric generation in New England, which ISO-NE’s Market Rule 1 will replace on March 1, 2003, began with FERC approval in 1999.⁶ The current regime allows generating companies, operating under so-called “market-based rate authority” granted by FERC, generally to bid unilaterally and without regulatory restriction for the supply of energy into a regional wholesale market. Under this regime, ISO-NE administers a single spot market for the sale of electric energy for the entire region and calculates a single hourly energy clearing price. The hourly clearing price is determined by stacking the bids received from generators throughout New England from lowest to highest cost to supply energy in that hour and setting the clearing price equal to the highest bid in the resulting stack needed to satisfy the electric load on the system in that hour. Generators with bids equal to or less than the clearing price are directed by ISO-NE to generate (or “dispatched”) and credited to receive the clearing price in that hour through the ISO-NE settlement process.

⁶ See New England Power Pool, 85 FERC ¶61,379 (1998) (the “1998 Orders”).

If a transmission constraint on the regional grid exists that prevents the physical delivery of the volumes of electric generation bid at or below the clearing price, then ISO-NE dispatches other higher cost generation which can deliver the power. This higher cost “out of merit operation” (“OOMO”) generation is compensated at its bid. The bids for such generation are not used to set the regional clearing price and the additional costs of such OOMO generation, called transmission “uplift” or more loosely “transmission congestion,” is averaged and charged on a uniform basis across all energy consumers throughout the region.

The new LMP regime approved in the 2002 FERC Orders will geographically differentiate the energy clearing price set by ISO-NE while leaving in place the previously granted market-based rate authority held by participating generators. Under the new LMP regime, ISO-NE will implement a transmission congestion management system in which the New England region will be divided into eight “load zones” and hundreds of “nodes.” Each New England state, other than Massachusetts, comprises a separate load zone with Massachusetts divided into three load zones. Each node is a location on the transmission grid designated by ISO-NE. For each node, ISO-NE will implement a separate wholesale spot market and will calculate a separate hourly energy clearing price, or LMP.

For those hours when there are no transmission constraints within the region, the hourly LMPs will be the same at each node. For any hour in which there are transmission constraints within the region, however, LMPs will vary by node based on the bid price of the marginal generating unit dispatched at that node by ISO-NE during the hour. Hourly LMPs for each load zone are then calculated based on the average of the nodal prices within each zone. To the extent that the ISO dispatches high-cost generation units at nodes within a zone because of transmission constraints, the hourly LMP for that zone will be higher than the LMP in non-constrained zones.

The difference between the LMPs in different zones indicates the transmission congestion costs that are incurred.

In granting approval to the current regime in the 1998 Orders, FERC made clear that it did so because it believed that the resulting market forced generators to compete against each other across the entire New England region in a single spot market that was generally “workably competitive.” As such, the market could lawfully function as a substitute for the prior cost-of-service regulation of electric generation established in conformity with FERC’s obligation to assure that wholesale rates for electric power are set at no more than “just and reasonable” levels as required by the FPA. 16 U.S.C. § 824d(a).

Constraints in the transmission grid coupled with concentration of ownership of generation in the area affected by the constraint, however, can create circumstances where a broad, liquid regional market-place with multiple competing generators ceases to function. As load increases relative to the capacity of the transmission system to deliver power from alternate sources, generators with plant located outside the constraint may be unable to physically deliver power to serve load within the constraint. Generators operating within the constraint facing reduced competition may then be called on to generate even though their bids are above the regionally determined clearing price. Facing a reduction in alternate competing suppliers such generators may also raise their bids to supra-competitive levels, creating so-called “transmission congestion.” With more concentrated ownership within a transmission constrained area, this likelihood increases.

In 1998, FERC approved the current regime despite this concern based on its conclusion that transmission constraints had historically occurred only on rare occasions in New England⁷

⁷ 1998 Orders, 85 F.E.R.C. 61,379 at p. 43.

and based in part upon the adoption by ISO-NE of a so-called “market power mitigation” rule, Market Rule 17. This rule was designed to limit the exercise of market power by generators in such circumstances by limiting or mitigating bidding by generators within a transmission constrained area when transmission constraints reduce competition to serve a particular incremental load. Absent the rule, the generators able to serve the load notwithstanding the transmission constraint could exercise “market power” and raise their bids to supra-competitive levels. Application of the rule is intended to replicate the results of the competitive market in those areas and during those periods when, because of limitations in the transmission grid, conditions for a workably competitive market in generation are absent.

The market power mitigation rule applicable in circumstances of reduced competition due to transmission constraints and/or excess concentration of ownership within a transmission constrained area is a critical underpinning of the current market structure. Competition was deemed an adequate substitute for cost of service regulation when functioning on a broad-based and regional basis. When prices could be raised in local areas of the grid due to transmission constraints and a curtailment of competition, market power mitigation rules kick in to assure that generators within the constraint cannot act like monopolists and drive prices above competitive levels in violation of the “just and reasonable” standard of the FPA.

3. The 2002 FERC Orders Violate the FPA Because the Resulting Market Structure Encourages the Undue Exercise of Market Power and Produces Rates That are More Than Just and Reasonable

The ISO-NE SMD approved by the 2002 FERC Orders violates the FPA by condoning and facilitating the exercise of market power in transmission constrained areas of New England, including Connecticut, and thereby encouraging and permitting rates that are more than just and reasonable. In stark contrast to its findings in 1998, in 2001 the FERC has specifically

recognized that Connecticut and particularly southwest Connecticut is a load pocket, characterized by exacting transmission constraints and concentrated ownership of in-area generation.⁸ Despite its realizations that load pockets exist in Connecticut and New England, thereby dramatically increasing the potential for the exercise of market power, the FERC is preparing to implement SMD rules that will facilitate and encourage the exercise of market power in these load pockets. In the 2002 FERC Orders, the FERC has approved market rules that increase the market power of generators within the known load pockets in Connecticut and New England and at the same time relax the market power mitigation rules. The obvious result of this new market regime will be the increased exercise of market power and rates that are more than just and reasonable.

a. LMP

The LMP regime in Market Rule 1 breaks up the broad regional market for generation into multiple, geographically differentiated markets with different clearing prices. Under LMP, concentrated ownership of generation located within a transmission constrained area will result in an increase in the ability of in-area generators to raise the price of power delivered into that area above competitive levels. All output in a load pocket, if defined as the “node” for purposes of determining a clearing price for compensation of energy, would receive the same price as the marginal bid. This would increase the benefits that a company with control over a large share of production in a load pocket would receive if it increased the price paid for the last unit of energy supplied in the load pocket.

As a result, while the current market regime limits the effects of congestion to payment of transmission uplift to the particular unit called on to produce output into the constrained local

⁸ Wisvest Connecticut LLC, 96 FERC ¶61,101 (2001).

area, LMP spreads that compensation to all generators providing output at the same time within the constrained local area to each node at which prices are set. While this has salutary incentive effects in a fully competitive market, in a market dominated by a single or few participants which occurs in a “load pocket,” it exacerbates the harms arising from the exercise of market power in violation of the FPA.

b. DCA

Accompanying the adoption of the LMP regime, the 2002 FERC Orders also modify the market power mitigation rules in a manner that increases the likelihood of the exercise of market power and rates that are more than just and reasonable. Market Rule 1 authorizes ISO-NE to establish Designated Congestion Areas (“DCAs”) each year for areas of the grid which are likely to be subject to transmission constraints over extended periods. Within such DCAs, ISO-NE will not impose its market power mitigation rules on generator bids which fall below a “safe harbor” hourly bid threshold administratively set by ISO-NE. Pursuant to the 2002 FERC Orders, ISO-NE will set bid thresholds at levels that permit the generators located within the DCA to recover the variable costs of operation of a “peaking” generator facility or “proxy” plant. The safe harbor bid thresholds, once set, apply during all hours of the year whether or not transmission constraints actually occur. The “proxy” selected by ISO-NE is wholly divorced from either actual cost or any relationship to market-based prices. Rather than market-based, the proxy now chosen is set by administrative fiat based on a theoretical peaking unit. The cost profile of a peaking unit, however, is not representative of the cost incurred by base load unit units within the DCA. In non-scarcity periods generators should not receive scarcity prices, yet this is what ISO-NE’s SMD contemplates and allows.

As a result, in transmission constrained areas with concentrated ownership of in-area generation, generators will be able to exercise their resulting market power and bid up to the “safe harbor” levels set by ISO-NE without the threat of having their bids mitigated. On February 7, 2003, ISO-NE gave notice of a revision to Market Rule 1 that would allow it to suspend the DCA mechanism in the event that it was not operating as intended. Such a suspension authority, however, does not remedy the flaws inherent in the DCA mechanism that, when in operation improperly sanctions the exercise of market power and leads to rates that are more than just and reasonable. Moreover, if the hours during which actual transmission constraints occur in the DCA exceed the level estimated by ISO-NE in initially setting the “safe harbor” bid threshold, generators operating within the affected load pocket will be able to exercise their market power to continue to bid at that level and recover more than the calculated permissible “margin” of fixed costs. Thus, under the proposed new market rule, the generator can bid up to the proxy plant’s variable costs, which are used by ISO-NE to calculate the bid safe harbor threshold, regardless of the generator’s own actual variable costs.⁹

The DCA mechanism permits prices in excess of the market price that would prevail in non-scarcity periods. Such prices exceed the permissible and lawful zone of reasonableness. As this court ruled in an analogous circumstance in Farmers Union:

FERC’s methodology... merely sets “ceilings seldom reached in actual practice, and permits ‘creamy returns’ to the [regulated entity].... Such ratemaking does not comport with FERC’s statutory responsibilities. FERC’s methodology, therefore, exposes a range of permissible prices that would exceed the zone of reasonableness by definition, unless competition in the.... Market drives the actual prices back down into the zone. But nothing in the regulatory scheme itself acts as a monitor to see if this occurs or to check rates if it does not. That is the fundamental flaw in the Commission’s scheme.

⁹ Although ISO-NE has authority to suspend the DCA rule and exercise market monitoring authority, these provisions do not change the meaning of this rule and do not provide sufficient protection against the exercise of market power.

Farmers Union, 734 F. 2d at 1509.

c. RMR Agreements

Market Rule 1 also authorizes ISO-NE to enter into Reliability Must Run contractual arrangements (“RMR Agreements”) with generators which are deemed necessary for “reliability” purposes and are unable to recover their going forward costs if allowed to collect only the clearing prices in the market, as mitigated by the operation of the market power mitigation rule. Amounts paid by ISO-NE under these arrangements are collected in a manner equivalent to a regulatory charge from market participants under ISO-NE’s open access transmission tariff.

Market Rule 1 gives ISO-NE broad discretion to enter into RMR arrangements. Market Rule 1 also specifically authorizes generators that are designated as “needed for reliability” by ISO-NE to apply for RMR contracts to allow recovery of their operating and investment costs if they indicate that absent such agreement they will permanently shut-down their generation plant.¹⁰ If such a generator is not satisfied with the financial arrangement offered by ISO-NE, it can default to a fully regulated cost of service rate as determined by FERC under section 205 of the FPA and thereby opt out of the competitive market back into the regulated market with

¹⁰ Market Rule 1, Appendix A, § 6 provides, in relevant part, as follows:

6. Reliability must-run Agreements.

6.1 Mitigation Agreements. A Participant with the authority to submit Supply Offers for any RMR Resources designated pursuant to Section 3 of *Exhibit 2* as RMR may initiate with the ISO negotiations for a prospective agreement under the procedures set forth in *Exhibit 2*.

6.2 Cost-of-Service Agreements. For Resources seeking authority permanently to shut-down and identified by the ISO as necessary for reliability, the ISO will negotiate prospective cost of service agreements under the procedures set forth in Section 3.3 of *Exhibit 2*.

6.3 Filing with the Commission. All agreements negotiated by the ISO under this Section 6 will be filed with the Commission in such form and manner as the Commission from time to time requires.

guaranteed cost recovery. If needed for reliability, a generator, by definition, has market power and does not face competitive forces with respect to the sale of its output from the periods when the plant is needed. Under the RMR procedure, generators, if deemed “needed,” may use the threat of shutting down their plants to exact special compensation regimes from ISO-NE whenever they are dissatisfied with the financial results of the competitive market. As a result, under Market Rule 1, generators are able to use their status as needed plants and, therefore, their market power, to seek fixed cost recovery guarantees as a floor under their operations in the competitive market.¹¹

d. Market Rule 1 Violates the FPA

The stated purpose of the LMP, DCA and RMR measures is to provide incentives for generators to locate within transmission constrained areas and thereby alleviate the scarcity of generation resources in such areas. The proposed measures, however, do not further this goal. Instead, they allow undue market power to be exercised and produce rates that are more than just and reasonable in violation of the FPA. New resources, once added within a transmission constrained area so as to remove the constraint, result in the elimination of the DCA determination for that area and thereby elimination of the safe-harbor bid threshold and the resulting incentive. Generators, aware of that result, are unlikely to premise the necessary long-term investment in generation based on such an incentive. Moreover, ISO-NE has separately committed to expansion of transmission plant to alleviate transmission constraints which is compensated through transmission tariff provisions unrelated to the DCA/RMR mechanism.

¹¹ Exacerbating this infirmity, existing generators, who previously have been granted market-based rate authority by FERC, are not required, absent a revocation of that authority, to support their request for such guaranteed recovery in conformity with the normal accounting and rate filing requirements which apply to utilities subject to rate regulation under the FPA and seeking to charge rates under FPA, section 205. The initial grant of market-based rate authority typically waives these requirements.

Market Rule 1 as approved by FERC plainly violates the FPA. It is an untested experiment in the redesign of the market for the supply of critical infrastructure necessary to the operation of the New England economy. In New England, generators operate under FERC-granted market based rate authority, so a competitive market structure is critical to continued compliance with the FPA. As described above, ISO-NE's proposed LMP mechanism will allow an increased scope for the exercise of market power in transmission constrained areas of the New England region – precisely those areas where market-power can be exercised because of an absence of competition. The DCA mechanism directly contemplates and allows for the exercise of market power in such areas, whereby generators may bid above their costs up to an administratively determined price-level and are exempt from the prevailing market power mitigation rule. Finally, the RMR mechanism delegates to ISO-NE the ability to negotiate whatever financial arrangements are necessary to ensure that a facility subject to an RMR agreement will be available. Generators deemed “needed for reliability” (implying an absence of competition and, therefore, the potential to exercise market power) can invoke RMR arrangements by threatening to shut-down their facilities. The combination of these new mechanisms gives rise to the high probability that generators in the New England marketplace will exercise market power and produce rates that are more than just and reasonable. Prevailing court and FERC precedent forecloses the exercise of market-based rate authority in a market context where market power can be exercised. Yet the market structure approved in the 2002 FERC Orders contemplate precisely that.

4. FERC's Decision is Not Founded Upon Substantial Evidence and is Arbitrary and Capricious

The fatal infirmities of the DCA mechanism are confirmed by the Commission's own discussion and analysis of the mechanism in the 2002 FERC Orders. In the September 20th

Order, the Commission accepted ISO-NE's filing, but limited the period, when it could take effect to the hours "only when transmission constraints and demand conditions in the DCA require the dispatch of all capacity of all available resources within the DCA." 100 FERC 61,287 at P. 45. In the rehearing order, the Commission reversed itself and adopted ISO-NE's original proposal to permit the safe harbor bid threshold to apply during all hours. The hours during which the DCA is anticipated to experience transmission congestion becomes merely a basis for calculating the hourly proxy price. The sole basis for the Commission's reversal of position is the claim that restricting the use of high safe harbor bids:

to defined scarcity periods would require that generators accurately assess when scarcity conditions would arise and then bid the CT proxy to obtain the scarcity price; and this uncertainty could discourage CT proxy bids and thus fail to achieve scarcity pricing needed to support entry [of generators] in DCAs.

Id. FERC itself, however, acknowledges potential weaknesses in the proposed mechanism.

Thus, it states, the DCA mechanism "may give generators an incentive to depart from a competitive marginal cost bidding strategy" and consequently "may result in scarcity prices being paid when there is no scarcity." Id. at 20.

FERC utterly fails to provide substantial evidence in support of its position. There is no substantial evidence to support the conclusion that the mechanism will encourage new generation to locate within transmission constrained areas or sets prices no higher than necessary to provide such incentive. Moreover, there is no showing that additional generation is required within a particular DCA when the "congestion" giving rise to the designation may result instead from concentrated ownership within the transmission load pocket. The 2002 FERC Orders are, therefore, legally infirm because lacking support in substantial evidence.

B. Absent the Grant of a Stay of the FERC's Orders approving ISO-NE's SMD, Irreparable Harm Will Result to Connecticut Ratepayers, Which Can Not Be Remedied Retrospectively

Adequate remedies do not exist to protect electric ratepayers from the unlawful effects of ISO-NE SMD. As discussed above, the new market structure will violate the "just and reasonable" standard of the FPA. The FPA provides for refunds of rates determined to exceed lawful levels only in limited instances, which precludes the possibility of retroactive refunds of such excessive amounts in the present case.

Section 206 of the FPA allows the FERC, if it acts on its own initiative against an unlawful rate, to institute refunds from a date no earlier than 60 days after publication by the Commission of notice of its intention to initiate such a proceeding. If a section 206 proceeding is initiated upon a complaint of third-party, the refund effective date cannot be earlier than the date sixty days following the filing of the complaint. Neither a Commission instituted nor third-party complaint is currently pending. Accordingly, any refund of excessive recoveries commencing on March 1, 2003 is foreclosed for a period of at least 60 days. As discussed above, the probability of such excessive and unlawful recovery is very high during this interim period. Such excessive charges, therefore, constitute irreparable harm to the interests of Connecticut ratepayers for which an adequate remedy does not exist.

Further, once the new market rules go into effect, it will be impossible to measure the harms to consumers. That is because there will be no means to determine what generators' bids might have been under the old market rules that constrained the exercise of market power in transmission congested areas and then compare them to the bids actually made under the new SMD rules.

C. The Granting of a Stay of the FERC's Orders approving ISO-NE's SMD Will Not Harm Other Parties

The granting of the requested stay will not harm other parties. First, the stay will preserve the status quo concerning the currently existing market rules. The existing market rules have operated since 1998 and it is undisputed that these rules provide for rates that are just and reasonable. Moreover, the implementation of SMD in New England has already been re-scheduled and delayed. In addition, FERC's efforts to impose a nationwide SMD have stalled. FERC's national SMD is the subject of a proposed rulemaking that is still pending. Accordingly, there is no urgency to implementing SMD in New England only, separate and apart from the national SMD effort.

D. The Granting of a Stay of the FERC's Orders approving ISO-NE's SMD is in the Public Interest

For the reasons articulated above, the granting of the stay is in the public interest. First, the 2002 FERC Orders plainly violate the FPA in that they facilitate and promote the exercise of market power by generators in transmission constrained areas, including those in Connecticut, resulting in rates that are more than just and reasonable in those areas. As such, the 2002 FERC Orders are contrary to law, are beyond the FERC's statutory authority and, if implemented, will cause substantial hardships and irreparable injury to Connecticut citizens.

