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February 25, 2003

VIA HAND DELIVERY

The Honorable Mark J. Langer
Clerk of the Court
United States Court of Appeals
For the District of Columbia Circuit
Room 5423
3333 Constitution Ave., N.W.
Washington, D.C. 20001

Re: *Attorney General for the State of Connecticut v. FERC*, Case No. 03-1032,
Motion of ISO New England Inc. for Leave to Intervene, and Memorandum Of
Intervener ISO New England Inc. In Opposition To Petitioner's Emergency
Motion For A Stay Pending Review

Dear Mr. Langer:

In accordance with the Federal Rules of Appellate Procedure and the Rules of this Court, and the *per curiam* order filed in this proceeding on February 21, 2003, ISO New England Inc. submits for filing an original and eight copies of the referenced documents, together with other required materials.

Also enclosed is an extra copy of this filing. Please have your staff date-stamp this extra copy and return it to the messenger making this delivery. Copies are being served by hand today on counsel for the Petitioner and Respondent.

If there are any questions concerning this filing, please call me at (202) 661-2205

Respectfully submitted,



Howard H. Shafferman
Counsel for ISO New England Inc.

Enclosures

DC_DOCS_A #1114025 v1

United States Court of Appeals

District of Columbia Circuit
Washington, D.C. 20001-2866

General Information
(202) 216-7000

Facsimile Number
(202) 219-8530

ENTRY OF APPEARANCE

Case No. 03-1032

CAPTION ATTORNEY GENERAL FOR THE STATE OF CONNECTICUT
v.
FEDERAL ENERGY REGULATORY COMMISSION

PARTY

The Clerk will enter my appearance as counsel for:

- Appellant(s)
 Petitioner(s) _____
Name of Party
- Appellee(s)
 Respondent(s) _____
Name of Party
- Intervenor(s) ISO NEW ENGLAND INC. _____
Name of Party
- Amicus Curiae _____
Name of Party

ATTORNEY

Name HOWARD H. SHAFFERMAN Phone 202-661-2205

Name _____ Phone _____

Name _____ Phone _____

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NOTE: Must be submitted by a member of the Bar of the USCA for the D.C. Circuit.

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

Richard Blumenthal, Attorney)	Docket No. 03-1032
General for the State of Connecticut,)	
)	
Petitioner,)	
)	
v.)	
)	
Federal Energy Regulatory Commission,)	
)	
Respondent.)	

**MOTION OF ISO NEW ENGLAND INC.
FOR LEAVE TO INTERVENE**

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure, ISO New England Inc. (the “ISO”) hereby moves for leave to intervene in the above captioned-proceeding. In support of this motion, the ISO respectfully states as follows:

Petitioner in the captioned proceeding seeks review of the following orders issued by the Respondent Federal Energy Regulatory Commission (“FERC”):

(1) “Order Accepting in Part and Modifying in Part Standard Market Design Filing and Dismissing Compliance Filing,” *New England Power Pool and ISO New England Inc.*, Docket Nos. ER02-2330-000 and EL00-62-039, dated September 20, 2002, 100 FERC ¶ 61,287 (2002); and

(2) “Order on Rehearing and Accepting Compliance Filings,” *New England Power Pool and ISO New England Inc.*, Docket Nos. ER02-2330-001 and EL00-62-052, Nos. ER02-2330-002 and EL00-62-053, and Nos. ER02-2330-003 and EL00-62-054, dated December 20, 2002, 101 FERC ¶ 61,344 (2002).

The ISO was a party in the FERC proceedings below. The ISO is the independent system operator of the bulk electric power system for New England, and administers the markets for wholesale electricity in New England, pursuant to the specific authorization of the Federal Energy Regulatory Commission. The ISO has developed and proposes to implement on March 1, 2003 the new standard market design for the electric markets in New England which is at issue in this proceeding. Accordingly, the ISO has a vital stake in the outcome of these cases. No other party can adequately represent the ISO's interests in these proceedings.

WHEREFORE, the ISO respectfully moves the Court for leave to intervene with the right to participate fully in all aspects of these proceedings.

Respectfully submitted,

Dated: February 25, 2003



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Attorney for ISO New England Inc.

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

Richard Blumenthal, Attorney)	Docket No. 03-1032
General for the State of Connecticut,)	
)	
Petitioner,)	
)	
v.)	
)	
Federal Energy Regulatory Commission,)	
)	
Respondent.)	

ORDER

Based on the Motion to Intervene filed in this proceeding by ISO New England Inc., any opposition thereto, and the record herein, it is this __ day of _____, 2003,

ORDERED,

that the Motion to Intervene of ISO New England Inc. is granted.

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

Richard Blumenthal, Attorney)	Docket No. 03-1032
General for the State of Connecticut,)	
)	
Petitioner,)	
)	
v.)	
)	
Federal Energy Regulatory Commission,)	
)	
Respondent.)	

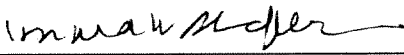
DISCLOSURE STATEMENT OF ISO NEW ENGLAND INC.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, ISO New England Inc. (the "ISO") hereby submits the following Disclosure Statement:

The ISO is the independent system operator of the bulk electric power system for New England, and administers the markets for wholesale electricity in New England, pursuant to the specific authorization of the Federal Energy Regulatory Commission. The ISO has developed and proposes to implement on March 1, 2003 the new standard market design for the electricity markets in New England which is at issue in this proceeding. The ISO a not-for-profit, non-stock corporation incorporated under the laws of the State of Delaware. The ISO has no parent corporation or shareholders.

Respectfully submitted,

Dated: February 25, 2003



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

Attorney General for the State of Connecticut,)	Docket No. 03-1032
)	
Petitioner,)	
)	
v.)	
)	
Federal Energy Regulatory Commission,)	
)	
Respondent.)	

**MEMORANDUM OF INTERVENOR ISO NEW ENGLAND INC.
IN OPPOSITION TO PETITIONER’S EMERGENCY
MOTION FOR A STAY PENDING REVIEW**

Intervenor ISO New England Inc. (the “ISO”) submits this Memorandum of Law in Opposition to the Emergency Motion of Petitioner, Richard Blumenthal, Attorney General for the State of Connecticut (“CTAG”) for a stay pending review of an order of the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued on September 20, 2002 and confirmed upon rehearing on December 20, 2002. The petitioner’s emergency motion for a stay is procedurally improper, fails to meet any of the requirements for a mandatory stay, and should be denied.

I. SUMMARY OF ARGUMENT

CTAG’s emergency motion is an eleventh-hour gambit to stop a process begun in 1999 when the ISO, the administrator of the bulk electric power markets in New England, commenced the operation of the energy market using market-based rates. At that time, the ISO recognized and the Commission concurred that the markets that the ISO was implementing were deficient in a number of significant respects, including the absence of a location-based

congestion management system. The ISO and the market participants (members of the New England Power Pool, or “NEPOOL”) have devoted substantial effort and resources to develop a new market system, overwhelmingly concluding in the spring of 2001 that it was most important to choose a platform of rules and software that was proven and that could be reliably implemented in a reasonable period at acceptable cost. The ISO and NEPOOL jointly filed the proposed Standard Market Design (“SMD”), modeled after other successfully operating markets, with the Commission on July 15, 2002. Thereafter, in August 2002, the NEPOOL Participants Committee (“NPC”), representing the over 220 entities that participate in the New England energy market, requested that the ISO set a firm date for the operation of the new market. On September 6, 2002, the ISO reported to the NPC that the firm date for the operation of the new market would be March 1, 2003. The Commission initially approved the new market on September 20, 2002¹ and, on rehearing, affirmed its September 20 Order on December 20, 2002.² It is much too late in this multi-year process of market development and implementation for one stakeholder to come in to this Court over two months later, having opted not to ask FERC to stay its December 20 Order, and seek an emergency stay from this Court, citing unsubstantiated allegations of irreparable harm.

As a practical matter, the ISO cannot reverse its decision to implement the new markets after noon on Thursday, February 27, 2003. As detailed in the affidavit of David LaPlante, attached hereto, the market participants (members of NEPOOL), in reliance on the

¹ See New England Power Pool and ISO New England Inc., 100 FERC ¶ 61,287 (2002) (the “September 20 Order”).

² See New England Power Pool and ISO New England Inc., 101 FERC ¶ 61,344 (2002) (the “December 20 Order”). The September 20 and December 20 Orders will be referred to herein collectively as the “2002 FERC Orders.”

start-up of the new market (and the discontinuance of the old market), are formulating bids of the prices at which they are willing to produce and sell electric energy for March 1, 2003 and thereafter. These bids must be submitted to the ISO by noon on Friday, February 28, 2003, if the ISO is to have sufficient time to process these bids and dispatch generators in accordance with the FERC-approved rules for the new market. In fact, because the bid period has already opened, many participants have begun to submit bids. If participants are required to submit (or resubmit) bids under the old market system, they must be given adequate notice as the two systems use different market rules to determine prices and utilize different software. Thus, the ISO believes that participants will require a minimum of 24-hours' notice in advance of the bid submission deadline, that is, by noon on February 27, 2003, of any change in plans. Accordingly, the ISO respectfully submits that it will be unable to comply with an order suspending the operation of the new markets after noon on Thursday, February 27, 2003.

However, the minimum notice required from an operational standpoint does not address the harm that the NEPOOL participants (CTAG is not a market participant) will suffer if SMD does not go into effect. In planning for the new market, many participants have entered into contracts and utilized other financial hedging devices appropriate to operations in the new markets. These arrangements cannot be undone in 48 hours. This is one reason why the participants requested that the ISO set a firm date for the implementation of SMD.

CTAG's belated request should be denied on both procedural and substantive grounds. Procedurally, CTAG fails to show why it waited until one week before the SMD implementation date to seek an emergency stay and cannot show why moving before FERC was impracticable in the two months that it sat by the sidelines after the rehearing order was issued. Nor can it explain why it failed to give the ISO reasonable notice of its motion. The ISO's first

notice of the emergency motion was through the mail just yesterday. CTAG also fails to support any of its factual assertions by way of affidavit or other sworn statement. These procedural infirmities alone require the denial of the motion.

Substantively, CTAG has not shown that it meets any of the requirements for a mandatory stay. CTAG cannot show that it can prevail on the merits. SMD is a superior market design,³ already implemented in the largest wholesale market in the world, and is the product of years of consideration by the NEPOOL participants, the ISO and FERC. Moreover, CTAG complains about certain aspects of the SMD, such as the establishment of designated congestion areas, that will not be implemented on March 1, 2003, and thus are not properly the subject of an emergency order. CTAG also complains about must-run reliability arrangement with generators, the effect of which could be changed after the fact by FERC order and thus also are not properly the subject of an emergency stay request.

CTAG has not produced any evidence of irreparable harm. Indeed, the absence of any supporting affidavit may be purposeful. The implementation of SMD will not affect retail consumers in Connecticut because of rate caps that are in effect through the end of 2003. Notably, the entities in Connecticut that serve this load at capped rates have not asked for a stay and have had the opportunity through long-term contracts and hedging mechanisms included in the new markets to avoid exposure to market prices in SMD.

Nor has CTAG offered any evidence that others will not be irreparably harmed if a stay is granted. CTAG has conveniently ignored the fact that the NEPOOL participants – who have acted in reliance on the new markets being implemented and have entered into various

³ See September 20 Order at P 21 (describing the new market as “superior to the market design in place in New England now, particularly in its treatment of congestion management problems through LMP and its superior allocation of congestion costs”).

long-term arrangements – stand to be harmed by any delay. CTAG has also failed to recognize that the public interest will be jeopardized through the delay in implementing superior, more efficient markets that send proper locational signals and do not impose local congestion costs on all New England customers.

In short, CTAG’s motion should be denied because CTAG has not met any of the requirements for a stay of the 2002 FERC Orders.

II. PETITIONER’S EMERGENCY MOTION FOR A STAY PENDING REVIEW IS PROCEDURALLY IMPROPER

CTAG’s emergency motion for a stay complies with none of the procedural requirements set forth in Federal Rule of Appellate Procedure 18 and Circuit Rule 18. As is set forth below, CTAG (i) has failed to show that moving for a stay before FERC would have been impracticable, (ii) has failed to proffer any affidavits or other sworn statements to support the factual assertions made in the motion, and (iii) failed to give reasonable notice of the motion to all parties, in particular, the ISO which is set to implement the 2002 FERC Orders on March 1, 2003.

A. Moving Before FERC Was Practicable

CTAG acknowledges in its brief that, pursuant to Federal Rule of Appellate Procedure 18, the Petitioner must ordinarily first move first before the agency for a stay pending review of its orders. Stay Motion at 3. CTAG also acknowledges that it has not previously requested a stay from the FERC. *Id.* CTAG then argues that moving first before FERC would be impracticable as the new market rules approved by the 2002 FERC Orders are scheduled to go into effect on March 1, 2003, and Circuit Rule 27(f) requires that an emergency motion for a stay be filed at least seven calendar days before the date by which court action is necessary. *Id.* However, standing idly by until seven days before court action is necessary does not create

impracticability. Nowhere does CTAG explain why it failed to ask the Commission for a stay in the five months since the Commission's initial order approving SMD or in the two months since the Commission's order on rehearing. Such bare assertions of impracticability are insufficient and, moreover, are contrary to the facts.

What CTAG does not tell this Court is that CTAG has known since at least September 6, 2002, that the new markets would go into effect on March 1, 2003. On August 8, 2002, the NEPOOL Participants Committee, representing the over 220 entities that participate in the New England energy market, requested that the ISO set a firm date for the operation of the new market. On September 6, 2002, the ISO informed the Committee of the ISO's decision to set a firm date of March 1, 2003, subject to completion of a successful external market trials and the confirmed readiness of both the ISO and the participants. The Commission issued an order on September 20, 2002 accepting the new standard market design for New England.⁴ FERC affirmed on rehearing its order accepting the standard market design on December 20, 2002. The State of Connecticut, and entities it represents, have made numerous filings before FERC concerning the standard market design since the order issued on rehearing on December 20, 2002. At no point, however, has CTAG requested that the Commission stay its orders of September 20 and December 20, pending appeal of those Orders. Thus, at a minimum, CTAG has had over two months since the Commission's order of December 20, 2002 to ask the Commission to stay the effect of that Order and has chosen not to do so. CTAG has failed to make any showing as to why it was impracticable at any point during those two months to request a stay from the Commission. On this ground alone, CTAG's motion should be denied.

⁴ In a filing with FERC dated December 13, 2002, the ISO repeated that the new market would go into effect on March 1, 2003. See Motion to Intervene and Comments of ISO New England Inc. in FERC Docket No. ER03-210-000 (December 13, 2002).

Courts have held that the filing of a motion to stay before the Court of Appeals after knowing and deliberate delay constitutes a “misuse of the judicial process,” and does not constitute impracticability sufficient to excuse adherence to the Rule requiring application first to the relevant agency. See Hirschfeld v. Board of Elections, 984 F.2d 35, 38 (2d Cir. 1993). In Hirschfeld, appellant Board of Elections sought the stay of a District Court order directing that the name of a candidate Hirschfeld be placed on the ballot for the general election. Id. at 35. The Board allowed the District Court judgment to stand for four weeks, then elected to file a motion for stay before the Second Circuit, without first applying to the District Court. Id. at 38. Additionally, the Board waited until less than a week before the General Election to file their motion papers. Id. The Court found the Board’s actions “misleading at best,” and denied the motion to stay given the Board’s “willful disregard of Rule 8.”⁵ Id. See also, Chemical Weapons Working Group v. Department of the Army, 101 F.3d 1360, 1361-62 (10th Cir. 1996) (denying motion to stay and finding appellants failed to show impracticability where appellants failed to apply to the district court first and waited over a month from the date of the judgment before seeking a stay). Indeed, courts deny motions to stay due to the simple failure to satisfy the plain requirements of the Rule, regardless of whether a movant acted in bad faith. See SEC v. Dunlap, 253 F.3d 768, 774 (4th Cir. 2001) (denying motion to stay where movant failed to first pursue relief in the district court); United States v. Rundle, 461 F.2d 768, 769 (3d Cir. 1972) (same). Here, CTAG’s failure to apply to FERC is inexcusable.

⁵ Federal Rules of Appellate Procedure 8, relating to motions to stay district court orders, and 18, relating to motions to stay agency orders, are governed by identical legal standards. Commonwealth-Lord Joint Venture v. Donovan, 724 F.2d 67, 68 (7th Cir. 1983).

B. Petitioner has Proffered no Affidavits or Other Sworn Statements in Support of its Emergency Motion

Federal Rule of Appellate Procedure 18 (a)(2)(B)(ii) dictates that a motion for a stay must include “originals or copies of affidavits or other sworn statements supporting facts subject to dispute.” Here, CTAG has failed to proffer any affidavits or other sworn statements supporting any of the facts set forth in its emergency motion for a stay pending review. In particular, CTAG asserts that irreparable harm will result to Connecticut ratepayers absent a stay of the FERC’s orders approving the standard market design, and asserts that a granting of the stay of the FERC orders will not harm other parties. Such assertions must be supported by affidavit.

C. Petitioner has Failed to Give the ISO Adequate Notice of Its Motion

The ISO was a party in the proceeding below before FERC. Indeed, it was the ISO and NEPOOL’s joint filing that the Commission approved in its Orders of September 20 and December 20, 2002. Yet, CTAG inexplicably failed to give the ISO reasonable notice of this “emergency motion” as required by Federal Rule of Appellate Procedure 18(a)(2)(C) and Circuit Rule 18(a)(2). CTAG filed the motion on February 21, 2003. Outside counsel for the ISO, as specified on the FERC’s official service list and located in the District, did not receive a copy of the motion until February 24, 2003, when a copy arrived in the mail. Nor did the ISO’s counsel receive telephone notification in advance of the filing of the motion. Moreover, inside counsel for the ISO (also specified on the FERC’s official service list and located in Holyoke, MA) attempted to contact CTAG’s counsel by phone on the day the motion was filed, but the telephone call was not returned. Such cavalier disregard for the notice provisions warrants the denial of the motion.

III. PETITIONER'S MOTION IS DEVOID OF MERIT

Substantively, CTAG has not met its burden of establishing any of the four factors that the Court considers in determining whether a stay is warranted. See Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985); see also Circuit Rule 18(a)(1). CTAG has not demonstrated that it is likely to prevail on the merits. Nor has CTAG made any showing that it will suffer irreparable harm absent a stay. CTAG also fails to address the harm market participants and consumers throughout New England will suffer if it the Court grants the stay and the new markets are delayed. Lastly, CTAG ignores the public interest, which weighs heavily in favor of implementing more efficient markets.

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

The CTAG objects to three aspects of the SMD market:

1. the adoption of locational marginal pricing ("LMP") under which energy prices will reflect the costs of transmission congestion;
2. the modification of market power mitigation procedures, including the establishment of designated congestion areas ("DCAs"); and
3. instituting reliability must-run ("RMR") arrangements for selected electric generators.

The CTAG's assertion that LMP is an unproven and untested market that will produce unreasonable rates for the citizens of Connecticut is unfounded and unsupported. The LMP market being instituted by the ISO is a proven market. The ISO's LMP market will be virtually identical to the LMP market, approved by FERC, that has been used since April 1, 1998 by PJM Interconnection, LLC ("PJM"). The PJM market is the largest wholesale market in the world (see www.PJM.com), covering Pennsylvania, New Jersey, Maryland, the District of Columbia and portions of West Virginia and New York, and its LMP market has been referenced

in support of LMP by FERC.⁶ The ISO affirmatively made the decision to implement this PJM-based market, as opposed to the unique LMP market which was previously being contemplated in New England, because it was an established market operating on proven technology which could be transported to New England. This decision by the ISO was first announced in March 2001,⁷ consistent with the prior urging of FERC.⁸ At that time, LMP markets had been adopted in PJM, New York and many other jurisdictions around the world.

The new market has been extensively and thoroughly tested and is ready to be implemented by the ISO. The new market design and software have undergone a series of tests and two internal and three external market trials. These trials represented an effective means of identifying design and implementation issues. The market trials did not reveal any unresolved design or implementation issues. The ISO also conducted a thorough review of supporting

⁶ The Commission expressed support for PJM's LMP as a congestion management technique in Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089 at 31,126-27 (1999) (Order No. 2000), order on reh'g, Order No. 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000) (Order No. 2000-A), aff'd sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607 (D.C. Cir. 2001) ("As we stated in our order approving the PJM ISO and reiterated in the NOPR, markets that are based on locational marginal pricing and financial rights for firm transmission service appear to provide a sound framework for efficient congestion management."). In a recent notice of proposed rulemaking, the Commission proposed to explicitly require implementation of LMP by Independent Transmission Providers. See Remediating Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design Notice of Proposed Rulemaking, 100 FERC ¶ 61,138 (2002) at PP 203-04.

⁷ See Regional Transmission Organizations, Docket No. RM99-2-000, Comments of ISO New England Inc., Preliminary Report of ISO New England Regarding "Standard Market Design" (March 29, 2001).

⁸ See ISO New England Inc., 91 FERC ¶ 61,311 (2002) at 62,060 ("ISO New England should consider acquiring existing congestion management software that has been shown to successfully operate locational pricing as an alternative to designing its own software from scratch.").

documentation, sponsored comprehensive training of market participants over an 18 month period and developed a “cutover” plan to ensure a smooth transition to the new market. In addition, the ISO has used independent consulting firms to review the SMD testing program to ensure that it was thorough and complete, and to certify that key software applications that will be used in the market are ready to be implemented and comply with the market rules. On February 7, 2003, the ISO notified FERC that the new markets were ready and should be implemented as planned on March 1, 2003.

Finally, the LMP market to be implemented by the ISO on March 1, 2003 represents a substantial improvement from the existing market in New England. The LMP market to be implemented by the ISO will send the necessary locational pricing signals needed for a successful market which have been missing in New England since the implementation of its current market. Contrary to the CTAG’s assertion that this will produce unfair and unreasonable prices, this market will produce fairer prices by reducing subsidization between regions and, thereby, will send appropriate signals for the construction of much needed transmission infrastructure and new generation. In its September 20, 2002 Order approving SMD, FERC specifically found that:

NEPOOL and ISO-NE have developed a standard market design that is superior to the market design in place in New England now, particularly in its treatment of congestion management problems through LMP and its superior allocation of congestion costs.

100 FERC ¶ 61,287 at P 27.

The SMD market to be implemented by the ISO, unlike the current market, will be consistent with FERC’s cost causation principles. One of the major flaws of the current market is its failure to send appropriate price signals to areas (including Connecticut) where electricity is more costly. The failure of the current market to send appropriate price signals has

resulted in: (i) consumers in low-cost areas subsidizing higher cost areas; and (ii) a lack of needed investment in those higher cost areas. Higher-cost areas are generally those areas that experience congestion. Congestion reflects the higher cost of producing power within a region due to the inability to import low-cost power that is available outside the region. Southwest Connecticut, where there is a need for substantial and long-delayed transmission infrastructure, is an area that incurs higher cost due to congestion. Under the current market, these costs are borne by the entire New England region.

The need to have a market with locational pricing signals and to end the socialization of congestion costs caused by local transmission constraints was recognized by the ISO even before the implementation of the current market. On September 14, 1998, the ISO filed its assessment of the current market, based on a study conducted by Dr. Peter Cramton and Robert Wilson.⁹ One of the significant findings of that study was the need for a location-based congestion system. In its Order approving the current markets, the Commission questioned the long-term viability of the current market and recognized the need for a revised congestion management plan. See New England Power Pool, 85 FERC ¶ 61,379 (1998). The Commission has continued to urge the adoption of a location-based congestion management system in subsequent orders. See ISO New England Inc., et al., 91 FERC ¶ 61,311 at 62,060 (FERC required ISO to explain why it cannot acquire an existing congestion management system and implement it by February 1, 2001); New England Power Pool, et al., 96 FERC 61,317 at 62,215 (urging ISO to continue development of SMD).

⁹ See ISO filing in New England Power Pool, Docket Nos. OA-97-237-000, et al., (September 13, 1998), attaching Cramer and Wilson, “A Review of ISO New England’s Proposed Market Rules.”

CTAG also objects to the implementation of the DCAs as the basis for a mandatory stay of SMD. However, this feature of the SMD market rule (“Market Rule 1”), which is part of a mitigation proposal based on the costs of a new combustion turbine generator (the “CT Proposal”), will not be implemented on March 1. As the ISO explained in the January 28 filing designating three areas within New England as DCAs, the ISO does not intend, nor is it required by Market Rule 1, to implement these DCA designations in conjunction with the March 1 effective date of the new markets.¹⁰ Market Rule 1 does not require the ISO to designate any areas within NEPOOL as DCAs or the implementation of the Proxy CT Proposal. In approving the Proxy CT Proposal in the December 20 Order, the Commission only gave the ISO the permission to identify certain areas as DCAs and implement the Proxy CT Proposal in these DCAs when the conditions for making this designation are met. Market Rule 1 does not require the ISO make and implement DCA designations nor must they be made in order for Market Rule 1 to become effective.

Furthermore, the ISO has announced that until the Commission issues an order approving its initial DCA designations and DCA threshold values, it intends to delay implementing them.¹¹ As the ISO noted in the DCA Filing, this decision to delay the implementation of DCAs practically precludes a March 1 effective date for the ISO’s DCA designations. Unless and until the Commission approves the ISO’s initial DCA designations, there will be no operational DCAs in New England. Consequently, there will be ample time and

¹⁰ Joint Informational Filing on Designated Congestion Areas (DCAs) and Notice of Planned Implementation of DCAs at p. 11, Docket No. ER02-2330-008 (Jan. 28, 2003) (the “DCA Filing”).

¹¹ Id.

opportunity to resolve all pending issues regarding the Proxy CT Proposal and the designation of DCAs regardless of whether the new markets are implemented on March 1.

As a result, CTAG's objection to DCA's does not meet the criteria for a mandatory stay since the proposal will not be implemented until a further Commission action. The CTAG will have the opportunity to object to that order, seek a subsequent stay from the Commission or this Court of that order and will experience no irreparable harm with respect to DCAs on March 1, 2003.

Finally, CTAG objects to the treatment of RMR units in the new market. While CTAG cites the ISO's "wide discretion" in dealing with RMR units (Stay Motion at 14), the ISO in fact will have less discretion under the new market rules than it has under the current market. The CTAG's real objection is that the congestion cost of RMR units will be borne by the specific region, instead of subsidized by consumers throughout all of New England, and that RMR units can set locational prices. Both of these are fully consistent with the cost causation and locational price signals of LMP. Further, the allocation of these costs to specific regions does not warrant a mandatory stay since this allocation could be changed by FERC after the fact through the ISO's financial settlement process. Allowing RMR units to set the clearing price is consistent with both the PJM and New York markets. In addition, ISO-NE has authority in RMR agreements to cause those units to bid their marginal costs. Finally, under the new market rules, the bids of units in constrained areas when constraints are binding cannot exceed established reference prices which are based on the unit's marginal costs.

B. The Petition Has Failed to Establish, Through Admissible Evidence or Otherwise, that Irreparable Harm will Result to Connecticut Ratepayers

Economic loss is insufficient, in and of itself, to establish irreparable harm.

Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). Moreover, the moving party

must “substantiate the claim that irreparable injury is ‘likely’ to occur.” *Id.* “Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur.” *Id.* (emphasis in original); see also Reynolds Metals Co. v. FERC, 777 F.2d 760 (D.C. Cir. 1985) (stay denied where irreparable harm unsubstantiated and speculative). Here, CTAG’s allegations are similarly unsubstantiated.

The CTAG offers no evidence of any actual irreparable harm to it or the consumers in Connecticut or the lack of irreparable harm to others. The only potential harm to Connecticut customers is the end of an unfair subsidy that does not recognize FERC’s fundamental cost causation principles which will be implemented through LMP. Even the termination of that subsidy will not be felt by the Connecticut consumers that the CTAG purports to represent. All consumers in Connecticut currently benefit from caps on retail rates which continue through the end of 2003.¹² Any real short-term economic impact of LMP in Connecticut will be experienced by the entities that would serve this load at those capped rates. These entities have not requested a mandatory stay and have had the opportunity through long-term contracts to avoid price increases or volatility in spot market prices due to LMP. The new SMD market also includes a number of hedging tools that will allow market participants to limit their exposure to this price risk.

Likewise, CTAG makes no reference to the harm that may be incurred by jurisdictions which have been paying for transmission congestion costs, but which do not have

¹² See Motion to Intervene and Comments of Richard Blumenthal, Attorney General for the State of Connecticut, in New England Power Pool and ISO New England Inc., Docket No. ER02-2330-000, at 12 (“Nearly all of Connecticut’s electric consumers now take their electric service pursuant to the ‘standard offer,’ a transitional capped rate for electric service that was determined by a competitive bid process. The current standard offer runs through the end of 2003, but may be extended by the legislature.”).

transmission congestion load pockets, such as the states of Maine and Rhode Island. These jurisdictions will be harmed by the continuation of the subsidies which result from the lack of an LMP market. Indeed, the Commission's September 20, 2002 order approving SMD is premised on its action benefiting "customers by accepting improvements to New England's markets, including ... locational marginal pricing [and] mechanisms to mitigate market power" See September 20 Order at P 1.

C. Granting the Stay of the FERC's Orders Will Harm the ISO, Market Participants and Consumers Throughout New England

Since mid-2001, the ISO and the NEPOOL Participants have expended time and resources to plan for the implementation of SMD. SMD represents a significant improvement in the electricity markets in New England. These new markets will be more efficient than the current markets and with LMP will provide appropriate locational pricing signals for the construction of transmission and generation. The new markets, particularly with LMP, will produce fairer prices – prices that reflect regional costs through New England.

In addition, market participants have committed to strategies to hedge financial risk in the new markets, including entering into long-term contracts. These strategies cannot easily be undone if SMD is not implemented as planned on March 1, 2003. Thus, market participants will suffer harm if SMD is not put into effect.

D. Granting the Stay of FERC's Orders Will Prevent the Benefits of the New Markets and Is Not In the Public Interest

Where primary responsibility rests with a governmental agency to consider issues and apply its expertise for the benefit of the public good, such determinations should not be upset by the court in favor of a few, except for cogent reasons. Associated Secs. Corp. v. SEC, 283 F.2d 773, 775 (10th Cir. 1960) (denying motion to stay SEC orders and holding to grant

requested stays would, in effect, be an improper substitution of the Court's judgment as to the public interest for that of the Commission).

Here, after a lengthy process that began years ago and after considering the views of all stakeholders, FERC approved SMD, specifically noting that the benefits of SMD warranted its prompt implementation:

Given that NEPOOL's and ISO-NE's design, as modified, is superior to the market design currently in place, will achieve greater consistency with neighboring transmission organizations, and is generally consistent with the market design principles articulated by the Commission, we will accept it, effective as of the dates requested. . . . We view NEPOOL's and ISO-NE's filing here as a platform on which to build a market design not only for New England, but for a future northeast RTO, and because this filing goes in that direction, we view it as worth implementing now.

101 FERC ¶ 61,287 at P 28. On rehearing, the Commission reiterated the benefits of proceedings with the new markets:

Delaying LMP would delay the benefits of New England of sending more accurate price signals about the costs of delivering electricity to the various locations in that area. We expect that more accurate price signals will encourage more efficient supply and demand decision in both the short and long run.

100 FERC ¶ 61,344 at P 35. CTAG's interest in delay cannot outweigh the public interest that will be served by the implementation of more efficient markets.

IV. CONCLUSION


For the foregoing reasons, the ISO respectfully requests that the Court deny CTAG's motion for an emergency stay.

Respectfully submitted,

Dated: February 25, 2003



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Attorneys for ISO New England Inc.

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

Richard Blumenthal, Attorney)	Docket No. 03-1032
General for the State of Connecticut,)	
)	
Petitioner,)	
)	
v.)	
)	
Federal Energy Regulatory Commission,)	
)	
Respondent.)	

**AFFIDAVIT OF DAVID LAPLANTE IN OPPOSITION TO
PETITIONER’S EMERGENCY MOTION FOR A STAY PENDING REVIEW**

I, David LaPlante, hereby depose and state as follows:

1. My name is David LaPlante. I am Vice President of Markets Development for ISO New England Inc. (the “ISO”), the system operator and market administrator for the New England Power Pool (“NEPOOL”). My business address is One Sullivan Road, Holyoke, MA 01040-2841. My responsibilities include responsibility for market design and development. The information contained in this affidavit is based on my personal knowledge.

2. I submit this affidavit in opposition to the Emergency Motion of Petitioner, Richard Blumenthal, Attorney General for the State of Connecticut for a stay pending review of the Orders of the Federal Energy Regulatory Commission issued on September 20, 2002 and December 20, 2002. The ISO is the private, non-profit independent system operator for New England and administers the wholesale power markets for the NEPOOL. The NEPOOL control area consists of the bulk electric power system in Connecticut, Rhode Island,

Massachusetts, Vermont, New Hampshire and most of Maine. The ISO controls the operation of the New England bulk power system, including dispatch of generation and administration of markets for wholesale electricity.

3. On May 1, 1999, the ISO commenced operation of the markets, including a market for electric energy in which electricity is bought and sold by the over 150 NEPOOL participants. The market for energy is a residual clearing market in which net producers of energy are paid by net consumers of energy. Pursuant to the market rules governing the energy market, which are filed with and accepted by FERC, electric generators or other entities wishing to participate in the energy market administered by the ISO must submit bids to the ISO before 12 noon for the following day's scheduled dispatch. The market rules require that all bids include price and quantity information, including, among other things, generator operating parameters consisting of "minimum run time," the "start-up time from cold start," and the "start-up profile." The ISO then puts the bids into economic order, or "bid stack," based on price. The price for energy for purchases and sales is determined on an hourly basis and will vary depending upon whether the market rules approved in 1999 are in effect or whether the rules approved in 2002 are put into effect. In conjunction with a reliability assessment conducted to ensure that enough generation will be available the following day to ensure the security of the system, the ISO makes unit commitment and dispatch decisions based upon the bids submitted. The ISO then informs generators when they will be dispatched. Given the lead time required to ramp up operations, some generators require six to twelve hours advance notice.

4. Pursuant to authorization from FERC, the ISO plans to implement new electricity markets in New England commencing on Saturday, March 1, 2003. The new markets have a substantially different design than the existing markets, including different products and

different pricing of these products, resulting in different bidding strategies by market participants. In order to bid in the new markets, the NEPOOL participants must submit bids no later than 12 hours prior to operation of the new markets. Thus, all bids in the new markets must be submitted no later than noon on Friday, February 28, 2003. In fact, the bid period to submit bids for operation in the new markets is already open. Under the new market rules, there is a rolling ten-day period in which to submit bids; hence, the ISO is already receiving bids for operation of the new markets. After the ISO receives bids from participants, it must have time to process those bids and send dispatch orders to the generators. And, because of the start-up time required by some generators, the ISO needs lead time to inform generators as to expected dispatch.

5. If the ISO were not to put into place the new markets effective March 1, 2003, it would need to give participants a minimum of 24 hours notice prior to the deadline for submission of bids so that participants would have sufficient time to submit (or resubmit) bids to the ISO based on the shift from the anticipated operation of the new markets. Thus, the ISO would need to inform participants no later than noon on Thursday, February 27, 2003 that the new markets will not commence operation on March 1, 2003.

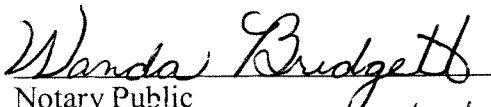
6. I emphasize that this is the minimum required time. Likely, participants have already implemented pricing strategies that cannot be undone in 24 hours. In fact, participants have informed me that they have committed to strategies to hedge risks in the new markets, including entering into long-term contracts. However, from an operational standpoint,

participants will need 24-hours notice to submit bids and the ISO will need an additional 12-hours to process those bids and make dispatch decisions. Thus, the ISO cannot comply with an order to cease the start-up or the operation of the new markets any later than noon on February 27, 2003 without jeopardizing the uninterrupted supply of electric energy in New England.



David LaPlante

Subscribed and sworn to before me
this 25th day of February, 2003



Notary Public
My Commission Expires: 7/31/04


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

Richard Blumenthal, Attorney)	Docket No. 03-1032
General for the State of Connecticut,)	
)	
Petitioner,)	
)	
v.)	
)	
Federal Energy Regulatory Commission,)	
)	
Respondent.)	

CERTIFICATE OF SERVICE

I hereby certify that I have *this* day served a copy of the foregoing Motion of ISO New England Inc. for Leave to Intervene, Memorandum Of Intervener ISO New England Inc. In Opposition To Petitioner’s Emergency Motion For A Stay Pending Review, Corporate Disclosure Statement and Entry of Appearance, by hand upon Petitioner Attorney General of Connecticut and on the Solicitor of the Respondent Federal Energy Regulatory Commission and by first-class mail on all parties in the underlying proceeding before the Federal Energy Regulatory Commission, as shown on the attached list.

Dated at District of Columbia, 25th of February, 2003.



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