

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.	Docket No.	ER25-1445
New York Independent System Operator, Inc.	Docket No.	ER25-1462
New York Independent System Operator, Inc.	Docket No.	EL25-62

Protest of Public Citizen, Inc.

On February 28, ISONE and NYISO moved to expedite recovery from New England and New York consumers 100% of the cost of any tariffs imposed on Canadian electricity exports. NYISO, for reasons it fails to justify by citation of law or regulation, claims that it must amend its filed rate in order to obtain “recovery and allocation of potential duty related costs” of expected electricity tariffs,¹ with a similar request by ISONE “to permit the ISO[NE] to recover any duties, tariffs, or taxes”.²

Neither ISONE nor NYISO appear to understand how import tariffs work, and because their request would expedite and facilitate the unjust and unreasonable recovery of the tariff from American families, these rate filings must be rejected.

NYISO and ISONE are not importers of record and therefore cannot collect import tariffs for direct distribution to American consumers for payment. NYISO and ISONE are market administrators that facilitate wholesale electricity transactions but do not take title to the commodity. Their function is analogous to natural gas and crude oil pipeline operators, which do not pay import duties themselves because they are common carriers providing open-access transportation services, and are not responsible for tariff collection, as this obligation falls on shippers—the actual owners of the commodity moving through the pipeline.

By misclassifying NYISO and ISO-NE as tariff collection agents, the ISOs fundamentally misapply core trade law principles and impose an unsustainable regulatory burden on entities that merely administer competitive market transactions.

The responsibility of administering and collecting tariffs rests with the U.S. Customs and Border Protection, which will collect them not from ISOs but from the

¹ At page 3.

² At page 1.

market-based rate (MBR) sellers that import Canadian electricity into the United States. As an example, the Commission’s Electric Quarterly Reports database³ reveals that the MBR seller H.Q. Energy Services (U.S.) Inc. (based in Hartford, CT)—affiliated with Hydro-Québec and owned by the Government of Québec—sells electricity from Canada to both ISONE and NYISO at a variety of *point of delivery* import hubs. H.Q. Energy Services (U.S.) Inc. and similarly-situated MBR importers would be the entities responsible for assuming liability for any imposed tariffs.

The ISOs play no role whatsoever in collecting proposed import tariffs, and most certainly they must not be involved in seeking to expedite the recovery of import tariffs from American electricity consumers. But should the Commission somehow determine it should proactively authorize ISOs to expedite the collection of Canadian import tariffs, such action is unjust and unreasonable because absent clear classification and enforcement guidance by U.S. Customs Border Protection, any tariff collection is legally indefensible.

The Trump administration imposed 10% *ad valorem* duties on energy resources imported from Canada effective March 4, 2025.⁴ This is a distinct and separate duty from the 25% tariffs imposed on other Canadian imports.

The United States government has defined Canadian energy or energy resources subject to the 10% *ad valorem* tariff as crude oil, natural gas, lease condensates, natural gas liquids, refined petroleum products, uranium, coal, biofuels, geothermal heat, the kinetic movement of flowing water, and critical minerals,⁵ but no specific identified Harmonized Tariff Schedule (HTSUS) have currently been provided for these products.⁶

In the United States, duty assessment and collection are executed by the U.S. Customs and Border Protection (CBP). To date, the CBP has failed to provide clear and enforceable guidance establishing a legally operable tariff classification or collection mechanism for Canadian hydroelectric imports. Any attempt to impose duties without first addressing these deficiencies is procedurally defective and inconsistent with trade law.

³ <https://eqrreportviewer.ferc.gov/>

⁴ www.govinfo.gov/content/pkg/FR-2025-03-06/pdf/2025-03664.pdf

⁵ <https://content.govdelivery.com/bulletins/gd/USDHSCBP-3d519e9>

⁶ <https://hts.usitc.gov/> Chapter 27

Electricity is a commodity that, once imported, cannot be traced back to its generation source, making selective tariff application on specific electricity fuel sources coming from Canada legally and logistically impossible. Therefore, until the CBP issues an explicit classification amendment that places hydroelectricity under a revised HTSUS entry, and a formal enforcement framework detailing how duties will be assessed and collected; any effort to impose or pass through tariff-related costs is legally premature, economically disruptive, and indefensible under established trade law principles.

Tariff Classification Requires Precision, Industry Recognition, and a Clear Enforcement Framework—None Of Which Exist Here

Tariff classification is governed by a well-established legal framework designed to ensure predictability, consistency, and enforceability in international trade.⁷ Under U.S. law, an importable good must:

- Be explicitly classified under the Harmonized Tariff Schedule of the United States (HTSUS) based on its physical characteristics and commercial identity;
- Fit squarely within an industry-recognized definition that distinguishes it from other goods to avoid arbitrary or inconsistent application; and
- Have a legally operable method for duty assessment and collection that ensures uniform enforcement by CBP.

For decades, HTS 2716.00.00 has classified electricity as duty-free, and CBP has never amended this designation to include import duties on hydroelectric power. As such, the legal foundation for assessing tariffs on Canadian hydropower remains fundamentally deficient. If the government seeks to impose duties, it must do so through a formal and transparent rulemaking process that establishes clear classification parameters, a valuation methodology, and an administratively enforceable framework for duty collection.

In *United States v. Mead Corp.*, 533 U.S. 218 (2001),⁸ the Supreme Court held that tariff classifications are not entitled to Chevron deference unless they result from formal rulemaking or adjudication. Since the CBP has not issued a formal tariff classification

⁷ www.cbp.gov/sites/default/files/documents/icp017r2_3.pdf

⁸ <https://tile.loc.gov/storage-services/service/ll/usrep/usrep533/usrep533218/usrep533218.pdf>

for hydroelectricity, any enforcement action would be subject only to Skidmore deference, requiring persuasiveness rather than automatic deference.

Without a structured classification framework, there is a lack of transparency and uniformity for collecting tariffs on hydroelectric power from Canada; thus, passing any cost to the consumers would be premature and imprecise.

Kinetic Movement of Flowing Water is an Undefined and Legally Indefensible Classification

Tariff classification is governed by a structured and well-established legal framework designed to ensure predictability, uniformity, and enforceability in international trade. Under U.S. customs law, tariff classification follows a methodical process:

- A. Identification of the Relevant Heading under the HTSUS.
- B. Examination of Subheadings to determine the most appropriate classification.
- C. Application of the General Rules of Interpretation (GRIs) to resolve classification ambiguities.
- D. Comparison with prior rulings and industry standards to ensure consistency and legal predictability.

A product must fit squarely within an established and industry-recognized classification to be subject to a tariff. The burden rests on the government to demonstrate that a product is dutiable under established classification principles. Failure to adhere to these principles results in arbitrary and legally deficient tariff applications.

The Trump Administration’s reliance on the phrase “kinetic movement of flowing water” as a basis for imposing tariffs is legally and factually untenable.⁹ This phrase is not a recognized industry classification for hydroelectric power, nor does it appear in any established customs, trade, or energy regulatory framework.

Hydropower is universally classified based on its method of generation (e.g., run-of-river, pumped storage, reservoir-based hydro) or its commodity form (hydroelectricity), not by the physical movement of water itself.

The phrase “kinetic movement of flowing water” describes a physical phenomenon, not a distinct product, transaction, or importable good that can be subject to customs

⁹ www.citizen.org/article/trump-energy-emergency-declaration-of-war/

duties. It lacks any precedent as a product, technology, or commodity subject to tariff classification. No governing regulatory framework, including the North American Industry Classification System, World Trade Organization tariff schedules, or the Commission itself, has ever defined hydroelectricity by this term.¹⁰

The Supreme Court has consistently held that tariff classifications must be based on established commercial usage and industry definitions. In *Nix v. Hedden*, 149 U.S. 304 (1893),¹¹ the Court ruled that common industry definitions control tariff classification disputes, rejecting technical descriptions that deviate from standard trade terminology.

By that precedent, the CBP cannot impose tariffs without an explicit and legally recognized tariff classification. If the U.S. government intends to tax hydroelectric imports, it must explicitly classify hydroelectricity under a revised HTSUS entry that reflects a recognized industry definition.

Beyond the definitional flaws in classification, the CBP has also failed to establish a framework for enforcing tariffs on electricity imports, a fatal defect under U.S. trade law. Unlike traditional imports, electricity is intangible; lacks a discrete point of entry where CBP can inspect and assess the import; and cannot be segregated by generation source once it enters the U.S. transmission grid.

However, electricity is not the only intangible product with similar challenges being imported from Canada to the United States. The CBP has implemented structured collection processes for other energy imports in the energy sector:

- Crude Oil & Petroleum Imports—CBP collects duties using metered flow data, shore tank measurements, and invoice declarations at ports of entry.
- Natural Gas Pipelines—Importers must submit periodic consolidated entry summaries to the CBP, relying on pipeline metering station reports to assess dutiable volumes.

¹⁰ For instance, NAICS classifies hydroelectric power generation under code 221111, defining it as “establishments primarily engaged in operating hydroelectric power generation facilities. These facilities use water power to drive a turbine and produce electric energy. The electric energy produced in these establishments is provided to electric power transmission systems or to electric power distribution systems.”

¹¹ <https://tile.loc.gov/storage-services/service/ll/usrep/usrep149/usrep149304/usrep149304.pdf>

These mechanisms are critical for ensuring due process, compliance, and uniform enforcement. The absence of a comparable process for electricity renders any tariff collection effort procedurally defective and legally indefensible.

To collect duties on hydroelectric power from Canada, the CBP must provide an administratively feasible, uniform methodology for tracking and assessing duties on electricity imports that do not pass through a traditional port of entry.

The March 3, 2025, CBP guidance fails to establish a clear and enforceable methodology for tracking and assessing duties on the designated imports, addressing only the applicable tariff rates without providing the necessary procedural framework for implementation. Absent uniform and legally operable enforcement guidelines, the CBP's directive remains incomplete and requires further clarification before any Commission-jurisdictional entity can move forward with efforts to collect import tariffs.

Respectfully submitted,

Tyson Slocum

Tyson Slocum, Energy Program Director
Public Citizen, Inc.
215 Pennsylvania Ave SE
Washington, DC 20003
tslocum@citizen.org
(202) 454-5191