120 FERC 61,234
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

ISO New England, Inc. and
New England Power Pool

Docket No. ER07-365-002

ORDER DENYING REHEARING

(Issued September 14, 2007)

1. In this order, the Commission denies rehearing of an earlier order[1] accepting proposed tariff changes to revise ISO New England, Inc.'s (ISO-NE's) Market Rule 1 regarding the determination of the Installed Capacity Requirements (ICR) for the New England Control Area.

Background

2. ISO-NE is in the process of developing a forward capacity market (FCM), pursuant to a settlement agreement approved by the Commission in 2006.[2] In order to accommodate the FCM Settlement, ISO-NE and the New England Power Pool Participants Committee (NEPOOL) have revised portions of the process for developing ISO-NE's ICR.

3. The ICR is a projection of the minimum amount of capacity required to serve load reliably in the New England region at all times. ISO-NE determines the system's total ICR for each year, in accordance with existing resource planning reliability criteria. The ICR is expressed as the total number of MW that New England's Load Serving Entities (LSEs) will be required to purchase through the Forward Capacity Auctions. Once an ICR number is determined for each year, that number is then subdivided to arrive at the amount of MW of capacity that each LSE must purchase for that year.

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[1] *ISO New England, Inc.*, 118 FERC ¶ 61,157 (2007) (February 28 Order).

[2] *See Devon Power, LLC*, 115 FERC ¶ 61,340 (FCM Order), *order on reh'g and clarification*, 117 FERC ¶ 61,133 (2006) (FCM Order on Rehearing).

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4. The ICR directly affects the determination of the clearing price in the capacity market and so directly affects charges to customers. During the Forward Capacity Auction, which is a so-called "descending clock" auction, all capacity resources submit supply offers at descending price levels, beginning at a price equal to twice the Cost of New Entry (CONE).[3] As the auction price decreases, the amount of supply offered by capacity resources will naturally decline. The auction ends when the amount of capacity offered by New England capacity resources equals the ICR. The price at which the amount of capacity offered (i.e., the supply) equals the ICR (i.e., the demand) is the market clearing price for that auction. Thus, the ICR directly affects charges to customers.

5. Pursuant to section 205 of the Federal Power Act (FPA), on December 22, 2006, ISO-NE and NEPOOL jointly submitted proposed revisions to the ISO-NE tariff that are designed to memorialize the processes and methodologies used to determine the ICR, which previously had not been memorialized in the tariff.

6. In its February 28 Order, the Commission accepted ISO-NE's and NEPOOL's filing. The Connecticut Department of Public Utility Control (CT DPUC) and the Long Island Power Authority (LIPA) have filed timely requests for rehearing. NEPOOL filed a motion for leave to file an answer and answer to the CT DPUC's request for rehearing, and the CT DPUC filed a response in opposition to NEPOOL's motion and answer.

Discussion

7. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2007), prohibits an answer to a request for rehearing. We therefore reject NEPOOL's answer and dismiss the CT DPUC's response.

8. As discussed below, the Commission denies both requests for rehearing.

Jurisdiction

9. In the February 28 Order, the Commission found that it has jurisdiction to consider the proposed mechanism for the determination of ICR. We pointed out that, as we had previously stated in our order accepting the parties' settlement regarding the FCM, the

[3] The Cost of New Entry for all capacity zones in the first Forward Capacity Auction will be $7.50/kW-month. Cost of New Entry values for subsequent Forward Capacity Auctions will be calculated based on the clearing prices from previous successful auctions.

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FCM "establish[es] a mechanism and market structure for the purchase and sale of installed capacity at wholesale in interstate commerce,"[4] and the FCM was therefore within our jurisdiction.

10. We further found that the determination of the ICR is one of the principal determinants of the price of capacity, and so it falls within the Commission's jurisdiction to review, as the Commission is charged with review of "any rate, charge or classification" charged by a public utility for electric transmission or sales subject to Commission jurisdiction, and "any rule, regulation, practice, or contract affecting such rate, charge or classification."[5] We also found that this determination was consistent with prior court decisions regarding the Commission's jurisdiction over capacity requirements and charges.[6]

11. We also stated that this view was consistent with the Commission's recent order conditionally accepting the market redesign for the California Independent System Operator Corporation (CAISO),[7] in which we found that the Commission properly considered resource adequacy in determining whether rates remain just and reasonable and not unduly discriminatory:

> [W]here an interconnected transmission system is operated on a regional basis as part of an organized market for electricity . . . all users of the system are interdependent, particularly with respect to reliability, i.e., one participant's reliability decisions can impact the reliability of service available to other participants and the related costs the other participants must bear. . . . We find that, in situations where one party's resource adequacy decisions can cause adverse reliability and costs impacts on other

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[4] February 28 Order at P 15, *citing FCM* Order at P 201.

[5] 16 U.S.C. § 824e(a) (2000).

[6] *Municipalities of Groton* v. *FERC* (*Municipalities of Groton*), 587 F.2d 1296, 1302 (D.C. Cir. 1978); *Mississippi Industries* v. *FERC*, 808 F.2d 1525, 1542, *vacated in part on other grounds*, 822 F.2d 1103 (D.C. Cir. 1978).

[7] *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274 at P 1113 (2006) (CAISO Order), *order on reh'g*, 119 FERC ¶ 61,076 (2007) (CAISO Rehearing Order).

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> participants in a regionally operated system, it is appropriate for us to consider resource adequacy in determining whether rates remain just and reasonable and not unduly discriminatory.[8]

12. We then found that in New England, similarly, the ICR requirement was "an integral component of the charges that ISO-NE makes to its member LSEs,"[9] and that because ISO-NE will determine a single ICR requirement for its entire system (later to be subdivided among its LSEs), the Commission was required to review ISO-NE's ICR methodology to ensure that these charges are determined in a just and reasonable manner.[10] Further, we found that the bid caps in ISO-NE's energy markets would harm customers by discouraging construction of new capacity, absent an affirmative mechanism to elicit the construction of new supply.[11]

13. We stated that, contrary to arguments made by the CT DPUC, the Commission was asserting jurisdiction not over generating facilities, but over "an essential component of the charge for wholesale capacity in interstate commerce,"[12] and that we were not requiring that any state build generation, or that any participant satisfy its capacity obligation via a particular resource.

14. Finally, we stated that our responsibility to assure that wholesale rates are just and reasonable does not mean that we cannot, when appropriate, accept state determinations regarding resource adequacy requirements, noting that in the CAISO proceeding we had

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[8] CAISO Order at P 1113, *citing Cal. Indep. Sys. Operator Corp*., 115 FERC ¶ 61,172 at P 36 (2006), and *Gainesville Utils. Dep't* v. *Fla. Power Corp*., 402 U.S. 515, 529 (1971) (Commission has "responsibility to the public to assure reliable efficient electric service").

[9] February 28 Order at P 19. We pointed out that this fact had also been acknowledged by the CT DPUC, which stated that "ICR plays a pivotal role under the FCM Settlement in determining how much capacity New England's electric customers must procure." *Id*. at P 19 n. 21, *citing* CT DPUC protest at 4.

[10] *Id.* at P 19

[11] *Id.*, *citing* CAISO Order at P 1114.

[12] February 28 Order at P 20.

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found that we could, in appropriate circumstances, defer to state and local regulatory authorities to set resource requirements. We also pointed out, however, that there was currently no proposal from all the New England states for us to consider.

15. Thus, we stated, "we therefore act today to establish an integral component of the jurisdictional charge for wholesale capacity within New England to ensure that wholesale rates are just, reasonable and not unduly discriminatory."[13]

CT DPUC's request for rehearing

16. In its request for rehearing, the CT DPUC asserts that the Commission erred in approving the ICR, on the basis that the FPA reserves to the states "jurisdiction over facilities used for generating electricity and resource adequacy decisions,"[14] and that, by establishing mechanisms and procedures to set ICR and approving ISO-NE's proposed market rules relating to ICR, the Commission exceeded its statutory authority.

17. The CT DPUC notes that it has consistently opposed the Commission's assertion of jurisdiction to set the amount of generating capacity necessary to meet ISO-NE's reliability requirements. It then notes, however, that the FCM itself does not set prices, and that it in fact "decoupled capacity price from ICR,"[15] since under the FCM capacity prices will be set by the competitive cost of new entry regardless of the amount of ICR. The CT DPUC states that the Commission acknowledged that, under the FCM, the amount of capacity required would not affect or control the capacity price.[16]

18. As explained in the greater detail below, the CT DPUC states that the Commission erred, in the February 28 Order, by:

1) Inappropriately usurping the responsibility and authority of the New England states to establish resource adequacy standards, and exercising jurisdiction to set ICR on the basis that resource adequacy plays an important role in addressing

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[13] *Id*. at P 21.

[14] CT DPUC request for rehearing at 1.

[15] *Id*. at 3.

[16] *Id.* at 3, *citing* FCM Order at P 201. The CT DPUC is presumably referring to the Commission's statement that "[t]he settlement does not in any way alter the method by which resource adequacy requirements (particularly the installed capacity requirement) are determined or direct that a particular amount of capacity be installed."

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whether Commission-jurisdictional wholesale prices reflect the exercise of market power or the scarcity of supply;

2) Incorrectly concluding that ISO-NE's mechanism to determine that ICR is a "practice . . . affecting" a wholesale capacity rate, charge or classification in New England and thus falls within the Commission's jurisdiction; and misapplying case law to arrive at this determination;

3) Incorrectly concluding that to allow the New England states to set ICR for use in the FCM could create situations where one party's resource adequacy decisions create reliability cost impacts on other participants in a regionally operated system; and

4) Incorrectly treating New England states differently from other states or regions by refusing to defer to the states' determinations regarding resource adequacy, and refusing state proposals to establish a mechanism for setting resource adequacy requirements.

19. The CT DPUC argues that the FPA grants jurisdiction over generating facilities and resource adequacy determinations, which the CT DPUC equates with the ability to set ICR, to the states, and that Congress did not change that jurisdictional allocation even if the ICR affects wholesale capacity rates or charges in some way. The CT DPUC also argues that, contrary to the Commission's claims, judicial precedent does not support Commission jurisdiction to set the amount of installed capacity resources that a state or region must have, and that no legitimate concerns about reliability impacts on other participants, market power, or scarcity of supply justify the Commission's usurpation of states' authority to set the level of ICR in New England. Finally, the CT DPUC states that, although the Commission has stated that it would defer to the states to establish resource adequacy requirements, it has refused to do so in New England, even when the states proposed specific alternative procedures.

20. As explained below, we deny the CT DPUC's request for rehearing, and affirm that we have jurisdiction to approve ISO-NE's rules for determining ICR. We address each of the CT DPUC's contentions in turn.

Commission Jurisdiction Under the FPA

CT DPUC argument

21. According to the CT DPUC, the FPA makes clear that states retain their traditional authority over the determination of resource adequacy requirements, particularly when that determination bears directly on the amount of generating facilities that a state must provide. The CT DPUC states that Congress recognized that states are particularly well

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suited to evaluate the need for additional capacity resources and to determine the conditions for satisfying that demand and that Congress emphasized that federal regulation "extend[s] only to those matters which are not subject to regulation by the States."[17] The CT DPUC argues that this Congressional declaration should be respected. It also asserts that states have long regulated all aspects of resource adequacy and generating facilities, and there is no basis in the FPA or otherwise for disrupting this Congressionally-dictated allocation of responsibility.[18] The CT DPUC then states that the New England states themselves have developed resource adequacy plans for their utilities using the same reliability standards as the Commission (and thus producing, in the aggregate, a region-wide ICR); thus, the CT DPUC argues that there can be more than one technically acceptable solution to the question of how much capacity the New England region should purchase, and states' exercise of their authority to set resource adequacy levels will not interfere with any Commission goals.

22. The CT DPUC disputes the Commission's statement that, by setting ICR, it "is not asserting jurisdiction over generating facilities." It points to the fact that the majority of ISO-NE's capacity resources are generating facilities rather than demand response or other resources.[19] The CT DPUC considers irrelevant the Commission's argument that a

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[17] CT DPUC request for rehearing at 9, *citing* 16 U.S.C. § 824(a) (2000).

[18] According to the CT DPUC, Congress reiterated this reservation of authority to the states in: section 201(b)(1), stating that "[t]he Commission shall have jurisdiction over all facilities for [the transmission of electric energy in interstate commerce] or [the sale of electric energy at wholesale in interstate commerce], but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy . . .; " in section 207, stating that even when a state commission complains about inadequate or insufficient interstate service, "the Commission shall have no authority to compel the enlargement of generating facilities" for the purpose of furnishing "proper, adequate, or sufficient service;" and section 215, which reiterated that the Commission's authority to set reliability standards "does not include any requirement to . . . construct new . . . generation capacity."

[19] The CT DPUC states that ISO-NE's most recent assessment of available capacity resources in New England found 30,526 MW of summer capacity consisting of combined cycle, fossil, nuclear, hydro, jet, and diesel generating facilities, and only 580 MW of demand response. CT DPUC request for rehearing at 11, *citing* ISO-NE's "Preliminary 2007-2008 Installed Capacity Requirements Values," Agenda Item 2.0, PSPC Meeting No. 224, Jan. 26, 2007, available at

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state can satisfy its capacity obligation in many ways, when virtually all of those methods result in the necessity for a specified quantity of generating facilities that must be available within the state or region. It also states that, as load grows, the only resources that can provide incremental kilowatt hours of energy are generators.

23. The CT DPUC argues that the most fundamental aspect of a state's jurisdiction over generating facilities is its authority to determine how much generating capacity is required, which decision has ramifications for all other aspects of state regulation and control over generating facilities. As an example, the CT DPUC argues that, because optimal locations for generating facilities – e.g., with the requisite access to fuel, water, transmission, and proximity to load – are scarce, if the Commission sets ICR at a level above what a state believes is necessary for reliability, that state may be required to (a) identify and approve additional sites where generation can be built, even if they are unsuitable or do not comport with the state's overall land use plans, (b) grant clean air waivers, (c) keep environmentally hazardous or undesirable units in service when they should be retired, or (d) forego the development of longer lead time, base load generating facilities – e.g., a new nuclear power plant – because it must instead add a succession of new peaking units each year to satisfy the annual ICR. The CT DPUC argues that, when the Commission sanctions ISO-NE's mechanism to set the level of ICR, it compels states to supply ISO-NE's projection of the minimum amount of capacity necessary to reliably serve load, and under the FCM, LSEs in each state must acquire their proportionate share of ICR at the Forward Capacity Auction clearing price. Thus, the CT DPUC argues, the Commission's approval of ICR also dictates the amount of capacity that must be installed in each capacity zone. The CT DPUC states that "[b]y setting ICR, the Commission effectively strips the states of their FPA-protected control over generating facilities within their borders."[20]

24. The CT DPUC further argues that the Commission erred in its assertion that the ICR is one of the principal determinants of the price of capacity. It states that the FCM provides that the Capacity Clearing Price will be set by new capacity, not existing capacity, that the Commission has taken pains to distinguish between the mechanism for setting ICR and the mechanism for setting the capacity price, and that in the FCM, the ICR is "no more than a plug-in number in the rate formula."[21] The CT DPUC states that

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http://www.isone.com/committees/comm_wkgrps/relblty_comm/pwrsuppln_comm/mtrls/2007/jan262007/draft_icr0708_01_23_2006.pdf at 10, 14, 17.

[20] CT DPUC request for rehearing at 12.

[21] *Id.* at 14.

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while the FCM requires load serving entities to purchase their proportionate share of ICR, how the ICR is set or by whom are not integral parts of the FCM, and the only role that the ICR has in the capacity charge is to provide the quantity multiplier in computing the total amount that load serving entities pay.

Commission Ruling

25. At the outset, it is important to note that section 201(b)(1) of the FPA confers jurisdiction on the Commission over the transmission of electric energy in interstate commerce, and sales of electric energy at wholesale in interstate commerce.[22] Further, FPA section 205(a) states that:

> 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.[[23]]

26. Thus, the FPA confers upon the Commission the responsibility for ensuring that transmission and wholesale power sales rates and charges, including any rule, regulation, practice or contract affecting them, are just and reasonable and not unduly discriminatory or preferential. And, given that the ICR is one of the principal determinants of the price of capacity and thus of charges to customers, review of the determination of the ICR rests with the Commission. In this regard, as described above, the ICR directly affects the capacity clearing price and charges to customers. The purpose of the Forward Capacity Auction is to determine the price at which the amount of capacity offered by all New England capacity resources equals the ICR (i.e., equals what is essentially demand); that price becomes the price of capacity, which, in turn, is charged to customers. The "stopping point" of this "descending clock" auction is therefore directly influenced by the size of the ICR (i.e., essentially demand): a greater ICR (i.e., essentially greater demand) will typically result in a higher price of capacity (i.e., a higher clearing price) and higher

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[22] 16 U.S.C. § 824(b)(1) (2000).

[23] 16 U.S.C. § 824d(a) (2000). FPA section 206 similarly gives the Commission the ability to review "any rate, charges, or classification" charged by a public utility for any transmission or sale subject to the jurisdiction of the Commission, as well as "any rule, regulation, practice, or contract affecting such rate, charge, or classification . . . ." 16 U.S.C. § 824e(a) (2000).

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charges to customers, while a lesser ICR (i.e., essentially lesser demand) will typically result in a lower price of capacity (i.e., a lower clearing price) and lower charges to customers.

27. Turning to the specifics of the CT DPUC's arguments, as the CT DPUC states, in the FPA, Congress did not grant the Commission authority over electrical generating capacity. Contrary to the CT DPUC's claim, however, the Commission is not exercising authority over electrical generating capacity or setting the amount of generating capacity that states must build (or require to be built). Rather, the Commission is reviewing the means by which ISO-NE determines the amount of resources member LSEs must provide (which leads ultimately to a determination of the amount of resources each individual state's LSEs must provide), which, as described above, directly affects the charges to customer, in order to evaluate the justness and reasonableness of the rates and charges to customers.

28. It is also critical to distinguish between ISO-NE's "capacity" requirement and "electrical generating capacity." In essence, "capacity" (the ability to produce electric energy to serve load, when called by ISO-NE) is the product, and electrical generating capacity is one means, but not the only means, of producing that product. For example, assume that within a particular state, ISO-NE determines that an LSE must provide 100 MW of capacity (in addition to the capacity that the LSE currently has). This does not mean that the LSE must necessarily construct, and the state must permit the construction of, 100 MW of new electrical generating capacity. The LSE could fulfill its capacity obligation to ISO-NE by constructing new electrical generating capacity but it could also add 50 MW of demand response[24] and 50 MW of capacity contracts (from inside or outside the state), or any mix of the above. If a state wishes to place controls on the amount or type of electrical generating capacity built within that state, or at particular locations within that state, the Commission's regulation of ISO-NE's calculation of ICR does not prevent it from doing so.[25] The capacity requirement that ISO-NE places on an

[24] Demand response reduces load to be served, so that less electrical generating capacity is needed to serve load.

[25] *See*, *e.g.*, *Jersey Central Power & Light Company* v. *Atlantic City Electric Co.*, 111 FERC ¶ 61,179 at P 10, 24-25, 27, *order on reh'g*, 113 FERC ¶ 61,237 at P 6-7, 47-48, 54-58 (2005), *reh'g denied*, 116 FERC ¶ 61,256 at P 13-15 (2006) (complainant sought relief from Commission-jurisdictional contract obligation to build facilities on the basis that, among other reasons, environmental regulation by the State of New Jersey prevented it from fulfilling its contract obligation; Commission responded that contract already contemplated that facilities might not be built and already provided complainant with options such as construction of other facilities).

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individual LSE may be a factor in a state's ultimate determination as to how much electrical generating capacity is built, and where and by whom. These are not, however, the same determinations, and it is inaccurate to conflate the two as the CT DPUC does here.

29. While, as the CT DPUC notes, currently the majority of the New England states' capacity needs are met through electrical generating capacity, this does not mean that that will remain the case in the future. The FCM is, in fact, currently eliciting the development of new resources, which may be electrical generating capacity or demand response providers.[26] Nothing in the ICR requirement prevents a state from requiring its LSEs to meet capacity requirements through demand response, or through contracts to purchase power (from resources located inside or outside the state), or through more environmentally-friendly generation, or, generally speaking, through resources that meet state health or environmental or land-use planning goals. In essence, ISO-NE says to its LSEs, "Provide X amount of resources." But *how* those resources are provided is up to the LSEs and the states.

30. It is, moreover, inaccurate to state, as the CT DPUC does, that the FCM has "decoupled" price and capacity, and that the only effect that the ICR will have on capacity prices will be to provide the number of MW of capacity that LSEs acquire. Again, as explained above, the ICR has a direct impact on the capacity clearing price in the Forward Capacity Auction. And while it is true that the price of capacity will be set by the CONE in those circumstances in which new entry is needed to meet capacity requirements,[27] ISO-NE's ruling of how many MW of capacity each LSE must acquire will determine whether, in fact, new resources will need to be developed to enable LSEs to meet that standard. Further, even in situations where new capacity resources are developed and set the per-MW price, an LSE's total cost for capacity will be the result of (a) the price of each MW, multiplied by (b) the number of MW the LSE must purchase.

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[26] The fact that there has been significant interest in providing demand response service can be seen in *ISO New England, Inc*., 119 FERC ¶ 61,045 (2007), where the Commission required changes to the FCM market rules in response to issues raised by multiple demand response providers to allow them to compete more effectively with electrical generating capacity. *See Id*. at P 145-147, 152.

[27] As described above, in the Forward Capacity Auction all capacity resources submit supply offers at descending price levels, beginning at a price equal to twice the CONE. Where new entry is needed to meet capacity requirements, though, as the cost of new entry is the CONE, the price of capacity will be set by the CONE.

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Relevant Caselaw

CT DPUC argument

31. The CT DPUC also states that, in *Northwest Central Pipeline Corp*. v. *State Corp. Comm'n of Kansas*,[28] the Supreme Court found that a practice that merely "affects" rates or charges does not negate the FPA's reservation of jurisdiction over resource adequacy to the states, unless state determination of resource adequacy would prevent attainment of Commission goals – a showing that, the CT DPUC argues, the Commission has not made here. According to the CT DPUC, Congress did not intend that any practice "affecting" rates and charges trumped the reservation of jurisdiction to the states. Rather, the CT DPUC argues, in *Northwest Central* the Court found that, although almost any state regulation of generating facilities could have an impact on wholesale capacity costs, "Congress has drawn a brighter line, and one considerably more favorable to the States' retention of their traditional powers to regulate" the facilities that produce electric energy.[29] Thus, the CT DPUC states, state regulation of generating facilities may be pre-empted only if "state regulation prevents attainment of FERC's goals,"[30] and the Commission has not made such a showing.

32. The CT DPUC argues that the Commission's reliance on *Groton* and *Mississippi Industries* [31] is inapposite. It asserts that *Groton* did not involve a Commission order relating to generating facilities, but rather, the rate that would be charged for a capacity deficiency, and that in *Mississippi Industries* the Commission only acted to remedy discrimination in the allocation of existing capacity costs, but not to establish the amount of capacity that a system would have to acquire. The CT DPUC considers it impermissible to "leap" from such authority over cost allocation to requiring the provision of a particular amount of capacity, since setting ICR is a reliability and resource adequacy question, not a cost allocation question.[32] The CT DPUC further notes that the Commission did not, in *Mississippi Industries*, seek to dictate where or when or how many generating facilities would be built, and that unlike the situation in *Mississippi*

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[28] 489 U.S. 493 (1989) (*Northwest Central*).

[29] CT DPUC request for rehearing at 16-17, *citing Northwest Central* at 514.

[30] CT DPUC request for rehearing at 17, *citing Northwest Central* at 515-16.

[31] 808 F.2d 1525, 1542 (D.C. Cir.), *vacated in part on other grounds*, 822 F.2d 1103 (D.C. Cir. 1978).

[32] CT DPUC request for rehearing at 20.

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Industries, which involved a system in which generating capacity was built on a highly integrated basis, in New England there is no similar integrated system and all decisions about planning and building generation are made by individual market participants. And finally, the CT DPUC notes that *Groton* and *Mississippi Industries* were decided prior to, and have now been superceded by, the Supreme Court's *Northwest Central* decision.

Commission Ruling

33. The Commission has considered the question of its jurisdiction over capacity requirements set by regional transmission organizations many times. As we most recently stated in *ISO New England, Inc.*,[33] section 201(b)(1) of the FPA confers jurisdiction on the Commission over the transmission of electric energy in interstate commerce, and over sales of electric energy at wholesale in interstate commerce, and "all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable."[34] In that order, which accepted ISO-NE's ICR determination for the 2007/2008 Power Year, we reaffirmed that the determination of a system's capacity requirement is a "rule or regulation affecting or pertaining to" the charges for the wholesale sale of electric energy in interstate commerce.[35] In response to the CT DPUC's argument that Congress did not intend any practice "affecting" rates and charges to trump the FPA's reservation of jurisdiction over resource adequacy to the states, we note here again that, as discussed in the February 28 Order, we are not considering just any practice affecting rates and charges. Rather, we are looking at what the February 28 Order characterized as a "principal" determinant of rates and charges.[36]

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[33] 119 FERC ¶ 61,161 (2007) (2007/2008 Power Year ICR Order).

[34] 16 U.S.C. § 824(b)(1) (2000).

[35] 2007/2008 Power Year ICR Order at P 23 ("the ICR is one of the principal determinants of the price of capacity and, therefore, falls within the Commission's jurisdiction to review 'any rate, charge or classification' charged by a public utility for electric transmission or sales subject to Commission jurisdiction, and 'any rule, regulation, practice, or contract affecting such rate, charge or classification.' ").

[36] *See* February 28 Order at P 15 ("the FCM settlement 'establish[es] a mechanism and market structure for the purchase and sale of installed capacity at wholesale in interstate commerce and to determine the prices for those sales, bringing it squarely within the Commission's jurisdiction under the FPA,'" *citing* FCM Order at P 201).

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34. In the 2007/2008 Power Year Order, we further reaffirmed our reliance on the *Mississippi Industries* and *Groton* precedents. First, we noted that, in *Mississippi Industries*, the court had recognized the connection between the allocation of capacity and wholesale rates:

> In that proceeding, the Commission had altered the allocation of capacity and costs of a nuclear generation plant among operating companies of an integrated utility system. Petitioners asserted that, in allocating the cost and capacity of the nuclear plant, the Commission had asserted jurisdiction over generating facilities in direct violation of the FPA section 201(b) prohibition against Commission regulation of generating facilities. . . . The court rejected the claim that this action was beyond the Commission's FPA jurisdiction. Instead, it found that the Commission has authority over the allocation of capacity among market participants because this allocation affects wholesale rates.[37]

35. We pointed to the court's statements that "[c]apacity costs are a large component of wholesale rates" and therefore the share of the capacity costs of the system carried by each affiliate will significantly affect the wholesale price it pays for energy,[38] and that while the allocation of capacity did not set sales prices, it directly affects costs and "consequently, wholesale rates."[39] We also cited the court's conclusion that "FERC's jurisdiction under such circumstances is unquestionable"[40] and that "[p]etitioners ignore the critical point here that, while these provisions [allocating capacity] do not fix wholesale rates, their terms do directly and significantly *affect* the wholesale rates at which the operating companies exchange energy, due to the highly integrated nature of the . . . system."[41]

36. In the 2007/2008 Power Year ICR Order we further noted that, in *Groton*, the court upheld the Commission's authority to review a NEPOOL rule requiring that each NEPOOL participant who was deficient in its capacity requirement pay a deficiency charge. We stated that:

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[37] 2007/2008 Power Year ICR Order at P 20.

[38] *Id., citing Mississippi Industries* at 1541.

[39] 2007/2008 Power Year ICR Order at P 20.

[40] *Id., citing Nantahala Power & Light Co.*, 426 U.S. 953 (1986).

[41] Power Year ICR Order at P 20, *citing Mississippi Industries* at 1542.

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> The court found that these charges are within Commission jurisdiction because they are under "the Commission's inclusive jurisdictional mandate – which reaches discriminatory practices 'with respect to' jurisdictional transmissions, or 'affecting' such transmissions or services. . . ."[[42]] The court further stated "[i]t is sufficient for jurisdictional purposes that the deficiency charge affects the fee that a participant pays for power and reserve service, irrespective of the objective underlying that charge. This is well within the Commission's authority as delineated in other court opinions." [[43]] [44]

37. We then found that "maintaining adequate resources has a significant and direct effect on jurisdictional rates and services and therefore falls within the Commission's jurisdiction."[45] We stated that this finding was fully consistent with *Mississippi Industries* and *Groton*:

> In *Mississippi Industries*, the Commission exercised jurisdiction over the allocation of the capacity of a nuclear generating plant, despite the fact that the FPA does not give the Commission jurisdiction over generating facilities (and indeed reserves that jurisdiction to the states). The [Supreme C]ourt affirmed Commission jurisdiction because of the nexus between the allocation of capacity and the justness and reasonableness of jurisdictional rates under the Entergy System Agreement. The court in *Groton* undertook a similar analysis in upholding Commission jurisdiction in that case. In *Groton*, the Commission had asserted jurisdiction over a charge related to resource adequacy requirements in New England. The court upheld the Commission's order, finding that that charge affected jurisdictional rates and that jurisdiction remained "irrespective of the objective underlying that charge."[46]

38. Thus, the Commission has previously ruled, and reaffirms here, that ISO-NE's method of determining its ICR (the amount of capacity that its member LSEs must

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[42] *Groton* at 1302.

[43] *Id., citing, e.g., FPC v. Conway Corp.*, 426 U.S. 271 (1976).

[44] 2007/2008 Power Year ICR Order at P 21.

[45] *Id*. at P 24.

[46] *Id., citing Groton* at 1302.

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provide) has a sufficiently immediate and direct effect on the rates, terms and conditions of the sale of electric energy in interstate commerce that it falls within the Commission's jurisdiction.

39. The CT DPUC's citation to *Northwest Central* does not assist it. *Northwest Central* speaks to the question of whether a federal agency's regulation of a particular area pre-empts state regulation in that area. This is not the case here: as discussed above, the Commission is not seeking to pre-empt (and has not pre-empted) the state's decision-making as to when or where or how many new generating facilities should be built in that state, and ISO-NE's determination of the amount of capacity that each LSE must procure does not render the state unable to go through that decision-making process. Thus, there is no pre-emption of state authority of the kind in issue in *Northwest Central*.[47]

Differences Between New England and California

CT DPUC Argument

40. The CT DPUC states that, in relying on the CAISO Order to support its exercise of jurisdiction over the ISO-NE method of determining ICR, the Commission ignored differences between the California and New England energy markets. According to the CT DPUC, the Commission pointed to the possibility that one participant's reliability decisions could negatively impact other participants as demonstrating the need for FERC authority over CAISO's resource adequacy determinations.[48] The CT DPUC states that

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[47] Additionally, assuming *arguendo* that the Commission was in fact pre-empting state decision-making authority, so that *Northwest Central* did apply, the Commission's actions here would pass the *Northwest Central* test. The CT DPUC asserts that, in *Northwest Central*, the Supreme Court found that a practice that merely "affects" rates or charges does not negate the FPA's reservation of jurisdiction over resource adequacy to the states, unless state determination of resource adequacy would prevent attainment of Commission goals, and that the Commission has not made a showing here that any Commission goal would not be attained. Given the existence of an integrated regional-wide system in New England, and given the absence of a region-wide resource adequacy determination process in New England as discussed below at P 39, the Commission has made such a showing.

[48] CT DPUC request for rehearing at 22-23, *citing* February 28 Order at P 17, *citing* CAISO Order at P 1113 ("where an interconnected transmission system is operated on a regional basis as part of an organized market for electricity . . . all users of the system are interdependent, particularly with respect to reliability, i.e., one participant's reliability decisions can impact the reliability of service available to other participants

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such “free rider” problems (in which one local area could set a lower reserve requirement than necessary, and the utilities in that area would then “lean on” capacity provided in other local areas) will not arise in New England, because the New England states have a long tradition of pooling of capacity resources for the benefit of all parties, and because under the FCM, each local area will have a capacity requirement based specifically on how much capacity is present in and can be imported into that area.

41. The CT DPUC further argues that the Commission's concern with bid caps in California does not justify its exercise of jurisdiction over the New England capacity market. In the February 28 Order, the Commission noted that, in approving bid caps to protect against market abuse in energy markets in California, it had found that, unless there were some mechanism (other than increases in the price of energy) to encourage the construction of new generation, such as a robust capacity market, "it would be difficult for us to approve such bid caps [, which] . . . would simply inhibit new supply, and thereby harm customers."[49] The CT DPUC asserts that in New England, however, unlike in California, the FCM's Peak Energy Rent mechanism “is intended to mitigate incentives to create price spikes in the energy market,”[50] so that the bid cap in New England is now, in essence, irrelevant, and the Commission’s fear that bid caps will inhibit the construction of new supply is groundless. The CT DPUC also asserts that the FCM provides sufficient incentives to attract new infrastructure where needed.

Commission Ruling

42. Neither of the CT DPUC's arguments here are valid. In the 2007/2008 Power Year ICR Order, we stated that we had addressed precisely this jurisdictional question in the CAISO Order, and noted that "the Commission recognized the importance of resource adequacy requirements in meeting our statutory mandate under the FPA to ensure that the rates, terms and conditions of jurisdictional and transmission sales of electric energy in CAISO markets are just, reasonable and not unduly discriminatory or preferential."[51] It

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and the related costs the other participants must bear. . . . We find that, in situations where one party’s resource adequacy decisions can cause adverse reliability and costs impacts on other participants in a regionally operated system, it is appropriate for us to consider resource adequacy in determining whether rates remain just and reasonable and not unduly discriminatory").

[49] CAISO Order at P 1114, *cited in* February 28 Order at P 18.

[50] CT DPUC request for rehearing at 24, *citing* FCM Order at P 29.

[51] 2007/2008 Power Year ICR Order at P 27.

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is inaccurate to assert, as the CT DPUC does, that the Commission was concerned solely with possible free rider problems. Whether or not the New England LSEs have a practice of pooling capacity resources for the benefit of all, as the CT DPUC states, is irrelevant to the possibility that concerned the Commission – namely, that within a large integrated system such as the New England control area, reliability actions taken by one local area could have an adverse effect on neighboring local areas. This problem can occur even absent any intent to lean on a neighbor's capacity: for instance, a project built to address one state's reliability needs might, because of its location and impact on the interstate transmission system, inadvertently cause reliability problems for a neighboring state. Therefore, as the Commission stated, "in situations where one party's resource adequacy decisions can cause adverse reliability and costs impacts on other participants in a regionally operated system, it is appropriate for us to consider resource adequacy in determining whether rates remain just and reasonable and not unduly discriminatory or preferential."[52]

43. Similarly, the CT DPUC's argument that the Commission's reliance on the CAISO Order and CAISO Rehearing Order to support its exercise of jurisdiction over the determination of ICR has been vitiated by the FCM's Peak Energy Rent mechanism is incorrect.[53] The CT DPUC argues that, in those two orders, the Commission supported its assertion of jurisdiction over resource adequacy by pointing to the fact that the Commission had found that, due to the bid caps in the CAISO energy markets, the construction of new supply might be inhibited unless the market design contained some other mechanism to ensure sufficient construction of supply. Here, in contrast, the CT DPUC states, since the Peak Energy Rent mechanism has ensured that New England's bid caps will never be activated, there is no need for the Commission to exercise jurisdiction.

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[52] *Cal. Indep. Sys. Operator Corp.*, 115 FERC ¶ 61,172 at P 36-37 (2006), *order on rehearing*, 118 FERC ¶ 61,045 (2007); *see also*, *Gainesville Utils. Dep't v. Fla. Power Corp.*, 402 U.S. 515, 529 (1979) (the Commission has a "responsibility to the public to assure reliable efficient electric service").

[53] The Peak Energy Rent mechanism seeks to stabilize prices by deducting from capacity prices amounts that might hypothetically be earned in the energy market during price spikes. *See* FCM Order at P 29 ("the peak energy rent deduction is intended to help mitigate incentives to create price spikes in the energy market [because it] will remove any profits gained from the rise in prices because the extra revenues earned in the energy market are deducted from capacity payments").

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44. This argument mistakes the nature of the Commission's concerns in the CAISO Order and CAISO Rehearing Order. We stated there:

> [R]esource adequacy plays an important role in addressing whether Commission-jurisdictional wholesale prices reflect the exercise of market power or the scarcity of supply. In particular, we are approving bid caps for the markets operated pursuant to the [Market Redesign and Technology Upgrade] Tariff. These bid caps are premised on the notion that bids above these levels may not reflect true scarcity pricing, but rather the exercise of market power or abuse that results in rates that are not just and reasonable. This premise is only valid, however, if there is some mechanism – other than energy price increases – to encourage the construction of new generation where and when needed. Consequently, in the absence of a workable resource adequacy program, it would be difficult for us to approve such bid caps. Without a workable program, the bid caps would simply inhibit new supply, and thereby harm customers, rather than protecting customers from the exercise of market power or abuse.[54]

45. The Commission focused on the fact that, in approving California's tariff provisions (which are clearly within the Commission's jurisdiction), we had put into place a market design that contained an element that could, potentially, inhibit the construction of necessary new generation and ultimately harm electricity customers. Thus, it was critical that the Commission be able to ensure that the market design also included a countervailing mechanism to ensure the construction of new generating capacity – in this case, a capacity market that sent appropriate price signals to encourage the development of new capacity. Absent the power to ensure that capacity prices correctly reflect the value of capacity, so as to make sure that necessary capacity is provided to the system, the Commission could not have approved a market design that included bid caps. This is equally true in New England, where the market design similarly contains bid caps; whether the Peak Energy Rent mechanism will modulate energy price spikes to a sufficient degree to render those bid caps irrelevant is an as-yet-untested proposition.

Deference to New England States

CT DPUC Argument

46. The CT DPUC states that, despite paying lip service to the concept of respecting state decision-making with respect to resource adequacy, the Commission has failed to do

[54] CAISO Order at P 1114.

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so and now asserts that it retains absolute jurisdiction to override any state's resource adequacy determination. As evidence of this, the CT DPUC states that the Commission has not acted on the petition for declaratory order filed by six New England governors in June 2004 asking the Commission to state that the governors' proposed New England States Committee on Electricity (NESCOE) would have authority to make resource adequacy determinations.[55] The CT DPUC states that it has proposed a specific mechanism under which the states would determine ICR, based on information provided by ISO-NE. The CT DPUC states that, on rehearing, the Commission should either reject ISO-NE's proposed ICR rules as beyond the Commission's jurisdiction to accept, or impose and direct ISO-NE to file rules that reflect the CT DPUC's proposal.

Commission Ruling

47. In the 2007/2008 Power Year ICR Order, the Commission reiterated that

> as a general matter, a state or region may determine in the first instance the appropriate level of planning reserves by balancing reliability and cost considerations. Citing the CAISO Order [in the CAISO Rehearing Order], we noted that "it is our responsibility to ensure that a workable resource adequacy requirement exists in a market such as that operated by the CAISO. This does not mean that we must determine all the elements of such a program in the first instance. Rather, we can, in appropriate circumstances, defer to state and Local Regulatory Authorities to set those requirements."[56]

48. The Commission has not changed its view. However, the CT DPUC does not point to a completed and ready-to-implement program for determining capacity requirements by the states. Rather, the CT DPUC points to a proposal filed in June 2004 by the New England governors. On July 7, 2005, the Commission issued an order deferring action, and encouraging further discussion among the stakeholders.[57] In its

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[55] CT DPUC request for rehearing at 27, *citing* Joint Petition for Declaratory Order to Form a New England Regional State Committee, *Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont*, Docket No. EL04-112-000 (June 25, 2004).

[56] 2007/2008 Power Year ICR Order at P 29, *citing* CAISO Rehearing Order, 119 FERC ¶ 61,076 at P 558, *citing* CAISO Order, 116 FERC ¶ 61,274 at P 1117.

[57] *Governors of: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont*, 112 FERC ¶ 61,049 (2005).

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most recent status report, filed on July 13, 2007, ISO-NE stated that it had prepared a draft Schedule 5 to its tariff, which was intended to be the vehicle for funding NESCOE, and which was approved at a July 6, 2007 meeting of the NEPOOL Participants Committee. ISO-NE further stated that it, NEPOOL and the state parties had been actively working on a filing letter pursuant to which the Commission would be asked to approve Schedule 5, and it hoped to make this filing before the next status report would be due, ninety days from July 6, 2007.[58] Subsequently, on August 31, 2007, in Docket No. ER07-1324-000, ISO-NE and others submitted proposed Schedule 5 to the tariff, which would provide for funding NESCOE costs through the tariff; that filing is presently pending, with interventions and protests presently due on or before September 21, 2007. Thus, NESCOE is still in the process of formation, rather than being an organization that is fully capable, at this time, of making resource adequacy determinations. As a result, as the Commission stated in the February 28 Order, "[t]here is no agreement among the New England states to establish the ICR and therefore nothing to which we could defer."[59]

Cross Sound Cable Issues

49. In the February 28 Order, the Commission addressed the issue of the treatment of tie benefits provided by the Cross Sound Cable.

50. "Tie benefits" are an estimate as to the amount of emergency assistance that is likely to be available to a control area as a result of its interconnections with neighboring control areas.[60] Thus, once the level of tie benefits is determined, the ICR number (i.e., MW of capacity that the ISO must procure) is reduced by that amount of tie benefits.

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[58] *Governors of: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont*, Docket No. EL04-112-000, Eighth Status Report, filed July 6, 2007.

[59] February 28 Order at P 21.

[60] In the February 28 Order at P 23, we stated:

> According to ISO-NE, tie benefits are a result of resource and load diversity between two control areas; for example, when New York has excess resources at a time when New England's resources are tight, New York resources could support New England's load to the extent that transmission constraints allow. . . . Thus, for example, if ISO-NE determines that it needs 30,000 MW of installed capacity in order to meet its reliability objective and it determines that tie

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51. The Commission addressed the treatment of the estimate of tie benefits provided to New England by the Hydro-Quebec Phase II Interconnection (HQ Interconnection), a transmission intertie between New England and Quebec, and the treatment of the estimate of tie benefits provided by the Cross Sound Cable, a transmission intertie between New England and New York. ISO-NE's market rules provide for the calculation of the tie benefits provided by the HQ Interconnection between New England and Hydro-Quebec by a deterministic methodology that uses forecasted load and capacity for the Hydro-Quebec control area and the HQ Interconnection transfer limit as determined by ISO-NE, in order to arrive at a specific amount of capacity that will be available for tie benefits on the HQ Interconnection interface. The rules also provide, however, for the use of a probabilistic methodology that quantifies firm capacity equivalents to express the probable amount of capacity that will be available on the interface for other transmission interties, including the Cross Sound Cable. As a result of this difference,

> parties utilizing the HQ Interconnection will have a higher degree of certainty as to the amount of capacity that will be available to them than parties utilizing the Cross Sound Cable [, and] transmission capacity across the HQ Interconnection is likely to receive a higher price than transmission capacity across the Cross Sound Cable and other transfer facilities as to which there is a lesser degree of certainty.[61]

52. LIPA, the owner of all firm transmission capacity on the Cross Sound Cable, asserted that this difference was discriminatory, on the basis that the two interties were equivalent in that they are both privately-owned, are both high voltage direct current (HVDC) facilities, and function in the same manner (i.e., both the HQ Interconnection and the Cross Sound Cable are direct current (DC) facilities, such that the direction of flows can be controlled). LIPA argued that a deterministic methodology (that would arrive at a definitive figure for the tie benefits) was more appropriate to measure the tie benefits for both DC facilities, where flows can be controlled, than a probabilistic methodology (that develops a probable estimate of tie benefits) appropriate for alternating current (AC) interface facilities, where the flows cannot be controlled. LIPA

> benefits total 1,000 MW, the ICR would be 29,000 MW. In this case, LSEs in the aggregate would need to acquire 29,000 MW of capacity through the FCM auction. The remaining 1,000 MW of capacity needed for reliability (the tie benefit) would be assumed to be available in an emergency from the neighboring control area.

[61] *Id*. at P 33 n.30.

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further argued that the owners of the HQ Interconnection receive capacity credits, in recognition of the contribution to tie benefits that the HQ Interconnection makes to the New England system, and LIPA, as the holder of all firm transmission rights on the Cross Sound Cable, believes that it is entitled to similar capacity credits. LIPA states that while it has raised this issue in the New England stakeholder process, it has received no relief.[62]

53. The Commission disagreed with LIPA's view. We stated that, while both the HQ Interconnection and the Cross Sound Cable are HVDC, controllable interconnections, "there are other important differences between the two facilities."[63] We pointed to the fact that ISO-NE is required to submit specific HQ Interconnection values, as required in a prior Commission order.[64] The Commission stated that, in that order, it had relied on the fact that:

> the deterministic method was appropriate there because all of the capacity transferred from the [Hydro-Quebec] control area to New England [is] sent through the HQ Interconnection. Thus, the determination of tie benefits available through the HQ Interconnection was based on the availability of all of the generating capacity from Quebec that can be accessed through the HQ Interconnection, rather than on an estimate of the likelihood that New England would require emergency assistance.[65]

54. We found that equivalent treatment for the Cross Sound Cable, however, would not take into account the fact that, when capacity is transferred from New York to New England, that transfer occurs not only across the Cross Sound Cable, but also two other transmission interties between the two control areas. And, because those two other interties are uncontrollable AC facilities,

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[62] LIPA protest at 17-18.

[63] February 28 Order at P 35.

[64] *Id.* at P 36, *citing New England Power Pool*, 111 FERC ¶ 61,132 (2005) (HQ Order). In the HQ Order, the Commission endorsed a deterministic method for calculating HQ Interconnection capacity ("ISO-NE used a deterministic approach to calculate the Monthly Capacity Potentially Available for Sales (MCPAS) and the corresponding monthly Capacity Credit values [which] requires a set of load and resource assumptions that describes the expected system conditions.") HQ Order at P 8; *see also Id.* at P 19.

[65] February 28 Order at P 36.

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> it is not possible to know in advance how much capacity will flow through those facilities. Therefore, it is similarly not possible to know in advance how much transmission capacity on the Cross Sound Cable will be necessary at any given time for emergency assistance.[66]

55. Therefore, the Commission ruled that it would not direct ISO-NE to quantify the tie benefits on the Cross Sound Cable in a similar way to its treatment of the HQ Interconnection.

LIPA's Request for Rehearing

56. LIPA challenges this determination. It states that the Commission engaged in arbitrary, capricious and discriminatory decision-making when it refused to treat the Cross Sound Cable comparably with the HQ Interconnection. LIPA asserts that the Commission failed to recognize the reliability benefits provided by the Cross Sound Cable, while at the same time grandfathering an earlier treatment of the HQ Interconnection.

57. LIPA first states that the Commission accepted ISO-NE's assertion that the tie benefits provided by the Cross Sound Cable must be weighed together with the energy flowing over the AC facilities interconnecting New York and New England, and that this assertion was not based on any study. LIPA states that this action "exclude[d] consideration of the unique characteristics of the HVDC [Cross Sound Cable] . . . from appropriate consideration in that process."[67] LIPA argues that:

> ISO-NE's premise that the preferential and grandfathered treatment [of the] HQ Interconnection is justified because it is the only interconnection between Quebec and New England while there are multiple interfaces between New England and New York, has no basis in electric reality. That premise is factually incorrect. The transmission system of Hydro-Quebec for the Canadian Province of Quebec is interconnected with all of New York, New England, Ontario New Brunswick and Newfoundland and Labrador.[68]

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[66] *Id.* at P 37.

[67] LIPA request for rehearing at 5.

[68] *Id.*, footnote omitted.

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58. LIPA then asserts that the Commission erred by assuming that any capacity from Long Island that may be provided over the Cross Sound Cable is "more speculative" than the capacity available over the HQ Interconnection. LIPA states that this conclusion is not consistent with the 2007 Reliability Needs Assessment of capacity available in the New York control area, which shows that Long Island will have "substantial excess capacity" above its planning requirement throughout the ten-year period studied in the Reliability Needs Assessment.[69] LIPA states that, as controllable HVDC interties, both the Cross Sound Cable and the HQ Interconnection are able to direct and regulate the flows across these facilities, and should therefore be treated equally, and the tie benefits provided by each facility should be assessed in a comparable manner. LIPA states that the Commission's assent to ISO-NE's proposal will result in treating the Cross Sound Cable as if it could provide only the level of reliability benefits provided by an AC intertie, a result that LIPA considers unjust and unreasonable.

59. LIPA also challenges the methodology by which ISO-NE measured capacity and reliability, and incorporation of tie benefits. LIPA asserts that ISO-NE's methodology is inconsistent with the methodology used by New York, and does not, therefore, take an appropriate regional approach. LIPA asserts that ISO-NE starts with a model of ISO-NE in an unconstrained state, then measures capacity in other areas on a static basis to measure tie benefits. By contrast, LIPA states that the New York approach examines that New York control area together with the flows over the interties to the PJM and New England control areas. LIPA claims that ISO-NE's methodology effectively discriminates against capacity from other areas, and perpetuates a seam between the New York and New England control areas. LIPA also asserts that it is inconsistent for ISO-NE to justify its discriminatory treatment of the Cross Sound Cable based on the existence of other interties between New York and New England, when at the same time ISO-NE's methodology for developing the ICR ignores those interties. LIPA considers this a fundamental flaw in ISO-NE's ICR methodology that justifies rejection by the Commission.

60. Finally, LIPA asserts that the Commission should not have relied on its own past treatment of the HQ Interconnection in the HQ Order, when that 2005 order did not establish the ICR requirement, but rather simply addressed capacity credits to be granted to the HQ Interconnection owners.

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[69] *Id*. at 7, *citing* affidavit of Curt Dahl, Attachment A to LIPA request for rehearing. Mr. Dahl's affidavit in turn attaches the 2007 Reliability Needs Assessment.

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Commission Ruling on Rehearing

61. The Commission denies LIPA's request for rehearing.

62. In the February 28 Order, the Commission found that, while both the Cross Sound Cable and the HQ Interconnection (both DC facilities) brought energy from external control areas into New England, it was more difficult to quantify how much energy will flow over the Cross Sound Cable than over the HQ Interconnection. This is because, while all of the energy that moves from Quebec to New England flows over the HQ Interconnection, this is not the case with the energy moving from New York to New England. As noted in the February 28 Order, there are other, AC interties between New England and New York; when energy flows from New York to New England some of it will flow across the Cross Sound Cable, and some will flow across the AC interties and it is not possible to estimate the amount of transfer capacity on the Cross Sound Cable that would be used during an emergency to bring energy from New York to New England.[70] Thus, the Commission found that while it was able to develop an estimate of the tie benefits that the HQ Interconnection provided to New England (especially since it was able to rely on prior Commission rulings as to the appropriate methodology for evaluating the capacity provided by the HQ Interconnection[71]), it was not able to identify the tie benefits that are specifically attributable to the Cross Sound Cable.

63. LIPA challenges this view, stating that the Commission is failing to take account of the fact that "[t]he transmission system of Hydro-Quebec for the Canadian Province of Quebec is interconnected with all of New York, New England, Ontario New Brunswick and Newfoundland and Labrador."[72] However, LIPA misstates the basis of the reasoning behind the Commission's evaluation of the amount of tie benefits that the HQ Interconnection brings to New England. Whether some generation in Quebec could reach New England indirectly by way of other control areas is not relevant to the calculation of the tie benefits attributable to the HQ Interconnection. The tie benefit

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[70] *See* February 28 Order at P 37 & n.33 (listing additional AC interties, and noting that "it is not possible to know in advance how much capacity will flow through those facilities").

[71] February 28 Order at P 36, *citing New England Power Pool*, 111 FERC ¶ 61,132 at P 19 (2005) (Commission accepts NEPOOL's and ISO-NE's values for the capacity credits associated with the HQ Interconnection and approves the methodology used to determine those credits).

[72] LIPA request for rehearing at 5.

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associated with a neighboring control area is based on the smaller of (i) the control area's surplus generating capacity estimated to be available to New England in an emergency, or (ii) the amount of transfer capability to import the associated energy. The transfer capability of the HQ Interconnection is smaller than the surplus generation capacity in Quebec. HQ has sufficient surplus generation capacity to fill not only the HQ Interconnection to New England but also the remaining DC interconnections between the HQ system and other areas such as New York and New Brunswick.[73] Phrased another way, the HQ Interconnection, by itself, makes additional surplus generation available to New England in an emergency, in that this surplus generation would not be available if the HQ Interconnection did not exist. As a result, the HQ Interconnection transmission capability provided to the system by the Interconnection Rights Holders (IRHs) measures the amount of energy that New England could directly import from Quebec in an emergency situation. The amount of this transmission capability should reasonably be counted as a tie benefit and used to meet the capacity obligations of the IRHs. If the HQ Interconnection were to be removed, the amount of energy that New England could procure in an emergency from Quebec would be reduced by the full amount of HQ Interconnection's capacity.[74]

64. By contrast, LIPA has not demonstrated that the Cross Sound Cable, by itself, makes any additional surplus generation available to New England; if the Cross Sound Cable did not exist, New England would have the same amount of surplus New York generation available to it in an emergency. In New York, the amount of surplus transmission capability exceeds the amount of surplus generation capacity. Thus, the tie benefit from New York into New England is limited by the amount of surplus generating capacity available in New York, not the amount of surplus transmission capacity (both over the Cross Sound Cable, and over the other AC interties) over which that generation could flow. If the Cross Sound Cable were to experience an outage, there would still be other AC transmission capability in New York that could be used to import the limited

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[73] The HQ Interconnection has roughly 1,800 MW of transmission capability, while Quebec has many times that much surplus energy during the non-winter months. Indeed, the amount of non-winter surplus generation in Quebec is substantially greater than the combined transmission transfer capabilities of all the DC lines leading out of Quebec to all of its neighboring control areas.

[74] Even if Quebec were to export surplus generation to New England indirectly by using its other DC ties that lead to other control areas (such as New York), that generation would need to use transmission capacity that connects New York to New England, and New York transmission capability has already been considered in determining New England's tie benefits from New York.

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amount of surplus energy available from New York. So, removing the Cross Sound Cable would not reduce the amount of generation capacity in New York that New England could import in an emergency. Further, if surplus energy flowed from New York to New England in an emergency situation over both the Cross Sound Cable and other AC interties, it would not be possible to quantify the extent of tie benefits that the Cross Sound Cable provides to the New England control area, given that some energy will flow on the Cross Sound Cable and other energy on the AC ties between New England and New York.[75]

65. The fact that Long Island, specifically, is projected to have large amounts of excess generating capacity by 2010 is not relevant to the calculus of tie benefits provided to New England by the Cross Sound Cable at this time. If the total amount of generation available from all of the New York control area should change, such that it would be appropriate to re-evaluate the tie benefits to New England from New York, ISO-NE's market rules already provide for that contingency: pursuant to Market Rule III.12.9, at least once every three years, ISO-NE must perform a tie benefits study, and will update its tie benefits analysis if it determines that changes in the New England control area or adjacent control areas warrant such changes.

66. LIPA further asserts that the Commission should not have relied on its HQ Order to establish the amount of tie benefits that could flow over the HQ Interconnection. The

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[75] Moreover, Quebec is electrically separate from the United States and the rest of the Canada due to its DC ties (and lack of AC ties). The Hydro-Quebec control area is a single, discrete synchronous "interconnection" (i.e., a power grid in which, during normal system operating conditions, all of its electric utilities are tied together and operate at a single synchronized frequency) tied to other interconnections only with DC ties (i.e., all load and generation within a given interconnection operates at a frequency that is independent of actions and events in adjacent interconnections). All of the interties between Hydro-Quebec and other control areas are DC ties like the HQ Interconnection. Thus, all of the energy flowing from Hydro-Quebec to other control areas is over ties that are controllable in a way that AC ties are not. By contrast, New York and New England, are not separate interconnections but form part of a single synchronous network that includes free-flowing AC ties that parallel controllable DC ties such as the Cross Sound Cable. Thus, the fact that the transmission system of Hydro-Quebec is interconnected via separate DC ties with New York, New England and New Brunswick does not support LIPA's argument.

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Commission did not, in the February 28 Order, rely on the HQ Order in that fashion. Rather, our observation was that, because of that order, we could more easily quantify the amount of capacity flowing over the HQ Interconnection.[76]

67. Finally, LIPA makes specific technical challenges to the methodology by which ISO-NE measured capacity and reliability, and incorporation of tie benefits. It states:

> ISO-NE's approach to measuring capacity and reliability and incorporation of "tie benefits" is inconsistent with New York's . . . methodology and does not take the appropriate regional approach. . . . Although ISO-NE justifies its discriminatory treatment of the Cross Sound Cable based upon the existence of other interties between New York and New England, ISO-NE's methodology for developing the ICR ignores those interties.[77]

Thus, LIPA claims, "[t]he ISO-NE methodology effectively discriminates against capacity from other areas and perpetuates a seam between the New York and New England Control Areas."[78]

68. The Commission's responsibility in this case is not to measure the ISO-NE methodology against the NYISO methodology to determine which is superior, but to determine whether the ISO-NE methodology is just and reasonable. The Northeast Power Coordinating Council (NPCC) is the regional entity responsible for coordinating planning studies.[79] All members of the NPCC are required to meet the basic criteria for normal and emergency operations, as well as resource adequacy design criteria specifying sufficient resources to meet a loss of load expectation of no more than 0.1 days per year,

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[76] February 28 Order at P 36 ("ISO-NE is required to submit specific HQ Interconnection values, as required in a prior Commission order, [in which] the applicants provided that the deterministic method was appropriate there because all of the capacity transferred from the HQ control area to New England are sent through the HQ Interconnection").

[77] LIPA request for rehearing at 8-9.

[78] *Id.* at 8.

[79] Bylaws of Northeast Power Coordinating Council, Inc., *see* http://www.npcc.org/publicFiles/NPCC_INC_Bylaws.pdf.

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as outlined in NPCC Documents A-02, A-03 and B-08, respectively.[80] The NPCC stated in its June 2004 tie benefits study that its CP-8 Working Group had concluded that "the interconnection assistance values reported by NPCC Areas in their recent resource adequacy assessments appear to be reasonable and do not overstate interconnection benefits."[81] In addition, the ISO-NE method does not ignore the other ties between New York and New England as LIPA states; those ties are, in fact, included in the analysis.[82]

69. The stakeholders of New York and New England agreed to ICR methodologies in their respective regions and any disputes over such methodologies, or attempts to change them, should be pursued through the relevant stakeholder processes in the first instance. LIPA states that it has so far been unsuccessful in persuading other New England stakeholders to treat the tie benefits provided by the Cross Sound Cable as equivalent to the tie benefits provided by the HQ Interconnection.[83] The fact that others may not see things LIPA's way does not mean that LIPA is right and others are wrong. In any event, the comparatively brief explanation that LIPA provides here of its criticism of the

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[80] NPCC Document A-02, "Basic Criteria for Design and Operation Of Interconnected Power Systems," *see* https://www.npcc.org/publicFiles/reliability/criteriaGuidesProcedures/new/A-02.pdf; NPCC Document A-03, "Emergency Operation Criteria," *see* https://www.npcc.org/publicFiles/reliability/criteriaGuidesProcedures/new/A-03.pdf; and NPCC Document B-08, "Guidelines for Area Review of Resource Adequacy," *see* https://www.npcc.org/publicFiles/reliability/criteriaGuidesProcedures/new/B-08.pdf.

[81] "Review of Interconnection Assistance Reliability Benefits," *see* https://www.npcc.org/publicFiles/documents/interconnectionAssistanceReliabilityBenefits/archives/RCC_Approved_CP-8_Tie_Benefit_Report.pdf.

[82] Key modeling assumptions that go into the tie benefit analysis are the transfer limits between New York, New England, Ontario and the Canadian Maritimes. Review of Interconnection Assistance Reliability Benefits, *see* https://www.npcc.org/publicFiles/documents/interconnectionAssistanceReliabilityBenefits/archives/RCC_Approved_CP-8_Tie_Benefit_Report.pdf.

[83] LIPA protest at 15 ("As a participant in the ICR Working Group . . .LIPA made a presentation and proposal to the ICR Working Group to treat the Cross Sound Cable consistent with the HQ Phase II line . . . . The equivalent treatment of the [Cross Sound Cable] was rejected by the NEPOOL Review Committee and the NEPOOL Participants Committee at the September 8, 2006 meeting").

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methodology used by ISO-NE and its own very different approach, however, is not sufficient for the Commission to find that we should adopt LIPA's very different approach, and we will not, therefore, grant LIPA the relief it requests.

The Commission orders:

The Commission hereby denies both requests for rehearing, as discussed above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.