

121 FERC ¶ 61,125
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England Inc.

Docket No. ER07-655-001

ORDER DENYING REHEARING

(Issued November 1, 2007)

1. In this order, the Commission denies the Connecticut Department of Public Utility Control's (CT DPUC) request for rehearing of a Commission order granting ISO New England Inc.'s (ISO-NE) Power Year 2007/2008 Installed Capacity Requirements (ICR) for the New England Control Area.¹ In the 2007/2008 Power Year ICR Order, the Commission found that it had jurisdiction over ICR and accepted the filing over the objection of the CT DPUC.²

¹ *ISO New England Inc., et al.*, 119 FERC ¶ 61,161 (2007) (2007/2008 Power Year ICR Order).

² This docket is one of three in which the CT DPUC raises this jurisdictional argument. Each of the three dockets, ER05-715-002, ER07-365-002, and the instant docket, is at a different procedural stage. Docket No. ER05-715-002, the 2005/2006 Power Year ICR Proceeding, was remanded by the D.C. Circuit Court of Appeals and is currently pending before the Commission. Docket No. ER07-365-002, which involves revisions to the ISO-NE tariff concerning the processes and methodologies used to determine the ICR, was addressed in an order denying rehearing issued on September 14, 2007. *See ISO New England, Inc. and New England Power Pool*, 120 FERC ¶ 61,234 (2007) (September 14 Order). And Docket No. ER07-655-001 is addressed in this order.

Background

2. On March 23, 2007, ISO-NE submitted for filing its 2007/2008 Power Year ICR,³ which the Commission accepted for filing to be effective May 22, 2007. ISO-NE explained that it will use the 2007/2008 Power Year ICR values to calculate the Annual and Monthly Installed Capacity Reserve Margins for use in determining the Unforced Capacity rating of demand resources, other demand resources and New York Power Authority contracts. ISO-NE noted that the 2007/2008 ICR values will not be used for establishing the amount of ICAP to be purchased, as was the case in prior years.

3. ISO-NE provided the basis underlying the 2007/2008 Power Year ICR values and explained that the methodologies for determining the tie benefits and projected load are the same as those used in last year's filing and the Equivalent Demand Forced Outage Rate (EFORd) methodology for measuring unit availability for the 2005/2006 and 2006/2007 Power Years has been used.⁴ ISO-NE also noted that the ICR values were subsequently considered and approved by both the Reliability Committee and the Participants Committee.⁵

Jurisdiction Over ICR

4. In the 2007/2008 Power Year ICR Order, the Commission found that it has jurisdiction to accept the 2007/2008 ICR.⁶ The Commission explained that Federal

³ The 2007/2008 Power Year ICR were filed pursuant to *NSTAR Elec. and Gas Corp. v. New England Power Pool*, 103 FERC ¶ 61,093 (2003) (April 30 Order) and section 205 of the Federal Power Act (FPA) 16 U.S.C. § 824d (2000). A detailed explanation of the methodology undertaken by ISO-NE in setting its 2007/2008 ICR is found in the May 18, 2007 Order.

⁴ The EFORd measures the portion of time that a generating unit is in demand, but is unavailable due to forced outages. A generator's ICAP is reduced by its EFORd and by other adjustments in order to determine its UCAP rating, which limits the amount of capacity that it can sell in bilateral contracts or in ISO-NE's capacity market auctions.

⁵ ISO-NE notes that under the currently effective Regional Transmission Organization (RTO) arrangements in New England, a 60 percent vote in favor is required for Participants Committee action to support a particular set of ICR values.

⁶ As noted, the CT DPUC presented a similar threshold objection to the Commission's jurisdiction over ICR in Docket No. ER05-715-001. *ISO New England, Inc.*, 111 FERC ¶ 61,185 (2005), *reh'g denied*, 112 FERC ¶ 61,254 (2005) (2005/2006

Power Act (FPA) section 201(b)(1) confers jurisdiction over the transmission of electric energy in interstate commerce, and sales of electric energy at wholesale in interstate commerce.⁷ The Commission further noted that FPA section 205(a) confers on the Commission jurisdiction over all rates and charges in connection with the transmission or sale of electric energy and ensuring that all rules and regulations affecting or pertaining to the rates or charges are just and reasonable.⁸

5. The Commission also explained that, in *Mississippi Industries v. FERC*,⁹ the D.C. Circuit recognized the connection between the allocation of capacity and wholesale rates. There 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 “reallocating generation costs falls outside of [the Commission’s] rate making jurisdiction and instead falls solely within state authority over generation”¹⁰ and found that the Commission has authority over the allocation of capacity among market participants because this allocation affects wholesale rates. The court stated “[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

Power Year ICR Order). On appeal, the U.S. Court of Appeals for the District of Columbia Circuit did not address the merits of the jurisdiction argument and instead remanded the issue to the Commission for an explanation of the basis for its jurisdiction. *See Connecticut Department of Public Utility Control v. FERC*, No. 05-1411 (D.C. Cir. Apr. 20, 2007). The CT CPUC immediately moved for rehearing, which was denied by the D.C. Circuit.

⁷ 16 U.S.C. § 824(b)(1) (2000).

⁸ 16 U.S.C. § 824d(a) (2000). FPA section 206 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).

⁹ 808 F.2d 1525 (D.C. Cir.), *vacated in part on other grounds*, 822 F.2d 1103 (D.C. Cir. 1987) (*Mississippi Industries*).

¹⁰ *Id.* at 1543.

the wholesale price it pays for energy and “[the Commission’s] jurisdiction under such circumstances is unquestionable.”¹¹

6. In the 2007/2008 Power Year ICR Order, the Commission also noted that, in *Municipalities of Groton v. FERC*, the D.C. Circuit upheld the Commission’s authority to review section 9.4(d) of the New England Power Pool (NEPOOL) Agreement which included a deficiency charge for each participant in the agreement whose prescribed level of generating capacity, known as “capability responsibility,” fell by more than one percent below the set level.¹² The court in *Groton* found that because these charges are under “the Commission’s inclusive jurisdictional mandate – which reaches discriminatory practices ‘with respect to’ jurisdictional transmissions, or ‘affecting’ such transmissions or services,”¹³ they are within Commission jurisdiction.

7. In the 2007/2008 Power Year ICR Order, the Commission also noted that the 2005/2006 Power Year ICR Order similarly addressed the jurisdictional question as it involves resource adequacy in New England. Furthermore, in *ISO New England, Inc.*, the Commission found that it has jurisdiction to consider the mechanism for the determination of ICR.¹⁴ The Commission explained there that the forward capacity market (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.”¹⁵

8. The Commission also noted that, in *California Independent System Operator Corporation*,¹⁶ the Commission determined that the minimum resource adequacy requirements set forth in the Market Redesign and Technology Upgrade (MRTU) Tariff

¹¹ *Id.* at 1543.

¹² 587 F.2d 1296, 1300 (D.C. Cir. 1978) (*Groton*).

¹³ *Id.* at 1302.

¹⁴ 118 FERC ¶ 61,157 (2007) (February 28 Order), *Order Denying Rehearing*, 120 FERC ¶ 61,234 (2007).

¹⁵ *Id.* at P 15, 16-21.

¹⁶ 116 FERC ¶ 61,274, at P 1113 (2006) (CAISO Order), *reh’g*, 119 FERC ¶ 61,076 (2007) (CAISO Rehearing Order).

have an effect on jurisdictional rates and services.¹⁷ The Commission noted that ISO-NE has bid caps, and, in the CAISO Order, the Commission found in connection with California's energy market that minimum resource adequacy requirements have a direct nexus to bid caps.¹⁸ The Commission specifically reaffirmed its finding on jurisdiction in the CAISO Rehearing Order.¹⁹ The Commission found that the adequacy of resources can have a significant effect on jurisdictional rates and services and, therefore, it is subject to the Commission's jurisdiction. The Commission again found that the FPA confers upon the Commission the responsibility for ensuring that jurisdictional rates and charges -- including any rule, regulation, practice or contract affecting them -- are just and reasonable and not unduly discriminatory or preferential.²⁰

9. In the 2007/2008 Power Year ICR Order the Commission applied the reasoning articulated by the D.C. Circuit and earlier Commission decisions. The Commission found 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 transmission or sales subject to Commission jurisdiction, and "any rule, regulation, practice, or contract affecting such rate, charge or classification."²¹ The Commission reasoned that maintaining adequate resources has a significant and direct effect on jurisdictional rates and services and therefore falls within the Commission's jurisdiction. The Commission determined that that finding was fully consistent with *Mississippi Industries, Groton* and the CAISO Rehearing Order.

10. The Commission added 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, the Commission 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

¹⁷ *Id.* at P 1113.

¹⁸ *Id.* at P 1114.

¹⁹ See CAISO Rehearing Order, 119 FERC ¶ 61,076, at P 521-64; *accord*, *New York State Reliability Council*, 118 FERC ¶ 61,179 at P 31 (2007), *reh'g pending*.

²⁰ *Id.*; 16 U.S.C. §§ 824d-824e (2000).

²¹ *Citing, Id.* at P 15, 19-20; *see also* 16 U.S.C. § 824e(a) (2000).

circumstances, defer to state and Local Regulatory Authorities to set those requirements. . . .”²² The Commission therefore found it has jurisdiction to consider and accept ISO-NE’s ICR.

Discussion

Procedural Matters

11. The CT DPUC filed the instant request for rehearing on June 18, 2007. Richard Blumenthal, Attorney General for the State of Connecticut (Connecticut Attorney General) filed an untimely motion to intervene and request for rehearing. Mystic Development, LLC, Mystic I, LLC and Fore River Development, LLC (collectively Mystic) filed a motion to intervene and motion to intervene out of time and Millennium Power Partners, L.P. filed a motion to intervene out of time. Milford Power Company, LLC (Milford), ISO-NE, and NEPOOL, filed motions for leave to answer and answers. NEPOOL filed an opposition to the Connecticut Attorney General’s filing. The Massachusetts Attorney General and Massachusetts Department of Public Utilities (MA DPUC) filed a motion for leave to file comments and comments. The Connecticut Attorney General filed a motion for leave to file an answer and answer to NEPOOL. Finally, the CT DPUC filed a response to the motions to answer filed by ISO-NE, NEPOOL and Milford.

12. Rule 713 (d) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713(d), prohibits an answer to a request for rehearing. We therefore reject the answers of Milford, ISO-NE, and NEPOOL and the comments of Massachusetts Attorney General and MA DPUC. We will likewise reject the CT DPUC’s response.

13. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.²³ Mystic and Millennium have not met this higher burden of justifying their late interventions. Accordingly, we deny their motions to intervene out-of-time.

²² CAISO Rehearing Order, 119 FERC ¶ 61,076, at P 558 (*citing* CAISO Order, 116 FERC ¶ 61,274, at P 1117).

²³ *See, e.g., Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P7 (2003).

14. With regard to the Connecticut Attorney General's untimely request for rehearing, filed on June 25, 2007, pursuant to section 313(a) of the FPA, 16 U.S.C. § 825 l(a) (2000), an aggrieved party must file a request for rehearing within thirty days after the issuance of the Commission's order -- in this case no later than June 17, 2007. Because the 30-day rehearing deadline is statutory, it cannot be extended, and the Connecticut Attorney General's request for rehearing must be rejected as untimely. Moreover, the courts have repeatedly recognized that the time period within which a party may file an application for rehearing of a Commission order is statutorily established at 30 days by section 313(a) of the FPA and that the Commission has no discretion to extend that deadline.²⁴ Accordingly, we will reject the opposition of NEPOOL to the untimely request for rehearing and to motion to intervene of the Connecticut Attorney General.

Discussion of CT DPUC Arguments

15. The CT DPUC argues that the FPA does not give the Commission jurisdiction to accept or approve ISO-NE's proposed Power Year 2007/2008 ICR and in fact, the FPA expressly and unambiguously reserves to the states jurisdiction over facilities used for generating electricity and resource adequacy decisions.²⁵

16. The CT DPUC acknowledged that the jurisdictional issue is before the Commission in two other parallel cases and it moved to make this proceeding the vehicle for accepting all comments and arguments regarding the issue.²⁶

17. We remain unpersuaded by the CT DPUC's arguments regarding the Commission's jurisdiction over ICR. We therefore deny rehearing. We also note that the CT DPUC seeks to raise arguments concerning issues that fall outside of the 2007/2008

²⁴ See *City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) ("the 30-day time requirement of the [FPA] is as much a part of the jurisdictional threshold as the mandate to file for a rehearing"); *Boston Gas Co. v. FERC*, 575 F.2d 975, 977-78, 979 (1st Cir. 1978).

²⁵ CT DPUC Rehearing Request at 10 (*citing* 18 C.F.R. § 385.713 (2006)).

²⁶ Joint Motion by the CT DPUC, NEPOOL, and ISO-NE to Establish a Briefing and Procedural Schedule and Request for Expedited Action, *ISO New England Inc. et al.*, Dockets Nos. ER05-715-002, ER07-365-002, ER07-655-000 (June 6, 2007).

Power Year ICR Order.²⁷ Those issues are more appropriately raised in the related dockets. We will therefore only address those errors the CT DPUC claims that concern the 2007/2008 Power Year ICR Order.

18. As stated in the February 28 Order, contrary to arguments made by the CT DPUC, the Commission asserted jurisdiction not over generating facilities, but over “an essential component of the charge for wholesale capacity in interstate commerce”.²⁸ The Commission was not requiring that any state build generation, or that any participant satisfy its capacity obligation via a particular resource.

19. The Commission stated that its responsibility to assure that wholesale rates are just and reasonable does not mean that it cannot, when appropriate, accept state determinations regarding resource adequacy requirements, noting that in the CAISO proceeding it had found that it could, in appropriate circumstances, defer to state and local regulatory authorities to set resource requirements.²⁹ The Commission also pointed out, however, that there was currently no proposal from all the New England states under consideration.

20. Thus, the Commission 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.”³⁰

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

²⁷ See CT DPUC Rehearing Request at 2 (“In order to give the Commission a comprehensive analysis of the jurisdictional questions that the CT DPUC has raised, this request will address each of the Commission’s asserted basis for setting ICR, *even if it was not expressly discussed in the May 18 Order*”) (emphasis added).

²⁸ February 28 Order at P 20.

²⁹ *Id.* at P 21 (citing *CAISO Order*, 116 FERC ¶ 61,274, at P 1117).

³⁰ *Id.*

provide.³¹ The CT DPUC states that Congress recognized that states are particularly well 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.”³² 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.³³ 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

³¹ CT DPUC Rehearing Request at 13.

³² *Id.* (citing 16 USC § 824(a) (2000)).

³³ *Id.* at 14-15. CT DPUC argues that Congress reiterated this reservation of authority to the states in section 201(b)(1), stating:

[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 . . . ;

and in section 207, stating:

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

in section 215:

the Commission’s authority to set reliability standards “does not include any requirement to . . . construct new . . . generation capacity.”

England region should purchase, and states' exercise of their authority to set resource adequacy levels will not interfere with any Commission goals.³⁴

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.³⁵ The CT DPUC considers irrelevant the Commission's argument that a 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.³⁶ It also states that, as load grows, the only resources that can provide incremental kilowatt hours of energy are generators.³⁷

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.³⁸ 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.³⁹ The CT DPUC argues that,

³⁴ CT DPUC Rehearing Request at 2-4.

³⁵ *Id.* at 14. 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 Rehearing Request at 15, *citing* ISO-NE's "Proposed Installed Capacity Requirements for 2007-2008".

³⁶ CT DPUC Rehearing Request at 11.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 11-12.

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, load serving entities (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."⁴⁰

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.⁴¹ 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."⁴² The CT DPUC states that 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.⁴³ 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

⁴⁰ CT DPUC Rehearing Request at 16-17.

⁴¹ *Id.* at 18.

⁴² *Id.* at 19.

⁴³ 16 U.S.C. § 824(b)(1) (2000).

such rate or charge that is not just and reasonable is hereby declared to be unlawful.^[44]

26. Accordingly, 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, 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 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) within their borders. Rather, the Commission is reviewing the means by which ISO-NE determines how much capacity its member LSEs must provide (which leads ultimately to a determination of how much capacity each state’s LSEs must provide), which, as described above, directly affects the charges to customers, in order to evaluate the justness and reasonableness of the resulting rates and charges for those capacity obligations.

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

⁴⁴ 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).

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 response⁴⁵ 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 it, or at particular locations within it, the Commission's regulation of ISO-NE's calculation of ICR does not prevent it from doing so.⁴⁶ The capacity requirement that ISO-NE places on an individual LSE may be a factor in a state's ultimate determination as to how much electrical generating capacity is built, 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.⁴⁷ 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

⁴⁵ Demand response reduces load to be served, so that less electric generating capacity is needed to serve load.

⁴⁶ 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 things, 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).

⁴⁷ 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 145-47, 152.

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 MWs 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. It is true that the price of capacity will be set by the CONE (Cost of New Entry) in those circumstances in which new entry is needed to meet capacity requirements.⁴⁸ However, ISO-NE’s ruling of how many MWs 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 MWs the LSE must purchase.

Relevant Caselaw

CT DPUC Argument

31. The CT DPUC also states that, in *Northwest Central Pipeline Corp. v. State Corp. Comm’n of Kansas*,⁴⁹ 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

⁴⁸ 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.

⁴⁹ 489 U.S. 493 (1989) (*Northwest Central*).

energy.⁵⁰ Thus, the CT DPUC states, state regulation of generating facilities may be pre-empted only if “state regulation prevents attainment of [the Commission’s] goals,”⁵¹ and the Commission has not made such a showing.

32. The CT DPUC argues that the Commission’s reliance on *Groton* and *Mississippi Industries*⁵² 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. The CT DPUC also argues 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.⁵³ 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 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 superseded 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 RTOs many times. As we stated in the 2007/2008 Power Year Order, 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.”⁵⁴ In the 2007/2008 Power Year

⁵⁰ CT DPUC Rehearing Request at 21 (*citing Northwest Central* at 514).

⁵¹ CT DPUC Rehearing Request at 22 (*citing Northwest Central* at 515-16).

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

⁵³ CT DPUC Rehearing Request at 25.

⁵⁴ 2007/2008 Power Year ICR Order at P 18.

Order 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.⁵⁵ 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.⁵⁶

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.⁵⁷

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

⁵⁵ *Id.* 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.'").

⁵⁶ *See id.* at P 23 ("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,'" (citation omitted)).

⁵⁷ *Id.* at P 20.

each affiliate will significantly affect the wholesale price it pays for energy,⁵⁸ and that while the allocation of capacity did not set sales prices, it directly affects costs and “consequently, wholesale rates.”⁵⁹ We also cited the court’s conclusion that “FERC’s jurisdiction under such circumstances is unquestionable”⁶⁰ 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.”⁶¹

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:

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. . . .”⁶² 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.”⁶³

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

⁵⁸ *Id.* (citing *Mississippi Industries* at 1541).

⁵⁹ *Id.*

⁶⁰ *Id.* (citing *Nantahala Power & Light Co.*, 426 U.S. 953 (1986)).

⁶¹ *Id.* at P 20 (citing *Mississippi Industries* at 1542).

⁶² *Groton* at 1302.

⁶³ 2007/2008 Power Year ICR Order at P 21 (citing, e.g., *FPC v. Conway Corp.*, 426 U.S. 271 (1976)).

jurisdiction.”⁶⁴ 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 court 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.”⁶⁵

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 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 (if any) 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*.⁶⁶

⁶⁴ *Id.* at P 24.

⁶⁵ *Id.* (citing *Groton* at 1302).

⁶⁶ Additionally, assuming *arguendo* that the Commission was in fact preempting 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

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.⁶⁷ The CT DPUC states that 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

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 region-wide system in New England, and given the absence of a region-wide resource adequacy determination process in New England, the Commission has made such a showing.

⁶⁷ CT DPUC Rehearing Request at 27-28 (*citing* 2007/2008 Power Year ICR Order at P 25 (*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 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"))).

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.”⁶⁸ 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,”⁶⁹ 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.”⁷⁰ It 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

⁶⁸ CAISO Order at P 1114, *cited in* 2007/2008 Power Year ICR Order at P 26.

⁶⁹ CT DPUC Rehearing Request at 29 (*citing* *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) (FCM Order) at P 29).

⁷⁰ 119 FERC ¶ 61,161, at P 27.

resource adequacy in determining whether rates remain just and reasonable and not unduly discriminatory or preferential.”⁷¹

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.⁷² 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.

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

⁷¹ *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”).

⁷² 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”).

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.⁷³

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 capacity resources – 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 so and now asserts that it retains absolute jurisdiction to override any state's resource adequacy determination. 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.

⁷³ CAISO Order at P 1114.

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.”⁷⁴
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.⁷⁵ And in its most recent status report on the proposal, filed on July 13, 2007, ISO-NE stated that it has prepared Schedule 5 to its tariff which is intended to be the vehicle for funding NESCOE, which was approved at a July 6 meeting of the NEPOOL Participants Committee.⁷⁶ 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.”⁷⁷ That situation has not changed. 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. Accordingly, CT DPUC has raised no basis to grant rehearing.

⁷⁴ 2007/2008 Power Year ICR Order, 119 FERC ¶ 61,161, at P 29 (*citing* CAISO Rehearing Order, 119 FERC ¶ 61,076, at P 558 (citation omitted)).

⁷⁵ *Governors of: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont*, 112 FERC ¶ 61,049 (2005).

⁷⁶ On August 31, 2007, in Docket No. ER07-1324-000, ISO-NE, NEPOOL and the state parties made a filing concerning Schedule 5. A decision in Docket No. ER07-1324-000 is currently pending.

⁷⁷ February 28 Order at P 21.

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The Commission orders:

The Commission hereby denies the CT DPUC's request for rehearing, as discussed above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.