

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 05-1411

**CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL,
PETITIONER,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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WASHINGTON, D.C. 20426**

**OCTOBER 30, 2006
FINAL BRIEF: DECEMBER 14, 2006**

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

All parties, intervenors, and Amici appearing below and in this Court are listed in the petitioner's brief.

B. Rulings Under Review

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *ISO New England, Inc.*, 111 FERC ¶ 61,185 (2005)
2. *ISO New England, Inc.*, 112 FERC ¶ 61,254 (2005)

C. Related Cases

Counsel is not aware of any related cases.



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GLOSSARY

Connecticut	Connecticut Department of Public Utility Control
FPA	Federal Power Act
ISO	ISO New England, Inc.
ISO New England	ISO New England, Inc.
ISO Tariff	ISO New England's Market And Services Tariff
TAPS	<i>Transmission Access Policy Study Group v. FERC</i> , 225 F.3d 667 (D.C. Cir. 2000)

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**FEDERAL ENERGY REGULATORY COMMISSION,
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**ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (Commission or FERC) has Federal Power Act (FPA) jurisdiction to review the annual filing by ISO New England, Inc. (ISO New England or ISO), pursuant to its tariff, of the proposed Installed Capacity Requirements of market participants in New England.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum to this brief.

I. INTRODUCTION

This appeal arises from the submission by ISO New England, pursuant to section 205 of the FPA, 16 U.S.C. § 824d, of the annual Installed Capacity Requirements established by the ISO “for the 2005/2006 Power Year (June 1, 2005 to May 31, 2006).” R. 1 at 1-2, JA 13-14 (footnote omitted).

Utilities typically maintain sufficient reserve capacity to ensure the reliability of their systems and operations. ISO New England manages the utility grid in New England. As the ISO explained in its filing with the Commission, the Installed Capacity Requirements “are a measure of the installed generating capability that the ISO projects is necessary to satisfy its total forecasted load requirements and to maintain sufficient reserve capacity to meet reliability standards.” *Id.* at 6, JA 18. The annual Installed Capacity Requirement is employed by ISO New England to determine the level of monthly capacity that each New England load-serving entity must have to make its contribution to the reliability of the overall transmission system. Essentially, load-serving entities in the control area governed by ISO New England have to maintain enough reserve capacity to meet the ISO’s reliability projections for the year or, alternatively, pay

a specified charge if they are deficient in this regard. The wholesale price paid by a market participant for the reserve capacity required by ISO New England is based on the Installed Capacity Requirement. The Installed Capacity Requirement is thus an integral component of the jurisdictional price for power paid by an ISO New England market participant to comply with this requirement.

ISO New England's Installed Capacity Requirements are primarily governed by the ISO Market and Services Tariff (ISO Tariff), on file with the Commission. See ISO Tariff § III.8. In addition, certain matters relating to ISO New England's filing of the Installed Capacity Requirements are governed by the New England Participants Agreement, which also has been filed with the Commission. The Participants Agreement governs the relationship between ISO New England, the New England Power Pool, and utilities participating in the ISO.

In the first order on appeal, *ISO New England, Inc.*, 111 FERC ¶ 61,185 (2005), R. 40, JA 57 (Initial Order), the Commission accepted ISO New England's proposal concerning the appropriate level of the Installed Capacity Requirement for the 2005/2006 power year, subject to certain modifications not at issue in this appeal. In so doing, the Commission rejected the contention of petitioner Connecticut Department of Public Utility Control (Connecticut) that it lacked statutory authority to review the ISO's filing. In the second order on appeal here, *ISO New England, Inc.*, 112 FERC ¶ 61,254 (2005) R. 54, JA 117 (Rehearing

Order), the Commission again rejected Connecticut's jurisdictional argument.

II. STATEMENT OF THE FACTS

A. Statutory and Regulatory Background

Section 201(b) of the FPA confers upon the Commission jurisdiction over all rates, terms and conditions of electric transmission service and sales at wholesale by public utilities in interstate commerce. 16 U.S.C. § 824(b). Section 205 of the Act prohibits unjust and unreasonable rates and undue discrimination “with respect to any transmission or sale subject to the jurisdiction of the Commission,” 16 U.S.C. §§ 824d(a)-(b), while section 206 gives the agency the power to correct any such unlawful practices. 16 U.S.C. § 824e(a).

The FPA charges the Commission to employ its authority “to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce.” *New York v. FERC*, 535 U.S. 1, 6 (2002) (quoting *Gulf States Util. Co. v. FPC*, 411 U.S. 747, 758 (1973)). The primary purpose of this grant of authority to the Commission is to protect consumers from excessive rates and charges by public utilities. *E.g.*, *Florida Power & Light Co. v. FERC*, 617 F.2d 809, 816 (D.C. Cir. 1980).

This Court is well aware of the Commission's exercise of its “broad authority” under FPA §§ 205 and 206 in the last decade “to impose open access as a generic remedy for its findings of systemic anticompetitive behavior” by

transmission-owning public utilities. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 682 (D.C. Cir. 2000) (*TAPS*) (affirmed in *New York v. FERC*). Thus, *New York* and *TAPS* affirmed the Commission's Order No. 888,¹ in which the Commission sought to remedy the monopoly control of vertically integrated utilities over interstate transmission facilities by requiring such utilities to unbundle wholesale electric power services and to file open access transmission tariffs.

As one means of compliance with FERC's Order No. 888 open access policies, public utilities were encouraged to participate in Independent System Operators. As described by the Court, such an entity "would assume operational control – but not ownership – of the transmission facilities owned by its member utilities, thereby 'separat[ing] operation of the transmission grid and access to it from economic interests in generation.'" *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004) (quoting Order No. 888 at 31,654); see also, e.g., *California Ind. Sys. Operator v. FERC*, 372 F.3d 395, 397 (D.C. Cir. 2004).

¹ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, *clarified*, 79 FERC ¶ 61,182 (1997), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998).

Subsequently the Commission, in Order No. 2000,² required each public utility either to participate in a Regional Transmission Organization, or explain its efforts to so participate. In the Commission's view, "better regional coordination in areas such as maintenance of transmission and generation systems and transmission planning and operation was necessary to address regional reliability concerns and to foster competition" over wider geographic areas. *Midwest ISO Transmission Owners*, 373 F.3d at 1364 (quoting Order No. 2000 at 30,999) (internal quotation marks omitted); *see also Public Util. Dist No. 1*, 272 F.3d at 611.

B. Factual Background

1. History of the Installed Capacity Requirement

The Commission has described Installed Capacity Requirements instituted by power pools "as a first-line reliability measure to cover electric load in the pool." *ISO New England, Inc.*, 91 FERC ¶ 61,311 at 62,080 (2000). Pursuant to this mechanism:

² *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs., Regs. Preambles ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,092 (2000), *dism'd sub nom. Public Utility District No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

[A] utility with load responsibility needed to have electric plant to serve that load. If a utility had an [Installed Capacity] deficiency, it could either obtain its requirements from an entity having a surplus or be subject to a deficiency charge from the pool. The pool charge for deficiencies was generally determined on the basis of the regulated cost of the electric facilities.

Id.

In 1971, the New England Power Pool was formed by utilities in that region to allow for interconnection and coordination of operations, pooling of resources, and lowering costs. Until 1998, the New England Power Pool maintained an Installed Capacity Requirement, under which it was necessary for each load-serving entity in the pool to acquire generation capacity equal to its peak load plus a reserve margin. If a pool utility did not have sufficient resources to meet its Installed Capacity Requirement, it could either obtain its requirement from an entity in the pool that had a surplus, or pay a deficiency charge. *See Municipalities of Groton v. FERC*, 587 F.2d 1296 (D.C. Cir. 1978).

ISO New England was created in 1997. In 1998, it was approved by the Commission and began operation. *See New England Power Pool*, 83 FERC ¶ 61,045 (1998). ISO New England's open access transmission tariff, which was accepted by the Commission, retained the Installed Capacity Requirement initially established by the New England Power Pool. *Id.* at 61,262-263,

The manner in which the Installed Capacity Requirement operated changed in various aspects over the years. *See ISO New England*, 91 FERC at 62,080. For

purposes of this case, it is sufficient to note that, in 2002, ISO New England filed with the Commission a comprehensive market redesign known as Market Rule 1, *see New England Power Pool*, 100 FERC ¶ 61,287, *order on reh'g*, 101 FERC ¶ 61,344 (2002), which included Installed Capacity Requirements as they were operated during the time period relevant to this appeal.

As of February 1, 2005, the Commission authorized ISO New England and its participating transmission providers to begin operation as a Regional Transmission Organization. *See ISO New England, Inc.* 106 FERC ¶ 61,280, *order on reh'g*, 109 FERC ¶ 61,147 (2004), *operations authorized*, 110 FERC ¶ 61,111 (2005), *aff'd, Maine Pub. Utils. Comm'n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006). The ISO's Installed Capacity Requirements were then incorporated in the ISO Tariff and the Participants Agreement. *See ISO Tariff*, section III.8.1 (quoted at R 34 at 17; JA 53); Participants Agreement, section 11.4 (quoted at *id.*, 17-18; JA 53-54).

2. The Installed Capacity Requirement

The Installed Capacity Requirement is the projection by ISO New England of the minimum amount of capacity required to serve load reliably in the New England region. Essentially, ISO New England sets the quantity of capacity that must be purchased for the region and allocates this quantity among market participants. Market participants may meet these obligations by purchasing

capacity through any of several means, including bilateral arrangements or purchases from ISO-administered auctions. The cost of this capacity to a market participant is determined in part by the Installed Capacity Requirement determination. If a market participant does not have or acquire sufficient capacity, it must pay a deficiency rate.

C. Orders On Review

In the orders on review, the Commission considered ISO New England's filing under FPA section 205, in accordance with the ISO Tariff and Participants Agreement, to "identify the monthly Installed Capacity Requirements . . . established by the ISO for the 2005/2006 Power Year (June 1, 2005 to May 31, 2006). R. 1 at 1-2, JA 13-14 (footnote omitted).

As relevant to this appeal, Connecticut protested ISO New England's filing on the ground that the Commission did not have jurisdiction to set generation resource adequacy requirements for the New England region. Initial Order P 17, JA 61. Rather, Connecticut contended, these requirements should have been set by the New England states. *Id.*

ISO New England responded that it was "well within the Commission's jurisdiction" to accept the Installed Capacity Requirements. *Id.* P 25, JA 64. In ISO New England's view, its authority to make the filing was approved in the earlier Commission proceeding that granted it Regional Transmission Organization

status, in which Connecticut and other protesters now raising the jurisdictional issue were parties. In the ISO's view, having failed to pursue the jurisdictional issue in that proceeding, "the ISO claims that all of these parties should be deemed to have agreed to the ISO's authority in this regard, and to the Commission's acceptance of a filing." *Id.*

In resolving this issue, the Commission agreed with ISO New England that "[w]ith respect to . . . resource adequacy . . . , in light of the ISO's Tariff and the Participants Agreement the ISO has the authority to file and we have the authority to accept the ISO's proposed [Installed Capacity] Requirements for the 2005/2006 Power Year." *Id.* P 33, JA 66.

A number of parties requested rehearing before the Commission, raising a variety of issues. On rehearing, Connecticut once again argued, *inter alia*, that the Commission was without jurisdiction to review the ISO's filing. R. 47, 7-13, JA 97-103. According to Connecticut, the Commission had no legal authority under the FPA "to regulate generation resource adequacy and determine levels of generation capacity necessary for reliability." *Id.* 8, JA 98 (citation omitted). Rather, Connecticut argued, such determinations "are public policy matters to be determined by Connecticut and the other New England states – not by [ISO New England] or the Commission." *Id.* 11, JA 101.

In its Rehearing Order, the Commission rejected Connecticut's argument with respect to jurisdiction. In the Commission's view, its action here was simply a matter of interpreting and applying the ISO Tariff:

The ISO Tariff and the Participants Agreement specifically provide for the ISO to file with the Commission, and for the Commission to consider and act on, annual [Installed Capacity] Requirements filings. Thus, we were simply determining the [Installed Capacity] Requirements, as the ISO Tariff and the New England Participants Agreement provide.

Rehearing Order P 17 & n.18, JA 123 (citing Initial Order P 2, JA 57-58; 16 U.S.C. § 824d).

SUMMARY OF ARGUMENT

While the orders on appeal dispose of Connecticut's jurisdictional argument briefly, this treatment was appropriate in view of the limited nature of the proceeding. All the Commission did here was to review an annual filing made in compliance with ISO New England's tariff. Connecticut should have raised this issue at the time the Commission approved the Installed Capacity Requirements as part of ISO New England's Tariff.

In any event, the Commission had already fully addressed the jurisdictional question in a parallel administrative proceeding, in which it concluded that the mechanism involves not whether load serving entities should be responsible for their share of capacity, but how capacity prices are determined in the wholesale market. The price of capacity at wholesale, which is directly subject to FERC's jurisdiction under FPA § 201(b), 16 U.S.C. § 824(b)(1), is in part determined by the Installed Capacity Requirement.

As this Court has made clear, that the Commission's wholesale jurisdiction happens to impinge on state-regulated matters, such as resource adequacy here, does not divest FERC of jurisdiction. For example, the reasoning of *Municipalities of Groton v. FERC*, which upheld FERC's authority to review the deficiency charge of a predecessor mechanism in New England, applies equally to the agency's review of an Installed Capacity Requirement calculation, which affects

wholesale capacity costs. *Mississippi Industries v. FERC* likewise recognized that the Commission has authority over the allocation of capacity among market participants, as it has an impact on wholesale rates.

Connecticut incorrectly asserts that the Commission has attempted to set resource adequacy levels or mandate the building of generation capacity, while correctly conceding that the Commission's orders here will have an impact on wholesale rates. In fact, capacity costs are a large component of wholesale rates, and FERC jurisdiction over the allocation of wholesale capacity costs may permissibly have an impact on matters subject to state regulation.

ARGUMENT

I. STANDARD OF REVIEW

The “deferential standard” of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), applies to “an agency’s interpretation of its own statutory jurisdiction.” *TAPS*, 225 F.3d at 694. On other issues, the Commission’s orders are reviewed under the arbitrary and capricious standard, under which a “court must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment. . . . The court is not empowered to substitute its judgment for that of the agency.” *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1078 (D.C. Cir. 2002) (citations and internal quotation marks omitted). *See also, e.g., Central Vermont Pub. Serv. Corp. v. FERC*, 214 F.3d 1366, 1369 (D.C. Cir. 2000).

Further, “[a]n agency’s interpretation of its own precedent is entitled to deference by the court.” *Entergy Services, Inc. v. FERC*, 319 F.3d 536, 541 (D.C. Cir. 2003) (citing *Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998)). And “in light of the technical nature of rate design, involving policy judgments at the core of the regulatory function,” review of the Commission’s ratemaking decisions is “highly deferential.” *Entergy Services, Inc. v. FERC*, 319 F.3d at 541 (citing *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999)).

Finally, the findings of the Commission as to the facts, if supported by

substantial evidence, are conclusive. FPA § 313(b), 16 U.S.C. § 825l(b).

II. IN REVIEWING ISO NEW ENGLAND'S LIMITED FILING IN THIS LIMITED PROCEEDING, THE COMMISSION ACTED ENTIRELY WITHIN ITS STATUTORY AUTHORITY.

A. The Commission Sufficiently Responded To Connecticut's Jurisdictional Argument.

At the outset, we acknowledge that the Commission only briefly touched on the jurisdictional issue in the contested orders. However, the Commission's brief treatment of the issue was sufficient in the circumstances presented by this case.

The Commission responded appropriately to Connecticut's jurisdictional arguments in relation to the limited scope of the proceeding. The Commission's role here was limited to its review of ISO New England's annual filing to establish its 2005/2006 Installed Capacity Requirements, which is conducted regularly in accordance with the ISO Tariff. *See* Letter Order, Docket No. ER04-670-000 (April 26, 2004) (unpublished letter order, provided in the Addendum to this brief) (accepting ISO New England's unprotested 2004/2005 calculations). Thus, the agency reasonably concentrated on the parties' specific objections to the calculation of the Installed Capacity Requirements (none of which are contested on appeal).

Connecticut raised its jurisdictional argument belatedly in the wrong proceeding. It failed to raise the jurisdictional issue in the proceeding in which the Commission approved the Installed Capacity Requirements as part of the ISO

Tariff. *See New England Power Pool*, 83 FERC at 61,261-63. While Connecticut participated in that case, it did not contest the Commission's statutory authority to review the Installed Capacity Requirements. Nor did Connecticut raise this issue in the proceeding approving ISO New England as a Regional Transmission Organization, which incorporated the Installed Capacity Requirements in a new tariff.

Here, however, with respect to the jurisdictional issue, the Commission was not writing on a blank slate. First, Connecticut had raised its jurisdictional argument in "the parallel Locational Installed Capacity [] proceeding" (Initial Order P 5, JA 59) before the Commission, in which ISO New England proposed to replace its Installed Capacity mechanism. *See Devon Power LLC*, 107 FERC ¶ 61,240, *on reh'g and clarification*, 109 FERC ¶ 61,154 (2004), *on reh'g and clarification*, 110 FERC ¶ 61,315 (2005) (Devon Rehearing Order).

In the Devon Rehearing Order, the Commission rejected Connecticut's claim that the Locational Installed Capacity requirement was an encroachment on the state's authority over generation resource adequacy. Under the proposed Locational Installed Capacity mechanism, the Commission observed, ISO New England would continue to set the amount of capacity that participants would be required to purchase each month to meet their reserve requirements, just as it had under the Installed Capacity Requirement. *See Devon Rehearing Order P 29*. The

new mechanism would “merely . . . change the pricing from being regionally uniform [using Installed Capacity] to prices that reflect local differences in supply and demand [using Locational Installed Capacity].” *Id.* P 32.

The Commission expressly rejected Connecticut’s argument that, under either provision, the agency was unlawfully extending its authority to matters reserved to the states. As the Commission explained, the proposed mechanism

will not change how resource adequacy determinations are made, and the issue here is not whether load serving utilities should be responsible for their share of capacity needed to serve the region. Instead, the issue here is how prices for capacity are determined in the wholesale market, to remedy the flaws that have been identified.

Id. While the Commission here simply referenced its decision in a parallel proceeding before the agency, this Court has stated that an agency’s “justification by adoption of a prior ruling is perfectly appropriate and adequate,” *Entergy Services, Inc. v. FERC*, 391 F.3d 1240, 1249 (D.C. Cir. 2004), as long as the decisions are consistent.³

Connecticut pressed the jurisdictional issue once again in a subsequent stage of the proceeding, which resulted in a settlement under which ISO New England will establish a Forward Capacity Market as an alternative to the Locational

³ Connecticut sought judicial review of orders issued by FERC in the parallel proceeding. *Connecticut Dept. of Pub. Util. Control v. FERC*, No. 05-1486 (1st Cir.); its petition was dismissed for lack of jurisdiction on May 5, 2005.

Installed Capacity Mechanism. In its order approving the settlement, the Commission again rejected Connecticut's jurisdictional arguments. *See Devon Power LLC*, 115 FERC ¶ 61,340 P 201 (2006) (explaining that FERC "has ample jurisdiction" to consider the "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") (citing FPA § 201(b) and relevant court cases). Connecticut now affirmatively supports the settlement approved by the Commission. *See Motion to Answer Request for Rehearing and Answer by [Connecticut]*, Docket No. ER03-563 (July 31, 2006).

Here, moreover, the Commission was writing against a backdrop of judicial decisions that, in matters where its FPA authority was clear (such as its jurisdiction over capacity allocation and sales), any incidental impact on regulatory areas reserved to the states was not a barrier to its action. *See Detroit Edison Co. v. FERC*, 334 F.3d 48 (D.C. Cir. 2003) (Commission may assert jurisdiction over wholesale sales, even if the sales occur over local distribution facilities otherwise subject to state jurisdiction); *Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir.) (the Commission has authority to allocate capacity costs among utility operating companies of a holding company), *vacated in part on other grounds*, 822 F.2d 1103 (D.C. Cir. 1987); *Municipalities of Groton v. FERC*, 587 F.2d 1296 (D.C. Cir. 1978) (Commission had jurisdiction over a deficiency charge made

pursuant to a New England Power Pool-administered installed capacity requirement, a precursor of ISO New England's Installed Capacity Requirement). We discuss these decisions in more detail below.

Finally, Commission determinations as to the specific levels of ISO New England's Installed Capacity Requirement have been subject to judicial review, without any question being raised as to FERC's jurisdiction to so act. *See Sithe New England Holdings v. FERC*, 308 F.2d 71 (1st Cir. 2002); *Central Maine Power Co. v. FERC*, 252 F.3d 34, 40 (1st Cir. 2001).

At bottom, Connecticut's argument against FERC's statutory authority to review ISO New England's Installed Capacity Requirement in the context of an annual filing is nothing more than a collateral attack on the Commission's orders approving the mechanism and subsequent orders resolving the jurisdictional issue. We do not argue that this deprives the Court of jurisdiction to hear the appeal under the circumstances presented here.⁴ However, this context demonstrates that the Commission's succinct disposition of the jurisdictional issue in the contested orders was, under the circumstances, legally sufficient.

⁴ *See Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 827 (D.C. Cir. 2006) (objection to statutory authority underlying agency decision can be made when the decision is later applied); *Sacramento Mun. Util. Dist. v. FERC*, 428 F.3d 294, 299 (D.C. Cir. 2005) (same).

B. The Installed Capacity Requirement Governed By ISO New England's FERC-Jurisdictional Tariff Has A Direct Impact On FERC-Jurisdictional Capacity Charges.

As described above, ISO New England establishes an Installed Capacity Requirement for its load-serving entities under which they must maintain a reserve level sufficient to meet their proportionate share of the capacity that the ISO has determined is necessary for the reliability of its system, or pay a deficiency charge. The Installed Capacity Requirements directly affect the capacity costs paid by the ISO's load serving entities.

Turning to the question of statutory authority, FPA section 201(b)(1) confers jurisdiction on the Commission over the transmission of electric energy in interstate commerce, and sales of electric energy at wholesale in interstate commerce. 16 U.S.C. § 824(b)(1). Section 201(b)(1) affords the Commission jurisdiction over "all facilities for such transmission or sale of electric energy except that it "shall not have jurisdiction . . . over facilities used for the generation of electric energy or over facilities used in local distribution." *Id.* Furthermore, the FPA bestows upon the Commission broad authority to review, *inter alia*, "any rate, charge, or classification" charged by any public utilities for electric transmission or sales subject to agency jurisdiction, as well as "any rule, regulation, practice, or contract affecting such rate, charge, or classification" FPA section 206(a), 16 U.S.C. § 824e(a); *see also* FPA section 205(a), 16 U.S.C. §

824d(a) (granting FERC jurisdiction over “[a]ll rates and charges . . . for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission”).

As this Court has observed, because of changing conditions in the electric industry, in Order No. 888, “FERC reinterpreted FPA § 201 to accommodate new industry practices and conditions.” *TAPS*, 225 F.3d at 691. While the Commission in Order No. 888 did not assert jurisdiction over generating or local distribution facilities, which remain subject to state jurisdiction, *New York*, 535 U.S. at 23, the Commission nevertheless has exclusive jurisdiction over all wholesale sales and transmission services that use such facilities. *TAPS*, 225 F.3d at 696 (finding that the Commission’s “assertion of jurisdiction over all wholesale transmissions, regardless of the nature of the facility, is clearly within the scope of its statutory authority”). Subsequently, in *Detroit Edison*, the Court, examining FERC’s wholesale sales jurisdiction, similarly found that “when a local distribution facility” subject to state jurisdiction “is used in a wholesale transaction, FERC has jurisdiction over that transaction pursuant to its wholesale jurisdiction under FPA § 201(b)(1).” 334 F.3d at 51.

Here, the price of capacity at wholesale – a matter directly within FERC jurisdiction – is governed in part by ISO New England’s proposed Installed Capacity Requirement. That the Commission’s jurisdiction over wholesale

charges may impinge on state regulation of generating facilities and resource adequacy matters – just as FERC jurisdiction impinged on state-regulated local distribution facilities in *TAPS* and *Detroit Edison* – does not undermine the agency’s authority to regulate here calculations affecting wholesale capacity charges.

Both *Municipalities of Groton* and *Mississippi Industries* fully support the Commission’s jurisdiction in this case. In *Municipalities of Groton*, this Court considered a jurisdictional challenge to New England Power Pool’s “capability responsibility” requirements, a predecessor of the current Installed Capacity Requirement mechanism. Each participating utility was obligated “to maintain a prescribed level of generating capacity, termed ‘capability responsibility,’ which represents its proportionate share of the pool’s peak load.” 587 F.2d at 1300. Then as now, participants with generating capability falling below specified levels were subject to certain charges, “intended to encourage [them] to maintain their required levels of generating capabilities.” *Id.*

The Court upheld the Commission’s jurisdiction to review these charges, reasoning that they came within “the Commission’s inclusive jurisdictional mandate – which reaches discriminatory practices ‘with respect to’ jurisdictional transmissions, or ‘affecting’ such transmissions or services. . . .” *Id.* at 1302. As the Court went on to explain:

It 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 authority is well within the Commission's authority as delineated in other court opinions.

Id. (citing *FPC v. Conway Corp.*, 426 U.S. 271 (1976)).

The Court's reasoning governs the issue presented here. The annual capacity requirement approved by the Commission in the contested orders here as just and reasonable directly affects wholesale capacity costs for ISO New England participants. Thus, like the jurisdictional charge in *Municipalities of Groton*, these capacity costs "affect[] the fee that a participant pays for power and reserve service," and thus comes within FERC's "inclusive jurisdictional mandate." *Id.*

In *Mississippi Industries v. FERC*, the Commission modified the allocation of capacity and costs of a nuclear generation plant among operating companies of an integrated utility system. The Court rejected the contention that this action was beyond the Commission's FPA jurisdiction. Rather, in the Court's view,

petitioners 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.

808 F.2d at 1542 (emphasis the Court's).

Mississippi Industries involved the Commission's reallocation of nuclear power capacity and costs among the operating companies, thereby "alter[ing] the

relative amount of system capacity ultimately paid for by each affiliate.” *Id.* at 1540. Similarly, the Commission here approved an allocation of the amount of capacity, the costs of which the ISO New England participants would be responsible for procuring in a given year. As *Mississippi Industries* specifically observed, “[c]apacity costs are a large component of wholesale rates.” *Id.* at 1541. While the allocation of capacity did not “set a sales price,” it directly affects costs and “consequently, wholesale rates.” *Id.* The Court concluded that “FERC’s jurisdiction under such circumstances is unquestionable.” *Id.*, citing *Nantahala Power & Light Co.*, 426 U.S. 953 (1986).

C. Connecticut’s Arguments To The Contrary Are Without Merit.

The general propositions that Connecticut advances are not subject to controversy. Thus, for example, Connecticut accurately observes that “the FPA gives FERC no explicit jurisdiction to set generation resource adequacy levels or to impose on New England and the individual states mandates for the amount of generation capacity that must be built.” Br. 18. However, this proposition, which provides the foundation for Connecticut’s entire argument, bear no relationship to what is actually involved with the Installed Capacity Requirements at issue.

In fact, the Commission orders neither set the resource adequacy level for New England, nor mandate building of any generation capacity. Rather, ISO New England identifies its level of resource adequacy in cooperation with its market

participants. The Commission's role is reactive, limited to considering whether the ISO's projection of the minimum amount of capacity it has determined is necessary to serve its load reliably for the year (*i.e.*, the Installed Capacity Requirement) is just and reasonable.

It is telling that Connecticut relies on *Mississippi Industries* for the proposition that "states have retained their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other state concerns." Br. 18, quoting 808 F.2d at 1547.⁵ What Connecticut fails to mention is that the Court's statement occurs in the course of its holding that "[t]he fact that FERC's assertion of jurisdiction has some impact on state regulation does not make it unlawful." 808 F.2d at 1547. Rather, the Court explained, cost allocation by the Commission routinely has "an extensive impact on the rate base of state jurisdictions" because the states must acknowledge it in their own ratemaking. *Id.* at 1547-48 (citing *Nantahala Power & Light v. FERC*, 476 U.S. at 966-67).

⁵ That quotation includes language from *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 205-206 (1983) (also cited by Connecticut), which goes on to refer to "the exception" to state jurisdiction in these areas due to "the broad authority" of FERC "over the need for and pricing of electrical power transmitted in interstate commerce" (citation omitted).

It is further telling that Connecticut, while studiously arguing this case is about the Commission interfering with resource adequacy, repeatedly concedes the rate impact of the Commission's decision. *See* Br. 8 (ISO New England's 2005/2006 Power Year filing advocated changes "that increased by about six percent the monthly amount of capacity New England's electricity customers would be compelled to purchase"); 11 (under ISO New England's tariff, "each state's electric customers must pay a specified level of generation capacity based on the FERC-approved [Installed Capacity Requirement]"); 12 (under the newly-approved Forward Capacity Market for New England, "the [Installed Capacity Requirement] level will dictate how much generation customers must buy in annual capacity auctions").

At bottom, Connecticut's arguments never come to grips with the basis upon which FERC jurisdiction to review ISO New England's filing is predicated here: the impact on wholesale power rates.

CONCLUSION

For the reasons stated, the Commission's orders should be affirmed in all respects.

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ADDENDUM

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Section 201 of the Federal Power Act, 16 U.S.C. § 824, provides as follows:

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this sub-chapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at whole-sale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provisions of sections 824i, 824j, and 824k of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order of the Commission under the provisions of section 824i or 824j of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A), wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 1935 [15 U.S.C. 79 et seq.].

Section 205 of the Federal Power Act, 16 U.S.C. § 824d provides as follows:

(a) Just and reasonable rates

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.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders,

