UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

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

Case No. 05-1411

CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

NEW ENGLAND POWER POOL PARTICIPANTS COMMITTEE, *et al.*,
Intervenors.

Petition for Review of the Federal Energy Regulatory Commission's Final Decision and Order dated May 9, 2005 in FERC Docket No. ER05-715-000

FINAL BRIEF FOR INTERVENOR FOR RESPONDENT ISO NEW ENGLAND INC.

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Brief Dated: December 20, 2006

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Fed. R. App. P. 28 and D.C. Circuit Rule 28, Intervenor ISO New England Inc. hereby submits this Certificate as to Parties, Rulings, and Related Cases.

A. Parties and Intervenors Below

All parties, intervenors and amici appearing before the Federal Energy Regulatory Commission and this Court are listed in the Brief for Petitioner Connecticut Department of Public Utility Control.

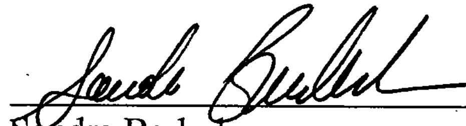
B. Rulings Under Review

References to the rulings at issue appear in the Brief for Petitioner Connecticut Department of Public Utility Control.

C. Related Cases

There are no related cases involving substantially the same parties and the same or similar issues currently pending in this court or in any other court in the District of Columbia.

Respectfully submitted,



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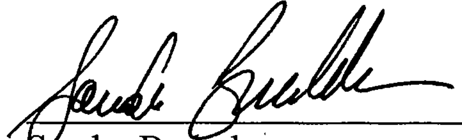
CORPORATE DISCLOSURE STATEMENT OF
ISO NEW ENGLAND INC.

Pursuant to Circuit Rule 26.1, counsel for ISO New England Inc. hereby certifies that:

> ISO New England Inc. is a private, not-for-profit corporation organized under the laws of the State of Delaware that is responsible for operation of New England's bulk power system. The New England region controlled by ISO New England Inc. encompasses Connecticut, Maine (portions), Massachusetts, New Hampshire, Rhode Island and Vermont. ISO New England has no corporate parents and no publicly held company owns a 10 percent or more interest in ISO New England Inc.

Respectfully submitted,



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GLOSSARY OF ABBREVIATIONS

CAISO	California Independent System Operator
DPUC	Connecticut Department of Public Utility Control
FCM	Forward Capacity Market
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
ICR	Installed Capacity Requirements
ISO	ISO New England, Inc., the independent system operator for the New England transmission system
LSE	Load Serving Entity
Midwest ISO	Midwest Independent Transmission System Operator
NARUC	National Association of Regulatory Utility Commissioners
NEPOOL	New England Power Pool
NESCOE	New England States Committee on Electricity
PUC	California Public Utilities Commission
RTO	Regional Transmission Organization

I. INTRODUCTION

This case addresses whether this Court should accept FERC's decision below[1] that it has jurisdiction over ICR, which identifies the capacity required for reliability in the interstate, integrated, highly interconnected electric system in New England. Although Petitioner, Connecticut Department of Public Utility Control ("DPUC"), seeks to establish its own ICR, FERC jurisdiction is necessary to ensure reliability of this interstate grid.

ICR is used to allocate reliability cost among New England market participants. It is a critical input to the quantity component of the wholesale capacity charge to those participants. As such, it is FERC-jurisdictional pursuant to Federal Power Act ("FPA") Section 201,[2] which gives FERC jurisdiction over wholesale sales in interstate commerce, and FPA Sections 205 and 206,[3] which explicitly give FERC jurisdiction over wholesale rates and charges (and

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[1] *ISO New England, Inc.*, 112 FERC ¶ 61,254 (2005) ("Rehearing Order"), R 54, JA 117-123; *ISO New England, Inc.*, 111 FERC ¶ 61,185 (2005) ("Initial Order"), R 40, JA 57-66 (together the "Orders"). "R" refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order. "FERC A" refers to FERC's addendum, "ISO ADD" refers to the ISO's addendum attached hereto, "NADD" refers to NEPOOL's addendum, and "DPUC ADD" refers to DPUC's addendum.

[2] 16 U.S.C. § 824, FERC A1-A3.

[3] 16 U.S.C. §§ 824d and 824e, FERC A4-A8.

regulations, classifications, practices and contracts affecting rates and charges). Because DPUC has admitted that ICR is a component of a wholesale charge,[4] there should be no jurisdictional issue before this Court.

DPUC does not challenge the definition of ICR but, through sleight of hand, seeks to leave the (incorrect) impression that ICR is a requirement to build or enlarge generation facilities. For example, DPUC uses skillful verbiage such as "generation resource adequacy," a concept undefined and unrelated to ICR. Only by so transmogrifying ICR can DPUC build its case that the FERC has no role in regulating ICR. Once the concept of ICR is demystified, however, DPUC's entire jurisdictional argument collapses, and it is evident that FERC has jurisdiction over ICR.

While DPUC argues that FERC intruded upon its jurisdiction, the truth is that DPUC seeks to intrude on FERC's jurisdiction to regulate wholesale charges in interstate commerce. Excluding FERC from reviewing capacity requirements could result in significant reliability problems.

II. STATEMENT OF THE ISSUE

ISO concurs in the Statement of Issue set forth in the Brief of Respondent FERC.

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[4] DPUC Brief ("CB") at 6.

III. STATUTES AND REGULATIONS

Except for the statutes included in the attached addendum, all applicable statutes and regulations are contained in the addendum to the Brief of Respondent FERC.

IV. STATEMENT OF FACTS

ISO concurs in the Statement of Facts set forth in the Brief of Respondent FERC.

V. SUMMARY OF ARGUMENT

After modification and in accordance with prior practice, FERC accepted ICR, the quantity of wholesale capacity that is necessary to ensure operation of a reliable regional market in New England. ICR is used to allocate responsibility for this essential capacity and its related costs among market participants in New England.

Wholesale capacity charges to each market participant under the Commission-approved ISO Tariff and Market Rules are the product of (1) the price per MW-month of capacity as determined pursuant to those arrangements, and (2) the difference between that Participant's allocated share of ICR and the amount of capacity entitlements credited to that Participant (either because it owns or has purchased generation or receives capacity credit for reducing peak demand). FPA Section 205 unambiguously grants FERC authority to regulate such wholesale

charges in interstate commerce. This authority is explicitly identified in ISO Tariffs[5] and has been addressed by FERC as part of a continuum of decisions setting just and reasonable charges for capacity in New England.

DPUC recognizes that ICR directly affects wholesale rates and charges in interstate commerce[6] and urges the Court to resolve the "core jurisdictional issue hanging over *wholesale capacity* purchases in New England."[7] The ISO agrees. Because ICR is integral to determining *wholesale capacity charges*, FERC unambiguously has ultimate regulatory responsibility for ICR.

DPUC seeks to develop its own ICR (perhaps jointly with other New England States) and preclude FERC from considering this requirement. Although DPUC does not dispute the ICR definition and recognizes that ICR dictates the responsibility for capacity that market participants must bear in wholesale capacity markets,[8] DPUC seeks to reframe ICR from a "quantity of capacity" to "generation resource adequacy." This semantic sleight of hand seeks to transform ICR from what it is – a regional capacity requirement for reliability (and a component of

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[5] The ISO documents applicable here are the Transmission, Markets and Services Tariff ("Tariff") and the Participants Agreements among ISO and NEPOOL ("PA") (together "ISO Tariffs").

[6] CB at 6.

[7] *Id.* at 7 (emphasis added).

[8] *Id.* at 12.

wholesale charges), which may be met through existing generation, new generation, demand reductions, or deficiency charges – to what it is not – a mandate to construct or enlarge generation.

DPUC asserts that it is a state's responsibility to balance reliability and costs even where, as here, a state's action could directly impact – and significantly harm – interstate commerce. The FPA was designed to avoid precisely this type of burden on interstate commerce. Although FERC may approve a capacity requirement developed for reliability by one or a combination of states (and has done so), it is not required to do so and appropriately reserves to itself any final consideration of such capacity requirements in interstate situations.

Even if this Court found that the FPA does not expressly grant FERC jurisdiction over ICR determinations, it should, in accordance with *Chevron*[9] principles, defer to FERC's interpretation, which is reasonable considering that: (1) ICR is reasonably defined as either a component of a wholesale charge or directly affecting wholesale charges and thus is FERC-jurisdictional pursuant to the standard established by this Court in *California Independent Systems Operator v. FERC*[10] (2) FERC's actions below are part of a continuum of prior decisions

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[9] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*").

[10] 372 F.3d 395, 403 (D.C. Cir. 2004) ("*CalISO*").

setting just and reasonable charges in the capacity market; and (3) allowing each state to set ICR could lead to reliability concerns in New England and beyond, by allowing states to underestimate their capacity needs and to obtain a "free ride" by relying on their neighbors in the interconnected grid.

FERC correctly found, and supported its determination by citing FPA Section 205 (as well as FERC-approved tariffs which require the ISO to file ICR pursuant to Section 205), that it has the authority to make ICR determinations, because ICR is a component for determining wholesale charges in interstate commerce. While FERC did not provide a complex discussion of its jurisdiction in the Orders, its ruling was sufficient considering the routine nature of the filing under review and the fact that the FERC decision was consistent with precedent.

ISO urges the Court to ensure that the reliability of the regional system is preserved by recognizing that FERC has jurisdiction over the ICR and only FERC is able to balance interstate interests in regulating ICR, an essential component of wholesale capacity charges.

VI. <u>ARGUMENT</u>

A. Standard of Review

ISO concurs with the Standard of Review set forth in the Brief of Respondent FERC.

B. Demystifying ICR

To put ICR in context, it is necessary to understand precisely what ICR is – and is not.

1. *What ICR Is.*

ICR is "a projection of the minimum amount of capacity required to serve load [*i.e.*, peak demand for electricity] reliably in the New England region"[11] ICR is developed by the ISO (which is an independent,[12] non-profit entity operating the wholesale electricity markets and the transmission system in New England) with input from stakeholders[13] and (contrary to DPUC's allegation)[14] in consultation with state regulators. ICR is developed by matching region-wide supply and demand, to ensure that non-interruptible customers are not disconnected from the

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[11] Initial Order at P 2, R 40, JA 57.

[12] FERC found that the ISO is independent from all New England market participants. *ISO New England Inc.,* 106 FERC ¶ 61,280 at P 51, *order on reh'g* 109 FERC ¶ 61,147 at PP 26-28 (2004), 110 FERC ¶ 61,111 (2005).

[13] As in past years, the 2005/2006 ICR was a function of regional consensus among market participants in New England. The full process of developing ICR is described in ISO Filing at 4, 6-9, 13-15, R 1, JA 16-27.

[14] CB at 11. States have participated in the past and, under new market rules, the ISO Tariff will require such consultation. FCM Settlement, FERC Docket ER03-563 (March 6, 2006) at Sections 3, 11, Parts II.B, II.E, ISO ADD 04, 08, 14; Explanatory Statement, FERC Docket ER03-563 (March 6, 2006) at 20, ISO ADD 39.

system more than once every ten years.[15] To determine ICR, the ISO considers various assumptions regarding expected system conditions, including generation unit availability, load forecasts and the reliability benefits received from neighboring transmission systems, which can vary annually.

After determining ICR, the ISO allocates capacity obligations to "market participants," entities that purchase capacity at wholesale and have a signed agreement with the ISO to participate in the ISO interstate wholesale electricity markets.[16] ICR capacity obligations may be met by market participants through (1) supply-side resources from either new or existing capacity (such as self-supply or purchases through bilateral contracts), (2) demand-side resources, such as the right to interrupt a customer's service during system peak, or a combination of these resources, or (3) payment of a deficiency charge.

Capacity charges paid by a market participant are based, in part, on its allocated ICR. Thus, ICR is an integral part of, or at a minimum directly affects, the wholesale charge to a market participant. Even DPUC recognizes that ICR is a component used to determine wholesale charges.

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[15] Rehearing Order at P 5, n.4, R 54, JA 118.

[16] *See* Market Participants Service Agreement, Background § F, ISO FERC Tariff No. 3, Original Sheet No. 9002, ISO ADD 70.

2. What ICR Is Not.

ICR is not "generation resource adequacy"[17] or a mandate to construct or enlarge generation. It does not set the "quantity of electric generation facilities that retail customers must provide"[18] or generation capacity levels.[19] While FERC has used the term "resource adequacy," which conveys the fact that a capacity requirement may be met by *either* supply-side or demand-side resources, DPUC adds "generation" to the term. Having reconstituted the phrase, DPUC then argues that FERC has no jurisdiction over such "generation." However, changing the language does not change the fact that ICR is a critical component of wholesale charges and an *interstate* capacity requirement which may be met through a variety of supply and demand options. DPUC admits that one of these options is the purchase of existing capacity in the annual capacity auctions.[20]

In fact, if ICR were a mandate to construct or enlarge generation, as DPUC poses, DPUC itself could not enforce it. The DPUC has no authority to "mandate" the regulated utilities or merchant generators to construct or enlarge any of their

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[17] *See e.g.,* CB at 3, 10, 12, 13, 15, 18, 21, 22.

[18] *Id.* at 4.

[19] *See e.g., id.* at 5, 18, 23, 26, 32.

[20] *Id.* at 12.

facilities. Connecticut has required its regulated utilities to divest themselves of generation.[21]

3. *Establishing ICR Has Always Been a Regional, Not a State Practice.*

As even DPUC recognizes,[22] ICR is and always has been a regional determination, used as the basis for establishing regional wholesale rates. Setting ICR on a regional basis has the advantage of decreasing the responsibility of all load in the region and is based upon the concept that each participant "carries its own weight."[23] ICR is embodied in tariffs and agreements filed at FERC. For many years, ICR[24] for the entire New England System was set by the New England Power Pool ("NEPOOL"). Authority to set ICR was transferred from NEPOOL to the ISO when the FERC approved RTO status for the ISO and accepted ISO Tariffs pursuant to FPA Section 205.[25] Under this authority, the ISO has established an ICR and has held auctions for capacity at wholesale for market participants who have not otherwise met their ICR obligation. Utilities or Load

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[21] CONN. GEN. STAT. §§ 16-244f, 16-244g (2006), ISO ADD 85-88.

[22] CB at 10.

[23] *ISO New England, Inc.*, 96 FERC ¶ 61,234 at 61,942 (2001).

[24] Prior to February 1, 2005, ICR was termed "Objective Capability." Such reserve requirements have long existed in New England. *Cent. Me. Power Co. v. FERC,* 252 F.3d 34 (1st Cir. 2001) ("*Central Maine*").

[25] *ISO New England Inc.,* 106 FERC ¶ 61,280, *order on reh'g* 109 FERC ¶ 61,147 (2004), 110 FERC ¶ 61,111 (2005).

Serving Entities ("LSEs")[26] which fail to meet the established ICR currently pay and historically paid a "deficiency charge."[27]

ICR is integral to the New England market mechanism. Through the years, FERC has considered various market mechanisms, and the Courts have long reviewed and recognized FERC's jurisdiction over various elements of the market mechanisms, including the level of ICR (or its equivalent) used in the installed capacity market[28] and the associated deficiency charges.[29]

As FERC points out in its brief,[30] FERC rejected DPUC's jurisdictional challenge to the locational installed capacity ("LICAP") market design, which incorporated ICR.[31] While not applicable for review purposes herein, FERC has further explained its jurisdiction in a more recent decision related to the settlement of the forward capacity market ("FCM"), the method which will replace the LICAP mechanism. FERC explained there that the FCM "establish[es] a

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[26] LSEs are entities which serve retail consumers.

[27] The "deficiency charge" is a charge assessed if a participant's system capability falls below its capability responsibility by more than a certain percent. *See Municipalities of Groton v. FERC*, 587 F.2d 1296 (D.C. Cir 1978) ("*Groton*").

[28] *Sithe New England Holdings v. FERC*, 308 F.3d 71 (1st Cir. 2002); *Central Maine*, 252 F.3d at 40.

[29] *Groton*, 587 F.2d 1296.

[30] FERC Brief at 16-17.

[31] DPUC's Notice of Intervention at 9, R 15, JA 49.

mechanism and market structure for the purchase and sale of installed capacity at wholesale in interstate commerce and . . . the prices for those sales, bringing it squarely within the Commission's jurisdiction under the FPA,"[32] citing support for this proposition from *Groton* and *Mississippi Industries*.[33] FERC's acceptance of the routine annual ICR annual filings is consistent with the larger continuum of decisions that FERC rendered to fix flaws in the capacity markets in New England.

C. Determining the Justness and Reasonableness of ICR is Unambiguously Within FERC's Statutory Jurisdiction.

While states have jurisdiction over certain aspects of electric generation and retail rates, Congress has unambiguously assigned to FERC jurisdiction over interstate wholesale sales. This is the "bright line" between state and federal jurisdiction articulated in *Attleboro*[34] and intrinsic in the FPA.[35] DPUC recognizes this bright line, but fails to place ICR on the correct side of the line, by labeling

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[32] *Devon Power LLC,* 115 FERC ¶ 61,340 P 201 (2006), *reh'g denied* 117 FERC ¶ 61,133 (2006).

[33] *Id.* at n.180.

[34] *Pub. Util. Comm'n. of Rhode Island v. Attleboro*, 273 U.S. 83 (1927) ("*Attleboro*").

[35] *Federal Power Comm'n. v. So. Cal. Edison Co.,* 376 U.S. 205, 214 (1964) ("*So. Cal. Edison*") (bright line test "cut[s] sharply and cleanly between sales for resale and direct sales for consumptive uses."); *Mississippi Industries v. FERC et al.,* 808 F.2d 1525, 1547 (D.C. Cir. 1987), vacated on other grounds, 822 F.2d 1104 (1987) ("*Mississippi Industries*").

ICR as "generation resource adequacy" or a mandate to build or enlarge generation, which it is not.

1. *FERC Has Jurisdiction Under FPA Section 205, Because ICR is a Wholesale Charge, or at a Minimum, Directly Affects Wholesale Rates or Charges.*

Pursuant to FPA Sections 205 and 206, FERC is responsible to ensure just and reasonable wholesale rates and charges.[36] Each entity serving load pays either a deficiency charge or a wholesale capacity charge measured, in part, by its allocated ICR. At the very least, ICR is a cost component affecting wholesale rates and charges.[37] Like the FERC-jurisdictional deficiency charge in *Groton*, ICR affects "the fee that a participant pays for power and reserve service."[38] As in the FERC-jurisdictional allocation of a power plant's capacity at issue in *Mississippi Industries,*[39] the ICR is a "cost component affecting wholesale rates" which "directly and significantly *affect[s]* the wholesale rates."[40]

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[36] 16 U.S.C. §§ 824d, 824e.

[37] *Id.* § 824d.

[38] *Groton,* 587 F.2d at 1302.

[39] *Mississippi Industries*, 808 F.2d 1525.

[40] *Id.* at 1542 (emphasis in original).

ICR is also a means of ensuring reliable operations of the market as established in a FERC-approved tariff, and thus is FERC-jurisdictional as a rule or regulation affecting wholesale rates pursuant to FPA Section 205.[41]

Consistent with this Court's directive in *CalISO,*[42] the FERC has jurisdiction here because ICR "directly affect[s] the rate or [is] closely related to the rate."[43] In contrast, the situation in *CalISO,* on which DPUC so heavily relies,[44] would have expanded the FERC's jurisdiction to change the management of the ISO, an action which this court found to be "remote . . . beyond the rate structure."[45]

2. *States Have Jurisdiction over Generating Facilities and Retail Rates, But FERC Has Jurisdiction Over Sales From Generation in Interstate Commerce.*

a. *FERC Has Jurisdiction Over Wholesale Sales From Generating Facilities.*

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[41] 16 U.S.C. § 824d(a).

[42] 372 F.3d 395.

[43] *Id.* at 403, *citing American Gas Ass'n v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990).

[44] CB at 19.

[45] 372 F.3d at 403.

DPUC argues that FPA Section 201(b)(1)[46] precludes FERC from exercising jurisdiction over generation facilities, but dismisses the exception to Section 201(b)(1) as inapplicable.[47] That exception authorizes FERC to regulate wholesale rates and charges in interstate commerce pursuant to FPA Section 205, even if those rates and charges result from the sale from "generation."[48] FPA Section 201(b) states that the Commission "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 . . ."[49] Section 205, in turn, limits this provision by stating: "All rates and charges made, demanded, or received by any public utility for or in connection with . . . 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 . . ."[50]

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[46] 16 U.S.C. § 824(b)(1), FERC A-1. Contrary to DPUC's assertions (*see* CB at 3, 4, 10, 12, 14, 15), nowhere does the statute refer to "generation capacity" or "generation resource adequacy;" it simply refers to "generation facilities."

[47] CB at 4, 21.

[48] *Mississippi Industries,* 808 F.2d at 1544.

[49] 16 U.S.C. § 824(b)(1) (emphasis added), FERC A-1.

[50] *Id.* § 824d(a), FERC A-4.

DPUC seeks to use FPA Section 201(b) to constrict FERC's Section 205 jurisdiction when this Court in *Mississippi Industries*[51] found that the opposite is true: Section 205 limits the exception provided in Section 201(b). In asserting that FERC overreached its authority by making determinations regarding interstate wholesale charges which may (or may not) entail generating facilities, DPUC is in effect reading out the crucial "except for" portion of FPA Section 201(b).[52]

In *Mississippi Industries,* two state regulatory commissions challenged FERC's jurisdiction to regulate an agreement which allocated the capacity of the Grand Gulf nuclear power plant to the operating companies of an interstate holding company.[53] This Court found that FERC had jurisdiction over matters pertaining to generation where it is found that "generation facilities are used as facilities for interstate wholesale sales,"[54] noting that "FERC has not regulated a facility, but rather the wholesale rate of interstate sales within the . . . system" and that the only authority FERC exercised was its "undisputed authority over the wholesale rates of electric generating facilities in interstate commerce, which includes, under the facts

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[51] *Mississippi Industries,* 808 F.2d at 1534-35.

[52] 16 U.S.C. § 824, FERC A-1.

[53] *Mississippi Industries,* 808 F.2d 1525.

[54] *Id.* at 1544.

presented, the authority to reallocate costs."[55] Consistent with this analysis, this Court concluded that "because the allocation of Grand Gulf capacity and costs . . . significantly *affects* the wholesale rates at which the operating companies exchange energy due to the combined effect of the [agreements] . . . that allocation is plainly within Commission jurisdiction."[56] ICR also allocates capacity requirements, and the quantity of this capacity is used to develop wholesale capacity charges.

In a reverse preemption argument, DPUC claims that FERC must include a *state*-determined reliability quantity in FERC's development of wholesale charges.[57] While FERC may use a state-determined ICR value, where appropriate, it is the states who are preempted, not FERC, from impinging on interstate commerce.

b. *States Have Jurisdiction over Purchasing Decisions and Retail Rates.*

While FERC has the jurisdiction to determine whether the ICR is just and reasonable, states have the jurisdiction to decide how ICR is met among the alternatives available and how the costs associated with these alternatives are

[55] *Id.* at 1541.

[56] *Id.* at 1542.

[57] CB at 6.

recovered through retail rates. This state jurisdiction over implementing ICR is consistent with FERC's statement, cited by DPUC, that "an RTO or ISO may *implement* a resource adequacy program only where a state (or states) asks it to do so, or where a state does not act."[58]

States may affect how jurisdictional utilities and LSEs meet ICR through their regulation of utilities and their ability to mandate the use of demand-side resources.[59] If new generation is proposed, states may consider siting, environmental and certification issues, including fuel type. Additionally, states decide which entities may or may not own generation within the state.[60] While the FPA reserves to the states authority over generation facilities (unless specifically granted to FERC by the FPA),[61] such grant does not give the states authority over interstate wholesale sales of capacity from those generation facilities.

The Supreme Court recognized this distinction between federal and state jurisdiction in *Pacific Gas and Electric Company v. State Energy Resources*

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[58] DPUC ADD 24, cited CB at 28, n.5 (emphasis added).

[59] CONN. GEN. STAT. § 16-243m (2006), ISO ADD 90-91.

[60] Many states in New England have required their utilities to divest or separate their generation from their utility function as part of their restructuring policies. *See e.g.,* MASS. GEN. STAT. ch. 164, § 1A (2006), ISO ADD 81-83, CONN. GEN. STAT. §§ 16-244f, 16-244g (2006), ISO ADD 85-88.

[61] 16 U.S.C. § 824(b)(1), FERC A-1.

Conservation & Development Commission.[62] There, after citing the states' traditional regulatory oversight of the "[n]eed for new power facilities, their economic feasibility, and rates and services,"[63] the Court stated: "With the exception of the broad authority of the Federal Power Commission, now the Federal Energy Regulatory Commission, over the *need for* and pricing of electrical power transmitted in interstate commerce . . . these economic aspects of electrical generation have been regulated for many years and in great detail by the states."[64] While DPUC cites this case in support of state jurisdiction over ICR,[65] it fails to include the "with the exception of" language, which mandates FERC jurisdiction.

Courts have recognized the delineation of responsibility between FERC, which regulates wholesale rates and charges and states, which determine whether a state-regulated utility should pay a particular price in light of potential alternatives (*i.e.*, a prudence of purchase review).[66] While New England market participants must pay for their share of ICR, they do so through wholesale, not retail rates. The

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[62] 461 U.S. 190 (1983).

[63] *Id.* at 205.

[64] *Id.* at 205-206 (emphasis added; citations and footnote omitted).

[65] CB at 18.

[66] *Pike County Light and Power Company v. Pennsylvania Pub. Utility Comm.,* 465 A.2d 735, 738 (Pa. 1983).

decision of whether LSEs meet their capacity requirement through one or another supply-side or demand-side resource, *i.e.,* prudence of selecting one alternative rather than another to meet ICR, may be affected by the state,[67] as long as it does not interfere with interstate commerce or preclude compliance with a pre-emptive FERC decision.[68] State commissions may also determine the appropriate allocations of ICR costs in retail rates, within the bounds mandated by FERC. However, FERC does not regulate generating facilities, set retail rates or allocate costs to retail customers through ICR.

3. *FERC's Regulation of ICR Is Consistent With the FPA's Bright Line Between Federal and State Jurisdiction.*

FPA Section 201 provides FERC with jurisdiction over interstate wholesale transactions.[69] The FPA was intended to close the *Attleboro* gap, defined as the gap created because state regulation of interstate rates causes a direct burden on interstate commerce.[70] DPUC cites FPA legislative history to argue that Congress did not intend to take away authority from the states.[71] But as the Supreme Court

[67] *Id.*

[68] *Mississippi Power & Light Co.*, 487 U.S. 354 (1988); *Nantahala Power & Light Co. v. Thornburg,* 476 U.S. 953 (1986).

[69] 16 U.S.C. § 824, FERC A-1.

[70] *Attleboro,* 273 U.S. at 88.

[71] CB at 19-20.

found in *So. Cal. Edison*,[72] even where a state did or could regulate sales in interstate commerce, the FPA reserved to FERC the ability to do so. Only where FERC has explicitly disavowed jurisdiction – not at issue here – would a state be able to regulate a matter affecting interstate commerce and then only if the effects on interstate commerce are merely incidental.[73] Here, FERC has asserted jurisdiction, and the effects on interstate commerce are potentially enormous.

Because of the tightly interconnected nature of the New England electric system, there is a danger that individual states would adversely affect interstate commerce if each state could set an intrastate capacity level for reliability, with no FERC oversight. In *Attleboro*, the Supreme Court articulated this type of concern:

> [I]f Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate is therefore not subject to regulation by either of the

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[72] 376 U.S. at 214.

[73] *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm.*, 461 U.S. 375, 393-94 (1983) ("*AECC*").

> two States in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress.[74]

Thus, in *Attleboro,* the Supreme Court attempted to prevent one state from obtaining parochial advantages over another state. The Court noted:

> Maintaining the proper balance between federal and state authority in the regulation of electric and other energy utilities has long been a serious challenge to both judicial and congressional wisdom. On the one hand, the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States. On the other hand, the production and transmission of energy *is an activity particularly likely to affect more than one State*, and its effect on interstate commerce is often significant enough that *uncontrolled regulation by the States can patently interfere with broader national interests*.[75]

The FPA protected against such "uncontrolled" state regulation by giving FERC the final authority to act in areas such as the necessary regional capacity requirement.

Finally, DPUC argues that the ISO represents the parochial interest of reliability.[76] Even if DPUC's concern were valid, any ISO decision would be

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[74] *Attleboro*, 273 U.S. at 90.

[75] *AECC*, 461 U.S. at 377, citing *Munn* v. *Illinois*, 94 U.S. 113 (1877); *FERC* v. *Mississippi*, 456 U.S. 742, 755-757 (1982); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 339 (1982) (emphasis added).

[76] CB at 16, n.3.

subject to FERC review. In contrast, DPUC proposes that states determine capacity requirements with *no* review,[77] a situation that the Supreme Court in *Attleboro* found fraught with concerns about parochialism.

4. FERC Has Jurisdiction Under Existing ISO Tariffs.

DPUC fails to inform this Court that the ISO's PA and Tariff, previously filed with and approved by the FERC,[78] explicitly state that the ISO must file ICR at FERC pursuant to FPA Section 205.[79] In addition, DPUC does not advise this Court that it failed to raise any contemporaneous challenge to FERC's jurisdiction over these ISO Tariffs. Despite these key facts, DPUC now accuses FERC of "bootstrapping"[80] its jurisdiction based upon these tariffs.

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[77] *Id.* at 5.

[78] *ISO New England Inc., et al.,* 106 FERC ¶ 61,280, *order on reh'g* 109 FERC ¶ 61,147 (2004), 110 FERC ¶ 61,111 (2005).

[79] Tariff Section III.8.1, R 34 at 17, JA 53, provides: "The ISO shall calculate the Installed Capacity Requirements for each Power Year. Following consultation with stakeholders as required by Section 11.4 of the Participants Agreement, the ISO shall file the Installed Capacity Requirements for each Power Year with the Commission pursuant to Section 205 of the Federal Power Act." PA Section 11.4, R 34 at 17-18, JA 53-54, provides: "ISO shall, in its discretion, determine and file with the Commission pursuant to Section 205 of the Federal Power Act the Installed Capacity Requirements for each Power Year." DPUC included these documents in its addendum but never identified in its brief the reference in these documents to FPA Section 205.

[80] CB at 28.

While FERC may not derive jurisdiction from an otherwise non-jurisdictional tariff provision, it may regulate the implementation of a jurisdictional provision. FERC had authority to approve the ISO Tariffs setting forth the process for establishing ICR because ICR: (a) is an integral component of the wholesale charge for capacity in New England; (b) specifically governs wholesale sales in interstate commerce; and (c) has always been set pursuant to contracts that govern sales for resale in interstate commerce (including ISO and NEPOOL tariffs). Thus, FERC's reliance on ISO's Tariff and PA, filed pursuant to FPA Section 205, is justified in this instance.

D. Even if the Court Finds that the Statutory Authority is Ambiguous, Which It Is Not, the Court Should Defer to FERC's Determination, Because FERC's Decision is Reasonable.

1. FERC's Decision Is Entitled To Great Weight.

Where the relevant statute is silent or ambiguous with respect to a specific issue, the reviewing court must determine "whether the agency's answer is based on a permissible construction of the statute."[81] Courts have long recognized that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making

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[81] *Chevron*, 467 U.S. at 843; *Mississippi Power & Light Co., v. Mississippi Ex. Moore*, 487 U.S. 354 (1988) ("*Mississippi Power*") ("In considering the Federal Power Act question we will defer, of course, to FERC's construction if it does not violate plain meaning and is a reasonable interpretation of silence or ambiguity").

of rules to fill any gap left, implicitly or explicitly, by Congress."[82] Thus, the Court will set aside FERC's approval only if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,[83] and courts will defer "to the agency's interpretation of the statute if it is reasonable and consistent with the statute's purpose."[84] This test is narrow and the court "is not to substitute its judgment for that of the agency."[85] Where, as here, the analysis to be performed "requires a high level of technical expertise, [the court] must defer to the informed discretion of the responsible federal agencies."[86]

In concurring with the majority in *Mississippi Power*, Justice Scalia explained why such deference should be given:

> [I]t is plain that giving deference to an administrative interpretation of its statutory jurisdiction or authority is both necessary and appropriate. It is *necessary* because there is no discernible line between an agency's

[82] *Chevron*, 467 U.S. at 843, citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("[S]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").

[83] *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 37 (D.C. Cir. 1999).

[84] *United Distributions Cos. v. FERC*, 88 F.3d 1105, 1166 (D.C. Cir. 1996).

[85] *Exxon Co.*, 182 F.3d at 37, citing *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

[86] *Id.*

> exceeding its authority and an agency's exceeding authorized application of its authority. To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending upon how generally one wishes to describe the "authority." And deference is *appropriate* because it is consistent with the general rationale for deference: Congress would naturally expect that the agency would be responsible, within broad limits, for resolving ambiguities in its statutory authority or jurisdiction. Congress would neither anticipate nor desire that every ambiguity in statutory authority would be addressed, *de novo*, by the courts (citations omitted, italics in original).[87]

If the Court finds that there is any uncertainty as to whether the ICR constitutes a component of a wholesale charge or affects wholesale charges subject to the FPA, the Court should give deference to FERC's construction of the FPA under the second prong of the *Chevron* test. FERC's construction is consistent with the FPA's purpose of ensuring just and reasonable rates in interstate commerce and is reasonable and consistent with past precedent.

DPUC argues that "FERC offered no basis under the FPA for its actions."[88] Yet, FERC specifically referred to its FPA Section 205 authority.[89] In addition,

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[87] *Mississippi Power*, 487 U.S. at 381, Justice Scalia concurring, citing *Chemical Manufacturers Assn. v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 123, 125, 126 (1985); *City of New York v. FCC*, 486 U.S. 57, 64 (1988).

[88] CB at 10.

[89] Rehearing Order at P 17, n.18, R 54, JA 123.

FERC cited a FERC-approved tariff and underlying agreement[90] which it previously found to be just and reasonable under Section 205 and which specifically requires ICR filings to be made pursuant to Section 205. FERC does not need a lengthy discussion of obvious authority, especially where, as here, FERC makes a decision consistent with its past practice. Courts have generally been concerned with FERC's failure to provide a reasoned explanation when the decision reviewed is a departure from past practice.[91] An agency must either abide by its precedent or provide a "reasoned explanation" for departing from it.[92] In this instance, because FERC was reasonable when relying upon statutory language and consistent with past practice, FERC was not required to go to great lengths to further articulate its reasons.[93]

[90] Initial Order at P 33, R 40, JA 66 ("With respect to the issue of resource adequacy, we agree with ISO-NE that in light of the ISO's Tariff and the PA, the ISO has the authority to file and that we have the authority to accept the ISO's proposed IC Requirements . . ."); Rehearing Order at P 17, R 54, JA 123 (citing 16 U.S.C. § 824d).

[91] *See Michigan Pub. Power Agency v. FERC*, 405 F.3d 8 (D.C. Cir. 2005).

[92] *Exxon Mobil Corp. v. FERC*, 315 F.3d 306, 309 (D.C. Cir. 2002). *See also*, *AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2000) (When an agency determines to *change* an existing regulatory regime it must do so on the basis of reasoned analysis under the arbitrary and capricious standard of review).

[93] *Automated Power Exchange, Inc. v. FERC*, 204 F.3d 1144, 1155 (D.C. Cir. 1999) (where a statute is ambiguous, courts will uphold FERC's decision as long as it is reasonable, is consistent with its own precedent or explains any reasons for departure therefrom).

2. *FERC Has Consistently Found It Has Jurisdiction Over Regional ICR.*

For the past 35 years, ICR (or its equivalent) has been determined on a regional basis, and the FERC has never disclaimed jurisdiction over it; nor has FERC previously disclaimed jurisdiction over capacity levels required for reliability outside of New England.[94] Although FERC has allowed states to develop those capacity levels,[95] this fact does not mean that the FERC has relinquished authority over the issue; it simply means that FERC has accepted the state's determination.

In relying on cases, DPUC ignores portions of decisions which contradict DPUC's argument. For example, in *Devon Power*, DPUC focuses on the sentence: "Resource adequacy is a matter that has traditionally rested with the states, and it should continue to rest there."[96] First, the FERC has not defined "resource adequacy" in this case or in other cases cited by DPUC. Therefore, the term's applicability to ICR is, at best, unclear. Second, in the cited paragraph, FERC indicated that it could, in the future, alter state resource adequacy choices:

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[94] *See e.g., New York Independent System Operator, Inc.*, 109 FERC ¶ 61,372 (2004); *Cal. Ind. Sys. Op.,* 115 FERC ¶ 61,172 (2006).

[95] CB at 29-31.

[96] *Devon Power, LLC*, 109 FERC ¶ 61,154 at P 47 (2004).

> [W]e will not at this time restrict the options that a state may consider to ensure resource adequacy for loads within its state, other than to require that the costs of those options not be imposed involuntarily on entities in other states.[97]

Similarly, in the *SMD Order* (which was issued in a proceeding that FERC later terminated),[98] DPUC focuses on one sentence: "The approach to and level of resource adequacy will be decided by the states."[99] Yet, DPUC omits the FERC's lengthy discussion differentiating a regional resource adequacy requirement, to be developed by a regional entity under FERC jurisdiction, such as the ISO, and the way of meeting that requirement – supply planning and customer demand response – which are to be determined by the states:

> The Commission proposes a resource adequacy requirement to ensure adequate electric generating, transmission and demand response infrastructure, the level of which is to be determined on a regional basis. Recognizing that supply planning and retail customer demand response are the states' responsibility, the Commission proposes a resource adequacy requirement intended to complement existing state programs. In particular, the Commission proposes that an RTO or other regional entity must forecast the region's future

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[97] *Id.*

[98] *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, Notice of Proposed Rulemaking, Remedying Undue Discrimination*, 100 FERC ¶ 61,138 (2002) ("*SMD Order*"), NADD 18-23, terminated, 112 FERC ¶ 61,073 (2005).

[99] CB at 29, citing DPUC ADD 25.

> resource needs, facilitate regional determination of an adequate future level of resources and assess the adequacy of the plans of load-serving entities to meet the regional needs. Each load-serving entity would be required to meet its share of the future regional need through a combination of generation and demand reduction.[100]

Significantly, FERC said that each "region's resource adequacy requirement could be satisfied by a combination of generation, transmission, and demand response infrastructure."[101]

The additional cases cited by DPUC are inapposite. In *Devon Power, LLC*,[102] the FERC merely said that "[t]he LICAP mechanism does not change the jurisdiction of the Commission or the states,"[103] thus continuing to assert ultimate FERC jurisdiction over ICR. In *California Independent System Operator*,[104] the FERC accepted a tariff filed by the California Independent System Operator ("CAISO") implementing a state reserve requirement adopted by the California Department of Public Utilities ("PUC") where: (1) the capacity requirement was

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[100] *SMD Order*, 100 FERC ¶ 61,138 at P 14, NADD 18.

[101] *Id.* at P 503.

[102] 110 FERC ¶ 61,313 (2005).

[103] *Id.* at P 39.

[104] 115 FERC ¶ 61,172 (2006).

coextensive with the existing FERC-approved CAISO tariff requirement,[105] and (2) the tariff under consideration included a default planning standard enabling the CAISO to cover any shortfall in the state reserve requirement.[106] In its decision, FERC recognized that any change in the reserve requirement would require a new tariff filing to be considered by the FERC.[107] Thus, the FERC did not find that the PUC had ultimate authority for determining capacity requirements or even defer to the PUC to set those requirements. Rather, the FERC approved a tariff incorporating capacity requirements developed by the California PUC which met established capacity requirements and required that any changes to those requirements be filed with and considered by FERC.

Similarly, in *Southwest Power Pool, Inc.*,[108] FERC deferred to a Regional State Committee for certain reliability related determinations, but required that any proposals affecting the RTO's reliability be filed with and reviewed by FERC under FPA Section 205. FERC further rejected states' arguments that FERC's

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[105] *See id.* at P 25.

[106] *See id.* at PP 32-40.

[107] *See id.* at P 30.

[108] 109 FERC ¶ 61,010 at P 91 (2004).

determination infringes on matters within state jurisdiction such as siting and certification of new transmission facilities.[109]

These two cases are consistent with FERC's findings in *New York Independent System Operator, Inc.*,[110] where FERC approved a New York Independent System Operator's ("NYISO") tariff giving the New York Public Service Commission ("NYPSC") substantial control over reliability in New York State, but only for matters not within FERC's exclusive jurisdiction. In doing so, FERC stated that the NYPSC was "singularly suited" to address certain reliability concerns because the NYISO footprint is coextensive with New York State.[111] Thus, even where there is a single-state RTO, FERC has deferred to the RTO without relinquishing FERC jurisdiction. FERC remains the arbiter of any state determination and may modify that determination if inter-regional reliability is affected.

Finally, DPUC cites *Midwest Independent Transmission System Operator, Inc.*,[112] where FERC responded to the Kentucky Commission's statement that

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[109] *Id.* at P 78.

[110] 109 FERC ¶ 61,372 (2004).

[111] *Id.* at P 19.

[112] 103 FERC ¶ 61,210 (2003).

FERC has no authority over "adequacy of generation."[113] The FERC stated that it "agree[d] with the Kentucky Commission that resource adequacy programs, in particular, are the responsibility of the states" and noted the need for strong state participation in developing resource adequacy proposals.[114] However, in *Midwest Independent Transmission System Operator, Inc.*,[115] FERC never disavowed its ultimate jurisdiction to review capacity requirements in a future Midwest ISO tariff.

The Connecticut Attorney General cites *Iroquois Gas Transmission System*,[116] and *Perryville Energy Partners, LLC*,[117] neither of which supports the Attorney General's argument. *Iroquois* addressed FERC's jurisdiction over gas local distribution companies, not at issue here. *Perryville* decided FERC cannot use FPA Section 203 authority to regulate the transfer of a generation-only facility. In *Perryville*, FERC stated "[T]he fact that the Commission does not have jurisdiction under section 203 of the FPA does not affect the Commission's

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[113] *Id.* at P 17.

[114] *Id.* at PP 18-21.

[115] *Id.*

[116] 52 FERC ¶ 61,091 at P 61,374 (1990) ("*Iroquois*"), cited Connecticut Attorney General Amicus Brief ("AG Brief"), at 7-8.

[117] 109 FERC ¶ 61,019 (2004) ("*Perryville*"), cited AG Brief at 8.

authority under Sections 205 and 206 of the FPA over wholesale sales associated with the generation facility . . ."[118]

In short, none of the cases cited by DPUC or its supporting *amici* suggest that FERC has relinquished ultimate authority over capacity levels required for reliability, such as ICR.

E. Potential Harm from Exclusive State Jurisdiction over Capacity Requirements

FERC may encourage states to participate in developing and implementing capacity requirements and may adopt such requirements when filed with the FERC. However, excluding FERC from this process could easily lead to six different determinations within New England, with resulting reliability concerns.

States may act to identify capacity levels necessary for reliability cooperatively, regionally and consistently within their region and between regions. However, no one has cited a statute requiring them to do so. Rather, DPUC claims that authority to set capacity requirements is vested in each individual state which could delegate its authority to a regional organization[119] through voluntary action.

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[118] *Id.* at 61,094.

[119] DPUC refers to a proposed regional committee, New England States Committee on Electricity ("NESCOE") to argue that an ICR decision could be done jointly by all New England states. CB at 12-13. NESCOE does not exist and therefore there is no mechanism for the states to agree jointly on ICR.

The very voluntary nature of such action demonstrates that a state could choose *not* to delegate its authority.

As NARUC points out, states consider political and economic policies in their determinations.[120] The Connecticut Attorney General underscores this fact when he identifies the cost of resource adequacy as a major concern.[121] Similarly, DPUC discusses the "trade-offs" between cost and reliability.[122] It is particularly disturbing that Connecticut is leading the fight to consider "trade-offs" between cost and reliability. Currently, Connecticut is capacity deficient and already relies on others to meet its reliability needs.

FERC has also noted that customers would prefer paying less and depending on others to pay for and provide needed capacity.[123] Regional reliability transcends state boundaries and should be based upon technical factors, not political determinations by individual states.

In addition, states lack the pervasive authority to be the final arbiter of the level of capacity required for regional reliability. Even NARUC admits that the

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[120] *Id.* at 8.

[121] AG Brief at 8-9.

[122] CB at 4-5.

[123] *See California Independent Sys. Op. Corp.*, 105 FERC ¶ 61,140 P 214 (2005).

state commissions' mandate is limited to ensuring the reliable and economic supply of power to consumers served by "a regulated utility with a power supply obligation within their States."[124] There is no mandate as to (a) unregulated utilities; (b) utilities without a power supply obligation; or (c) utilities outside the state. The changing nature of the bulk power system caused by restructuring of the industry, including the entrance of new market participants which are neither regulated by the state nor have power supply obligations, confirm the wisdom of Congress's assignment to FERC of final jurisdiction over the level of capacity necessary for regional reliability.

Courts have long recognized that states may be tempted to put their own local interests before regional interests.[125] In contrast, FERC is "in the best position to reach the most equitable result and to act in the public interest, rather than to be controlled by the necessarily parochial concerns of the states."[126] This Court has specifically acknowledged that the FPA was designed to preclude one state from acting in a way that disadvantages another state:

> "If State Commission A orders a change to be made in a wholesale rate filing, presumably because it would

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[124] NARUC Brief at n.12.

[125] *Mississippi Industries,* 808 F.2d at 1549; *see also* quote from *Attleboro* at n.74, *supra.*

[126] *Mississippi Industries,* 808 F.2d at 1549.

> benefit the ratepayers in State A, then State Commission B might well retaliate by ordering a counter rate filing that would benefit the ratepayers in State B . . . It was to protect against such competing local state interests that a Federal Commission was given jurisdiction to protect the national interest in transmission and sales for resale in interstate commerce."[127]

DPUC's argument that states are in the best position to be the sole judge of installed capacity requirements ignores the highly interconnected, regional nature of the New England transmission system, where planning and market operations occur (and have historically occurred) on an interstate basis. States cannot make determinations without affecting other states. Although ISO does not attribute improper motives to any state, it recognizes, as have the courts, that states may be tempted to promote their own interests *vis-a-vis* other states, such as taking the less expensive course (in the short-run) and relying on others to pay for reliability.

Even if a group of New England states were able to reach consensus on capacity requirements (which no one claims to have achieved to date), such a joint decision could understate capacity needs by placing costs ahead of reliability and seeking a "free ride" on neighboring systems. The FERC has described this "free rider" concern as follows:

> As long as regional reserves are made available to all, a load-serving entity can reduce its own reserve resource

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[127] *Id.*, quoting *Western Massachusetts Elec. Co.,* 23 FERC ¶ 61,025 at 61,064 (1983).

> costs and rely on the resources of others. The result is that all load-serving entities will tend to follow this strategy, leading to a systematic underinvestment in resources needed for reliability.[128]

Any decision to seek such a "free ride" would adversely affect interstate commerce. If DPUC's argument were adopted by this Court, FERC would have no jurisdiction to prevent an inadequate level of capacity in New England from adversely affecting reliability in other states.

In contrast, to date, FERC has appropriately exercised its statutory jurisdiction to review capacity requirements filed by the ISO (and previously by NEPOOL) to determine whether those requirements both support and preserve the reliability of the system. Within the bounds set by Congress, states have exercised jurisdiction over generation siting and regulation, retail rates, and the determination whether to use regulation or markets for providing retail service to in-state customers. The system has been successful to date and should not be overturned.

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[128] *SMD Order,* 100 FERC ¶ 61,138 at P 472, NADD 23. In the accompanying footnote 218, FERC references this situation as "the well-known 'free rider' problem for public goods . . ."

VII. CONCLUSION

In its Orders, FERC appropriately found it has jurisdiction to determine just and reasonable wholesale rates. FERC has unambiguous jurisdiction over interstate wholesale rates. Because ICR is an allocation of capacity costs and a component of wholesale charges, and because the determination of capacity requirements directly impact interstate commerce, ICR is FERC jurisdictional.

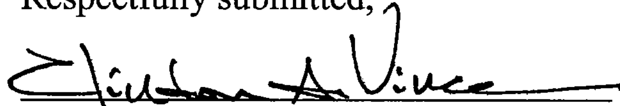
The ISO urges this Court to find that FERC has ultimate authority over ICR. If there is any doubt that the FPA grants FERC unambiguous jurisdiction to regulate ICR, the ISO urges this Court to defer to FERC's decision that it has authority to review ICR, because FERC reasonably construed its statutory authority, is an entity with experience to make these technical determinations, and its decision is consistent with its long-standing practice.

This case is not confined to issues related to an isolated area where one state could reasonably make a decision affecting only its incumbents. Rather, allowing individual states to establish capacity requirements, with no FERC oversight, could lead to reliability concerns in the region and nationally. FERC's mandate has always been to promote the national interest and prevent one state from gaining advantages over another through state actions which harm interstate commerce. Keeping prices low for consumers in a state, although a noble cause, cannot be

achieved by sacrificing the rest of the New England region, or sacrificing the reliability of states beyond New England.

For the reasons set forth above, the ISO requests that the Court dismiss DPUC's petition, and affirm FERC's Orders in this respect.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation set by the Court's Order filed on May 17, 2006 in this Proceeding and Fed. R. App. P. 32(a)(7)(B), because this brief contains 8,504 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The "Word Count" function of Microsoft Word 2003 was used for this purpose.

This brief complies with the typeface requirements of D.C. Cir. Rule 32(a)(1) and Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing document have been served on the parties on the attached Service List, by United States first class mail, postage prepaid.

Dated at Washington, D.C. this 20th day of December, 2006.

By:

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