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March 14, 2008

VIA ELECTRONIC FILING

The Honorable Kimberly D. Bose, Secretary
The Honorable Nathaniel J. Davis, Sr., Deputy Secretary
Federal Energy Regulatory Commission
Room 1A-East, First Floor
888 First Street, N.E.
Washington, D.C. 20426

Re: ISO New England Inc., Docket No. ER05-715-002

Dear Secretary Bose and Deputy Secretary Davis:

Attached for electronic filing in the above-referenced docket is the *Motion for Leave to Answer and Answer of ISO New England Inc.* A copy of the foregoing has been served upon all parties included in the Commission's service list.

If you have any questions or concerns regarding this filing, please feel free to contact me. Thank you for your assistance in this matter.

Respectfully submitted,

/s/ Sherry A. Quirk
Sherry A. Quirk, Esq.
Robin E. Remis, Esq.

Counsel for ISO New England Inc.

Attachment
cc: Official Service List

advanced by the CT DPUC are based upon inaccurate factual assumptions and are contrary to relevant judicial and FERC precedent. Accordingly, the ISO hereby files this limited Answer in order to assure a more complete record and clarify the issues, and requests that the Commission deny rehearing.

I. INTRODUCTION AND SUMMARY

Stated simply, the CT DPUC's jurisdictional argument rests on facts that are divorced from the history of how resource adequacy has been established and paid for by entities in New England, and how it will be established and paid for under the FCM market design. When ICR is placed in the proper factual context, Commission jurisdiction becomes unassailable.

The CT DPUC intimates that it has been involved in state-level "comprehensive and detailed proceedings" regarding the development of the installed capacity requirement; however, as the Commission correctly noted, for many years the ISO and not the individual states has imposed ICR -- the quantity of capacity required for the region -- "on its members in order to maintain adequate system reliability."⁶ The CT DPUC seeks to strip the Commission of its jurisdiction and empower the states to act individually to set ICR, with the cumulation of the individual amounts setting the regional ICR. In support of this result, the CT DPUC alleges that the states have used the same reliability standard as NEPOOL and the ISO.

However, the reality is that ICR as it has been developed historically cannot be established on a state-by-state level. Following the CT DPUC's analysis, each state would have

capacity market design. Notwithstanding the context of the filing, many of the CT DPUC's arguments anticipate the existence of the FCM. For purposes of this pleading, the ISO will address the arguments that the CT DPUC has made in the context of the FCM, assuming that the Commission may choose to address them; however, the ISO's arguments also support the Commission's jurisdiction in the context of the previous market design

⁶ February 21 Order at P 2.

the authority to develop its own assumptions on key inputs to ICR and would likely reach differing and potentially inconsistent conclusions. The ICR could be vastly over- or under-stated based upon those assumptions. Because the FCM market design procures only an amount of capacity equal to ICR,⁷ a state-by-state, inconsistent approach is particularly troubling. The need for an appropriate level of ICR to support regional reliability mandates a uniform and regional approach.

The CT DPUC sets forth as a purported admission the Commission's statement that the determination of wholesale capacity prices is distinct from setting ICR.⁸ In the Order Approving the FCM Settlement Agreement,⁹ the Commission simply stated that the FCM Settlement Agreement did not alter the manner in which ICR was calculated nor did it order generation capacity to be installed. In trying to rely on the Commission's statements to bolster its case, the CT DPUC omitted the related statement by the Commission that, "Currently, ISO-NE calculates capacity requirements to achieve "Objective Capability," or the total amount of capacity required by the system to meet peak load plus a reserve margin."¹⁰ Thus, contrary to what the CT DPUC intimates, the states did not previously determine ICR for the New England region – ICR was previously calculated by the ISO and this is not changed by the advent of FCM.

The CT DPUC's allegation that "Any connection between calculating the capacity requirement and determining the capacity price is particularly attenuated under the FCM, where capacity price is set by the competitively established cost of new entry ("CONE") -- without

⁷ *ISO New England, Inc.*, 119 FERC ¶ 61,045 at P 8 (2007).

⁸ CT DPUC Rehearing Request at 5.

⁹ *Devon Power LLC*, 115 ¶ 61,340 (2006).

¹⁰ Order Accepting Settlement at n.177.

regard to the amount of the capacity required or how the ICR is set”¹¹ is misleading. In fact, the ISO procures an amount of capacity equal to ICR, stops the auction when quantity offered equals ICR, and sets the Capacity Clearing Price accordingly. Moreover, load pays for capacity based on its demand in relation to ICR. The FCM and ICR work together to establish capacity prices for the New England region, based on the region’s resource adequacy needs.

The CT DPUC claims that three provisions of the Federal Power Act preclude this Commission from exercising its authority to determine whether ICR is just, reasonable, and non-discriminatory. First, the CT DPUC cites the “generating facility” exception in Section 201(b) of the FPA.¹² Ignoring statutory language that this exception only applies “except as specifically provided” elsewhere in the FPA, the CT DPUC claims that the exception swallows the rest of the FPA and precludes Commission authority over ICR. However, ICR does not regulate generating facilities. Because its application under the FCM Rules will require the procurement of a certain quantity of capacity, ICR does influence the amount of capacity to be purchased in New England and concomitantly, the price of that capacity. As made clear in *Mississippi Industries*,¹³ this Commission has jurisdiction over allocation of capacity where such allocation directly affects wholesale rates or charges.

The CT DPUC also relies on Sections 207 and 215 of the FPA¹⁴ for the proposition that this Commission cannot mandate the construction or enlargement of generation. However, first, ICR does not mandate the construction or enlargement of generation. It merely requires the procurement of sufficient capacity to ensure reliability, whether that capacity is purchased from

¹¹ CT DPUC Rehearing Request at 6.

¹² 16 U.S.C. § 824(b)(1). See CT DPUC Rehearing Request at 13.

¹³ *Mississippi Industries v. FERC*, 808 F.2d 1525 at 1539-1540 (D.C. Cir. 1987).

¹⁴ 16 U.S.C. §§ 824f and 824o.

existing generation, demand-side resources, import contracts or new capacity. Although the market result may encourage construction of new capacity, neither ICR nor this Commission's approval of ICR mandates such construction. Second, Sections 207 and 215 are not at issue here, where this Commission is exercising its authority pursuant to Sections 205 and 206 of the FPA.¹⁵

II. MOTION FOR LEAVE TO ANSWER

In this *Answer*, the ISO responds to certain arguments raised in the CT DPUC's Rehearing Request of the Commission's February 21 Order in this proceeding. While the Commission's Rules of Practice and Procedure allow parties to respond to comments,¹⁶ as a general matter, the Commission's rules prohibit responses to requests for rehearing.¹⁷ The Commission has the authority, however, to waive this prohibition for good cause.¹⁸ The Commission has found good cause to permit replies where they are otherwise prohibited in various circumstances, including where the answer would assure a complete record in the proceeding,¹⁹ provide information helpful to the disposition of an issue,²⁰ permit the issues to be narrowed or clarified,²¹ or aid the Commission in understanding and resolving issues.²²

¹⁵ *Id.* at §§ 824d and 824e.

¹⁶ *See* 18 C.F.R. § 385.213(a)(3) (2007).

¹⁷ *Id.* at § 385.213(a)(2).

¹⁸ *Id.* at § 385.101(e).

¹⁹ *See, e.g., Pacific Interstate Transmission Co.*, 85 FERC ¶ 61,378 at 62,444 (1998), *reh'g denied*, 89 FERC ¶ 61,246 (1999).

²⁰ *See, e.g., CNG Transmission Corp.*, 89 FERC ¶ 61,100 at 61,287 n.11 (1999).

²¹ *See, e.g., PJM Interconnection, L.L.C.*, 84 FERC ¶ 61,224 at 62,078 (1998); *New Energy Ventures, Inc. v. Southern California Edison Co.*, 82 FERC ¶ 61,335 at 62,323 n.1 (1998).

²² *See, e.g., Tennessee Gas Pipeline Co.*, 92 FERC ¶ 61,009 at 61,016 (2000).

The CT DPUC, in its Rehearing Request, has relied on facts and assertions that are incorrect. The ISO believes that this *Answer* will clarify the issues, assure a more complete record in this proceeding, and otherwise assist the Commission in understanding and resolving the issues raised concerning the monthly ICR established by the ISO for the 2005/2006 Power Year. For these reasons, the ISO respectfully requests that the Commission grant the ISO's motion to provide the following *Answer*.

III. ANSWER

A. **ICR In New England Has Been Calculated Historically By The ISO And NEPOOL – Not By The Individual States.**

The CT DPUC's discussion of the history of resource adequacy in New England sets forth a faulty factual basis for examining the Commission's jurisdiction over ICR. First, the CT DPUC states that "Connecticut has long had a comprehensive statutory scheme for establishing resource adequacy and has exercised this traditional authority in comprehensive and detailed proceedings."²³ The CT DPUC intimates that Connecticut and the other New England states, individually, have historically established state-level resource adequacy requirements. Yet, *the CT DPUC has not cited a single case where a New England state has set the equivalent of ICR*. Nor can it -- prior to establishment of the ISO, NEPOOL, a tight power pool covering the six-state New England region, calculated capacity requirements for the region.²⁴ New England's regional approach to setting ICR has permitted the states to rely upon and support each other as the individual circumstances of the states have changed.

In an attempt to cite to its "comprehensive statutory scheme for establishing resource adequacy," the CT DPUC cites to the "Report to the Joint Standing Committee on Energy and

²³ Rehearing Request at 3, footnote omitted.

²⁴ February 21 Order at P 2.

Public Utilities of the Connecticut General Assembly” (“1985 Report”) as evidence of its exercise of “traditional authority in comprehensive and detailed proceedings.”²⁵ This over-20 year old report evaluating the consequences of the existence of excess capacity and alternatives to ratemaking treatments of the excess, ordered by the state legislature in no way demonstrates any authority of the CT DPUC to set the installed capacity requirement; in fact, the CT DPUC expressly states in the 1985 Report; “The level of capacity required to maintain system reliability, and which is thus clearly appropriate under our definition, is that established by the New England Power Pool.”²⁶ Additionally, the CT DPUC defined “Objective Capability” as “the system peak load plus reliability reserve capacity requirements as calculated for and by NEPOOL.”²⁷

Moreover, the CT DPUC attempts to paint the picture that regardless of which entity calculates ICR, the end result will be similar. Specifically, the CT DPUC alleges that, like the ISO, NEPOOL and FERC, all New England states have used – and presumably would use -- as a standard for resource adequacy a loss of load probability (“LOLP”) of once in ten years.²⁸ However, the states have not used this standard to review resource adequacy on the state level, because the states have not been responsible for resource adequacy. Moreover, assuming, *arguendo*, that each New England state did use the same LOLP for resource adequacy purposes, the setting of ICR by each state would require a tremendous amount of coordination of assumptions to reflect the real time operation of dispatching the regional resources to meet the

²⁵ CT DPUC Rehearing Request at 3, n.7.

²⁶ 1985 Report at 13.

²⁷ *Id.* at 26. (Emphasis added).

²⁸ CT DPUC Rehearing Request at 3-4.

regional load.

Even setting aside the temptation to “lean on” other states in the region, if each state were to set its own installed capacity requirements to meet the 1 day in 10 years resource adequacy planning criterion, there would be significant challenges to coordinating assumptions used in each state’s ICR calculations to assure that the concept of real time central dispatch of resources to meet a regional load is properly reflected in each state’s ICR determination. For example, without proper coordination of assumptions, the states might all rely on the same resources to meet their installed capacity requirements which would result in shortfalls in regional installed capacity. In the CT DPUC’s own words, “Despite reliance on mathematical calculations that suggest an aura of precision, ICR is not a single, empirically derived data point that is beyond reasonable debate.”²⁹ Not modeling this regional central dispatch aspect in determining ICR on a state by state basis would result in over building resources at best and under building resources at worst. The amount of resources needed regionally would impact the regional wholesale market rates, which is precisely why Congress has given FERC jurisdiction over ICR as part of its regulation of wholesale rates in interstate commerce.

In addition, without FERC ultimate jurisdiction over ICR and with each of the six states in the New England region free to set its own ICR, each state could rely on potentially conflicting criteria and assumptions. Significantly, deferring the establishment of ICR decisions to the states will leave the region vulnerable to threats to reliability if individual state cost considerations are given greater weight than the need for sufficient resources to meet the regional

²⁹ CT DPUC Rehearing Request at 2. Similarly, the CT DPUC, in the 1985 Report, stated: “The planning reserves (for reliability purposes) contained within the NEPOOL objective capability are calculated on a probabilistic basis, to take a number of variable conditions into account. These include the vagaries of weather, which drive peak demand, and forced outages of generating units, which drive capacity availability.” 1985 Report at 11.

reliability requirements. The CT DPUC argues that because of the FCM's Local Sourcing Requirements ("LSRs") that are derived from the New England-wide ICR, "there is no reasonable threat or probative facts indicating that one state will attempt to free ride on others" and will assist in "assur[ing] reliability throughout the entire region."³⁰ However, this Commission has noted that customers would prefer paying less and depending on others to pay for and provide needed capacity.³¹ Regional reliability transcends state boundaries and should be based upon technical factors, not political determinations by individual states.

Because of the absolute relationship between ICR and the Capacity Clearing Price, as explained *infra*, a state might have the incentive to under-estimate ICR (for example, by over-estimating tie benefits, which decreases ICR). If each state were deemed to have jurisdiction to set ICR, each state would be free to make whatever tie benefit – or other -- assumptions it wishes, with possible adverse results for regional resource adequacy.

If each state is granted sole jurisdiction to make judgment calls and trade offs between reliability and costs, this may result in states setting ICR to allow service disruptions. Very simply, ICR must be a regional measure in order to be accurate and effective. Based upon its Congressional grant of authority, this Commission properly determines whether ICR is just, reasonable and non-discriminatory (after receiving input from stakeholders, including state commissions) because ICR directly affects wholesale rates and charges in interstate commerce.

³⁰ CT DPUC Rehearing Request at 26. Notably, the CT DPUC touts the benefits of LSRs as a means of ensuring reliability throughout New England to bolster its argument, while simultaneously claiming that LSRs "unlawfully dictate the amount of capacity that 'must be obtained' in each capacity zone." *Id.* at 16.

³¹ See *California Independent Sys. Op. Corp.*, 105 FERC ¶ 61,140 at P 214 (2003).

B. ICR Is An Integral Part Of The Forward Capacity Market.

In support of its argument that regulation of ICR is not within FERC's jurisdiction, the CT DPUC maintains that the ICR amount neither determines nor affects capacity prices.³² The CT DPUC argues that under FCM, "[t]he only role that ICR has in the capacity charge is to provide the quantity multiplier in computing the total amount that load serving entities pay. In no sense does that quantity 'affect' the capacity price."³³ However, as shown below, this is factually untrue. Moreover, the CT DPUC's own argument demonstrates that ICR affects wholesale rates because ICR is one of the factors used to calculate "the total amount that load serving entities pay."

The CT DPUC attempts to divorce completely the concepts of ICR and the capacity market, casting for a legal theory that supports the conclusion that the Commission has jurisdiction over the FCM (which the CT DPUC has conceded) but not over ICR (which it has not). However, ICR and the FCM are interrelated and function together to fairly establish the cost of resource adequacy and to allocate those costs over wholesale customers in New England. As explained herein, ICR is the requisite quantity of capacity needed to reliably serve load. The FCM incorporates this input as the quantity term and, thus, the amount of ICR determines the amount of capacity purchased in the forward market and affects the price which is determined in a descending clock auction. Further, each Load-Serving Entity ("LSE") is allocated a share of the cost of resource adequacy established in the FCA based upon its relative share of ICR. Contrary to the CT DPUC's statements, the amount of installed capacity required necessarily affects or controls the capacity price, bringing it squarely within the Commission's jurisdiction.

³² CT DPUC Rehearing Request at 17-18.

³³ *Id.* at 18.

1. ICR Is Essential To Determining Capacity Price And Rates In The Forward Capacity Market.

Under the FCM framework, ICR projects the minimum amount of capacity required to serve load reliably in the New England region. ICR establishes the target level for the amount of capacity to be procured in the initial, annual and reconfiguration auctions. As the Commission noted in the order approving the FCM Settlement Agreement, “The amount of capacity procured will be that amount required to maintain the installed capacity requirement. . .”³⁴

It is axiomatic that the level at which ICR is established will have a direct effect on the Capacity Clearing Prices in the FCM. The FCM is a typical bid stack market. Sellers will submit quantity price pairs at which they are willing to sell their capacity resources in the wholesale market. The more supply needed, the higher the price. This is simply a market with an upward sloping supply curve where as quantity demanded increases, price increases. The Commission understands this point well, and has previously held:

[T]he ICR directly affects the capacity clearing price and charges to customers. The purpose of the Forward Capacity Auction is to determine the price at which the amount of capacity offered by all New England capacity resources equals the ICR (i.e., equals what is essentially demand); that price becomes the price of capacity, which, in turn, is charged to customers. The “stopping point” of this “descending clock” auction is therefore directly influenced by the size of the ICR (i.e., essentially demand): a greater ICR (i.e., essentially greater demand) will typically result in a higher price of capacity (i.e., a higher clearing price) and higher charges to customers, while a lesser ICR (i.e., essentially lesser demand) will typically result in a lower price of capacity (i.e., a lower clearing price) and lower charges to customers.³⁵

³⁴ Order Approving Settlement at P 20.

³⁵ ISO New England, Inc., 120 FERC ¶ 61,234 at P 26 (2007).

2. ICR Affects the Total Costs Borne by Load.

ICR also directly affects price because it sets a quantity of capacity to be procured, and the level of that quantity times the rate equals the total wholesale charge borne by load. The CT DPUC admits this very fact, but seeks to minimize its import. As the Commission has found: “Each load-serving entity, as the ultimate purchaser of capacity, is required to pay for a share of the installed capacity requirement proportionate to its share of peak load.”³⁶ Thus, ICR is a central part of, or at a minimum directly affects, the wholesale charge to a market participant.

The FCM Rules clearly set out the interrelationship between the ICR and costs borne by load, as follows:

A load serving entity’s Capacity Requirement for each month and Capacity Zone shall equal the product of: (i) the total Installed Capacity Requirement (adjusted for HQICCs); and (ii) the ratio of the sum of the load serving entity’s annual coincident contributions to the system-wide annual peak load in that Capacity Zone from the calendar year ending December 31 of the year prior to the start of the upcoming Capability Year to the system wide sum of all load serving entities’ annual coincident contributions to the system-wide annual peak load from the calendar year ending December 31 of the year prior to the start of the upcoming Capability Year.³⁷

Thus, ICR functions within the FCM to establish the resource adequacy needs of the region; to set the Capacity Clearing Price by pricing that amount of capacity; and to allocate the costs to load.

Through the years, this Commission has considered various market mechanisms, and the courts have recognized FERC’s jurisdiction over various elements of the market mechanisms,

³⁶ Order Approving Settlement at P 20.

³⁷ FCM Rule III.13.7.3.1.

including the level of ICR (or its equivalent) used in the installed capacity market³⁸ and the associated deficiency charges.³⁹ ICR is integral to the New England market mechanism. As the Commission correctly noted, “ICR is one of the principal determinants of the price of capacity, and, therefore, falls within the Commission’s jurisdiction to review ‘any rate, charge or classification’ charged by a public utility for electric transmission or sales subject to Commission jurisdiction, and ‘any rule, regulation, practice, or contract affecting such rate, charge or classification.’”⁴⁰

C. The CT DPUC Ignores The Applicable Statutory Provisions And Relevant Case Law And Attempts To Cloud The Jurisdictional Issue.

1. Neither Section 201(b), 207 Nor 215 Of The FPA Overturn This Commission’s Broad Statutory Authority Over ICR.

Disregarding this Commission’s broad authority under FPA Sections 205 and 206, the CT DPUC argues that Sections 201(b)(1), 207 and 215 of the FPA deprive this Commission of authority over ICR.⁴¹ However, none of these sections are applicable to FERC jurisdiction over ICR. Section 201(b)(1) grants a limited exception to the FPA for state regulation of generating facilities; however, ICR (1) does not regulate generating facilities and (2) falls outside the limited exception. Sections 207 and 215 are not at issue here. Their prohibition against this Commission’s mandating construction or expansion of generating facilities therefore do not apply. Even if they did apply, ICR does not mandate either construction or expansion of generating facilities.

³⁸ *Sithe New England Holdings v. FERC*, 308 F.3d 71 (1st Cir. 2002); *Central Maine Power Co. v. FERC*, 252 F.3d 34, 40 (1st Cir. 2001).

³⁹ *Municipalities of Groton v. FERC*, 587 F.2d 1296 (D.C. Cir. 1978).

⁴⁰ February 21 Order at P 10.

⁴¹ CT DPUC Rehearing Request at 13-15, 18-19.

In maintaining that Section 201(b)(1) precludes this Commission from exercising jurisdiction over generation facilities, the CT DPUC quotes Section 201(b)(1)'s directive that FERC "shall not have jurisdiction, *except as specifically provided in this Part and the Part next following*, over facilities used for the generation of electric energy . . ."⁴² The italicized phrase authorizes FERC to regulate wholesale rates and charges in interstate commerce pursuant to FPA Sections 205 and 206 -- even if those rates and charges result from a sale from "generation."⁴³ In *Mississippi Industries*, the D.C. Circuit cited the Supreme Court for the proposition that Section 201(b) does not exclude from FERC jurisdiction those generating facilities used for interstate wholesale sales.⁴⁴ Here, the CT DPUC seeks to use FPA Section 201(b)(1) to constrict FERC's Section 205 jurisdiction which is directly contrary to the D.C. Circuit's finding in *Mississippi Industries*⁴⁵ that the opposite is true: Section 205 limits the exception provided in Section 201(b). In asserting that FERC has overreached its authority by making determinations regarding interstate wholesale charges which may (or may not) entail generating facilities, the CT DPUC is, in effect, reading out the crucial "except for" portion of FPA Section 201(b).⁴⁶

The CT DPUC also relies on Section 207 of the FPA,⁴⁷ which, as the CT DPUC notes, provides that "the Commission shall have *no authority to compel the enlargement of generating facilities*' for the purpose of furnishing '*proper, adequate, or sufficient service*.'"⁴⁸ Beyond the fundamental fact that the Commission is not compelling "the enlargement of generating

⁴² 16 U.S.C. § 824(b)(1) (emphasis added).

⁴³ *Mississippi Industries*, 808 F.2d at 1544.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1534-35.

⁴⁶ 16 U.S.C. § 824(b).

⁴⁷ 16 U.S.C. § 824f.

⁴⁸ CT DPUC Rehearing Request at 13.

facilities” when it regulates ICR, Section 207’s prohibition only applies, as the CT DPUC acknowledges, “when a state commission complains about inadequate or insufficient interstate service.”⁴⁹ Such circumstances are not present in this proceeding. Section 207, on its face, does not apply here, lacks any relationship to FERC’s ICR determinations, and does not in any way operate to deprive FERC of its jurisdiction over this interstate capacity issue.

Similarly, the CT DPUC’s reliance on Section 215 of the FPA is misplaced. The CT DPUC states that Section 215 provides that in setting reliability standards, the Commission’s authority “does not include any requirement to . . . construct new . . . generation capacity.”⁵⁰ This is true. However, first, Section 215 is not being invoked in this proceeding. Second, because Section 215 both calls for reliability standards and precludes a mandate by this Commission of constructing new generation, it recognizes that this Commission is able to regulate ICR without mandating construction or enlargement of generation facilities.

2. Consistent With Supreme Court Precedent, ICR Is An Obligation Of Purchasers, Not Generators; Thus, It Is Not Subject To The Generating Facilities Exception In Section 201(b) Of The FPA.

ICR is a requirement placed upon purchasers in the wholesale market, not one placed upon generating facilities or their owners. Recognizing the difference between the two concepts—regulating the purchaser and regulating the generator—assists in understanding the Section 201(b) exemption for generating facilities. This difference was explored in cases examining the Natural Gas Act⁵¹ on which the CT DPUC wrongly relies.

The Natural Gas Act is similar in many ways to the Federal Power Act. For example, while the Federal Power Act includes an exemption for generating facilities (except as

⁴⁹ *Id.*

⁵⁰ CT DPUC Rehearing Request at 13.

⁵¹ 15 U.S.C. § 717 *et seq.*

specifically provided),⁵² the Natural Gas Act includes an exemption for production of natural gas.⁵³ The Supreme Court has explained how this exemption for production coexists with the broad mandate of Commission regulation of natural gas in interstate commerce.

In *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*,⁵⁴ the Supreme Court decided that the State Corporation Commission of Kansas was not precluded from regulating the timing of production of natural gas from a gas field. The Court in *Northwest Central* carefully distinguished *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*⁵⁵ and *Transcontinental Pipe Line Corp. v. State Oil and Gas Bd. of Mississippi*,⁵⁶ two prior cases which found that states were pre-empted from requiring purchasers to take gas ratably from producers. The Court explained:

In both *Northern Natural* and *Transco*, States had crossed the dividing line so carefully drawn by Congress in NGA § 1(b) and retained in the NGPA, trespassing on federal territory by imposing purchasing requirements on interstate pipelines. In this case, on the contrary, Kansas has regulated production rates in order to protect producers' correlative rights—a matter firmly on the States' side of that dividing line.⁵⁷

The distinction between *Northwest Central* on the one hand, and *Northern Natural* and *Transco*, on the other, was that the former case was directed at producers, a matter at least sometimes reserved to the state,⁵⁸ and the latter were directed at purchasers in interstate commerce, a matter beyond the states' purview.

⁵² 16 U.S.C. § 824(b)(1).

⁵³ 15 U.S.C. § 717(b).

⁵⁴ *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493 (1989) (“*Northwest Central*”).

⁵⁵ 372 U.S. 84 (1963).

⁵⁶ 474 U.S. 409 (1986).

⁵⁷ *Northwest Central*, 489 U.S. at 514.

⁵⁸ Compare *FPC v. Panhandle E. Pipeline Co.*, 337 U.S. 498 (1949) where the Court found this Commission lacked jurisdiction over leases for undeveloped gas reserves and *United Gas*

ICR falls on the *Northern Natural* and *Transco* side. It is a requirement of purchasers, not of generators. ICR requires those purchasers to have sufficient supply or demand resources so that the region operates reliably and, to the extent they buy capacity, it is capacity in the interstate wholesale market. As the Court noted in *Northwest Central*:

In *Northern Natural*, we held that ratable-take orders “invalidly invade[d] the federal agency’s exclusive domain” precisely because they were “unmistakably and unambiguously directed at *purchasers*.” 372 U.S. at 92, 83 S.Ct. at 651 (emphasis in original). Interstate pipelines operate within the field reserved under the NGA for federal regulation, buying gas in one State and transporting it for resale in another, so inevitably the States are pre-empted from directly regulating these pipelines in such a way as to affect their cost structures. *Ibid.*⁵⁹

Similarly, ICR is a regional requirement, involving purchases of capacity at wholesale, in interstate commerce.

Improvement Co. v. Continental Oil Co., 381 U.S. 392 (1965), where the Court found that this Commission had jurisdiction over the sale of leasehold interests in a proven and substantially developed natural gas field used for sales of natural gas at wholesale.

⁵⁹ *Northwest Central*, 489 U.S. at 513-514 (footnote omitted).

IV. CONCLUSION

For the foregoing reasons, the ISO respectfully requests that the Commission deny the CT DPUC's Rehearing Request of the February 21 Order.

Respectfully submitted,

/s/ Sherry A. Quirk, Esq.

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Dated: March 14, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2007), upon each person designated on the official service list in this proceeding as compiled by the Secretary of the Federal Energy Regulatory Commission.

Dated at Washington, D.C., this 14th day of March, 2008.

/s/ Sherry A. Quirk
Sherry A. Quirk