

122 FERC ¶ 61,144
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ISO New England, Inc.

Docket No. ER05-715-002

ORDER ON REMAND

(Issued February 21, 2008)

1. In this order on remand, we explain the basis for the Commission's jurisdiction over the filing at issue in this proceeding – ISO New England, Inc.'s (ISO-NE) Power Year 2005/2006 Installed Capacity Requirements (ICR) for the New England Control Area.

Background

2. For over 20 years, ISO-NE has imposed ICRs on its members in order to maintain adequate system reliability.¹ The ICR is a projection of the minimum amount of capacity required to serve load reliably in the New England region. The ICR is used to determine the monthly unforced capacity (UCAP) requirements (with various adjustments) that each market participant must purchase. ISO-NE calculates the ICR to meet system design criteria with a Loss of Load Expectation of one day in ten years. To meet their UCAP obligations, market participants must self-supply, purchase UCAP through bilateral transactions, or obtain capacity credits from tie-line benefits, or they must make up any deficiencies in the ISO-NE administered installed capacity market. The ICR directly affects the determination of the clearing price in the capacity market and so affects the charges to customers. If a market participant does not have or acquire sufficient capacity, it must pay a deficiency rate.

3. On March 21, 2005, as supplemented on April 1, 2005, ISO-NE filed its ICR for the 2005/2006 Power Year. The Connecticut Department of Public Utility Control (CT

¹ Prior to the existence of the ISO-NE the requirements were imposed on the members of the New England Power Pool (NEPOOL), and the ICR was then called NEPOOL's Objective Capability (OC).

DPUC) protested the substance of the ICR and also argued that the Commission does not have jurisdiction to regulate resource adequacy, a matter the CT DPUC argued that the Federal Power Act (FPA) leaves to the states. The Commission accepted ISO-NE's 2005/2006 Power Year ICR with modifications.² On appeal, the U.S. Court of Appeals for the District of Columbia Circuit, without addressing the merits, remanded the issue of jurisdiction to the Commission for an explanation of the basis for the Commission's jurisdiction.³

4. The CT DPUC has raised the same argument, that the Commission lacks jurisdiction over ICR, in response to two other relatively recent ISO-NE filings. The first of those proceedings involved ISO-NE's filing a tariff change to revise the processes and methodologies used to determine ICR. In response to that filing the Commission accepted the tariff changes and explained the basis of its jurisdiction.⁴ The CT DPUC has appealed that decision.⁵ The second of those proceedings involved ISO-NE's filing its ICR for the 2007/2008 Power Year. The Commission accepted the ISO-NE's 2007/2008 Power Year ICR, and again explained the basis of its jurisdiction.⁶ The CT DPUC has also appealed that decision.⁷ Consistent with the orders in those two proceedings, and as discussed below, the Commission finds that it has jurisdiction over the ICRs.

Discussion

5. The CT DPUC asserts that the Commission does not have jurisdiction to establish ICRs. The CT DPUC argues that the FPA expressly directs that the Commission "shall not have jurisdiction . . . over facilities used for the generation of electric energy." The CT DPUC argues that, while the Commission has the authority to establish the price of

² *ISO New England, Inc.*, 111 FERC ¶ 61,185, *reh'g denied*, 112 FERC ¶ 61,254 (2005).

³ *Connecticut Department of Public Utility Control v. FERC*, 484 F.3d 558 (D.C. Cir. 2007).

⁴ *ISO New England, Inc.*, 118 FERC ¶ 61,157, *reh'g denied*, 120 FERC ¶ 61,234 (2007).

⁵ *Connecticut Department of Public Utility Control v. FERC*, No. 07-1375 (D.C. Cir. filed September 19, 2007).

⁶ *ISO New England, Inc.*, 119 FERC ¶ 61,161, *reh'g denied*, 121 FERC ¶ 61,125 (2007).

⁷ *Connecticut Department of Public Utility Control v. FERC*, No. 07-1460 (D.C. Cir. filed November 13, 2007).

capacity and how capacity requirements will be allocated among load serving entities, it does not have jurisdiction to dictate the amount of ICR that must be purchased.

6. We begin our analysis of the Commission's resource adequacy jurisdiction with the FPA. FPA section 201(b)(1) confers jurisdiction on the Commission over the transmission of electric energy in interstate commerce, and sales of electric energy at wholesale in interstate commerce.⁸ Further, FPA section 205(a) states that:

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.^[9]

Thus, the FPA confers upon the Commission the responsibility for ensuring that transmission and wholesale power sales rates and charges, including any rule, regulation, practice or contract affecting them, are just and reasonable and not unduly discriminatory.

7. In *Mississippi Industries v. FERC*,¹⁰ the court recognized the connection between the allocation of capacity and wholesale rates. In that proceeding, the Commission had altered the allocation of capacity and costs of a nuclear generation plant among operating companies of an integrated utility system. Petitioners asserted that, in allocating the cost and capacity of the nuclear plant, the Commission had asserted jurisdiction over generating facilities in direct violation of the FPA section 201(b) prohibition against Commission regulation of generating facilities. Petitioners asserted that "reallocating generation costs falls outside of FERC's rate making jurisdiction and instead falls solely within state authority over generation."¹¹ The court rejected the claim that this action was beyond the Commission's FPA jurisdiction. Instead, it found that the Commission has authority over the allocation of capacity among market participants because this

⁸ 16 U.S.C. § 824(b)(1) (2000).

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

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

¹¹ *Id.* at 1543.

allocation affects wholesale rates. The court stated, “[c]apacity costs are a large component of wholesale rates” and therefore the share of the capacity costs of the system carried by each affiliate will significantly affect the wholesale price it pays for energy.¹² While the allocation of capacity did not set sales prices, it directly affects costs and “consequently, wholesale rates”¹³ and therefore “FERC’s jurisdiction under such circumstances is unquestionable.”¹⁴ The court further noted that:

Petitioners ignore the critical point here that, while these provisions [allocating capacity] do not fix wholesale rates, their terms do directly and significantly *affect* the wholesale rates at which the operating companies exchange energy, due to the highly integrated nature of the . . . system.^[15]

8. Similarly, in *Municipalities of Groton v. FERC*,¹⁶ the court upheld the Commission’s authority to review section 9.4(d) of the New England Power Pool Agreement which included a capacity deficiency charge for each participant in the agreement whose prescribed level of generating capacity, known as “capability responsibility,” fell by more than one percent below the set level. The court found that these capacity deficiency charges were within the Commission’s jurisdiction because they were under “the Commission’s inclusive jurisdictional mandate – which reaches discriminatory practices ‘with respect to’ jurisdictional transmissions, or ‘affecting’ such transmissions or services. . . .”¹⁷ The court further stated:

[i]t is sufficient for jurisdictional purposes that the deficiency charge affects the fee that a participant pays for power and reserve service, irrespective of the objective underlying that charge. This is well within the Commission’s authority as delineated in other court opinions.^[18]

9. As noted above the Commission likewise has recently addressed this question as it involves resource adequacy in New England. Specifically, in two proceedings involving

¹² *Id.* at 1541.

¹³ *Id.*

¹⁴ *Id.* (citing *Nantahala Power & Light Co.*, 426 U.S. 953 (1986)).

¹⁵ *Id.* at 1542.

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

¹⁷ *Id.* at 1302.

¹⁸ *Id.* (citing, e.g., *FPC v. Conway Corp.*, 426 U.S. 271 (1976)).

ISO-NE ICR filings,¹⁹ the CT DPUC argued that, while the Commission has the authority to establish the price of capacity and how capacity requirements will be allocated among LSEs, it does not have the jurisdiction to dictate the amount of ICRs that must be purchased.

10. We find here, as we did in our order addressing ISO-NE's revisions to its methodology for determining ICR,²⁰ that the ICR is one of the principal determinants of the price of capacity and, therefore, falls within the Commission's jurisdiction to review "any rate, charge or classification" charged by a public utility for electric transmission or sales subject to Commission jurisdiction, and "any rule, regulation, practice, or contract affecting such rate, charge or classification."²¹ ISO-NE's mechanism to determine ICRs is a "practice . . . affecting" the price of capacity, and as such falls within the Commission's jurisdiction.

11. As ISO-NE's ICRs have a significant and direct effect on jurisdictional rates and services, they therefore fall within the Commission's jurisdiction. This finding is fully consistent with *Mississippi Industries* and *Groton*. In *Mississippi Industries*, the Commission exercised jurisdiction over the allocation of the capacity of a nuclear generating plant, despite the fact that the FPA does not give the Commission jurisdiction over generating facilities (and indeed reserves that jurisdiction to the states).²² The court affirmed Commission jurisdiction because of the nexus between the allocation of capacity and the justness and reasonableness of jurisdictional rates under the Entergy System Agreement. The court in *Groton* undertook a similar analysis in upholding Commission jurisdiction in that case. In *Groton*, the Commission had asserted jurisdiction over a charge related to resource adequacy requirements in New England. The court upheld the Commission's order, finding that that the capacity deficiency charge affected jurisdictional rates and that jurisdiction therefore attached "irrespective of the objective underlying that charge."²³

¹⁹ See *supra* notes 4, 6.

²⁰ *ISO New England, Inc.*, 118 FERC ¶ 61,157 at P 15, 19-20, *reh'g denied*, 120 FERC ¶ 61,234 at P 25-30 (2007).

²¹ 16 U.S.C. § 824e(a) (2000).

²² *Mississippi Industries*, 808 F.2d at 1543-44.

²³ *Groton*, 587 F.2d at 1302.

12. We also note that, in *California Independent System Operator Corporation*,²⁴ the Commission addressed how the minimum resource adequacy requirements set forth in the Market Redesign and Technology Upgrade (MRTU) Tariff have an effect on jurisdictional rates and services. The Commission explained that:

where an interconnected transmission system is operated on [a] regional basis as part of an organized market for electricity, as in California, all users of the system are interdependent, particularly with respect to reliability, *i.e.*, one participant's reliability decisions can impact the reliability of service available to other participants and the related costs the other participants must bear. . . . We find that, in situations where one party's resource adequacy decisions can cause adverse reliability and costs impacts on other participants in a regionally operated system, it is appropriate for us to consider resource adequacy in determining whether rates remain just and reasonable and not unduly discriminatory.^[25]

13. More recently, in the CAISO Rehearing Order, we reaffirmed our finding on jurisdiction.²⁶ We found that the adequacy of resources can have a significant effect on jurisdictional rates and services and, therefore, is subject to Commission jurisdiction. We again found that the FPA confers upon the Commission the responsibility for ensuring that jurisdictional rates and charges -- including any rule, regulation, practice or contract affecting them -- are just and reasonable and not unduly discriminatory or preferential.²⁷

²⁴ 116 FERC ¶ 61,274, at P 1113 (2006) (CAISO Order), *order on reh'g*, 119 FERC ¶ 61,076 (2007) (CAISO Rehearing Order).

²⁵ CAISO Order at P 1113.

²⁶ *See* CAISO Rehearing Order, 119 FERC ¶ 61,076, at P 521-64; *accord*, *New York State Reliability Council*, 118 FERC ¶ 61,179, at P 31(2007), *order on reh'g*, 122 FERC ¶ 61,153 (2008).

²⁷ *Id.*; 16 U.S.C. §§ 824d, 824e (2000). We agree, however, that as a general matter a state or region may determine in the first instance the appropriate level of planning reserves by balancing reliability and cost considerations. Thus, in the CAISO Order, we noted that "it is our responsibility to ensure that a workable resource adequacy requirement exists in a market such as that operated by the CAISO. This does not mean that we must determine all the elements of such a program in the first instance. Rather, we can, in appropriate circumstances, defer to state and Local Regulatory Authorities to set those requirements. CAISO Rehearing Order, 119 FERC ¶ 61,076 at P 558 (*citing* CAISO Order, 116 FERC ¶ 61,274 at P 1117).

14. The Commission acknowledges that FPA section 201 puts limits on the Commission's jurisdiction as it relates to electrical generating capacity. In approving the ICR filing, however, the Commission is not exercising authority over electrical generating capacity or setting the amount of generating capacity that states must build (or require to be built). Rather the Commission is reviewing the means by which ISO-NE determines the amount of resources member load serving entities (LSEs) must provide (which leads ultimately to a determination of the amount of resources each state's LSEs must provide), which as described above directly affects the charges to customers.

15. It is also critical to distinguish between ISO-NE's "capacity" requirement and "electrical generating capacity." In essence, "capacity" (the ability to provide electric energy to serve load, when called by ISO-NE) is the product, and electrical generating capacity is one means, but not the only means, of producing that product. For example, assume that within a particular state, ISO-NE determines that an LSE must provide 100 MW of capacity (in addition to the capacity that the LSE currently has). This does not mean that the LSE must necessarily construct, and the state must permit the construction of, 100 MW of new electrical generating capacity. The LSE could fulfill its capacity obligation to ISO-NE by constructing new electrical generating capacity but it could also add 50 MW of demand response²⁸ and 50 MW of capacity contracts (from inside or outside the state), or any mix of the above. If a state wishes to place controls on the amount or type of electrical generating capacity built within that state, or at particular locations within that state, the Commission's regulation of ISO-NE's calculation of ICR does not prevent it from doing so.²⁹ The capacity requirement that ISO-NE places on an individual LSE may be a factor in a state's ultimate determination as to how much electrical generating capacity is built, and where and by whom. These are not, however, the same determinations, and it is inaccurate to conflate the two.

16. While currently the majority of the New England states' capacity needs are met through electrical generating capacity, this does not mean that that will remain the case in the future. Nothing in the ICR requirement prevents a state from requiring its LSEs to meet capacity requirements through demand response, or through contracts to purchase

²⁸ Demand response reduces load to be served, so that less electrical generating capacity is needed to serve load.

²⁹ See, e.g., *Jersey Central Power & Light Company v. Atlantic City Electric Co.*, 111 FERC ¶ 61,179 at P 10, 24-25, 27, *order on reh'g*, 113 FERC ¶ 61,237 at P 6-7, 47-48, 54-58 (2005), *reh'g denied*, 116 FERC ¶ 61,256 at P 13-15 (2006) (complainant sought relief from Commission-jurisdictional contract obligation to build facilities on the basis that, among other reasons, environmental regulation by the State of New Jersey prevented it from fulfilling its contract obligation; Commission responded that contract already contemplated that facilities might not be built and already provided complainant with options such as construction of other facilities).

power (from resources located inside or outside the state), or through more environmentally-friendly generation, or, generally speaking, through resources that meet state health or environmental or land-use planning goals. In essence, ISO-NE says to its LSEs, "Provide X amount of resources." But *how* those resources are provided is up to the LSEs and the states.

17. Therefore, we find that the Commission has jurisdiction to consider and accept ISO-NE's 2005/2006 Power Year ICR.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.