

ORAL ARGUMENT NOT YET SCHEDULED

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

No. 07-1375, et al.

CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

**BRIEF OF INTERVENOR ISO NEW ENGLAND INC.
IN SUPPORT OF RESPONDENT**

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September 2, 2008

**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 Amici.

All parties, intervenors and amici appearing before the Federal Energy Regulatory Commission and this Court are listed in the Brief for Petitioner.

B. Rulings Under Review.

References to the rulings at issue appear in the Brief for Petitioner.

C. Related Cases.

This appeal addresses ISO New England's Installed Capacity Requirement. The Order on Remand, *ISO New England, Inc.*, 122 FERC ¶ 61,144, and Order Denying Rehearing, *ISO New England, Inc.*, 123 FERC ¶ 61,036, are on remand from this Court's decision in *Connecticut Department of Public Utility Control v. FERC*, 484 F.2d 558 (D.C. Cir. 2007), which reviewed earlier Commission orders asserting jurisdiction over the Installed Capacity Requirement. In addition, the Court in *Maine Public Utilities Commission v. FERC*, 520 F.3d 464 (D.C. Cir. 2008), held that ISO New England's Forward Capacity Market (of which the Installed Capacity Requirement is an element) is subject to Commission jurisdiction, but specifically reserved the question presented here.

Except as described above, 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.

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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 Inc. has no corporate parents and no publicly held company owns a 10 percent or more interest in ISO New England Inc.

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GLOSSARY OF ABBREVIATIONS

DPUC	Connecticut Department of Public Utility Control
FERC	Federal Energy Regulatory Commission
FCM	Forward Capacity Market
FPA	Federal Power Act
ICR	Installed Capacity Requirements
ISO	ISO New England Inc.
NEPOOL	New England Power Pool
2007/2008 ICR Filing	<i>ISO New England Inc.</i> , Docket No. ER07-655-000, 2007/2008 Power Year Installed Capacity Requirements, filed on March 23, 2007.
2007/2008 Order	<i>ISO New England Inc.</i> , 119 FERC ¶ 61,161 (May 18, 2007).
2007/2008 Rehearing Order	<i>ISO New England Inc.</i> , 121 FERC ¶ 61,125 (Nov. 1, 2007).
ICR Rules Filing	<i>ISO New England Inc. and New England Power Pool Participants Committee</i> , Docket No. ER07-365-000, Revisions to Market Rule 1 Relating to the Methodology for Calculating Installed Capacity Requirements, filed on December 22, 2006.
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ICR Rules Rehearing Order	<i>ISO New England Inc. and New England Power Pool</i> , 120 FERC ¶ 61,234 (Sept. 14, 2007).
2005/2006 ICR Filing	<i>ISO New England Inc.</i> , Docket No. ER05-715-000, 2005/2006 Power Year Installed Capacity Requirements (Objective Capability Values), filed on March 21, 2005.
Remand Order	<i>ISO New England, Inc.</i> , 122 FERC ¶ 61,144 (Feb. 21, 2008).
Final Order on Remand	<i>ISO New England, Inc.</i> , 123 FERC ¶ 61,036 (Apr. 17, 2008).

I. STATUTES AND REGULATIONS

All statutes cited are attached.

II. STATEMENT OF THE CASE

ISO concurs with Respondent's Statement of the Case.

III. SUMMARY OF ARGUMENT

Contrary to Petitioner DPUC's arguments, ICR establishes the amount of capacity necessary for New England regional reliability and is a key input to the wholesale megawatt price. Thus, it is a "principle determinant of rates and charges," and FERC-jurisdictional pursuant to FPA Sections 205 and 206.

DPUC's case relies upon inaccurate factual assumptions and its similarly flawed conclusions are contrary to judicial and FERC precedent. Facts demonstrate that ICR is a regional calculation that has not been performed by the states, does not require states to construct generation, and does not deprive states of their jurisdiction over generating facilities.

If FERC could not set ICR, states could adhere to individual self-interest, harming both reliability and costs in other states. The FPA was enacted to regulate electricity in interstate commerce and harmonize competing state interests. Based upon the law and for good reason, FERC has jurisdiction over the regional wholesale markets in New England and, thus, over ICR.

IV. ARGUMENT

A. Standard of Review

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

B. The States Erroneously Portray ICR as Requiring Generation to be Installed Within a State.

1. ICR is a Regional Calculation That Has Not Been Done on a State by State Basis.

DPUC's jurisdictional argument rests on representations that are divorced from how regional installed capacity requirements ("ICR") are established in New England under the FCM market design, and how they have been established historically. When ICR -- the quantity of capacity required for the integrated New England region -- is placed in its proper factual context, Commission jurisdiction is clear. ICR is the minimum amount of capacity required to serve load reliably throughout the integrated, highly interconnected electric system in the New England region.¹ ICR is an *interstate* capacity requirement. ICR can be met through generation, as well as other resources, including demand response -- a resource that "reduces load to be served, so that less electrical generating capacity is needed to serve load."²

¹ *ISO New England Inc.*, 123 FERC ¶ 61,290 at P 18, n.19 (2008); 2005/2006 ICR Filing at 6; JA ___.

² Remand Order at P 15, n.28; JA ___.

ISO is the independent, non-profit entity that serves as the regional transmission organization (“RTO”) for New England. With significant input and review from all regional stakeholders (including representatives of all six New England states),³ ISO computes the ICR for the New England electric control area and makes FPA Section 205 filings for FERC approval. ISO operates New England’s bulk power system.

The nature of ICR and how it is calculated reveals that it is an inherently regional determination and a critical component of wholesale rates, requiring assumptions across the entire New England interstate region. ICR is calculated to ensure that non-interruptible customers in New England are not disconnected from the system more than once in every ten years as a result of insufficient capacity.⁴ Over the years ICR has been and is based on assumptions drawn from region-wide data and studies developed by two regional entities: previously by NEPOOL and now by ISO.

ISO derives ICR by evaluating the New England region as a whole, based upon the amount of load and resources, and the factual premise that resources located anywhere in the region can serve load in any of the states within the region.

³ ICR Rules Filing at 9; JA ___.

⁴ This is the “Loss of Load Expectation” or “LOLE” standard, a system requirement which helps ensure system reliability. 2007/2008 ICR Filing at 5; JA ___.

In technical terms, the capacity model used to calculate ICR is a one bus model and the New England transmission system is assumed to have no constraints in this simulation. In other words, all the modeled resources are assumed to be deliverable to meet forecasted load. This means that ICR is being computed for the region as a whole, with each state relying on the other states' resources, not by totaling six state ICR determinations as DPUC would have this Court believe.

Total forecasted load for New England is one of the assumptions underlying the ICR calculations.⁵ To forecast load for the region, peak loads used in ICR calculations are system-wide in nature and not utility- or state-specific.⁶ ISO adjusts load forecasts to reflect load reductions from demand resources that the ISO qualifies as resources for the FCM.⁷ ISO is uniquely informed regarding such needed inputs from the FCM, given ISO's role as administrator of the regional capacity market.

In addition, ISO considers characteristics of the various resources available to serve the forecasted system load, including generating units, demand resources, and capacity imports from outside the New England system. All of these are used

⁵ *Id.* at 6; JA ___.

⁶ *Id.*, Testimony at 13; JA ___.

⁷ *Id.*, Testimony at 18-19; JA ___.

to meet the region's needs and eligible to receive capacity payments in the FCM.⁸ No individual state has the regional scope and responsibility to make these determinations on behalf of the entire New England region, contrary to DPUC's claim that the states, individually or collectively, have jurisdiction over ICR.

ICR also reflects assumptions regarding "tie benefits," or the assumed emergency assistance that directly-connected neighboring areas may provide during capacity-shortage conditions in New England over interconnections, or ties, between their systems and New England's system.⁹ To determine tie benefits from the neighboring Canada and New York systems, load and resource assumptions must be made for the New England region, as well as neighboring interconnected systems. These assumptions are developed based on both public and confidential information available to ISO in its role as the independent, non-profit entity operating the wholesale electricity markets and transmission system in New England.¹⁰ Contrary to DPUC's contention, States are not best suited to perform this uniquely interstate function.¹¹ This fact is particularly noteworthy given that tie benefits are a vital, and sometimes controversial, component of the ICR

⁸ *Id.* at 15; JA ___.

⁹ 2005/2006 ICR Filing at 8-9; ICR Rules Filing, Testimony at 21-24; JA ___.

¹⁰ ICR Rules Filing, Testimony at 24; JA ___.

¹¹ DPUC Brief ("CB") at 22.

calculation.¹² Over the years, various stakeholders, including state regulators, have disagreed regarding the appropriate level of tie benefits available to the New England region, and the distribution of overall benefits among the different interconnections.¹³ Practically, if assumed tie benefit levels are too high, New England would be relying on emergency assistance from a neighboring area that may not be available when needed. Conversely, if the assumed tie benefit level is too low, the region would be requiring more capacity internally than is necessary to meet capacity requirements. Deriving appropriate tie benefits requires an analysis of the region as a whole. ISO's role as independent system operator and the regional stakeholder process it oversees have helped to facilitate determinations of reasonable tie benefit levels.

ISO computes ICR through simulating the New England bulk power system using the Westinghouse/ABB Capacity Model Program – which has been used to establish ICR in New England for at least the past 25 years, including in the proceedings below.¹⁴ This reliability modeling program calculates system reliability based on a range of assumptions, including projected transmission interconnection benefits from surrounding areas. Although DPUC dismisses the

¹² ICR Rules Filing at 11; JA ____.

¹³ *Id.* at 13; JA ____.

¹⁴ *Id.* at 8; JA ____.

assumptions as “subjective,”¹⁵ these sophisticated modeling techniques have facilitated regional reliability in New England over the several years in which they have been used.

DPUC erroneously suggests that Connecticut and other states have historically determined how much capacity must be installed within a state by determining ICR.¹⁶ The facts clearly demonstrate that the New England region, through a FERC-jurisdictional regional entity, has set overall capacity requirements for many years.

For several years, ICR for the New England System was set by NEPOOL, a tight power pool covering the six-state New England region.¹⁷ Authority to set ICR was transferred from NEPOOL to ISO when FERC approved RTO status for the ISO and accepted ISO Tariffs pursuant to FPA Section 205.¹⁸ Under this authority, ISO has established ICR and held auctions for capacity at wholesale. Under the previous installed capacity market ISO determined capacity

¹⁵ CB at 11.

¹⁶ “Well before FERC began to set resource adequacy requirements, Connecticut’s regulators and utilities enforced the principle that a specified quantity of generation facilities must be available to assure reliable system performance.” CB at 15.

¹⁷ Remand Order at P 2, n.1; JA ___.

¹⁸ *ISO New England Inc.*, 106 FERC ¶ 61,280, *order on reh’g* 109 FERC ¶ 61,147 (2004), 110 FERC ¶ 61,111 (2005).

requirements and each Market Participant's proportional share of the system capacity requirement. Under the current FCM Settlement, as upheld by this Court, the amount of capacity necessary to maintain the regional ICR is purchased through a Forward Capacity Auction in advance.¹⁹

DPUC inaccurately suggests that states have performed the role of setting ICR.²⁰ DPUC's discussion of the history of resource reliability in New England sets forth a faulty factual basis for examining FERC's jurisdiction over ICR. First, DPUC states that "Connecticut has long had a comprehensive statutory scheme for establishing resource adequacy"²¹ and "has exercised its traditional authority over resource adequacy in comprehensive and detailed proceedings."²² DPUC intimates that Connecticut and other New England states, individually, have historically established state-level resource reliability requirements. Yet, DPUC has not cited a single case where a New England state has set the equivalent of ICR.²³ Nor can it – prior to ISO's establishment, NEPOOL calculated capacity

¹⁹ *Maine Public Utilities Commission v. FERC*, 520 F.3d 464 (D.C. Cir. 2008); ICR Rules Filing at 6-7; JA __.

²⁰ CB at 15-18.

²¹ CB at 15.

²² CB at 16.

²³ Neither the Vermont case or Maine case relied on by DPUC involve setting the regional ICR or making any determination regarding regional capacity needs. CB at 18.

requirements for the region.

In support of its claimed “comprehensive statutory scheme for establishing resource adequacy,”²⁴ DPUC cites various state statutes; however, none of the referenced statutory provisions confirm state authority to set ICR.²⁵ DPUC also cites the “Report to the Joint Standing Committee on Energy and Public Utilities of the Connecticut General Assembly” (“1985 Report”) as evidence of its “traditional authority over resource adequacy in comprehensive and detailed proceedings.”²⁶

This over-20 year old report, which evaluates the consequences of excess capacity and alternatives for addressing it, in fact expressly states: “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.”²⁷

Additionally, DPUC defined “Objective Capability” (historically used to describe ICR) as “the system peak load plus reliability reserve capacity requirements as calculated for and by NEPOOL.”²⁸

²⁴ CB at 15.

²⁵ CB at 14-18.

²⁶ CB at 16.

²⁷ *Report to the Joint Standing Comm. on Energy & Pub. Utils. of the Conn. Gen. Assembly*, No. 84-07-12, 1985 Conn. PUC LEXIS 246 at *51 (Jan. 14, 1985) (“1985 Report”).

²⁸ 1985 Report at *101.

DPUC further alleges that states have used the same reliability standard as NEPOOL and ISO. "Like ISO-NE, NEPOOL, and FERC, all of the New England states have used the same widely accepted standards for resource adequacy - a loss of load probability of once in ten years."²⁹ However, since the formation of NEPOOL, the 1 day in 10 years LOLE resource adequacy planning criterion has been applied only at the regional level to develop installed capacity requirements. None of the cases cited by DPUC support any suggestion to the contrary.

The New England electric system is highly interconnected, reflecting its status as a tight power pool. As such, this interstate system cannot be broken into six pieces for the purposes of determining ICR, as DPUC proposes. Such an effort is wholly inconsistent with the closely integrated nature of the New England region. Likewise, while DPUC correctly notes that initial steps have been taken to establish a Regional State Committee to consider ICR on a regional basis, such an entity has no FPA granted jurisdiction to determine ICR nor has it demonstrated any practical ability to do so.

2. Regulation of ICR Is Not Regulation of Generating Facilities.

a. ICR Is an Integral Part of a Wholesale Charge.

Pursuant to the FCM Settlement, New England has a regional Forward Capacity Market. There, demand-side resources and existing and new supply-side

²⁹ CB at 18 (citations omitted).

resources bid into a “Forward Capacity Auction” which procures ICR and establishes the per megawatt price based upon the highest accepted bid.³⁰ ICR is more than a “plug-in” number to a rate formula;³¹ it “directly affects charges to customers.”³²

Although DPUC argues that FERC bases jurisdiction solely on the “affecting rates” provision in the FPA,³³ FERC actually found that ICR is a “principle determinant of rates and charges.”³⁴ A Market Participant pays wholesale capacity charges based on ICR, both because the auction price is based upon ICR and each Market Participant must pay for a quantity of resources that is its allocated share of ICR.

b. ICR Does Not Deprive States of Jurisdiction over Generating Facilities.

Despite DPUC’s claims,³⁵ *nothing in the ICR requires a State to approve a new generating facility.* In fact, applicants for new resources seeking to qualify

³⁰ If ICR is 5,000 MW, the bid to supply the megawatt between 4,999 and 5,000 MW establishes the price.

³¹ CB at 39.

³² ICR Rules Rehearing Order at P 4; 2007/2008 Rehearing Order. at PP 26, 30; JA ___.

³³ CB at 46.

³⁴ 2007/2008 Rehearing Order at P 33; ISO Rules Order at P 15; JA ___.

³⁵ *See, e.g.*, CB at PP 23, 33, 52.

for the Forward Capacity Auction must identify major federal, state and local permits required, include a critical path for obtaining such permits, and document its application for and receipt of each major permit.³⁶

DPUC asserts that, because generating facilities have provided most of the capacity needed to meet ICR, FERC regulation of ICR is regulation of generating facilities.³⁷ In fact, ICR is a number, in megawatts, which must be met for regional reliability. As FERC found, ICR does not direct how the region -- or any state -- will meet that number and does not interfere with a state's ability to regulate generating facilities.³⁸

DPUC argues that its recent action in contracting for new generation “demonstrate[s] the essential role that generation facilities play in providing required resource adequacy.”³⁹ Neither FERC nor ISO has ever disputed that generation plays a key role in resource adequacy. However, this is totally beside the point. In two recent decisions,⁴⁰ DPUC ordered the signing of contracts for

³⁶ ISO New England Inc. Transmission, Markets and Services Tariff, FERC Electric Tariff No. 3, Section III.13.1.1.2.2.2.

³⁷ CB at 12-13, 33-34.

³⁸ ICR Rules Rehearing Order at P 29; JA ___.

³⁹ CB at 36-37.

⁴⁰ *DPUC Review of Energy Independence Act Capacity Contracts*, No. 07-04-24, 2007 Conn. PUC LEXIS 219 (Conn. D.P.U.C. Aug. 22, 2007); *DPUC Review of Peaking Generation Projects*, No. 08-01-01, 2008 Conn. PUC LEXIS

roughly 1,460 MW of new generating capacity – the 782 MW referenced by DPUC and 678 MW in a subsequent docket. While DPUC would have this Court believe that FERC ordered this action or that the regional establishment of ICR forced this result, this perception would be wholly inaccurate. Instead, Connecticut undertook the purchase of 1,460 MW of generation to protect reliability and reduce prices in New England’s markets for capacity, reserves and, potentially, energy.⁴¹

DPUC’s assertion in its brief that FERC was “requiring Connecticut to expand its generation facilities,” is inaccurate. Neither DPUC order cites any FERC “requirement” for the State to “expand its generating facilities.” Rather, those orders in which DPUC elected whether and how much generation to procure demonstrate quite a different situation. In both cases, DPUC evaluated varying projects to determine which combination of resources would have the most favorable result for customers, both from reliability and price perspectives.

126 (Conn. D.P.U.C. June 25, 2008) (“Peaking Decision”). Selected bidders were GenConn, a joint venture of United Illuminating and NRG; PSEG; and Bridgeport Energy II.

⁴¹ Peaking Decision at *1.

C. FERC Jurisdiction Over Regional Reliability Facilitates Interstate Reliability and Prevents Parochialism.

1. The FPA Contemplated FERC Jurisdiction over Interstate Reliability.

DPUC argues that FPA Sections 201(a) and 201(b)(1)⁴² preclude FERC from setting interstate electric reliability requirements.⁴³ In fact, the FPA was enacted to give FERC plenary jurisdiction over interstate commerce in electricity.⁴⁴

First, DPUC quotes FPA Section 201(a), which states that FERC authority “extend[s] only to those matters which are not subject to regulation by the States.”⁴⁵ This quotation must be read in the context of the history of the FPA, adopted in response to *Attleboro*,⁴⁶ where the Supreme Court held that states could not constitutionally regulate electricity in interstate commerce. That decision resulted in a regulatory gap, which the FPA filled.

As the Supreme Court found in *So. Cal. Edison*, even where a state did or could regulate sales in interstate commerce, the FPA reserved to FERC the ability

⁴² 16 U.S.C. §§ 824(a) and 824(b)(1) (2000).

⁴³ CB at 29, 33.

⁴⁴ *FPC v. So. Cal. Edison*, 376 U.S. 205, 216 (1964).

⁴⁵ CB at 30, quoting 16 U.S.C. § 824(a).

⁴⁶ *Pub. Util. Comm’n of Rhode Island v. Attleboro*, 273 U.S. 83 (1927).

to do so.⁴⁷ A state would be able to regulate a matter affecting interstate commerce only if (1) FERC disavowed jurisdiction and (2) the effects on interstate commerce are merely incidental.⁴⁸ Here, FERC has asserted jurisdiction, and the effects on interstate commerce are potentially enormous.

Second, DPUC relies upon language in FPA Section 201(b)(1) denying FERC jurisdiction “*except as specifically provided in this subchapter and subchapter III, over facilities used for the generation of electric energy.*”⁴⁹ DPUC argues that the FPA has no “specific provision” authorizing FERC jurisdiction over ICR.⁵⁰ Ohio argues that such “specific provision” must include the words “generation” or “generating facilities.”⁵¹

However, FERC may regulate interstate rates for electricity, despite any incidental effect on generating facilities and the fact that neither FPA Section 205 nor 206 specifically mentions “generating facilities.” State regulatory commissions must honor FERC decisions regarding wholesale costs of generating

⁴⁷ *FPC v. So. Cal. Edison*, 376 U.S. at 216.

⁴⁸ *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm.*, 461 U.S. 375, 393-94 (1983).

⁴⁹ CB at 31, *quoting* 16 U.S.C. § 824(b)(1)(emphasis added).

⁵⁰ CB at 44-49.

⁵¹ Ohio Br. at 3.

facilities and interstate allocations of capacity even where such decisions impact retail rates.⁵²

In *Mississippi Industries*⁵³ this Court rejected arguments by two state regulatory Commissions that FPA Section 201(b)(1) precluded FERC from reallocating capacity and costs from the Grand Gulf nuclear power plant. This Court held that FERC has “jurisdiction over generating facilities ‘to the extent provided in other sections,’ including jurisdiction necessary to effectuate regulation of wholesale rates”⁵⁴ and recognized “that although allocating cost does, to some extent, result in the ‘regulation of matters relating to generation,’ such regulation is valid under the FPA when it is the byproduct of a legitimate exercise of FERC’s power to regulate wholesale rates” under FPA Sections 205 and 206.⁵⁵

DPUC attempts to distinguish *Mississippi Industries*, stating (1) “decisions about planning and building generation facilities” in New England are made by unaffiliated market participants, not an integrated system as in *Mississippi*

⁵² See *Mississippi Power & Light Co. v. Moore*, 487 U.S. 354 (1988); *Nantahala Power & Light v. Thornburg*, 476 U.S. 953 (1986).

⁵³ *Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir. 1987).

⁵⁴ *Id.* at 1544, 1545.

⁵⁵ *Id.* at 1543.

Industries;⁵⁶ and (2) *Mississippi Industries* involved capacity costs, not capacity.⁵⁷

Both are incorrect.

First, even DPUC acknowledges that the FCM “provides for a single, region-wide Installed Capacity Requirement” and that capacity in New England is “coordinated regionally as it has been for decades.”⁵⁸ Second, this Court stated that its decision in *Mississippi Industries* addressed allocation of *both* capacity and costs of a generating unit.⁵⁹ Similarly, in *Mississippi Power & Light*, the Supreme Court stated: “FERC’s exclusive jurisdiction applies not only to rates but also to power allocations that affect wholesale rates.”⁶⁰

Even if the tangential relationship between ICR and generating facilities subjects FERC to the FPA “generating facility exception,” FERC’s authority should be treated no differently than its authority to consider interstate capacity allocations or the cost of generation in wholesale ratemaking. All are FERC jurisdictional.

⁵⁶ CB at 54.

⁵⁷ CB at 23, 50-55.

⁵⁸ CB at 57-58.

⁵⁹ *Mississippi Industries*, 808 F.2d at 1542.

⁶⁰ *Mississippi Power & Light*, 487 U.S. at 371.

2. State Jurisdiction Over Interstate Reliability of Electricity Could Promote Parochialism.

ISO does not question the good faith of DPUC or other regulatory commissions. However, when a politically appointed or elected body in one state can seek to advantage itself vis-à-vis a similar body in another state, there is a potential for mischief. The same is true when one region, potentially New England, could benefit itself at the expense of other regions, New York and eastern Canada.

In *Attleboro*, the Supreme Court emphasized this 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 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.⁶¹

This Court also acknowledged that the FPA was designed to preclude one state from disadvantaging another state:

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

⁶¹ *Attleboro*, 273 U.S. at 90.

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.”⁶²

As this Court has recognized, 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.”⁶³

DPUC argues that FERC should always defer to states’ decisions on reliability determinations⁶⁴ and claims that the New England states would not undermine each other in setting reliability standards.⁶⁵ Yet, DPUC contemplates individual state reliability standards⁶⁶ or some yet to be determined standard by a yet to be finalized coalition among New England states.⁶⁷

States often participate in FERC proceedings and may propose capacity requirements that FERC may adopt, if they are just, reasonable and non-

⁶² *Mississippi Industries*, 808 F.2d at 1549, citing *Western Massachusetts Elec. Co.*, 23 FERC ¶ 61,025 at 61,064 (1983).

⁶³ *Mississippi Industries*, 808 F.2d at 1549.

⁶⁴ CB at 61-63.

⁶⁵ CB at 57-58.

⁶⁶ *See* CB at 16-18.

⁶⁷ CB at 62-63. DPUC argues that, sometime in the future, the states, ISO, and NEPOOL would develop a reliability plan. As the FERC found below: “There is no agreement among the New England states to establish the ICR and therefore nothing to which we could defer.” ICR Rules Order at P 21; ICR Rules Rehearing Order at P 48; JA ___.

discriminatory.⁶⁸ However, state interests often differ, and FERC must determine regional and national interests when considering interstate matters. For example, of 115 parties participating in negotiations leading to the FCM Settlement, only nine, including two of the six New England state regulatory commissions, opposed the Settlement.⁶⁹ Excluding FERC from deciding ICR could lead to as many as six different determinations within New England, with resulting reliability concerns; or lowered ICR for New England at the expense of neighboring regions.

DPUC suggested just such a problem when it declared that states could “balance weighty concerns about both electric reliability and costs.”⁷⁰ Essentially, one state could give increased weight to reliability and require adequate power reserves, while another could give increased weight to costs, accepting occasional blackouts. Because of the highly integrated nature of New England’s electric grid, the state choosing reliability would pay more but be subject to blackouts, while the state choosing lower costs could lean on the resources of the higher reliability state.

⁶⁸ 16 U.S.C. §§ 824d and 824e (2000).

⁶⁹ *Devon Power, LLC*, 117 FERC ¶ 61,133 at P 15, n.24 (2006).

⁷⁰ CB at 22.

Even if a group of New England states could reach consensus on ICR, their decision could understate capacity needs by placing costs ahead of reliability and seeking a “free ride” on neighboring systems. FERC has described this concern:

As long as regional reserves are made available to all, a load-serving entity can reduce its own reserve resource 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.⁷¹

As FERC found below, even if a state had no intention of obtaining a “free ride,” its decision could adversely impact reliability and costs in other New England states simply because of the interconnected nature of the grid.⁷²

States lack the pervasive authority to be the final arbiter of the level of capacity required for regional reliability. One State Commission cannot overrule another. If DPUC’s argument were adopted by this Court, *no regulatory body* would have jurisdiction to prevent an inadequate level of capacity in one New England state from adversely affecting reliability in other states, thus creating a new regulatory gap. Or, assuming all six states could agree, a level of ICR below the regional need could be adopted and, without FERC exercising jurisdiction, a similar gap would be created.

⁷¹ *Remedying Undue Discrimination Through Open Access Transmission Service*, 100 FERC ¶ 61,138 at P 472 (2002).

⁷² 2007/2008 Rehearing Order at P 42; JA ___.

V. CONCLUSION

The Court should deny the petition for review.

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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 June 21, 2007 in this Proceeding and Fed. R. App. P. 32(a)(7)(B), because this brief contains 4,485 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.

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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 second day of September, 2008.

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