

ORAL ARGUMENT IS NOT YET SCHEDULED

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

Nos. 07-1375, *et al.*

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

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

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

B. Rulings Under Review

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

1. Order Accepting Tariff Changes and Requiring Compliance Filing, *ISO New England, Inc., et al.*, 118 FERC ¶ 61,157 (February 28, 2007), JA 79.
2. Order Denying Rehearing, *ISO New England, Inc., et al.*, 120 FERC ¶ 61,234 (September 14, 2007), JA 154.
3. Order on Installed Capacity Requirements, *ISO New England, Inc.*, 119 FERC ¶ 61,161 (May 18, 2007), JA 232.
4. Order Denying Rehearing, *ISO New England, Inc.*, 121 FERC ¶ 61,125 (November 1, 2007), JA 285.
5. Order on Remand, *ISO New England, Inc.*, 122 FERC ¶ 61,144 (February 21, 2008), JA 382.
6. Order Denying Rehearing, *ISO New England, Inc.*, 123 FERC ¶ 61,036 (April 17, 2008), JA 424.

C. Related Cases

This appeal concerns 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. Additionally, in *Maine Public Utilities Commission v. FERC*, 520 F.3d 463 (D.C. Cir. 2008), the Court 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.

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GLOSSARY

FPA	Federal Power Act
Remand Order	Order on Remand, <i>ISO New England, Inc.</i> , 122 FERC ¶ 61,144 (February 21, 2008), JA 382.
Remand Rehearing Order	Order Denying Rehearing, <i>ISO New England, Inc.</i> , 123 FERC ¶ 61,036 (April 17, 2008), JA 424.
Tariff Order	Order Accepting Tariff Changes and Requiring Compliance Filing, <i>ISO New England, Inc., et al.</i> , 118 FERC ¶ 61,157 (February 28, 2007), JA 79.
Tariff Rehearing Order	Order Denying Rehearing, <i>ISO New England, Inc., et al.</i> , 120 FERC ¶ 61,234 (September 14, 2007), JA 154.
2007-2008 Order	Order on Installed Capacity Requirements, <i>ISO New England, Inc.</i> , 119 FERC ¶ 61,161 (May 18, 2007), JA 232.
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**ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (Commission or FERC) has jurisdiction pursuant to the Federal Power Act (FPA) to review the annual calculation by ISO New England, Inc., of the minimum amount of wholesale electric capacity that must be available to assure reliable service in the New England region.

STATUTORY AND REGULATORY PROVISIONS

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

brief.

STATEMENT OF THE CASE

Petitioner Connecticut Department of Public Utility Control (Connecticut) challenges three different sets of orders, in which the Commission concluded that it has jurisdiction to review ISO New England's Installed Capacity Requirement.

The Installed Capacity Requirement, which is designed to “ensure[] that transmission providers have procured enough capacity to maintain the reliability of the grid,” *Maine Public Utilities Commission v. FERC*, 520 F.3d 464, 480 (D.C. Cir. 2008), is governed by ISO New England's Transmission Markets and Services Tariff (ISO Tariff), on file with the Commission. The Installed Capacity Requirement is the quantity of electric capacity that ISO New England determines annually is necessary to serve its load reliably in the multi-state region in which it operates. That quantity, expressed as a value per megawatt, is then allocated proportionately among ISO New England's Load-Serving Entities (*i.e.*, wholesale purchasers of electricity, which sell electricity to their retail customers). *See* ISO New England's 2007-2008 Power Year Filing (March 23, 2007) at 5-6, JA 189-190.¹

In the first set of contested orders, ISO New England and the New England

¹“‘Load’ simply refers to demand for service on a transmission grid.” *Wisconsin Public Power Inc. v. FERC*, 493 F.3d 239, 249 n.1 (D.C. Cir. 2007) (citation omitted).

Power Pool Participants Committee filed with the Commission proposed revisions to the ISO Tariff to formalize the method by which the annual Installed Capacity Requirement is calculated. In accepting ISO New England's proposed tariff changes, the Commission concluded that it has jurisdiction under the FPA to make this determination. Order Accepting Tariff Changes and Requiring Compliance Filing, *ISO New England, Inc., et al.*, 118 FERC ¶ 61,157 (February 28, 2007) (Tariff Order), JA 79. On rehearing, the Commission rejected Connecticut's challenge to the agency's jurisdiction. Order Denying Rehearing, *ISO New England, Inc., et al.*, 120 FERC ¶ 61,234 (September 14, 2007) (Tariff Rehearing Order), JA 154.

In the second set of orders, the Commission reviewed ISO New England's filing of its Installed Capacity Requirement for the 2007-2008 Power Year (June 1, 2007 to May 31, 2008) and again held, over Connecticut's objection, that it has jurisdiction to review this calculation. Order on Installed Capacity Requirements, *ISO New England, Inc.*, 119 FERC ¶ 61,161 (May 18, 2007) (2007-2008 Order), JA 232, Order Denying Rehearing, *ISO New England, Inc.*, 121 FERC ¶ 61,125 (November 1, 2007) (2007-2008 Rehearing Order), JA 285.

The third set of orders is on remand from this Court's decision in *Connecticut Department of Public Utility Control v. FERC*, 484 F.3d 558 (D.C. Cir. 2007), which held that the Commission had improperly accepted ISO New

England's Installed Capacity Requirement for the 2005-2006 Power Year without addressing the jurisdictional issue. On remand, the Commission affirmed its FPA jurisdiction to review this rate matter, consistent with the explanation in its orders in the two prior proceedings. Order on Remand, *ISO New England, Inc.*, 122 FERC ¶ 61,144 (February 21, 2008) (Remand Order), JA 382, Order Denying Rehearing, *ISO New England, Inc.*, 123 FERC ¶ 61,036 (April 17, 2008) (Remand Rehearing Order), JA 424.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Section 201(b) of the FPA confers upon the Commission jurisdiction over all rates, terms and conditions of electric transmission service and sales at wholesale by public utilities in interstate commerce. 16 U.S.C. § 824(b). The Commission also has jurisdiction over the facilities for such wholesale sales and transmission services, but not over generating or local distribution facilities. *Id.* Section 205 of the Act prohibits unjust and unreasonable rates and undue discrimination “with respect to any transmission or sale subject to the jurisdiction of the Commission,” 16 U.S.C. §§ 824d(a)-(b), while section 206 gives the agency the power to correct any such unlawful practices. 16 U.S.C. § 824e(a).

The FPA charges the Commission to employ its authority “to provide effective federal regulation of the expanding business of transmitting and selling

electric power in interstate commerce.” *New York v. FERC*, 535 U.S. 1, 6 (2002) (quoting *Gulf States Util. Co. v. FPC*, 411 U.S. 747, 758 (1973)). A primary purpose of the Act is “to encourage the orderly development of electricity . . . at reasonable prices.” *Public Utilities Commission of California v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)); *see also, e.g., Consolidated Edison Co. of New York v. FERC*, 510 F.3d 333, 342 (D.C. Cir. 2007) (“multiple purposes” of the FPA include “protecting against inadequate service” and “promoting the orderly development of plentiful supplies of electricity”) (citations omitted). In the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), which amended the FPA, Congress enhanced the Commission’s jurisdictional authority over the reliability of “the bulk power system,” including “electric energy from generation facilities needed to maintain transmission system reliability.” 16 U.S.C. § 824o(a)(1)(B).

This Court is well aware of the Commission’s exercise of its “broad authority” under FPA sections 205 and 206 in the last decade “to impose open access as a generic remedy for its findings of systemic anticompetitive behavior” by transmission owning public utilities. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 684 (D.C. Cir. 2000) (affirmed in *New York v. FERC*). Thus, *New York* and *Transmission Access Policy Study Group* affirmed the

Commission's Order No. 888,² in which the agency sought to remedy the monopoly control of vertically integrated utilities over interstate transmission facilities by requiring such utilities to unbundle wholesale electric power services and to file open access transmission tariffs.

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

Subsequently, in Order No. 2000,³ the Commission required each public

² *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, *clarified*, 79 FERC ¶ 61,182 (1997), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998).

³ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. &

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

II. Factual Background

A. Formation and Development Of ISO New England

Utilities in New England have a long history of coordinated region-wide operation. In 1971, the New England Power Pool began operating the bulk electric power system for the entire New England region, centrally dispatching generating units and transmission facilities to serve the load of the various utilities in the region. *See, e.g., New England Power Pool*, 79 FERC ¶ 61,374 at 62,576 (1997).

In 1996 and 1997, the New England Power Pool filed a comprehensive restructuring proposal in compliance with the requirements of Order No. 888. As part of that proposal, it sought approval to establish an Independent System

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

Operator, to which it would transfer operational control of the New England bulk electric power system. The New England Power Pool proposed that the new Independent System Operator would administer its open access transmission tariff. The New England Power Pool also proposed the development of competitive wholesale electricity markets in New England, to be administered by the Independent System Operator, as well as the use of market-based rates.

The Commission accepted the New England Power Pool's proposals in various orders issued between 1997 and 2001. *See New England Power Pool*, 79 FERC ¶ 61,374, *reh'g dismissed and denied*, 85 FERC ¶ 61,242 (1998) (accepting establishment of ISO New England); *New England Power Pool*, 83 FERC ¶ 61,045 (1998), *reh'g denied*, 95 FERC ¶ 61,074 (2001) (approving open-access transmission tariff); *New England Power Pool*, 85 FERC ¶ 61,379 (1998), *reh'g denied*, 95 FERC ¶ 61,074 (2001) (conditionally accepting market rules and market-based rates); *New England Power Pool*, 87 FERC ¶ 61,045 (1999) (approving revised market rules and request for market-based rates). FERC later approved a comprehensive redesign of the New England wholesale electricity markets. *See New England Power Pool and ISO New England, Inc.*, 100 FERC ¶ 61,287 (2002).

In 2003, ISO New England and New England's transmission-owning utilities jointly filed a request for approval to reorganize their arrangements to

establish ISO New England as a Regional Transmission Organization pursuant to Order No. 2000. The Commission approved the Regional Transmission Organization proposal in 2004. *ISO New England Inc., et al.*, 106 FERC ¶ 61,280, *order on reh'g*, 109 FERC ¶ 61,147 (2004), *aff'd*, *Maine Pub. Utils. Comm'n v. FERC*, 454 F.3d 278 (D.C. Cir. 2006).

B. History And Development Of The Installed Capacity Requirement And Installed Capacity Markets in New England

For many years, the New England Power Pool, and later ISO New England, has established an Installed Capacity Requirement as a “first line reliability measure to cover electric load.” *ISO New England, Inc.*, 91 FERC ¶ 61,311 at 62,080 (2000). This requirement obligates load-serving utilities in the power pool (and later ISO New England) to acquire a specific amount of electric capacity based on their peak load, plus a reserve margin, or make a payment in lieu of doing so. *Id.* As the Commission explained in 2000:

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

Id., 91 FERC at 62,080; *see also Municipalities of Groton v. FERC*, 587 F.2d 1296, 1300-01 (D.C. Cir. 1978) (describing installed capacity mechanism then in effect in the New England Power Pool). As we explained above, each load-serving

utility must acquire its allocation of the Installed Capacity Requirement, the total of which is ISO New England's calculation of the minimum amount of electric capacity needed to reliably serve load. *See Conn. Dep't of Pub. Util. Control*, 484 F.3d at 559-60.

Until 1998, load-serving utilities that failed to satisfy their Installed Capacity Requirements were subject to a deficiency charge, set by the New England Power Pool. *Id.* The Installed Capacity Requirement was retained when ISO New England was formed in 1998, but the single deficiency charge was replaced by a bid-based market for capacity, with market prices capped at the deficiency charge set by the New England Power Pool. *See New England Power Pool*, 83 FERC at 61,262-63.

Following separate proceedings in 2000 and 2002 addressing, *inter alia*, the method for setting the Installed Capacity Requirement, New England adopted an auction mechanism. *See ISO New England, Inc.*, 91 FERC ¶ 61,311 at 62,080-81 (2000) (order eliminating bid-based capacity auction and returning to single deficiency charge); *Central Maine Power Co. v. FERC*, 252 F.3d 34, 38-40 (1st Cir. 2001) (discussing same); *New England Power Pool*, 100 FERC ¶ 61,287 at PP 88-98 (order reinstating bid-based capacity auction, as part of comprehensive redesign of New England electricity markets).

Under the auction mechanism, modeled after the system then in place in

New York, ISO New England administered both a monthly auction, to allow participants to procure capacity to meet their requirement for the next month, and a separate deficiency auction, through which ISO New England would procure capacity for those who did not satisfy their monthly requirement by a specified time. *New England Power Pool*, 100 FERC ¶ 61,287 at P 91.

In early 2003, a group of Connecticut generators filed Reliability Must-Run agreements with the Commission, *i.e.*, generation contracts designed to ensure the reliability of the system. In April 2003, the Commission accepted these agreements in part, but expressed concern about the effect that such contracts would have on the competitive wholesale electric market. *See Devon Power LLC, et al.*, 103 FERC ¶ 61,082, *order on reh'g*, 104 FERC ¶ 61,123 (2003). To address these concerns, the Commission instituted proceedings under FPA section 206, 16 U.S.C. § 824e, to revise the New England market rules to address compensation problems faced by electric capacity suppliers in the region. *See Devon Power*, 103 FERC ¶ 61,082 at PP 33-37; *Devon Power*, 104 FERC ¶ 61,123 at PP 33-34. In response, ISO New England filed a proposal to redesign its wholesale capacity market, and in particular to establish a locational installed capacity market.

Eventually, these proceedings, involving many issues contested by many parties, led to the comprehensive settlement reviewed by the Court in the 2008 *Maine Public Utilities* decision, establishing the Forward Capacity Market. As the

Court explained, under this system, “there will be annual auctions for capacity, which will be held three years in advance of when the capacity is needed.” 520 F.3d at 469 (citation omitted). Pursuant to this mechanism, “[e]ach transmission provider will be required to purchase enough capacity to satisfy its ‘installed capacity requirement,’ which is the minimum level of capacity that is necessary to maintain reliability on the grid.” *Id.* (citation omitted).

In *Maine Public Utilities*, the Court affirmed the Commission’s FPA jurisdiction over the Forward Capacity Market, which “only establishes a market design for determining capacity charges,” but does not itself set the Installed Capacity Requirement “or in any way determine the appropriate amount of capacity that must be available.” 520 F.3d at 480 (citation omitted). In so doing, the Court specifically reserved for this appeal the question of whether the Commission’s FPA jurisdiction also included the computation of the Installed Capacity Requirement. *Id.*

C. Orders On Review

1. Tariff Redesign Proceeding

On December 22, 2006, ISO New England and the New England Power Pool filed proposed revisions to Market Rule 1 of the ISO Tariff, “designed to memorialize the processes and methodologies used to determine the Installed Capacity Requirements . . . for the New England Control Area,” consistent with the

Forward Capacity Market settlement. ISO New England ISO Market Rule 1 Revisions Filing (December 22, 2006) at 1 (footnotes omitted), JA 1.

In the Tariff Order, the Commission accepted the proposed tariff revisions, rejecting Connecticut's contention that it does not have jurisdiction to consider the issue. As the Commission explained, the Forward Capacity Market had established "a mechanism and market structure for the purchase and sale of installed capacity at wholesale in interstate commerce and to determine the prices for those sales." Tariff Order P 15, JA 84 (quotation omitted). Because the Forward Capacity Market was "squarely within the Commission's jurisdiction under the FPA," the Commission reasoned, and "the [Installed Capacity Requirement] is one of the principal determinants of the price of capacity," it likewise falls within the agency's jurisdiction to review "any . . . practice . . . affecting" wholesale rates, charges and classifications. *Id.* (quoting FPA section 206, 16 U.S.C. § 824e(a)) (internal quotation marks omitted).

In reaching this conclusion, the Tariff Order found support in this Court's precedent concerning the Commission's jurisdiction over capacity requirements and charges. *See* Tariff Order P 16, JA 84 (citing *Municipalities of Groton and Mississippi Industries v. FERC*, 808 F.2d 1525, 1542, *vacated in part on other grounds*, 822 F.2d 1103 (D.C. Cir. 1978)). The agency further relied on its decision that it has jurisdiction over the analogous resource adequacy requirements

established by the California Independent System Operator. *Id.* PP 17-21, JA 85-88 (citing *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274 (2006)).

Connecticut filed a request for rehearing on the jurisdictional issue, R 30, JA 113, which the Commission denied in its Tariff Rehearing Order. JA 154. The Commission rejected Connecticut's argument that its consideration of ISO New England's Installed Capacity Requirement violated FPA section 201(b)(1), 16 U.S.C. § 824(b)(1), by usurping jurisdiction reserved to the states over facilities used for the generation of electric energy. *Id.* P 27, JA 163. As the Commission emphasized, it was "not exercising authority over electrical generating capacity or setting the amount of generating capacity that states must build (or require to be built)." *Id.*

The Commission went on to specifically reject Connecticut's position that *Mississippi Industries and Municipalities of Groton* do not fully support the agency's jurisdiction over the Installed Capacity Requirement as part of the calculation of jurisdictional wholesale capacity prices. Tariff Rehearing Order PP 34-38, JA 167-169.

Finally, the Commission rejected Connecticut's contention that the factual differences between the California and New England markets were relevant. Because electric reliability and its cost impacts are not governed by state borders, the agency explained, "it is appropriate for us to consider resource adequacy in

determining whether rates remain just and reasonable and not unduly discriminatory or preferential.” Tariff Rehearing Order P 42 & n.52, JA 171 (quoting *Cal. Indep. Sys. Operator Corp.*, 115 FERC ¶ 61,172 at PP 36-37 (2006) (also citing *Gainesville Utils. Dep’t v. Fla. Power Corp.*, 402 U.S. 515, 529 (1979) (Commission has “responsibility to the public to assure reliable efficient electric service”)).

2. 2007-2008 Installed Capacity Requirement

On March 23, 2007, ISO New England submitted to the Commission its Installed Capacity Requirements for the 2007-2008 Power Year. ISO New England’s 2007-2008 Power Year Filing (March 23, 2007), JA 185.

In its 2007-2008 Order, the Commission accepted ISO New England’s filing. As relevant here, the Commission again rejected Connecticut’s position that it does not have FPA jurisdiction to review the Installed Capacity Requirement. 2007-2008 Order PP 17-30, JA 238-244.

The Commission determined that its jurisdiction over ISO New England’s Installed Capacity Requirement was encompassed by FPA section 201(b)(1), 16 U.S.C. § 824(b)(1), which confers plenary jurisdiction on the Commission over interstate electric transmission and wholesale sales of energy in interstate commerce, as well as the broad language of FPA section 205, 16 U.S.C. § 824d(a), giving it authority over “transmission and wholesale power sales[,] rates and

charges, including any rule, regulation, practice or contract affecting them.” 2007-2008 Order P 19, JA 239. In this regard, the agency specifically relied on the holding of *Mississippi Industries* that “[w]hile the allocation of capacity did not set sales prices, it directly affects costs and ‘consequently, wholesale rates, . . . and therefore ‘FERC’s jurisdiction under such circumstances is unquestionable.’” *Id.* P 20, JA 239-240 (quoting *Mississippi Industries*, 808 F.2d at 1531 (footnotes and citation omitted)).

The Commission also reiterated its position that because the Installed Capacity Requirement “is one of the principal determinants of the price of capacity,” it falls within the Commission’s jurisdiction over any “practice . . . affecting” jurisdictional rates and services. 2007-2008 Order P 23 & n.39, JA 241 (citing 16 U.S.C. § 824e(a)).

Connecticut once again requested rehearing on the jurisdictional issue, R 12, JA 245, which the Commission denied in the 2007-2008 Rehearing Order. JA 285.

3. The Remand Proceeding

On February 21, 2008, the Commission issued its Order on Remand from this Court’s 2007 decision in *Connecticut Department of Public Utility Control*. Remand Order, JA 382. The Commission again affirmed that it has jurisdiction to review ISO New England’s Installed Capacity Requirement, based on the reasoning expressed in the prior contested orders. *Id.* PP 6-17, JA 384-389.

Connecticut requested rehearing on the jurisdictional question (R 82, JA 390), essentially repeating its arguments verbatim. Intervenor Richard Blumenthal, Attorney General for the State of Connecticut (Attorney General), also filed a request for rehearing on the jurisdictional issue, which, as relevant here, adopted Connecticut's request for rehearing in its entirety. R 85, JA 420.

On April 17, 2008, the Commission issued its Remand Rehearing Order, denying both the rehearing requests of both Connecticut and the Attorney General. JA 424. Because the rehearing requests were virtually identical to Connecticut's rehearing request in the 2007-2008 Installed Capacity Proceeding, the Commission "den[ied] rehearing in this proceeding for the same reasons" as in the 2007-2008 Rehearing Order. Remand Rehearing Order P 8, JA 426.

SUMMARY OF ARGUMENT

1. Because the Federal Power Act does not directly speak to whether the Commission has jurisdiction to review ISO New England's Installed Capacity Requirement, the Court should, pursuant to *Chevron* principles, defer to any reasonable interpretation by the agency with respect to its statutory authority.

Contrary to Connecticut's view, the FPA's exclusion of generating facilities from FERC jurisdiction does not resolve the question presented. Rather, the Commission here is reviewing a calculation by ISO New England of wholesale capacity that New England utilities must maintain to ensure the reliability of services, a practice that directly affects wholesale electricity prices. The Commission is not directly regulating generating facilities.

2. The Commission reasonably determined that its review of ISO New England's Installed Capacity Requirement falls within the ambit of FPA section 201's plenary grant of jurisdiction to the agency over transmission and wholesale sales of electricity, as well as FPA sections 205 and 206, which give FERC authority to review the terms and conditions of wholesale rates and any practice affecting them. As the Commission orders describe, the Installed Capacity Requirement directly affects the price of wholesale electric capacity. Furthermore, this Court has recognized the Commission's FPA jurisdiction over wholesale capacity costs.

Connecticut fails to demonstrate that the Commission's interpretation is unreasonable. The Commission's reasoning that the Installed Capacity Requirement affects the wholesale capacity price in New England is sound. In any event, because the Installed Capacity Requirement is a quantity component of a wholesale rate, and an input in a rate formula that the Court has previously determined is FERC-jurisdictional, it falls directly within the Commission's authority to review matters affecting wholesale rates.

3. The Commission also reasonably rejected Connecticut's argument that it is without jurisdiction to review ISO New England's Installed Capacity Requirement because its review may have an incidental effect on non-jurisdictional generating facilities. Such an incidental effect, as this Court has explained, is permissible as long as the Commission, as here, is regulating matters within its own authority.

4. Finally, Connecticut's policy arguments against Commission review are not well taken, in view of the integrated and regional nature of the ISO New England system. In any event, such policy claims are irrelevant to the issue of the Commission's statutory authority.

ARGUMENT

I. *CHEVRON* DEFERENCE PROVIDES THE APPROPRIATE STANDARD OF REVIEW IN THIS APPEAL.

“[I]t is the law of this circuit that the deferential standard” established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), applies to “an agency’s interpretation of its own statutory jurisdiction.” *Transmission Access Policy Study Group*, 225 F.3d at 694 (citing *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-1284 (D.C. Cir. 1994)); *Maine Public Utilities*, 520 F.3d at 479 (“The Commission’s interpretation of the scope of its jurisdiction is entitled to *Chevron* deference”).

Under the familiar *Chevron* standard, if Congress has directly spoken to the precise question at issue, “that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43 (footnote omitted). *See also, e.g., Whitman v. American Trucking Assn’s*, 531 U.S. 457, 481 (2001). However, if the statute is silent or ambiguous to the question at issue, then the Court “must defer to a ‘reasonable interpretation made by the . . . agency.’” *Whitman*, 531 U.S. at 481 (quoting *Chevron*, 467 U.S. at 844); *Transmission Access Policy Study Group*, 225 F.3d at 694 (citing *Chevron*, 467 U.S. at 842-43). Furthermore, “[a]s *Chevron* counsels . . . FERC’s interpretation of undefined and ambiguous statutory terms is entitled to deference.” *Transmission Access Policy Study Group*, 225 F.3d at 696

(citing *Chevron*, 467 U.S. at 842-843).

In light of this precedent, the Commission’s interpretation of its FPA jurisdiction to include review of ISO New England’s Installed Capacity Requirement should be accorded *Chevron* deference on appeal. The issue presented is whether the Commission’s plenary section 201 jurisdiction over electric transmission and wholesale sales, as well as its section 205 jurisdiction over “all rules and regulations affecting or pertaining” to jurisdictional rates and charges, and its section 206 jurisdiction to review “any . . . practice” affecting rates, authorize it to review the minimum amount of wholesale electric capacity that a regional electric system operator determines member utilities must have available in a particular time period to assure reliable service.

Connecticut argues that *Chevron* deference is not warranted here because the FPA by its plain language denies the Commission this jurisdiction. Pet. Br. 29-30. The basis for Connecticut’s argument is that section 201(b)(1) states that the Commission “*shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III, over facilities used for the generation of electric energy. . . .*” *Id.* 31 (quoting 16 U.S.C. § 824(b)(1)) (emphasis Connecticut’s). Similarly, Connecticut believes that in FPA section 207, 16 U.S.C. § 824f, indicating the Commission “*shall have no authority to compel the enlargement of generating facilities,*” Congress “unmistakably” intended to prohibit FERC

jurisdiction over the Installed Capacity Requirement. *Id.* 31 (emphasis Connecticut’s).

Connecticut is obviously correct that the cited sections of the FPA prohibit the Commission from directly regulating generating facilities. However, the Commission’s orders on review do no such thing. As the agency explained:

[T]he 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 New England] determines the amount of resources member [Load Serving Entities] must provide (which leads ultimately to a determination of the amount of resources each individual state’s [Load Serving Entities] must provide).

Tariff Rehearing Order P 27, JA 167.

We do not dispute that the Commission’s jurisdiction over the Installed Capacity Requirement may have an *incidental* impact on state regulation of generating facilities. But that is a separate issue, discussed below, that is not dispositive of the jurisdictional question presented. *See National Ass’n of Regulatory Util. Commissioners v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (the Commission’s exercise of its “indisputable authority . . . may, of course, impinge as a practical matter on the behavior of non-jurisdictional” entities); *see also id.* at 1281 (the “assertion of jurisdiction over specified transactions, even though affecting the conduct of the owner(s) with respect to its facilities, is not per se an exercise of jurisdiction over the facility”). The present question is whether

Congress in the FPA directly spoke to the Commission's authority to review a quantity measurement of wholesale electric capacity used by a regional jurisdictional entity to establish its resource adequacy requirements. The answer is it did not.

Similarly, *amici curiae* National Association of Regulatory Utility Commissioners, *et al.*, maintain that FPA section 215, added by the Energy Policy Act of 2005, expressly precludes Commission jurisdiction here because, while expanding the agency's jurisdiction over electric reliability, it disavows preemption over state authority "to ensure the safety, adequacy, and reliability of electric service" within a state. Amici Br. 22-28 (citing 16 U.S.C. § 824o(i)(3)). Once again, this general language simply does not directly address, much less resolve, the question of whether the Commission has jurisdiction over the capacity requirement imposed by ISO New England's tariff for wholesale purchasers.

The failure of reasoning proffered by Connecticut and National Association of Regulatory Utility Commissioners is starkly illustrated by the cases which Connecticut describes as having found "parallel FPA jurisdictional prohibitions" to plainly forbid a particular agency action, *Transmission Agency of Northern California v. FERC*, 495 F.3d 663 (D.C. Cir. 2007), *Detroit Edison Co. v. FERC*, 334 F.3d 48 (D.C. Cir. 2003), and *Duke Power Co. v. FPC*, 401 F.2d 930 (D.C. Cir. 1968). Pet. Br. 28, 47-48.

In *Transmission Agency of Northern California*, the Court held that the Commission exceeded its authority by ordering a non-jurisdictional municipality to pay refunds, as section 201(f) of the FPA “unequivocally exempts from” FERC authority ““any political subdivision of a State . . . unless [included by] specific reference.”” 495 F.3d at 674 (quoting 16 U.S.C. § 824(f)). Ordering a municipality to perform such an action was forbidden, therefore, because “FERC exceeds its jurisdiction under the [Administrative Procedure Act] if it regulates an entity that Congress has explicitly exempted from the statute.” *Id.* at 673 (citing *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001), and *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 3 (D.C. Cir. 2001)). However, Connecticut fails to mention *Transmission Agency of Northern California*’s corollary holding, *see* 495 F.3d at 671-72, that, notwithstanding the statutory exemption of municipalities, the Commission nonetheless has FPA jurisdiction to subject a municipality’s transmission revenue requirement to direct section 205 rate review. (We discuss this holding in more detail at p. 34, *infra*).

In *Detroit Edison*, the Court rebuffed the Commission’s attempt to assert jurisdiction over unbundled retail service occurring over local distribution facilities, which is specifically denied to the agency by FPA section 201(b)(1), 16 U.S.C. § 824(b)(1). 354 F.3d at 53. *But see National Ass’n of Regulatory Util. Commissioners*, 475 F.3d at 1280 (FERC assertion of authority over the

interconnection between a non-jurisdictional generator and a jurisdictional transmission provider upheld by the Court as “the inverse of *Detroit Edison*”). Similarly, in *Duke Power*, the Court held that the Commission was not empowered to exercise authority over the acquisition of non-jurisdictional local distribution facilities. 401 F.2d at 931.

Connecticut’s reliance on *Transmission Agency of Northern California*, *Detroit Edison* and *Duke Power* might be appropriate if the Commission here had directly ordered Connecticut to take a particular action, or that any particular action be taken by or with respect to generating facilities. But, once again, the Commission has done neither. Rather, the agency’s orders review submissions by ISO New England, a FERC-jurisdictional transmission provider, concerning the calculation of a component of a wholesale rate.

Thus, this is exactly the type of situation to which *Chevron* deference was meant to apply. The question for the Court is whether the Commission has drawn a reasonable line in determining whether it has jurisdiction in a matter that falls within the interstices of the FPA. In such a case, this Court has explained, “[t]he burden is on the petitioners to show that the Commission’s choices are unreasonable and its chosen line of demarcation is not within a ‘zone of reasonableness.’” *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1084 (D.C. Cir. 2002) (quoting *Hercules Inc. v. EPA*, 598 F.2d 91, 107 (D.C. Cir. 1978)

and *FPC v. Conway Corp.*, 426 U.S. 271, 278 (1976)). See also *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 828 (D.C. Cir. 2006) (“in drawing the jurisdictional lines” pursuant to the FPA, “some practical accommodation is necessary”).

As we now demonstrate, the Commission’s jurisdictional analysis in the contested orders is reasonable and, thus, should be upheld.

II. THE COMMISSION REASONABLY INTERPRETED ITS FPA JURISDICTION TO INCLUDE REVIEW OF THE INSTALLED CAPACITY REQUIREMENT IN ISO NEW ENGLAND’S TARIFF.

A. The Commission Reasonably Found That The Installed Capacity Requirement Affected Wholesale Rates.

As the Commission explained, ISO New England’s Installed Capacity Requirement “is expressed as the total number of [megawatts] that New England’s Load Serving Entities . . . will be required to purchase” by auction pursuant to the Forward Capacity Market. Tariff Rehearing Order P 3, JA 154. That number is then “subdivided to arrive at the amount of [megawatts] of capacity that each [Load Serving Entity] must purchase for that year.” *Id.* Thus, the Commission concluded, the Installed Capacity Requirement “directly affects the determination of the clearing price in the capacity market and so directly affects charges to customers.” *Id.* P 4, JA 155.

The Commission’s jurisdictional analysis began with section 201(b)(1) of the FPA, conferring jurisdiction on the agency “over the transmission of electric

energy in interstate commerce, and sales of electric energy at wholesale in interstate commerce.” Tariff Rehearing Order P 25 & n.22, JA 162 (citing 16 U.S.C. § 824(b)(1)). The Commission also relied on FPA section 205(a), which bestows upon the agency authority over not only all jurisdictional rates and charges, but also “all rules and regulations affecting or pertaining to such rates or charges. . . .” *Id.* (quoting 16 U.S.C. § 824d(a)). Additionally, the agency indicated that FPA section 206 “similarly gives the Commission ability to review” not only rates and charges, but also “any rule, regulation, practice, or contract ” affecting such rates. *Id.* P 25 & n.23, JA 162 (quoting 16 U.S.C. § 824e(a)).

In the Commission’s view, the calculation of ISO New England’s Installed Capacity Requirement falls squarely within the agency’s section 201(b)(1), section 205(a) and section 206(a) jurisdiction: “[G]iven that [it] is one of the principal determinants of the price of capacity and thus of charges to customers, review of the determination of the [Installed Capacity Requirement] rests with the Commission.” Tariff Rehearing Order P 26, JA 162.

In this regard, the Commission described how the Installed Capacity Requirement calculation 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 [Installed Capacity Requirement] (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 [Installed Capacity Requirement] (i.e., essentially demand): a greater [Installed Capacity Requirement] (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 [Installed Capacity Requirement] (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.

Tariff Rehearing Order P 26, JA 162-163; *see also* 2007-2008 Rehearing Order P 26, JA 296 (same).

More fundamentally, the Commission concluded that the Installed Capacity Requirement comes within the Commission’s FPA jurisdiction over wholesale capacity costs, based on this Court’s decisions in *Mississippi Industries* and *Municipalities of Groton*. In *Mississippi Industries*, the Commission explained, “the [C]ourt recognized the connection between allocation of capacity and wholesale rates,” rejecting the petitioners’ claim that allocation of such costs was a matter for state authority, beyond FERC’s FPA jurisdiction. 2007-2008 Order P 20, JA 239. Instead, the agency indicated, the Court specifically

found that the Commission has authority over the allocation of capacity among market participants because this 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. While the allocation of capacity did not set sales prices, it directly affects costs and “consequently, wholesale rates” and therefore “FERC’s jurisdiction under such circumstances is unquestionable.”

Id. (footnotes omitted) (quoting *Mississippi Industries*, 808 F.2d at 1543, 1541). In other words, the agency concluded, the Court recognized FERC jurisdiction “because of the nexus between the allocation of capacity and the justness and reasonableness of jurisdictional rates.” Remand Order P 11, JA 386.

Likewise, the Commission observed, in *Municipalities of Groton*, the Court upheld the agency’s authority to review the New England Power Pool Agreement’s “deficiency charge for each participant . . . whose prescribed level of generating capacity . . . fell by more than one percent below the set level.” 2007-2008 Order P 21, JA 240. That charge was governed by an earlier version of the Installed Capacity Requirement at issue here. As the Commission explained, the Court concluded that such charges came within “the Commission’s inclusive jurisdictional mandate” which reaches discriminatory practices “with respect to” or “affecting” jurisdictional services. *Id.* & n.33, JA 240 (quoting *Municipalities of Groton*, 587 F.2d at 1302) (internal quotation marks omitted); *see also* Remand Order P 11, JA 386 (noting that the Court had upheld the Commission’s assertion of “jurisdiction over a charge related to resource adequacy requirements in New England”).

B. Connecticut Erroneously Argues That The Installed Capacity Requirement Does Not Affect Jurisdictional Rates And Practices.

Connecticut asserts that the Installed Capacity Requirement does not affect jurisdictional rates and practices so as to come within the agency’s FPA

jurisdiction. In this regard, Connecticut first emphasizes the Commission's specific conclusion that the Installed Capacity Requirement directly affects the price of capacity. Pet. Br. 38-42.

As discussed above, the Commission found that the higher the level of Installed Capacity Requirement (*i.e.*, the greater demand), the higher the eventual wholesale charges to customers. *See* Tariff Rehearing Order P 26, JA 162. According to Connecticut, however, because the Forward Capacity Market's procurement of capacity three years in advance allows for potential new capacity to compete in the auctions, additional new capacity will respond to the level of expected demand three years in the future and keep the price at the long-run cost of new entry. Pet. Br. 40-41. Thus, Connecticut maintains, the Commission's view contradicts the well-established economic principle that the long-run average cost of new entry does not vary with demand – that is, that in the long run, supply is horizontal, and demand has no effect on price. *Id.*

At the outset, Connecticut's economic theory should not be considered by the Court because it was never brought to the Commission's attention on rehearing. Under section 313(b) of the FPA, 16 U.S.C. § 8251(b), no objection to the Commission's orders is properly subject to judicial review unless it has "been urged before the Commission in the application for rehearing." The Court has often held that the FPA's rehearing requirement is a jurisdictional bar. *E.g.*, *Save*

Our Sebasticook v. FERC, 431 F.3d 379, 381 (D.C. Cir. 2005); *City of Orrville v. FERC*, 147 F.3d 979, 990 (D.C. Cir. 1998). This directive, it has recognized, “enables the Commission to correct its own errors, which might obviate judicial review, or to explain why in its expert judgment the party’s objection is not well-taken, which facilitates judicial review.” *Save Our Sebasticook*, 431 F.3d at 381 (citations omitted).

In the Remand Order, the Commission specifically asserted that the Installed Capacity Requirement was “one of the principle determinants of the price of capacity.” Remand Order P 10 & n.20, JA 386 (citing Tariff Order at PP 15, 19-20, JA 84, 86-87, and Tariff Rehearing Order PP 25-30, JA 295-298). Thus, Connecticut had a reasonable opportunity to present its contrary economic theory to the Commission on rehearing, but failed to do so. *See Connecticut Request for Rehearing of Remand Order* (February 28, 2008) at 17-18, JA 407-408 (addressing the capacity price issue with no mention of the so-called “bedrock economic principles” it relies on now). Therefore, Connecticut should not be allowed to raise this argument for the first time on appeal.

Even if the Court reaches the argument, however, it is substantively flawed. In fact, the Commission’s reasoning on this point has been borne out by the first auction held by ISO New England under its Forward Capacity Market. In that auction, 34,253 megawatts of supply were offered at a price of \$4.50 per kilowatt-

month, while 35,974 megawatts were offered at a price of \$9.00 per kilowatt-month.⁴ That is, raising the price from \$4.50 to \$9.00 would elicit 1721 megawatts (35,974- 34,253 megawatts) of additional supply. Under the terms of the settlement, the auction ended when the price fell to a pre-established floor of \$4.50 per kilowatt month, despite the fact that the amount of supply offered at the floor (*i.e.*, 34,253 megawatts) exceeded the Installed Capacity Requirement (*i.e.*, 32,305 megawatts). Thus, increasing the Installed Capacity Requirement to a level above 34,253 megawatts would have resulted in a higher capacity price, validating the Commission's logic.

More fundamentally, even if Connecticut is correct, and “the only role that [the Installed Capacity Requirement] has in the capacity charge is to provide the quantity multiplier in computing the total amount that load serving entities pay,” Pet. Br. 42, review of the Installed Capacity Requirement is still directly subject to the agency's statutory authority.

As the Commission indicated, even where the Installed Capacity Requirement does not directly impact the capacity clearing price, “[a] [Load Serving Entity's] total cost for capacity will be the result of (a) the price of each

⁴ See “Forward Capacity Market Auction (FCA 2010-2011) Results Report,” February 13, 2008, available on ISO New England's web site at www.iso-ne.com/markets/othrmkts_data/fcm/cal_results/fac_2010_2011_results.pdf.

[megawatt], multiplied by (b) the number of [megawatts] the [Load Serving Entity] must purchase.” Tariff Rehearing Order P 30, JA 164. In other words, the Installed Capacity Requirement is a quantity component of a wholesale rate formula, and as such, within the Commission’s FPA section 205 and 206 jurisdiction to review matters “affecting” rates. *See City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985) (“[T]here is an infinitude of practices affecting rates and service . . . It is obviously left to the Commission, within broad bounds of discretion, to give concrete application to this amorphous directive”).

Connecticut attempts to answer this point by arguing that the Installed Capacity Requirement is “no more than a plug-in number in the rate formula,” and that “the formula itself is the rate, not the particular components of the formula.” Pet. Br. 39 (quoting *Pub. Utils. Comm’n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001), and *Ocean State Power*, 69 FERC ¶ 61,146 at 61,544-45 (1994)).

However, the cases cited by Connecticut merely explain that under a Commission-approved formula rate, “periodic adjustments made in accordance” with the formula “do not constitute changes in the rate itself and accordingly do not require” separate filings under FPA section 205. *Pub. Utils. Comm’n of Cal.*, 254 F.3d at 254 (quoting *Ocean State Power*, 69 FERC at 61,544-45). The cases certainly do not hold that the Commission is divested of jurisdiction to review any rate adjustments filed with the agency, as Connecticut appears to believe.

In fact, this Court’s decision in *Transmission Agency of Northern California*, on which Connecticut relies (Pet. Br. 28-29, 47), holds exactly the opposite. There, the Court upheld the Commission’s FPA section 205 jurisdiction to review a non-jurisdictional municipality’s revenue requirement, because it was a component of the California Independent System Operator’s jurisdictional rate. 495 F.3d at 671-672. Thus, in spite of FPA section 201(f)’s exclusion of municipalities from FERC jurisdiction, the Commission nonetheless retained authority to review the municipality’s input (the plug-in number in the rate formula) into a jurisdictional rate. *Id.* This is exactly the situation here: the Commission is merely reviewing the input (the Installed Capacity Requirement) into a rate structure (the Forward Capacity Market) the Court has already found is jurisdictional. *See Maine Public Utilities*, 520 F.3d at 480.

Furthermore, Connecticut’s theory ignores the broad view that the Court has taken of the range of matters that “affect” a rate for FPA jurisdictional purposes. As discussed above, *Mississippi Industries*, on which the Commission relied, specifically recognizes capacity costs, whether or not they set a sales price, as subject to FERC review under FPA section 205. 808 F.2d at 1542 (citing *Nantahala Power & Light v. Thornburg*, 426 U.S. 953 (1986)). Similarly, the agency indicated, *Municipalities of Groton* holds that FERC has jurisdiction over a charge specifically tied to resource adequacy requirements in New England. *See*

Tariff Order P 16 & nn. 14-15, JA 84-85 (citing *Municipalities of Groton*, 587 F.2d at 1302).

Connecticut claims that *Mississippi Industries* and *Municipalities of Groton* are irrelevant to the jurisdictional question presented here, as “[n]either case addressed the level of capacity requirements and, therefore, did not tread on state jurisdiction to regulate generation facilities or resource adequacy.” Pet. Br. 51. But the fact that the Commission’s action affirmed in *Mississippi Industries* did not affect the overall amount of the integrated system’s capacity, but only allocated a pre-determined amount, does not undermine the applicability of the Court’s logic to this case. If capacity costs are a component of jurisdictional rates, it follows that the Commission must have authority to review a proposed figure representing the value of a utility’s reserved capacity.

Furthermore, *Municipalities of Groton* specifically recognized that the Commission’s “inclusive jurisdictional mandate” encompassed review of the *amount* of wholesale capacity. As the Court stated, “[d]etermining the effect on [the New England Power Pool] of a capacity shortage is a matter well within the Commission’s expertise.” 587 F.3d at 1303.

Connecticut also maintains that *Mississippi Industries* is inapplicable here because rather than having a “system for planning generation facilities,” like the regional multi-state utility system in that case, “all decisions about planning and

building generation facilities” in New England are individually made by “unaffiliated market participants.” Pet. Br. 54. However, Connecticut itself later acknowledges that ISO New England’s Forward Capacity Market “provides for a single, region-wide [Installed Capacity Requirement],” and that capacity in the New England system is not determined individually but “coordinated regionally, as it has been for decades.” Pet. Br. 57-58. Indeed, as discussed above, *supra* pp. 7-9, ISO New England operates as an integrated system for capacity and reliability purposes, and the Installed Capacity Requirement for New England has always been set for the system by ISO New England and its predecessors, rather than by the individual New England states. *See* p. 9, *supra*. *See also Mississippi Industries*, 808 F.3d at 1549-1550 (agreeing with FERC that decisions concerning capacity costs in an integrated regional system like New England’s should not be left to the parochial concerns of the individual states).

As this Court summed up in *Transmission Access Policy Study Group*:

In this age of interconnected transmission grids, and given the accompanying technological complexities, we would be hard pressed to conclude that FERC’s interpretation of § 201(c) as giving it jurisdiction over both wholesale and retail transmissions is unreasonable or impermissible.

225 F.3d at 694. The Court should treat the Commission’s interpretation here of FPA section 201(b), in conjunction with FPA sections 205 and 206, in the same manner.

C. The Commission Reasonably Concluded That Its Jurisdiction Over The Installed Capacity Requirement Does Not Impermissibly Intrude On Authority That The FPA Reserves To The States.

As the Commission explained, while the Installed Capacity Requirement does require a Load Serving Entity to provide a specified amount of capacity (*i.e.*, “the ability to produce electric energy to serve load, when called by [ISO New England]),” this “does not mean that the [Load Serving Entity] must necessarily construct, and the state must permit construction” of generating facilities to produce this capacity. Tariff Rehearing Order P 28, JA 163. Rather, the Commission observed, a Load Serving Entity also “could fulfill its capacity obligation” by means of demand response (*i.e.*, reducing the load to be served, so that less electric generation is necessary) or “capacity contracts (from inside or outside the state), or any mix of the above.” *Id.*

Connecticut objects that “virtually all of these methods boil down to the same thing – a specified quantity of generating facilities that must be available within the state or region.” Pet. Br. 34. In fact, ISO New England recently indicated that the first auction in the Forward Capacity Market for the 2010-2011 period elicited twice as much new demand response as new generation.⁵ Even if Connecticut were correct, however, it would not transform the Commission’s

⁵See ISO New England Filing, Docket No. ER08-633-000 (March 6, 2008) at 6.

jurisdiction concerning the amount of ISO New England's Installed Capacity Requirement into jurisdiction over generation *facilities* barred by the statute.

In *Transmission Access Policy Study Group*, the Court rejected the contention of various states that the Commission had overstepped its authority by regulating unbundled retail transmission in contravention of FPA section 201(b)'s explicit exclusion from FERC jurisdiction of "facilities used in local distribution." 225 F.3d at 695. Rather, the Court concluded that, pursuant to the broad jurisdictional grant of section 201(a), "FERC's assertion of jurisdiction over all wholesale transmissions, regardless of the nature of the facility, is clearly within the scope of its statutory authority." *Id.* at 696. In *New York*, the Supreme Court affirmed this reasoning, holding that the Commission's regulation of unbundled transmission of electricity retailers did not impermissibly intrude over state control of local distribution facilities. 535 U.S. at 16-24

In *National Ass'n of Regulatory Utility Commissioners*, this Court employed similar reasoning in affirming Commission jurisdiction over interconnection agreements between operators of generators and transmission facilities. As the Court explained, the agency was regulating "relationships between the parties with respect to electricity flowing over facilities," rather than the facilities themselves. 475 F.3d at 1280. The Court also rejected the theory that the Commission's jurisdiction could not extend to facilities jointly owned by private firms and states,

because of the exclusion of state facilities from FERC jurisdiction by FPA section 201(f), 16 U.S.C. § 824(f), explaining that the “assertion of jurisdiction over specified transactions, even though affecting the conduct of the owner(s) with respect to its facilities, is not per se an exercise of jurisdiction over the facility.” *Id.* at 1281.

The Commission’s review of ISO New England’s Installed Capacity Requirement falls comfortably within the jurisdictional boundaries set by *Transmission Access Policy Study Group, New York* and *National Ass’n of Regulatory Utility Commissioners*. Here, the Commission is regulating a specific jurisdictional transaction between New England and wholesale purchasers of electricity. The transaction involves the cost of wholesale electric capacity, with the Installed Capacity Requirement being the amount of capacity that these wholesale customers must acquire. As with the cited cases, the Commission’s regulation of the Installed Capacity Requirement could have incidental effect on generating facilities, over which the states have authority. But such incidental impact does not divest the Commission of its jurisdiction.

In this context, Connecticut relies heavily on *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kan.*, 489 U.S. 493 (1989), for the proposition that the Commission’s regulation of the Installed Capacity Requirement would render the FPA’s reservation of generating facilities to state authority virtually meaningless.

According to Connecticut, “almost any state regulation of generation facilities or resource adequacy will likely have at least an incremental effect on wholesale capacity costs.” Pet. Br. 49-50 (citing *Northwest Central*, 489 U.S. at 514-415); *see also* Pet. Br. 42.

The Commission did not see *Northwest Central* as helpful to Connecticut’s position:

Northwest Central speaks to the question of whether a federal agency’s regulation of a particular area pre-empts state regulation in that area. This is not the case here [T]he Commission is not seeking to pre-empt (and has not pre-empted) the state’s decision-making as to when or where or how many new (if any) generating facilities should be built in that state, and ISO [New England’s] determination of the amount of capacity that each [Load Serving Entity] must procure does not render the state unable to go through that decision-making process. Thus, there is no pre-emption of state authority of the kind [at] issue at *Northwest Central*.

2007-2008 Rehearing Order P 39, JA 302 (footnote omitted). The Commission also found that “[g]iven the existence of an integrated region-wide system in New England, and given the absence of a region-wide resource adequacy determination process in New England,” the reasoning of *Northwest Central* places the level of the Installed Capacity Requirement squarely within the agency’s FPA authority. *Id.* P 39 n.66, JA 303.

In a related manner, Connecticut argues that the Commission’s jurisdiction over ISO New England’s Installed Capacity Requirement would allow FERC to invoke “sweeping jurisdiction” to regulate land use, air quality and labor

requirements because they affect jurisdictional prices in some manner. Pet. Br. 42. But as long as “FERC is exerting jurisdiction over transactions, based on the transactions’ satisfaction of the Act’s jurisdictional criteria,” it is operating within its statutory authority. *National Ass’n of Regulatory Utility Commissioners*, 475 F.3d at 1282; *see also id.* (FERC’s actions need only “bear a close enough relation” to its statutory authority). And if the Commission’s jurisdictional action nonetheless affects matters beyond the scope of its authority, it does not follow that the agency is *regulating* such matters. *See id.* at 1282-83 (approving FERC-jurisdictional regulation despite incidental effect on state eminent domain authority).

D. Connecticut’s Policy Arguments Are Irrelevant To The Issue Of The Commission’s Statutory Authority.

In the contested orders, the Commission relied on its precedent concerning the California ISO, where it had previously addressed its jurisdiction over resource adequacy requirements. *See* Tariff Order PP 17-22, JA 85-88; 2007-2008 Order PP 25-29, JA 242-244. In its rehearing orders, the Commission addressed Connecticut’s arguments that various differences with California made comparison to the situation in New England irrelevant. *See* Tariff Rehearing Order PP 42-45, JA 170-172; 2007-2008 Rehearing Order PP 42-45, JA 304-306.

In this context, the Commission emphasized that it had relied on its California precedent as having resolved “precisely [the] jurisdictional question”

raised by Connecticut. Tariff Rehearing Order P 42, JA 170; *see also* 2007-2008 Rehearing Order P 43, JA 305 (Commission’s reliance on California orders “to support its exercise of jurisdiction over the determination of [the Installed Capacity Requirement]” not “vitiating” by Connecticut’s argument).

Before the Court, Connecticut reiterates its arguments that the Commission’s concerns about reliability and capacity in California do not apply to the New England region. Pet. Br. 55-60. However, these arguments are irrelevant to this appeal. The sole issue raised by Connecticut before this Court is “[w]hether FERC exceeded its statutory authority by establishing rules for determining and by setting the amount of installed capacity requirements for Connecticut and New England[.]” *Id.* at 3. Any purported factual differences between the New England and California markets do not affect the Commission’s holding that it has statutory authority to review ISO New England’s Installed Capacity Requirement. Thus, Connecticut’s argument does “no more than raise policy concerns which are for FERC and not the court.” *Transmission Access Policy Study Group*, 225 F.3d at 696 (citation omitted).

Connecticut further contends that the Commission has failed to honor its promise to defer to the New England states in setting ISO New England’s Installed Capacity Requirement. Pet. Br. 61. In this regard, Connecticut complains that the Commission has denied “Connecticut’s requested changes in the level of [the

Installed Capacity Requirement]” or the tariff governing it, “instead upholding [ISO New England’s] proposals.” *Id.* However, Connecticut has not appealed the levels established for the Installed Capacity Requirement by any of the contested orders. If Connecticut is aggrieved by a specific determination by the Commission on review of ISO New England’s Installed Capacity Requirement in the future, it can make its arguments to the agency, and then, as appropriate, seek judicial review.

Finally, intervenor Attorney General (but not Connecticut) argues that the Commission has improperly ignored state planning determinations in the various factors used to set the Installed Capacity Requirement, such as resource modeling assumptions, tie benefits and load forecasts. Int. Br. 12-18. However, neither intervenor (nor any party) raised this argument on rehearing, so it is barred on appeal. *E.g., Save Our Sebasticook*, 431 F.3d at 381. In any event, as explained above, ISO New England’s selection of factors (and choice of methodology) in setting the level of the Installed Capacity Requirement has no bearing on the Commission’s authority, in the first instance, to review the resulting Installed Capacity Requirement upon a filing by the ISO.

CONCLUSION

For the reasons stated, the petitions for review should be denied, and the Commission's orders affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 9342 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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