ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 10-1103

PSEG ENERGY RESOURCES & TRADE LLC AND
PSEG POWER CONNECTICUT LLC,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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May 5, 2011

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

To counsel's knowledge, the parties before this Court and before the Federal Energy Regulatory Commission in the underlying agency proceeding are as listed in Petitioners' brief.

B. Rulings Under Review:

1. Order Accepting Filing, *ISO New England Inc.*, 123 FERC ¶ 61,290 (June 20, 2008) ("Compliance Order"), R.64, JA 87;

2. Order Denying Rehearing and on Informational Filing, *ISO New England Inc.*, 130 FERC ¶ 61,235 (Mar. 24, 2010) ("Rehearing Order"), R.80, JA 147.

C. Related Cases:

This case has not previously been before this Court or any other court. Counsel is not aware of any other related cases pending before this Court or any other court.

/s/ Jennifer S. Amerkhail
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May 5, 2011

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GLOSSARY

Compliance Filing	Filing, in Docket No. ER08-633, providing the results of the first capacity auction, R.1, JA 1
Compliance Order	*ISO New England Inc.*, 123 FERC ¶ 61,290 (June 20, 2008), R.64, JA 87
Commission or FERC	Federal Energy Regulatory Commission
De-list Bid	A supplier's bid that indicates the price at which it will exit the auction
FPA	Federal Power Act
Import Rule	Tariff section III.13.2.7.3(c)
ISO-NE	ISO New England Inc.
JA	Joint Appendix
Market Rules	ISO New England Transmission, Markets and Services Tariff, FERC Electric Tariff No. 3, Market Rule 1, JA 156
MW	Megawatt
Proration Rule Revision	Filing, in Docket No. ER07-1338, to modify the Proration Rule, JA 217
P	Paragraph number in a FERC order
Proration Rule	Tariff section III.13.2.7.3(b), JA 178
PSEG Suppliers	Petitioners PSEG Energy Resources & Trade LLC and PSEG Power Connecticut LLC
R.	Record citation

Rehearing Order	*ISO New England Inc.*, 130 FERC ¶ 61,235 (Mar. 24, 2010), R.80, JA 147
Settlement Order	*Devon Power LLC*, 115 FERC ¶ 61,340 (June 16, 2006), JA 264
Tariff	ISO New England Transmission, Markets and Services Tariff, FERC Electric Tariff No. 3, Market Rule 1, JA 156
Transmission Security Analysis	A local reliability analysis that supplements the loss-of-load probability analysis used to determine regional capacity requirements

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ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

An excess supply of electric capacity was procured in an auction held by ISO New England Inc. ("ISO-NE" or "ISO New England"), the regional operator of wholesale energy markets in New England states, because of price protections afforded to suppliers. The issue presented for review is:

Whether the Federal Energy Regulatory Commission ("FERC" or "Commission") reasonably determined that ISO New England complied with its filed tariff in requiring a reduction in the price paid for that capacity when

suppliers are not allowed to reduce their quantities of capacity on account of local reliability needs.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes are set out in Addendum A to this brief. Pertinent provisions of the governing ISO New England tariff are set out in Addendum B to this brief. The most pertinent section of the ISO New England tariff, section III.13.2.7.3(b), is set out in full on page ten of this brief.

INTRODUCTION

The challenged orders in this case resolve disputes regarding the results of the first auction in New England held pursuant to the Forward Capacity Market Rules. These rules were created by settlement, approved by the Commission and later upheld, in relevant respects, by this Court. *See Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008). (That contested settlement also created a controversy over the standard by which non-settling parties can challenge the auction results. *See id*. at 476-479, *rev'd in part*, *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 130 S. Ct. 693, 700 (2010), *on remand, Maine Pub. Utils. Comm'n v. FERC*, 625 F.3d 754 (D.C. Cir. 2010)).

In the annual auctions, ISO New England procures the Installed Capacity Requirement which represents the estimated amount of capacity needed, projected three years into the future, to maintain the reliability of the regional system. As

protection for buyers and sellers, respectively, the tariff dictates maximum and minimum clearing prices in the first of its auctions. The minimum price, or the price floor, does not allow the price to drop to the point where the supply of capacity meets demand. Indeed, because of the price floor, the first auction procured an excess supply of capacity. Section III.13.2.7.3(b) of ISO New England's Tariff ("Proration Rule"), JA 178, reduces either the price or, at the option of the supplier, the quantity of a capacity obligation to meet the auction's total payment cap. The total payment cap is the floor price multiplied by the Installed Capacity Requirement.

Following the steps of the Proration Rule, ISO New England first calculated the prorated price needed to meet the total payment cap. Next it paid each supplier an amount equal to the prorated price times the supplier's capacity obligation awarded through the auction. The ISO then allowed each supplier to elect to reduce the amount of their capacity obligations instead by the same amount. About 84 percent of the supply that cleared in the auction elected quantity proration. Petitioners PSEG Energy Resources & Trade LLC and PSEG Power Connecticut LLC ("PSEG Suppliers") elected to reduce their capacity obligation by 52 megawatts ("MW").

As a final step, ISO New England conducted its reliability review of capacity proration elections and determined that PSEG Suppliers' resources were

needed for local reliability. ISO New England rejected their quantity proration election. PSEG Suppliers objected, arguing for release of their excess capacity obligations or an additional out-of-market payment to compensate for the reliability provided by their resources.

In response, the Commission found that ISO New England had faithfully complied with and properly administered its tariff. The tariff required a cap on total expenditures through the auction and a reliability review of all proration elections. Together, these tariff mechanisms authorized ISO New England to price prorate the megawatts that were needed for local reliability. *ISO New England Inc.*, 123 FERC ¶ 61,290 (2008) ("Compliance Order"), R.64, JA 87, *reh'g denied*, *ISO New England Inc.*, 130 FERC ¶ 61,235 (2010) ("Rehearing Order"), R.80, JA 147.[1]

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. The Federal Power Act

The Federal Power Act ("FPA") gives the Commission exclusive jurisdiction over the rates, terms and conditions of service for wholesale sales of electric energy in interstate commerce. 16 U.S.C. § 824; *New York v. FERC*, 535 U.S. 1 (2002). This grant of jurisdiction includes the power to set rates for electric

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

capacity, either directly or indirectly through a market mechanism, and to review capacity requirements that affect those rates. *See Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 482-84 (D.C. Cir. 2009). "In a 'capacity' market – as opposed to a wholesale electricity market – the transmission provider compensates the generator for the *option* of buying a specified quantity of power irrespective of whether it ultimately buys the electricity." *Maine Pub. Utils. Comm'n*, 520 F.3d at 467 (internal punctuation omitted; emphasis original).

Section 205(c) of the FPA, 16 U.S.C. § 824d(c), requires public utilities to file tariff schedules with the Commission providing their jurisdictional rates, terms and conditions of service, and related contracts for service. When those tariff schedules are filed, sections 205(a)-(b) of the FPA, 16 U.S.C. §§ 824d(a)-(b), direct the Commission to assure that the rates and services described in the tariff are just and reasonable and not unduly discriminatory. Further, "no change shall be made by any public utility in any such rates, charges, classification, or service" without notice to the public and approval by the Commission. FPA § 205(d), 16 U.S.C. § 824d(d).

Section 206(a) of the FPA, 16 U.S.C. § 824e(a), authorizes the Commission to investigate, on complaint or the agency's own initiative, whether existing rates are lawful. Under section 206(b) of the FPA, 16 U.S.C. § 824e(b), the complainant or the Commission, rather than the utility provider, bears the burden to show that

an existing rate or charge is "unjust, unreasonable, unduly discriminatory or preferential." *See*, *e.g.*, *Maryland Pub. Serv. Comm'n v. FERC*, No. 09-1296, 2011 U.S. App. LEXIS 3172 (D.C. Cir. Feb. 8, 2011) (affirming FERC's denial of a third party challenge, under FPA § 206, to the results of a capacity auction).

B. Reliability Concerns And Capacity Markets

Having considered many appeals concerning new energy market rate designs over the last decade, this Court is familiar with the problems of maintaining reliability of the transmission system, and with the various mechanisms that the Commission has approved in regional markets for the purpose of compensating suppliers for that reliability. *See*, *e.g.*, *id*. (describing capacity pricing model adopted by the regional transmission entity operating in mid-Atlantic states); *Electric Consumers Res. Council v. FERC*, 407 F.3d 1232, 1239-1242 (D.C. Cir. 2005) (upholding market structure in New York with administratively-determined demand curve that specified the prices, pegged to the cost of a new peaking generator, that must be paid for various quantities of capacity); *Public Utils. Comm'n of Cal. v. FERC*, 254 F.3d 250, 252-53 (D.C. Cir. 2001) (generators needed for reliability in the California market are compensated through reliability contracts, the costs of which are then passed to transmission-owning member utilities).

II. The Development Of New England's Forward Capacity Market

As a regional transmission operator, ISO New England is responsible for preventing interruptions to the delivery of electricity in New England by ensuring that its system has sufficient generating capacity. *See Maine Pub. Utils. Comm'n*, 520 F.3d at 467-69. New England's programs to ensure sufficient capacity have taken many forms over the years, from uniform penalty charges for capacity deficiencies, *Municipalities of Groton v. FERC*, 587 F.2d 1296, 1300-1301 (D.C. Cir. 1978), to bid-based capacity procurement markets supplemented by reliability contracts with individual generators, *Blumenthal v. FERC*, 552 F.3d 875, 879 (D.C. Cir. 2009). *See also Central Me. Power Co. v. FERC*, 252 F.3d 34, 39 (1st Cir. 2001) (describing one other variation of capacity auction used in New England). These latter efforts failed to provide accurate capacity prices or correct incentives and compensation for new investment. *Connecticut Dep't of Pub. Util.*, 569 F.3d at 479-480.

In early 2004, ISO New England, at the Commission's urging, was moving toward capacity markets that resemble those in other regionally operated grids on the Eastern Seaboard when parties reached a settlement on an alternative capacity market structure. *Id*. at 480. The settling parties proposed a reliability auction, the Forward Capacity Market, with a three-year lead time and a location component to reflect scarcity of capacity in different sub-regions, and fixed payments to

generators for the three-year transitional period. *Maine Pub. Utils. Comm'n*, 520 F.3d at 469; *see also Connecticut Dep't of Pub. Util.*, 569 F.3d at 480 (describing how this "descending clock auction" works). The proposed auction would purchase just enough capacity (the Installed Capacity Requirement) to maintain the reliability of the New England system as a whole. *Devon Power LLC*, 115 FERC ¶ 61,340 at P 20 & n.27 (2006) ("Settlement Order"), JA 267 (comparing this auction with the one proposed by ISO New England using a proxy demand curve to target purchase of capacity in excess of the requirement). To protect buyers against high prices and protect sellers against low prices, the settling parties agreed upon a price floor and ceiling (collectively, a price collar) in the first three auctions. *Id.* at P 19, JA 267 ("In the first year, . . . auction prices . . . can range from $4.50 to $10.50/kW-month").

Although the Settlement resolved an "enormous controversy" over the then-pending ISO New England proposal, *Connecticut Dep't of Pub. Util.*, 569 F.3d at 480, it nevertheless provoked targeted objections from parties representing both buyers and sellers in the new market. While the fixed "transition payments" received the most criticism, *Maine Pub. Utils. Comm'n*, 520 F.3d at 469, the structure of the auction also was criticized. For example, PSEG Suppliers expressed concern about the price-setting mechanism and argued for an auction that would purchase excess capacity relative to need. Settlement Order at P 150,

JA 289. Buyers, on the other hand, argued that "the combination of an excessive [starting price] and the price floor established via the collar mechanism will result in load paying excessive capacity charges even in a surplus situation." Settlement Order at P 126, JA 285.

In June 2006, concluding on balance that the "larger package embodied by the Settlement" was just and reasonable, the Commission approved the Settlement. *Id*. at PP 2, 89, JA 264, 279. The Commission then directed ISO New England to convert the agreed-upon rules for the Forward Capacity Market into a new tariff. This Court later rejected a challenge to the Commission's authority to create and review the operation of the Forward Capacity Market. *Maine Pub. Utils. Comm'n*, 520 F.3d at 476-80 (but remanded to decide which standard should apply to FERC's review of objection to "the transition payments and the final prices from the . . . auctions"), *rev'd in part*, *NRG Power Mktg.*, 130 S. Ct. at 700, *on remand, Maine Pub. Utils. Comm'n*, 625 F.3d 754 (remanding to FERC the question of whether auction rates are contract rates).

III. ISO New England Forward Capacity Market Tariff

ISO New England Transmission, Markets and Services Tariff, FERC Electric Tariff No. 3, Market Rule 1 ("Market Rules" or "Tariff") contains the rules that establish the clearing price in each capacity sub-region in the Forward Capacity Market. Tariff § III.13.2.7, 1st Rev. Sheet No. 7314O, JA 176. Tariff

section III.13.2.7.3 provides the minimum and maximum prices for the first three auctions and the payment rules when the minimum or maximum prices are reached in any auction. 2d Rev. Sheet No. 7314P to Sheet No. 7314Q.01, JA 177-79.

The dispute in this case centers on what should have occurred after the minimum clearing price (i.e., 60 percent of the Cost of New Entry or $4.50 per kilowatt-month) was reached in the first auction. Specifically, the dispute is whether ISO New England appropriately reviewed proration choices for reliability impacts and properly applied the total payment cap contained in Tariff section III.13.2.7.3(b):

> Where the Capacity Clearing Price reaches 0.6 times Cost of New Entry, offers shall be prorated such that no more than the Installed Capacity Requirement is procured in the Forward Capacity Auction, as follows: the total payment to all listed capacity resources during the associated Capacity Commitment Period shall be equal to 0.6 times Cost of New Entry times the Installed Capacity Requirement applicable in the Forward Capacity Auction. Payments to individual listed resources shall be prorated based on the total number of megawatts of capacity clearing in the Forward Capacity Auction (receiving a Capacity Supply Obligation for the associated Capacity Commitment Period). Suppliers may instead prorate their bid megawatts of participation in the Forward Capacity Market by partially de-listing one or more resources (e.g., proration may be done by reducing, through bilateral contracts, the capacity of one resource by the amount equal to the entire prorated amount of the Market Participant). . . . Any proration shall be subject to reliability review.

2d Rev. Sheet No. 7314Q (effective Jan. 9, 2008) (acronyms replaced), JA 178.

Tariff section III.13.2.5.2.5 establishes the reliability review process that ISO New England applies in the Proration Rule, the rule regulating the transfer of capacity obligations through bilateral contract, and the acceptance or denial of bids that signal a resource's desire to exit the market ("De-list Bids"). *See* Rehearing Order at P 7, JA 147 (quoting section III.13.2.5.2.5, Sheet No. 7314K, JA 171, and describing the local reliability review ("Transmission Security Analysis")).

ISO New England incorporated this reliability review and much of the currently-contested version of the Proration Rule into its tariff in its first filing to convert the Settlement into the Market Rules. *See* Compliance Order at P 2 n.2, JA 87. The Commission accepted a portion of the Market Rules on April 16, 2007. *ISO New England, Inc.*, 119 FERC ¶ 61,045 (2007) (accepting Tariff §§ 13.1 – 13.2), JA 326. The Proration Rule and the reliability review, as well as the remainder of the other rules, were accepted on June 5, 2007. *ISO New England, Inc.*, 119 FERC ¶ 61,239 (2007) (accepting Tariff §§ 13.3 – 13.8), JA 365.

In the latter order, the issue arose as to whether suppliers that were limited in their flexibility on account of the reliability review would receive additional compensation for loss of that flexibility. *Id.* at PP 23-34, JA 369-371 (contesting Tariff § III.13.5.1.1.3, Sheet No. 7316J, JA 210 (effective June 15, 2007), which restricts transfers of obligations between resources based on reliability need). Upholding ISO New England's right to review transfers of capacity obligations,

the Commission rejected the request for additional compensation for loss of supplier flexibility. *Id*. at PP 37-38, JA 372.

Three months after the Commission rejected that request for more compensation, ISO New England filed to modify the Market Rules. *See* Revisions to Forward Capacity Market Rules at 1 (Aug. 31, 2007) ("Proration Rule Revision"), JA 217. As most relevant here, the ISO proposed modifications to Tariff section III.13.2.7.3(b) to clarify the form that a quantity proration should take in the first auction, *id*. at 13, JA 229, and to insert a reliability review requirement, *id*., Attach. 1 at Sheet 7314Q, JA 239. The Commission approved the proposed modifications, noting that the filing "provide[s] market participants [with] ample notice and market certainty." *ISO New England Inc.*, 121 FERC ¶ 61,106 at PP 16-17 (Oct. 30, 2007), JA 381; *see id*. at P 13, JA 381 (describing the change to the Proration Rule).

IV. Challenged FERC Orders

A. Compliance Filing And Proration Informational Filing

The proceeding on appeal here began on March 3, 2008, when, pursuant to a Settlement requirement, ISO New England filed the results of its first auction. ISO New England Results Filing at 1 ("Compliance Filing"), R.1, JA 1. The ISO stated that the results showed that the Forward Capacity Market "worked as designed in attracting significant investment in new resources while maintaining needed

existing resources in New England." *Id*. at 2, JA 2. By "decreas[ing] the amount of Reliability Agreements" under which resources are paid out-of-market rates and increasing "incentives and opportunities for Demand Resources" participation, ISO New England asserted that two goals of the market were met. *Id*. The ISO asked the Commission to find that "the [auction] was conducted in accordance with the Tariff previously found just and reasonable by the Commission." *Id*.

Reporting that the auction clearing price was the floor price, ISO New England noted that the auction cleared over two thousand more megawatts than needed. *Id*. at 1, JA 1. "In accordance with the Tariff, when the minimum auction price is reached, the auction will conclude and load will pay only [the Installed Capacity Requirement] times the applicable floor price." *Id*. at 4, JA 4. To address this requirement, "[r]esources will choose" between taking a prorated price for all of their obligated capacity or prorating their capacity and receiving the clearing price. *Id*.; *see also id*. at 8, JA 8 (explaining step-by-step application of Tariff Rule III.13.2.7.3(b)). Because the ISO had already rejected, for reliability reasons, two Connecticut resources' bids to exit the capacity market, the ISO indicated that "it is highly unlikely that the ISO will allow proration based on bid MW for resources" within Connecticut. *Id*., Attach. C (Test. of S. Rourke) at 19, JA 36.

On November 18, 2008, pursuant to a commitment made in its Compliance Filing, ISO New England submitted information on proration elections. Proration Informational Filing at 1, R.73, JA 118. "The auction initially purchased 34,077 MW of capacity at a [prorated] price of $4.254/kW-month." *Id*. at 2, JA 119. In September of 2008, resources were allowed to elect quantity proration. *Id*. About 84 percent of megawatts (28,499 of 34,077 MW) elected quantity proration over price proration. *Id*. ISO New England then conducted its reliability review and determined that Connecticut resources would not be allowed to quantity prorate. *Id*. (the 5,859 MW that sought to reduce their obligations by 320 MW were not allowed to do so).

B. PSEG Suppliers' Interpretation Of The Proration Rule

Like other suppliers, PSEG Suppliers raised many issues related to their compensation for accepting capacity obligations in the market. *See* Protest of the PSEG Power Companies (Apr. 17, 2008), R.17, JA 44. They alone protested the application of the Proration Rule. *See* Compliance Order at PP 71-73, JA 99-100.

PSEG Suppliers agreed with ISO New England that "the tariff describes the two potential outcomes when excess capacity clears in the auction: either the price is reduced by the proration fraction or, at the option of the supplier, the number of MWs that are committed to the ISO may be reduced by the proration fraction."

Protest at 8, JA 51. But PSEG Suppliers interpreted the last sentence of Tariff section III.13.2.7.3(b) to mean that "the proration price/volume reduction provision is expressly 'subject to' the reliability review" by ISO New England. *Id.* Because of this, they argued "the entire proration mechanism does not apply if the units are needed for local reliability reasons" and, therefore, "the general pricing provisions . . . must be controlling." *Id.*

C. Compliance Order

On June 20, 2008, the Commission approved the results of the auction, finding that ISO New England had complied with its Commission-approved tariff in conducting the auction. Compliance Order at PP 1, 4, JA 87. Rejecting PSEG Suppliers' interpretation of the proration provision, the Commission found that it "would violate section III.13.2.7.3(b) of the ISO-NE tariff and the [Forward Capacity Market] Settlement . . . ." *Id.* at P 74, JA 100. The Settlement and Market Rules "prohibit ISO-NE from purchasing more capacity than what is equal to the [Installed Capacity Requirement] times the clearing price." *Id.* The Commission concluded that, to meet this restriction and comply with its tariff, ISO New England appropriately prorated the price of resources needed for local reliability rather than allow those resources "the option to prorate the amount of capacity they provide . . . ." *Id.* at P 75, JA 100.

Among the many other tariff compliance issues raised by buyers and sellers, the Commission also addressed: the incentives provided by a recalculated Cost of New Entry in the next auction, *id*. at PP 13-17, JA 89-90; the use of a local reliability analysis (the Transmission Security Analysis) to supplement the loss-of-load probability analysis used to determine the Installed Capacity Requirement for New England, *id*. at PP 18-62, JA 90-98; and the propriety of out-of-market purchases from generators needed for reliability that seek to exit the market (through submission of a De-list Bid), *id*. at PP 66-70, JA 99.[2] Finally, noting that many parties raised important issues that were nevertheless outside the scope of ISO New England's compliance proceeding, the Commission encouraged parties to raise these issues in the stakeholder process in order to change the filed rate. *Id*. at P 82, JA 101.

D. Rehearing Order

Answering both of PSEG Suppliers' arguments on rehearing, on March 24, 2010, the Commission determined that: (1) the correct interpretation of the Proration Rule allows price proration when resources are needed for local reliability; and (2) if such resources did not submit a De-List Bid to exit the

[2] The Compliance Order mistakenly refers to the Norwalk Harbor generators located in Connecticut as PSEG Suppliers' generators. *See id*. at PP 73, 75, JA 99, 100. The Norwalk Harbor generators, belonging to NRG Power Marketing LLC, submitted bids so that they could exit the auction. *Id*. at P 8, JA 88. PSEG Suppliers' generating stations at Bridgeport Harbor and New Haven Harbor are also located in Connecticut, but did not submit bids to exit the market.

market, they cannot be compensated pursuant to the De-List Bid tariff provisions. Rehearing Order at P 41, JA 154. In the Rehearing Order, the Commission also affirmed ISO New England's use of a security analysis in addition to a resource adequacy requirement in administering the capacity market, *id*. at PP 18-26, JA 150-52, and accepted the proration informational filing, *id*. at PP 43-45, JA 154-55.

The Commission concluded by noting that the ISO and its stakeholders separately had submitted a filing that addressed issues raised on rehearing and incorporated experience gained in the first auction. *Id*. at PP 25, 42, JA 151, 154. The only issues before the Commission for immediate resolution, however, concerned ISO New England's compliance with its current Tariff provisions. *Id*. The proper place to address arguments regarding whether (and to what extent) the Market Rules should be revised is, first, through the stakeholder process and, ultimately, in a proceeding to modify the Tariff. *Id*. at P 42, JA 154.

This appeal followed.

SUMMARY OF ARGUMENT

This case concerns ISO New England's implementation of the Market Rules, a complex tariff spanning more than 330 pages that instructs the ISO in the complicated operations of the Forward Capacity Market. Both buyers and sellers were upset with, and raised numerous and difficult issues regarding, the results of the first Forward Capacity Market auction. Yet the scope of this appeal has now narrowed to one precise issue concerning the interpretation of one provision on one page of the Market Rules.

The goal of that provision is to create market stability for the first three years of the Forward Capacity Market. The price floor assures suppliers that the price for their capacity will not go too near zero when there is too much supply somewhere in New England. The price ceiling assures buyers that, when supplies are tight, they will pay no more than the ceiling price for each megawatt from an existing resource.

The Proration Rule contains an additional protection for buyers when the price floor causes excess supply to clear in the auction. Buyers' total market payment is limited to the floor price times the Installed Capacity Requirement. As directed by the tariff, ISO New England initially prorates the price of all committed resources in order to meet that total payment cap. Suppliers then have

an option to convert the price proration into a quantity proration, freeing up some of their capacity for other purposes.

The narrow compliance issue on appeal is whether suppliers maintain their option under the Market Rules to convert to quantity proration when the ISO finds that their capacity is needed for local reliability. After examining the goal of the price collar provision, the text of the Proration Rule, and the objective of the total payment cap contained therein, the Commission reasonably agreed with ISO New England that suppliers do not enjoy such discretion when electricity reliability is in doubt. The Commission concluded that PSEG Suppliers' suggested remedy of out-of-market compensation would violate the purpose and the explicit directives of the Tariff. Responding to PSEG Suppliers' equity arguments, the Commission encouraged PSEG Suppliers and other parties to seek appropriate tariff modification, reflecting auction experience, through the ISO New England stakeholder process.

ARGUMENT

I. Standard Of Review

The Court's review of FERC orders is governed by the arbitrary and capricious standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). This standard of review is particularly deferential in the rate design context, which involves issues that "are fairly technical" and "involve policy judgments that lie at

the core of the regulatory mission." *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999) (internal quotations omitted); *see also Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) ("The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [the Court] afford[s] great deference to the Commission in its rate decisions").

The Court also "generally gives substantial deference to [FERC's] interpretation of filed tariffs, even where the issue simply involves the proper construction of language." *Southern Cal. Edison Co. v. FERC*, 415 F.3d 17, 21 (D.C. Cir. 2005) (quotation omitted). In such circumstances, the Court employs a variation of the familiar two-step analysis established in *Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837 (1984). The Court first looks to see whether the "language of the tariff is unambiguous – that is, if it reflects the clear intent of the parties to the agreement." *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998). If so, the plain language of the tariff controls. If, however, the Court determines the tariff language is ambiguous, it will "defer to the Commission's construction of the provision at issue so long as that construction is reasonable." *Id*. at 814-15.

PSEG Suppliers argue that *Chevron* step one applies here because the language of the Tariff is "not ambiguous." Br. 28, 33. Indeed, in their judgment,

the Tariff language is not just clear, but "pellucidly clear." *Id*. at 34. If, however, the Tariff meaning is clear, then it is clear in favor of the Commission's interpretation which (unlike PSEG Suppliers' interpretation) gives meaning to each word and sentence of the Proration Rule, as well as to the provision's goal of market stability. *See* Rehearing Order at P 41 & n.40, JA 154. If the Tariff is ambiguous, and thus deserving of *Chevron* step two deference, then the Commission's construction should be sustained as reasonable. *See Colorado Interstate Gas Co. v. FERC*, 599 F.3d 698, 701-702 (D.C. Cir. 2010); *see also Interstate Natural Gas Ass'n v. FERC*, 617 F.3d 504, 508 (D.C. Cir. 2010) (Court is "particularly reluctant to interfere with the agency's reasoned judgments" on a particularly complex or technical matter within its expertise).

II. The Commission's Reasonable Interpretation Of The Proration Rule Should Be Affirmed By The Court

After reviewing ISO New England's tariff to determine whether the ISO had violated the Proration Rule, the Commission found that the rule's primary objective is the total payment cap. Compliance Order at P 74, JA 100; Rehearing Order at P 41, JA 154. It "would violate section III.13.2.7.3(b) of the ISO-NE Tariff" for the ISO to "purchas[e] more capacity than what is equal to the [Installed Capacity Requirement] times the clearing price." Compliance Order at P 74, JA 100; *see* Rehearing Order at P 41, JA 154 (restating this objective three times).

To meet the payment cap objective, the Proration Rule directs the ISO to prorate the price paid to individual resources that have obtained obligations (i.e., become "listed") through the auction. Tariff § III.13.2.7.3(b), JA 178 ("Payments to individual listed resources shall be prorated based on the total number of MWs of [cleared] capacity"). The next sentence of the rule gives "[r]esources . . . the option to prorate the amount of capacity they provide . . . ." Compliance Order at P 75, JA 100. The last sentence provides that "[a]ny proration shall be subject to reliability review." Tariff § III.13.2.7.3(b), JA 178.

The Commission determined that the last sentence of the rule removes suppliers' flexibility to elect quantity proration if their resource is needed for local reliability. Compliance Order at P 75, JA 100; Rehearing Order at PP 40-41, JA 154. PSEG Suppliers' resources were needed for local reliability in Connecticut. *See* Rehearing Order at P 32, JA 153 (reducing capacity "would have caused a shortfall in the transmission security requirement"). "[T]o conform to [the total payment cap] provision in the Forward Capacity Market rules, ISO New England must prorate all capacity resources, including those in Connecticut." Compliance Order at P 74, JA 100 (acronyms replaced). Thus, because quantity proration was no longer available to Connecticut resources, the Commission interpreted the tariff to require application of the price proration default. *Id.* at P 75, JA 100. The Commission, therefore, properly concluded that ISO New England complied with

its tariff when it paid the prorated price to PSEG Suppliers. Rehearing Order at P 42, JA 154.

A. The Objective Of The Proration Rule Is Reduction To Meet The Total Payment Cap

PSEG Suppliers argue that, in the Commission's view, the "controlling rule" of Tariff section III.13.2.7.3(b) is that payments to individual resources must be prorated. Br. 37. To the contrary, the Commission's view is that the total payment cap is both the controlling rule and the primary objective of the Proration Rule, designed to limit auction-created prices during the early years of the New England Forward Capacity Market.

When the Proration Rule is triggered:

> [O]ffers shall be prorated such that no more than the Installed Capacity Requirement is procured in the Forward Capacity Auction, as follows: the total payment to all listed capacity resources during the associated Capacity Commitment Period shall be equal to 0.6 times Cost of New Entry times the Installed Capacity Requirement applicable in the Forward Capacity Auction.

Tariff § III.13.2.7.3(b), JA 178 (acronym replaced). The Commission interpreted this difficult sentence to mean that ISO New England may not "purchas[e] more capacity than what is equal to the Installed Capacity Requirement times the clearing price." Compliance Order at P 74, JA 100 (acronym replaced).

In the Commission's view, the first part of the sentence sets forth a general proposition: offers shall be reduced down to the capacity requirement. *Id.* The

second part, following the colon, interprets or amplifies the first: it sets forth the specifics for attaining that purchase limitation. Tariff § III.13.2.7.3(b), JA 178. In its reading, the Commission properly gave more weight to the specific directive, that is, prorating to meet the total payment cap. *See Entergy Services, Inc. v. FERC*, 568 F.3d 978, 984 (D.C. Cir. 2009) (upholding contract interpretation that "ground its analysis in . . . specific instructions" rather than general terms); *Southwestern Elec. Coop., Inc. v. FERC*, 347 F.3d 975, 982 (D.C. Cir. 2003) ("where specific contract provisions . . . conflict with more general ones, the specific provisions control"). Giving each word in the sentence meaning, the Commission properly concluded that "proration must occur until the total payment to all listed capacity resources is equal to the clearing price multiplied by the Installed Capacity Requirement . . . ." Rehearing Order at P 41, JA 154 (acronym replaced).

By comparison, PSEG Suppliers' interpretation minimizes and downplays, in turn, whole phrases in the sentence. They ignore the words "as follows:" and thus fail to recognize the important linkage those words create between the procurement cap and the total payment cap. *See* Br. 33-35. Further, reading the total payment cap as "an apparent financial limit," Br. 33, PSEG Suppliers fail to recognize that the total payment cap is a directive. *See* Tariff § III.13.2.7.3(b), JA 178 ("total payment . . . *shall* be equal to" the price times capacity requirement

(emphasis added)). Although the sentence references both capacity (e.g., the Installed Capacity Requirement) and price concepts (e.g., the floor price of 60 percent of the cost of new entry) in proclaiming that "offers shall be prorated," PSEG Suppliers focus exclusively on the capacity directive, thereby depriving the payment cap of legal effect. *See Colorado Interstate Gas*, 599 F.3d at 703 (upholding FERC's interpretation of a tariff because it "ensures that no provision of the tariff lacks legal effect").

Moreover, the Commission properly gave each word in the sentence its meaning under the Market Rules. PSEG Suppliers' interpretation of the term "offer," Br. 34, violates the meaning found in the other sections of the Forward Capacity Market tariff. *See* Compliance Order at P 75, JA 100. The term, as it is used in the Market Rules, encompasses both the concepts of price and quantity. *See*, *e.g.*, Tariff § III.13.2.3.2(a), Compilation of Offers and Bids, 1st Rev. Sheet No. 7313M, JA 163 (new resources "may submit an offer . . . indicating the quantity of capacity . . . [and] one to five prices"); *id.* § III.13.2.5.1, 1st Rev. Sheet No. 7314E, JA 165 (a new resource receives an obligation if the clearing price is "greater than or equal to the price specified in the offer"); *id.* § III.13.4.2.1, Supply Offers, Sheet No. 7315R, JA 190 ("[a]ll supply offers . . . shall specify the resource, the amount of capacity offered in MW, and the price, in dollars per kW/month").

B. The Tariff Directs ISO New England To Prorate Price, After Which Suppliers Can Exercise Their Option To Prorate Quantity

Price proration, although not the "controlling rule," *see* Br. 45, is the only means available to ISO New England to meet the payment cap objective. PSEG Suppliers argue that the "first directive" to the ISO is to prorate quantity so that no more than the capacity requirement is procured. Br. 33-34. To the contrary, the Proration Rule contains no independent authority for ISO New England to prorate the quantity of capacity obligations. *Compare* Tariff § III.13.2.7.3(b), JA 178 ("Suppliers may . . . prorate" quantity) *with* § III.13.2.7.3(c)(ii), JA 179 ("the capacity offered at that price [floor] . . . *will be* prorated such that the interface's approved capacity transfer limit . . . is not exceeded" (emphasis added)); *see also* *ISO New England Inc.*, 122 FERC ¶ 61,016 at PP 18, 25, JA 385, 386 (Jan. 8, 2008) (in proposing Tariff § III.13.2.7.3(c) which explicitly allows it to prorate capacity, ISO New England argued, and FERC agreed, "that section III.13.2.7.3(b) prorates the price of all offers but the [Forward Capacity Market] rules do not provide enough specificity about how to treat any remaining oversupply of capacity"). Instead, the language of the rule directs that the ISO "shall" prorate prices; suppliers alone have an explicit option to prorate quantity. Tariff § III.13.2.7.3(b), JA 178; s*ee* Compliance Order at P 75, JA 100; Rehearing Order at PP 31, 41, JA 152, 154.

As a general matter, the Commission agrees with PSEG Suppliers that price proration is "merely one of two ways available to keep the total cost of capacity within the target cap." Br. 45; *but see id*. at 34 (arguing that the rule contains three ways to meet that limit, including "an optional method for prorating quantity through bilateral contracts"); *id*. at 50 (suggesting "de-listing" as another way to prorate). The Commission disagrees that the two ways to prorate are equally available to suppliers (or, for that matter, to ISO New England).

PSEG Suppliers argued below that the Proration Rule provides an "absolute" right for a supplier "to choose the type of proration it wishe[s] to accept . . . ." Rehearing Order at P 37, JA 153; *see* Request for Rehearing of PSEG Power Companies at 8 (July 21, 2008), R.65, JA 109 (suppliers "must still retain the same unrestricted right to make [the proration] election that they had before the reliability review requirement was added"). The Commission reasonably found that the rule does not contain an unlimited right for suppliers to choose between the two types of proration when quantity proration would harm the reliability of the New England grid. *See* Rehearing Order at P 40, JA 154.

A supplier's option to quantity prorate is exercised after ISO New England has determined the payment cap, determined the prorated price that meets that objective, and paid all of the suppliers at the prorated rate. *See* Compliance Filing at 8, JA 8 ("the auction will initially purchase 34,077 MW of capacity at a price of

$4.254/kW-month"). After suppliers are paid the prorated price for all of their capacity that cleared the auction, they may elect to reduce the megawatts of their capacity obligation. *Id*. (Although no money changes hands at this stage, this effectively means that the price per megawatt is restored to the clearing price.) The election by suppliers to quantity prorate, as explained in the next section, is limited by reliability review.

C. The Commission Reasonably Determined That The Reliability Review Removes Suppliers' Flexibility

The final sentence of the Proration Rule – "any proration shall be subject to reliability review" – is ambiguous. *See Colorado Interstate Gas*, 599 F.3d at 702 (tariff provision is "reasonably susceptible to different constructions or interpretations"). It does not explain how ISO New England will conduct its review or what the ISO's next step will be if it determines that reliability is in peril. The Commission determined that the logical next step is to deny suppliers the option of reducing their capacity obligations if that option would endanger reliability. Compliance Order at P 75, JA 100; Rehearing Order at P 31, JA 152 ("resources . . . are not allowed to prorate quantity for reliability reasons" (punctuation omitted)); *id*. at P 41 & n.40, JA 154 (the sentence was inserted in the tariff "to ensure that the proration provision . . . does not adversely affect reliability"); *see also Blumenthal*, 552 F.3d at 879 (ISO New England's capacity tariff "meets a primary goal of system reliability").

The Commission further found that the directive in the last sentence does not override the total payment cap objective or the "market stability" goal served by proration. Rehearing Order at P 41 & n.40, JA 154; *see also Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1545 (D.C. Cir. 1985) ("[t]he purposes for which a tariff was imposed should be considered when interpreting the tariff"). Finding that all capacity resources "must prorate" to conform to the Proration Rule, Compliance Order at P 74, JA 100, the Commission reasonably concluded that when reliability review prevents quantity proration, ISO New England must price prorate. Rehearing Order at P 41, JA 154.

Given that the Commission here interpreted and gave effect to the ambiguous terms of the Proration Rule, PSEG Suppliers can only prevail before this Court by demonstrating that the agency's interpretation was unreasonable. *See*, *e.g.*, *Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) (question presented is not "whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision"); *Koch Gateway Pipeline Co.*, 136 F.3d at 814-15 (deference to the Commission's interpretation of ambiguous tariff language). PSEG Suppliers cannot meet this burden.

PSEG Suppliers contend that their compensation was reduced in contravention of the Proration Rule. Br. 20; *see* Rehearing Request at 13, JA 114

(arguing that the out-of-market payments to compensate their resources "should be allocated to the reliability region which directly benefits from the needed reliability"). They interpret that rule to mandate only quantity proration. Br. 34-35 (asserting there is "a choice between means of meeting" the proration requirement with one choice being price proration). In PSEG Suppliers' view, if the reliability review disallows quantity proration, then the rest of the language of the rule becomes ineffective. *Id*. at 35. But as the Commission sensibly observed, the option for quantity proration is the only part of the Proration Rule that is rendered inoperable when there are reliability concerns. Rehearing Order at P 31, JA 152. PSEG Suppliers' interpretation and request for additional compensation "would violate section III.13.2.7.3(b) . . . which prohibit[s] ISO-NE from purchasing more capacity than what is equal to the [Installed Capacity Requirement] times the clearing price." Compliance Order at P 74, JA 100.

PSEG Suppliers also argue that the Commission's interpretation ignores a fundamental policy goal of the Forward Capacity Market. Br. 28-30, 40-42. But this purported "goal" of the Market Rules is actually a Commission instruction to ISO New England to file a reliability market proposal that recognizes and compensates for the different value of resources at different locations. Br. 14, 41-42 (quoting *Devon Power LLC*, 103 FERC ¶ 61,082 at P 37 (2003)).

The Commission need not identify or evaluate here the broader goals of the Forward Capacity Market as long as it adopts, as it did here, an interpretation that is consistent with the specific goal of the relevant tariff provision. The purpose of the price collar in Tariff section III.13.2.7.3 is to limit the exposure of buyers to high prices and suppliers to low prices, in other words, to "ensure relative market stability during the initial years of the Forward Capacity Market . . . ." Rehearing Order at P 41 n.40, JA 154 (acronym replaced). The problem with a price floor is excess supply – too many megawatts are procured because the price is unable to fall to a point where supply meets demand. Proration is the answer to that problem and thus advances the goal of market stability. *Id.*; *see Consolidated Gas*, 771 F.2d at 1547 (upholding tariff interpretation in which FERC relied, in part, on the "risk allocation purpose" of a billing provision).

III. PSEG Suppliers' Remaining Arguments Are Without Merit

PSEG Suppliers assert that the Commission failed to address their "separate and distinct arguments" regarding the Commission's errors in interpreting the Proration Rule. Br. 31. To the contrary, the Commission fully addressed the two arguments raised by PSEG Suppliers on rehearing, finding that PSEG Suppliers' interpretation of the Proration Rule would violate the tariff and that PSEG Suppliers' resources did not qualify for De-List Bid compensation. Rehearing Order at P 41, JA 154. PSEG Suppliers' points regarding discrimination and

market goals were subsumed within their first argument regarding interpretation error. Rehearing Request at 3-4, JA 104-105. But even if they were separate and distinct arguments, the Commission appropriately considered them in the challenged orders.

A. PSEG Suppliers' Equity And Discrimination Arguments Are More Appropriately Raised In A Tariff Modification, Rather Than A Tariff Compliance, Proceeding

Having failed to demonstrate that the Commission's interpretation of the Proration Rule is unreasonable, PSEG Suppliers indulge in a lengthy argument that the Commission's interpretation of the Proration Rule is unfair, in that it results in compensation of resources needed for local reliability at a lower price than other resources. Br. 25-26, 29-32, 38-39.

The Commission did not ignore this argument; it simply viewed PSEG Suppliers as arguing "more broadly" in favor of their preferred Tariff interpretation. Rehearing Order at P 38, JA 153. Moreover, the Commission viewed the discrimination and equity claims as more properly raised in a tariff modification proceeding, as opposed to the Compliance Filing proceeding at issue here. *See* Rehearing Order at P 42, JA 154. In this regard, the Commission encouraged PSEG Suppliers (and others) to engage in the stakeholder process, to revise, as appropriate, the Market Rules to address any undue disparity in treatment among resources. Compliance Order at P 17, 82, JA 89, 101. It held that "[t]he

importance of these issues, however, does not render them appropriate for decision in the instant proceeding, which is limited to ISO New England's filing regarding the results of the February 2008 Forward Capacity Auction." *Id.* at P 82, JA 101 (acronyms replaced). The Commission also explained that there was an opportunity to address these issues earlier, when the "subject to reliability review" language was added to the Tariff. Rehearing Order at P 41 n.40, JA 154. And these issues would be addressed later, upon the Commission's review of the stakeholder revisions to the Tariff. *Id.* at P 42, JA 154. The Commission logically could conclude that there was no reason to consider them again, separately, when it is the Commission's view "that ISO New England is complying with section III.13.2.7.3 to the extent that it is prohibiting quantity proration to maintain reliability." *Id.* (acronym replaced).

Rather than entertain equity arguments, the Commission appropriately focused on the "language within the four corners of the tariff [and] the purposes of the [relevant] provisions . . . to support" its interpretation. *Consolidated Gas*, 771 F.2d at 1546; *see Entergy Services*, 568 F.3d at 985 ("Commission's analysis . . . appropriately focused on the contract the parties negotiated rather than on which side struck the better bargain"); *see also Mobil Oil Exploration & Producing S.E., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) (FERC enjoys "broad discretion in determining how best to handle related, yet discrete, issues in terms of

procedures and priorities"); *Midwest Indep. Transmission Sys. Operator, Inc. v. FERC*, 388 F.3d 903, 911 (D.C. Cir. 2004) ("considerable deference" is given to FERC's view of its own priorities "because FERC presumably knows its priorities better than [petitioners] – or for that matter, this court").

For the first time on appeal, PSEG Suppliers argue that ISO New England bore the burden of justifying the disparity in compensation that would result from the application of its Proration Rule. Br. 43 ("utility bears the burden of justifying . . . different" charges for similar services). This is a misstatement of the burden in this case.

If ISO New England had that burden at any time, then the time for raising any disparity was when tariff modifications were proposed. *See* Settlement Order at P 35, JA 269 (pursuant to the Forward Capacity Market Settlement, the ISO is allowed to modify the Market Rules only where it shows that the failure to make the "change would have a negative effect on (1) system reliability or security or (2) the competitiveness or efficiency of the forward capacity or forward reserve markets"). That was when the ISO filed the Proration Rule Revision. "No party protested the addition of that language [requiring reliability review] to section III.13.2.7.3(b), and it became part of the [Market Rules] when the Commission accepted ISO-NE's proposed Tariff changes on October 30, 2007." Rehearing Order at P 41 n.40, JA 154. Furthermore, ISO New England was prevented by the

Commission's Rules of Practice and Procedure from responding to PSEG Suppliers' undue discrimination claim because it was raised for the first time on rehearing. *See* 18 C.F.R. § 385.713(d)(1) ("The Commission will not permit answers to requests for rehearing."); *see also*, *e.g.*, *Allegheny Energy Supply Co., LLC*, 122 FERC ¶ 61,104 at P 6 (2009) (FERC "looks with disfavor on parties raising issues for the first time on rehearing . . . because other parties are not permitted to respond to a request for rehearing").

When there is a payment or billing dispute regarding the implementation of a Commission-approved tariff, the usual approach is to address it through a complaint filed under Federal Power Act section 206, 16 U.S.C. § 824e. *See Maryland Pub. Serv. Comm'n*, 2011 U.S. App. LEXIS 3172, at *2-3 (results of capacity auction in the mid-Atlantic were challenged under FPA § 206); *IDACORP Energy L.P. v. FERC*, 433 F.3d 879 (D.C. Cir. 2006) (billing dispute over charges imposed pursuant to formula rate). In the usual case, the burden is on the complainant to show that the results of a tariff rate are unduly discriminatory.

In the challenged orders, the Commission approved a compliance filing showing that the auction was conducted in compliance with the provisions of the Market Rules. Rehearing Order at PP 28, 31, 42, JA 152, 154 (agreeing with ISO New England that its price proration, to maintain system reliability, complied with

section III.13.2.7.3 of the Market Rules). If the Commission were to find that the Proration Rule unduly discriminates among resources, it would be limited to initiating proceedings to change the tariff under Federal Power Act section 206, 16 U.S.C. § 824e. *See Southern Cal. Edison*, 415 F.3d at 22 ("because FERC has already approved the mechanism in the ISO Tariff . . . and cannot retroactively reverse that determination . . . no argument concerning cost causation, regardless of how compelling, would permit the Commission to disregard the approved ISO Tariff"). There was no reason to initiate such a new proceeding, in light of the agency's finding of tariff compliance and a separate proceeding to consider tariff modification.

B. The Total Payment Cap Applies Only In The Price Collar Provision Of The Tariff And Not To Other Market Rules

1. De-List Bidders Receive Out-Of-Market Payments For Not Exiting The Market

Instead of proffering an interpretation that is consistent with the total payment cap, PSEG Suppliers argue that they should receive "out-of-market" compensation for their resources because the total payment cap is violated by other parts of the Markets Rules. Br. 34 n.8, 48-50. Specifically, they argue that Tariff section III.13.2.5.2.5(b), JA 172, shows that the "cap was never inviolate" and that resources needed for local reliability are "not compelled to accept prices below the clearing price." *Id*. at 48-49. This argument is without merit.

Tariff section III.13.2.5.2.5 provides out-of-market compensation to resources that seek to exit the market but are prevented from doing so because they are needed for reliability. Compliance Order at P 8, JA 88 (defining De-List Bid); Rehearing Order at P 7, JA 147 (citing Tariff § III.13.2.5.2.5.1, Sheet No. 7314N.02, JA 188 (effective Oct. 29, 2008) (a resource needed for reliability "will be paid . . . on the basis of its de-list bid as accepted for the . . . Auction . . . instead of the . . . Clearing Price)). As PSEG Suppliers point out, this tariff provision does not allow de-listing when capacity is needed for reliability. *See* Br. 47-48 & n.15. In that case, the flexibility enjoyed by the supplier is limited by the reliability needs of the system. *Id*. The Commission reasonably applied that same approach in interpreting the Proration Rule. *See* Rehearing Order at P 40, JA 154.

Although PSEG Suppliers argued below that it was "entitled to out-of-market compensation," Rehearing Request at 12, JA 113, the Commission properly did not apply this compensation approach below. *See* Rehearing Order at P 41, JA 154. The Proration Rule explicitly directs the amount of compensation to be paid to suppliers "receiving a Capacity Supply Obligation" for supply "clearing in the Forward Capacity Auction," not outside of the auction. Tariff § III.13.2.7.3(b), JA 178. Out-of-market compensation, in contrast, is used to bring resources back that exited before the auction concluded. *See* Rehearing Order at P 41, JA 154 (explaining that "delisting and proration occur at different points"). The total

payment cap is a cap on what buyers pay (and what suppliers are paid) for capacity that clears the auction. Tariff § III.13.2.7.3(b), JA 178. The Commission read the tariff as a harmonious whole: extra, out-of-market compensation is given to particular resources to lure them back into capacity obligations; and compensation consistent with the total payment cap is provided to all resources, even those needed for local reliability, that accepted capacity obligations in the auction. *See* Rehearing Order at P 41, JA 154; *see also Entergy Services*, 568 F.3d at 984 ("FERC's reading of the contract has the substantial virtue of harmonizing [all of the parts of] the Power Agreement").

PSEG Suppliers, when given the opportunity during the first auction, never sought to forego market compensation. *See* Protest at 10, JA 53 (arguing that rejected De-List Bid should "have set the price at their offer bids of $5.99 per k/w month for all Connecticut units"). Because no De-List Bid was submitted by PSEG Suppliers, "[i]t would thus violate the tariff to compensate proration as if it were governed by the de-listing tariff provisions." Rehearing Order at P 41, JA 154.

2. The Applicable Market Rules Met The Total Payment Cap Even When Reliability Review Limited Supplier Flexibility

PSEG Suppliers also incorrectly assert that "every other provision in the [Forward Capacity Market] Rules that requires reliability review establishes unique preferences or pricing procedures for resources needed to preserve the reliability of

the grid." Br. 38 n.12. PSEG Suppliers overlook the Tariff provision that requires reliability review when a supplier wants to transfer its capacity obligation to a different resource. *See* Tariff section III.13.5.1.1, Process for Approval of Capacity Supply Obligation Bilaterals, Sheet Nos. 7316I - 7316J, JA 209-10 ("The ISO shall review . . . and may reject [the transfer for] identified reliability issues"). ISO New England may reject for reliability reasons, including a local reliability need, a supplier's request to transfer its obligations to a different resource. *ISO New England, Inc.*, 119 FERC ¶ 61,239 at P 35, JA 371. If this happens, the supplier does not receive special preferences or pricing – in fact, its compensation for providing the capacity obligation does not change at all. *Id.* at P 37, JA 372. The Market Rules, as they existed at the time PSEG Suppliers challenged the Proration Rule interpretation, thus contained at least one provision that explicitly restricted supplier flexibility on account of reliability review and provided no additional compensation or preference for that loss of flexibility.

PSEG Suppliers' resort to comparison with the 2010 Market Rules modifications, Br. 39-40, offers no help in avoiding the payment cap in the old Market Rule. The 2010 modification of the language that adopted the interpretation and compensation provisions advocated by PSEG Suppliers shows that PSEG Suppliers' construction cannot reflect the plain meaning of the Proration Rule. There the tariff was modified to explicitly override the total payment cap.

See 2010 Revisions Filing, 5th Rev. Sheet No. 7314Q, JA 428 (when payments to resources needed for reliability are not prorated, "the total payment described . . . above will increase accordingly"). Where there was no explicit override of the total payment cap in the text of the Proration Rule, it was reasonable for the Commission to interpret that cap as remaining inviolate.

3. The Import Rule, Tariff § III.13.2.7.3(c), Is Subject To The Total Payment Cap

Finally, PSEG Suppliers argue on appeal that their resources deserve preferential treatment like the resources imported into ISO New England pursuant to grandfathered agreements. Br. 50-52 (citing Tariff Rule III.13.2.7.3(c), JA 179 ("Import Rule")). In the proceeding below, PSEG Suppliers did not direct the Commission's attention to this provision or argue that they should receive similar treatment to that given import contracts. PSEG Suppliers are barred from introducing this new issue on appeal. *See* FPA § 313(b), 16 U.S.C. § 825*l*(b); *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (failure to raise an issue on rehearing is a bar to the Court's consideration).

In any event, the Import Rule does not provide the preferential treatment that PSEG Suppliers claim. Instead, grandfathered capacity contracts may be spared from reductions to meet import limits, but they are not spared from the Proration Rule. *See* III.13.2.7.3(c)(iii), JA 179 ("capacity remaining after the treatment described [for pre-existing capacity contracts] . . . shall be subject to the proration

described in III.13.2.7.3(b)”). Assuming the capacity provided through an import contract is a “critical resource” needed for local reliability as PSEG Suppliers claim, Br. 51, under the application of the Proration Rule, that supply contract would also lose its option to prorate quantity and instead receive the prorated price. All supply that clears in the auction, whether it is a pre-existing import contract or a capacity resource located inside the ISO New England footprint, is subject to the Proration Rule and the total payment cap objective contained therein.

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the Commission's orders should be upheld in all respects.

Respectfully submitted,

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March 16, 2011
Final Brief: May 5, 2011

PSEG Energy Resources & Trade LLC v. FERC **Docket No. ER08-633**
D.C. Cir. No. 10-1103

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 9,521 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addenda.

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May 5, 2011

ADDENDUM A

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with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the reservation. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(b) Alternative prescriptions

(1) Whenever the Secretary of the Interior or the Secretary of Commerce prescribes a fishway under section 811 of this title, the license applicant or any other party to the license proceeding may propose an alternative to such prescription to construct, maintain, or operate a fishway.

(2) Notwithstanding section 811 of this title, the Secretary of the Interior or the Secretary of Commerce, as appropriate, shall accept and prescribe, and the Commission shall require, the proposed alternative referred to in paragraph (1), if the Secretary of the appropriate department determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative—

(A) will be no less protective than the fishway initially prescribed by the Secretary; and

(B) will either, as compared to the fishway initially prescribed by the Secretary—

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

(3) In making a determination under paragraph (2), the Secretary shall consider evidence provided for the record by any party to a licensing proceeding, or otherwise available to the Secretary, including any evidence provided by the Commission, on the implementation costs or operational impacts for electricity production of a proposed alternative.

(4) The Secretary concerned shall submit into the public record of the Commission proceeding with any prescription under section 811 of this title or alternative prescription it accepts under this section, a written statement explaining the basis for such prescription, and reason for not accepting any alternative prescription under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final prescription would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(June 10, 1920, ch. 285, pt. I, §33, as added Pub. L. 109–58, title II, §241(c), Aug. 8, 2005, 119 Stat. 675.)

SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with re-

spect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term ''sale of electric energy at wholesale'' when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term ''public utility'' when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),[1] 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms ''affiliate'', ''associate company'', ''electric utility company'', ''holding company'', ''subsidiary company'', and ''exempt wholesale generator'' shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

(June 10, 1920, ch. 285, pt. II, § 201, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 847; amended Pub. L. 95–617, title II, § 204(b), Nov. 9, 1978, 92 Stat. 3140; Pub. L. 102–486, title VII, § 714, Oct. 24, 1992, 106 Stat. 2911; Pub. L. 109–58, title XII, §§ 1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985.)

REFERENCES IN TEXT

The Rural Electrification Act of 1936, referred to in subsec. (f), is act May 20, 1936, ch. 432, 49 Stat. 1363, as amended, which is classified generally to chapter 31 (§ 901 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 901 of Title 7 and Tables.

The Public Utility Holding Company Act of 2005, referred to in subsec. (g)(5), is subtitle F of title XII of Pub. L. 109–58, Aug. 8, 2005, 119 Stat. 972, which is classified principally to part D (§ 16451 et seq.) of subchapter XII of chapter 149 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of Title 42 and Tables.

AMENDMENTS

2005—Subsec. (b)(2). Pub. L. 109–58, § 1295(a)(1), substituted ''Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title'' for ''The provisions of sections 824i, 824j, and 824k of this title'' and ''Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''Compliance with any order of the Commission under the provisions of section 824i or 824j of this title''.

Subsec. (e). Pub. L. 109–58, § 1295(a)(2), substituted ''section 824e(e), 824e(f), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''section 824i, 824j, or 824k of this title''.

Subsec. (f). Pub. L. 109–58, § 1291(c), which directed amendment of subsec. (f) by substituting ''political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year,'' for ''political subdivision of a state,'', was executed by making the substitution for ''political subdivision of a State,'' to reflect the probable intent of Congress.

[1] So in original. Section 824e of this title does not contain a subsec. (f).

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for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Notes or drafts maturing less than one year after issuance

Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) Public utility securities regulated by State not affected

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Guarantee or obligation on part of United States

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Filing duplicate reports with the Securities and Exchange Commission

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78*l*, and 78m of title 15.

(June 10, 1920, ch. 285, pt. II, § 204, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 850.)

TRANSFER OF FUNCTIONS

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and de-

livering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Pub. L. 95–617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142.)

AMENDMENTS

1978—Subsec. (d). Pub. L. 95–617, § 207(a), substituted "sixty" for "thirty" in two places.

Subsec. (f). Pub. L. 95–617, § 208, added subsec. (f).

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95–617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate,

charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.[1]

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

(A) The term "short-term sale" means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term "applicable Commission rule" means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by

[1] See References in Text note below.

the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

(June 10, 1920, ch. 285, pt. II, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852; amended Pub. L. 100–473, § 2, Oct. 6, 1988, 102 Stat. 2299; Pub. L. 109–58, title XII, §§ 1285, 1286, 1295(b), Aug. 8, 2005, 119 Stat. 980, 981, 985.)

REFERENCES IN TEXT

The Public Utility Holding Company Act of 1935, referred to in subsec. (c), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 803, as amended, which was classified generally to chapter 2C (§ 79 et seq.) of Title 15, Commerce and Trade, prior to repeal by Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58, § 1295(b)(1), substituted ''hearing held'' for ''hearing had'' in first sentence.

Subsec. (b). Pub. L. 109–58, § 1295(b)(2), struck out ''the public utility to make'' before ''refunds of any amounts paid'' in seventh sentence.

Pub. L. 109–58, § 1285, in second sentence, substituted ''the date of the filing of such complaint nor later than 5 months after the filing of such complaint'' for ''the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period'', in third sentence, substituted ''the date of the publication'' for ''the date 60 days after the publication'' and ''5 months after the publication date'' for ''5 months after the expiration of such 60-day period'', and in fifth sentence, substituted ''If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision'' for ''If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision''.

Subsec. (e). Pub. L. 109–58, § 1286, added subsec. (e).

1988—Subsec. (a). Pub. L. 100–473, § 2(1), inserted provisions for a statement of reasons for listed changes, hearings, and specification of issues.

Subsecs. (b) to (d). Pub. L. 100–473, § 2(2), added subsecs. (b) and (c) and redesignated former subsec. (b) as (d).

EFFECTIVE DATE OF 1988 AMENDMENT

Section 4 of Pub. L. 100–473 provided that: ''The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such complaints may be withdrawn and refiled without prejudice.''

LIMITATION ON AUTHORITY PROVIDED

Section 3 of Pub. L. 100–473 provided that: ''Nothing in subsection (c) of section 206 of the Federal Power Act, as amended (16 U.S.C. 824e(c)) shall be interpreted to confer upon the Federal Energy Regulatory Commission any authority not granted to it elsewhere in such Act [16 U.S.C. 791a et seq.] to issue an order that (1) requires a decrease in system production or transmission costs to be paid by one or more electric utility companies of a registered holding company; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company. For purposes of this section, the terms 'electric utility companies' and 'registered holding company' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C. 79 et seq.].''

STUDY

Section 5 of Pub. L. 100–473 directed that, no earlier than three years and no later than four years after Oct. 6, 1988, Federal Energy Regulatory Commission perform a study of effect of amendments to this section, analyzing (1) impact, if any, of such amendments on cost of capital paid by public utilities, (2) any change in average time taken to resolve proceedings under this section, and (3) such other matters as Commission may deem appropriate in public interest, with study to be sent to Committee on Energy and Natural Resources of Senate and Committee on Energy and Commerce of House of Representatives.

§ 824f. Ordering furnishing of adequate service

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

(June 10, 1920, ch. 285, pt. II, § 207, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

§ 824g. Ascertainment of cost of property and depreciation

(a) Investigation of property costs

The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

(b) Request for inventory and cost statements

Every public utility upon request shall file with the Commission on inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

(June 10, 1920, ch. 285, pt. II, § 208, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

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Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amended June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this

ADDENDUM B

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III.13.2.3.2. Step 2: Compilation of Offers and Bids. The auctioneer shall compile all of the offers and bids for that round, as follows:

(a) **Offers from New Generating Capacity Resources, New Import Capacity Resources, and New Demand Resources.**

(i) The Project Sponsor for any New Generating Capacity Resource, New Import Capacity Resource, or New Demand Resource accepted in the qualification process for participation in the Forward Capacity Auction may submit an offer (a "New Capacity Offer") indicating the quantity of capacity that the Project Sponsor would commit to provide from the resource (in the associated modeled Capacity Zone during the qualification process) during the Capacity Commitment Period at that round's prices. A New Capacity Offer shall be defined by the submission of one to five prices, each strictly less than the Start-of-Round Price but greater than or equal to the End-of-Round Price, and an associated quantity in the associated modeled Capacity Zone. Each price shall be expressed in units of dollars per kilowatt-

month to an accuracy of at most three digits to the right of the decimal point, and each quantity shall be expressed in units of MWs to an accuracy of at most three digits to the right of the decimal point. Such a New Capacity Offer shall imply a supply curve indicating quantities offered at all of that round's prices, pursuant to the convention of Section III.13.2.3.2(a)(iii).

(ii) If the Project Sponsor of a New Generating Capacity Resource, a New Import Capacity Resource, or New Demand Resource elects to offer in a Forward Capacity Auction, the Project Sponsor must offer the resource's full summer Qualified Capacity at the Forward Capacity Auction Starting Price in the first round of the auction. A New Capacity Offer for a resource may in no event be for greater capacity than the resource's full summer Qualified Capacity at any price. A New Capacity Offer for a resource may not be for less capacity than the resource's Economic Minimum Limit at any price, except where the New Capacity Offer is for a capacity quantity of zero.

(iii) Let the Start-of-Round Price and End-of-Round Price for a given round be P_S and P_E, respectively. Let the m prices ($1 \leq m \leq 5$) submitted by a Project Sponsor for a modeled

(c) The CONE for each Capacity Zone will be updated after each Forward Capacity Auction to incorporate the results of that auction. If a Capacity Zone that experienced price separation in any previous Forward Capacity Auction is either not included in a subsequent Forward Capacity Auction or does not experience price separation in that subsequent Forward Capacity Auction, its CONE will be updated using the Capacity Clearing Price of the Capacity Zone in which it was included in that subsequent Forward Capacity Auction. At any time, there will only be one CONE for each Capacity Zone, applicable for all purposes. References in this Section III.13 to CONE shall mean the CONE applicable to the relevant Capacity Zone or modeled Capacity Zone.

III.13.2.5. Treatment of Specific Offer and Bid Types in the Forward Capacity Auction.

III.13.2.5.1. Offers from New Generating Capacity Resources, New Import Capacity Resources, and New Demand Resources. A New Capacity Offer clears (receives a Capacity Supply Obligation for the associated Capacity Commitment Period) in the Forward Capacity Auction if the Capacity Clearing Price is greater than or equal to the price specified in the offer, except possibly as a result of the Capacity Rationing Rule described in Section III.13.2.6. The amount of capacity that receives a Capacity Supply Obligation through the Forward Capacity Auction shall not exceed the quantity of capacity offered from the New Generating Capacity Resource, New Import Capacity

(that is, the amount of capacity procured in the Forward Capacity Auction shall be the Installed Capacity Requirement or Local Sourcing Requirement, as appropriate, not decreased by the amount of the administratively de-listed capacity).

III.13.2.5.2.5. Bids Rejected for Reliability Reasons. The ISO shall review each Permanent De-List Bid, Static De-List Bid, Export Bid, Administrative Export De-List Bid, and Dynamic De-List Bid to determine whether the capacity associated with that bid is needed for reliability reasons during the Capacity Commitment Period associated with the Forward Capacity Auction. The capacity shall be deemed needed for reliability reasons if the absence of the capacity would result in the violation of any NERC or NPCC (or their successors) criteria, or ISO New England System Rules. De-list bids shall not be rejected pursuant to this Section III.13.2.5.2.5 solely on the basis that acceptance of the de-list bid may result in the procurement of less capacity than the Installed Capacity Requirement or Local Sourcing Requirement for Load Zones or aggregations of Load Zones considered for modeling in a Forward Capacity Auction. Where a Permanent De-List Bid, Static De-List Bid, Export Bid, Administrative Export De-List Bid, or Dynamic De-List Bid would otherwise clear in the Forward Capacity Auction, but the ISO has determined that some or all of the capacity associated with the bid is needed for reliability

reasons, then the bid having capacity needed for reliability will not clear in the Forward Capacity Auction, and the following provisions will apply:

(a) The Lead Market Participant shall be notified that its bid did not clear for reliability reasons at the later of: (i) immediately after the end of the Forward Capacity Auction round in which the auction price reaches the price of the bid; or (ii) as soon as practicable after the time at which the ISO has determined that the bid must be rejected for reliability reasons.

(b) If at the completion of the last annual reconfiguration auction for the relevant Capacity Commitment Period (and subsequent Capacity Commitment Periods, in the case of a Permanent De-List Bid), the ISO has not replaced the capacity needed for reliability reasons and the reliability concern has not been otherwise addressed, the resource or portion thereof shall become listed for the Capacity Commitment Period. The resource shall be compensated at a just and reasonable rate, as determined by the Commission. A unit receiving a just and reasonable rate under this Section III.13.2.5.2.5 shall have the obligations of listed capacity resources as described in Section III.13.6.1. Such resources shall be counted towards the Installed Capacity Requirement for the Capacity Commitment Period.

III.13.2.5.2.5.1. Compensation for Bids Rejected for Reliability Reasons.

(a)(i) In cases where a Static De-List Bid, Export Bid, Administrative Export De-List Bid, Dynamic De-List Bid, or partial Permanent De-List Bid would otherwise clear in the Forward Capacity Auction but the de-list bid has been rejected for reliability reasons pursuant to Section III.13.2.5.2.5 and the resource qualifies for payment under Section III.13.2.5.2.5.1(a)(ii), the resource will be paid in the same manner as all other Capacity Resources, except that payment shall be made on the basis of its de-list bid as accepted for the Forward Capacity Auction for the relevant Capacity Commitment Period instead of the Forward Capacity Market Clearing Price. Under this Section, accepted Dynamic De-list Bids filed with the Commission as part of the FCA results filing are subject to review and approval by the Commission pursuant to the "just and reasonable" standard of Section 205 of the Federal Power Act.

(a)(ii) A resource will qualify for payment under Section III.13.2.5.2.5.1(a)(i) if the ISO has not notified the resource that it is no longer needed for reliability reasons by 12:00 a.m. on June 1 of the year preceding the commencement of the Capacity Commitment Period for which the de-list bid was rejected. Once qualified under this Section III.13.2.5.2.5.1(a)(ii), the resource will have a Capacity Supply Obligation for the 12-month Capacity Commitment Period for which the de-list bid was rejected.

III.13.2.6. Capacity Rationing Rule. Except for Dynamic De-List Bids, Export Bids, and offers from New Import Capacity Resources and Existing Import Capacity Resources, offers and bids in the Forward Capacity Auction must clear or not clear in whole, unless the offer or bid specifically indicates that it may be rationed. A resource may elect to be rationed to either its Economic Minimum Limit or a level above its Economic Minimum Limit. These levels are submitted pursuant to Section III.13.1.1.2.2.3. Offers from New Import Capacity Resources and Existing Import Capacity Resources are subject to rationing, except where such rationing would violate any applicable physical minimum flow requirements on the associated interface. Export Bids may elect to be rationed generally, but regardless of such election will always be subject to potential rationing where the associated external interface binds. If more Dynamic De-List Bids are submitted at a price than are needed to clear the market, the bids shall be cleared pro-rata, subject to honoring the Economic Minimum Limit of the resources. Where an offer or bid may be rationed, such rationing may not result in procuring an amount of capacity that is below the associated resource's Economic Minimum Limit.

III.13.2.7. Determination of Capacity Clearing Prices. The Capacity Clearing Price in each Capacity Zone shall be the price established by the descending clock Forward Capacity Auction as described in Section III.13.2.3, subject to the other provisions of this Section III.13.2.

III.13.2.7.1. Import-Constrained Capacity Zone Capacity Clearing Price Floor. The Capacity Clearing Price in an import-constrained Capacity Zone shall not be lower than the Capacity Clearing Price in the Rest-of-Pool Capacity Zone. If after the Forward Capacity Auction is conducted,

the Capacity Clearing Price in an import-constrained Capacity Zone is less than the Capacity Clearing Price in the Rest-of-Pool Capacity Zone, all resources clearing in the import-constrained Capacity Zone shall be paid based on the Capacity Clearing Price in the Rest-of-Pool Capacity Zone during the associated Capacity Commitment Period.

III.13.2.7.2. Export-Constrained Capacity Zone Capacity Clearing Price Ceiling. The Capacity Clearing Price in an export-constrained Capacity Zone shall not be higher than the Capacity Clearing Price in the Rest-of-Pool Capacity Zone. If after the Forward Capacity Auction is conducted, the Capacity Clearing Price in an export-constrained Capacity Zone is higher than the Capacity Clearing Price in the Rest-of-Pool Capacity Zone, all resources clearing in the export-constrained Capacity Zone shall be paid based on the Capacity Clearing Price in the Rest-of-Pool Capacity Zone during the associated Capacity Commitment Period.

III.13.2.7.3. Capacity Clearing Price Collar. Until three Successful Forward Capacity Auctions have been conducted in the Rest-of-Pool Capacity Zone, but in no case for more than the first five Forward Capacity Auctions, the following additional provisions regarding the Capacity Clearing Price shall apply in all Capacity Zones (and in the application of Section III.13.2.3.3(d)(iii)):

(a) If the Capacity Clearing Price is above 1.4 times CONE, Existing Generating Capacity Resources, Existing Import Capacity Resources, and Existing Demand Resources shall be paid 1.4 times CONE during the associated Capacity Commitment Period,

and New Generating Capacity Resources, New Import Capacity Resources, and New Demand Resources shall be paid the Capacity Clearing Price during the associated Capacity Commitment Period; and

(b) The Capacity Clearing Price shall not fall below 0.6 times CONE. Where the Capacity Clearing Price reaches 0.6 times CONE, offers shall be prorated such that no more than the Installed Capacity Requirement is procured in the Forward Capacity Auction, as follows: the total payment to all listed capacity resources during the associated Capacity Commitment Period shall be equal to 0.6 times CONE times the Installed Capacity Requirement applicable in the Forward Capacity Auction. Payments to individual listed resources shall be prorated based on the total number of MWs of capacity clearing in the Forward Capacity Auction (receiving a Capacity Supply Obligation for the associated Capacity Commitment Period). Suppliers may instead prorate their bid MWs of participation in the Forward Capacity Market by partially de-listing one or more resources (e.g., proration may be done by reducing, through bilateral contracts, the capacity of one resource by the amount equal to the entire prorated amount of the Market Participant). Regardless of any such proration, the full amount of capacity that cleared in the Forward Capacity Auction will be ineligible for treatment as new capacity in subsequent Forward Capacity Auctions (except as provided under Section III.13.1.1.1.2). Any proration shall be subject to reliability review.

(c) Where the Capacity Clearing Price reaches 0.6 times CONE, if the amount of capacity offered from New Import Capacity Resources and Existing Import Capacity Resources over an interface between an external Control Area and the New England Control Area is greater than that interface's approved capacity transfer limit (net of tie benefits, or net of HQICC in the case of the HQ Interconnection):

(i) the full amount of capacity offered at that price from Existing Import Capacity Resources associated with contracts listed in Section III.13.1.3.3(c) shall clear; and

(ii) the capacity offered at that price from New Import Capacity Resources and Existing Import Capacity Resources other than Existing Import Capacity Resources associated with the contracts listed in Section III.13.1.3.3(c) will be prorated such that the interface's approved capacity transfer limit (net of tie benefits, or net of HQICC in the case of the HQ Interconnection) is not exceeded.

(iii) Capacity remaining after the treatment described in Sections III.13.2.7.3(c)(i) and III.13.2.7.3(c)(ii) shall be subject to the proration described in Section III.13.2.7.3(b).

bids submitted for reconfiguration auctions shall not be subject to mitigation by the Internal Market Monitoring Unit. A supply offer or demand bid submitted for a reconfiguration auction shall not be limited by the associated resource's Economic Minimum Limit. Offers composed of separate resources may participate in annual reconfiguration auctions, pursuant to the requirements of Section III.13.1.5 (but subject to the deadlines described in this Section III.13.4), but may not participate in seasonal or monthly reconfiguration auctions. Participation in any reconfiguration auction is conditioned on full compliance with the applicable financial assurance requirements as provided in Exhibit 1A to Section I of the Transmission, Markets and Services Tariff (ISO New England Financial Assurance Policy for Market Participants).

III.13.4.2.1. Supply Offers. Submission of supply offers in reconfiguration auctions shall be governed by this Section III.13.4.2.1. All supply offers in reconfiguration auctions shall be submitted by the Project Sponsor or Lead Market Participant, and shall specify the resource, the amount of capacity offered in MW, and the price, in dollars per kW/month.

III.13.4.2.1.1. Capacity Qualified in a Previous Qualification Process.

III.13.4.2.1.1.1. Resources that have Achieved Commercial Operation.

(a) To submit a supply offer in an annual reconfiguration auction, a resource that has achieved

III.13.5.1.1. Process for Approval of Capacity Supply Obligation Bilaterals.

III.13.5.1.1.1. Timing. The Lead Market Participant for either the Capacity Transferring Resource or the Qualified Capacity Resource may submit a Capacity Supply Obligation Bilateral during specified submittal windows, as defined in the ISO New England Manuals and ISO New England Operating Procedures, prior to the Capacity Commitment Period or prior to the Obligation Month during the Capacity Commitment Period.

III.13.5.1.1.2. Application. The Capacity Supply Obligation Bilateral shall include the following: (i) the asset identification number of the Capacity Transferring Resource; (ii) the MW amount of the Capacity Supply Obligation being transferred in MW amounts up to three decimal places with a minimum size of 100kW (the 100kW minimum shall not apply to resources registered with the ISO prior to the earliest date that any portion of this Section III.13.5 becomes effective); (iii) the term of the transaction (in whole month increments up to one year); (iv) the asset identification number of the Qualified Capacity Resource; (v) the Capacity Zone to which the Capacity Supply Obligation Bilateral will apply; and (vi) confirmation of the transaction by both the Lead Market Participant for the Capacity Transferring Resource and the Lead Market Participant or Project Sponsor for the

Qualified Capacity Resource. If the Qualified Capacity Resource is supporting the transaction with an Import Capacity Resource, the application must include documentation that such resource has or will have import rights over the interface for the applicable Capacity Commitment Period.

III.13.5.1.1.3. ISO Review and Approval. The ISO shall review the information provided in support of the Capacity Supply Obligation Bilateral, and may reject the Capacity Supply Obligation Bilateral for the following reasons:

(a) Identified reliability issues pursuant to the standards set forth in Section III.13.2.5.2.5;

(b) Submission of incomplete or inadequate information as required in Section III.13.5.1.1.2;

(c) Late submission of the Capacity Supply Obligation Bilateral;

(d) The resource proposed to assume the Capacity Supply Obligation is not a Qualified Capacity Resource pursuant to Section III.13.1;

(e) The megawatt amount identified in the Capacity Supply Obligation Bilateral is greater than the actual Capacity Supply

Obligation associated with the resource seeking to transfer its Capacity Supply Obligation; or

(f) Lack of confirmation by the Capacity Transferring Resource or the Qualified Capacity Resource.

III.13.5.1.1.4. Approval. Upon approval of a Capacity Supply Obligation Bilateral, the Capacity Transferring Resource shall be relieved of its Capacity Supply Obligation in the amount set forth in the Capacity Supply Obligation Bilateral, and the portion of the Capacity Transferring Resource associated with the Capacity Supply Obligation being shed will be de-listed and relieved of the obligations of a listed resource as identified in Section III.13.6. The Qualified Capacity Resource identified by the Capacity Transferring Resource in its submittal pursuant to Section III.13.5.1.1.2 will assume the Capacity Supply Obligation in the amount set forth in the Capacity Supply Obligation Bilateral. This Qualified Capacity Resource, or the portion thereof, shall be listed and subject to all the rights and obligations of a listed resource and subject to availability penalties and other adjustments as detailed in Section III.13.7.

PSEG Energy Resources & Trade, et al. **Docket No. ER08-633**
v. ***FERC***
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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 5th day of May, 2011, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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