ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 12-1060, *et al.*

NEW ENGLAND POWER GENERATORS ASSOCIATION, INC., *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

David L. Morenoff
Acting General Counsel

Robert H. Solomon
Solicitor

Beth G. Pacella
Senior Attorney

Robert M. Kennedy
Attorney

For Respondent Federal Energy
Regulatory Commission
Washington, D.C. 20426

March 5, 2013

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in Petitioners' briefs.

B. Rulings Under Review

1. *ISO New England, Inc.*, 131 FERC ¶ 61,065 (2010) ("First Order"), JA 1;

2. *ISO New England, Inc.*, 132 FERC ¶ 61,122 (2010) ("Second Order"), JA 77;

3. *ISO New England, Inc.*, 135 FERC ¶ 61,029 (2011) ("Third Order"), JA 103; and

4. *ISO New England, Inc.*, 138 FERC ¶ 61,027 (2012) ("Fourth Order"), JA 248.

C. Related Cases

This Court, in most respects, affirmed the Federal Energy Regulatory Commission's initial approval of the New England Forward Capacity Market in *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 467 (D.C. Cir. 2008), *rev'd in part sub nom. NRG Power Mktg. v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010). The one respect in which this Court did not affirm the Commission was reversed by the Supreme Court. The instant case, concerning the Commission's subsequent approval of revisions to the New England Forward Capacity Market, has not been presented to this Court or any other court.

A case currently pending before the Third Circuit, *New Jersey Board of Public Utilities, et al. v. FERC,* 3d Cir. Nos. 11-4245, *et al*., raises similar issues with respect to the capacity market operated by PJM Interconnection, L.L.C., the regional transmission organization that operates the wholesale electricity market in 13 mid-Atlantic states and the District of Columbia.

/s/ Beth G. Pacella
Beth G. Pacella
Senior Attorney

March 5, 2013

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

---

* Cases chiefly relied upon are marked with an asterisk.

ADMINISTRATIVE CASES:

STATUTES:

GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
Connecticut	Intervenor Attorney General for the State of Connecticut
First Order	*ISO New England, Inc.*, 131 FERC ¶ 61,065 (2010), JA 1
Fourth Order	*ISO New England, Inc.*, 138 FERC ¶ 61,027 (2012), JA 248
Generators	Petitioners New England Power Generators Association
ISO New England or System Operator	ISO New England, Inc., the Independent System Operator of New England's wholesale electricity markets
New England Commissioners	Intervenor New England Conference of Public Utilities Commissioners
NSTAR	Petitioner NSTAR Electric Company
Public Systems	Petitioners Massachusetts Municipal Wholesale Electric Company and New Hampshire Electric Cooperative, Inc.
Second Order	*ISO New England, Inc.*, 132 FERC ¶ 61,122 (2010), JA 77
Settlement	Settlement Resolving All Issues, filed Mar. 6, 2006, in FERC Dkt. No. ER03-563, and approved in *Devon Power LLC*, 115 FERC ¶ 61,340, *order on reh'g*, 117 FERC ¶ 61,133 (2006)
Third Order	*ISO New England, Inc.*, 135 FERC ¶ 61,029 (2011), JA 103

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

Nos. 12-1060, *et al.*

NEW ENGLAND POWER GENERATORS ASSOCIATION, INC., *ET AL.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

Two sets of petitioners (representing buyers) claim that the orders of the Federal Energy Regulatory Commission ("FERC" or "Commission") went too far in acting to prevent the exercise of buyer-side market power in the New England forward capacity market, and present the questions of:

1. Whether the Commission reasonably found that it possesses jurisdiction under the Federal Power Act to impose mitigation requirements upon

resources that bid into forward capacity auctions at prices that do not reflect their long-run average cost, net of non-forward capacity market revenues;

2. Whether the Commission reasonably determined, based on substantial evidence, that mitigation of resources that bid into the forward capacity auctions at prices that do not reflect their annualized net cost of entry was appropriate to ensure that such auctions produce just and reasonable rates; and

3. Whether the Commission reasonably declined, based on substantial evidence, to create a categorical mitigation exemption for state-sponsored resources and those designated as self-supply by load-serving entities.

On the other hand, the other set of petitioners (representing suppliers) asserts that the Commission did too little to mitigate buyer-side market power and imposed too much mitigation on supplier-side resources. These petitioners present the questions of:

4. Whether the Commission reasonably determined, in the circumstances here, that resources deemed to be below-cost capacity in the first five auctions would be subject to a price floor until the new offer-floor mitigation construct was implemented, but would not be subject to further mitigation under that construct;

5. Whether the Commission reasonably determined that new, but not existing, import resources would be subject to offer-floor mitigation; and

6. Whether the Commission reasonably determined that the threshold price triggering Internal Market Monitor review of bids to leave the market should be lowered to $1/kilowatt-month.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the Addendum.

INTRODUCTION

This is merely the latest in a series of cases arising from the ongoing efforts of the Commission, regional transmission operators, and electricity market participants to create and implement rate designs that promote the development of sufficient capacity resources to ensure system reliability. Of particular relevance, this Court, in most respects, affirmed FERC's initial approval of the New England Forward Capacity Market; the one respect in which this Court did not affirm the Commission was reversed by the Supreme Court. *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 467 (D.C. Cir. 2008), *rev'd in part sub nom. NRG Power Mktg. v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010). *See also Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009) (affirming that FERC has jurisdiction to regulate Installed Capacity Requirement as it affects FERC-jurisdictional rates).

In this latest proceeding, the Commission reviewed numerous proposed changes to the market rules governing New England's Forward Capacity Market. At issue here are the Commission's efforts to curb the price suppressive effect of buyer-side market power, as well as to ensure appropriate Internal Market Monitor review to prevent the exercise of seller-side market power. *ISO New England, Inc.*, 131 FERC ¶ 61,065 ("First Order"), *order on reh'g and clarification*, 132 FERC ¶ 61,122 (2010) ("Second Order"), *order on reh'g*, 135 FERC ¶ 61,029 (2011) ("Third Order"), *order on reh'g*, 138 FERC ¶ 61,027 (2012) ("Fourth Order").

Some parties contended that the proposed changes did not go far enough, while others argued that they went too far. In the end the Commission balanced these competing interests and reasonably resolved these complex matters in a manner appropriate to ensure a just and reasonable capacity market.

COUNTERSTATEMENT OF JURISDICTION

Petitioners Massachusetts Municipal Wholesale Electric Company and New Hampshire Electric Cooperative, Inc. ("Public Systems"), and Intervenors the Attorney General for the State of Connecticut ("Connecticut") and the New England Conference of Public Utilities Commissioners ("New England Commissioners"), contend that the Commission exceeded its jurisdiction and otherwise erred in failing to categorically exempt self-supplied resources and state-

sponsored projects constructed to further specific state policy goals (such as renewable resource mandates) from the buyer-side mitigation measures established in the challenged orders.[1] These claims are not ripe for review, as the Commission is currently considering proposed exemptions for such resources in an ongoing compliance proceeding. *ISO New England, Inc*., FERC Dkt. No. ER12-953.

In the proceeding below, the Commission found that, to ensure that forward capacity auctions produce just and reasonable rates, ISO New England, Inc. ("ISO New England" or "System Operator") needed to develop mitigation rules that would, under certain circumstances, impute benchmark prices to new resources offered into the market at bids below their annualized cost of entry. *See, e.g.*, Third Order PP 17-20, JA 112-13. The Commission declined to adopt across-the-board exemptions for new resources designed as self-supply by load-serving entities, and for new state-sponsored resources. *Id*. PP 170, 232, JA 162, 187. Instead, the Commission directed the parties to consider appropriately-tailored exemptions for such resources in the stakeholder process relating to the

[1] At times, Petitioner NSTAR Electric Company ("NSTAR") also appears to complain about the Commission's failure to exempt self-supply from buyer-side mitigation. *See, e.g.*, NSTAR Br. 20 ("preservation of the right to self-supply . . . was integral to the Settlement"). But the Commission reads NSTAR's brief to challenge the imposition of buyer-side mitigation in general, rather than just the application of that mitigation to self-supplied resources.

development of the buyer-side mitigation rules. *See* Fourth Order PP 70, 91, JA 280, 293.

On December 3, 2012, ISO New England submitted a compliance filing setting forth proposed tariff revisions to implement the benchmark-pricing mitigation mechanism. *See* FERC Dkt. No. ER12-953, Forward Capacity Market Redesign Compliance Filing, filed Dec. 3, 2012. A number of parties – including Public Systems, NSTAR, Connecticut, and the New England Commissioners – filed protests arguing, in part, that the new market rules should contain appropriate mitigation exemptions for state-sponsored projects and self-supplied resources.[2]

The Court has often "postponed review for want of ripeness where (1) delay would permit better review of the issues while (2) causing no significant hardship to the parties." *Interstate Natural Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 60 (D.C. Cir. 2002) (internal quotations omitted). Here, postponing review until the conclusion of the ongoing agency proceedings would permit better consideration of the issues, as those proceedings will ultimately determine the precise contours, if any, of a mitigation exemption for new self-supplied and state-sponsored resources. The agency proceedings very well may provide the relief that the

[2] *See* Motion to Intervene and Protest of Attorney General of Connecticut, filed Dec. 28, 2012, at 3-4; Comments of Northeast Utilities Companies (parent to NSTAR), filed Dec. 28, 2012, at 9-11; Motion to Intervene and Protest of Mass. Mun. Wholesale Elec. Co. and N.H. Elec. Coop., Inc., filed Dec. 28, 2012, at 7-24, all filed in FERC Dkt. No. ER12-952.

parties seek here. And, of course, "litigants as a group are best served by a system which prohibits piecemeal appellate consideration of rulings that may fade into insignificance by the time the initial decisionmaker disassociates itself from the matter." *Aluminum Co. of Am. v. United States*, 790 F.2d 938, 942 (D.C. Cir. 1995) (internal quotations omitted).

Postponing review would not cause significant hardship to the parties. The pertinent buyer-side mitigation measures originally proposed by the Independent System Operator – and supported by Public Systems, NSTAR, Connecticut, and the New England Commissioners[3] –govern the auctions that take place while the Commission is considering the revised market rules. *See* Third Order P 367, JA 233.[4] The Commission clarified, however, that any new resources entering in the sixth auction (held in April 2012) and subsequent auctions would be treated as "new" resources – and thus potentially subject to mitigation – in the first auction in which the final benchmark-pricing mitigation rules are in place. Fourth Order P 47, JA 269. But the potentially affected parties are currently litigating before the

[3] *See* First Order PP 26, 28, 62, JA 12-13, 23 (noting support for initial proposal from Public Systems, New England Commissioners, Connecticut, and NSTAR).

[4] The market rule revisions currently under consideration by the Commission would govern as of the eighth forward capacity auction, which is scheduled to occur in February 2014. *See* FERC Dkt. No. ER12-953, Forward Capacity Market Redesign Compliance Filing, filed on Dec. 3, 2012, at 1-2.

Commission whether those final rules should exempt new self-supplied and state-sponsored resources.

Because the ongoing agency proceedings are considering the very issues being raised to the Court, the claims relating to the application of buyer-side mitigation to new self-supplied and state-sponsored resources are not ripe for immediate judicial review.

STATEMENT OF FACTS

I. Development of New England's Capacity Market

A. Capacity

This case involves the "capacity" market for electricity in New England. "'Capacity' is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties – generally, generators – who can either produce more or consume less when required." *Conn. Dep't*, 569 F.3d at 479. *See also Me. Pub. Utils. Comm'n*, 520 F.3d at 467 ("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.") (internal quotation omitted; alteration by Court).

"An abiding concern in regulating electricity supply is the need for adequate reserve capacity." *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 38 (1st Cir. 2001). "The goal is for [load-serving entities]," i.e., "the penultimate and most proximate

buyers of capacity (before the consumers who ultimately shoulder the costs in their utility bills)," to "purchase sufficient capacity to easily meet expected peaks in electricity demand on their transmission systems." *Conn. Dep't*, 569 F.3d at 479.

B. The Pre-Settlement Capacity Market

Since 1971, the New England Power Pool (a voluntary association of New England electric utilities) set, subject to Commission review, capacity requirements for each utility and administered deficiency charges for those that did not obtain their share. *Conn. Dep't*, 569 F.3d at 479. In 1998, that role shifted to ISO New England, a regional transmission organization that administers open access to transmission facilities in New England. *See id.* (citing *Me. Pub. Utils Comm'n*, 520 F.3d at 467-68 (describing ISO New England)); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (affirming the Commission's open access transmission approach to fostering competition) (*aff'd New York v. FERC*, 535 U.S. 1 (2002)).

After the 1998 reforms, the New England capacity market faced insufficient supply to meet increasing capacity demand. *Blumenthal v. FERC*, 552 F.3d 875, 878 (D.C. Cir. 2009). As a temporary solution, in 2003, the Commission approved "Reliability Must-Run" agreements between generators and the System Operator, under which older and less-efficient generating units could recover up to their full cost-of-service so they could remain in operation. *Me. Pub. Utils Comm'n*, 520

F.3d at 467-68. In its orders addressing those agreements, FERC directed the System Operator to develop a locational capacity market, i.e., a market in which prices are set separately for geographical sub-regions, so that prices are highest in the regions with the most severe capacity shortages to encourage new entry. *Id.* at 468 (citing *Devon Power LLC*, 103 FERC ¶ 61,082 at 61,271 (2003)).

In response, ISO New England proposed locational monthly auctions based on a controversial, administratively-determined "demand curve." *Id.* Ultimately, the Commission established settlement procedures, which resulted in a settlement that replaced the System Operator's earlier proposal with a Forward Capacity Market ("Settlement"). *Id.* at 469. The Commission approved the Settlement in 2006 (*Devon Power LLC*, 115 FERC ¶ 61,340, *order on reh'g*, 117 FERC ¶ 61,133 (2006)), and, in 2007, approved the System Operator's proposed revisions to the market rules to implement the Forward Capacity Market (*ISO New England, Inc.*, 119 FERC ¶ 61,045, *order on reh'g*, 120 FERC ¶ 61,087 (2007); *ISO New England, Inc.*, 119 FERC ¶ 61,239 (2007), *order on reh'g*, 122 FERC ¶ 61,171 (2008)).

C. The Forward Capacity Market As Approved Under The Settlement

1. The Auction

Under the Forward Capacity Market, annual locational auctions for capacity are held three years before capacity is needed. *See Me. Pub. Utils Comm'n*, 520

F.3d at 469; *Devon Power*, 115 FERC ¶ 61,340 P 16. The advance time allows potential new capacity resources to compete in the auctions and, if they clear the auction, provides them three years to build the infrastructure needed to fulfill their capacity obligations. *Me. Pub. Utils Comm'n*, 520 F.3d at 469; *ISO New England*, 119 FERC ¶ 61,045 P 5.

Before the auction, the System Operator determines the amount of capacity that will be required for system reliability in three years, i.e., the Installed Capacity Requirement, which is akin to a peak demand estimate. *Conn. Dep't*, 569 F.3d at 480. Each energy provider is required to purchase enough capacity to meet its share of the Installed Capacity Requirement. *Id*. After the demand level is established, the System Operator then announces the starting price, which was set, by agreement, at twice the estimated "Cost of New Entry." *Id.* Cost of New Entry is the price of capacity, expressed in $/kilowatt per month, that is needed to attract new capacity. *Devon Power*, 115 FERC ¶ 61,340 P 130. Cost of New Entry originally was set at $7.50/kilowatt-month, and subsequently is calculated using the clearing prices of previous auctions. *Id.* PP 130, 131.

Capacity providers state how much capacity they would be willing to offer at the starting price. *Conn. Dep't*, 569 F.3d at 480. If the capacity offered exceeds the Installed Capacity Requirement, the System Operator lowers the offering price, which in turn lowers the quantity of capacity offered. *Id.* This continues until the

quantity of capacity offered into the market equals the Installed Capacity Requirement. *Id.* That price point becomes the market clearing price, which is paid to all bidders participating in the last round of the auction. *Id.*

2. The Alternative Price Rule

The Alternative Price Rule adjusts the clearing price upward under certain circumstances. *Devon Power*, 115 FERC ¶ 61,340 P 109. Before the auction, the Internal Market Monitor reviews the bids from all new resources that wish to submit offers below .75 times Cost of New Entry. If the Internal Market Monitor determines such a bid is below the resource's long-run average costs net of expected non-capacity market revenues, the capacity related to that offer is deemed to be "out-of-market" (hereinafter referred to as "below-cost"). First Order P 40 and nn. 25 & 26 (citing ISO New England Tariff § III.13.1.1.2.6), JA 16; *Devon Power*, 115 FERC ¶ 61,340 P 109; *ISO New England*, 119 FERC 61,045 PP 59, 87. When any offer is deemed below-cost, the capacity clearing price is reset to the lower of (a) Cost of New Entry or (b) one penny below the lowest price offered by a new in-market resource, i.e., the price at which the last in-market resource withdrew from the auction. First Order P 38, JA 15. The Rule only operates if the following three conditions are met: (1) new capacity is needed to meet the Installed Capacity Requirement, i.e., the Installed Capacity Requirement exceeds the amount of existing capacity; (2) the total amount of capacity offered at the

beginning of the auction is adequate to meet the Installed Capacity Requirement; and (3) the amount of below-cost capacity exceeds the need for new capacity, so no new in-market capacity clears the market. *Id*., JA 16.

3. Self Supply

Under the Settlement, load-serving entities were permitted to designate resources – such as utility-owned generation or resources with whom the utility had contracted – as "self-supply." If such resources were able to satisfy the Forward Capacity Auction technical qualification process, they would act as price takers in the auction (that is, they would stay in the auction at any price above $0). After clearing in the auction, the capacity of the self-supplied resources would offset an equal number of megawatts of the load-serving entities' share of the Installed Capacity Requirement. *See* Fourth Order nn.99 & 103, JA 282, 283. Because self-supplied resources participate in the auction at prices below their long-run average costs, the original market rules designated them as "out-of-market" resources for purposes of the Alternative Price Rule. *See* Third Order P 225, JA 185

4. Clearing Price Floor

The Settlement established a clearing price floor for the first three auctions. *Devon Power*, 115 FERC ¶ 61,340 P 19. Thus, the clearing price could not be set below 0.6 times Cost of New Entry. *Id.*

5. De-List Bids And Pre-Auction Zonal Modeling

The Settlement provided several means for existing capacity resources to submit a "de-list" bid to exit the auction. Permanent de-list bids, which enable a capacity resource to exit the auction permanently, have to be reviewed by the Internal Market Monitor if they exceed 1.25 times Cost of New Entry. Third Order n.191, JA 200; *ISO New England*, 119 FERC ¶ 61,045 P 34. A temporary de-list bid above 0.8 times Cost of New Entry (known as a static de-list bid) enables an existing capacity resource to exit the auction for one year, but must be submitted before the auction and must be reviewed by the Internal Market Monitor. Third Order n.75, JA 130. Alternatively, existing resources could submit a temporary de-list bid at or below 0.8 times Cost of New Entry (known as a dynamic de-list bid) during the auction without Internal Market Monitor review. *Id.* n. 74, JA 130; *ISO New England*, 119 FERC ¶ 61,045 P 35.

Before the auction, an analysis is conducted to determine whether there is expected to be sufficient capacity within each load zone[5] to satisfy that zone's local requirements. Internal Market Monitor's June 5, 2009 Report at 13, 17. If it is projected that the amount of capacity needed will exceed the aggregate capacity in

[5] New England has eight load zones: Maine; New Hampshire; Vermont; Rhode Island; Connecticut; Western/Central Massachusetts; Northeast Massachusetts and Boston; and Southeast Massachusetts. FERC Dkt. No. ER09-1282-000, Internal Market Monitor's June 5, 2009 Report at 13 n.32.

a zone and, therefore, that there is a need for new capacity, that capacity zone is "modeled" as a separate import-constrained zone and allowed to have a higher clearing price in the auction than the rest of the market. *Id.* at 13-14, 41; First Order P 131, JA 48; R.34 (External Market Monitor's March 15, 2010 Comments) at 16, JA 737; R.159 (ISO New England's Revised Proposal) at 45, JA 1108.

If it turns out that a projection of sufficient capacity was incorrect (as occurred in the first and third Forward Capacity Market auctions), the System Operator rejects de-list bids from resources needed to satisfy the region's reliability requirements. Those resources are paid their marginal going-forward cost (as reflected in their de-list bids) while other resources in the same zone are paid the lower, market-wide price. First Order PP 131, 134, JA 48, 49; R.34 (External Market Monitor's March 15, 2010 Comments) at 16, JA 737; Internal Market Monitor's June 5, 2009 Report at 41.

II. Proposed Revisions To The Forward Capacity Market

ISO New England held the first two Forward Capacity Market auctions in 2008.[6] Fourth Order P 2, JA 251. Then, on December 1, 2008, ISO New England

[6] The third Forward Capacity Market auction was held in October 2009, the fourth in August 2010, and the fifth in June 2011. Fourth Order P 2, JA 251.

and the New England Power Pool Participants Committee[7] submitted a filing proposing a stakeholder process to address necessary modifications to the Forward Capacity Market. FERC Dkt. No. ER09-356-000, December 1, 2008 Filing. Six months later, on June 5, 2009, the Internal Market Monitor issued its initial assessment of the Forward Capacity Market, as required by ISO New England's Tariff. The report recommended changes to: how and when capacity zones are defined; the Alternative Capacity Price Rule; and the Cost of New Entry parameter to determine the starting price for each auction. Internal Market Monitor's June 5, 2009 Report at 1; *see also* First Order P 3 and nn.2 & 3, JA 4. A Forward Capacity Market Working Group (chaired by representatives from the New England Power Pool Participants Committee, the New England Conference of Public Utility Commissioners, and ISO New England) was formed to provide a stakeholder forum to consider Forward Capacity Market design changes. First Order P 4, JA 4.

As a result of the stakeholder process, on February 22, 2010, ISO New England and the New England Power Pool Participants Committee proposed

[7] New England Power Pool participants "include all of the electric utilities rendering or receiving service under ISO New England's Tariff, as well as independent power generators, marketers, load aggregators, brokers, consumer-owned utility systems, end users, developers, demand resource providers, and a merchant transmission provider." R.1 at 11-12, JA 333-34. New England Power Pool participants act through the New England Power Pool Participants Committee. *Id.* at 12, JA 334.

Forward Capacity Market rule changes ("ISO New England's original proposal" or "original proposal") to take effect on April 23, 2010, before the fourth auction, which was scheduled for August 2, 2010. First Order PP 5-8, JA 4-5. The filing proposed, among other things, to: revise the Alternative Price Rule;[8] increase transparency regarding review of offers below 0.75 times Cost of New Entry; extend the price floor; decouple the auction starting price from Cost of New Entry; and revise how Cost of New Entry is determined. *Id*. P 6, JA 4-5. The filing further stated that additional stakeholder input was needed to address other issues, including the definition of out-of-market resources, when the Alternative Price Rule should be triggered, and how the price should be set in those circumstances. *Id*. P 7, JA 5.

III. The First And Second Challenged Orders

In an order issued on April 23, 2010, the Commission found certain aspects of the proposal just and reasonable and accepted them without further hearing. First Order PP 15-16, JA 7-8. The Commission also established a paper hearing to address the remainder of the proposal which, to provide the parties sufficient certainty regarding the coming auction, was made immediately effective. *Id.* at

[8] ISO New England Tariff § 13.2.5.2.5(f) required the System Operator to evaluate whether to modify the Alternative Price Rule and the treatment of de-list bids rejected for reliability reasons. First Order PP 4, 24 and n.17, JA 4,11; R.1 at 2, JA 324; R.159 (ISO New England's Revised Proposal) at 4, JA 1067; Third Order P 7, JA 108.

PP 15, 17-19, JA 7-9. The Commission clarified certain rulings and hearing matters in the Second Order, JA 77, issued on August 12, 2010.

IV. The Hearing

ISO New England's initial brief in the hearing presented a revised proposal on the issues set for hearing ("revised proposal"). R.159, JA 1058. The parties filed briefs on the original and revised proposals. Third Order PP 11-12, Appendix A, JA 109-10, 237-39 (setting out numerous briefs filed during hearing).

V. The Third And Fourth Challenged Orders

The Commission determined that this case presented two fundamental and interrelated issues: "(1) whether the [Forward Capacity Market] design in New England will provide sufficient income to incent market entry when necessary without the assistance of supplemental revenue streams from outside the ISO-NE markets and (2) the proper design of market power mitigation regimes to protect against both buyer and seller market power." Third Order P 15, JA 111. Each side of the buyer-seller divide "believes that it is fully justified in exercising market power to affect prices, but loudly decries the ability of the opposing side to exercise such market power." *Id*. P 156, JA 157 (internal quotations omitted). In these circumstances, it was the Commission's statutory obligation to resolve the "seeming impasse." *Id*. P 15, JA 111.

With respect to buyer-side market power, the Commission determined that ISO New England's original and revised proposals failed to adequately address the price suppressive effect of capacity placed into the market through below-cost bids. *Id*. PP 17-19, 59, JA 112-13, 126. The Commission found, however, that the principle of benchmark pricing, introduced in the System Operator's revised proposal, "form[ed] the basis for a just and reasonable buyer-side mitigation measure." *Id*. P 165, JA 160. It therefore ordered ISO New England to develop offer-floor mitigation rules which would attribute an asset-class-specific benchmark price to new resources seeking to enter the market through below-cost bids. *Id*. If the clearing price falls below such a benchmark, the new resource would not clear in the auction and would not obtain a capacity supply obligation. *Id*. PP 165-69, JA 160-61.

The Commission declined to adopt categorical mitigation exemptions for state-sponsored resources and those designated as self-supply. *Id*. PP 170, 232, JA 162, 188. But the Commission invited the parties to develop and propose appropriately-tailored exemptions for such resources in the stakeholder process. Fourth Order PP 70, 91, JA 281, 293.

The Commission determined that resources deemed to be below-cost capacity during the first five auctions would be subject to a price floor until the new offer floor was implemented, but would not be subject to further mitigation

under the new construct. Third Order PP 214-17, n.146, JA 181-82, 177. Fourth Order PP 38-46, JA 264-69. Resources deemed below-cost capacity during the sixth and later auctions, however, would be considered new resources and, therefore, mitigated under the offer floor. Fourth Order P 47, JA 269.

With respect to seller-side mitigation, the Commission found that dynamic de-list bids above $1/kilowatt-month would require Internal Market Monitor review. Third Order PP 305, 313-15, JA 213, 215-16; Fourth Order PP 110-11, 121-28, JA 300-01, 304-07.

SUMMARY OF ARGUMENT

In this case, various petitioners challenge the Commission's revisions to the market rules governing the New England Forward Capacity Market. Some claim the Commission did too much to curb buyer-side market power, while others claim the Commission did too little and imposed too much mitigation upon capacity sellers. These contrasting views highlight the competing interests of the Forward Capacity Market participants. It is the Commission's responsibility to strike "an appropriate balancing of the investor and the consumer interests." *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 532 (2008) (internal quotation omitted).

This is particularly true in the context of regional transmission organizations, like ISO New England, where the Commission "is perhaps in the best position to

reach the most equitable result and to act in the public interest, rather than to be controlled by the necessarily parochial concerns of the States." *Miss. Indus. v. FERC*, 808 F.2d 1525, 1549 (D.C. Cir.) (internal quotations omitted), *vacated and remanded in part on other grounds*, 822 F.3d 1103 (D.C. Cir. 1987). Here, the Commission carried out its statutory responsibility to balance the conflicting interests and ensure that the Forward Capacity Market produces just and reasonable outcomes.

First, the Commission appropriately struck the jurisdictional balance between the need to regulate capacity markets to ensure just and reasonable auction results (which ultimately ensure the reliability of the regional networks) and the states' rights to regulate generation directly. Offer-floor mitigation is designed to prevent below-cost capacity from artificially suppressing Commission-jurisdictional wholesale capacity rates. It does so by regulating a parameter determining the price of capacity (i.e. bid prices), a matter that falls within the heartland of the Commission's jurisdiction under the Federal Power Act. States remain free to sponsor the construction of any new generating plant they desire. Load-serving entities remain free to build or contract for any self-supply they believe necessary. While the offer-floor mitigation construct may influence such decisions, that is a permissible byproduct of the Commission's legitimate exercise of its authority to regulate wholesale rates.

The Commission also reasonably determined that injecting new capacity into the Forward Capacity Market via below-cost bids can cause the clearing price to be inefficiently low. New below-cost resources, which are likely to be at the low end of the supply stack, displace competitively-priced offers of new capacity that otherwise would have set the market clearing price. This is true even when no new capacity is needed in an auction. The likelihood of such an occurrence will only increase in the future since the price floor, which establishes a minimum clearing price, will expire when the offer-floor construct is implemented.

Furthermore, the Commission reasonably determined that new self-supplied resources should not be categorically exempt from mitigation. Designating a new resource as self-supply has the same price effect as offering the resource into the auction at a price of zero which, in turn, will displace a higher-priced resource that would otherwise set the clearing price. To categorically exempt new self-supplied resources would allow the mitigation mechanism to be circumvented and result in unjust and unreasonable auction rates.

The Commission, however, reasonably permitted the parties an opportunity to develop appropriately-tailored exceptions for self-supplied and state-sponsored resources through the stakeholder process. The Commission's incremental approach to buyer-side mitigation is well within its broad discretion in determining how best to handle related, yet discrete, issues. Moreover, because the

Commission is currently considering proposed exemptions for self-supplied and state-sponsored resources in an ongoing compliance proceeding, Petitioners' claims relating to these issues are unripe for immediate review.

In addition, the Commission appropriately balanced the competing interests in determining that resources deemed below-cost capacity in auctions one through five should be subject to a price floor, but should not be further mitigated once the offer floor is implemented. Further mitigating those resources could not prevent them from entering the market (the fundamental purpose of buyer-side mitigation), but could send inappropriate price signals as the Forward Capacity Market has a significant capacity surplus.

The Commission also reasonably agreed with the System Operator that an import should be deemed a new resource and, therefore, subject to further mitigation only when it is clear that a new resource is being devoted to the New England market over the long term, i.e., when (1) a new resource can be identified and (2) a significant investment (such as construction of a new transmission line to import power) is made. Generators' alternative proposal to impose mitigation when only one of those factors is met would unduly discriminate between internal and external resources, as well as between service over new and existing transmission facilities.

Finally, the Commission reasonably determined that, since dynamic de-list bids (i.e., bids the Internal Market Monitor does not review) will now be able to set zonal clearing prices, the dynamic de-list threshold needed to be lowered to a level at which an exercise of market power was unlikely to occur or have a significant effect on the market. The threshold initially would be set at $1/kilowatt-hour. The Commission understandably agreed with the System Operator and the Internal Market Monitor that this figure is a price at which there is no market power concern and, therefore, no need for Internal Market Monitor review. That the Commission did not, at the urging of Generators, choose a different figure, or otherwise adopt, at this time, precisely the package of market mitigation measures sought by any party, hardly indicates that the agency was indifferent to the issues raised or uncaring in its balance.

ARGUMENT

I. Standard Of Review

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard and upholds FERC's factual findings if supported by substantial evidence. *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010). FERC's orders will be affirmed "so long as FERC examine[d] the relevant data and articulate[d] a . . . rational connection between the facts found

and the choice made." *Id.* (quoting *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009) (alterations and omission by Court)).

"In matters of ratemaking, [the Court's] review is highly deferential, as '[i]ssues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission.'" *Alcoa*, 564 F.3d at 1347 (quoting *Town of Norwood v. FERC*, 962 F.2d 20, 22 (D.C. Cir. 1992)). This "great deference" derives from the Federal Power Act itself, because "[t]he statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition . . . ." *Morgan Stanley*, 554 U.S. at 532; *see also In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) ("[C]ourts are without authority to set aside any rate selected by the Commission which is within a 'zone of reasonableness.'"). Furthermore, "'the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.'" *Blumenthal*, 552 F.3d at 881 (quoting *Permian Basin*, 390 U.S. at 790).

This case also raises issues regarding the Commission's interpretation of the scope of its jurisdiction under the Federal Power Act. An agency's construction of the statute it administers is reviewed under well-settled principles. If Congress has directly spoken to the precise question at issue, the Court "must give effect to the

unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). If the statute is silent or ambiguous, the Court "must defer to a 'reasonable interpretation made by the [agency].'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 481 (2001) (quoting *Chevron*, 467 U.S. at 844). *See also, e.g.*, *Me. Pub. Utils. Comm'n*, 520 F.3d at 479 (agency's interpretation of the scope of its own jurisdiction entitled to *Chevron* deference).

II. The Commission Reasonably Required The Development Of Buyer-Side Mitigation Measures

While the generator parties contend that the Commission did too little to curb buyer-side market power, Public Systems, NSTAR, and their supporting intervenors argue that the Commission did too much. These competing contentions highlight the fundamental tensions underlying the design of the forward capacity market. In formulating just and reasonable market rules, the Commission must balance three competing objectives: (1) allowing resources that receive revenues outside of the wholesale market (including state-sponsored and self-supplied resources) to clear in an auction; (2) preventing those resources from distorting the clearing price; and (3) ensuring that the capacity purchased in the auction does not exceed the Installed Capacity Requirement. *See, e.g.*, Fourth Order P 75, JA 284-85.

The Commission determined that it was imperative to prevent resources bid into the market at prices below their long-run annualized costs from distorting the clearing price (i.e., Objective 2). *Id*. PP 28, 75, JA 259, 284-85. The Commission further found that it was more important to limit purchases to the amount of the Installed Capacity Requirement (and thus protect consumers from unnecessary capacity charges) (i.e., Objective 3), than it was to allow new resources placed into the market via below-cost bids to clear (i.e., Objective 1). Third Order P 159-64, JA 158-60; Fourth Order P 75, JA 284-85. "[T]he Commission must be given the latitude to balance the[se] competing considerations and decide on the best resolution," given its responsibility to consider all of the competing and often conflicting interests in addressing the "intensely practical difficulties" of regional electricity markets. *Blumenthal*, 552 F.3d at 885.

Public Systems, NSTAR, and their supporters contend that the Commission lacks jurisdiction to impose buyer-side mitigation because it may affect the manner in which a state shapes its capacity portfolio. But, as the Court has already held, FERC has exclusive jurisdiction to regulate matters that affect FERC-jurisdictional rates even when doing so may influence a state's exercise of its sovereign powers. *See, e.g.*, *Me. Pub. Utils. Comm'n*, 520 F.3d at 479-80.

Public Systems, NSTAR, and their supporters also raise a variety of arguments in support of their assertion that the Commission erred in determining

that buyer-side mitigation was necessary, and the type of resources to which it should be applied. Their fundamental contention is that the Commission should have placed a higher value on the ability of new resources receiving revenues from outside the ISO New England markets to clear in forward capacity auctions (i.e., Objective 2). But the fact that the Commission could have balanced the competing interests differently does not render its decision arbitrary and capricious. *See, e.g.*, *Sacramento,* 616 F.3d at 541-42 (Court "properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions," where the Commission "reflected on the competing interests at stake to explain why it struck the balance it did"); *Natural Gas Pipeline Co. of Am. v. FERC*, 765 F.2d 1155, 1164 (D.C. Cir. 1985) (Court's role is not to "'supplant the Commission's balance of these interests with one more nearly to its liking'") (quoting *Permian Basin,* 390 U.S. at 792).

In any event, Public Systems' and NSTAR's arguments – to the extent the Court finds them ripe for review – are largely unsupported by the record and contrary to law. Set forth below is a discussion of the buyer-side mitigation measures directed by the Commission, and why the various objections to those measures lack merit.

A. The Commission Determined That Mitigation Should Be Applied To All New Resources Offered Into The Market Via Below-Cost Bids

The New England Forward Capacity Market was designed on the assumption that new capacity, bidding its actual long-run marginal cost, would enter the market in response to increasing capacity requirements and set the market clearing price. The initial market rules also recognized, however, that new entry might occur by resources that earn revenues through mechanisms that are not generally available to comparable units, such as long-term contracts or subsidies pursuant to state programs. Indeed, the rules permitted load-serving entities to self-supply their capacity requirements through bilateral contracts with supply resources, or through owned-generation. *See* FERC Dkt. No. ER07-546, ISO New England Inc. Revisions to Market Rules Implementing FCM Settlement Agreement, filed Feb. 15, 2007, at 44-45.

1. The Alternative Price Rule Was Intended To Remedy The Price Suppressing Effect Of Resources Bid Into The Market At Below-Cost.

In light of the virtually vertical demand curve in the Forward Capacity Market, small amounts of uneconomic supply can suppress clearing prices. As the Internal Market Monitor explained, New England's "annual new capacity requirement is small relative to the size of the existing generating capacity." Internal Market Monitor's June 5, 2009 Report at 43. Buyers thus have the ability

to "exploit the market's price sensitivity by building or contracting for a large amount of new capacity bilaterally and then offering such capacity into the [auction] at an uncompetitively low price." *Id.* This could "depress the capacity clearing price" which, in turn, "could prevent the [Forward Capacity Market] from attracting or retaining competitive, market-based resources." *Id.* This observation is equally applicable to new self-supplied resources, which are offered into the market as price takers (i.e., willing to stay in the auction at any price above $0). *See, e.g.*, *Devon Power*, 115 FERC ¶ 61,340 P 113 ("the price in the [auction] could be depressed below the price needed to elicit entry if enough new capacity is self-supplied (through contract or ownership)").

Any such depression could potentially harm centralized wholesale electricity markets, which depend upon "appropriate price signals to alert investors when increased entry is needed." *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 P 103 (2008). Accordingly, in accepting the Settlement, the Commission noted the importance of the Alternative Price Rule, which was intended to reset the capacity clearing price up to the competitive cost of new entry in the event that market-based new entry was crowded out by below-cost resources. *Devon Power*, 115 FERC ¶ 61,340 PP 113-14 (discussing importance of Alternative Price Rule). Specifically, the Alternative Price Rule adjusted the clearing price upward when there was a need for new capacity and the amount of capacity offered through

below-cost bids exceeded the amount of new entry required to meet the Installed Capacity Requirement. First Order P 38, JA 15-16.[9] If triggered, the Rule would "ensure that the prices in [the] capacity market[] reflect[ed] the market cost of new entry when new entry is needed." *Id*. P 69, JA 26.

2. The Alternative Price Rule Failed To Meet Its Objective

Experience proved, however, that the Alternative Price Rule failed to "fully meet" its objectives. First Order P 70, JA 26. *See also* Fourth Order P 74, JA 284 ("the original APR was inadequate and failed to discourage the price suppressing effects of below-market entry"). Each of the first five auctions conducted in the New England market cleared at the price floor and, even at that level, there was significant excess capacity. Third Order P 13, JA 110. New resources entering the market via below-cost bids contributed to that surplus. *Id*. P 214, JA 181. And a "substantial amount" of such below-cost capacity was constructed as a result of state-funded initiatives. *Id*. P 13, JA 110. *See also* R.55 (ISO New England Answer) at Attachment A, Table 1, JA 848 (addressing auctions 1-3). Evidence also indicated that there was a sizable growth in the amount of resources designated as self-supply. R.180 (Supp. Test. Of Robert B. Stoddard) at Ex. 9, p. 5, JA 1463 (observing that self-supply grew from 1,935 MW in the third auction,

[9] The original market rules designated new self-supply resources as "out of market" capacity, since such resources would effectively be offered into the auction at prices below their entry costs. *See, e.g.*, Third Order P 225, JA 185.

to 2,699 MW in the fourth auction); Third Order P 226, JA 186. Notwithstanding the presence of this below-cost capacity, the Alternative Price Rule was never triggered. Third Order P 14, JA 111.

The results of the initial auctions demonstrated that the Alternative Price Rule's triggering conditions – which only permitted a price adjustment if the Installed Capacity Requirement exceeded all existing capacity and, therefore, new capacity was needed – were too narrow. First, "new capacity may be needed in other situations, such as when some existing capacity retires." First Order P 70, JA 26. Second, self-supply and other below-cost resources "can affect prices even when no new capacity is needed, by displacing what would otherwise be the marginal, price-setting existing resource." *Id*. Third, even in those circumstances where the Rule could be triggered, it did "not establish the price that would have arisen had all of the [below-cost] resources [receiving revenues outside of the wholesale market] offered at prices that reflect their full entry costs net of in-market revenues." *Id*.

3. The Commission Directed The Independent System Operator To Develop An Offer-Floor Mitigation Regime For Below-Cost Resources

After evaluating various proposals to address these deficiencies, and balancing the competing interests, the Commission directed ISO New England to develop an offer-floor mitigation regime based on benchmark pricing. Third Order

P 165, JA 160 ("benchmark pricing forms the basis for a just and reasonable buyer-side mitigation measure"). Under this approach, the Internal Market Monitor would establish resource-specific benchmark prices approximating the capacity price required for a new resource to rationally enter the market, assuming no out-of-market revenues were available. *Id*. PP 165, 169, JA 160, 161. Bids below a specified percentage of the relevant benchmark would be deemed "out of market" and potentially subject to mitigation.

At that point, the resource would have an opportunity to demonstrate that its actual costs were below the applicable benchmark. *Id*. P 168, JA 161; *see also* Fourth Order P 70, JA 281. If successful, the resource would be permitted to bid its actual costs. If unsuccessful, the resource would have a competitive benchmark offer imputed to it. Third Order P 168, JA 161. When the auction price drops below the relevant benchmark price, all new resources of that type would be removed from the auction. *Id.* P 167, JA 161. By preventing new resources from offering at prices significantly below their true cost of entry, the offer-floor mitigation regime is intended to limit the ability of "new resources . . . to lower the price of capacity significantly below competitive levels." *Id*. P 166, JA 160.

The Commission ordered the System Operator to develop the precise contours of the mitigation regime through a stakeholder process. Third Order P 169, JA 161. As part of that process, the Commission directed the parties to

consider exemptions for (a) the self-supply needs of municipal, cooperative, and traditionally-regulated investor-owned-utilities, and (b) projects intended to meet state environmental or technological goals, such as those based upon renewable resources. *See* Fourth Order PP 70, 91 JA 281, 293; Third Order P 171, JA 162. Indeed, in their concurring opinion, Chairman Wellinghoff and Commissioner LaFleur "encourage[d] ISO-NE and its stakeholders" to "think creatively" in determining whether "to exempt certain types of generation resources from mitigation." Third Order (LaFleur and Wellinghoff, concurring), JA 241.

4. The Impact Of Offer-Floor Mitigation Upon Self-Supplied And State-Sponsored Resources

In the challenged orders, the Commission "retained the right for load to self-supply, but precluded the suppression of capacity market clearing prices in a Commission-jurisdictional market, something that would otherwise affect [Forward Capacity Market] participants in a multi-state region." Fourth Order P 73, JA 283. Under the offer-floor mitigation construct, self-supply may occur in a number of ways.

First, parties may continue to self-supply with existing capacity, which will not be subject to any mitigation. *Id*. P 74, JA 284. The Commission's orders thus leave undisturbed the self-supply purchasing decisions that have already been made. Nor do they affect those state-sponsored projects that have already entered the Forward Capacity Market. *Id*. P 88, JA 292.

Second, new self-supplied and state-sponsored resources may clear in the auction if: (a) the actual cost of the new resource[10] is equal to, or less than, the relevant benchmark price and clearing price; or (b) the relevant benchmark price applied to the new resource is less than the clearing price. *Id*. P 80, JA 287.

Third, parties may petition the Commission for a mitigation exemption pursuant to section 206 of the Federal Power Act, 16 U.S.C. § 824e, "the statutory vehicle available to state parties seeking an exemption for any particular state policy project." Fourth Order P 89, JA 292. The Commission explained that "states and state agencies may conclude that the procurement of new capacity . . . will further specific legitimate policy goals and, therefore, argue that certain resources . . . which would otherwise trigger the offer floor price, should nonetheless be exempt." Third Order P 171, JA 162. A complaint pursuant to section 206 affords parties the ability to "demonstrate that [ISO New England's] offer floor mitigation tariff rules are unjust and unreasonable as applied to a particular project or projects." Fourth Order P 89, JA 292.

Fourth, the market rules ultimately may contain exemptions for certain self-supplied resources or projects designed to comply with state environmental

[10] Under the approved rule changes, the Internal Market Monitor will include "economic development incentives offered broadly by state or local governments" and cost reductions occasioned by reduced taxes, in determining a resource's net revenues for bid purposes. Fourth Order P 80, JA 287.

objectives, such as renewable portfolio standards. Although the System Operator's initial filing did not provide for such exemptions, that filing engendered a number of protests and the Commission is currently considering the issue. *See supra* p. 6.

B. The Commission Possesses Jurisdiction To Require An Offer-Floor Mitigation Regime

"There is nothing special about capacity decisions that places them beyond the Commission's jurisdiction." *Conn. Dep't*, 569 F.3d at 484. Indeed, "[c]apacity costs are a large component of wholesale rates." *Miss. Indus.*, 808 F.2d at 1541. And the Forward Capacity Market itself is "designed to address pricing issues, which fall comfortably" within the Commission's jurisdiction over wholesale sales of energy. *Me. Pub. Utils. Comm'n*, 520 F.3d at 479.

The Commission thus has jurisdiction to regulate certain parameters in the Forward Capacity Market that set the price of capacity, even if such determinations have an effect on state-jurisdictional authority. *See, e.g.*, *Conn. Dep't*, 569 F.3d at 481 (FERC may regulate Installed Capacity Requirement as it affects FERC-jurisdictional rates, even if the requirement, in practice, could motivate the construction of generation facilities, a matter reserved for the states); *Municipalities of Groton v. FERC*, 587 F.2d 1296, 1300-03 (D.C. Cir. 1978) (FERC approval of a capacity deficiency charge does not invade state jurisdiction, even though it may "motivate [utilities] to develop sufficient capacity to meet their load requirements").

Here, Public Systems and Intervenor-Connecticut contend that, in applying bid mitigation to self-supplied resources, the Commission exceeded its jurisdiction by creating a "powerful disincentive for any state to exercise its right under the [Federal Power Act] to shape its portfolio of electric generation resources." Conn. Br. 3. *See also* Pub. Sys. Br. 8 ("FERC's orders thus impair [load-serving entities'] ability to shape their capacity portfolios"). But the price at which self-supplied resources are offered into the wholesale market directly impacts the price of capacity – a matter indisputably within the Commission's exclusive jurisdiction. The fact that the offer-floor mitigation construct may influence state decisions regarding the construction of generation facilities does not invalidate the Commission's action.

1. The Commission Reasonably Found That Self-Supplied Capacity Affects Jurisdictional Rates

Self-supplied resources, like any other resources offered into the market at prices below their full cost of entry, can suppress capacity prices. *See, e.g.*, Third Order PP 230-32, JA 187-88 (discussing economic impact of self-supplied resources); Fourth Order PP 71-72, JA 281-82 (same). Take, for example, an auction that would otherwise clear at $6. If a load-serving entity wanted to offer a resource whose going forward-costs (and bid price) were $8, the resource would not clear. But if designated as self-supply, the $8 resource would act as a price taker under the original market rules. The resource "would have been accepted in

the auction, and would have displaced the $6 resource that set the clearing price … resulting in a resource with a potentially lower offer to set the clearing price." Fourth Order P 72, JA 282. *See also* Parts II.C.1, 2 *infra*.

The Commission thus reasonably found that "uneconomic entry" – including entry via self-supply – "can produce unjust and unreasonable prices by artificially depressing capacity prices." Third Order P 170, JA 162. Such activity adversely impacts matters within the Commission's jurisdiction – in particular, the establishment of just and reasonable wholesale electric energy rates, 16 U.S.C. § 824e(a). The offer-floor mitigation construct enables the Commission to fulfill this statutory obligation: "By regulating the mechanism that ultimately produces the capacity clearing price, the Commission is properly exercising its jurisdiction over rates, terms and conditions of service." Fourth Order P 79, JA 287. *See also* Third Order P 220, JA 183 (noting Commission's jurisdiction over matters "affecting or relating to wholesale rates" under Sections 201 and 206, 16 U.S.C. §§ 824(b)(1), 824e(a)). In short, mitigating below-cost bids "is an integral part of the regulation of capacity costs, which are a large component of wholesale rates." Fourth Order P 79, JA 287.

2. The Commission Reasonably Found That Buyer-Side Mitigation Does Not Impermissibly Intrude On The Authority Reserved To The States Under The Federal Power Act

Public Systems contend that, by regulating the prices at which self-supplied resource are bid into capacity auctions, the offer floor violates section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b)(1) (which states that the Commission "shall not have jurisdiction, except as specifically provided in this subchapter [the Federal Power Act] . . ., over facilities used for the generation of electric energy") and sections 202(b) and 207, 16 U.S.C. §§ 824a(b), 824f (which provide that the Commission "shall have no authority to compel the enlargement of generating facilities"). Pub. Sys. Br. 10. Public Systems' contention is mistaken.

Offer-floor mitigation does not dictate the make up of load-serving entities' capacity portfolios. *See* Pub. Serv. Br. 8, 9, 13; Conn. Br. 4, 6, 9. Rather it regulates the "price constructs that result in offers into the capacity market from these resources that are not reflective of their actual costs." Third Order P 170, JA 162. Indeed, the Commission expressly acknowledged the "rights of the states to pursue policy interest within their jurisdiction" with respect to generation facilities. *Id*. States remain free to permit the construction of any projects they wish, and load-serving entities are free to contract with any generator they choose to supply power. Offer-floor mitigation affects only the price that such a generator will be permitted to bid into the capacity market, which in turn affects the ultimate

wholesale price to be paid to all resources. *See, e.g.*, Fourth Order P 73, JA 283 (buyer-side mitigation limits "the suppression of capacity market clearing prices in a Commission jurisdictional market, something that would otherwise affect [Forward Capacity Market] participants in a multi-state region").

Subjecting bids to mitigation is not direct regulation of generation facilities. It is direct regulation of a parameter that determines the price of capacity (i.e., the bid price for supply). While mitigation may ultimately influence the decisions of states and load-serving entities, that is "a byproduct of a legitimate exercise of the Commission's power to regulate wholesale rates." Third Order P 220, JA 184.

The jurisdictional arguments raised by Public Systems and Connecticut echo those considered and rejected by this Court in the *Connecticut* case. There, it was argued that the Commission exceeded its jurisdiction by approving the Installed Capacity Requirement (i.e., the level of demand), which had the purported effect of dictating the state's generation and reliability policies. 569 F.3d at 481, 483. The Court found, however, that regulating "a key input into the market-based mechanism," *id*. at 478, does not constitute "direct regulation of generation facilities," *id*. at 482, even though such regulation may influence a state's determination as to the amount and type of generation built. *Id.* As the Court explained:

> State and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of

> existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other actions in their role as regulators of generation facilities without direct interference from the Commission.

Id. at 481.

Here too, the Commission's modifications to the capacity auction rules permit states to pursue whatever policy choices their "consumer-constituents" prefer, while ensuring "they will appropriately bear the costs of that decision." *Id*. Requiring the "internalization of the true costs of the alternatives . . . is not only a requirement for efficient market outcomes but, again, something the Commission may concededly pursue." *Id*. at 482-83. *See also* Third Order P 220, JA 183-84 (discussing *Connecticut*).

Public Systems point to the *Connecticut* Court's emphasis on the "flexibility" afforded to utilities to select the resources necessary to meet their capacity obligations, and argue that offer-floor mitigation eliminates that flexibility. Pub Sys. Br. 15, *see also* Conn. Br. 5-6 (same). But offer-floor mitigation does not bar states and utilities from favoring "renewable, fuel-diverse, or utility-owned resources" that provide "non-cost benefits," over those having the "lowest net capital costs." Pub. Sys. Br. 8. *See also Conn. Dep't*, 569 F.3d at 481 (noting state's ability "to limit new construction to more expensive, environmentally-friendly units"). It simply ensures that they "will appropriately bear the costs of that decision." *Id*.

Public Systems further contend that the Commission exceeded its jurisdiction because offer-floor mitigation has the effect of "forc[ing] customers to rely on [the forward capacity] market exclusively." Pub. Sys. Br. 11. But "this particular camel has long since entered – indeed, ransacked – the tent." *Conn. Dep't*, 569 F.3d at 483. The Court has already found that the Commission possesses jurisdiction to require load-serving entities to acquire a particular amount of capacity and to impose deficiency charges when they fail to do so. *See id*. at 483-84 (affirming Commission jurisdiction to review Installed Capacity Requirement); *Groton*, 587 F.2d at 1300-03 (sustaining Commission jurisdiction over deficiency charges).

Finally, it should be noted that, while Public Systems repeatedly cites to *New York v. FERC* for the proposition that FERC lacks jurisdiction over "'utility buy-side . . . decisions . . . [and] generation and resource portfolios'" (Pub. Sys. Br. 3, 10, 12 (quoting *New York*, 535 U.S. at 24)), the quoted language is not that of the Supreme Court. It is the Commission's as found in a footnote to its Order No. 888 rulemaking, which imposed an open access requirement on unbundled retail transmissions. *See New York*, 535 U.S. at 24 (quoting Order No. 888 at 31,782 n.544). And the language does not reflect an analysis of the Commission's jurisdiction with respect to capacity markets, but only a comment on the scope of its open access rulemaking.

New York v. FERC is nonetheless instructive. There, the Supreme Court upheld, over state objections, the Commission's assertion of jurisdiction to require open access service on interstate transmission lines – even those directly serving retail customers. The Court found that the state powers language in section 201(a) of the Federal Power Act, 16 U.S.C. § 824(a), reserving state authority over certain types of transactions, is a "mere policy declaration that cannot nullify a clear and specific grant of jurisdiction" to the Commission. 532 U.S. at 22 (internal quotation omitted).[11] Where the Commission acts within its jurisdictional authority – there as to interstate transmission, here as to wholesale prices – the residual effect on state authority is not jurisdictionally meaningful.

3. The Policy Objections To Offer-Floor Mitigation Do Not Demonstrate That The Commission Exceeded Its Jurisdiction

Fundamentally, Public Systems and Connecticut take issue with the Forward Capacity Market's failure to include a "mechanism reflecting the non-cost benefits of different resources." Pub. Sys. Br. 8. *See also* Conn. Br. 3 (FERC fails to consider "important, non-cost state policy goals"). But a disagreement with the Commission's policy choice to design the market to procure the least-cost,

[11] *See also Miss. Power & Light Co. v. Miss.*, 487 U.S. 354, 382 (1988) (Scalia, J, concurring) (noting that section 201 of the Act limits FERC authority over generation facilities "'except as specifically provided'" and finding "it is reasonable to regard FERC's [16 U.S.C.] § 824e(a) authority to set wholesale rates as precisely an example of jurisdiction 'specifically provided'").

competitively-priced combination of resources necessary to meet the region's reliability objective does not establish that the Commission exceeded its jurisdiction. *See, e.g.*, Third Order P 167, JA 161 (auction is designed "to select the lowest-cost set of resources needed to meet the [Installed Capacity Requirement], and no more"). "[T]he sort of policy arguments forwarded by [Public Systems and Connecticut] are properly addressed to the Commission or to the Congress, not to this Court." *New York*, 535 U.S. at 24.

In any event, the Commission recognized that the Forward Capacity Market "has no feature to explicitly recognize, for example, environmental or technological goals." Fourth Order P 91, JA 293. It made clear that, if stakeholders believe that the market should account for resource attributes that reflect these broader objectives, they may develop and propose exemptions to incorporate these features into the market design. *See id.*; *cf. Blumenthal*, 552 F.2d at 884 (upholding capacity mechanism notwithstanding "imperfections").

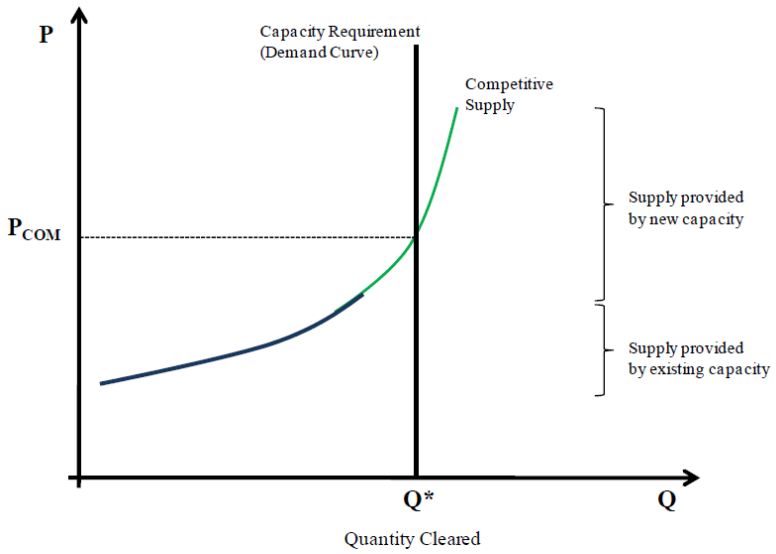
C. The Commission Reasonably Ordered ISO New England To Develop Offer-Floor Mitigation

1. Resources Entering The Auction Via Below-Cost Bids Affect The Clearing Price

While NSTAR asserts that resources that earn revenues not generally available to comparable units in the Forward Capacity Market cannot "be used as a tool to suppress capacity prices," the Commission found otherwise. NSTAR Br.

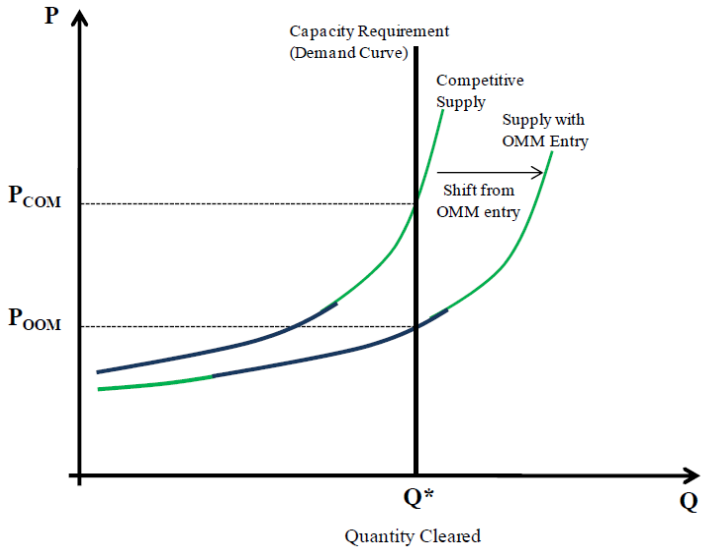
20. Resources that receive revenues from outside the wholesale market are able to bid into forward capacity auctions at prices below their annualized cost of entry, since the amount they will accept to enter into the Forward Capacity Market is less than that required by comparable entrants without access to these additional revenue streams. *See, e.g.*, Third Order P 13-14, JA 110-11. Injecting capacity into the Forward Capacity Market via below-cost bids can result in a clearing price that is inefficiently low.

When an auction consists entirely of competitive offers – that is, offers of capacity that reflect the payment necessary to cover annualized entry costs (taking into consideration expected revenue through generally-available energy and ancillary services) – it results in a clearing price that reflects the marginal cost of satisfying New England's Installed Capacity Requirement. *See, e.g.*, R.34 (Comments of External Market Monitor) at 7, JA 728. An auction based on competitive offers can be illustrated by the following graphic, where "PCOM" reflects the competitive price and "Q*" is the cleared capacity:



Id. at 8, JA 729.

A different result occurs when below-cost capacity bids are added to the auction. Because below-cost resources are likely to be at the low end of the supply stack, they have the effect of shifting the supply curve to the right and displacing competitively-priced offers of new capacity that otherwise would have set the clearing price, and resulting in a lower clearing price ("POMM").



Id. at 9, JA 730. *See also* First Order P 70, JA 26 (discussing economic impact of below-cost bids), Third Order P 158, JA 157-58 (same). This is true whether the resources receives extra-market revenues through state subsidies or otherwise. Third Order P 170, JA 162.

a. Below-Cost Resources Can Affect The Clearing Price Even When There Is Excess Capacity

NSTAR argues that, in light of the excess capacity in the New England market, below-cost resources have had no effect on the auctions conducted to date, and thus there is no basis for the Commission's offer-floor mitigation regime. NSTAR Br. at 21 ("There is no evidence that OOM . . . has affected the result of any FCA to date."). *See also* N.E. Comm'rs Br. at 6 (asserting that "FERC imposed a [minimum-offer price rule] based only on general concerns about market power"). But the fact that previous auctions "may have resulted in just and reasonable outcomes has no relevance to the Commission's express finding" that the revised Alternative Price Rule originally proposed by the System Operator "may produce unjust and unreasonable results for future" auctions. Third Order P 44, JA 120.

Below-cost bids "can affect prices even when no new capacity is needed, by displacing what would otherwise be the marginal, price-setting existing resource." First Order P 70, JA 26; *see also* Third Order P 59, JA 126 (same). And the fact that below-cost bids have "not affected the FCA clearing price in the past does not

mean that it will not do so in the future." Fourth Order P 19, JA 255. Each of the auctions to date cleared at the price floor, a feature that will terminate when the new market rules are in place. *Id*. P 57, JA 274. In the absence of a price floor establishing a minimum clearing price, "it is more likely that [below-cost] resources will depress the clearing price, even if no new capacity is needed." *Id*. P 19, JA 256.

b. The Commission Appropriately Declined To Impose An Intent Requirement

NSTAR contends that any buyer-side mitigation should be limited to situations where below-cost bids are submitted by net capacity buyers "as a tactic to suppress market prices." NSTAR Br. 12. *See also* Pub. Sys. Br. 20. In support, NSTAR argues that much of the new capacity offered in the first five auctions via below-cost bids came from parties that purportedly have no interest in lowering capacity prices. NSTAR Br. at 19-25. *See also* Conn. Br. 9 (arguing that "no rational actor would attempt to 'suppress' capacity auction prices [with] high-priced renewable resources"). But capacity offered into the market through below-cost bids "suppresses prices regardless of intent." Third Order P 170, JA 162. *See also N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301 P 29 (2008) ("all uneconomic entry has the effect of depressing prices below the competitive level and . . . this is the key element that mitigation of uneconomic entry should address").

Mitigation thus should operate irrespective of whether a party intends to lower prices. Otherwise, the Commission will not be able to ensure that appropriate price signals are sent and that auction rates are just and reasonable. *See* First Order P 70, JA 26; Fourth Order P 20, JA 256; *see also* Third Order P 116, JA 144 (noting Internal Market Monitor's concerns about inherent difficulties in proving intent).

NSTAR's call for a mitigation regime limited to net buyers of capacity was not presented to the Commission on rehearing. *See* R.219 (Rehearing Request of NSTAR and United Illuminating Co.), JA 1821. The Court thus lacks jurisdiction to consider it. 16 U.S.C. § 825*l*(b) ("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"). In any event, the Commission has previously rejected the imposition of a net buyer rule because "net buyers could undermine enforcement . . . [by] behav[ing] strategically to avoid categorization as net buyers." *N.Y. Indep. Sys. Operator*, 124 FERC ¶ 61,301 P 29.

c. Offer-Floor Mitigation Is Not Designed To Confer An Undue Advantage On Existing Resources

NSTAR contends that a minimum offer rule is "fundamentally at odds with free market conduct" and thus "does not reflect reasoned decisionmaking." NSTAR Br. 30. As the Commission noted, such "general concerns over administrative pricing" do not "offer[] any support for failing to employ a full price

correction to uneconomic offers." Fourth Order P 73, JA 282. Moreover, while governmental regulation may be at odds with a perfectly free market, that does not render it arbitrary and capricious. Here, the Commission exercised its obligation under section 206 of the Federal Power Act, 16 U.S.C. § 824e, to determine and put into a place a just and reasonable alternative to the ineffective Alternative Price Rule and the proposed revisions to the Rule. *See* Third Order P 156, JA 157; Fourth Order P 20, JA 256.

NSTAR baldly asserts that the offer-floor mitigation regime is "designed to confer an undue advantage on existing resource owners." NSTAR Br. 30. In fact, the Commission actions here are simply an attempt to replicate competitive market outcomes. These outcomes, in turn, are designed to send accurate long-term price signals that support efficient private investment that ultimately will support regional reliability for customers.

2. The Commission Reasonably Determined That New Self-Supplied Resources Should Not Be Categorically Exempt From Mitigation

The Commission reasonably declined to adopt an across-the-board mitigation exemption for new resources designated as self-supply. Fourth Order P 70, JA 281. Designating a new resource as self-supply "has the same price effect as offering the new resource [into the auction] at a price of zero." *Id*. P 60, JA 275. Doing so displaces a higher-priced resource that would otherwise set the clearing

price, resulting in a resource with a potentially lower offer price setting the clearing price. *Id*. P 72, JA 282. Since new self-supplied capacity "distort[s] the clearing price," the Commission reasonably required that below-cost bids from such resources be mitigated, subject to whatever just and reasonable exceptions may emerge from the stakeholder process. Third Order P 232, JA 188.

NSTAR and Public Systems contend that this conclusion is in error because self-supply was a "cornerstone" of the Settlement. Pub. Sys. Br. 6. *See also* NSTAR Br. 20 (same). But when the Commission accepted the Settlement in 2006, it believed that the Alternative Price Rule was a reasonable method of assuring that buyers "do not use self-supply to artificially suppress the auction's clearing price below the price needed to elicit new entry when new entry is needed." *Devon Power*, 115 FERC ¶ 61,340 P 115. Experience showed, however, that the Alternative Price Rule needed to be modified through improved offer-floor mitigation. To exempt self-supplied resources would allow "the mitigation mechanism to be circumvented" (Third Order P 232, JA 188), and would vitiate one of the bases upon which the Commission approved the Settlement. *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 P 205 (2011) (noting same with respect to approval of minimum-offer rule in mid-Atlantic market).

NSTAR and Connecticut also claim that subjecting self-supplied resources to mitigation will require load-serving entities to "pay twice" for capacity – once

under their bilateral contract, and again in an auction if the resource does not clear. Conn. Br. 3, NSTAR Br. 20-21. But offer-floor mitigation only applies to new resources. Contracting decisions that have already been made are unaffected, Fourth Order P 74, JA 284, and load-serving entities will be able to consider the impact of the new market rules when making decisions in the future. And to the extent that future contracting decisions are dictated by state policy requirements, the Commission has stated that it will consider appropriate exemptions, either individually through a complaint filing, or generally through an exemption derived from the stakeholder process. *Id*. PP 89, 91, JA 292-93; Third Order P 171, JA162.

a. The Commission Reasonably Considered The Economic Impact Of New Self-Supplied Resources

Public Systems do not dispute the Commission's analysis of the economic impact of new self-supplied resources. Instead, they note that the original market rules only subjected such resources to technical requirements, and argue that the Commission acted arbitrarily in imposing an economic condition – i.e., the price of the bid – upon the ability of self-supplied resources to participate in capacity auctions. Pub. Sys. Br. 15-17. But the Forward Capacity Market is not solely meant to ensure that capacity is procured from resources that meet the technical requirements imposed by the System Operator. It is also designed to "ensure that the rates for capacity are just and reasonable." Fourth Order P 81, JA 288. *See also Me. Pub. Utils. Comm'n*, 520 F.3d at 479 ("the Forward Capacity Market is

designed to address pricing issues"). This is accomplished through market rules that require resources to compete "based on economic criteria – prices – as well as on technical criteria," to ensure that "the lowest-cost set of resources are accepted in the auction." Fourth Order P 81, JA 288. Subjecting self-supplied resources to economic review thus "flows appropriately from the Commission's jurisdiction to ensure just and reasonable rates." *Id*.

In a related argument, Public Systems concede that self-supplied resources depress auction prices, but assert that this merely leads to the "natural clearing price of a smaller, residual market." Pub. Sys. Br. 19. But self-supplied resources are not part of a separate market. By the terms of the Settlement and the resulting market rules, self-supplied resources are offered into the auction. Once deemed to be technically qualified for inclusion, the self-supplied resources can serve to reduce a party's share of the Installed Capacity Requirement, which otherwise would need to be satisfied through the market. *See, e.g.*, Fourth Order P 72 n.99, JA 282. An offer-floor mitigation regime based upon benchmarks allows below-cost resources to be replaced in the supply stack at the bid prices that would have been offered in the absence of extra-market revenues. This permits the auction to result in "natural" clearing prices based upon the cost of entry of all resources.

b. Public Systems' Alternative Proposal Was Not Presented To The Commission And Should Be Rejected

Public Systems asserts that the Commission should have adopted mitigation rules that would prevent self-supplied resources from affecting the clearing prices, while allowing those resources "to displace other (now unneeded) resources." Pub. Sys. Br. 18. Public Systems' failure to present this proposal to the Commission in a request for rehearing (or otherwise) jurisdictionally bars the Court from considering it. *See* 16 U.S.C § 825*l*(b) ("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."); *Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 738-39 (D.C. Cir. 2012) ("our jurisdiction is limited by the extent to which a petitioner objected 'with specificity'").

In any event, although Public Systems' proposal is short on details, it would work to the disadvantage of resources that bid into the market at the actual cost of entry by displacing them and preventing them from clearing. It also appears that the proposal would adversely affect investment decisions. Permitting self-supplied resources to clear the market in this manner would displace offers from new resources that would otherwise have been accepted and resulted in new capacity

being built, and could reduce the incentives of investors to enter the New England market. *See, e.g.*, R.34 (Comments of External Market Monitor) at 4, JA 725.

D. The Fact That The Alternative Price Rule Arose From A Settlement Does Not Bar The Commission From Ordering Modifications

NSTAR asserts that the imposition of an offer-floor mitigation regime represents an unwarranted "abrogation" of the Settlement. NSTAR Br. 16. From the start, however, it was contemplated that the rules governing the Forward Capacity Market would be revised as the parties gained experience with the market. Indeed, the Settlement provided that, after a two year period, all market participants would "have the rights provided by law with respect to seeking to change . . . the Market Rules that address the terms of the Settlement Agreement." *See* FERC Dkt. No. ER03-563, Explanatory Statement In Support of Settlement Agreement, filed Mar. 6, 2006, at Attachment 1, p. 4 (§ 4.B). To assist the parties in exercising those rights, the Settlement required the Internal Market Monitor to prepare reports analyzing the operations and effectiveness of the Forward Capacity Market. *See* Internal Market Monitor's June 5, 2009 Report at 9.

In response to that report and issues identified during stakeholder proceedings, the Independent System Operator filed proposed revisions to the rules governing the Forward Capacity Market – including the Alternative Price Rule – pursuant to section 205 of the Federal Power Act, 16 U.S.C. § 824d. *See* First

Order PP 3-4, JA 4. The Commission accepted certain aspects of that filing, but set other parts for hearing – including the proposed modifications to the Alternative Price Rule – as they had not been shown to be just and reasonable. First Order PP 15-18, JA 7-9. The hearing also addressed alternative proposed modifications to the then-current market construct, including the Alternative Price Rule, set forth in the complaints filed by certain generators under section 206 of the Federal Power Act, 16 U.S.C. § 824e. *See* R.43, JA 744 (Generators Complaint); R.64, JA 862 (PSEG Energy Complaint). *See generally* Third Order PP 36-43, JA 118-20 (discussing procedural history).

Thus, the Commission did not unilaterally or unexpectedly modify the Settlement. The System Operator's proposed revisions triggered the "Commission's independent obligation under section 205" to determine whether the proposed revisions were just and reasonable. Second Order P 22, JA 85. And when it was determined that those revisions were not just and reasonable, the Commission had an "obligation under section 206" to "determine and put into place a just and reasonable alternative." Third Order P 157, JA 157. While NSTAR correctly notes (Br. 11) that there was "no consensus for change," the Commission had a statutory obligation to resolve the "seeming impasse" that resulted from the stakeholder process. Third Order P 15, JA 111.

NSTAR asserts that any revisions to the Alternative Price Rule must be justified by a stringent "public interest test … akin to the burden created by the *Mobile-Sierra* doctrine." NSTAR Br. 17. In the Settlement, however, the parties agreed that only certain aspects of the Forward Capacity Market – specifically, the price generated in the auctions, and provisions related to the transition period between December 1, 2006 and May 30, 2010 – would be subject to *Mobile-Sierra* public interest protection. *See* Fourth Order P 63 n.83, JA 277. *See also Me. Pub. Utils. Comm'n*, 520 F.3d at 476 (discussing application of *Mobile-Sierra* doctrine to specific portions of Settlement); *Me. Pub. Utils. Comm'n*, 625 F.3d. 754, 756 (D.C. Cir. 2010) (same). The changes to the Alternative Price Rule relate to "market rules, not to prices, and will operate only on a forward basis." Fourth Order P 77, JA 286. Accordingly, the *Mobile-Sierra* doctrine is inapplicable.

NSTAR further contends that there are no "special circumstances" warranting revisions to the Alternative Price Rule, since complaints about the Rule were nothing more than the "[m]usings of economists as to the perfect world." NSTAR Br. 17. But in addition to extensive economic testimony submitted by interested parties,[12] the System Operator "itself, and the external market monitor,

[12] *See, e.g.*, Aff. of Dr. Shanker, Ex. 1 to NEPGA Protest (R.12) at ¶¶ 18-44, JA 630-43; Aff. of R. Stoddard, Ex. 3 to NEPGA Protest (R.12) at ¶¶ 12-44, JA 652-71; Aff. of M. Bidwell, Attach. A to Boston Gen Cos. First Brief (R.162) at 2-8, 16-22, JA 1129-35, 1143-49; Testimony of Prof. McAdams, Ex. 4 to NEPGA First Brief (R.156) at 11:15-20:4, JA 1008-17; Testimony of Prof. Milgrom, Ex. 5

agreed with the Commission that major design issues remained" with the Alternative Price Rule and the initial proposed revisions thereto. Fourth Order P 76, JA 285. *See also id*. P 18, JA 255.

E. The Commission Reasonably Permitted The Parties An Opportunity To Develop A Renewable Resource Mitigation Exemption Through The Stakeholder Process Or Through Project-Specific Complaints

The New England Commissioners assert that the Commission "fail[ed] to consider" their request for a categorical mitigation exemption for renewable resources. N.E. Comm'rs Br. 11. But the Commission did not ignore the New England Commissioners' request. It advised that any such exemptions should be developed through the stakeholder process relating to further development of the rules governing offer-floor mitigation. Fourth Order P 91, JA 293. The Commission declined to preemptively rule that any such exemption would be just and reasonable, because such a course would require "a declaratory ruling based on an undeveloped record for an exemption that has not yet been introduced in the stakeholder process." *Id*., JA 294.[13]

---

to NEPGA Second Brief (R.180) at 4:14-12:19, JA 1411-19; Testimony of Prof. Kalt, Ex. 6 to NEPGA Second Brief (R.180), at 7:4-29:9, JA 1433-55.

[13] While the New England Commissioners note (Br. 9) that such an exemption was permitted in the forward capacity market operated by the Pennsylvania-New Jersey-Maryland regional transmission organization, that exemption was proposed under section 205 of the Federal Power Act only after development through a stakeholder process. Fourth Order P 91, JA 293-94.

The Commission further explained that the parties "ha[d] not provided sufficient specificity to allow [the Commission] to approve an appropriately narrow exemption." Third Order P 171, JA 162. The Commission's incremental approach was well within the "broad discretion" it enjoys "in determining how best to handle related, yet discrete, issues in terms of procedures and priorities." *Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991). *See also TC Ravenswood LLC v. FERC*, 331 Fed. Appx. 8, 9 (D.C. Cir. 2009) ("An incremental approach to a problem is certainly within the scope of the Commission's discretion").

The New England Commissioners similarly argue that the Commission failed to provide sufficient guidance as to what criteria it would consider when evaluating a complaint under section 206 of the Federal Power Act, 16 U.S.C. § 824e, seeking a project-specific mitigation exemption. N.E. Comm'rs Br. 11-12. In the challenged orders, the Commission explained that any such complaint could be filed in advance of a particular auction or "prior to initiating the administrative process necessary to solicit new resources." Fourth Order P 89, JA 293. The complaint would have to establish that the "offer floor mitigation tariff rules are unjust and unreasonable as applied to a particular project or projects" (*id.*, JA 292) because, for example, a project "furthers specific legitimate [state] policy goals." Third Order P 171, JA 162. Since such an exemption would depend on the

"unique facts" applicable to the project, the Commission explained that it could not create the exemption parameters "in a vacuum or without facts supporting a specific exemption." *Id*. Again, the Commission acted well within its discretion in choosing to develop the standards for project-specific mitigation exemptions on a case-by-case basis. *See, e.g.*, *SEC v. Chenery Corp*., 332 U.S. 194, 204 (1947) ("the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency"); *City of Orrville v. FERC*, 147 F.3d 979, 988 n.11 (D.C. Cir. 1998) ("An agency's choice of which regulatory vehicle (rulemaking or adjudication) is the more appropriate means to refine a standard 'lies primarily in the informed discretion of the administrative agency.'") (*quoting Chenery*, 332 U.S. at 203).

III. FERC Reasonably Determined That Resources Deemed Below-Cost Capacity In Auctions One Through Five Should Be Subject To Price Floor Mitigation, But Not Further Mitigated Once The Offer Floor Is Implemented

Petitioners New England Power Generators Association, *et al*. ("Generators") also urge the Court to alter the Commission's careful balance, but claim that the Commission's orders weigh too heavily in favor of the interests of those parties who act as buyers in the Forward Capacity Market. But the Commission's orders do not adopt the position of any single interest group. Instead, the Commission ordered the development of offer-floor mitigation rules, but declined to apply those rules to resources that had already entered the Forward

Capacity Market. Doing so would not further the underlying purpose of the rules – the prevention of uneconomic market entry – and would send inaccurate price signals to potential market entrants, undermining the very purpose of the Forward Capacity Market. Such a determination is an appropriate exercise of the Commission's statutory responsibility to weigh competing interests in order to achieve a reasonable outcome. *See Blumenthal*, 552 F.3d at 885 ("electricity market presents intensely practical difficulties demanding a solution from FERC, and the Commission must be given the latitude to balance the competing considerations") (internal quotations omitted).

The Commission also determined that it was necessary, in conjunction with new market rules, to adjust the rules that govern the circumstances under which sellers can withdraw capacity from the market without Internal Market Monitor review. The adjusted rules were informed by the Commission's expertise, experience with prior auctions in the New England market, and extensive commentary from the parties. The policy determinations reflected in those rules are entitled to this Court's respect. *See, e.g.*, *Transmission Access Policy Study Grp.*, 225 F.3d at 689 (D.C. Cir. 2000) (affirming FERC's landmark open-access rulemaking, where FERC had relied "upon extensive commentary as well as its own experiences" with the electric transmission industry), *aff'd*, *New York*, 535 U.S. 1.

A. The System Operator's Original Proposal

Under the System Operator's original proposal, capacity deemed by the Internal Market Monitor to be offered through below-cost bids in the fourth and later auctions would be added to a running total of below-cost capacity and "carried forward" in future auctions. This carried-forward capacity would be mitigated in future auctions only when new capacity would have been needed but for the previously cleared below-cost capacity. R.1 (ISO New England's Original Proposal) at 15-18, JA 337-40; First Order P 43, JA 17; Third Order P 52, JA 123-24. In such circumstances, the market clearing price would be adjusted to the lower of Cost of New Entry or one penny below the lowest price offered by a new in-market resource, i.e., the price at which the last in-market resource withdrew from the auction. R.1 (ISO New England's Original Proposal) at 18, JA 340.

Below-cost capacity from the first three auctions would not be carried forward under this proposal for two reasons. R.1 (ISO New England's Original Proposal) at 16, JA 338. First, it is generally preferable to apply rule changes on a prospective basis to minimize market uncertainty. *Id.* at 16 n.80, JA 338. Moreover, if the carry-forward rules had been in effect during the first three auctions, resources would have had reason to better support their offers, which might not have been deemed below-cost. *Id.*

To provide certainty as to the rules governing the upcoming fourth auction, the First Order accepted this proposal. First Order P 71, JA 26. Because it warranted further consideration, however, the Commission simultaneously included this proposal in the matters set for hearing. *Id.*

B. The System Operator's Revised Proposal

Under the System Operator's revised proposal, capacity deemed below-cost in the fourth and later auctions would again be carried forward in future auctions. Now, however, in future auctions the running total of below-cost capacity would be discounted by load growth and resource retirements. Any remaining carried-forward capacity would be re-priced at a benchmark value, i.e., the price that would have prevailed without the below-cost capacity. R.159 (ISO New England's Revised Proposal) at 18-20, JA 1081-83; Third Order P 88, JA 135.

Thus, under this proposal, there would be two clearing prices any time below-cost capacity cleared an auction. All new resources that offered below the capacity clearing price (based on parties' actual offers) would receive that price. Third Order P 159, JA 158. All existing resources that bid below the comparatively higher alternative benchmark price would receive that price. *Id.*

As in the original proposal, below-cost capacity from the first three auctions would not be carried forward and subject to further mitigation because it would be both unfair and inconsistent with Commission precedent (*N.Y. Indep. Sys.*

Operator, Inc., 122 FERC ¶ 61,211, *order on reh'g*, 124 FERC ¶ 61,301 (2008)) to do so. R.159 at 22-23, JA 1085-86; Third Order P 100, JA 138.

C. The Commission's Determinations

1. The Original Proposal Was Unjust And Unreasonable

After the hearing, the Commission found the original proposal's Alternative Price Rule unjust and unreasonable because, among other things, below-cost capacity mitigation would occur only when new capacity would have been needed but for the below-cost capacity. Third Order PP 60-62, JA 127-28.

2. The Revised Proposal Was Unjust And Unreasonable

The Commission also rejected the revised proposal. Third Order P 159, JA 158. While that proposal would remove the financial incentive to bid below cost, it would cause the System Operator to procure capacity in excess of the Installed Capacity Requirement contrary to a bedrock principle of the Forward Capacity Market. *Id.* PP 159-60, 164, JA 158, 159-60.

As noted above, however, the Commission found that the benchmark pricing principle contained in the revised proposal would form the basis for a just and reasonable mitigation measure. Third Order PP 165-69, JA 160-61. Accordingly, the Commission directed ISO New England and its stakeholders to develop an offer-floor mitigation regime that relies on asset-class-specific benchmarks, but does not procure more capacity than the Installed Capacity Requirement. *Id*. PP 165-69, JA 160-61. The Commission determined that such a construct "spares

customers the cost of procuring capacity that is not needed to meet [ISO New England's] reliability objectives while simultaneously preventing new resources from offering significantly below their true net cost of entry and thereby suppressing capacity market prices." Fourth Order P 28, JA 259.

3. Resources Deemed Below-Cost During The First Five Auctions Would Be Mitigated Pursuant To A Price Floor Until The Offer Floor Is Implemented, But Would Not Be Subject To Further Mitigation

The Commission determined that capacity deemed below-cost in the first five auctions should be subject to a price floor until the new mitigation regime is implemented, but should not be subject to further mitigation under the new regime. Third Order PP 214-17, n.146, JA 181-82, 177; Fourth Order PP 38-46, JA 264-69.

a. Resources Deemed Below-Cost During The First Three Auctions

The purpose of buyer-side mitigation is to prevent below-cost entry into a market. Third Order PP 21, 214-15, n.146 (citing *N.Y. Indep. Sys. Operator*, 122 FERC ¶ 61,211 PP 100-01, 118-19) JA 113, 181, 177; Fourth Order P 39, JA 264-65. Because the first three auctions already had occurred, the Commission determined that it would be inappropriate to subject resources deemed below-cost in those auctions to additional mitigation in future auctions, as doing so could not prevent those resources from entering the market. Third Order PP 21, 214-15, JA 113, 181; Fourth Order PP 32, 38-41, JA 261, 264-66.

Moreover, the Commission explained, further mitigating this capacity – and thus increasing the clearing price – would be inconsistent with the Forward Capacity Market's purpose of providing accurate market signals, as doing so would produce higher capacity prices and, thereby, encourage older, higher-cost resources to remain in the market rather than retire. Fourth Order P 39, JA 264-65. New England already had a significant capacity surplus and, therefore, it would be inappropriate to encourage such inefficient decisions. *Id*. PP 39-40, JA 264-65.

b. Resources Deemed Below-Cost During The Fourth And Fifth Auctions

Likewise, the Commission determined that resources deemed below-cost capacity in the fourth and fifth auctions should not be carried forward and further mitigated when the new offer floor is instituted. Fourth Order P 45, JA 268-69. First, the Commission pointed out, "because investment in [below-cost] entry through [auction] 5 ha[d] already occurred, subjecting this capacity to mitigation would not prevent the entry of these uneconomic resources." Fourth Order P 58, JA 275.

Moreover, although the First Order indicated that the original mitigation proposal might not be sufficiently rigorous, that order accepted and made that proposal effective as of the fourth auction. *Id*. P 45, JA 268-69. The Commission did not determine that the original mitigation proposal was insufficient until it issued the Third Order in April 2011, after the fourth auction and just before the

fifth auction, which was held in June 2011. *Id.*

Thus, while auction four participants were on notice that the Commission was considering stronger mitigation rules, they did not know whether the Commission would find the original proposal acceptable after the hearing, or, if not, what new mitigation rules would be implemented. Fourth Order P 45, JA 268-69. In these circumstances, the Commission found that resources deemed below-cost capacity in the fourth auction "should be treated as existing resources and not mitigated further when the offer floor regime is instituted." *Id*., JA 269.

The Commission further explained that, while the Third Order determined that the original mitigation proposal would eventually be replaced with an offer-floor regime, that same order notified market participants that the original mitigation proposal would remain in effect until the new market rules were implemented. Fourth Order P 46, JA 269 (citing Third Order P 366, JA 232-33). Since the Third Order issued so shortly before the fifth auction, and the parties could not have known before its issuance that the Commission would direct implementation of an offer-floor regime, they did not have an opportunity to address whether resources deemed below-cost capacity in the fifth auction would be carried over for further mitigation once the offer-floor regime is implemented. *Id*.

"In light of these procedural considerations and the fact that further mitigation cannot prevent [below-cost] entry in an auction that has already taken place," the Commission found "that fairness and efficiency dictate that [below-cost capacity] that entered in [auction] 5, under the [original proposal's] regime, should, like [below-cost capacity] entry from [auction] 4, be treated as existing resources when the offer floor regime is instituted." *Id*.

c. Resources Deemed Below-Cost During The Sixth And Later Auctions

By contrast, the Commission determined that resources deemed below-cost capacity in the sixth and later auctions would be carried over for mitigation when the offer floor is instituted. Fourth Order P 47, JA 269. Unlike capacity deemed below-cost in the fourth and fifth auctions, these resources had notice that offer-floor mitigation would be implemented and had an opportunity to address transition issues. *Id.* Furthermore, as the sixth auction had not yet taken place, ordering this mitigation could prevent such capacity from entering the auction. *Id.*

d. Floor Price Extended

To address the price effect of the below-cost capacity that entered during the first five auctions, the Commission extended the capacity auction price floor until the offer floor is implemented. Third Order PP 22, 213, 216-17, JA 113, 180, 181-82; Fourth Order PP 39, 50, 55, 57, JA 264-65, 270-71, 273, 274.

D. The Commission Appropriately Determined That Resources Deemed Below-Cost Capacity In Auctions One Through Three Should Not Be Carried Forward For Further Mitigation

Generators assert that the Commission's determinations regarding resources deemed below-cost capacity in the first three auctions ignored that below-cost capacity can depress market prices below a competitive level and, therefore, like seller-market power, should be mitigated. Gen. Br. 27-32. As the Commission explained, however, it mitigated that effect by extending the price floor until the new offer floor is implemented. Fourth Order P 39, JA 264; Third Order P 22, JA 113.

The Commission found that carrying this capacity forward for further mitigation under the future offer floor would send improper price signals. Fourth Order PP 39-40, JA 264-65. Doing so would result in increased capacity prices, which would encourage older, higher-cost resources to remain in the market rather than retire. *Id.* Sending such a signal in the New England market, which has a significant capacity surplus that is likely to last for many years, would be inappropriate. *Id.* PP 39-40 & n.45, JA 264-65.

Next, Generators contend that the challenged orders "make clear to buyers seeking to suppress prices that, in the event they succeed, they will receive a perpetual exemption." Gen. Br. 29. This contention is mistaken. The challenged orders not only mitigated resources deemed below-cost capacity in the first five

auctions through the price floor (Third Order PP 22, 213, 216-17, JA 113, 180, 181-82; Fourth Order PP 50, 55, 57, JA 270, 273, 274), but also made clear that any new resources deemed below-cost capacity in later auctions will be carried forward for mitigation under the offer-floor regime, Fourth Order P 47, JA 269.

Generators do not contest that the decision not to further mitigate capacity deemed below-cost in the first three auctions was consistent with Commission precedent in existence when the challenged orders issued (*N.Y. Indep. Sys. Operator*, 122 FERC ¶ 61,211, *order on reh'g*, 124 FERC ¶ 61,301).[14] Instead, Generators assert that that decision is inconsistent with rulings made in orders issued after the FERC proceeding here ended (*Astoria Generating Co. L.P.*, 140 FERC ¶ 61,189 (2012), *pending reh'g*; *Astoria Generating Co. L.P.*, 139 FERC ¶ 61,244 (2012), *pending reh'g*). Gen. Br. 31-32; *see also* Int.-PSEG Br. 11-12. For several reasons, those orders are unhelpful.

First, the cited orders are factually distinguishable. Unlike the matters at issue here, the cited orders addressed complaints that the New York System

[14] Intervenors PSEG Energy Resources & Trade LLC and PSEG Power Connecticut LLC (collectively, "Intervenors-PSEG") do argue that the instant case was factually distinguishable from *N.Y. Indep. Sys. Operator*. Int.-PSEG Br. 11. The Commission explained, however, that none of the purported distinctions affected the Commission's conclusion that mitigating already constructed below-cost capacity in either NYISO or ISO New England would neither deter that capacity from entering the market nor encourage efficient decisions. Fourth Order P 41, JA 266; Third Order P 215, JA 181.

Operator was improperly implementing its existing buyer-side market power mitigation rules. Moreover, the cited orders are nonfinal, as each is pending rehearing at the Commission. And, even assuming the cited orders were factually relevant and final, they post-date the FERC proceeding at issue and, therefore, have no bearing on this case. *See, e.g.*, *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 406 (D.C. Cir. 2005); *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 965 (D.C. Cir. 2000).

In addition, Generators contend, for the first time on appeal, that the Commission's focus on deterring entry of below-cost capacity and encouraging older resources to retire is inconsistent with respecting states' rights to pursue their policy interests. Gen. Br. 33-34. Generators claim, without explanation, that deterring entry of below-cost capacity and encouraging older resources to retire prevents states from exercising "'the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities.'" Gen. Br. 33 (quoting *Conn. Dep't*, 569 F.3d at 481). In any event, the Commission made clear, in response to jurisdictional objections raised by other parties, that nothing in the challenged orders eliminates any rights entities may have to request a mitigation exemption to accommodate state policy goals. Third Order P 20, JA 113; *see supra* pp. 39-43

(not an extra-statutory encroachment on state authority over generation resources). Ultimately, it is telling that no state entity is raising this contention.

E. The Commission Appropriately Determined That Resources Deemed Below-Cost Capacity In Auctions Four And Five Should Not Be Carried Forward For Further Mitigation

The Commission addressed whether below-cost capacity in auctions four and five would be carried forward for further mitigation under the offer-floor construct for the first time in the Fourth Order, the last order challenged here. Fourth Order PP 42, 43, JA 266, 267. Generators never challenged the Commission's determinations on that issue in a petition for agency rehearing and, therefore, they cannot do so on judicial review. FPA § 313(b), 16 U.S.C. § 825*l*(b); *Ind. Util. Regulatory Comm'n*, 668 F.3d at 738-39.

Even if these challenges were properly before the Court, they have no merit. Generators claim that the Commission could not consider reliance and fairness in determining whether to further mitigate auctions four and five below-cost capacity because the Commission did not do so for auctions one through three below-cost capacity. Gen. Br. 36. While resources deemed below-cost capacity in auctions one through five were alike in that directing further mitigation could not deter their entry into the market, there were important differences as well. Fourth Order PP 45-46, JA 268-69. Unlike capacity in auctions one through three, capacity seeking to bid into auctions four and five had notice that the mitigation rules might change.

Id. Thus, the Commission properly considered additional factors in determining whether auctions four and five capacity should be further mitigated.

Generators also assert that auctions five and six below-cost capacity are alike and, therefore, should both be subject to further mitigation. Gen. Br. 36-37. As already discussed, however, auctions five and six below-cost capacity were not alike for further mitigation purposes. For example, when the issue of further mitigating below-cost capacity arose, investment in auction five capacity already had occurred, so ordering that capacity further mitigated could not stop its market entry. Fourth Order P 58, JA 275. By contrast, ordering further mitigation for auction six below-cost capacity could prevent it from entering that auction. *Id.* P 47, JA 269. Furthermore, unlike auction five below-cost capacity, auction six below-cost capacity had an opportunity, before the auction, to address whether below-cost capacity should be further mitigated under the offer-floor regime. *Id.* Accordingly, these resources are not alike, and the Commission appropriately treated them differently.

F. The Commission Reasonably Determined That It Was Just And Reasonable, In The Circumstances Here, To Mitigate Resources Deemed Below-Cost Capacity In The First Five Auctions By Extending The Price Floor

1. It Is Just And Reasonable Not To Further Mitigate This Capacity

Generators claim that the Commission's determination that capacity deemed below-cost in auctions one through five should not be subject to further mitigation will "doom" competitive suppliers because capacity market clearing prices will be too low for them to recover their costs over time. Gen. Br. 23-26. But supplying capacity is not a significant cost item for generators. As the Commission (agreeing with the Internal Market Monitor) found, "a competitive offer for most existing resources would be expected to be quite low since the added costs for providing capacity in many cases is nearly zero." Fourth Order P 122, JA 305; *see also* Third Order P 315, JA 216 (explaining that the combined revenues from the capacity, energy and ancillary services markets are intended to give a supplier the opportunity to recover its costs).

Intervenors-PSEG, but not the Generators, argue that the Commission should not have considered whether further mitigating auctions one through five below-cost capacity would improperly encourage less efficient resources to stay in the market rather than retire. Int.-PSEG Br. 13-15. This issue is not properly before the Court. "[A]bsent extraordinary circumstances, intervenors 'may join

issue only on a matter that has been brought before the court by another party.'" *Ala. Mun. Distribs. Grp. v. FERC*, 300 F.3d 877, 879 (D.C. Cir. 2012) (quoting *Ill. Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990)); *accord Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 37 n.4 (D.C. Cir. 1992); *see also Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999) (intervenors must petition for review directly if they desire to raise any additional issues). And, the Court cannot construe Intervenors-PSEG's motion to intervene in this case as a petition for review, as that motion – filed nearly three months after the Fourth Order issued – was not filed within the statutory sixty-day period for seeking review. *See* 16 U.S.C. § 825*l*(b); *Process Gas Consumers Grp. v. FERC*, 912 F.2d 511, 514-15 (D.C. Cir. 1990) ("Treating a notice of intervention filed beyond [the statutory] sixty-day filing period . . . as a timely petition for review would squarely conflict with [the statute's] strict jurisdictional time limits.").

In any event, Intervenors-PSEG's argument ignores that, even without the below-cost capacity, the Forward Capacity Market had "significant excess capacity." Third Order P 13 & n.18, JA 110; Fourth Order PP 39-40, 55 & n.68, JA 264-65, 273. Auctions one through five all cleared at the price floor and, even at such price levels, significantly more resources were offered to provide capacity than were needed. Third Order P 13 & n.18, JA 110; Fourth Order P 55 & n.68,

JA 273. The Commission's determination that, in these circumstances, it could not take action that would encourage less efficient resources to stay in the market "'involved a 'policy judgment[] . . . at the core' of FERC's 'regulatory mission,'" and deserves "substantial deference." *Sacramento*, 616 F.3d at 532 (quoting *Alcoa*, 564 F.3d at 1347) (omissions and alterations by Court). *See also Conn. Dep't*, 569 F.3d at 480 (explaining that Forward Capacity Market is intended to provide a price signal for supply resources); *E. Tenn. Nat. Gas Co. v. FERC*, 863 F.2d 932, 939 (D.C. Cir. 1988) ("FERC's adoption of an 'incentive theory' . . . is a judgment well within its discretion in deciding what is a just and reasonable rate."); *Mid-Tex Elec. Co-op. v. FERC*, 773 F.2d 327, 345 (D.C. Cir. 1985) (sending price signals is a valid regulatory objective).

2. The Level And Length Of The Price Floor Are Appropriate In The Circumstances Here

Generators claim that the price floor should be higher and last longer. Gen. Br. 37-40. The Commission reasonably found otherwise. Fourth Order PP 55-57, JA 273-74; First Order PP 97-98, JA 35-36.

First, as already explained, the first five capacity auctions cleared at the price floor with significant surplus capacity. Fourth Order P 55 & n. 68, JA 275. In fact, those auctions would have had significant surplus capacity even without the below-cost capacity. *Id.* In these circumstances, the Commission found that generally increasing the price floor would send inappropriate price signals. *Id.*

P 55, JA 273; First Order P 98, JA 36.

Generators next complain that the price floor is too low because Cost of New Entry, on which the price floor is based, is improperly based on clearing prices in prior auctions. Gen. Br. 38. In fact, however, the First Order revised how Cost of New Entry is calculated so that, when the price floor sets an auction price, the following year's Cost of New Entry is not calculated based on the prior year's clearing price. Fourth Order P 56 & n.72, JA 274; First Order PP 142-43, 150, JA 52, 54-55. Instead, Cost of New Entry is adjusted using a rolling three-year average of the Handy-Whitman Index of Public Utility Construction Costs. Fourth Order PP 5, 6 & n.72, JA 251, 274; First Order PP 142-43, 150, JA 52, 55-56. Under this revised system, the fifth auction's price floor was adjusted and increased. Fourth Order P 56, JA 273-74.

Generators complain that an order issued after the underlying FERC proceeding (*ISO New England, Inc.*, 138 FERC ¶ 61,238 P 27 (2012)) lowered the price floor for the seventh auction. Gen. Br. 38. This post-record order, like the others Generators earlier attempted to rely on, *see supra* p. 71, has no bearing on this case. *Midcoast*, 198 F.3d at 965.

The Commission also reasonably determined that it would be inappropriate to continue the price floor under the new offer-floor construct. Fourth Order P 57, JA 274. Like increasing the price floor, extending the price floor further would

send the wrong price signals regarding the need for capacity, and thereby discourage some old and inefficient existing capacity from retiring. *Id.* As New England has significant excess capacity, the Commission found that it would be inappropriate to encourage such inefficient decisions. *Id.* PP 39-40, JA 264-65.

G. The Commission Reasonably Determined That Only New Import Resources Should Be Subject To The New Offer Floor

ISO New England proposed that, like existing internal resources, existing external resources would not be subject to mitigation. Fourth Order P 96, JA 295. Because it is very difficult to determine what resources support an import, however, the System Operator proposed that an import be considered new and, therefore, subject to mitigation, only when a specific new external resource is identified as the sole support for the import and a significant investment (such as the construction of a new transmission line to import power) is made to provide capacity to New England. *See id.*; R.204 (ISO New England's Third Brief) at 43-44, JA 1686-87.

The Commission agreed that "it is very difficult to determine what resources support an import – except when a new resource can be identified *and* a significant investment (such as construction of a new transmission line to import power from an adjacent control area) is made to provide capacity to New England." Fourth Order P 97, JA 295; *see also* Third Order PP 190-91, JA 171. Only when both of these factors are met is it clear that new resources are being devoted to the New

England market over the long term and, therefore, that, like new internal resources, these new external resources should be subject to an offer floor. Third Order P 191, JA 171.

Thus, contrary to Generators' claim (Gen. Br. 42), the Commission did not avoid making a difficult judgment call. Rather, the Commission put in place a standard that, consistent with the principles of open access and non-discrimination, ensures that only new resources, whether internal or external, are mitigated. Fourth Order P 98, JA 296.

By contrast, Generators' proposal to mitigate external resources when either of the criteria is met (Gen. Br. 41-45) "would create disparate treatment" by imposing a price floor on existing external, but not existing internal, resources. Fourth Order P 98, JA 296. Requiring identification of only a specific new external resource, without also requiring identification of a significant investment made to provide capacity to New England, Br. 42-43, would not ensure that mitigation occurs only when new resources will be devoted to the New England market over the long term. Third Order P 191, JA 171.

Moreover, mitigating external resources when only a significant investment (such as the construction of a new transmission line to import power) to provide capacity to New England is identified, Br. 43-44, would not only unduly discriminate between internal and external existing resources, but also would

unduly discriminate between service over new and existing transmission facilities. Fourth Order P 98, JA 296. As the Commission explained, an importer's incremental avoidable costs include transmission costs whether it uses existing or new transmission facilities, but Generators' proposal would require an offer floor, which reflects transmission costs, only for capacity imported over new, but not over existing, transmission facilities. *Id.*

IV. FERC Reasonably Approved The Proposal To Lower The Threshold Price At Which The Internal Market Monitor Would Review Temporary De-list Bids

Generators contend that there was no need to lower the threshold price at which the Internal Market Monitor reviews de-list bids, i.e., bids to allow capacity resources to exit auctions. Gen. Br. 46-55. The Commission, however, reasonably agreed with the System Operator and market monitors that, since de-list bids will now be able to set zonal clearing prices (a change Generators support), the threshold for Internal Market Monitor review of de-list bids needed to be lowered to a level at which there was no market power concern.

A. The System Operator's Proposal

As already discussed, *see supra* pp. 14-15, under the auction system established under the Settlement, a zone would be "modeled" as a separate zone in a forward capacity auction and, therefore, subject to a separate, higher clearing price, only if it was projected before the auction that there was a need for new

capacity in that zone. First Order P 131, JA 48. If it turned out during the auction that there was insufficient capacity, the System Operator would have to reject de-list bids from resources needed to satisfy reliability requirements. *Id.*, Internal Market Monitor's June 5, 2009 Report at 41; R.34 (External Market Monitor Comments) at 16, JA 737.

In this proceeding, the System Operator proposed that zones be modeled during the auction as well, so that, if transmission constraints occur during an auction, a new capacity zone would form, and be subject to a separate, higher clearing price. R.159 (ISO New England's Revised Proposal) at 41-43, JA 1104-06. The System Operator further proposed that all de-list bids be considered in modeling zones and, therefore, that de-list bids be able to set zonal clearing prices. *Id.* at 45, JA 1108.

The Internal and External Market Monitors supported these changes, but cautioned that they should be implemented only if market power mitigation measures were improved. Internal Market Monitor's June 5, 2009 Report at 42; R.34 (External Market Monitor's Comments) at 19-20, JA 740-41. As the Internal Market Monitor explained, allowing de-list bids to set the clearing price would provide an incentive for suppliers to withhold capacity by submitting de-list bids to create a new capacity zone and increase the price received by their other resources within the zone. Internal Market Monitor's June 5, 2009 Report at 4. The External

Market Monitor also pointed out that the existing threshold to trigger market monitor review of de-list bids – bids of more than 80 percent of Cost of New Entry – was "too high to be fully effective in mitigating the substantial market power that likely exists in the local capacity zones." R.34 (External Market Monitor's Comments) at 19-20, JA 740-41.

Accordingly, the System Operator also proposed to lower the threshold price at which de-list bids are reviewed by the Internal Market Monitor. R.159 at 49-52, JA 1112-15. The System Operator explained that, while ISO New England's Tariff requires that a de-list bid reflect a resource's going forward or opportunity costs,[15] the existing dynamic de-list bid threshold of 0.8 times Cost of New Entry did not bear any particular relationship to those costs. *Id*. at 50, JA 1113; Third Order P 305, JA 213. Accordingly, the System Operator explained, absent Internal Market Monitor review, a bid at that price cannot be considered competitive and allowed to set zonal prices in an auction. R.159 at 50, JA 1113 (citing External Market Monitor Comments at 20, JA 741).

The System Operator proposed, instead, to set the dynamic de-list bid threshold at the lowest clearing price ($1/kilowatt-month) in the three annual

[15] ISO New England Tariff §§ III.13.1.2.3.2.1.1 and III.13.1.2.3.2.1.2, cited in R.216 (New England Power Generators/NextEra Energy Rehearing Request) at 52, JA 1773.

Forward Capacity Market reconfiguration auctions that had taken place so far.[16] *Id.* at 50-51, JA 1113-14. In a reconfiguration auction, resources that want to shed capacity supply obligations trade with resources that want to take on those obligations. *Id.* at 50, JA 1113. Because reconfiguration auctions, unlike the primary capacity auctions that had taken place so far, have no administrative floor price, a reconfiguration auction's clearing price represents a price suppliers were willing to accept in exchange for taking on a capacity supply obligation – i.e., a competitive market price for an existing unit to provide capacity. *Id*. at 11-12, 50, JA 1074-75, 1113. Reconfiguration auction results thus serve as a reasonable estimate of the level at which de-lists bids can be presumed competitive. *Id.*; Third Order P 305, JA 213. And, the System Operator explained, since the Internal Market Monitor does not review dynamic de-list bids, the threshold at which those bids can be submitted should be set at the lowest reconfiguration auction clearing price to date in order to maximize the likelihood that auction outcomes will be competitive. R.159 at 51, JA 1114.

The System Operator acknowledged that $1/kilowatt-month was significantly below the current dynamic de-list bid threshold, but noted that resources that want to leave the market at prices above that threshold may do so by

[16] These three reconfiguration markets cleared at $1/kilowatt-month, $1.43/kilowatt-month, and $1.50/kilowatt-month. *Id.* at 51, JA 1114.

submitting a static de-list bid, which will be subject to Internal Market Monitor review. *Id.* Furthermore, in light of the small data set from reconfiguration auctions, the System Operator proposed that the Internal Market Monitor periodically review the dynamic de-list bid threshold level to take into account annual reconfiguration auctions, bilateral transactions, and static de-list bids under the revised system, thereby ensuring that the threshold remains a reasonable estimate of the cost of providing capacity for an existing resource that wants to exit the capacity market. *Id.* at 11-12, 51-52, JA 1074-75, 1114-15.

Generator parties protested that the proposed dynamic de-list threshold was too low; load parties protested that it was too high. Third Order PP 306-10, JA 213-15. The Internal Market Monitor, however, supported $1/kilowatt-month as an initial threshold for market monitor review. R.198, JA 1601; Third Order P 311, JA 214-15. As the Internal Market Monitor explained, the dynamic de-list bid threshold must be set at a level at which the exercise of market power either is improbable or would have a negligible impact on the marketplace. R.198 at 8-9, JA 1612-13; *see also id.* at 11, JA 1615 ("the threshold is a boundary below which the [Internal Market Monitor] must be confident that market power is not a concern and the explicit review of bids would provide little if any improvement to the auction results").

B. The Commission Approved ISO New England's Proposed Changes

The Commission approved the System Operator's proposal to model all zones all the time, as doing so made it more likely that auction prices will reflect local constraints and, thereby, reduce the need to reject de-list bids and rely on out-of-market solutions to address reliability needs. Third Order PP 272-77, JA 203-05; Fourth Order PP 102, 107-09, JA 297, 299-300.

The Commission also approved the proposal to permit de-list bids to set zonal clearing prices in conjunction with improved market power mitigation measures, including a new threshold ($1/kilowatt-month) for Internal Market Monitor review of temporary de-list bids. Third Order PP 290, 313-15, 322-24, JA 208, 215-16, 218-19; Fourth Order PP 110-11, 121-28, JA 300-01, 304-07. While the prior threshold was appropriate under the prior system, because dynamic de-list bids will now be able to set zonal prices, the threshold to submit those bids (which are not reviewed by the Internal Market Monitor), needed to be set at a level at which an exercise of market power was unlikely to occur or to have a significant effect on market price. Third Order PP 305, 313, JA 213, 215; Fourth Order PP 122, 123, JA 305.

The Commission explained that a competitive de-list bid reflects the minimum amount needed to induce an existing resource that intends to provide energy and ancillary services to also provide capacity. Fourth Order P 122,

JA 305. Since the added costs for providing capacity in many cases is nearly zero, the Commission determined that a competitive offer for most existing resources should be quite low. *Id.*

Capacity auction clearing prices could not be used to set the threshold, competitive price because those auctions had an administratively-set price floor. Fourth Order P 122, JA 305. Instead, that price would be set based on capacity reconfiguration auction clearing prices, as reconfiguration auctions involve bids for capacity supply obligations, but have no price floor. *Id.* The Commission further determined that the dynamic de-list bid threshold would be updated to account for new information and market experience. Third Order P 314, JA 215-16; Fourth Order P 122, JA 305.

C. The Commission Reasonably Determined That Increased Internal Market Monitor Review Is Required Now That Dynamic De-List Bids Can Set The Market Clearing Price

Generators support the Commission's approval of the proposal to model all zones all the time and to permit all de-list bids to set zonal prices in the auction. *See* Third Order PP 265, 287, JA 201-02, 207. Generators contend, however, that, despite these market changes, there was no need to change the threshold at which the Internal Market Monitor would review de-list bids to ensure they are competitive rather than an exercise of market power. Gen. Br. 46-55.

The Commission reasonably agreed with the System Operator and the Internal Market Monitor that it could accept those proposed market changes only in conjunction with the proposed market mitigation measures. Third Order P 313, JA 215; Fourth Order P 110, 121, 123, JA 300-01, 304, 305; *see also* R.159 (Revised proposal) at 45, JA 1108 (same).

First, allowing de-list bids to set the market clearing price provides an incentive for suppliers to withhold (via de-listing) a portion of their capacity in order to cause a zone to separate and, thereby, increase the price for the rest of their capacity within that zone. Fourth Order P 123, JA 305; *see also* Internal Market Monitor's June 5, 2009 Report at 42 (same).

Moreover, the previous threshold (0.8 times Cost of New Entry) was not representative of a competitive de-list bid. Fourth Order P 125, JA 306; *see also* R.159 (Revised proposal) at 50, JA 1113 (same). Rather, at that price, sellers would have an incentive to withhold capacity. Fourth Order P 125, JA 306.

The Commission also rejected Generators' claim that de-list bids are intended to limit downward price volatility in the Forward Capacity Market. Gen. Br. 46, 48-50. The Commission explained that "[a] resource's de-list bid is not intended to serve as a price stabilizer; it is intended to represent the offer a competitive supplier would accept voluntarily to commit its resource as a capacity resource." Third Order P 315, JA 216.

Generators and Intervenors-PSEG note that there was no evidence that market power was exercised when the threshold was set at 0.8 times Cost of New Entry. Gen. Br. 48, 54-55; Int.-PSEG Br. 17-18. This claim ignores that dynamic de-list bids will, for the first time, be permitted to set zonal prices in Forward Capacity Market auctions and, therefore, that sellers will now have an incentive to exercise market power by submitting de-list bids in order to increase prices. Third Order PP 305, 313, JA 213, 215; Fourth Order PP 121-23, JA 304-05; *see also* Gen. Br. 55 (acknowledging that "[c]ontracting supply in response to falling prices can be problematic if, rather than being a competitive response to price, it represents an exercise of market power"). Whether market power was exercised at a threshold applied when de-list bids could not set zonal prices is, therefore, irrelevant.

D. The Commission Reasonably Approved The Proposal To Initially Set The Dynamic De-List Threshold At $1/Kilowatt-Hour

Generators raise several challenges to the Commission's approval of the proposal to set the new dynamic de-list bid threshold at $1/kilowatt-hour. Gen. Br. 55-60. None of these challenges has merit.

First, Generators argue that the threshold for Internal Market Monitor review cannot be set based on capacity reconfiguration auction results because those auctions have a shorter forward procurement period, involve less volume, and produce lower clearing prices than forward capacity auctions. Gen. Br. 57. The

Commission found otherwise.

As the Commission explained, "[a] competitive de-list bid should reflect the minimum amount needed to induce an existing resource that intends to provide energy and ancillary services to also provide capacity, a circumstance that applies to most existing resources." Fourth Order P 122, JA 305. In addition, the Commission "agree[d] with the internal market monitor that a competitive offer for most existing resources would be expected to be quite low since the added costs for providing capacity in many cases is nearly zero." *Id.* While acknowledging that reconfiguration auctions have a shorter forward procurement period and lower volume than forward capacity auctions, the Commission found that reconfiguration auction results represent a reasonable estimate of the price at which a competitive supplier would choose to commit its resource as a capacity resource and, therefore, are a reasonable basis for determining the price at which Internal Market Monitor review of de-list bids is necessary. *Id.*; Third Order PP 314, 315, JA 215, 216. *See also, e.g., WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001) (not arbitrary and capricious to rely on an admittedly imperfect proxy).

For the first time on appeal, Generators also argue that the threshold is improperly based on reconfiguration auctions because those auctions are for existing market participants rather than for sellers choosing whether to enter the market in the first place. Gen. Br. 56-57. As Generators acknowledge in their

Brief at 7, however, de-list bids, like reconfiguration auctions, are used by existing, rather than potential new, market participants.

Generators mistakenly claim that the Commission did not explain why reconfiguration auctions provide a better proxy for competitive dynamic de-list bids than either 0.8 times Cost of New Entry or cost data in reliability-must-run contracts. Gen. Br. 58. As already explained, the Commission found 0.8 times Cost of New Entry did not represent a competitive de-list bid and, in fact, was a price at which sellers would have an incentive, under the new market rules, to withhold a portion of their capacity to increase the price for the rest of their capacity. Fourth Order P 125, JA 306.

The Commission also explained why it would be inappropriate to use reliability-must-run cost data. *Id.* P 123, JA 305; Third Order P 313, JA 215. While Reliability-Must-Run contracts were intended to provide total cost recovery for reliability-must-run resources, market-based rate Forward Capacity Market auctions are not intended to guarantee total cost recovery. Fourth Order P 123, JA 305, Third Order PP 254-55, 315, JA 196-97, 216. Rather, revenues from the capacity, energy and ancillary services markets are each intended to contribute to a supplier's fixed costs, giving it an opportunity to recover its costs. *Id.* P 315, JA 216.

Next, Generators contend the dynamic de-list bid threshold should not have been set at the lowest reconfiguration auction clearing price. Gen. Br. 58-59. The

Commission (agreeing with the Internal Market Monitor and System Operator) determined, however, that this figure is the price at which market power is not a concern and, therefore, at which Internal Market Monitor review of de-list bids is unnecessary. Third Order PP 313-14, JA 215-16; Fourth Order PP 121-23, 125, JA 304-05, 306. Furthermore, as the Commission directed, the dynamic de-list bid threshold will be updated to account for new information and market experience. Third Order P 314, JA 216; Fourth Order P 122, JA 305.

Generators express concern that unlinking the dynamic de-list bid threshold from Cost of New Entry will prevent a resource from exiting the auction in response to prices that depart sufficiently from Cost of New Entry so as to preclude recovering Cost of New Entry over time. Gen. Br. 49-52. That concern is unfounded. The Commission emphasized that "generators are not precluded from submitting a de-list bid over $1.00/kW-month; such a de-list bid must simply be submitted as a static de-list bid, which is by definition subject to [Internal Market Monitor] review." Third Order P 313, JA 215.

Generators contend, however, that the Commission "ignored critical differences" between dynamic and static de-list bids, complaining that, because static de-list bid have to be submitted well in advance of an auction, they may not reflect some changing costs or new opportunities. Gen. Br. 60; *see also* Int.-PSEG Br. 19 (same). In fact, the Commission recognized that "the binding nature of

static de-list bids and the timeframe involved limit flexibility to respond to some changes," but found that this was not "a serious impediment to the participation of existing resources or unreasonable under [ISO New England's] zonal proposal." Fourth Order P 128, JA 307. In light of the increased incentive to withhold via de-listing in order to raise capacity prices, the proposal was "a reasonable approach to mitigating supplier market power" since it "gives most existing sellers the flexibility to offer capacity at un-reviewed competitive levels while providing little ability to withhold and increase market clearing prices." *Id.*; Third Order P 313, JA 215; *see also* Fourth Order P 121, JA 304 ("We conclude that the internal market monitor's review of bids below this level is not justified by market power concerns and that review of bids above this level is necessary in light of the zonal framework that reduces the use of rejected de-list bids as a market power mitigation tool.").

In addition, contrary to Generator's claim (Br. 50, 52-53), the Commission meaningfully responded to the contention that the new threshold would become the *de facto* capacity clearing price and have dire consequences for the market. The Commission agreed that, if a much lower clearing price developed, resource retirements might accelerate. Fourth Order P 126, JA 306. That would be appropriate in New England, however, as that market has "significant excess supply that may include aging facilities unable to meet environmental standards in

a cost-effective manner." *Id.* Moreover, requiring existing resources to offer capacity on a competitive basis, which is the objective of this market power mitigation measure, would not unduly discourage competitive new entry. *Id.* Rather, "new merchant entry depends on many factors including environmental requirements, transmission enhancements and upgrades and the effectiveness of buyer-side market power mitigation." *Id.*

The Commission, therefore, reasonably found that the proposed $1/kilowatt-hour threshold was appropriate as an initial threshold for Internal Market Monitor review of temporary de-list bids. Third Order P 313, JA 215. The Commission made clear, however, that the threshold would be updated to account for new information and market experience. *Id.* P 314, JA 215-16; Fourth Order P 122, JA 305. In these circumstances, the Commission's determinations should be upheld.

CONCLUSION

For the foregoing reasons, the Court should dismiss for lack of ripeness those claims regarding application of offer-floor mitigation measures to state-sponsored and self-supplied resources. The balance of the petitions for review should be denied.

Respectfully submitted,

David L. Morenoff
Acting General Counsel

Robert H. Solomon
Solicitor

/s/ Beth G. Pacella
Beth G. Pacella
Senior Attorney

Robert M. Kennedy
Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-6048
Fax: 202-273-0901
E-mail: beth.pacella@ferc.gov

March 5, 2013

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief contains 21,160 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

/s/ Beth G. Pacella
Beth G. Pacella
Senior Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
TEL: (202) 502-6600
FAX: (202) 273-0901
beth.pacella@ferc.gov

March 5, 2013

ADDENDUM

STATUTES

TABLE OF CONTENTS

PAGE

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).

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.

Subsec. (g)(5). Pub. L. 109–58, § 1277(b)(1), substituted ''2005'' for ''1935''.

1992—Subsec. (g). Pub. L. 102–486 added subsec. (g).

1978—Subsec. (b). Pub. L. 95–617, § 204(b)(1), designated existing provisions as par. (1), inserted ''except as provided in paragraph (2)'' after ''in interstate commerce, but'', and added par. (2).

Subsec. (e). Pub. L. 95–617, § 204(b)(2), inserted ''(other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title)'' after ''under this subchapter''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by section 1277(b)(1) of Pub. L. 109–58 effective 6 months after Aug. 8, 2005, with provisions relating to effect of compliance with certain regulations approved and made effective prior to such date, see section 1274 of Pub. L. 109–58, set out as an Effective Date note under section 16451 of Title 42, The Public Health and Welfare.

STATE AUTHORITIES; CONSTRUCTION

Nothing in amendment by Pub. L. 102–486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102–486, set out as a note under section 796 of this title.

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

Section 214 of Pub. L. 95–617 provided that:

''(a) PRIOR ACTIONS.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall apply to, or affect, any action taken by the Commission [Federal Energy Regulatory Commission] before the date of the enactment of this Act [Nov. 9, 1978].

''(b) OTHER AUTHORITIES.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall limit, impair or otherwise affect any authority of the Commission or any other agency or instrumentality of the United States under any other provision of law except as specifically provided in this title.''

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and

between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Sale or exchange of energy; establishing physical connections

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) Temporary connection and exchange of facilities during emergency

During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

(d) Temporary connection during emergency by persons without jurisdiction of Commission

During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: *Provided*, That such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: *Provided further*, That upon approval of the Commission permanent connections for emergency use only may be made hereunder.

(e) Transmission of electric energy to foreign country

After six months from August 26, 1935, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate.

(f) Transmission or sale at wholesale of electric energy; regulation

The ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is (a) generated within a State and transmitted from the State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a foreign country and transmitted across an international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this subchapter. The State within which any such facilities are located may regulate any such transaction insofar as such State regulation does not conflict with the exercise of the Commission's powers under or relating to subsection (e) of this section.

(g) Continuance of service

In order to insure continuity of service to customers of public utilities, the Commission shall require, by rule, each public utility to—

(1) report promptly to the Commission and any appropriate State regulatory authorities any anticipated shortage of electric energy or capacity which would affect such utility's capability of serving its wholesale customers,

(2) submit to the Commission, and to any appropriate State regulatory authority, and periodically revise, contingency plans respecting—

(A) shortages of electric energy or capacity, and

(B) circumstances which may result in such shortages, and

(3) accommodate any such shortages or circumstances in a manner which shall—

(A) give due consideration to the public health, safety, and welfare, and

(B) provide that all persons served directly or indirectly by such public utility will be treated, without undue prejudice or disadvantage.

(June 10, 1920, ch. 285, pt. II, § 202, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 848; amended Aug. 7, 1953, ch. 343, 67 Stat. 461; Pub. L. 95–617, title II, § 206(a), Nov. 9, 1978, 92 Stat. 3141.)

AMENDMENTS

1978—Subsec. (g). Pub. L. 95–617 added subsec. (g).
1953—Subsec. (f). Act Aug. 7, 1953, added subsec. (f).

EFFECTIVE DATE OF 1978 AMENDMENT

Section 206(b) of Pub. L. 95–617 provided that: ''The amendment made by subsection (a) [adding subsec. (g) of this section] shall not affect any proceeding of the Commission [Federal Energy Regulatory Commission] pending on the date of the enactment of this Act [Nov. 9, 1978] or any case pending on such date respecting a proceeding of the Commission.''

DELEGATION OF FUNCTIONS

Functions of President respecting certain facilities constructed and maintained on United States borders delegated to Secretary of State, see Ex. Ord. No. 11423, Aug. 16, 1968. 33 F.R. 11741, set out as a note under section 301 of Title 3, The President.

PERFORMANCE OF FUNCTIONS RESPECTING ELECTRIC POWER AND NATURAL GAS FACILITIES LOCATED ON UNITED STATES BORDERS

For provisions relating to performance of functions by Secretary of Energy respecting electric power and natural gas facilities located on United States borders, see Ex. Ord. No. 10485, Sept. 8, 1953, 18 F.R. 5397, as amended by Ex. Ord. No. 12038, Feb. 3, 1978, 43 F.R. 4957, set out as a note under section 717b of Title 15, Commerce and Trade.

§ 824a–1. Pooling

(a) State laws

The Commission may, on its own motion, and shall, on application of any person or governmental entity, after public notice and notice to the Governor of the affected State and after affording an opportunity for public hearing, exempt electric utilities, in whole or in part, from any provision of State law, or from any State rule or regulation, which prohibits or prevents the voluntary coordination of electric utilities, including any agreement for central dispatch, if the Commission determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area. No such exemption may be granted if the Commission finds that such provision of State law, or rule or regulation—

(1) is required by any authority of Federal law, or

(2) is designed to protect public health, safety, or welfare, or the environment or conserve energy or is designed to mitigate the effects of emergencies resulting from fuel shortages.

(b) Pooling study

(1) The Commission, in consultation with the reliability councils established under section 202(a) of the Federal Power Act [16 U.S.C. 824a], the Secretary, and the electric utility industry shall study the opportunities for—

(A) conservation of energy,

(B) optimization in the efficiency of use of facilities and resources, and

(C) increased reliability,

through pooling arrangements. Not later than 18 months after November 9, 1978, the Commission shall submit a report containing the results of such study to the President and the Congress.

(2) The Commission may recommend to electric utilities that such utilities should voluntarily enter into negotiations where the opportunities referred to in paragraph (1) exist. The Commission shall report annually to the President and the Congress regarding any such recommendations and subsequent actions taken by electric utilities, by the Commission, and by the Secretary under this Act, the Federal Power Act [16 U.S.C. 791a et seq.], and any other provision of law. Such annual reports shall be included in the Commission's annual report required under the Department of Energy Organization Act [42 U.S.C. 7101 et seq.].

(Pub. L. 95–617, title II, § 205, Nov. 9, 1978, 92 Stat. 3140.)

REFERENCES IN TEXT

This Act, referred to in subsec. (b)(2), means Pub. L. 95–617, Nov. 9, 1978, 92 Stat. 3117, known as the ''Public Utility Regulatory Policies Act of 1978''. For complete classification of this Act to the Code, see Short Title note set out under section 2601 of this title and Tables.

The Federal Power Act, referred to in subsec. (b)(2), is act June 10, 1920, ch. 285, 41 Stat. 1063, as amended, which is classified generally to this chapter. For complete classification of this Act to the Code, see section 791a of this title and Tables.

The Department of Energy Organization Act, referred to in subsec. (b)(2), is Pub. L. 95–91, Aug. 4, 1977, 91 Stat. 565, as amended, which is classified principally to chapter 84 (§ 7101 et seq.) 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 7101 of Title 42 and Tables.

CODIFICATION

Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter.

DEFINITIONS

For definitions of terms used in this section, see section 2602 of this title.

§ 824a–2. Reliability

(a) Study

(1) The Secretary, in consultation with the Commission, shall conduct a study with respect to—

(A) the level of reliability appropriate to adequately serve the needs of electric consumers, taking into account cost effectiveness and the need for energy conservation,

(B) the various methods which could be used in order to achieve such level of reliability and the cost effectiveness of such methods, and

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,

(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 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.''

[1] See References in Text note below.

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 an 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.)

§ 824h. References to State boards by Commission

(a) Composition of boards; force and effect of proceedings

The Commission may refer any matter arising in the administration of this subchapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The board shall be appointed by the Commission from persons nominated by the State commission of each State affected or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Cooperation with State commissions

The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Availability of information and reports to State commissions; Commission experts

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may upon request from a State make available to such State as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement to the Commission by such State of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 10, 1920, ch. 285, pt. II, § 209, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

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 an 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.)

§ 824h. References to State boards by Commission

(a) Composition of boards; force and effect of proceedings

The Commission may refer any matter arising in the administration of this subchapter to a board to be composed of a member or members, as determined by the Commission, from the State or each of the States affected or to be affected by such matter. Any such board shall be vested with the same power and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold any hearings. The action of such board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The board shall be appointed by the Commission from persons nominated by the State commission of each State affected or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Cooperation with State commissions

The Commission may confer with any State commission regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Availability of information and reports to State commissions; Commission experts

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of public utilities. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may upon request from a State make available to such State as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement to the Commission by such State of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 10, 1920, ch. 285, pt. II, § 209, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 853.)

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

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 March 2013, 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:

Jeffrey Richard Babbin Wiggin and Dana LLP One Century Tower PO Box 1832 New Haven, CT 06508-1832 Email: jbabbin@wiggin.com	Email
Monica M. Berry Schiff Hardin LLP 901 K Street, NW Suite 700 Washington, DC 20001 Email: mberry@schiffhardin.com	Email
Mary Ellen Grover NSTAR Electric & Gas Corporation 800 Boylston Street P1700 Boston, MA 02199-8003 Email: mary.grover@NSTAR.com	Email
Jeffrey Alan Lamken Molo Lamken LLP The Watergate 600 New Hampshire Avenue, NW Washington, DC 20037 Email: jlamken@mololamken.com	Email

Stephanie Szu-Ping Lim — Email
King & Spalding LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006-4706
Email: sslim@kslaw.com

Kerim Peritz May — US Mail
ISO New England Inc.
One Sullivan Road
Holyoke, MA 01040-0000
Email: kmay@iso-ne.com

Jodi L. Moskowitz — Email
PSEG Services Corporation
80 Park Plaza, T5G
Newark, NJ 07102-4194
Email: Jodi.Moskowitz@PSEG.com

Christopher C. O'Hara — Email
NRG Energy, Inc.
211 Carnegie Center Drive
Princeton, NJ 08540
Email: chris.ohara@nrgenergy.com

Matthew Scott Owen — Email
King & Spalding LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006-4706
Email: mowen@kslaw.com

Ashley Charles Parrish — Email
King & Spalding LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006-4706
Email: aparrish@kslaw.com

Sherry Ann Quirk — Email
Schiff Hardin LLP
300
901 K Street, NW
Suite 700
Washington, DC 20001
Email: squirk@schiffhardin.com

F. Anne Ross — Email
New Hampshire Public Utilities Commission
Suite 10
21 South Fruit Street
Concord, NH 03301-2429
Email: F.Anne.Ross@puc.nh.gov

Jeffrey Alan Schwarz — Email
Spiegel & McDiarmid LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
Email: jeffrey.schwarz@spiegelmcd.com

John L Shepherd Jr. — Email
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, NW
Washington, DC 20005
Email: John.Shepherd@skadden.com

Abraham Silverman — Email
NRG Energy, Inc.
211 Carnegie Center Drive
Princeton, NJ 08540
Email: abraham.silverman@nrgenergy.com

Randall L. Speck — Email
Kaye Scholer, LLP
The McPherson Building
901 15th Street, NW
Washington, DC 20005
Email: rspeck@kayescholer.com

Scott Harris Strauss — Email
Spiegel & McDiarmid LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
Email: scott.strauss@spiegelmcd.com

Allan Bert Taylor — Email
Day Pitney LLP
242 Trumbull Street
Hartford, CT 06103-1212
Email: abtaylor@daypitney.com

Stephen L. Teichler — Email
Duane Morris LLP
505 9th Street, NW
Suite 1000
Washington, DC 20004-2166
Email: slteichler@duanemorris.com

David G. Tewksbury — Email
King & Spalding LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006-4706
Email: dtewksbury@kslaw.com

Gregory S. Wagner — Email
Baker Botts, LLP
1299 Pennsylvania Avenue, NW
The Warner, Suite 1300 West
Washington, DC 20004-2400
Email: gregory.wagner@bakerbotts.com

Robert A. Weishaar Jr. — Email
McNees, Wallace & Nurick
777 North Capitol Street, NE
Suite 401
Washington, DC 20002-0000
Email: rweishaa@mwn.com

Michael C. Wertheimer Email
Office of the Attorney General, State of Connecticut
10 Franklin Square
New Britain, CT 06051
Email: michael.wertheimer@po.state.ct.us

John Story Wright Email
Office of the Attorney General, State of Connecticut
10 Franklin Square
New Britain, CT 06051
Email: john.wright@ct.gov

/s/ Beth G. Pacella
Senior Attorney