122 FERC ¶ 61,153
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York State Reliability Council Docket No. ER07-429-001

ORDER ON REHEARING AND CLARIFICATION

(Issued February 21, 2008)

1. In this order the Commission grants clarification in limited part and otherwise denies the New York State Public Service Commission's (New York Commission) request for rehearing and clarification of the Commission's March 5, 2007 Order[1] accepting for filing the New York State Reliability Council's (NYSRC) proposed Installed Capacity Requirement (ICR) for the New York Control Area (NYCA) for the 2007-2008 Capability Year.

Background

2. By Commission order issued June 30, 1988, the NYSRC was established as part of the restructuring of the electricity market in New York and the formation of the New York Independent System Operator (NYISO).[2] The New York State Reliability Council Agreement (NYSRC Agreement) and the Agreement between the New York Independent System Operator and the New York State Reliability Council (NYISO-NYSRC Agreement) were among the agreements that the Commission accepted. These

[1] *New York State Reliability Council*, 118 FERC ¶ 61,179 (2007) (March 5, 2007 Order).

[2] *See Central Hudson Gas & Electric Corp.*, 83 FERC ¶ 61,352 (1998), *order on reh'g*, 87 FERC ¶ 61,135 (1999); *Central Hudson Gas & Electric Corp.*, 86 FERC ¶ 61,062 (1999); *Central Hudson Gas & Electric Corp.*, 87 FERC ¶ 61,135 (1999); *Central Hudson Gas & Electric Corp.*, 88 FERC ¶ 61,138 (1999).

agreements established the NYSRC and vested it with primary responsibility for setting New York bulk-power system reliability rules, to be based on the reliability rules and criteria of entities such as the North American Electric Reliability Council (NERC), the Northeast Power Coordinating Council (NPCC), and the New York Commission.

3. Section 3.03 of the NYSRC Agreement thus provides, in relevant part:

> The NYSRC shall establish the state-wide annual Installed Capacity [ICR] requirements for New York State consistent with NERC and NPCC standards. The NYSRC will initially adopt the Installed Capacity requirement as set forth in the current [New York Power Pool] Agreement and currently filed with the [Commission]. Any changes to this requirement will require an appropriate filing and [Commission] approval.

4. The ICR that NYSRC establishes is a measure of the installed generating capability that load-serving entities in the NYCA must procure. It is expressed as a percentage of the forecasted peak loads in the NYCA and includes an Installed Reserve Margin (IRM) which is also a percentage of forecasted peak load.

5. In 2005, subsequent to the agreements establishing NYSRC, Congress enacted section 215 of the Federal Power Act (FPA),[3] which authorizes the Commission to ensure the reliable operation of the bulk-power system through reliability standards enforced by NERC which the Commission certified as the Electric Reliability Organization (ERO). Section 215 thus grants the Commission jurisdiction "over the ERO, . . . any regional entities, and all users, owners and operators of the bulk-power system . . . for purposes of approving reliability standards . . . and enforcing compliance with this section."[4] However, section 215 does not authorize the Commission or NERC, as the ERO, "to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy or safety of electric facilities or services."[5] Section 215 also includes a provision relating to states in general and a specific provision for the State of New York:

> Nothing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any

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[3] 16 U.S.C. § 824o (Supp. V 2005).

[4] 16 U.S.C. § 824o(b)(1) (Supp. V 2005).

[5] 16 U.S.C. § 824o(i)(2) (Supp. V 2005).

> reliability standard, except that the State of New York may establish rules that result in greater reliability within that State, as long as such action does not result in lesser reliability outside the State than that provided by the reliability standards.[6]

6. On February 9, 2006, the New York Public Service Commission issued an order adopting NYSRC Reliability Rules. In its order, the New York Commission described new section 215 of the FPA as specifically granting the State of New York authority to adopt state reliability standards that result in a greater degree of reliability than produced by national standards. The New York Commission then stated:

> In this Order, we adopt the NYSRC's current Reliability Rules. This action is taken to avoid any delay in the application and enforcement of reliability standards due to implementation of FPA § 215 which requires action by New York State, and to ensure application of the NYSRC reliability standards in New York. It is critical that mechanisms to enforce New York's reliability standards remain in place even under FPA § 215 and the new authority given our federal partners.[7]

7. The New York Commission also stated that "[b]ecause the federal statute [FPA section 215] authorizes the *State* of New York to establish rules that result in greater reliability, we are compelled to establish our own *State* regulations to ensure that New Yorkers receive the highest level of reliable service."[8] The New York Commission went on to explain that it was not adopting at that time the NPCC criteria for operation of the Northeast bulk-power system because the NPCC was in the process of classifying its reliability criteria, based upon their relationship to national and regional standards, into various categories, and that it would consider their adoption later once the classification project has been completed.

8. On January 12, 2007, consistent with the agreements accepted earlier, the NYSRC filed with the Commission its revised ICR for the NYCA for the 2007-2008 capability

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[6] 16 U.S.C. § 824o(i)(3) (Supp. V 2005).

[7] *Reliability Rules of the New York State Reliability Council and the Criteria of the Northeast Power Coordinating Council*, Order Adopting New York State Reliability Rules, New York Commission Case No. 05-E-1180 at 2 (February 9, 2006).

[8] *Id*. at 6 (emphasis in original).

year.[9] The NYSRC proposed to reduce the IRM from 18 percent to 16.5 percent and requested that the Commission accept the filing effective March 1, 2007, so that the revised ICR, inclusive of the 16.5 percent IRM, could be in place prior to the NYISO ICAP auction on March 29, 2007.

9. On February 2, 2007, the New York Commission filed a notice of intervention and comments. In its comments, the New York Commission stated that it was not taking a position on the IRM adopted by NYSRC. However, in response to the NYSRC's request that the Commission accept its January 12, 2007 filing, the New York Commission stated that the Commission should "accept for filing" (as it had in an order issued March 17, 2000[10]), rather than "approve," any change in the IRM,[11] subject to an ongoing New York Commission proceeding.[12]

10. The New York Commission stated it was submitting its comments out of an abundance of caution to preserve its existing jurisdiction over the adequacy and reliable operation of the bulk-power system within New York State, in a manner consistent with New York law and the FPA. It asserted that the Commission has recognized that the states are the appropriate entities to oversee and ensure the adequacy of the bulk-power system, including the setting of an IRM. In the alternative, it argued, if the setting of IRMs relates to the "reliable operation of the bulk-power system" (a reference to the authority granted the Commission by section 215(i)(3) of the FPA), which the New York Commission stated it does not believe to be the case, it asserted that the FPA preserves the state's ability to act in a manner not inconsistent with federal reliability standards. The New York Commission asserted that new section 215 of the FPA preserves the role of the states in regulating and ensuring the safety and adequacy of facilities, and that, even if the IRM is considered a reliability standard, which the New York Commission stated it does not believe, New York retains authority to set the IRM as long as its actions do not result in lesser reliability outside the state than that provided by federal reliability standards. The New York Commission further asserted that no federal reliability

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[9] The Capability Year is May 1, 2007 through April 30, 2008.

[10] *Citing New York State Reliability Council*, 90 FERC ¶ 61,313 (2000).

[11] However, in the "Conclusion" of its comments, the New York Commission stated that it requests that the Commission accept the NYSRC's filing for informational purposes only.

[12] *See* Notice Soliciting Comments on Adoption of an Installed Reserve Margin, New York Commission Case Nos. 07-E-0080 and 05-E-1180.

standard for installed reserves exists and, thus, New York's setting of an IRM would not result in any lesser reliability.

11. The March 5, 2007 Order accepted for filing the NYSRC's revised ICR, including the revised 16.5 percent IRM.[13] The Commission acknowledged the New York Commission's jurisdictional concerns and stated that it respects the traditional role of state and local entities over resource adequacy. The Commission stated that its goal is to appropriately recognize state jurisdiction over resource adequacy while fulfilling its statutory mandate under the FPA to ensure that rates, terms and conditions of jurisdictional sales of electric energy and of jurisdictional transmission are just, reasonable, and not unduly discriminatory or preferential. It further stated that, under the terms of the NYSRC Agreement, the NYSRC is required to file its reduction of the IRM with the Commission, and, to the extent the IRM is used to determine capacity charges, it affects Commission jurisdictional power sales rates and therefore was properly before the Commission.[14] The Commission also stated that, in light of the fact that the New York Commission took no position on the NYSRC's 16.5 percent IRM, the Commission's acceptance of it did not conflict with any decision or action of the New York Commission.[15] The Commission concluded by stating that "[s]hould the NYSRC, as a result of New York Commission action, adopt a different IRM percentage, then it is the Commission's expectation that the NYSRC would make a filing with the Commission to that effect."[16]

12. In a subsequent order issued by the New York Commission on March 8, 2007,[17] the New York Commission adopted the 16.5 percent IRM for the NYCA for the

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[13] March 5, 2007 Order, 118 FERC ¶ 61,179 at P 30.

[14] *Id.* P 31.

[15] *Id.* (*citing California Independent System Operator Corp.*, 116 FERC ¶ 61,274 at P 1112–1119 (2006) *(*citing *California Independent System Operator Corp.*, 115 FERC ¶ 61,172 at P 36 (2006), and *Gainesville Utility Dep't v. Florida Power Corp.*, 402 U.S. 515, 529 (1971) (the Commission has the "responsibility to the public to assure reliable efficient electric service"))).

[16] *Id.*

[17] *Order Adopting An Installed Reserve Margin For The New York Control Area*, New York Commission Case Nos. 07-E-0088 and 05-E-1180 (March 8, 2007).

capability period beginning on May 1, 2007 and ending April 30, 2008. The New York Commission stated that its review of the record was guided by two considerations:

> First, the NYSRC is the entity responsible for establishing the IRM for the NYCA. The NYSRC's Reliability Rules, which we have adopted, [footnote omitted] are based on decades of experience in these matters. The NYSRC's process for evaluating the IRM on a yearly basis is well-established, comprehensive, detailed, and open and transparent. The NYSRC, industry members, NYISO, market participants, and Department [of Public Service] Staff all participate in the annual IRM Study process. Second, the adoption of an IRM which differs from that adopted by the NYSRC at this late date would potentially undermine the NYSRC's process and may disrupt or interfere with the operation of the markets serving the NYCA. For these reasons, we will give considerable weight to the NYSRC's findings, conclusions, and recommendations.

13. Finally, on April 19, 2007, the Commission issued an order conditionally accepting, *inter alia*, the Regional Entity Delegation Agreement establishing NPCC as the Regional Entity to implement section 215 (NPCC Delegation Agreement) for the region that includes New York.[18] The Commission noted that the geographic region in which NPCC will perform its duties and functions under the NPCC Delegation Agreement will include New York State, six New England states, and Ontario, Quebec, and the Maritime Provinces of Canada.

Request for Clarification and Rehearing

14. On April 4, 2007, the New York Commission filed a request for clarification and rehearing of the March 5, 2007 Order. The New York Commission submits that, to the extent the March 5, 2007 Order can be read as holding that the Commission has jurisdiction to determine the appropriate level of the IRM, the March 5, 2007 Order unlawfully intrudes upon New York's jurisdiction over generating facilities and the safety and adequacy of the State's electric system. Therefore, the New York Commission requests that the Commission clarify that it did not intend to determine the level of the IRM, or, if it did so intend, grant rehearing and state that it no longer has any desire to preempt state jurisdiction over the adequacy of electric facilities and services.

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[18] *North American Electric Reliability*, 119 FERC ¶ 61,060, *order on reh'g*, 120 FERC ¶ 61,260 (2007).

15. The New York Commission asserts that, "insofar as the Commission set an IRM in the March 5, 2007 Order, it erroneously intruded upon the New York Commission's jurisdiction." The New York Commission argues that the New York Public Service Law, under the authority of the state's police power, vests the New York Commission with responsibility for ensuring the adequacy of the state's electric system, including the adequacy of generation facilities and long range planning. It states that the Commission has long-recognized that states traditionally regulate the setting and enforcement of standards relating to the adequacy of generation facilities and in the March 5, 2007 Order again expressly recognized the states' longstanding jurisdiction over the adequacy of electric services.

16. The New York Commission states that the FPA vests the Commission with jurisdiction over the transmission of electric energy in interstate commerce, the sale of electric energy at wholesale in interstate commerce, and facilities used for such purposes. It notes the Commission's responsibility under section 205 of the FPA for ensuring that all rates and charges for interstate transmission and wholesale sale of electricity and all rules and regulations affecting or pertaining to such rates and charges are just and reasonable. It also notes the Commission's responsibility for ensuring the reliable operation of the bulk-power system under section 215 of the FPA. However, the New York Commission contends that section 215 of the FPA expressly limits the Commission's jurisdiction in that the Commission does not have jurisdiction over facilities used for the generation of electric energy and only has jurisdiction over those matters which are not subject to regulation by the states. Specifically, the New York Commission points out that section 215 of the FPA expressly states that the statute "does not authorize the . . . Commission to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for *adequacy* or safety of electric facilities or services."[19]

17. The New York Commission asserts that, given these limits and its own longstanding jurisdiction over the adequacy of electric services and facilities in New York, any attempt by the Commission to establish an IRM would be unlawful. It contends that the states have authority to ensure system adequacy by determining the appropriate level of the IRM and the Commission is limited to ensuring that rates and charges for the services under its jurisdiction are just and reasonable, in light of a state-established IRM.

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[19] *Citing* 16 U.S.C. § 824o(i)(2) (Supp. V 2005) (emphasis added by the New York Commission).

18. The New York Commission specifically disputes the language in the March 5, 2007 Order which states "to the extent the IRM is used to determine capacity charges, it affects Commission jurisdictional power sales rates and therefore is properly before us."[20] It argues that the March 5, 2007 Order apparently rests on the erroneous notion that the Commission's jurisdiction extends to practices that "affect" or "determine" the wholesale price of power. To the contrary, it contends, the Commission's jurisdiction does not authorize the Commission to regulate in all areas which "affect" or "determine" wholesale prices. It states that while the Commission must recognize or consider a multitude of factors in determining whether wholesale rates are just and reasonable, and while the level of the IRM may be one such factor, "considering" the IRM in "setting" prices, however, is far different than actually "setting" the IRM itself and, it asserts, the Commission has previously recognized this important distinction.

19. The New York Commission states that, where a federal agency attempts to preempt an area traditionally regulated by the states, the Commission must do more than merely infer that it has jurisdiction and that the existence of federal authority to act should appear affirmatively and not rest on inference alone. The New York Commission further argues that the Commission cannot infer statutory authority to set the IRM; rather, it must demonstrate that a statute confers upon it the power it purported to exercise. The New York Commission contends that, in the instant case, the Commission "has apparently improperly inferred authority to set an IRM based on its jurisdiction over the rates and rules for the wholesale sale of electricity." However, it states, the FPA language giving the Commission jurisdiction over wholesale power sales rates does not make any mention of system adequacy or the setting of installed reserves and, in fact, when the FPA mentions "adequacy" of the electric system it does so by expressly prohibiting the Commission from setting and enforcing standards for adequacy.[21] The New York Commission concludes that, to the extent the March 5, 2007 Order infers federal authority under FPA section 206 to preempt state jurisdiction in an area long regulated by the states, such an inference is contrary to the express language of FPA section 215 which prohibits the Commission from setting standards for the safety or adequacy of the system.

20. Finally, in reference to the Commission's statements declaring its intention to only "defer to the NYSRC and its processes *in the first instance*" (emphasis added) and that, should the New York Commission adopt a different IRM percentage then "it is [the Commission's] expectation that the NYSRC would make a filing with the Commission to

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[20] March 5, 2007 Order, 118 FERC ¶ 61,179 at P 31.

[21] *Citing* 16 U.S.C. 824o(i)(2) (Supp. V 2005).

that effect," the New York Commission asserts that the language of the March 5, 2007 Order suggests that the Commission reserves the right to "set" the level of the IRM. The New York Commission states that, to the extent the March 5, 2007 Order finds that a state-established IRM is controlling only if the Commission chooses to defer to state jurisdiction, it diverges from the approach the Commission took in *California Independent System Operator Corporation*,[22] and is erroneous. It asserts that "the setting of the IRM" is within the jurisdiction of the states, not the Commission, because the states have authority and responsibility to act to ensure the safety, and adequacy of the electric system, and the FPA unambiguously prohibits the Commission from "setting" the IRM.

Discussion

21. Except to the limited extent clarification is granted below, the Commission denies the New York Commission's requests for clarification and rehearing. Before turning to our discussion, though, we note that NYSRC filed a 16.5 percent IRM, that we accepted that 16.5 percent IRM, and that the New York Commission similarly adopted that same 16.5 percent IRM. Hence, there is no practical dispute over what the 2007-2008 IRM should be. With that being said, we turn to the New York Commission's request for clarification and rehearing. We find that to ensure just and reasonable rates, terms and conditions of jurisdictional service, the Commission has authority to review and, as we did here, accept the NYSRC's IRM.

A. The Commission's Authority to Review the IRM

22. As we did in recent Commission orders that have addressed similar issues regarding the Commission's jurisdiction over a similar figure for the New England Control Area, which are relevant here and whose rationale we adopt here,[23] we begin our analysis of our jurisdiction with the FPA. Section 201(b)(1) of the FPA vests the Commission with jurisdiction over the transmission of electric energy in interstate

[22] 116 FERC ¶ 61,274, at P 1118 (2006) (*CAISO*). The New York Commission asserts that the Commission "took a somewhat different approach when it approved a tariff incorporating resource adequacy requirements established by the State of California."

[23] *ISO New England, Inc*., 118 FERC ¶ 61,157, *order denying reh'g*, 120 FERC ¶ 61,234 (2007) (*ISO-NE I*); *ISO New England, Inc*., 119 FERC ¶ 61,161, reh'g denied, 121 FERC ¶ 61,125 (2007) (*ISO-NE II*); *accord ISO New England, Inc*., 122 FERC ¶ 61,144 (2007).

commerce, and sales of electric energy at wholesale in interstate commerce.[24] Further, FPA section 205(a) states that:

> All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.[25]

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

23. In *Mississippi Industries v. FERC*,[26] the court recognized the connection between the allocation of capacity and wholesale rates. In that proceeding, the Commission had altered the allocation of capacity and costs of a nuclear generation plant among operating companies of an integrated utility system. Petitioners asserted that, in allocating the cost and capacity of the nuclear plant, the Commission had asserted jurisdiction over generating facilities in direct violation of the FPA section 201(b) prohibition against Commission regulation of generating facilities. Petitioners asserted that "reallocating generation costs falls outside of FERC's rate making jurisdiction and instead falls solely within state authority over generation."[27] The court rejected the claim that this action was beyond the Commission's FPA jurisdiction. Instead, it found that the Commission has authority over the allocation of capacity among market participants because this allocation affects wholesale rates. The court stated, "[c]apacity costs are a large

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[24] 16 U.S.C. § 824(b)(1) (2000).

[25] 16 U.S.C. § 824d(a) (2000). FPA section 206 similarly vests the Commission with the authority to review "any rate, charges, or classification" charged by a public utility for any transmission or sale subject to the jurisdiction of the Commission, as well as "any rule, regulation, practice, or contract affecting such rate, charge, or classification." 16 U.S.C. § 824e(a) (2000).

[26] 808 F.2d 1525 (D.C. Cir. 1987), *vacated in part on other grounds*, 822 F.2d 1103 (D.C. Cir. 1987) (*Mississippi Industries*).

[27] *Id.* at 1543.

component of wholesale rates" and therefore the share of the capacity costs of the system carried by each affiliate will significantly affect the wholesale price it pays for energy.[28] While the allocation of capacity did not set sales prices, it directly affects costs and "consequently, wholesale rates"[29] and therefore "FERC's jurisdiction under such circumstances is unquestionable."[30] The court further noted that:

> Petitioners ignore the critical point here that, while these provisions [allocating capacity] do not fix wholesale rates, their terms do directly and significantly *affect* the wholesale rates at which the operating companies exchange energy, due to the highly integrated nature of the . . . system.[31]

24. Similarly, in *Municipalities of Groton v. FERC,*[32] the court upheld the Commission's authority to review section 9.4(d) of the New England Power Pool (NEPOOL) Agreement which included a capacity deficiency charge for each participant in the agreement whose prescribed level of generating capacity, known as "capability responsibility," fell by more than one percent below the set level. The court found that these capacity deficiency charges were within the Commission's jurisdiction because they were under "the Commission's inclusive jurisdictional mandate – which reaches discriminatory practices 'with respect to' jurisdictional transmissions, or 'affecting' such transmissions or services. . . ."[33] The court further stated:

> [i]t is sufficient for jurisdictional purposes that the deficiency charge affects the fee that a participant pays for power and reserve service, irrespective of the objective underlying that charge. This is well within the Commission's authority as delineated in other court opinions.[34]

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[28] *Id.* at 1541.

[29] *Id.*

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

[31] *Id.* at 1542.

[32] 587 F.2d 1296, 1300 (D.C. Cir. 1978) (*Groton*).

[33] *Id.* at 1302.

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

25. Most recently, in orders involving ISO New England, Inc. (ISO-NE),[35] the Commission stated that New England's similar "ICR is one of the principal determinants of the price of capacity and, hence, falls within the Commission's jurisdiction to review 'any rate, charge or classification' charged by a public utility for electric transmission or sales subject to agency jurisdiction, and 'any rule, regulation, practice, or contract affecting such rate, charge or classification. '"[36] The Commission, thus, concluded that "ISO-NE's mechanism to determine ICRs is a 'practice . . . affecting' the price of capacity, and as such falls within the Commission's jurisdiction."[37] The Commission found this to be fully consistent both with prior Commission orders[38] and with the prior court decisions in *Mississippi Industries* and *Groton* on which those orders relied.

26. The Commission's actions in this proceeding are consistent with that precedent, as well as the approach taken in *CAISO*, cited by the New York Commission. Similar to our actions in *CAISO*, the Commission in this proceeding has accepted the IRM proposed by the NYSRC, as did the New York Commission in its own proceeding. Both in *CAISO* and here, the Commission asserted jurisdiction because of the effect of resource adequacy requirements on jurisdictional rates. In *CAISO*, as here, the Commission recognized the importance of resource adequacy requirements in meeting its statutory mandate under the FPA to ensure that the rates, terms and conditions of jurisdictional transmission and sales of electric energy are just, reasonable, and not unduly discriminatory, or preferential.[39]

27. The New York Commission errs when it implies that the March 5, 2007 Order attempts to regulate the adequacy of electric generation facilities when it points out that the Commission is prohibited under FPA section 215 from ordering the construction of additional generation facilities. Contrary to the implications of the New York Commission's claim, this Commission, in accepting the NYSRC's filing, is not setting the amount of generating capacity that states must build (or require to be built). Rather,

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[35] *See supra* note 23.

[36] *See ISO-NE II*, 119 FERC ¶ 61,161 at P 23.

[37] *Id*.

[38] *Id.* P 25–29; *see CAISO*, 116 FERC ¶ 61,274 at P 1112–14; *CAISO*, 119 FERC ¶ 61,076 at P 521–64.

[39] *See ISO-NE II*, 119 FERC ¶ 61,161 at P 27–28; *CAISO*, 116 FERC ¶ 61,274 at P 1112–14; *CAISO*, 119 FERC ¶ 61,076 at P 521–64.

the Commission is evaluating the justness and reasonableness of rates and charges within its jurisdiction under sections 201, 205, and 206 of the FPA.

28. In *ISO-NE II*, the Commission distinguished between ISO-NE's "capacity" requirement (the ability to provide electrical energy to serve load when called upon by the ISO) and "electrical generating capacity" (the rated continuous load-carrying ability of generation equipment).[40] The Commission pointed out that, although a capacity obligation could be met by constructing new electrical generating capacity, it could also be met through demand response and/or capacity contracts from inside or outside the state and there is nothing to prevent a state from requiring its Load Serving Entities (LSEs) from meeting their resource requirements from such other sources.[41] The Commission explained that, by establishing capacity requirements for LSEs, "[i]n essence, ISO-NE says to its LSEs, 'Provide X amount of resources.' But *how* those resources are provided is up to the LSEs and the states."[42] While the capacity requirement that ISO-NE placed on an individual LSE, and that New York similarly imposes here, may be a factor in a state's ultimate determination as to how much electrical generating capacity is built, and where and by whom, the Commission has emphasized for New England and reiterates here for New York that the two are not the same and that it is inaccurate to conflate them.

29. In sum, the Commission has previously ruled, and reaffirms here, that because the IRM established by the NYSRC has a sufficiently direct effect on the rates, terms and conditions for jurisdictional power sales, the Commission has jurisdiction to review and accept for filing the NYSRC IRM.

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[40] 120 FERC ¶ 61,234 at P 28. The Commission acknowledges that FPA section 201 puts limits on the Commission's jurisdiction as it relates to electrical generating facilities. In accepting NYSRC's 16.5 percent IRM, however, the Commission is not exercising authority over electrical generating capacity or setting the amount of generating capacity that states must build (or require to be built). Rather, the Commission is reviewing the means by which New York determines the amount of resources member utilities must provide, which as described above directly affects the rates charged to customers.

[41] *Id.* P 29.

[42] *Id.*

30. Accordingly, for the reasons explained above, except to the limited extent clarification is granted as discussed below, we deny the requests for clarification and rehearing.

B. Clarification

31. The Commission disagrees with the core premise of the New York Commission's arguments; the Commission did not "set" the new 16.5 percent IRM as it would "set" a rate for jurisdictional service in, for example, a power sales rate case at the Commission. The March 5, 2007 Order accepted the NYSRC's IRM, just as the New York Commission had requested in its comments on the NYSRC's filing. Regarding the Commission's actions in the March 5, 2007 Order, we clarify the following.

32. The NYSRC "set" the IRM in the first instance and, in so doing, was required by section 3.01 of the NYSRC Agreement to use "the reliability standards, regulations, criteria, procedures, and rules established or imposed by . . . [the New York Commission]," among others.[43] The Commission, in turn, reviewed whether the NYSRC followed the tariff, to wit: (1) that NYSRC considered all factors NYISO's tariff requires it to consider[44] and supported its proposed 16.5 percent IRM, and (2) that the NYSRC

[43] Section 3.01 of the NYSRC Agreement provides, in relevant part:

> Using the reliability standards, regulations, criteria, procedures, and rules established or imposed by NERC, NPCC, FERC, PSC [New York Commission], NRC [Nuclear Regulatory Commission], and any other government agency with jurisdiction over the reliability of the NYS Power System, other reliability criteria, and Local Reliability Rules, the NYSRC shall develop, establish, maintain, assure compliance with, and, from time-to-time, update the Reliability Rules which shall be complied with by the [NYISO] and all entities engaging in electric power transactions on the NYS Power System. . . . . The NYSRC shall adopt all mandatory compliance rules of NERC and NPCC unless existing Reliability Rules are more stringent.

[44] See March 5, 2007 Order, 118 FERC ¶ 61,179 at P 28 (listing factors in the NYSRC's Reliability Rules that NYISO's Market Services Tariff, § 5.11.4, requires it to consider).

followed the stakeholder process. And, finding it did,[45] just like the New York Commission, we accepted NYRSC's proposed 16.5 percent IRM for filing.

33. Further, the Commission did not "usurp," "intrude on," or "preempt" any authority exclusively within the jurisdiction of the New York Commission. Section 215(i)(2) of the FPA does not reserve authority over all matters related to or that flow from "resource adequacy," as the New York Commission suggests. The reservations of authority found in section 215(i)(2) of the FPA apply to the exercise of Commission jurisdiction under that section,[46] not under other provisions of the FPA. The Commission has an independent obligation under sections 201, 205, and 206 of the FPA to consider whether practices affecting jurisdictional transactions result in rates, terms, or conditions that are unjust, unreasonable, or unduly discriminatory. That is what the Commission has done in this proceeding. We have considered the proposed 16.5 percent IRM and concluded that the proposed 16.5 percent IRM does not appear to have an adverse effect on matters within our jurisdiction.

34. Further, there are built-in features that are designed to effectively eliminate the kind of conflict that the New York Commission apparently believes may ensue, because the NYSRC is required by section 3.01 of the NYSRC Agreement, quoted *supra* note 43, to use "the reliability standards, regulations, criteria, procedures, and rules established or imposed by . . . FERC [and the New York Commission]." Our expectation is that the NYRSC will be able to accommodate the interests of both commissions. Indeed, in the instant case both this Commission and the New York Commission have accepted the NYSRC's proposed 16.5 percent IRM.

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[45] In the March 5, 2007 order, we stated: "Our intent has been to defer to the NYSRC and its processes in the first instance in reviewing a NYSRC-filed IRM. Here the 16.5 percent IRM is supported by the 2007 IRM study and the NYSRC's analysis, and by the stakeholder process for selecting an IRM." March 5, 2007 Order, 118 FERC ¶ 61,179 at n.12.

[46] Section 215(i)(2) provides in pertinent part: "*This section does not authorize* the ERO or the Commission . . . ." 16 U.S.C. § 824o(i)(2) (Supp. V 2005) (emphasis added).

The Commission orders:

Except to the limited extent clarification is granted as discussed in the body of this order, the requests for clarification and rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.