

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

Internet Address: <http://www.dps.state.ny.us>

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April 4, 2007

SENT VIA ELECTRONIC FILING
Philis Posey, Acting Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

Re: Docket No. ER07-429-000 – New York State Reliability Council

Dear Acting Secretary Posey:

For filing, please find the Petition for Rehearing of the New York State Public Service Commission in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 474-7663.

Very truly yours,


Sean Mullany
Assistant Counsel

Enclosure

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

New York State Reliability Council)
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Docket No. ER07-429-000

**PETITION OF THE STATE OF NEW YORK
PUBLIC SERVICE COMMISSION
FOR CLARIFICATION, AND,
IN THE ALTERNATIVE, REHEARING**

Pursuant to Rule 713 of the Federal Energy Regulatory Commission's (Commission or FERC) Rules of Practice and Procedure, 18 C.F.R. §385.713, the New York State Public Service Commission (NYSPSC) hereby submits its Petition for Rehearing of the Commission's March 5, 2007 Order Accepting Proposed Installed Capacity Requirement For the 2007/2008 Capability Year (Order) in the captioned proceeding.

On January 7, 2007 the New York State Reliability Council (NYSRC) made a filing with the Federal Energy Regulatory Commission (FERC or Commission) advising FERC that the NYSRC had revised the Installed Capacity Requirement (ICR) for the New York Control Area (NYCA) for the 2007/2008 capability year to 116.5 percent, reflecting an Installed Reserve Margin (IRM) of 16.5 percent. A notice of the NYSRC's filing published in the *Federal Register*, 72 Fed. Reg. 3828 (2007), set a deadline of January 26, 2007 for the filing of interventions and protests. That date was subsequently extended to February 2, 2007.

The NYSPSC filed a notice of intervention and comments on February 2, 2007. In its comments, the NYSPSC requested that FERC "accept for filing," rather than approve, the NYSRC's papers, subject to an ongoing NYSPSC proceeding regarding the establishment of an

IRM for the NYCA. The NYSPSC recommended this approach in order to preserve New York State's existing jurisdiction over the adequacy and reliable operation of the bulk-power system facilities within New York State. FERC Docket ER07-429-000, Notice of Intervention and Comments of the Public Service Commission of the State of New York, (February 2, 2007), at 2.

In the Order, FERC acknowledged New York's jurisdictional concerns and stated that it respects the traditional role of state and local entities over resource adequacy. FERC stated that its goal is to "appropriately recognize state and local jurisdiction over resource adequacy while at the same time 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." Order, at ¶ 31 & n. 10 (citing 16 U.S.C. §§ 824d and 824e (2000)). However, FERC then concluded that, "to the extent the IRM is used to determine capacity charges, it affects Commission jurisdictional power sales rates and therefore is properly before us." *Id.*, at ¶ 31 & n. 11 (citing *California Independent System Operator Corp.*, 116 FERC ¶ 61,274 at P 1112-1119 (2006), and *Gainesville Utility Dep't v. Florida Power Corp.*, 402 U.S. 515, 529 (1971)).

The NYSPSC respectfully submits that to the extent the Order can be read as holding that FERC has jurisdiction to determine the appropriate level of the IRM, the Order unlawfully intrudes upon New York State's jurisdiction over generating facilities and the safety and adequacy of the State's electric system. Therefore, the NYSPSC requests that the Commission grant this petition and clarify that it did not intend to determine the level of the IRM, or, if it did, then grant rehearing and state that FERC no longer has any desire to preempt state jurisdiction over the adequacy of electric facilities and services.

SPECIFICATION OF ERRORS

In accordance with Order No. 663-A and Rule 713(c)(1), the NYSPSC respectfully submits that, insofar as the Commission set an Installed Reserve Margin in its March 5, 2007 Order, the Commission erroneously intruded upon New York State's jurisdiction, authority and responsibility to ensure the reliability, safety and adequacy of New York State's electric system, including the authority to establish resource adequacy standards.

CONCISE STATEMENT OF ISSUE

Pursuant to Rule 713(c)(2), 18 C.F.R. § 385.713(c)(2), the NYSPSC respectfully submits that the Commission should grant rehearing to consider the following issue:

- 1) Whether the Commission, by setting an Installed Reserve Margin in its March 5, 2007 Order, erroneously intruded upon New York State's jurisdiction, authority and responsibility to ensure the reliability, safety and adequacy of New York State's electric system, including the authority to establish resource adequacy standards.

ARGUMENT

The New York Public Service Law (PSL) vests the NYSPSC with responsibility for ensuring the adequacy of New York State's electric system, including the adequacy of generation facilities.¹ The NYSPSC also has jurisdiction over long-range planning by electric

¹ See, e.g., N.Y. Pub. Serv. L. § 66(5) (Authorizing the NYSPSC to "prescribe ... safe, efficient and *adequate* property, equipment and appliances ... for the security and accommodation of the public...") (emphasis added); *id.* at §65(1) (Requiring electric corporations to provide "such service, instrumentalities and facilities as shall be safe and adequate..."); *id.* at § 66(2) (Vesting the NYSPSC with authority to "order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of...electric corporations and municipalities."); *id.* at § 25(4) (allowing the NYSPSC to impose penalties "to protect the overall reliability and continuity of electric service....").

utilities.² FERC has long-recognized that states have traditionally regulated the setting and enforcing of standards relating to the adequacy of generation facilities.³ In the Order, FERC again expressly recognized the State's longstanding jurisdiction over the adequacy of electric services.⁴ The NYSPSC's responsibility to ensure the long-term adequate supply of electricity is grounded in the State's police power.⁵

The Federal Power Act (FPA) vests FERC with jurisdiction over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce, and facilities used for such purposes. 16 U.S.C. § 824(b)(1). FERC is responsible for ensuring that all "rates and charges" for the interstate transmission and wholesale sale of electricity, and all "rules and regulations affecting or pertaining to" such rates and charges, are just and reasonable. 16 U.S.C. § 824d. FERC also has jurisdiction to ensure the "reliable operation" of the bulk-power system.⁶

² *Id.* at § 5(2) (Authorizing the NYSPSC to "encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources.").

³ When FERC proposed a 12 percent installed reserve requirement as part of its now-abandoned Standard Market Design, it likened its proposal to "the *traditional* reserve margin requirement imposed by states on monopoly utilities [which] worked well during most of the last century to ensure adequate supplies . . ." DOE & FERC Docket No. RM01-12-000, *Notice of Proposed Rulemaking, Remediating Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, Part II*, 67 *Federal Register* 55452, 55513 (August 29, 2002) (emphasis).

⁴ Order at ¶ 31 (Stating that FERC "respects the *traditional* role of state and local entities over resource adequacy.") (emphasis added).

⁵ *Gilchrist v. Interborough Rapid Transit Co.*, 279 U.S. 159 (1929) (The State of New York exercised its police power in 1907 by delegating to the NYSPSC the power to regulate substantially all public utility rates); *TEC Cogeneration v. Fla. Power & Light Co.*, 76 F.3d 1560, 1565 (11th Cir. 1996) ("The PSC exercises the state's police power by ensuring safe, adequate, and reliable electric service at fair, just, and reasonable rates."). This jurisdiction of the NYSPSC is one of New York State's essential attributes as a sovereign. *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 434-435 (1934) (the authority of the State to safeguard the vital interests of its people is one of the "essential attributes of sovereign power....").

⁶ The FPA defines "reliable operation" as "operating the elements of the bulk-power system within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a *sudden disturbance . . . or unanticipated failure of system*

However, the FPA expressly limits FERC's jurisdiction in certain very important respects. FERC does not have jurisdiction over facilities used for the generation of electric energy, 16 U.S.C. § 824(b)(1), and only has jurisdiction over those matters which are not subject to regulation by the States. 16 U.S.C. § 824(a). Section 215 of the FPA, which vests FERC with the responsibility to ensure the "reliable operation" of the bulk-power system, expressly states that the statute "does not authorize [FERC] 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."⁷

Given the longstanding jurisdiction of the NYSPSC over the adequacy of electric services and facilities, and the clearly articulated limits which Congress placed on FERC's jurisdiction, any attempt by FERC to intrude on state authority by establishing an IRM, and/or preempting the state's ability to do so, would be unlawful. The States have authority to ensure system adequacy by determining the appropriate level of the IRM, and the role of FERC is limited to ensuring that rates and charges for FERC-jurisdictional services are just and reasonable, in light of a State-established IRM.

In the Order, FERC said that its goal is "to appropriately recognize state and local jurisdiction over resource adequacy while at the same time fulfilling [FERC's] 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."⁸ The Commission reasoned that Section 206 of the FPA, which refers to "all rules

elements." 16 U.S.C. § 824o(a)(4) (emphasis added).

⁷ 16 U.S.C. § 824o(i)(2) (emphasis added).

⁸ Order, at ¶ 31 (citing 16 U.S.C. §§ 824d and 824e (2000)).

and regulations affecting or pertaining to” rates and charges for the wholesale sale of energy,⁹ allows FERC to determine the appropriate level of the IRM, because the IRM “affects” wholesale energy rates. Order at ¶ 31. The Commission specifically concluded that, “to the extent the IRM is used to determine capacity charges, it affects Commission jurisdictional power sales rates and therefore is properly before [FERC].” Order, at ¶ 31 & n. 11 (citing *California Independent System Operator Corp.*, 116 FERC ¶ 61,274 at P 1112–1119 (2006); *Gainesville Utility Dep’t v. Florida Power Corp.*, 402 U.S. 515, 529 (1971)).

In this way, the Order apparently rests on the erroneous notion that the Commission’s jurisdiction extends to practices which “affect” or “determine” the wholesale price of power.¹⁰ To the contrary, the Commission’s jurisdiction over wholesale rates, and “rules and regulations affecting or pertaining to” wholesale rates, does not authorize FERC to regulate in all areas which “affect” or “determine” wholesale prices. The Commission’s jurisdiction is limited to ensuring just and reasonable wholesale power rates, and does not reach all practices affecting rates.

Undoubtedly, in determining whether wholesale rates are just and reasonable, FERC must recognize or consider a multitude of factors. Insofar as it may have an impact upon the wholesale value of electricity, the level of the IRM set by the State of New York may be one such factor FERC could consider. Considering the IRM in setting prices, however, is far

⁹ 16 U.S.C. § 824d(a).

¹⁰ The Order goes beyond the scope of the order FERC issued in 2000 when it accepted the NYSRC’s filing after the NYSRC reduced the IRM from 22% to 18%. Docket No. ER00-1671-000, Order Accepting for Filing Revised Installed Capacity Requirement (issued March 29, 2000). In that order, FERC stated that it had reviewed the reduced IRM only “for purposes of determining whether it would have any adverse effect on jurisdictional matters [and] concluded that the revision does not appear to have an adverse effect on matters within [FERC’s] exclusive jurisdiction.” March 29, 2000 Order, at 4. In this case, FERC has apparently asserted that the IRM itself is within FERC’s jurisdiction simply because it “affects” FERC-jurisdictional matters.

different than actually setting the IRM itself, and FERC has previously recognized this important distinction. *Devon Power LLC*, 110 FERC ¶ 61,313 (“The proposed LICAP mechanism and its demand curve feature will not change how resource adequacy determinations are made, and the issue here is not whether load serving utilities should be responsible for their share of the capacity needed to serve the region. Instead, the issue here is how prices for capacity are determined in the wholesale market.”); *California Independent System Operator Corp.*, 116 FERC ¶ 61,274, at ¶ 1113 (2006) (Wherein FERC stated that “it is appropriate for us to consider resource adequacy in determining whether rates remain just and reasonable and not unduly discriminatory.”). *See Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 276-277 (1976) (Holding that while FPC may consider retail rates in determining whether wholesale rates are just and reasonable, the Commission has no power to prescribe rates for retail sales or remedy undue discrimination between wholesale and retail rates by ordering a utility to increase its retail rates); *Panhandle Eastern Pipe Line Co. v. Federal Power Com.*, 324 U.S. 635, 646 (1945) (The FPC lacks authority to fix rates for direct industrial sales but “may take those rates into consideration” when it fixes rates for interstate wholesale sales).¹¹

FERC Cannot Infer Statutory Authority to Set the IRM

It is well-established that “a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority[,] . . . [for] an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.” *New York v. FERC*, 535 U.S.

¹¹ Such a broad reading of the word “affecting” in the FPA would allow FERC to regulate utilities by imposing land use, air quality, and labor standards at every level because the costs of siting, constructing, and operating generating facilities “affects” the wholesale price of energy and capacity. FERC Docket ER07-365-000, Request For Rehearing By the Connecticut Department of Public Utility Control, at 15 (March 23, 2007). The limits Congress placed on FERC’s jurisdiction are not nearly so elastic as the Order presumes.

at 18 (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 90 L. Ed. 2d 369, 106 S. Ct. 1890 (1986)). Therefore, FERC must “demonstrate that some statute confers upon it the power it purported to exercise” *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004).

Where a federal agency attempts to preempt an area traditionally regulated by the states, FERC must do more than merely infer that it has jurisdiction. “Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone.” *Conn. Power and Light v. FPC*, 324 U.S. 515, 532 (1945) (internal quotes and cites omitted). See *Solid Waste Agency v. United States Army Corps of Eng’Rs*, 531 U.S. 159, 172-173 (2001) [Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority]; *Nat’l Ass’n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1252 (11th Cir. 2006) [Courts start with the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress]. In such cases, federal preemption of state law is not warranted “in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.”¹²

In this case, FERC 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, the language of the FPA giving FERC jurisdiction over wholesale sales rates and rules does not

¹² *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *New York v. FERC*, 535 U.S. 1, 18 (2002) (Court has “to be certain that Congress has conferred authority on the agency” when the controversy concerns the scope of federal authority to preempt state law); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (for a court to find federal pre-emption, it must be “unmistakably clear” that Congress intended to do so).

make any mention of system adequacy or the setting of installed reserves. Where the FPA does expressly mention the “adequacy” of the electric system, however, it does so by expressly prohibiting FERC from setting and enforcing standards for “adequacy.” 16 U.S.C. § 824o(i)(2). The Commission nonetheless seemingly infers that the IRM is a “rule” which “affects” wholesale electricity prices, within the meaning of Section 206 of the FPA. To the extent the 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 FERC from setting standards for the safety or adequacy of the system. In this regard, the Order is contrary to law.¹³

In the Order, the Commission declared its intention to only “defer to the NYSRC and its processes *in the first instance*” and stated that, should the NYSRC adopt a different IRM percentage in response to an order of the NYSPSC, then “it is [FERC’s] expectation that the NYSRC would make a filing with the Commission to that effect.” Order at ¶ 31 & n. 12 (emphasis added).¹⁴ The language of the Order suggests FERC reserves the right to set the level of the IRM. To the extent the Order finds that a state-established IRM is controlling only if FERC chooses to defer to state jurisdiction, it diverges from the approach the Commission took in California, and it is erroneous. The setting of the IRM is within the jurisdiction of the states, not FERC, because the states have authority and responsibility to act to ensure the safety, and

¹³ FERC’s reading of Section 205 would negate Section 215’s prohibition against FERC’s setting and enforcing standards. Traditional principles of statutory construction counsel against reading acts of Congress to be superfluous. *Cal. Indep. Sys. Operator Corp. v. FERC*, 362 U.S. App. D.C. 28 (D.C. Cir. 2004)

¹⁴ The Commission took a somewhat different approach when it approved a tariff incorporating resource adequacy requirements established by the State of California. In its decision, the Commission expressly noted that it “was not establishing planning reserve requirements, but instead [was] adopting those set by state and Local Regulatory Authorities in the first instance.” *California Independent System Operator Corp.*, 116 FERC ¶ 61,274 (2006).

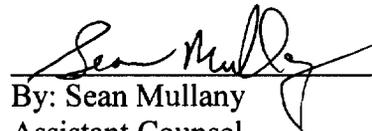
adequacy of the electric system, and the FPA unambiguously prohibits FERC from setting the IRM.

CONCLUSION

The Commission's Order erroneously indicates that the Commission may preempt state jurisdiction over the setting of standards for the reliability, safety and adequacy of electric facilities, such as the setting of an IRM. Therefore, the NYSPSC requests that its petition for clarification, and, in the alternative, rehearing be granted.

Respectfully submitted,

Peter McGowan
Acting General Counsel
Public Service Commission
Of the State of New York



By: Sean Mullany
Assistant Counsel
Three Empire State Plaza
Albany, New York 12223-1350
(518) 474-7663

Dated: April 4, 2007
Albany, New York

CERTIFICATE OF SERVICE

I, Margaret Manupella, do hereby certify that I will serve on April 4, 2007, the foregoing Petition for Rehearing of the New York State Public Service Commission upon each of the parties of record indicated on the official service list compiled by the Secretary in this proceeding.

Date: April 4, 2007
Albany, New York


Margaret Manupella