

151 FERC ¶ 61,055
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

ISO New England Inc.

Docket No. ER12-953-003

ORDER DENYING REHEARING

(Issued April 20, 2015)

1. In this order, the Commission denies rehearing of its February 12, 2013 order on ISO New England Inc.'s (ISO-NE's) compliance filing in this proceeding, which, as relevant here, found it appropriate for ISO-NE to apply buyer-side market power mitigation to self-supplied resources and provide for only case-specific, not a blanket, exemption.¹

I. Background

A. FCM and Buyer Market Power Concerns

2. ISO-NE operates a Forward Capacity Market (FCM) that procures capacity on a three-year forward basis. Capacity suppliers make offers into a Forward Capacity Auction (FCA) in which ISO-NE procures the amount of capacity needed in a one-year period (the Installed Capacity Requirement or ICR), and suppliers of the capacity that clears each FCA are committed to, and receive payment for, providing capacity for that period three years in the future.

¹ *ISO New England Inc.*, 142 FERC ¶ 61,107 (2013) (February 2013 Compliance Order).

3. In a series of orders addressing revisions to the FCM market rules,² the Commission has addressed ISO-NE's proposals to prevent the exercise of buyer market power. Buyer market power is exercised when "some market buyers may have an incentive to depress market clearing prices by offering supply at less than a competitive level [because] . . . the reduction in capacity prices across the market participant's entire load achieved by a below-market bid for a new generating resource offsets any losses suffered on the individual new entrant being bid into the market below its true competitive cost."³ To protect against the exercise of buyer market power in the FCM, in its April 2011 Order, the Commission required ISO-NE to develop a benchmark pricing method,⁴ also known as the Minimum Offer Price Rule (MOPR) mechanism. Under this mechanism, a benchmark price is developed for each type of resource that provides capacity in order to determine whether a resource is offering at a competitive price. That benchmark then serves as a floor for resource offers, and offers below that benchmark are mitigated (i.e., replaced with a competitive price).

4. In its April 2011 Order, the Commission found that self-supplied resources⁵ developed by public power entities should be subject to buyer market power mitigation. It stated:

² *ISO New England Inc.*, 131 FERC ¶ 61,065 (2010) (April 2010 Order); *ISO New England Inc.*, 135 FERC ¶ 61,029 (2011) (April 2011 Order); *ISO New England Inc.*, 138 FERC ¶ 61,027 (2012) (January 2012 Order).

³ *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 24 (2011) (footnote omitted). *See also PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 21 n.18 (2013) ("[S]uppose a large buyer has a load of 1,000 MWs, and the competitive market price is \$20/MW, producing a total cost to load of \$20,000. If load finances an uneconomic new entrant that produces 100 MWs at a cost of \$5,000 (\$50/MW) . . . and that new entry reduces the market price by \$5.00, the total cost to load is less, even though its new generator is more expensive than a market purchase. Under these circumstances, load would pay a total cost of \$13,500 to the market and an additional \$5,000 to the generator for a total of \$18,500").

⁴ April 2011 Order, 135 FERC ¶ 61,029 at P 165.

⁵ In the context of ISO-NE's FCM, self-supplied resources are resources that a load-serving entity (LSE) has built or otherwise procured outside the FCM, and that the LSE uses to satisfy its portion of New England's installed capacity requirement. An LSE

(continued...)

[N]ew self-supply has the same price effect as offering the new resource at a price of zero, [and] it is reasonable to treat the resource as [out-of-market] in both circumstances. . . . [W]e find that any new self-supplied capacity that clears (through a zero-price offer rather than at full net entry cost) would distort the market clearing price. Therefore, we find that new self-supply offers should be subject to offer-floor mitigation.⁶

In the January 2012 Order, the Commission reaffirmed that “a blanket, across-the-board offer floor mitigation exemption for new resources designated as self-supply would allow for an unacceptable opportunity to exercise buyer market power and thus could inhibit competitive investment.”⁷

5. The Commission also noted, however, that “there are certain advantages associated with long-standing and well-recognized business models that should not be deemed automatically suspect (or summarily barred) when determining whether a particular sell offer accurately reflects a resource’s net costs.”⁸ It first noted that, if a specific unit could demonstrate to ISO-NE’s internal market monitor (IMM) that its actual costs were below that resource’s asset-specific benchmark, it would be able to offer that resource into the auction at that price. The Commission then noted that ISO-NE and its stakeholders had the option of seeking to develop other options:

would effectively meet its portion of the installed capacity requirement with self-supplied resources by offering the resources into the FCM at a price low enough to clear in the auction. Typically, the LSE would offer the self-supplied resources as a “price taker;” that is, the LSE would be willing to stay in the auction and commit to take on a capacity obligation at any price, no matter how low. If the self-supplied resource clears in the auction, the revenue that the LSE receives from the sale of the capacity may well offset most or all of the amount that the LSE must pay to purchase capacity from the auction.

⁶ April 2011 Order, 135 FERC ¶ 61,029 at P 232.

⁷ January 2012 Order, 138 FERC ¶ 61,027 at P 70.

⁸ *Id.*

If stakeholders nevertheless conclude that this existing tariff process is not sufficient to mitigate the concerns that the application of offer floor mitigation to self-supplied resources will be particularly burdensome for municipal, cooperative and traditionally regulated investor-owned-utilities, ISO-NE and its stakeholders should work within the stakeholder process to develop a mechanism that further addresses these concerns.⁹

B. February 2013 Compliance Order

6. In response to the Commission's directives, ISO-NE submitted a compliance filing (December 3, 2012 filing) including a buyer market power mitigation mechanism reflecting a benchmark price for each type of asset offering into the FCM. A resource offering capacity into the FCM at or above the benchmark price for that resource type may do so without review of its costs by the IMM. If a resource wishes to offer capacity at a lower price, the IMM will review that resource's costs and revenues, and if it determines that the resource is not offering at a competitive price, the IMM will substitute a mitigated price.¹⁰ In order to determine whether a resource's offer is competitive, the IMM will review the resource's costs and the revenues it will receive outside of the FCM, and will exclude any out-of-market revenue sources from the cash flows used to evaluate the requested offer price.¹¹

7. The December 3, 2012 filing did not include a blanket exemption from the MOPR for self-supplied resources. Over protests, the Commission found in the February 2013 Compliance Order that ISO-NE had complied with the Commission's prior directives.¹²

⁹ *Id.*

¹⁰ February 2013 Compliance Order, 142 FERC ¶ 61,107 at PP 44-45.

¹¹ ISO-NE defines out-of-market revenues as "any revenues that are: (a) not tradable throughout the New England Control Area or that are restricted to resources within a particular state or other geographic sub-region; or (b) not available to all resources of the same physical type within the New England Control Area, regardless of the resource owner." ISO-NE Tariff Appendix A, section III.A.21.2(b)(i).

¹² February 2013 Compliance Order, 142 FERC ¶ 61,107 at P 80.

The Commission reiterated that “a blanket self-supply exemption from the MOPR would allow entities with new self-supply to circumvent the MOPR, thereby allowing subsidized uneconomic entry to artificially depress prices.”¹³ The Commission further stated:

[T]he parties’ arguments do not persuade us that self-supplied resources, including those of public or consumer-owned power, are unduly discriminated against by the lack of such an exemption. . . . [U]nder the revisions accepted here, resources with entry costs below the default level will have the opportunity, through the unit specific offer review afforded to all ISO-NE participants, to demonstrate that their entry costs are lower than the relevant trigger price. Any new self-supplied resource whose actual full entry costs are below the clearing price will have the opportunity to clear in the FCA.¹⁴

8. The Commission further stated that, contrary to arguments raised by the parties, the January 2012 Order did not require ISO-NE to develop a mechanism to address the concerns of consumer-owned utilities regarding self-supply. Rather, the order merely allowed for development of such a mechanism by stakeholders.¹⁵ As subsequently noted in the February 2013 Compliance Order, New England Power Pool Participants Committee (NEPOOL) stakeholders rejected a proposal to recognize an exemption to the MOPR for new self-supplied FCA resources of publicly owned entities, and ISO-NE’s alternative proposal otherwise complied with Commission directives.¹⁶

C. Demand Curve Changes

9. On April 1, 2014, ISO-NE and NEPOOL jointly submitted proposed revisions to ISO-NE’s Transmission, Markets and Services Tariff (Tariff) to establish a system-wide sloped demand curve and related parameters for use in the FCM (Demand Curve

¹³ *Id.* P 80 (citing April 2011 Order, 135 FERC ¶ 61,029 at P 232).

¹⁴ February 2013 Compliance Order, 142 FERC ¶ 61,107 at P 80.

¹⁵ *Id.* P 81.

¹⁶ *Id.* (citing NEPOOL Comments, December 21, 2012 at 10).

Changes). On May 30, 2014, the Commission conditionally accepted the Demand Curve Changes.¹⁷ The changes relating to the demand curve did not include an exemption from the minimum offer price rule for resources that self-supply. The Commission dismissed requests for a self-supply exemption as beyond the scope of the FPA section 205 filing, noting that ISO-NE did not propose such an exemption, nor did the Commission require it.¹⁸

10. On rehearing of the Demand Curve Order, Public Systems¹⁹ argued that the Commission failed to consider their request that the Commission require ISO-NE to include a self-supply exemption and that the Commission intruded on state and non-public utilities' jurisdiction. In the Demand Curve Rehearing order, the Commission denied Public Systems' rehearing request, noting that the D.C. Circuit Court of Appeals rejected Public Systems' contention that the failure to allow a self-supply exemption exceeds the Commission's jurisdiction by, in effect, regulating generation facilities.²⁰

D. Requests for Rehearing

11. Eastern Massachusetts Consumer-Owned Systems and Danvers Electric Division (jointly, EMCOS); and Massachusetts Municipal Wholesale Electric Company (MMWEC), New Hampshire Electric Cooperative, Inc., American Public Power Association, Northeast Public Power Association, and National Rural Electric Cooperative Association (collectively, Public Systems) filed requests for rehearing of the February 2013 Compliance Order.

¹⁷ *ISO New England Inc. and New England Power Pool Participants Committee*, 147 FERC ¶ 61,173 (2014) (Demand Curve Order), *order on reh'g and clarification*, 150 FERC ¶ 61,065 (2015) (Demand Curve Rehearing Order).

¹⁸ Demand Curve Order, 147 FERC ¶ 61,173 at P 95.

¹⁹ American Public Power Association, Northeast Public Power Association, and National Rural Electric Cooperative Association (collectively, Public Systems).

²⁰ Demand Curve Rehearing Order, 150 FERC ¶ 61,065 at P 38 (citing *New England Power Generators Ass'n v. FERC*, 757 F.3d 283, 291 (D.C. Cir. 2014)).

1. EMCOS Request for Rehearing

12. EMCOS challenges the Commission's acceptance of the benchmark prices developed by ISO-NE. According to EMCOS, the benchmark prices are unduly discriminatory because they will disproportionately require projects developed by public power entities to use the unit-specific review process in order to submit their desired offers into the FCM. According to EMCOS, ISO-NE established its benchmark process by using project finance *pro forma* cash flows based on assumptions that would apply to a private developer's project²¹ and applied assumptions that were not relevant to the financing of self-supply by a public power entity.²² EMCOS states that, for example, the offer price that would trigger IMM review for a simple cycle combustion turbine would be approximately \$10.00/kW-month, but that the same unit, developed by a public power system using 100 percent debt financing at good credit quality, "[non-]taxable" interest²³ rates and 30-year straight line depreciation, could be offered at approximately \$6.00/kW-month. EMCOS asserts that the 40 percent difference between these prices demonstrates that almost all public power generation projects will be subject to unit-specific review, despite the Commission's earlier recognition that "there are certain advantages associated with longstanding and well-recognized business models that should not be deemed

²¹ EMCOS Rehearing Request at 8 (citing testimony of Marc Montalvo and David Naughton, attachment to ISO-NE's December 3, 2012 filing, at 6).

²² EMCOS attaches a worksheet to its request for rehearing which, it alleges, shows the derivation of the \$5.90/kW-month price floor value using the same *pro forma* cash flow modeling as that on which ISO-NE bases its Offer Price Review Triggers, but using a set of financing variables germane to public power generation development. EMCOS Rehearing Request at 6 n.1.

²³ EMCOS Rehearing Request at 5-6. We assume EMCOS intended to refer to "non-taxable" rather than "taxable" interest rates, consistent with its earlier argument that "consumer-owned utilities do not require an explicit return on equity, generally do not use equity financing, and are not subject to state or federal income taxes" (EMCOS December 28, 2012 Protest at 2). Because the Commission denies EMCOS's request for rehearing substantially on other grounds, any discrepancy is not significant for purposes of this order.

automatically suspect (or summarily barred) when determining whether a particular sell offer accurately reflects a resource's net costs."²⁴

13. EMCOS further challenges the Commission's finding that the unit-specific review process does not "create[] undue uncertainty or impose[] an unduly discriminatory burden on public power projects" because that review will occur three years in advance of the applicable capacity commitment period.²⁵ EMCOS posits that knowing the results of a unit-specific review three years in advance of the applicable period, and therefore prior to the time when financing must be in place for construction expenditures, does not address its argument that unit-specific review will be disproportionately triggered from the outset against public power projects. EMCOS asserts that this additional layer of review by the IMM will seldom apply to merchant generator projects and will cost public power systems time and resources that will not have to be expended by their merchant competitors. Moreover, EMCOS asserts that uncertainty and costs associated with unit-specific review may deter public power parties from making the necessary preconstruction investment in siting, rights of way, project design, contracting, and similar expenditures.

2. Public Systems Request for Rehearing

14. Public Systems claims that by accepting ISO-NE's compliance filing, the February 2013 Compliance Order in effect unlawfully limits on economic grounds the ability of consumer-owned entities to rely upon new, technically-qualified self-supplied resources to meet their capacity obligations.²⁶ Public Systems posits that the Commission exceeded its jurisdiction by effectively overriding consumer-owned entities' decisions about which capacity resources to use in fulfilling long-term customer service

²⁴ EMCOS Rehearing Request at 14 (citing January 2012 Order, 138 FERC ¶ 61,027 at P 70).

²⁵ February 2013 Compliance Order, 142 FERC ¶ 61,107 at P 56.

²⁶ Public Systems rehearing request at 12 (claiming that pursuant to the accepted tariff revisions, ISO-NE will improperly "prohibit[] [load-serving entities (LSEs)] from using preferred, self-supplied new resources unless they cost less than the auction clearing price," and thereby prohibit LSEs from employing qualitative criteria (such as environmental benefits) in selecting resources, and require LSEs to buy capacity selected solely on the basis of price).

obligations—and the price-taking self-supply offers used to effectuate those decisions. Public Systems argues that the Federal Power Act (FPA) gives the Commission authority over the rates, terms, and conditions of wholesale sales, but not over decisions about which resources to buy. Public Systems asserts that an LSE’s self-supply of its capacity requirement is not a wholesale rate, and even if it were, sales by non-public utilities like Public Systems are outside the Commission’s jurisdiction.²⁷

15. Public Systems asserts that LSEs determine what resources to buy or build by balancing multiple considerations, including but not limited to, price. They may also seek to hedge risk or to build supply portfolios that comply with state policies and customer preferences for environmentally-friendly resources. According to Public Systems, the February 2013 Compliance Order interferes unduly with the longstanding business models of consumer-owned utilities in New England, which, Public Systems states, are mostly small vertically-integrated utilities that must plan to provide service on a much longer time frame than the three-year FCM time frame, and must also address customer preferences (such as, for example, meeting capacity needs through renewable resources or demand response). Public Systems argues that self-supply is essential to these entities’ ability to meet these customer needs. Public Systems states that the availability of the unit-specific review process to allow public-power resources to offer into the FCM does not address this problem, because consumer-owned utilities are still prevented from selecting capacity resources on grounds other than price.²⁸

16. Public Systems further states that the February 2013 Compliance Order departs from Commission precedent approving the contested FCM Settlement, which, according to Public Systems, relied on the settlement’s flexible allowance for self-supply as the basis for approving it.²⁹ Public Systems further states that the Commission relied on that

²⁷ *Id.* at 13 (citing 16 U.S.C. § 824(f) (“[n]o 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 . . . , unless such provision makes specific reference thereto”)).

²⁸ Public Systems Rehearing Request at 20.

²⁹ *Id.* at 14 (citing *Devon Power, LLC*, 115 FERC ¶ 61,340, at P 201 (FCM Settlement Order) (“Objecting Parties’ argument . . . fails because the provisions in the

flexibility in allowing ISO-NE to establish the region's ICR, finding the ICR requirement did not require a state to meet its capacity requirement through particular resources or means and therefore did not intrude upon state jurisdiction.³⁰ Public Systems argues that the February 2013 Compliance Order now prevents consumer-owned utilities from meeting their capacity requirements with qualitatively-selected resources that cost more than the auction price, which Public Systems asserts is inconsistent with the FCM Settlement.

17. Public Systems further argues that the Commission erred in not directing ISO-NE, when it conducts unit-specific reviews, to include as in-market those payments that consumer-owned utilities receive from their members. Public Systems states that revisions to the PJM Interconnection, L.L.C. (PJM) MOPR would exempt self-supply from the MOPR³¹ and permit payments to a self-supplying LSE to be considered in-market, and that similar tariff provisions would be appropriate in New England.

18. Public Systems also asserts that ISO-NE's proposal did not address what Public Systems believes are the unique burdens of consumer-owned utilities, in that, when such utilities develop a generation project that does not clear the FCM, the utility and its customers must either abandon the resource or pay twice (first for the debt associated

Settlement Agreement permit parties to self-supply their capacity obligations"), *reh'g denied*, 117 FERC ¶ 61,133, at P 110 (2006), *petition for review granted in part sub nom. Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008), *rev'd in part sub nom. NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 558 U.S. 165 (2010).

³⁰ Public Systems Rehearing Request at 15 (citing *ISO New England Inc.*, 120 FERC ¶ 61,234, at P 29 (2007). Public Systems notes that this argument was upheld in *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) (*CT DPUC*) ("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 action in their role as regulators of generation facilities without direct interference from the Commission.")).

³¹ Public Systems Rehearing Request at 22 (citing to proceedings in *PJM Interconnection, L.L.C.*, Docket No. ER13-535-000).

with the new unit, and second for the auction-selected capacity purchased to meet those utilities' capacity obligations).³²

19. Finally, Public Systems states that the Commission erroneously relied on lack of stakeholder support in not requiring an exemption for consumer-owned entities.³³ Public Systems argues that, under the FPA, the Commission must require ISO-NE to exempt self-supply from the MOPR if that is the just and reasonable result, regardless of stakeholder action.

II. Discussion

A. Procedural Issues

20. The New England Power Generators Association (NEPGA) filed an answer to Public Systems' request for rehearing. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a request for rehearing unless otherwise ordered by the decisional authority, and we therefore reject NEPGA's answer.

B. Analysis

21. The Commission denies both requests for rehearing. EMCOS and Public Systems raise no arguments on rehearing that have not been previously addressed by the Commission or warrant reversal of the Commission's earlier rulings.

1. EMCOS

22. Even if, as EMCOS asserts, the benchmarks developed by ISO-NE are more likely to reflect the costs of projects developed by merchant developers than of projects developed by public power entities, this does not render the MOPR mechanism unduly discriminatory as to public power-developed projects. As discussed above and in prior orders, the Commission has ruled that the MOPR mechanism is necessary to ensure that the FCM clearing price is not improperly depressed by the exercise of buyer market power. The Commission has recognized, however, that some resources may be able to offer into the auction at costs below the benchmark, and accordingly the Commission has

³² Public Systems Rehearing Request at 6.

³³ *Id.* at 7-9.

approved the option for unit-specific review to permit such resources to do so. Therefore, the MOPR, including its unit-specific review provision, already accommodates both the broad need to prevent the exercise of buyer market power in order to ensure the correct functioning of the FCM, and the specific needs of a resource that has costs below the benchmark. Although the unit-specific review process may impose more procedural requirements on certain resources (i.e., those resources with costs below the benchmark) than on others, those requirements are necessary to ensure the correct functioning of the FCM and neither results in nor is motivated by undue discrimination. While EMCOS claims that undergoing the unit-specific review process is a significant burden, it offers no specific evidence in that regard.

23. All new resources, including those developed by public power entities, seeking to offer into the FCM at prices below the applicable resource-specific trigger prices can include in their qualification packages the lowest prices at which they seek to offer capacity in the FCA, along with supporting documentation justifying those prices as competitive in light of their costs. The IMM³⁴ will enter all relevant resource costs and non-capacity revenue data, as well as resource-specific assumptions regarding depreciation, taxes, and discount rate into the capital budgeting model used to develop the relevant trigger price and will calculate the breakeven contribution required from the FCM to yield a discounted cash flow with a net present value of zero for the project.³⁵ The IMM will then compare this calculated breakeven price with the requested unit offer price to determine whether to grant the request.³⁶

24. Moreover, once a unit passes unit-specific review and is able to offer into the FCA, that unit is in the same position as all other new units that are offering into that FCA. EMCOS states that public power developers will be less likely to make necessary preconstruction investment, given the uncertainty of the result of a unit-specific review, but until the FCA has taken place, no developer, not only a public power developer, has any certainty that a new unit will be taken in the auction. And like all other new

³⁴ The IMM unit-specific review process is specified in Tariff section III.13.1.1.2.2.3 (new generating capacity resources), section III.13.1.4.2.4 (new demand response resources), and section III.13.1.3.5 (new import capacity resources).

³⁵ Tariff section III.A.21.2(b).

³⁶ *Id.*

resources, a public power developer will have three years to complete its unit before its capacity obligation begins. We thus reject EMCOS's argument that the unit-specific review process is unduly discriminatory.

2. Public Systems

25. We also find Public Systems' arguments to be without merit. It is well-established that the Commission has jurisdiction over aspects of independent system operator services that affect wholesale rates. Thus, the Commission has jurisdiction over the capacity rates produced by the FCM and the ICR, even though the operation of the FCM may influence the type of generation that contributes to that capacity.³⁷ As stated by the D.C. Circuit:

The Federal Power Act grants the Commission broad authority over "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). The protracted litigation over Must-Run agreements, the locational installed capacity market, and the [FCM] is fundamentally a dispute over the *rates* that will be paid to suppliers of capacity. . . . The mere fact that the [FCM] will encourage new supply does not mean that it *regulates* "facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1). Rather, the [FCM] is designed to address pricing issues, which fall comfortably within FERC's statutory authority over "the sale of electric energy at wholesale in interstate commerce." *Id.*³⁸

³⁷ See *CT DPUC, supra* (modifications to ICR within Commission jurisdiction even where approval of rate increase was challenged as equivalent to directing installation of new capacity); *Groton v. FERC*, 587 F.2d 1296, 1302 (D.C. Cir. 1978) (capacity deficiency charge within Commission jurisdiction); *Mississippi Industries v. FERC*, 808 F.2d 1525, 1542 (D.C. Cir. 1987) (capacity allocation costs within Commission jurisdiction as practice significantly affecting wholesale rates).

³⁸ *Maine Pub. Utils Comm'n. v. FERC*, 520 F.3d 464, 479 (D.C. Cir. 2008), *rev'd in part sub nom. NRG Power Marketing, LLC v. Maine Pub. Utils. Comm'n.*, 130 S. Ct. 693 (2010), *remanded*, *Maine Pub. Utils. Comm'n v. FERC*, 625 F.3d 754 (D.C. Cir. 2010) (emphasis in original).

The D.C. Circuit has also stated:

Out-of-market resources – whether self-supplied, state-sponsored, or otherwise – directly impact the price at which the Forward Capacity Market auction clears. As the price of capacity is indisputably a matter within the Commission’s exclusive jurisdiction, FERC likewise has jurisdiction to mitigate buyer-side market power as to out-of-market entrants... [S]tates remain free to subsidize the construction of new generators, and load serving entities to build or contract for any self-supply they believe is necessary; FERC’s orders simply regulate the ‘price constructs that result in offers into the capacity market from these resources that are not reflective of their actual costs.’³⁹

The D.C. Circuit ruled:

[W]e uphold the Commission’s determination that because self-supply serves to depress capacity prices, a categorical exemption from mitigation is unwarranted. To categorically exempt new self-supplied resources “would allow the mitigation mechanism to be circumvented” and result in unjust and unreasonable rates.

Thus, in properly exercising its jurisdiction over capacity rates, the Commission has approved mechanisms to protect against buyer market power in order to facilitate the appropriate functioning of the capacity market, even though such mechanisms might impact the type of capacity resources that are likely or able to clear in that market.

26. We reaffirm the Commission’s previous response to Public Systems’ jurisdictional challenges:

FCM is more than a vehicle “to ensure that each [LSE] contributes its share of . . . capacity that is needed to operate the region’s electric system reliably.” The broader purpose of

³⁹ *New England Power Generators Ass’n v. FERC*, 757 F.3d 283, 291 (D.C. Cir. 2014) (quoting *ISO New England, Inc.*, 138 FERC ¶ 61,027, at P 170 (2012)).

FCM is to “locate the price at which market incentives will be sufficient to meet [the system’s] expected demand.” 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. . . . Buyer-side mitigation is an integral part of the regulation of capacity costs, which are a large component of wholesale rates. To the extent the offer floor construct the Commission has accepted impacts matters relating to generation, this outcome is an indirect result of a legitimate exercise of the Commission’s power to regulate wholesale rates under the FPA.⁴⁰

27. Public Systems argue that the February 2013 Compliance Order (or previous Commission rulings) prevents their members from developing the type of capacity resources that they prefer. As the Commission has previously stated:

“[n]othing in the ICR requirement prevents a state from requiring its LSEs to meet capacity requirements through demand response, or through contracts to purchase power (from resources located inside or outside the state), or through more environmentally-friendly generation, or, generally speaking, through resources that meet state health or environmental or land-use planning goals.”⁴¹

The FCM market rules do not prohibit Public Systems’ members, or any other party, from developing capacity or offering that new capacity into the market. Rather, the MOPR solely addresses the price at which that capacity can be offered into the FCM. As noted above, any new resource that can demonstrate that its offer reflects its costs may offer into the auction at that price.

⁴⁰ January 2012 Order, 138 FERC ¶ 61,027 at P 79 (citing *CT DPUC*, 569 F.3d at 481).

⁴¹ *ISO New England Inc. and New England Power Pool*, 120 FERC ¶ 61,234, at P 29 (2007).

28. The Commission has also stated that offer floor mitigation would not result in the Commission's dictating the existing FCM-selected resources that LSEs must purchase, or mandate duplicative purchases. The Commission noted that "[i]t is only new self-supply that will be subject to the offer floor."⁴² The Commission also addressed Public Systems' argument that the Commission may not require the purchase of capacity based on economic criteria, rather than on other preferences. We reiterate that, to ensure that rates for capacity were just and reasonable, the FCM was "based on economic criteria – prices – as well as on technical criteria, so as to ensure that the lowest-cost set of resources are accepted in the auction[, and t]o facilitate this purpose, asset-specific benchmarks are used to make sure that resources bid their true costs into the FCM." Use of such criteria thus flows appropriately from the Commission's jurisdiction to ensure just and reasonable rates.⁴³

29. Public Systems also reiterates its argument that the Commission should have directed ISO-NE, when it conducts unit-specific reviews, to include payments that consumer-owned utilities receive from their members as in-market. Public Systems has made no showing that these payments should fall outside of ISO-NE's definition of out-of-market payments. Rather, Public Systems has made clear that they are indeed out-of-market payments. Public Systems states that "[w]hen a joint action agency like MMWEC develops a new resource on behalf of its member municipal utilities, it enters into a long-term agreement that obligates the utilities participating in the new resource to support its costs."⁴⁴ As noted above, ISO-NE defines out-of-market revenues as "any revenues that are: (a) not tradable throughout the New England Control Area or that are restricted to resources within a particular state or other geographic sub-region; or (b) not available to all resources of the same physical type within the New England Control Area, regardless of the resource owner."⁴⁵ Revenues received by a resource developer as a result of an agreement among its sponsors specifically to develop that resource fit within this definition.

⁴² January 2012 Order, 138 FERC ¶ 61,027 at P 80.

⁴³ *Id.* P 81.

⁴⁴ Public Systems December 28, 2012 Protest at 25.

⁴⁵ ISO-NE Tariff Appendix A, section III.A.21.2(b)(i).

30. Public Systems further argues that PJM has proposed revisions to its MOPR that would exempt self-supply from the MOPR, and that similar tariff provisions would be appropriate in New England. Subsequent to Public Systems submitting its rehearing request in this case, the Commission accepted a limited version of the relevant PJM revisions; however, the provisions, as accepted in PJM, would not elicit Public Systems' desired result in this case.⁴⁶ Specifically, the Commission accepted PJM's proposal for a categorical exemption from its MOPR for self-supply by public power entities, but limited the operation of this exemption to "certain self-supplying LSEs . . . who do not 'buy' substantially more capacity in PJM's capacity auction, via PJM's procurement protocols, than they clear or sell as capacity supply (i.e., they are not significantly 'net-short'), and who, conversely, do not clear or sell substantially more capacity than they 'buy' (i.e., they are not significantly 'net-long')." ⁴⁷ The Commission reasoned that entities that satisfy this limitation would lack the incentive to use this exemption to depress the clearing price through the exercise of buyer market power. ISO-NE has not proposed an exemption with comparable parameters in its filing and Public Systems has not demonstrated that the lack of such an exemption is unjust and unreasonable or unduly discriminatory or preferential. Moreover, while we will not require a blanket exemption for self-supplied resources, nothing in this order prevents a public power project from seeking a case-specific exemption, and in doing so, such a resource may show how any generally-applied assumptions do not apply to that resource's financing.

31. Public Systems contend that, if consumer-owned utilities develop a project that does not clear the FCM, the utility and its customers must either abandon the resource or pay twice (first for the new unit, and second for the auction-selected capacity purchased to meet those utilities' capacity obligations). However, there is a three-year period between the FCA and the commencement of resources' capacity obligations. If a consumer-owned utility offers a project into the FCA and it does not clear, the utility can still, at that point, evaluate the costs and benefits of continuing with construction for purposes other than meeting the utility's capacity obligation.

⁴⁶ *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 (2013) (May 2013 PJM Order).

⁴⁷ May 2013 PJM Order, 143 FERC ¶ 61,090 at P 63, footnotes omitted. The Commission additionally required PJM to retain its unit-specific review procedure. *Id.* P 141.

32. Finally, we disagree that the Commission gave excessive deference to ISO-NE stakeholders in the February 2013 Order. The Commission acknowledged that stakeholders did not support a categorical exemption but did not rely on that fact to support its substantive ruling that “a blanket, across-the-board offer floor mitigation exemption for new resources designated as self-supply would allow for an unacceptable opportunity to exercise buyer market power and thus could inhibit competitive investment.”⁴⁸

The Commission orders:

The requests for 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.

⁴⁸ January 2012 Order, 138 FERC ¶ 61,027 at P 70.