**ORAL ARGUMENT HAS NOT BEEN SCHEDULED**

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

NO. 17-1110

NEXTERA ENERGY RESOURCES, LLC, *ET AL.*,
*Petitioners*,

*v.*

FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent*.

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

## BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: FEBRUARY 1, 2018

## CIRCUIT RULE 28(a)(1) CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### A. Parties and Amici

To counsel's knowledge, the parties, intervenors, and amici before this Court and before the Federal Energy Regulatory Commission in the underlying agency dockets are as stated in the Petitioners' Brief.

### B. Rulings Under Review

1. *ISO New England Inc*., 147 FERC ¶ 61,173 (May 30, 2014) ("First Order"), R. 49, JA 429;

2. *ISO New England Inc*., 150 FERC ¶ 61,065 (Jan. 30, 2015) ("Second Order"), R. 63, JA 496;

3. *ISO New England Inc*., 155 FERC ¶ 61,023 (Apr. 8, 2016) ("Remand Order"), R. 81, JA 560; and

4. *ISO New England Inc*., 158 FERC ¶ 61,138 (Feb. 3, 2017) ("Remand Rehearing Order"), R. 85, JA 611.

### C. Related Cases

Petitioners previously sought review of the first two Commission orders on review here. *See NextEra Energy Resources, LLC, et al. v. FERC*, No. 15-1070 (D.C. Cir. filed Mar. 30, 2015). On the Commission's unopposed motion for voluntary remand, the Court remanded the case back to the Commission on December 1, 2015.

This Court has previously considered petitions for review of earlier Commission orders that established rules for auctions in the ISO New England regional electricity capacity market, *Maine Public Utilities Commission v. FERC*,

520 F.3d 464 (D.C. Cir. 2008), *rev'd in part sub nom. NRG Power Mktg. v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010), and that made changes to the capacity market rules. *See New England Power Generators Association v. FERC*, Nos. 16-1023 and 16-1024, 2018 WL 472545 (Jan. 19, 2018); *New England Power Generators Association v. FERC*, 757 F.3d 283 (D.C. Cir. 2014). One other case concerning those auction rules is currently pending before this Court in *New England Power Generators Association v. FERC*, Nos. 15-1071 and 16-1042 (consolidated) (oral argument held Oct. 6, 2017).

*/s/ Holly E. Cafer*
Holly E. Cafer

February 1, 2018

# TABLE OF CONTENTS

**PAGE**


STATEMENT OF THE ISSUES....1

STATUTORY AND REGULATORY PROVISIONS…. ....2

STATEMENT OF FACTS ....2

I. STATUTORY AND REGULATORY BACKGROUND ....2

A. Federal Power Act....2

B. Developing Supplier Competition And Regional Markets....4

II. NEW ENGLAND'S REGIONAL CAPACITY MARKET....6

A. New England's Evolving Resource Mix And Reliability Construct ....6

B. The Forward Capacity Market ....7

C. The Minimum Offer Price Rule .... 11

III. THE COMMISSION'S PROCEEDINGS AND ORDERS ON REVIEW…. .... 14

SUMMARY OF ARGUMENT .... 18

ARGUMENT……. .... 20

I. STANDARD OF REVIEW.... 20

II. THE RENEWABLES EXEMPTION IS APPROPRIATE.... 22

## TABLE OF CONTENTS

**PAGE**


A. The Commission's Finding That The Renewables Exemption Has Limited Potential to Depress Prices Is Supported By Substantial Evidence ..... 22

1. Annual and Cumulative Caps, Load Growth and Resource Retirements ..... 24

2. Sloped Demand Curves and Supply Curves ..... 27

3. The 9th and 10th Auctions ..... 29

4. New Demand Curves ..... 31

B. The Commission Adequately Considered The Price Impacts Of The Renewables Exemption ..... 32

C. The Commission Reasonably Balanced The Competing Interests At Stake And Determined That The Renewables Exemption Is Just And Reasonable ..... 35

D. The Commission Did Not Abuse Its Discretion In Declining To Hold A Hearing ..... 43

E. The Exemption Is Subject To Ongoing Review ..... 45

III. THE COMMISSION DID NOT DEPART FROM PRECEDENT ..... 46

A. The Limited Renewables Exemption Is A Direct Response To Earlier New England Proceedings ..... 46

B. There Is No Bright Line Rule Concerning Price Suppression ..... 51

CONCLUSION…. ..... 56

## TABLE OF AUTHORITIES

**COURT CASES:** **PAGE**

*Advanced Energy Mgmt. All. v. FERC*,
860 F.3d 656 (D.C. Cir. 2017)..... 21

*Associated Gas Distribs. v. FERC*,
824 F.2d 981 (D.C. Cir. 1987)..... 34

*Blumenthal v. FERC*,
552 F.3d 875 (D.C. Cir. 2009)..... 7, 8

*Cajun Elec. Power Coop. v. FERC*,
28 F.3d 173 (D.C. Cir. 1994)..... 44, 45

*Cogeneration Ass'n of Cal. v. FERC*,
525 F.3d 1279 (D.C. Cir. 2008)..... 24

**Connecticut Dep't of Pub. Util. Control v. FERC*,
569 F.3d 477 (D.C. Cir. 2009).....3, 7, 9, 35, 37-39

*Delaware Dep't of Nat. Res. and Envtl. Control v. EPA*,
785 F.3d 1 (D.C. Cir. 2015).....8

*Electricity Consumers Res. Council v. FERC*,
407 F.3d 1232 (D.C. Cir. 2005)..... 8, 46

*Emera Maine v. FERC*,
854 F.3d 9 (D.C. Cir. 2017)..... 50

*FCC v. Fox Television Stations, Inc.*,
556 U.S. 502 (2009).....55-56

**FERC v. Elec. Power Supply Ass'n*,
136 S. Ct. 760 (2016)..... 3, 20, 21, 22, 38, 43

---

* Cases chiefly relied upon are marked with an asterisk.

## TABLE OF AUTHORITIES

**COURT CASES:** **PAGE**

*Florida Gas Trans. Co. v. FERC*,
604 F.3d 636 (D.C. Cir. 2010)..... 26

*Florida Mun. Power Ag. v. FERC*,
315 F.3d 362 (D.C. Cir. 2003)..... 22

*FPC v. Hope Nat. Gas Co*.,
320 U.S. 591 (1944)..... 42

*FPL Energy Me. Hydro LLC v. FERC*,
287 F.3d 1151 (D.C. Cir. 2002)..... 22

*Hughes v. Talen Energy Mktg., LLC*,
136 S. Ct. 1288 (2016)..... 36, 40

*Illinois Comm. Comm'n v. FERC*,
576 F.3d 470 (7th Cir. 2009) ..... 34

*Louisiana Ass'n of Indep. Producers and Royalty Owners v. FERC*,
958 F.2d 1101 (D.C. Cir. 1992)..... 45

*Louisiana Pub. Serv. Comm'n v. FERC*,
184 F.3d 892 (D.C. Cir. 1999)..... 34, 44

*Marsh v. Ore. Nat. Res. Council*,
490 U.S. 360 (1989)..... 29

*Maryland Pub. Serv. Comm'n v. FERC*,
632 F.3d 1283 (D.C. Cir. 2011).....8

*Maine Pub. Utils. Comm'n v. FERC*,
520 F.3d 464 (D.C. Cir. 2008)..... 7, 8

*Mobil Oil Expl. & Producing Se. Inc. v. United Distrib. Cos*.,
498 U.S. 211 (1991)..... 32, 43

## TABLE OF AUTHORITIES

**COURT CASES:** **PAGE**

*Montana Consumer Counsel v. FERC*,
659 F.3d 910 (9th Cir. 2011) ..... 5

*Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*,
554 U.S. 527 (2008) ..... 4, 5, 21

*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*,
463 U.S. 29 (1983) ..... 20, 21

*Murray Energy Corp. v. FERC*,
629 F.3d 231 (D.C. Cir. 2011) ..... 22

*New Eng. Power Generators Ass'n v. FERC*,
707 F.3d 364 (D.C. Cir. 2013) ..... 7

**New Eng. Power Generators Ass'n v. FERC*,
757 F.3d 283 (D.C. Cir. 2014) ..... 7, 9, 11, 21, 36, 38-40, 42, 47, 48, 52, 53

*New York v. FERC*,
535 U.S. 1 (2002) ..... 3, 4, 21

**New Jersey Bd. of Pub. Utils. v. FERC*,
744 F.3d 74 (3d Cir. 2014) ..... 9, 11, 35, 50-54

*NRG Power Mktg. v. FERC*,
718 F.3d 947 (D.C. Cir. 2013) ..... 35-36, 38

*NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*,
558 U.S. 165 (2010) ..... 3, 5, 7, 8

*NSTAR Elec. & Gas Corp. v. FERC*,
481 F.3d 794 (D.C. Cir. 2007) ..... 5

*Pennsylvania Office of Consumer Advocate v. FERC*,
131 F.3d 182 (D.C. Cir. 1997) ..... 26

## TABLE OF AUTHORITIES

**COURT CASES:** **PAGE**

*Public Citizen, Inc. v. FERC*,
839 F.3d 1165 (D.C. Cir. 2016).....9

*Public Serv. Elec. & Gas Co. v. FERC*,
324 F. App'x 1 (D.C. Cir. 2009) .....8

*Sacramento Mun. Util. Dist. v. FERC*,
616 F.3d 520 (D.C. Cir. 2010)..... 33, 36, 43

*South Carolina Pub. Serv. Auth. v. FERC*,
762 F.3d 41 (D.C. Cir. 2014)..... 21, 22, 33, 56

*Sierra Club v. FERC*,
867 F.3d 1357 (D.C. Cir. 2017)..... 34

*Sithe/Indep. Power Partners, L.P. v. FERC*,
165 F.3d 944 (D.C. Cir. 1999)..... 20, 34

*Transmission Access Policy Study Grp. v. FERC*,
225 F.3d 667 (D.C. Cir. 2000)..... 21

*Wisconsin Pub. Power Inc. v. FERC*,
493 F.3d 239 (D.C. Cir. 2007)..... 33

*Xcel Energy Servs. Inc. v. FERC*,
815 F.3d 947 (D.C. Cir. 2016)..... 38

**ADMINISTRATIVE CASES:**

*Bridgeport Energy, LLC*,
113 FERC ¶ 61,311 (2005)..... 41

*Devon Power LLC*,
115 FERC ¶ 61,340, *on reh'g*, 117 FERC ¶ 61,133 (2006)..... 6, 10

## TABLE OF AUTHORITIES

**ADMINISTRATIVE CASES:** **PAGE**

*ISO New England Inc.*,
135 FERC ¶ 61,029 (2011) ..... 11, 12, 47, 48

*ISO New England Inc.*,
138 FERC ¶ 61,027 (2012) ..... 11

*ISO New England Inc.*,
142 FERC ¶ 61,017 (2013) ..... 14

*ISO New England Inc.*,
147 FERC ¶ 61,073 (2014) ..... 15, 16, 23-25, 27, 33, 46, 49

*ISO New England Inc.*,
148 FERC ¶ 61,201 (2014) ..... 9

*ISO New England Inc.*,
150 FERC ¶ 61,065 (2015) ..... 15-16, 24, 25, 27, 45

*ISO New England Inc.*,
153 FERC ¶ 61,338 (2015) ..... 17

*ISO New England Inc.*,
155 FERC ¶ 61,023 (2016) ..... 11, 17, 23-31, 33, 35-41
44, 46, 48-49, 51-54

*ISO New England Inc.*,
158 FERC ¶ 61,138 (2017) ..... 17, 23-33, 35-41, 44-46,
48-51, 53-55

*Market-Based Rates for Whole Sales of Elec. Energy, Capacity and Ancillary Servs. by Pub. Utils.*,
Order No. 697, 72 Fed. Reg. 39,904, FERC Stats. & Regs. ¶ 31,252, 119 FERC ¶ 61,295 (2007, *on reh'g and clarification*, Order No. 697-A, 73 Fed. Reg. 25,382, FERC Stats. & Regs. ¶ 31,268, 123 FERC ¶ 61,055 (2008) ..... 5

## TABLE OF AUTHORITIES

**ADMINISTRATIVE CASES:** **PAGE**

*New Eng. Power Generators Ass'n, Inc.*,
146 FERC ¶ 61,039 (2014) ..... 6

*New Eng. States Cmte. on Elec. v. ISO New Eng. Inc.*,
142 FERC ¶ 61,108 (2013) ..... 13-14, 37, 41, 49

*New Eng. States Cmte. on Elec. v. ISO New Eng. Inc.*,
151 FERC ¶ 61,056 (2015) ..... 13

*PJM Interconnection*,
135 FERC ¶ 61,022 (2011) ..... 50

**STATUTES:**

Federal Power Act

Section 201, 16 U.S.C. § 824 ..... 2

Section 205, 16 U.S.C. § 824d ..... 14, 33, 49, 51

Section 205(a), 16 U.S.C. § 824d(a) ..... 3

Section 205(b), 16 U.S.C. § 824d(b) ..... 3

Section 205(e), 16 U.S.C. § 824d(e) ..... 3

Section 206, 16 U.S.C. § 824e ..... 12, 47-50

## GLOSSARY

| | |
|---|---|
| Br. | Petitioners' opening brief |
| Commission or FERC | Federal Energy Regulatory Commission |
| First Order | *ISO New England Inc.*, 147 FERC ¶ 61,173 (2014), R. 49, JA 429 |
| FPA | Federal Power Act |
| Generators | Petitioners NextEra Energy Resources, LLC, the PSEG Companies, and the NRG Companies, *see* Remand Rehearing Order P 3, JA 613 |
| JA | Joint Appendix |
| P | Denotes a paragraph number in a Commission order |
| R. | Indicates an item in the certified index to the record |
| Remand Order | *ISO New England Inc.*, 155 FERC ¶ 61,023 (2016), R. 81, JA 522 |
| Remand Rehearing Order | *ISO New England Inc.*, 158 FERC ¶ 61,138 (2017), R. 85, JA 611 |
| Second Order | *ISO New England Inc.*, 150 FERC ¶ 61,065 (2015), R. 63, JA 496 |
| System Operator | ISO New England, Inc., the independent system operator that operates the electrical grid and energy markets in the six New England states |

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

---

**BRIEF FOR RESPONDENT**
**FEDERAL ENERGY REGULATORY COMMISSION**

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## STATEMENT OF THE ISSUES

This case concerns the supply and pricing of power-generating resources necessary to ensure the reliable provision of electricity. In New England, a regional independent system operator, ISO New England Inc. (here, the "System Operator"), runs the high-voltage electric transmission network and administers annual wholesale capacity auctions, where traditional local utilities (i.e., load-serving entities) purchase from generators and other suppliers commitments to buy quantities of energy (i.e., capacity) three years in advance.

In order to prevent the exercise of buyer-side market power in its capacity auction, ISO New England's tariff includes a "minimum offer price rule," which generally requires new capacity resources to supply capacity above a price floor. In the orders on review, the Commission approved a package of reforms to the capacity auction, including a proposal to exempt from that rule a limited quantity of qualifying renewable resources.

The issues presented are:

(1) Whether the Commission reasonably determined, based on substantial record evidence and a balancing of the competing interests at stake, that the limited renewables exemption was appropriate; and

(2) Whether the Commission reasonably explained its decision to approve a limited renewables exemption on this record, after previously rejecting an unlimited exemption on a different record, where the exemption has the potential—although limited—to suppress capacity prices.

## STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes are contained in the Addendum.

## STATEMENT OF FACTS

### I. STATUTORY AND REGULATORY BACKGROUND

#### A. The Federal Power Act

Section 201 of the Federal Power Act ("FPA"), 16 U.S.C. § 824, gives the

Commission jurisdiction over the rates, terms, and conditions of service for the transmission and wholesale sale of electric energy in interstate commerce. This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction). It includes the power to set rates for electricity capacity, either directly or indirectly through a market mechanism, and to review capacity requirements that affect those rates. *See Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 482-84 (D.C. Cir. 2009) ("*Connecticut*").[1]

All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA §§ 205(a), (b), (e), 16 U.S.C. §§ 824d(a), (b), (e). *See, e.g.*, *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 766-68 (2016) (describing federal regulation and development of energy markets).

[1] "'Capacity' is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties—generally, generators—who can either produce more or consume less when required." *Id.* at 479*; see also NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 168 (2010) ("In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases an option to buy a quantity of energy, rather than purchasing the energy itself.").

### B. Developing Supplier Competition And Regional Markets

Since the 1970s, a combination of technological advances and policy reforms has given rise to market competition among power suppliers. The expansion of vast regional grids and the possibility of long-distance transmission has enabled electric utilities to make large transfers of electricity in response to market conditions, thereby creating opportunities for competition among suppliers. *See New York*, 535 U.S. at 7-8 (explaining evolution of competitive markets). In the 1990s, the Commission furthered the development of such competition by ordering functional unbundling of wholesale generation and transmission services, requiring utilities to provide open, non-discriminatory access to their transmission facilities to competing suppliers. *See generally id.* at 11-13; *cf. Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536 (2008) ("[T]he Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity.").

The Commission's efforts to foster wholesale electricity competition over broader geographic areas in recent decades have led to the creation of independent system operators and regional transmission organizations. *See Morgan Stanley*, 554 U.S. at 536-37. These independent regional entities operate the transmission grid on behalf of transmission-owning member utilities and are required to

maintain system reliability. *See NRG*, 558 U.S. 165, 169 & n.1 (explaining responsibilities of regional system operators).

These regional entities also run auction markets for wholesale electricity sales. *See Morgan Stanley*, 554 U.S. at 537. Such organized regional markets are subject to FERC market rules that help mitigate the exercise of market power, that set administratively-determined prices in some instances, and that require oversight of market behavior and conditions by the Commission and by the regional entities' own market monitors. *See, e.g.*, *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity and Ancillary Servs. by Pub. Utils.*, Order No. 697, 72 Fed. Reg. 39,904, FERC Stats. & Regs. ¶ 31,252, 119 FERC ¶ 61,295 at P 955 (2007), *on reh'g and clarification*, Order No. 697-A, 73 Fed. Reg. 25,382, FERC Stats. & Regs. ¶ 31,268, 123 FERC ¶ 61,055 at P 395 (2008), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

The System Operator here, ISO New England Inc., is the regional entity that operates the regional transmission system and administers bid-based energy markets across six northeastern States (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont). *See generally NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 796 (D.C. Cir. 2007).

## II. NEW ENGLAND'S REGIONAL CAPACITY MARKET

### A. New England's Evolving Resource Mix And Reliability Construct

Due to technological advances, resource economics, and state and federal policy decisions, the United States has experienced a significant increase in natural gas-fired generation, and a corresponding decrease in coal-fired generation, over the last two decades. *See* Energy Information Admin., *U.S. electric generating capacity increase in 2016 was largest net change since 2011* (Feb. 27, 2017), https://www.eia.gov/todayinenergy/detail.php?id=30112. At the same time, renewable resources, primarily wind and solar generation, have made up a larger share of total new generating resources. *Id.*

In the middle of this transition, the regulatory paradigm fundamentally changed for wholesale suppliers of electricity in New England. Prior to 2006, decisions about the adequacy of utilities' resource fleets were made by a voluntary association of the region's electric utilities. *See Connecticut*, 569 F.3d at 479 (describing history of New England's resource adequacy construct). That approach, by design, procured more resources than the region needed to maintain reliability. *See New Eng. Power Generators Ass'n, Inc.*, 146 FERC ¶ 61,039 at P 50 (2014); *see also Devon Power LLC*, 115 FERC ¶ 61,340 at P 20 n.27, *on reh'g*, 117 FERC ¶ 61,133 at P 100 (2006) (noting region-wide capacity surplus).

Recognizing the disadvantages of that model, the region's stakeholders, including the New England states, chose to abandon it in favor of competitive market forces. *See Connecticut*, 569 F.3d at 479-80. As a result, the System Operator implemented a wholesale market for electricity capacity—the forward capacity market—that was specifically intended to maintain reliability by attracting adequate resources at the least cost. *Id.* at 480.

### B. The Forward Capacity Market

Having ruled on numerous appeals concerning energy and capacity market rate designs over the last decade, this Court is well-acquainted with the problems of maintaining system reliability, especially in areas of high demand along the eastern seaboard, and with the various mechanisms that the Commission has approved in regional markets (including New England) for the purpose of promoting reliability. *See Connecticut*, 569 F.3d 477 (capacity market in New England); *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008) (same), *rev'd in part sub nom. NRG Power Mktg. v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010); *New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283 (D.C. Cir. 2014) ("*New England*") (affirming additional buyer-side and supplier-side mitigation measures for New England capacity market); *New Eng. Power Generators Ass'n v. FERC*, 707 F.3d 364 (D.C. Cir. 2013) (standard for review of auction rates); *Blumenthal v. FERC*, 552 F.3d 875 (D.C. Cir. 2009) (transition to

capacity market in New England); *see also, e.g.*, *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283 (D.C. Cir. 2011) (transitional capacity auctions in mid-Atlantic region); *Pub. Serv. Elec. & Gas Co. v. FERC*, 324 F. App'x 1 (D.C. Cir. 2009) (capacity market in mid-Atlantic); *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232 (D.C. Cir. 2005) (capacity market in New York).

Since 2006, the System Operator has administered the forward capacity market in New England pursuant to the rules set forth in its FERC-jurisdictional tariff. *See Me. Pub. Utils. Comm'n*, 520 F.3d at 467 (affirming, in relevant respects, New England's capacity market). Load-serving entities in New England (traditional local utilities) purchase from generators (and other suppliers) commitments to buy quantities of energy (i.e., capacity) three years in advance. *See Blumenthal*, 552 F.3d at 879; *see generally NRG*, 558 U.S. at 168-72 (describing New England's capacity market). A forward capacity market encourages the entry of new suppliers into the market with auctions that set rates three years in advance of delivery. This lag time allows competition from new suppliers that lack the installed capacity to deliver electricity now but could develop that capacity within three years of winning a bid. *See Md. Pub. Serv. Comm'n*, 632 F.3d at 1285 (dismissing challenge to a pricing model designed to encourage increased investment in capacity); *see also Del. Dep't of Nat. Res. and Envtl. Control v. EPA*, 785 F.3d 1, 12 (D.C. Cir. 2015) (explaining that capacity

payments provide revenues to maintain operations of existing generation resources and to encourage development of new resources); *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 82-83 (3d Cir. 2014) ("*New Jersey*") ("Capacity auctions, also, at least in theory, incentivize the development of new generation resources by establishing a market-based means by which those resources can recover their investment costs.").

Capacity prices are set through the annual forward capacity auction. First, the System Operator "determines the net amount of capacity required by the region." *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1168 (D.C. Cir. 2016) (citing *ISO New Eng. Inc.*, 148 FERC ¶ 61,201 at P 2 (2014)). The capacity auction is a descending price auction under which generators and other suppliers willing to provide capacity submit bids reflecting the price at which they are willing to supply capacity. *Id*.; *see also Connecticut*, 569 F.3d at 480 (describing auction). Each bid reflects the lowest price the bidding resource will accept before it leaves the capacity market. *See New England*, 757 F.3d at 298 (explaining bidding process); *ISO New Eng. Inc.*, 148 FERC ¶ 61,201 at P 2 (describing capacity auction process). Any bid that "clears" the auction receives the auction-clearing price. *See New England*, 757 F.3d at 298. New England's capacity market also includes a locational component, conducting auctions in different zones based on transmission constraints between subregions. *See id*. at 298-99.

The System Operator conducts the annual capacity auction to procure capacity commitments for a 12-month period ("Capacity Year") from June 1 through May 31. *See Devon Power LLC*, 115 FERC ¶ 61,340 at P 16. The results of the capacity auctions are as follows:

| **Capacity Auction** | **Auction Held** | **Capacity Year (June 1-May 31)** | **Clearing Price (per kW-month)** |
|---|---|---|---|
| 1 | 2007 | 2010-2011 | $4.50 |
| 2 | 2008 | 2011-2012 | $3.60 |
| 3 | 2009 | 2012-2013 | $2.95 |
| 4 | 2010 | 2013-2014 | $2.95 |
| 5 | 2011 | 2014-2015 | $3.21 |
| 6 | 2012 | 2015-2016 | $3.43 |
| 7 | 2013 | 2016-2017 | $3.15, except for one zone which cleared at $6.66 for existing resources and $14.99 for new resources.* |
| 8 | 2014 | 2017-2018 | $7.025 for existing resources and $15.00 for new resources, except for one zone which cleared all resources at $15.00.* |
| 9 | 2015 | 2018-2019 | $9.55, except for one zone which cleared at $11.08 for existing resources and $17.73 for new resources.* |
| 10 | 2016 | 2019-2020 | $7.03 |
| 11 | 2017 | 2020-2021 | $5.30 |

* Indicates downward mitigation of price.

*See* ISO New England Inc., *Key Grid and Market Stats: Markets*, https://iso-ne.com/about/key-stats/markets (last visited Nov. 16, 2017).

### C. The Minimum Offer Price Rule

The New England System Operator's tariff includes rules that operate to prevent the exercise of market power by both sellers and buyers. *See New Jersey*, 744 F.3d at 84-85. Relevant to this case, buyer market power, sometimes called monopsony power, can be exercised by buyers "offering their capacity at artificially low prices that are sure to clear the auction." *Id*. at 85. Such offers can "crowd out other capacity that is priced at a higher, cost-based rate, and thus result in a lower overall clearing price." *Id*.

To counteract this potential, the System Operator relies on a number of measures, including the minimum offer price rule (elsewhere, "MOPR"), requiring new capacity resources to supply capacity above a price floor. *See ISO New England, Inc.*, 135 FERC ¶ 61,029 at P 165 (2011) (Buyer Market Power Order), *reh'g denied in part*, 138 FERC ¶ 61,027 (2012), *aff'd*, *New England*, 757 F.3d 283. The rule establishes an offer floor, administratively set by the System Operator at a level that approximates the net cost of entry of a new resource. Buyer Market Power Order P 166; *see also ISO New England Inc*., 155 FERC ¶ 61,023 at P 17 n.41, JA 530 (describing net cost of new entry). "By preventing new resources from offering at prices that are significantly below their true net cost

of entry, new resources would not be able to lower the price of capacity significantly below competitive levels." Buyer Market Power Order P 166; *see also id*. P 165 (noting that parties sought to have New England's rule operate similar to that found in the mid-Atlantic market, PJM Interconnection).

At the time the Commission initially approved the minimum offer price rule, the Commission addressed the possibility of exempting from the rule certain resources developed under state policies, in furtherance of those state policies. *See* Buyer Market Power Order P 20. The Commission rejected the possibility of an exemption in that proceeding. The Commission explained, as it had before, that "uneconomic entry can produce unjust and unreasonable prices by artificially depressing price." *Id*. P 170. While the Commission explained that the "[p]arties have not provided sufficient specificity to allow us to approve an appropriately narrow exemption," it also noted that parties could return with a complaint, under FPA section 206, 16 U.S.C. § 824e, to seek an exemption.

Acting on that invitation, in 2012, the New England States Committee on Electricity ("New England Committee," elsewhere "NESCOE") filed a complaint with the Commission under FPA section 206, 16 U.S.C. § 824e, alleging that the minimum offer price rule mechanism would result in unjust and unreasonable rates, absent an exemption for resources developed pursuant to state policies to support renewable generation. Complaint at 6, New Eng. States Cmte. on Elec. v.

ISO New Eng. Inc., FERC Docket No. EL13-34 (filed Dec. 28, 2012). The Committee sought a categorical exemption for qualifying renewable resources, arguing that, because such resources are otherwise unable to clear the auction, without such an exemption customers are required to pay for redundant capacity—that required by the auction and that required by state policies. *Id*.

The Commission denied the complaint. *See New Eng. States Cmte. on Elec. v. ISO New Eng. Inc*., 142 FERC ¶ 61,108 at P 12 (2013) (New England Complaint Order), *reh'g denied*, 151 FERC ¶ 61,056 (2015). While acknowledging that it had allowed a similar exemption in the mid-Atlantic capacity market, PJM Interconnection, the Commission reasoned that it could not simply copy that approach in New England. New England Complaint Order PP 35, 37. The Commission explained that, in considering such an exemption, it must balance economic efficiency with the interests of the states in accommodating state policy objectives. *Id*. P 35. "[T]here are differences between PJM and ISO-New England that affect the balancing of [these] considerations." *Id*. Specifically, the Commission explained that because the New England market, at that time, used a vertical demand curve, while PJM's market used a sloped demand curve, any exemption would have a greater price-suppressive impact in New England. *Id*. Further, the Commission reasoned that a given quantity of new renewable capacity

will have a greater effect on capacity prices in the smaller New England market compared with the larger PJM market. *Id*.

In a related, contemporaneous, order addressing a package of reforms to New England's capacity market, including buyer-side mitigation measures, the Commission noted "the large number of stakeholders that supported some form of renewable resource exemption" from the minimum offer price rule. *ISO New Eng. Inc*., 142 FERC ¶ 61,107 at P 97 (2013). As such, the Commission "encouraged [the System Operator] to undertake the development of a stakeholder process for such an exemption which could include the development of a [downward-sloping] demand curve." *Id*.

## III. THE COMMISSION'S PROCEEDINGS AND ORDERS ON REVIEW

In 2014, the New England System Operator filed, under section 205 of the Federal Power Act, 16 U.S.C. § 824d, a package of reforms to change how it determines the amount of system-wide capacity needed in each annual auction, by replacing its vertical demand curve with a system-wide sloped demand curve. *See* Initial Filing, Transmittal Ltr. at 2, 6, R. 1, JA 20, 24. The System Operator did not propose to change the curves used for determining capacity needs in certain areas (so-called local capacity zones) that are modeled separately in the market, but stated that it expected to do so after completing further stakeholder consultations. *See id*. at 13, JA 31. As most relevant here, the reforms included a proposal to

exempt a limited amount of qualifying renewable energy resources (those that qualify under a state renewable portfolio standard or renewable energy goal) from the minimum offer price rule. *Id*. at 12-13, JA 30-31. In support of the reforms, including the renewables exemption, the System Operator included testimony from Dr. Ethier, the Operator's Vice President of Market Development and a Ph.D. resource economist, who explained that the exemption is limited, by design and because of the sloped demand curve, so as to minimize potential concerns about price suppression. *Id*. (citing Initial Filing, Ethier Testimony at 40-42, JA 140-42).

On May 30, 2014, the Commission approved the System Operator's package of reforms, including the system-wide sloped demand curve and the renewables exemption from the minimum offer price rule. *ISO New England Inc*., 147 FERC ¶ 61,073 ("First Order"), *reh'g denied*, 150 FERC ¶ 61,065 (2015) ("Second Order"). Starting in the 9th Auction, up to 200 megawatts ("MW") of renewables can enter each auction without being subject to the minimum offer price rule. First Order P 63, JA 449. Any unused portion of that 200 MW can carry forward for up to three years (two additional auctions) for a possible total of 600 MW. *Id*.

In approving the renewables exemption, the Commission rejected arguments advanced by certain generators that the exemption would significantly lower prices in the capacity market. First Order PP 81-88, JA 455-58; Second Order PP 16-26, JA 501-06. Relying on the System Operator's expert testimony, the Commission

found that the structure of the exemption, including qualifying criteria, prorating rules, and the 200 MW and 600 MW caps, as well as related market features, including the sloped demand curve and anticipated load growth and retirements, would limit any potential price-suppressing impact of the exemption. *See, e.g.*, First Order PP 83-84, JA 456. Further, the Commission recognized that the System Operator had committed to propose sloped demand curves for the separately-modeled zones, in time for the 10th annual auction, and set a deadline for that filing. *Id*. PP 41, 85, JA 442, 457; Second Order P 24, JA 505. Ultimately, the Commission found that the renewables exemption, subject to the limiting factors, would still allow the capacity market to clear, on average and over time, near the net cost of new entry, and thereby retain and incent adequate resources to meet reliability targets. First Order P 83, JA 456; Second Order P 21, JA 504.

NextEra Energy Resources, LLC, the PSEG Companies, and the NRG Companies (together, Generators) filed a petition for review of the First and Second Orders, on the issue of the renewables exemption only, in this Court (Case No. 15-1070). The Commission sought a voluntary remand to allow it to further consider certain arguments, and the Court granted that remand on December 1, 2015. On December 28, 2015, the Commission directed the System Operator to submit sloped demand curves for the separately-modeled zones, to be implemented

beginning with the next (11th) auction. *See ISO New England Inc*., 153 FERC ¶ 61,338 (2015).

On remand, the Commission reaffirmed its decision that the renewables exemption is just and reasonable. *See ISO New England*, *Inc*., 155 FERC ¶ 61,023 (2016) ("Remand Order"), JA 522, *reh'g denied*, 158 FERC ¶ 61,138 (2017) ("Remand Rehearing Order"), JA 611. The Commission reiterated that the renewables exemption is just and reasonable because, "while acknowledging state policy considerations, it nevertheless enables the capacity market to fulfill its function of procuring sufficient capacity to meet reliability targets, on average, over time, at just and reasonable prices to customers." Remand Rehearing Order P 8, JA 614; *see also* Remand Order P 39, JA 541. In so doing, the Commission addressed Generators' claims that the price impact is likely to be more significant, but ultimately concluded that Generators' experts' predictions were unrealistic. *Id*. P 44, JA 544; Remand Rehearing Order PP 21, 24, 45 JA 622, 625, 638. On balance, considering the consumers' interest in avoiding paying excessively for redundant capacity, and the purpose of the market in incenting and retaining adequate capacity for reliability purposes, the Commission held that the exemption is just and reasonable. *See* Remand Rehearing Order P 8, JA 614; Remand Order PP 33-36, JA 537-40.

This appeal followed.

## SUMMARY OF ARGUMENT

As this Court knows, balancing the often-competing interests of parties involved in regional, auction-based capacity markets is a challenging task, but it is one ultimately entrusted to the Commission by Congress. Here, the Commission reasonably balanced the competing interests of consumers and generators, taking into account the purpose of the capacity market and state policy objectives, and determined that exempting a limited amount of renewable resources from buyer-side market power mitigation rules is appropriate at this time.

As a necessary predicate for the Commission's ultimate balancing decision, the Commission first determined, on the basis of substantial record evidence, that prices in the capacity market, with the renewables exemption, would be roughly the same as prices resulting from the market without the exemption, on average, over time. The System Operator's expert witness reasonably predicted that multiple factors—including the annual and cumulative caps, load growth, retirements, and new sloped demand curves—would effectively limit potential price suppression. The Commission reasonably explained its decision to rely on the System Operator's expert predictions, as opposed to those offered by Generators, which the Commission found contained unsupported assumptions.

After finding that the renewables exemption would have limited impact on prices in New England's capacity market, the Commission balanced that potential

impact with other considerations. Generators suggest the Commission's analysis must be primarily, if not entirely, quantitative, but the Commission has used a balancing approach in all preceding capacity market cases, including those affirmed by this and other courts. In balancing the competing interests then, the Commission recognized that, on the one hand, the renewables exemption protects consumers from paying for two sets of resources—one prompted by the capacity market and the other prompted by state policies. On the other hand, the Commission recognized that while Generators may prefer higher capacity prices, individual generators are not entitled to particular prices, only to a market that on average, over time, provides adequate incentives to attract and retain capacity. Because the renewables exemption allows the market to achieve that result, the Commission's balance is reasonable and warrants this Court's respect.

Finally, the Commission did not depart from precedent in approving the renewables exemption. In earlier New England proceedings, the Commission provided guidance to the stakeholders in developing a renewables exemption—and encouraged them to do so. As the Commission advised, the System Operator and a majority of its stakeholders devised a narrowly tailored exemption and paired it with downward sloping demand curves—and the Commission reasonably approved it. Moreover, contrary to Generators' claims, the Commission has approved other exemptions from buyer-side mitigation, in both New England and

other markets, even where there was some potential for price suppression. Those Commission orders, and court decisions affirming them, speak in terms of balancing, not bright lines: It is well within the Commission's authority to balance the need for mitigation with the risk of over-mitigation. To the extent, however, the Commission's orders depart from past practice, the Commission adequately explained that changing market realities, including the States' continued pursuit of renewable resources, served as a tipping point and warranted the Commission's action to protect consumers from paying excessively for duplicative resources.

## ARGUMENT

### I. STANDARD OF REVIEW

This Court reviews Commission orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Indep. Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). As the Supreme Court has recently explained, "[t]he 'scope of review under the 'arbitrary and capricious' standard is narrow.'" *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Id*. Rather, the court must uphold an agency's decision "if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,]

including a rational connection between the facts found and the choice made.'" *Id*. (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43); *see also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014) (*South Carolina*).

"And nowhere is that more true than in a technical area like electricity rate design: '[W]e afford great deference to the Commission in its rate decisions.'" *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (quoting *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008)); *see also, e.g.*, *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656 (D.C. Cir. 2017) (upholding FERC-approved rate method tied to resource performance). In particular, the Court will "defer to the Commission's sound judgment in crafting mitigation measures responsive to the needs of the New England Forward Capacity Market." *New England*, 757 F.3d at 286.

The Commission's policy assessments also are afforded "great deference." *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). *See also South Carolina*, 762 F.3d at 55 ("the Commission must have considerable latitude in developing a methodology responsive to its regulatory challenge") (citations omitted); *New England*, 757 F.3d at 293 (court "properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions") (citation omitted).

"Substantial evidence 'is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *South Carolina*, 762 F.3d at 54 (quoting *Murray Energy Corp. v. FERC*, 629 F.3d 231, 235 (D.C. Cir. 2011)). It "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *Fla. Mun. Power Ag. v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

## II. THE RENEWABLES EXEMPTION IS APPROPRIATE

### A. The Commission's Finding That The Renewables Exemption Has Limited Potential To Depress Prices Is Supported By Substantial Evidence

Generators claim that the Commission lacked substantial evidence to support its determination that the potential for the renewables exemption to depress prices in the capacity market is limited. Br. 42-57. While they argue that nothing justifies any artificial price suppression (*see infra* Part III.B), they also dispute the Commission's finding, in the first instance, that any potential price suppression will be limited. Generators are wrong. The Commission's reasoned determination was based on the structure of the limited exemption and rational predictions of likely market impacts, well within the agency's realm of expertise. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 784 ("Our important but limited role is to ensure that the Commission engaged in reasoned decisionmaking—that it weighed

competing views, selected a [rate] with adequate support in the record, and intelligibly explained the reasons for making that choice.").

The Commission recognized the potential of the renewables exemption to suppress capacity prices, and based its acceptance of the exemption in part on factors—each of which is supported by substantial evidence—that limit the price impact. *See*, *e.g.*, Remand Rehearing Order PP 11, 20-21, JA 616, 622-23 (summarizing limiting factors). Specifically, the Commission found that the structure of the exemption, including the qualifying criteria, prorating rules, and the 200 MW annual cap and 600 MW cumulative cap, as well as related market functions, including the sloped demand curve and anticipated load growth and retirements, would limit any potential price suppression. *See*, *e.g.*, *id*.; *see also* First Order P 83, JA 456; Remand Order PP 26-27, JA 535. The Commission reasonably relied on expert testimony predicting that, on average and over time, the capacity market with the limited renewables exemption would still produce prices near the net cost of new entry, i.e., prices will be "roughly the same" with or without the exemption. Remand Rehearing Order P 23, JA 624; *see also id*. P 44, JA 638 (quoting testimony).

Generators argue that price suppression is not effectively mitigated or, in their view, eliminated by the annual and cumulative caps, the increasing demand caused by load growth and retirements, or the functioning of the sloped demand

curve. Br. 42-55. The Commission reasonably addressed Generators' concerns, but ultimately agreed with the New England System Operator that the renewables exemption is likely to have only a limited price depressing impact in the capacity market. *See Cogeneration Ass'n of Cal. v. FERC*, 525 F.3d 1279, 1283 (D.C. Cir. 2008) ("the question [courts] must answer . . . is not whether record evidence supports [petitioner's] version of events, but whether it supports FERC's").

### 1. Annual and Cumulative Caps, Load Growth and Resource Retirements

The Commission found that the annual and cumulative caps on the exemption limit are reasonable and that, combined with anticipated load growth and expected retirements, these factors will effectively limit the potential for price suppression. *See* First Order P 83, JA 456; Second Order P 21, JA 504; Remand Order PP 26-27, 52-53, JA 535, 548-50; Remand Rehearing Order PP 20, 23, 52, JA 621, 624, 645. The New England System Operator originally based the 200 MW cap on the then-current estimate of average annual load growth (189 MW, plus an adjustment for the reserve margin to reach 200 MW). First Order P 83, JA 456. The Commission recognized that load growth estimates can fluctuate, but found the 200 MW cap reasonable in light of the best estimate available to the System Operator at that time. *See* Second Order P 22, JA 504; Remand Order PP 20, 52 & n.120, JA 532, 548. Moreover, the Commission reasonably relied on the System Operator's commitment to revisit the cap on the renewables exemption,

as necessary depending on changes in load growth, retirements and other factors. *See* Remand Rehearing Order PP 28, 74, JA 627, 657; *see also* Remand Order P 20 & n.51, JA 532; Second Order P 22, JA 504.

Further, the Commission reasonably relied on the System Operator's estimates of likely retirements, which are predicted to far exceed both the 200 MW annual cap and the 600 MW carryover cap. Remand Order P 53, JA 549; *see also* First Order P 83, JA 456; Second Order P 21, JA 504; Remand Rehearing Order PP 11, 20, 34, JA 616, 621, 630. The System Operator's expert witness, Dr. Ethier, testified that retirements could reach 6,500 MW by 2020; later estimates indicate that by 2020, resources representing about 30 percent of regional capacity have committed to cease operation or are at risk of retirement. Remand Order P 53, JA 549 (citing System Operator reports). The combined limiting effect of the caps, load growth (even if it remains flat) and retirements means that "[s]ince merchant entry [which is subject to the price floor of the minimum offer price rule] is likely to be required to meet reliability requirements, [a capacity auction] in equilibrium will still be expected to clear near [net cost of new entry] over time." Remand Rehearing Order P 36, JA 632; *see also* Second Order P 21, JA 504; Remand Order P 52, JA 548.

Generators argue the Commission's reliance on the cap is unreasonable in light of projections that, due to increases in energy efficiency, load growth will

remain essentially flat. *See* Br. 50; *see* Remand Rehearing Order PP 11, 93, JA 617, 666 (acknowledging that growth has been flat). But the Commission appropriately relied on the System Operator's best prediction available at the time while recognizing the possibility of changes. Remand Order P 52, JA 548; Remand Rehearing Order P 100, JA 669 (citing *Fla. Gas Trans. Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("reasoned decisionmaking does not require complete prescience")); *see also Penn. Office of Consumer Advocate v. FERC*, 131 F.3d 182, 187 (D.C. Cir. 1997) ("The task of rate-setting necessarily requires the Commission to make predictive judgments about the operations and costs of regulated entities. Although the Commission must base these judgments on the evidence before it, the Commission cannot guarantee that the results will be error-free."). And the slowing of load growth does not render the 200 MW annual cap or the 600 MW carryover provision arbitrary. *See* Br. 48, 57. The Commission explained that the those limited amounts are "small relative to the amount of new entry that will be needed to offset the expected retirements (approximately 4,200-10,000 MW), in a capacity market that needs to procure roughly 35,000 MW annually." Remand Rehearing Order P 81, JA 660.

Generators point to the 9th and 10th auctions, which saw retirements of 152.5 MW and 661.1 MW, respectively. Br. 54; *see also* Remand Rehearing Order P 73, JA 656. Bearing in mind, however, that only 72 MW of exempt

resources cleared in those two auctions combined, "retirements continue to more than make up for the deficit in load growth." Remand Rehearing Order P 73, JA 656. And the Commission also reasonably relied on the System Operator's specific "commitment to revisit the cap on the [exemption] in the future, should the entry of [exempt resources] exceed load growth." Second Order P 22, JA 504; Remand Order P 52 n.120, JA 549 (same).

### 2. Sloped Demand Curves and Supply Curves

The Commission also reasonably relied on sloped demand curves to mitigate the potential price-suppressing impact of the limited renewables exemption. *See* Second Order P 20, JA 503; *see also* First Order P 84, JA 456; Remand Order PP 26, 28, 40, 46, JA 535, 541, 545; Remand Rehearing Order PP 11, 86, JA 616, 663. As discussed below, *infra* Part III.A, the Commission's reliance on the mitigating effect of the sloped demand curves follows directly from precedent. And even Generators agree, Br. 42, that sloped demand curves "generally result in the renewables exemption having a smaller impact on price for any changes in quantity than would have been the case under the vertical demand curve." Remand Rehearing Order P 11, JA 616.[2]

[2] For example, Dr. Ethier explained that where all resources offer as price takers (submit bids of zero) at a quantity equal to the installed capacity requirement (which implies that there is no new merchant entry), use of a vertical demand curve results in a zero clearing price, while use of a sloped demand curve results in a

Generators maintain that price suppression remains significant because the steepness of the *supply* curve means that even small changes in supply can result in significant price changes. Br. 43-44. The Commission agreed that the steepness of the supply curve ultimately affects capacity prices. Remand Rehearing Order P 20, JA 621. But, the System Operator's witness, Dr. Ethier, offered a cogent explanation for why the supply curve is likely to be flatter than those used by Generators' experts to evaluate the renewables exemption. *See* Remand Order P 40, JA 541. For auctions in which new capacity is needed (e.g., there is load growth and/or retirements) and there is a deep pool of competitive entrants, the System Operator expects that several suppliers would submit offers near net cost of new entry, resulting in a relatively flat (i.e., elastic) supply curve where it intersects the demand curve. *Id*. (citing Ethier Testimony at 8-9, JA 108-09). The Commission reasonably found this explanation persuasive, noting in particular that anticipated load growth (even where it has slowed) and retirements "should ensure that, in years where new entry is needed, the supply curve is relatively flat at the point of intersection." *Id*. P 41, JA 542. As the Commission explained, this is "how it expects the [market] to operate generally over time." Remand Rehearing

price of approximately $13.00/kW-month. *Id*. P 34, JA 630 (citing Ethier Testimony at 40, JA 140).

Order P 36, JA 631 (noting that the 9th and 10th auctions in fact had deep, competitive new entry pools and relatively flat supply curves).

By contrast, the Commission noted that Generators' experts each relied on very steep supply curves, which the Commission found were based on unsupported, unrealistic assumptions. *See* Remand Order P 40, JA 541; Remand Rehearing Order PP 20-25, 45, JA 621-25, 638. The fact that Generators' supply curves are based on the System Operator's data, *see* Br. 47, lacks relevance where the Operator itself assumed a flatter, more realistic supply curve for its own analysis. *See* Remand Order P 40, JA 541 (citing Ethier Testimony at 8-9, JA 108-09). In light of this disagreement among experts, the Commission's reasoned determination to rely on the System Operator's analysis deserves particular deference. *See Marsh* v. *Ore. Nat. Res. Council*, 490 U.S. 360, 378 (1989) ("an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive"); *see also* Remand Rehearing Order PP 25, 45 & n.126, JA 625, 639.

### 3. The 9th and 10th Auctions

The renewables exemption was in place for the 9th and 10th auctions, which occurred while the Commission's proceeding was in progress. As such, the Commission reasonably considered actual participation in and the results of the 9th and 10th auctions, and found that those figures support its determination that the

exemption is just and reasonable. *See* Remand Order P 44, JA 544; Remand Rehearing Order PP 6, 73, JA 614, 656.

First, participation in the renewables exemption was well below the annual cap, with only 72 MW of renewable resources actually clearing the market (i.e., bidding as price takers and receiving the market clearing price) in the 9th and 10th auctions *combined*. *See* Remand Rehearing Order PP 73 & n.197, 78, JA 656, 658 (deriving updated figures from the System Operator's public data). Generators claim that the exempt renewables entry remains significant because "prices are set by resources on the margin, and 72 MW" is a larger percentage of new entry (about 5 percent) than it is of total supply (0.2 percent). Br. 47. But the price reduction created by a given increase in capacity depends on how much the increase adds to total supply, not just to marginal supply; therefore, the Commission's finding that 72 MW of exempt renewables entry is 0.2 percent of the total supply is the relevant figure. Remand Rehearing Order P 73, JA 656.

Second, the System Operator was able to procure sufficient capacity to meet its reliability targets in those two auctions, and Generators do not assert any particular harm from prices in the 9th and 10th auctions. Remand Rehearing Order PP 36-37, 54, JA 631-33, 647. And third, actual results from those auctions show that the supply curves are much flatter than Generators assumed in their price suppression analyses. *See id.* P 37, JA 632; *see also* Remand Order P 44, JA 544

(noting that actual auction results "demonstrate that petitioners' projections appear to have been unrealistic").

Generators suggest that the Commission's reliance on the results of the 9th and 10th auctions is "post hoc," *see* Br. 46-47, but offer no legal proposition that precludes the Commission's reliance on public records while the record remains open. *See* Remand Rehearing Order PP 6, 100, JA 614, 669; *see also* Rehearing Request at 42-43, JA 604-05 (addressing auction results). In any event, while the auction results are a useful reference point in a proceeding that turns on predictions, the results merely substantiate the Commission's finding that the exemption is just and reasonable. *See* Remand Rehearing Order P 6, JA 614.

**4. New Demand Curves**

Finally, Generators argue that the new demand curves filed while this proceeding was pending before the Commission could allow the renewables exemption to depress prices further than previously anticipated. Br. 55-56. The Commission recognized that the demand curves will change over time, but also explained that if capacity prices resulting from the revised curves "are lower than was previously the case, those prices more accurately reflect the contribution to reliability of all resources available to provide resource adequacy and demonstrate that the [market] is working as intended." Remand Rehearing Order P 29, JA 628. And, in any event, the Commission reasonably concluded that issues arising from

the new demand curves—which were approved after the renewables exemption—should be addressed in the proceedings established to review the demand curves. *Id*. Generators' preference to air those concerns in this proceeding is just a preference, while the Commission's articulated reason for addressing demand curve changes in dedicated proceedings for the demand curves warrants deference. *See Mobil Oil Expl. & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures").

### B. The Commission Adequately Considered The Price Impacts Of The Renewables Exemption

Generators misapprehend the nature of the substantial evidence standard, arguing that the Commission must provide a "quantitative estimate" of the effects of the exemption. Br. 39. First, as described *supra* Part II.A, the Commission relied on Dr. Ethier's testimony as offering a reasonable prediction that, on average and over time, capacity market "prices with the renewables exemption would still clear near" the net cost of new entry. Remand Rehearing Order P 44, JA 638. That Dr. Ethier's testimony did not specify—or speculate, as the case may be—what the clearing price might be does not mean his analysis was not quantitative. Remand Rehearing Order P 44, JA 638. Rather, Dr. Ethier's prediction of the likely degree of the price impact, based here on substantial evidence, is adequate to support the Commission's finding that the exemption is just and reasonable. *See*

*Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 260-61 (D.C. Cir. 2007) (FERC's prediction that a rate would "provide an efficient incentive to invest" was a "reasonable predictive judgment that warrants judicial deference").

In any event, the substantial evidence standard, as applied to section 205 of the Federal Power Act, 16 U.S.C. § 824d, in general, or to capacity market decisions, specifically, does not require precise quantification. *See, e.g.*, Remand Order P 42, JA 542 (citing, e.g., *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 531 (D.C. Cir. 2010) ("[I]t was perfectly legitimate for the Commission to base its findings about the benefits of marginal loss charges on basic economic theory, given that it explained and applied the relevant economic principles in a reasonable manner.")); Remand Rehearing Order P 43, JA 637 (same). Substantial evidence "does not necessarily mean empirical evidence." *South Carolina*, 762 F.3d at 65. Where, as here, the "[p]romulgation of generic rate criteria clearly involves the determination of policy goals or objectives, and the selection of means to achieve them," *id*. (quoting *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1008 (D.C. Cir. 1987)) and the Commission's finding is "based on reasonable economic propositions, the court will uphold it." *Id*.; *see also Associated Gas.*, 824 F.2d at 1008 ("Courts reviewing an agency's selection of means are not entitled to insist on empirical data for every proposition on which the selection depends")).

In support of their claim that the Commission must put a number on the likely price impact of the limited renewables exemption, Generators string together three cases, Br. 39, none of which involves rates set by markets or auctions. *See Sierra Club v. FERC*, 867 F.3d 1357, 1373-74 (D.C. Cir. 2017) (requiring either a quantitative estimate of emissions under the National Environmental Policy Act or an explanation why quantification is not appropriate); *Ill. Comm. Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009) (requiring that, in a case concerning allocation of the costs of new transmission facilities among customers, FERC assign costs "roughly commensurate" with benefits); *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 899 (D.C. Cir. 1999) (remanding for FERC to explain the "rough equalization" standard required for allocation of costs under a specified contract)). Likewise, this case is unlike *Sithe/Indep. Power Partners*, 165 F.3d at 951, where the Commission "failed to disclose its calculations;" Generators here disagree with the Commission's preferred expert predictions, but do not assert that the Commission relies on non-record evidence.

As explained below, in Part III.B, the Commission followed the same decisional path in this case as it has in other capacity markets cases: it supported its factual findings with substantial evidence and relied on a balancing of the competing interests to determine whether the market rule, here the renewables exemption, is just and reasonable. Nothing more is required.

### C. The Commission Reasonably Balanced The Competing Interests At Stake And Determined That The Renewables Exemption Is Just And Reasonable

After finding that the renewables exemption would have limited impact on prices in the New England System Operator's capacity market, the Commission balanced that rate impact with other considerations in ultimately finding the exemption just and reasonable. *See* Remand Rehearing Order PP 6-11, JA 614-17; Remand Order PP 26, 33-36, JA 535, 537-40.

Generators' arguments suggest that the Commission's role is effectively limited to assessing quantitative rate impacts of mitigation measures. *See* Br. 37-42. But the Commission's responsibility to ensure that rates are just and reasonable is far more complex, and necessarily involves the balancing of the competing interests protected by the Federal Power Act. *See* Remand Order PP 33-34, JA 537-38 (citing cases). In the context of capacity markets, this is necessarily true where the very purpose of the market is to strike a balance between "both incentivizing and account[ing] for new entry by more efficient generators, while ensuring a price both adequate to support reliability and fair to consumers." *Connecticut*, 569 F.3d at 480. Thus, in capacity market cases, courts have specifically held that "FERC is permitted to weigh the danger of price suppression against the counter-danger of over-mitigation, and determine where it wishes to strike the balance." *New Jersey*, 744 F.3d at 109 (citing *NRG Power*

*Mktg. v. FERC*, 718 F.3d 947, 961 (D.C. Cir. 2013), and *Sacramento*, 616 F.3d at 541-42); *see also New England*, 757 F.3d at 286 (affirming orders "[b]ecause FERC undertook its balancing responsibilities in the capacity market with appropriate consideration and based its decision on substantial evidence"). That is precisely what the Commission did here.

As an initial matter, the Commission considered that states have jurisdiction over many aspects of electric generation and set renewable resource targets and renewable portfolio standards. *See* Remand Rehearing Order P 9, JA 615 (citing *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016) (holding that the Federal Power Act does not "foreclose . . . [states] from encouraging production of new or clean generation" so long as such initiatives did not "condition payment of [state] funds on capacity clearing a [FERC-jurisdictional] auction.")). States and market participants may have a legitimate need to develop renewable resources to satisfy those state policies. Remand Order P 25, JA 534. In other words, "those resources will be constructed with or without a renewables exemption." Remand Order P 62, JA 554. On the other hand, the System Operator explained that, absent the renewables exemption, those resources would be unlikely to clear the capacity market because of the minimum offer price rule. *Id.* (citing Initial Filing, Transmittal Ltr. at 12, JA 30). As a result, those resources "would not be 'counted' as part of the region's capacity, and therefore, the [auction] would require the

procurement of additional," duplicative, resources. *Id*. P 25 n.61, JA 534 (citing *New England State Cmte.*, 142 FERC ¶ 61,108 at PP 8-9); *see also id*. PP 33-34, JA 537-38.

Against this factual backdrop, the Commission considered the impact of the renewables exemption on the competing interests at stake. Simply put, "[t]he renewables exemption fulfills the Commission's statutory mandate by protecting consumers from paying for redundant capacity." Remand Order P 33, JA 537. In the absence of the exemption, consumers would pay twice, once for "capacity that cleared through the [auction] and [once] for renewable resources built by state entities to meet state policy objectives." *Id*.

Generators claim that the Commission errs in relying on the harm to consumers from paying for redundant capacity, Br. 27-28, but they do not dispute that "without the renewables exemption, the capacity market would signal that new resources are needed when, in actual fact, they are not." Remand Rehearing Order P 48, JA 642. There is no actual dispute that the costs are ultimately paid by consumers. *Id*. P 46, JA 639; *see also Connecticut*, 569 F.3d at 479 (recognizing "the consumers who ultimately shoulder the costs in their utility bills"); *id*. at 480 (describing market as "both incentivizing and account[ing] for new entry by more efficient generators, while ensuring a price both adequate to support reliability and fair to consumers").

More generally, Generators argue that the Commission places inordinate weight on consumers' interests in avoiding paying for redundant capacity. *See* Br. 27-28. But, the Commission's balance is consistent with the Federal Power Act, which has as its "primary aim . . . the protection of consumers from excessive rates and charges." *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016) (citation omitted); *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 781 (noting the "statute aims to protect against excessive prices") (citation omitted). Identifying the appropriate level of buyer-side market mitigation "present[s] intensely practical difficulties that demand a solution," and requires that "FERC must be given the latitude to balance the competing considerations and decide on the best resolution." *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 955–56 (D.C. Cir. 2013) (quotations and citation omitted); *see also New England*, 757 F.3d at 293 ("FERC evaluated the relative importance of several parameters . . . . Such a juggling act would not benefit from our rearranging.").

Moreover, the building of redundant capacity not only harms consumers, but is inconsistent with the purpose of the capacity market. *See* Remand Rehearing Order P 9, JA 615. One purpose of the market is to attract needed new capacity and send signals regarding where and when such resources are needed. *Id*.; *see also* Remand Order P 34, JA 538. "If renewable resources are being built, but are not reflected in the [market], then the [market] may send an incorrect signal to

construct new capacity that is not needed." Remand Rehearing Order P 9, JA 615; *see Connecticut*, 569 F.3d at 481 (recognizing that states' "choices" in "their role as regulators of generation facilities" "affect the pool of bidders in the Forward Market, which in turn affects the market clearing price for capacity"). To this point, the System Operator's witness Dr. Ethier testified that requiring the building of redundant resources to meet the same need is "economically inefficient." Remand Order P 24 n.59, JA 534 (quoting Ethier Testimony at 39, JA 139). As the Court has explained in affirming other aspects of the New England capacity market, the "regulatory scheme" established by the Commission's decades-long efforts to provide open access and promote competition "contemplates that the [market operators] will 'adopt transmission (and ancillary services) pricing policies to promote the efficient use of, and investment in, generation, transmission, and consumption' of wholesale electric power in specific energy capacity systems." *New England*, 757 F.3d at 286 (citation omitted). Thus, the Commission's reliance on efficiency concerns is in keeping with precedent and entirely appropriate.

The Commission's balancing of the competing interests here is a case-specific, fact-specific determination. *See* Remand Order P 36, JA 539. Generators claim (Br. 27-28) that, because the Commission has found that, on balance, the potential development of redundant capacity did not justify a renewables exemption in other cases (discussed *infra* Part III.A), it must reach the same result

here. *See* Remand Rehearing Order PP 52, 67, JA 645, 652; *see also New England*, 757 F.3d at 295 (affirming Commission's decision not to require a renewables exemption). But here, the Commission reasonably reached a different result based on a different record. Thus, the Commission's decision to place more weight on efficiency concerns here, where the potential for price suppression is limited, backed by expert testimony and real-world experience, was a reasonable exercise of the Commission's balancing role.

In so doing, the Commission also reasonably sought to accommodate state interests in pursuing their policy objectives in their own role overseeing generation. Remand Order P 23, JA 533; Remand Rehearing Order P 68, JA 653. The Commission recognized that it "does not regulate in a vacuum," Remand Rehearing Order P 68, JA 653, and that "those resources will be constructed with or without a renewables exemption." Remand Order P 62, JA 554; Remand Rehearing Order PP 7-8, JA 614-15 (acknowledging the rights of states to pursue their policy objectives consistent with *Hughes*, *supra*). In proposing the renewables exemption with the support of the majority of stakeholders, the System Operator itself sought to accommodate state policy objectives. Remand Order P 35, JA 538. Likewise, the Commission has "sought to accommodate the ability of states to pursue their policy goals" in prior cases, and no departure from that

approach is warranted here. *Id.* P 23 n.58, JA 533 (citing *New England States Cmte.*, 142 FERC ¶ 61,108 at P 35).

Recognizing that the renewables exemption has the potential to cause limited price suppression, the Commission also considered the impact on existing generators and potential new entrants. The Commission recognized that "ensuring that price signals are sufficient to incent existing resources to stay in the capacity market, and new resources to enter," is a purpose of the capacity market. Remand Order P 35, JA 538. To Generators, the Commission's factual statement that customers are ultimately responsible for the costs of the development of new generating resources is a "quibbling denial" (Br. 37) of the impact on generators. *See* Remand Rehearing Order P 46, JA 639. But as the Commission explained, the purpose of the capacity market is to provide adequate incentives (in Generators' terms, value) to "attract and retain sufficient capacity" to meet reliability needs, not to provide a specific price or value to market participants. *Id*. P 58, JA 648. "No individual supplier has an entitlement to a specific capacity price." *Id*. In other words, a utility is entitled to an opportunity to recover its costs—not a guarantee. *Id*. PP 54, 58, JA 647, 648 (citing *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311 at P 29 (2005)); *see also, e.g.*, *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944). Here, the Commission reasonably relied on evidence demonstrating that the potential for price suppression is limited, and took that into account in balancing

the competing interests at stake. *New England*, 757 F.3d at 298 (affirming agency orders where the Commission "was aware of, and considered, the effect such a decision [to exempt certain resources from buyer-side mitigation] would have on capacity prices," and "[s]uch a balancing function is precisely the role of expert agencies").

The Court's analysis of the Commission's balancing role in *New England Power Generators*, 757 F.3d 283, is instructive here. In the orders on review in that case, the Commission found existing buyer-side mitigation measures inadequate. The mitigation triggers were too narrow and the measure, even when triggered, did not produce just and reasonable rates. *Id*. at 293. The Court considered whether the Commission "proper[ly] exercise[d] its role in balancing competing interests," including "allowing uneconomic resources to clear the market, preventing uneconomic resources from distorting the market clearing process, and limiting the purchased capacity" to the installed capacity requirement. *Id*. In that case, the Court found reasonable the Commission's conclusion that "it was more important to prevent price distortion and excess capacity purchase than it was to allow out-of-market resources to clear." *Id*.; *see also id*. at 295 ("In this instance, the Commission chose to value most strongly the concept of preventing price distortion . . . . FERC made the judgment that encouraging renewable energies was less important than allowing such out-of-market entrants to depress

capacity prices. Such is FERC's prerogative. That it is unfortunate does not make it arbitrary."). The Court properly deferred to this "juggling act" as within the Commission's discretion. *Id*. (citing *Sacramento*, 616 F.3d at 541-42)).

Here, the Commission weighed the same factors differently, based on record considerations particular to this case. That record showed that any price suppression from out-of-market entry would be limited, but there would be countervailing benefits to allowing those resources to clear the market, including allowing the market to send accurate price signals and thereby avoiding the purchase/construction of excess capacity. Thus, the Commission reasonably balanced the competing factors, and its judgment should not be second-guessed, for "[t]he disputed question here involves both technical understanding and policy judgment. The Commission addressed that issue seriously and carefully, providing reasons in support of its position and responding to the principal alternative advanced." *Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (adding that "[i]t is not our job" to judge whether "FERC made the better call"); *Mobil Oil*, 498 U.S. at 231 ("We are neither inclined nor prepared to second-guess the agency's reasoned determination in this complex area.").

### D. The Commission Did Not Abuse Its Discretion In Declining To Hold A Hearing

Generators next claim that the Commission was required to hold a hearing to resolve the disputed issues of fact in this proceeding. Br. 57-59. But, the

Commission reasonably declined to do so because it was able to resolve the dispute based on the written record. *See* Remand Order PP 70-71, JA 558; Remand Rehearing Order PP 99-100, JA 668-69. Generators have not demonstrated that the Commission abused its discretion in relying on the written record. *See La. Pub. Serv. Comm'n*, 184 F.3d at 895 ("We review a Commission decision to deny an evidentiary hearing for abuse of discretion."); *see also* Remand Rehearing Order P 99, JA 668 (citing cases).

The Commission is not required to hold an evidentiary, trial-type hearing if the disputed issues of material fact "may be adequately resolved on the written record." Remand Rehearing Order P 99, JA 668 (citing, *e.g.*, *Cajun Elec. Power Coop. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994)). Here, the Commission explained that the record is primarily comprised of competing expert predictions of the likely impact of the renewables exemption, and the Commission's decision involved both its own expertise and policy judgment. Remand Rehearing Order P 99, JA 668. These are not matters on which discovery or cross-examination would be useful, and Generators have not shown otherwise. Remand Order P 71, JA 558 (citing *La. Ass'n of Indep. Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1113-15 (D.C. Cir. 1992)).

Rather, Generators rely on *Cajun Electric*, 28 F.3d at 177, where the Court found petitioners' proffer of evidence "raised serious doubts" about the

Commission's determinations. In that case, however, the Court found that the Commission had "not adequately addressed" petitioners' arguments, and that an "evidentiary hearing may shed some light" on the dispute. *Id*. Neither of those findings is warranted here, where the record includes competing expert predictions, and the Commission utilized its own technical expertise and policy judgment to resolve the dispute. *See* Remand Rehearing Order PP 99-100, JA 668-69.

### E. The Exemption Is Subject To Ongoing Review

The Commission recognized that New England's capacity market rules are not carved in stone: the System Operator has committed to monitor load growth and revisit the exemption cap as necessary, and there is an ongoing process that may result in a different mechanism for reconciling state policy goals and the market's function of meeting reliability targets. Remand Rehearing Order PP 28, 74, JA 626, 657 (monitoring); Second Order P 22, JA 504 (citing System Operator Answer at 16, R. 41, JA 416); *see also* Remand Rehearing Order PP 12, 101, JA 617, 669 (noting New England's ongoing stakeholder process for considering other means to accommodate state policy goals within FERC-jurisdictional markets). The record in this case reflects that the Commission has done its best to evaluate the exemption in light of the ever-changing market realities, and that work necessarily continues. The Commission's reliance on both the System Operator's monitoring and the possibility of later changes is appropriate in these

circumstances. *See Elec. Consumers Res. Council*, 407 F.3d at 1239 (deferring to FERC's predictive judgment, based on substantial evidence, that the new rate design will do "more good than harm," where "the Commission will monitor its experiment and review it accordingly").

## III. THE COMMISSION DID NOT DEPART FROM PRECEDENT

### A. The Limited Renewables Exemption Is A Direct Response To Earlier New England Proceedings

Generators claim that the Commission inadequately explained its decision to permit a renewables exemption here, when it declined to require an exemption in earlier New England proceedings. *See* Br. 32-33. To the contrary, the "exemption, along with the other changes proposed [e.g., the sloped demand curve] . . . is consistent with the Commission's guidance to [the System Operator] in possibly developing [an] exemption for renewable resources, and allowing such an exemption is consistent with the Commission's acceptance of a similar exemption in the PJM capacity market." First Order P 81, JA 455; *see also* Remand Order PP 4-8, 67-68, JA 524-27, 556-57; Remand Rehearing Order P 67, JA 652. The orders on review reflect that the System Operator and stakeholders were able to develop an exemption aligned with the Commission's guidance and precedent.

The Commission first addressed the possibility of an exemption from buyer-side market power mitigation for New England renewables in the orders initially approving the minimum offer price rule. *See* Remand Order P 4, JA 524

(discussing Buyer Market Power Order, *supra* p. 12). There, the Commission held that it would not permit a categorical exemption, noting its concern that, "regardless of intent," "uneconomic entry can produce unjust and unreasonable prices by artificially depressing capacity prices." Buyer Market Power Order P 171. The Commission went on, however, and explained that "[p]arties have not provided sufficient specificity to allow [the Commission] to approve an appropriately narrow exemption." *Id.* Nonetheless, the Commission reminded parties of their right to file a complaint, under section 206 of the Federal Power Act, 16 U.S.C. § 824e, to request an exemption. *Id*.

On appeal of the Buyer Market Power Order, this Court addressed arguments in support of a renewables exemption, in conjunction with arguments addressing a separate self-supply exemption. *New England*, 757 F.3d at 295. The Court held that the Commission "reasonably acted to balance competing interests" by "mak[ing] the judgment that encouraging renewable energies was less important than allowing such out-of-market entrants to depress capacity prices." *Id*. Further, the Court found the Commission's "conclusion that certain resources, by definition, depress capacity prices falls within its duty of ensuring that rates are just and reasonable." *Id*. Thus, the Court "defer[red] to the Commission's decision to decline a categorical mitigation exemption" for renewables.

Neither the Buyer Market Power Order nor the Court's decision affirming that order in *New England* can be read to preclude the Commission's approval of a limited renewables exemption on this record in this proceeding. The Buyer Market Power Order provides the reason: In that proceeding, the parties had not presented a specific proposal, and the Commission lacked any factual record on which to consider an exemption. *See* Remand Order P 4, JA 524 (citing Buyer Market Power Order P 171); *see also* Remand Rehearing Order PP 67-68, JA 652-53. And, if anything, the Court's decision in *New England* affirms that the Commission's decision is the result of informed, expert balancing, warranting the Court's deference. *New England*, 757 F.3d at 295 ("Such [a judgment] is FERC's prerogative. That it is unfortunate does not make it arbitrary.").

Generators also allege, Br. 32-33, that the Commission's decision here cannot be reconciled with its decision to deny the New England Committee's 2012 complaint, filed under FPA section 206, 16 U.S.C. § 824e. There, the Committee sought a categorical exemption for all qualifying renewable resources, arguing that without such an exemption customers are required to pay for redundant capacity. *See* Remand Order P 5, JA 525. As it has in the orders on review here, the Commission framed its role as one of balancing two considerations: "The first is its responsibility to promote economically efficient markets and efficient prices, and the second is its interest in accommodating the ability of states to pursue other

legitimate state policy objectives." *Id*. P 6, JA 526 (quoting New England Complaint Order P 35). The Commission acknowledged that it had found a similar exemption just and reasonable in PJM's mid-Atlantic market, but distinguished that circumstance because PJM was using a sloped demand curve (and New England was not, at that time), and because PJM's market is substantially larger than New England's market. *Id*. P 7, JA 526.

The Commission's decision to approve the renewables exemption here is fully consistent with the New England Complaint Order. *See* Remand Rehearing Order PP 67-68, JA 652-53. The System Operator "now has put into place the sloped demand curves both system-wide and for individual zones," thus eliminating that distinction from PJM. *Id*. P 67, JA 652. And "the Commission's earlier concern about the smaller size of the [New England] region is less significant," both because the System Operator has implemented the zonal sloped demand curves and because the 200 MW cap—as opposed to PJM's unlimited exemption—is more appropriate for New England. *Id*. Accordingly, because the narrow exemption proposed by the System Operator and its stakeholders satisfied the concerns articulated in the New England Complaint Order, the Commission has not departed from that precedent without adequate reason.

In addition, the difference in the scope of the burden of proof between sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d, e, supports the

Commission's decision to approve the exemption here, but not in earlier orders. First Order P 86, JA 457; *see also* Remand Rehearing Order P 49, JA 642. In the orders approving renewables exemptions, both in PJM (the mid-Atlantic region) and in the orders here on review, the Commission acted in response to the utility's filing under section 205. *See PJM Interconnection*, 135 FERC ¶ 61,022 at P 1 (2011); First Order P 1, JA 429. Section 205 requires the Commission to find that proposed rate is just and reasonable, "arguably a more modest standard." Remand Rehearing Order P 49, JA 642. By contrast, when the Commission rejected the renewables exemption in the New England Complaint Order, it acted under section 206, 16 U.S.C. § 824e, which involves two steps. *Id*.; s*ee also Emera Maine v. FERC*, 854 F.3d 9, 22 (D.C. Cir. 2017) (addressing the "two-step procedure" required by FPA section 206). First, the Commission must find that the existing capacity market rules are unjust and unreasonable or unduly discriminatory or preferential. *Id*. Only then may the Commission consider whether a new replacement rule is just and reasonable. *Id*.

Contrary to Generators' assertions, Br. 32-33, the Commission does not suggest that there is more than one "just and reasonable" standard, but only that there are two steps under FPA section 206 for the agency (and a complainant, where appropriate) to satisfy. *Emera Maine*, 854 F.3d at 24; *see also New Jersey*, 744 F.3d at 112 (holding that the rights and leeway afforded public utilities under

FPA section 205 supported FERC's decision not to adopt New York rules for the PJM market; "after all, under § 205, these organizations [the regional markets] are largely tasked with coming up with their own rates, rules, and procedures, subject only to FERC's determination that" they are just and reasonable).

### B. There Is No Bright Line Rule Concerning Price Suppression

Generators claim that any level of artificial price suppression is necessarily unjust and unreasonable and therefore violates the Federal Power Act. *See* Br. 26-31. Neither the Commission nor the courts have proscribed such a standard. Rather, as described *supra* Part II.C, courts have affirmed the Commission's approach of balancing the risk of over-mitigation with the risk of under-mitigation in assessing whether mitigation measures are just and reasonable. Here, the Commission recognized the renewable exemption's potential to suppress capacity prices, and based its acceptance of the exemption in part on factors that would limit its price impact. *See* Remand Rehearing Order P 20, JA 621. Balancing customer and generator interests, while taking into account state policies, the Commission found that a narrowly tailored exemption was appropriate to reduce the likelihood that customers will have to pay for redundant capacity. *See id*. P 43, JA 637.

Neither courts nor the Commission have required that market mitigation measures set a "bright line for the amount of artificial price suppression that is or is not acceptable." Remand Order P 39, JA 541; *see also id*. P 33, JA 537. Market-

power mitigation rules are a blend of those that seek to limit both unwarranted price increases and decreases. *See, e.g.*, *New England*, 757 F.3d at 287-88 (discussing need for both buyer- and supplier-side market power mitigation). The Commission has used an approach that balances competing interests, without imposing a bright line—with the Court's approval—for not only buyer-side mitigation measures, but also supplier-side market power mitigation measures. *See id*. at 298 ("FERC, of course, contends that its supplier-side mitigation measure—lowering the dynamic de-list bid threshold—was also striking a balance between interests. We agree."). Indeed, as directly relevant to this case, the Commission has approved other exemptions to the minimum offer price rule, which also theoretically have the potential to suppress prices, in New England, PJM Interconnection (mid-Atlantic), and New York markets. *See* Remand Order P 33, JA 537 (citing cases). *See also New England*, 757 F.3d at 295-97 (affirming exemption of existing resources from minimum offer price rule); *Id*. at 298 (affirming FERC's decision to "err on the side of caution in mitigating import resources," and exempt most imports from the minimum offer price rule where it "was aware of, and considered, the effect such a decision would have on capacity prices"); *New Jersey*, 744 F.3d at 106-107 (affirming FERC's decision to extend PJM's exemption from minimum offer price rule to wind and solar resources); *Id*. at 105 (noting FERC's approval of self-supply exemption).

The Commission's orders on review here continue to recognize that exemptions to the minimum offer price rule can suppress prices, regardless of intent. Remand Rehearing Order PP 48, 52, JA 641, 645; *see also* Remand Order P 36, JA 539; *see also id*. PP 4, 68, JA 524, 556. As Generators stress, Br. 28-29, courts have recognized the same economic principle, and agreed with the Commission that it is obligated to act to ensure that prices remain just and reasonable. *See New England*, 757 F.3d at 291 (recognizing that "uneconomic entry, regardless of resource and regardless of intent, "*can* produce unjust and unreasonable prices by artificially depressing capacity prices") (emphasis added). To that end, the Commission acts by "curbing or mitigating buyer-side market power" (and supplier-side market power). *Id*. In keeping with this, the Commission has stated that it would consider renewables exemptions on a case-by-case basis, as it has here and in other regions. *See* Remand Order P 68, JA 556; *see also* Remand Rehearing Order P 52, JA 645.

To be clear, there is no dispute that the qualifying renewable resources have "limited or no ability to exercise buyer-side market power to artificially suppress" capacity market prices. Remand Order P 33, JA 537 (citing cases). Nonetheless, the absolute nature of Generators' argument evokes a similar argument rejected by the Third Circuit in *New Jersey*. 744 F.3d at 106-07. There, the proponents of certain gas-fired resources argued that PJM's expansion of its exemption to include

not only nuclear, hydroelectric and coal resources, but also wind and solar resources, unduly discriminated against natural gas resources. *See id*. at 106. The court of appeals rejected that argument and affirmed the Commission's finding that "the exempted resources are not similar to gas-fired resources; accordingly, the [rule's] disparate treatment of the various types of capacity resources does not constitute undue discrimination." *Id*. at 107. Along the same lines here, the Commission found it "reasonable . . . to provide a limited exemption for state-subsidized resources that are not intended to suppress capacity prices (even if they may do so), so that customers may avoid having to pay for duplicative capacity." Remand Rehearing Order P 48, JA 642. Otherwise, "the capacity market would signal that new resources are needed when, in actual fact, they are not." *Id*.

In any event, to the extent Generators view precedent as barring all uneconomic entry into capacity markets (even where, as here, the price impact is limited, and the Commission has found such entry, on balance, warranted), the Commission appropriately recognized that its position has, much like the markets it regulates, changed over time. *See* Remand Order P 68, JA 557; Remand Rehearing Order PP 43, 58, JA 637, 649. Generators claim that the Commission did not provide a principled basis for this change, Br. 30, but in fact the Commission explained that states have "continue[d] to support the development of renewable resources, which customers pay for through out-of-market

mechanisms." Remand Rehearing Order P 43, JA 637. The Commission pointed to data from the U.S. Department of Energy, showing that the "total Renewable Portfolio Standard obligation . . . across all New England" "grew by 34 percent between 2010 and 2014, or six percent annually." *Id*. (citing U.S. Dep't of Energy, RPS Compliance Data (Feb. 2016), https://emp.lbl.gov/projects/renewables-portfolio (periodically updated data files)); *see also id*. ("in the five years since the Commission accepted the minimum offer price rule to mitigate buyer-side market power, New England states have continued to intensify their renewable resource development") (citing ISO New England Inc., 2016 Regional Electricity Outlook (Mar. 2016), https://www.iso-ne.com/static-assets/documents/2016/03/2016_reo.pdf ). (Similarly, Generators attest to continued renewables growth in New England, Br. 48.)

Taking the intensifying development of renewable resources in New England into account, the "Commission, in balancing generators' and customers' interests, reasonably recognized how these developments, over time, have tipped the scales." Remand Rehearing Order P 43, JA 637. In this light, the Commission reasonably placed more weight on the risk of requiring customers to pay for increasing amounts of duplicative or "extra" capacity, leading it to allow the narrowly tailored exemption at this time. *Id*. The Commission's explanation for how it balances customer and generator interests is more than adequate. *See FCC*

*v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (holding that an agency need only "display awareness that it is changing position" and "show that there are good reasons for the new policy"); *see also South Carolina*, 762 F.3d at 95 ("Even if we were to view the Commission's alteration of what constitutes comparable service under the [tariff] as a change in course, however, the agency acknowledged that it was altering the content of the reciprocal obligations . . . [and] provided an adequate justification for that change . . . .").

## CONCLUSION

For the foregoing reasons, the petition for review should be denied and the Commission's orders should be affirmed.

Respectfully submitted,

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Initial Brief: November 21, 2017
Final Brief: February 1, 2018

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,790 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

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February 1, 2018

# ADDENDUM

## STATUTES

## TABLE OF CONTENTS

**STATUTES**: **PAGE**

Federal Power Act

Section 201, 16 U.S.C. § 824 ..... A-1

Section 205, 16 U.S.C. § 824d ..... A-3

Section 206, 16 U.S.C. § 824e..... A-4

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

**(b) Alternative prescriptions**

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

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

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

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

(i) cost significantly less to implement; or

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

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

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

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

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

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

### § 824. Declaration of policy; application of subchapter

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

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

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

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

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

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

**(c) Electric energy in interstate commerce**

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

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

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

**(e) "Public utility" defined**

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

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

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

**(g) Books and records**

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

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

(June 10, 1920, ch. 285, pt. II, §201, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 847; amended Pub. L. 95–617, title II, §204(b), Nov. 9, 1978, 92 Stat. 3140; Pub. L. 102–486, title VII, §714, Oct. 24, 1992, 106 Stat. 2911; Pub. L. 109–58, title XII, §§1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985; Pub. L. 114–94, div. F, §61003(b), Dec. 4, 2015, 129 Stat. 1778.)

REFERENCES IN TEXT

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

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

AMENDMENTS

2015—Subsec. (b)(2). Pub. L. 114–94, §61003(b)(1), inserted ''824*o*–1,'' after ''824*o*,'' in two places.

Subsec. (e). Pub. L. 114–94, §61003(b)(2), inserted ''824*o*–1,'' after ''824*o*,''.

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

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

Subsec. (f). Pub. L. 109–58, §1291(c), which directed amendment of subsec. (f) by substituting ''political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of

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

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

**(a) Just and reasonable rates**

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

**(b) Preference or advantage unlawful**

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

**(c) Schedules**

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

**(d) Notice required for rate changes**

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a reg-

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

**(d) Investigation of costs**

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

**(e) Short-term sales**

(1) In this subsection:

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

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

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

(3) This section shall not apply to—

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

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

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

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

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

REFERENCES IN TEXT

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

AMENDMENTS

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

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

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

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

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

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

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–473, § 4, Oct. 6, 1988, 102 Stat. 2300, provided that: ''The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such

[1] See References in Text note below.

***NextEra Energy Resources, et al. v. FERC*** **Docket Nos. ER14-1639*, et al.***
**D.C. Cir. No. 17-1110*, et al.***

## CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 1st day of February, 2018, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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