ORAL ARGUMENT NOT YET SCHEDULED

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

NEXTERA ENERGY RESOURCES, LLC, *et al.*, Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION, Respondent.
Case No. 17-1110

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

BRIEF OF PETITIONERS NEXTERA ENERGY RESOURCES, LLC, THE NRG COMPANIES, AND THE PSEG COMPANIES

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

I. PARTIES

The parties to this proceeding are as follows:

A. Petitioners

The Petitioners in this case are NextEra Energy Resources, LLC ("NextEra"), NRG Power Marketing LLC, GenOn Energy Management, LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, NRG Canal LLC and Energy Curtailment Specialists, Inc. (the "NRG Companies"), and PSEG Power LLC, PSEG Energy Resources & Trade LLC and PSEG Power Connecticut LLC (the "PSEG Companies").

B. Respondent

The Respondent in this proceeding is the Federal Energy Regulatory Commission ("FERC" or "the Commission").

C. Intervenors

The intervenors in this case are:

CPV Power Development, Inc.
Entergy Nuclear Power Marketing, LLC
ISO New England Inc.
New Hampshire Electric Cooperative, Inc.
New England Power Pool Participants Committee
New England States Committee on Electricity, Inc.
State of Connecticut Public Utilities Regulatory Authority

D. Parties Below

The parties in the Commission proceeding below included the following:

Belmont Municipal Light Department
Braintree Electric Light Department
Brookfield Energy Marketing LP
Calpine Corporation
Champlain VT, LLC d/b/a TDI New England
Concord Municipal Light Plant
Connecticut Jet Power LLC
Connecticut Light and Power Company
Connecticut Public Utilities Regulatory Authority
Consolidated Edison Energy, Inc.
Consolidated Edison Solutions, Inc.
CPV Power Development, Inc.
Devon Power LLC
Dominion Energy Manchester Street, Inc.
Dominion Energy Marketing, Inc.
Dominion Nuclear Connecticut, Inc.
Dominion Resources Services, Inc.
Electric Power Supply Association
Emera Energy Services, Inc.
Energy Curtailment Specialists, Inc.
Energy Management, Inc.
Entergy Nuclear Power Marketing, LLC
Exelon Corporation
First Wind Energy, LLC
GDF Suez Energy Marketing NA, Inc.
GDF Suez Energy North America, Inc.
GenOn Energy Management, LLC
Georgetown Municipal Light Department
Granite Ridge Energy, LLC
Groveland Electric Light Department
Industrial Energy Consumer Group
Hingham Municipal Lighting Plant
Littleton Electric Light and Water Department
Long Island Lighting Company d/b/a Power Supply Long Island
Long Island Power Authority
Maine Public Utilities Commission

Massachusetts Municipal Wholesale Electric Company
Merrimac Municipal Light Department
Middleton Electric Light Department
Middletown Power LLC
Millennium Power Partners, L.P.
Montville Power LLC
National Grid
NEPOOL Industrial Customer Coalition
New England Power Generators Association, Inc.
New England States Committee on Electricity
New Hampshire Electric Cooperative, Inc.
NextEra Energy Resources, LLC
Northeast Utilities Service Company
Norwalk Power LLC
NRG Canal LLC
NRG Power Marketing LLC
NSTAR Electric Company
Office of the Attorney General of the Commonwealth of Massachusetts
PSEG Energy Resources & Trade LLC
PSEG Power Connecticut LLC
PSEG Power LLC
Public Service Company of New Hampshire
Rhode Island Division of Public Utilities and Carriers
Rowley Municipal Lighting Plant
Taunton Municipal Lighting Plant
TransCanada Hydro Northeast Inc.
TransCanada Power Marketing Ltd.
United Illuminating Company
Vermont Department of Public Service
Vermont Public Service Board
Wellesley Municipal Light Plant
Western Massachusetts Electric Company

II. RULINGS UNDER REVIEW

Petitioners seek review of the following orders:

A. *ISO New England Inc. and New England Power Pool Participants Committee*, Docket No. ER14-1639-000, Order Accepting Tariff Revisions, 147 FERC ¶61,173 (May 30, 2014), JA____-__;

B. *ISO New England Inc. and New England Power Pool Participants Committee*, Docket No. ER14-1639-002, Letter to James H. Douglass, ISO New England Inc. Referencing Compliance Filing Concerning the Limited Exemption from Offer Review Trigger Price Review for Renewable Technology Resources (Nov. 13, 2014) (unpublished delegated letter order), JA____-__;

C. *ISO New England Inc. and New England Power Pool Participants Committee*, Docket No. ER14-1639-001, Order Denying Rehearing, Providing Clarification and Directing Further Compliance Filing, 150 FERC ¶61,065 (Jan. 30, 2015), JA____-__;

D. *ISO New England Inc. and New England Power Pool Participants Committee*, Docket No. ER14-1639-003, Compliance Filing Concerning the Renewable Technology Resource Exemption and the New Resource Price Lock-In Election (May 1, 2015) (unpublished delegated letter order);

E. *ISO New England Inc. and New England Power Pool Participants Committee*, Docket No. ER14-1639-004, Order on Remand, 155 FERC ¶61,023 (Apr. 8, 2016); and

F. *ISO New England Inc. and New England Power Pool Participants Committee*, Docket No. ER14-1639-005, Order on Rehearing, 158 FERC ¶61,138 (Feb. 3, 2017).

III. RELATED CASES

This case is back before the Court for a second time following FERC's request for a voluntary remand of a prior petition for review. *See NextEra Energy Resources, LLC v. FERC*, No. 15-1070 (D.C. Cir. Dec. 1, 2015).

Counsel for petitioners are not aware of any related proceedings challenging the orders on review before this Court or any other court.

Respectfully submitted,

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September 8, 2017

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of this Court, NextEra Energy Resources, LLC ("NextEra"), NRG Power Marketing LLC, GenOn Energy Management, LLC, Connecticut Jet Power LLC, Devon Power LLC, Middletown Power LLC, Montville Power LLC, Norwalk Power LLC, NRG Canal LLC and Energy Curtailment Specialists, Inc. (the "NRG Companies"), and PSEG Power LLC ("PSEG Power"), PSEG Energy Resources & Trade LLC ("PSEG ER&T") and PSEG Power Connecticut LLC ("PSEG Power CT") (collectively, the "PSEG Companies"), hereby provide their corporate disclosure statements as the petitioners in this case.

NextEra

NextEra Energy Resources, LLC, is the largest generator of renewable energy from the wind and sun in the world, and its subsidiaries are indirect subsidiaries of NextEra Energy, Inc., a publicly-held energy and utility holding company. In addition, ownership interests in certain NextEra Energy, Inc.'s subsidiaries are held by NextEra Energy Partners, LP, a publicly-held energy and utility holding company limited partnership formed by NextEra Energy, Inc. The following subsidiaries of NextEra Energy, Inc. have issued publicly-held securities: Florida Power & Light Company, FPL Recovery Funding LLC,

NextEra Energy Partners, LP and NextEra Energy Capital Holdings, Inc. No other parents, affiliates or subsidiaries of NextEra Energy Resources, LLC are publicly-held or publicly-traded. No publicly-held company can exercise 10% or greater of the voting power in NextEra Energy, Inc. or NextEra Energy Partners, LP.

The NRG Companies

NRG Power Marketing LLC is a Delaware limited liability company with its principal office in Princeton, New Jersey, that engages in electric power marketing by placing market bids and entering into bilateral contracts on behalf of generating facilities for the supply and purchase of energy throughout the United States. The other NRG Companies are each Delaware limited liability companies (with their principal offices also located in Princeton, New Jersey) that own electric generation facilities operating within the service territory of the New England Independent System Operator. The NRG Companies are subsidiaries of NRG Energy, Inc., a publicly-held corporation. At this time, only NRG Energy, Inc. (NYSE: NRG) has issued shares to the public. The NRG Companies have not issued shares to the public. No publicly-held company has a 10% or greater ownership interest in NRG Energy, Inc.

The PSEG Companies

The PSEG Companies are each wholly owned, direct and indirect subsidiaries of Public Service Enterprise Group Incorporated ("PSEG"). The

principal and executive offices of PSEG, PSEG Power, PSEG ER&T and PSEG Power CT are located at 80 Park Plaza, Newark, New Jersey 07102.

PSEG is an exempt public utility holding company incorporated under the laws of the State of New Jersey. PSEG subsidiaries are engaged in, among other things, the generation of electric energy, and the transmission, distribution and sale of electricity and natural gas.

PSEG Power, a Delaware limited liability company, is a wholesale energy supply company that integrates its generation asset operations with its wholesale energy, fuel supply, energy trading and marketing, and risk management functions through four principal subsidiaries: (i) PSEG Nuclear LLC ("PSEG Nuclear"), which owns and operates nuclear generating stations; (ii) PSEG Fossil LLC ("PSEG Fossil"), which develops, owns, and operates domestic fossil-fuel fired and other non-nuclear generating stations; (iii) PSEG Power Ventures LLC, which develops utility-scale solar facilities outside Public Service Electric and Gas Company's ("PSE&G") service territory through its subsidiary PSEG Solar Source LLC and operates the Kalaeloa Cogeneration Plant; and (iv) PSEG ER&T, which is described below.

PSEG ER&T, a Delaware limited liability company and a direct subsidiary of PSEG Power, sells power and energy and certain ancillary services at market-based rates. PSEG ER&T markets the capacity and production of PSEG Nuclear's

and PSEG Fossil's generating stations, manages the commodity price risks and market risks related to generation, and provides gas supply services. PSEG ER&T is engaged in extensive asset-based energy trading operations throughout the Northeast.

PSEG Power CT, a Connecticut limited liability company and a direct subsidiary of PSEG Fossil, owns two plants located in Connecticut: (i) the Bridgeport Harbor Generating Station; and (ii) the New Haven Harbor Generating Station (collectively the "PSEG Power CT Generation Assets") with a total capacity of nearly 1,000 MWs. The PSEG Power CT Generation Assets are interconnected with the transmission system under the control of ISO New England Inc.

An affiliate of the PSEG Companies, PSE&G, is a public utility organized under the laws of the State of New Jersey. PSE&G is engaged principally in the transmission of electricity and distribution of electricity and natural gas in certain areas of New Jersey, serving approximately 1.8 million gas customers and 2.2 million electric customers in an area having a population in excess of 5.5 million persons and which extends from the Hudson River opposite New York City, south to the Delaware River at Trenton and west to Camden, New Jersey. PSE&G owns transmission facilities in PJM Interconnection, L.L.C.

PSEG has publicly-held common stock and debt securities outstanding. PSEG Power has publicly-held debt securities outstanding. No parent company or other publicly-held company has a 10% or greater ownership interest in PSEG.

Respectfully submitted,

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September 18, 2017

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*Authorities upon which we chiefly rely are marked with an asterisk.

GLOSSARY

Commission	Federal Energy Regulatory Commission, the Respondent
FERC	Federal Energy Regulatory Commission, the Respondent
FPA	Federal Power Act
ICAP	Installed Capacity
ICR	Installed Capacity Requirement
ISO-NE	ISO New England Inc.
LOLE	Loss of Load Expectation
MW	Megawatt
Net ICR or NICR	Net Installed Capacity Requirement
NYISO	New York Independent System Operator, Inc.
Order	*ISO New England Inc.*, 147 FERC ¶61,173 (2014), JA____-__.
PJM	PJM Interconnection, L.L.C.
Rehearing Order	*ISO New England Inc.*, 150 FERC ¶61,065 (2015), JA____-__.
Remand Order	*ISO New England Inc.*, 155 FERC ¶61,023 (2016), JA____-__.
Remand Rehearing Order	*ISO New England Inc.*, 158 FERC ¶61,138 (2017), JA____-__.

JURISDICTIONAL STATEMENT

On voluntary remand from a prior petition for review, the Federal Energy Regulatory Commission ("FERC") affirmed orders that exempt certain renewable electric generation resources from minimum offer price rules governing new entry in the ISO New England Inc. ("ISO-NE") Forward Capacity Market, thereby allowing up to 200 MW of new capacity per year (and up to 600 MW in any one year) subsidized by out-of-market revenues to offer below-market prices. *See ISO New England Inc.*, 147 FERC ¶61,173 (2014) ("Order"), JA____, *reh'g denied*, 150 FERC ¶61,065 (2015) ("Rehearing Order"), JA____, *remanded sub nom. NextEra Energy Res., LLC v. FERC*, No. 15-1070 (D.C. Cir. Dec. 1, 2015), *order on remand, ISO New England Inc.*, 155 FERC ¶61,023 (2016) ("Remand Order"), JA____, *rehearing denied*, 158 FERC ¶61,138 (2017) ("Remand Rehearing Order"), JA____.

FERC's orders are final and aggrieve all competitive capacity suppliers in New England, including petitioners, by artificially suppressing capacity prices. Petitioners timely requested rehearing at FERC on June 30, 2014 and May 9, 2016. Petitioners timely petitioned for judicial review on March 30, 2015 and April 3, 2017. This Court has jurisdiction to review the orders under Federal Power Act ("FPA") section 313(b), 16 U.S.C. § 825*l*(b).

STATEMENT OF ISSUES

1. Whether the Renewable Technology Resource exemption causes unjust, unreasonable, and unduly discriminatory or preferential rates under FPA section 205, 16 U.S.C. § 824d(a)-(b), by artificially reducing capacity prices and shifting the costs of subsidized new entry to competitive generators.

2. Whether FERC's orders are arbitrary and capricious, contrary to law, unsupported by substantial evidence, or otherwise inconsistent with the requirements of reasoned decisionmaking under the Administrative Procedure Act, 5 U.S.C. § 706(2), because:

a. FERC erroneously found the renewable exemption would not cause significant artificial price suppression, contrary to record evidence;

b. FERC failed to provide a reasoned explanation for its departure from precedent condemning artificial price suppression caused by out-of-market entry, contrary to the core purpose of the New England Forward Capacity Market; and

c. FERC failed to hold an evidentiary hearing to resolve genuine issues of disputed fact.

STATUTORY ADDENDUM

An addendum attached to this brief reproduces the statutory provisions discussed herein.

STATEMENT OF FACTS

I. THE NEW ENGLAND FORWARD CAPACITY MARKET

ISO-NE operates New England's transmission system and administers the region's wholesale electricity markets. *Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 467 n.2 (D.C. Cir. 2008) ("*MPUC*"), *rev'd in part not relevant*, *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm'n*, 558 U.S. 165 (2010). This case concerns the rules governing ISO-NE's Forward Capacity Market, which this Court has examined several times.

"'Capacity' is not electricity itself but the ability to produce it when necessary." *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009) ("*CTDPUC*"). Load serving entities—that is, utilities who provide electricity to retail consumers—must purchase sufficient capacity to ensure they are able to serve peak demand. *Id.* "In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases from a generator an option to buy a quantity of energy, rather than purchasing the energy itself. To maintain the reliability of the grid, electricity providers generally purchase more capacity, *i.e.*, rights to acquire energy, than necessary to meet their customers' anticipated demand." *NRG Power Mktg.*, 558 U.S. at 168-69.

The New England Forward Capacity Market was established by a settlement FERC approved in 2006 to remedy chronically-low prices that forced ISO-NE to

enter reliability must-run contracts with generators to retain sufficient electric supplies. *MPUC*, 520 F.3d at 467-69; *CTDPUC*, 569 F.3d 479-80. The solution was to create a competitive mechanism to set prices that reflect the true Cost of New Entry, which "ensure[s] both that existing generators are adequately compensated and that prices support new entry when additional capacity is needed." *MPUC*, 520 F.3d at 473; *see CTDPUC*, 569 F.3d at 480 (same).

ISO-NE administers Forward Capacity Auctions in which resources compete to provide capacity three years before the relevant delivery year, thus allowing time to construct new resources to compete with existing ones. Rehearing Order P 2, JA___. This Court described the basic mechanics of the descending-clock auction in prior cases. *See CTDPUC*, 569 F.3d at 480; *New England Power Generators Ass'n v. FERC*, 757 F.3d 283, 287 (D.C. Cir. 2014) ("*NEPGA*"). The orders on review changed those mechanics by substituting a sloped demand curve for a vertical demand curve, and also created the exemption for renewable resources that is the subject of this case. *See infra* 12-14.

"The purpose of the New England [Forward Capacity Market] is to attract and retain sufficient capacity to maintain ISO-NE's Installed Capacity Requirement, and to do so, [Forward Capacity Market] capacity prices will need to average out over time to the cost of new entry." *ISO New England Inc.*, 125 FERC ¶61,102 at P 43 (2008); *accord*, *e.g.*, *id.* at P 77 ("Over the long run, the average

price for capacity should reflect [Cost of New Entry], in order to attract new entry needed for reliability."); *see NEPGA*, 757 F.3d at 287 (explaining how this "pricing scheme allows for the market to signal its need for additional electrical generation, while enabling generators to recover their costs").

The other centralized capacity markets FERC regulates—including the New York Independent System Operator, Inc. ("NYISO") and the vast multi-state region operated by PJM Interconnection, L.L.C. ("PJM")—were designed to achieve the same purpose: to procure sufficient capacity at a price equal to the net cost of new entry. *See Centralized Capacity Mkt. Design Elements*, Docket No. AD13-7, Commission Staff Report at 7 (Aug. 23, 2013); *see, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 99 (2d Cir. 2015) (describing NYISO); *PJM Interconnection, L.L.C.*, 128 FERC ¶61,157 at P 13 (2009) (describing PJM).

Another common design feature of organized capacity markets is location-based pricing that signals where capacity should enter or exit by setting rates that reflect the need for generation in particular areas. *See, e.g.*, *Cent. Hudson*, 783 F.3d 9 at 99; *PJM Interconnection, L.L.C.*, 119 FERC ¶61,318 at P 76 (2007). Thus, like other markets, New England is divided into Local Capacity Zones "and the amount of capacity needed within a given capacity zone is the Local Sourcing Requirement for that zone." Rehearing Order P 2, JA____.

II. BUYER-SIDE MARKET POWER AND UNECONOMIC ENTRY

A. Mitigation of Buyer-Side Market Power in New England

Mitigating the exercise of buyer-side market power has been an important feature of the Forward Capacity Market since its inception. *See NEPGA*, 757 F.3d at 287. Buyer-side market power is manifested as "uneconomic entry"—*i.e.*, entry at a price below the true cost of new entry—through "self-supplied and state-sponsored resources." *Id.* at 294. When utilities that control generation enter capacity auctions as suppliers, they "may not have an incentive to submit bids that reflect their true cost of new entry." *Devon Power, LLC*, 115 FERC ¶61,340 at P 113 (2006). Similarly, new suppliers that receive out-of-market revenues through state-subsidized contracts "have no interest in compensatory auction prices because their revenues have already been determined by contract." *Id.* In both circumstances, utilities and state regulators have an "interest in depressing the auction price" because even small increments of out-of-market entry can "reduce the prices they must pay for existing capacity procured in the auction." *Id.* "Out-of-market resources—whether self-supplied, state-sponsored, or otherwise—directly impact the price at which the Forward Capacity Market auction clears." *NEPGA*, 757 F.3d at 290. Thus, FERC and this Court have "found that uneconomic entry, regardless of resource and regardless of intent, 'can produce

unjust and unreasonable prices by artificially depressing capacity prices.'" *Id.* at 290-91 (quoting *ISO New England Inc.*, 135 FERC ¶61,029 at P 170 (2011)).

ISO-NE's original mechanism for controlling buyer-side market power was the Alternative Price Rule, but that rule failed to prevent "the entrance of significant amounts of out-of-market capacity," because it did not prevent uneconomic entry "to replace existing capacity entering retirement" or in a "quantity [] less than the amount of new capacity needed, even though in both cases [out-of-market] capacity can substantially lower prices." *Id.* at 292-93 (citations omitted).

To correct these problems, FERC ordered major revisions to ISO-NE's tariff, which this Court affirmed in *NEPGA*. Specifically, FERC "ordered ISO-NE to develop a minimum-offer price rule ('MOPR' or 'offer-floor mitigation') specific to resources' asset class" and required ISO-NE "to develop a mitigation regime that relies on these benchmarks." *Id.* at 288-89 (summarizing proceedings). Under the reformed rule, "a new resource must generally offer at its Offer Review Trigger Price, which is intended to represent the costs of each resource type, unless the resource receives approval from the Internal Market Monitor prior to the auction to offer at a lower price" and "must provide cost support for an offer below the relevant Offer Review Trigger Price to enable the ISO-NE Internal Market

Monitor to determine if the offer is consistent with the estimated costs of that particular resource." *ISO New England Inc.*, 149 FERC ¶61,227 at P 4 (2014).

FERC rejected claims that "some resources—those which are self-supplied and those which are state-sponsored—should be categorically exempt." *NEPGA*, 757 F.3d at 294. "FERC specifically found that '[out-of-market] capacity suppresses prices regardless of intent,'" *id.* at 292 (quoting 135 FERC ¶61,029 at P 170), and thus rejected "the states' request for a categorical exemption for state-sponsored resources, which [the states argued] are unlikely to be used for the purpose of suppressing capacity prices," *id.* at 294. FERC further held that designating uneconomic resources as "self supply" effectively permitted them to enter the market at zero price, thus displacing competitive resources from the market, which this Court described as "definitional market distortion in favor of buyers." *Id.* Moreover, contrary to the orders on review here, FERC declined to create an exception for renewable resources: "FERC made the judgment that encouraging renewable energies was less important than allowing such out-of-market entrants to depress capacity prices." *Id.* at 295.

B. Mitigation of Buyer-Side Market Power in New York and PJM

New England was hardly alone in confronting artificial price suppression—the same buyer-side market power problems have required correction through minimum-offer price reforms to prevent uneconomic entry in New York and PJM.

See N.J. Bd. of Pub. Utils. v. FERC, 744 F.3d 74 (3d Cir. 2014) ("*NJBPU*") (affirming PJM's elimination of blanket exemptions for new state-mandated and self-supply resources); *TC Ravenswood LLC v. FERC*, 705 F.3d 474, 476 (D.C. Cir. 2013) (describing NYISO's offer-floor mechanism). FERC's orders addressing buyer-side market power in those markets track the contemporaneous New England orders affirmed in *NEPGA*.

For example, in New York, FERC found buyer-side controls cannot be limited to "net buyers" because "all uneconomic entry has the effect of depressing prices below the competitive level." *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶61,301 at P 29 (2008), *cited in NEPGA*, 757 F.3d at 292. FERC rejected requests to exempt New York City because that "would lead to artificially depressed capacity prices" and "caus[e] existing generators to be under-compensated." *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶61,211 at P 110 (2008).

Like ISO-NE, PJM's capacity market included a minimum offer price rule from the outset, but PJM expressly exempted "resources that were built pursuant to a state mandate." *NJBPU*, 744 F.3d at 87. However, FERC eliminated PJM's state mandate exemption to prevent market-wide artificial price suppression when New Jersey and Maryland ordered their utilities to enter capacity contracts with new gas-fired resources, who were paid the difference between a price set by the states and the price set in PJM's capacity auctions. *See id.* at 87-88. FERC held

"there is no valid state interest in ensuring that uneconomic [resources] can submit below-cost offers into the [PJM capacity] auction." *PJM Interconnection, L.L.C.*, 135 FERC ¶61,022 at P 142, *reh'g denied*, 137 FERC ¶61,145 at PP 3, 96 (2011).

The Third Circuit affirmed, accepting FERC's explanation that "[b]ecause below-cost entry suppresses capacity prices," FERC was "statutorily mandated to protect the [PJM capacity market] against the effects of such entry." *NJBPU*, 744 F.3d at 100 (quoting 135 FERC ¶61,022 at P 143). The intent of state and local policies is not relevant: FERC is "forced to act, however, when subsidized entry supported by one state's or locality's policies has the effect of disrupting the competitive price signals that PJM's [capacity market] is designed to produce, and that PJM as a whole, including other states, rely on to attract sufficient capacity." *Id.* at 101 (quoting 137 FERC ¶61,145 at P 3); *accord id.* at 98 n.24. The Third Circuit adopted this Court's holding that states are "free to make their own decisions" regarding capacity resources, "but they 'will appropriately bear the costs of [those] decision[s],' including possibly having to pay twice for capacity." *Id*. at 97 (quoting *CTDPUC*, 569 F.3d at 481).[1]

[1] The state contracts at issue in *NJBPU* were also found preempted under the FPA. *See Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016); *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476, 479 (4th Cir. 2014); *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 246, 255 (3d Cir. 2014). Those decisions, which spawned cases now pending in other courts, do not squarely govern this case because they address what the FPA forbids states to do, rather than what the FPA obliges FERC to do. However, the Supreme Court quoted the same FERC orders recounted in

Unlike ISO-NE, PJM's Minimum Offer Price Rule focuses on gas-fired resources: it does not govern hydroelectric, nuclear, or coal facilities (because they are large, expensive, and take much longer to build) or renewable resources (because they are too small to affect a market that large).[2] *Id.* at 106-07.

C. The NESCOE Order

In December 2012—as briefing in *NEPGA* ended—the New England States Committee on Electricity filed a complaint arguing that ISO-NE's capacity market rules "undermine state laws supporting the development of renewable resources" by requiring "over-procurement of capacity" and proposed an exemption for renewable resources of 225 MW per year. *New England States Comm. on Elec. v. ISO New England Inc.*, 142 FERC ¶61,108 at PP 8, 13-14 (2013) ("*NESCOE*"), *reh'g denied*, 151 FERC ¶61,056 (2015). The Committee claimed contracts for "renewable resources are not an intentional exercise of buyer-side market power," *id.* at P 11, and "any incidental price suppression would be limited," *id.* at P 15.

FERC denied the complaint. It found the Committee "failed to provide any evidentiary support for [its] claim" that a renewable resource exemption would

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NJPBU, including the discussion adopting *CTDPUC*, to describe FERC's statutory role in responding to state subsidies and capacity preferences. *See Hughes*, 136 S. Ct. at 1296.

[2] PJM's peak demand (165,492 MW) is over five times greater than ISO-NE's (28,130 MW). *See* https://www.ferc.gov/market-oversight/mkt-electric/pjm/elec-pjm-glance.pdf; https://www.ferc.gov/market-oversight/mkt-electric/new-england/elec-ne-glance.pdf.

"have a limited price-suppression impact." *Id.* at P 34. FERC also rejected the over-procurement argument, agreeing with ISO-NE that "'if the states choose to build uneconomic resources . . . to further various policy interests, the states, not the [Forward Capacity Market] are responsible for procuring redundant capacity.'" *Id.* And FERC rejected the State Committee's comparison with PJM, which does not require price mitigation for renewable resources:

> Exempting renewables whose costs exceed the market price would result in the uneconomic entry of renewables and thereby reduce capacity prices. The effect of an exemption for renewables would likely be much greater in New England than in PJM. . . . because the ISO-NE capacity market relies on a vertical demand curve [and] the New England market is substantially smaller than the PJM market.

Id. at P 35. "Any new proposal," FERC held, "must do more than rely on findings specific to PJM and address the above-described characteristic of ISO-NE's market." *Id.* at P 37.

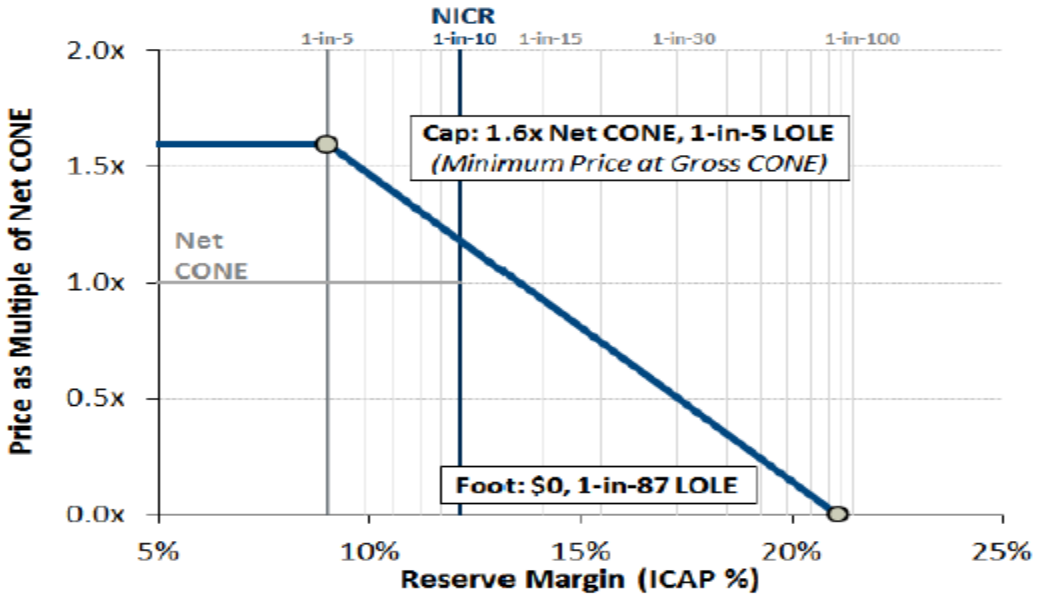
III. THE PROCEEDINGS BELOW

FERC directed ISO-NE to change its Forward Capacity Auction mechanism by replacing the vertical demand curve with a sloped demand curve before the ninth auction in February 2015. *ISO New England Inc.*, 146 FERC ¶61,038 at P 30 (2014). The purpose of this change was to allow the auction to set "a uniform clearing price rather than two separate prices (one for new resources and one for existing resources)." *Id.* P 30 n.41. ISO-NE timely filed a system-wide sloped demand curve on April 1, 2014, but failed to develop zonal demand curves, which

it committed to implement before the tenth auction in 2016. Transmittal Letter 2-3, JA____-__.

The system-wide sloped demand curve reflects the changing value of capacity as a function of the Net Cost of New Entry ("Net CONE") and Loss of Load Expectation ("LOLE")—*i.e.*, the probability of a blackout, measured against the industry standard of one event in ten years—as Installed Capacity ("ICAP") increases and the system becomes more reliable. The chart below contrasts the sloped demand curve with a vertical demand curve at the Net Installed Capacity Requirement ("Net ICR" or "NICR"):

Figure 1
ISO New England Proposed System Demand Curve



Notes:
Reserve Margin quantities as a percentage of ICAP are based on FCA7. See ISO-NE, Summary of Historical ICR Values, posted at: http://iso-ne.com/markets/othrmkts_data/fcm/doc/summary_of_icr_values%20expanded.xls

Id., Newell/Spees Test. 5, JA____.

Although FERC's order directing ISO-NE to submit a sloped demand curve nowhere mentioned renewable resources, ISO-NE also proposed a Renewable Technology Resource exemption that would allow up to 200 MW of explicitly subsidized renewable resources to enter the market each year and then carry forward any unused portion of that allowance up to 600 MW in a single auction. *Id.* at 12 & n.42, JA____.[3] The 200 MW annual allowance reflected ISO-NE's estimate of average annual load growth (*i.e.*, increased demand) of 189 MW plus a small reserve margin. *See id.* at 13, JA____; Ethier Test. 41:5-9, JA____. The exemption has no sunset provision and applies to any resources that:

> (1) receive an out-of-market revenue source supported by a state- or federally-regulated rate, charge or other regulated cost recovery mechanism, and; (2) qualify as a renewable or alternative energy generating resource under any New England state's mandated renewable or alternative energy portfolio standards or, in states without a standard, qualify under that state's renewable energy goals as a renewable resource.

Ethier Test. 37:11-17, JA____; *see* ISO-NE Tariff § III.13.1.1.1.7, JA____.

ISO-NE described the exemption as "a reasonable means of accommodating legitimate state policies that favor renewable resources and that are not intended to suppress market-clearing prices, while being sufficiently limited to alleviate design

[3] The exemption quantity is based on the Qualified Capacity a unit can consistently provide. *See* ISO-NE Tariff § III.13.1.1.2.2.6, JA____. In ISO-NE, "the capacity value of wind and solar resources is approximately 20 percent of nameplate capacity," so the 200 MW exemption represents approximately "1000 MW of renewable nameplate capacity." Remand Order P 43, JA____.

concerns." Transmittal Letter 12, JA____. However, because ISO-NE proposed the exemption very late in the stakeholder process, ISO-NE conceded its demand curve modeling analysis did not include the renewable exemption. ISO-NE Answer 16, JA____.

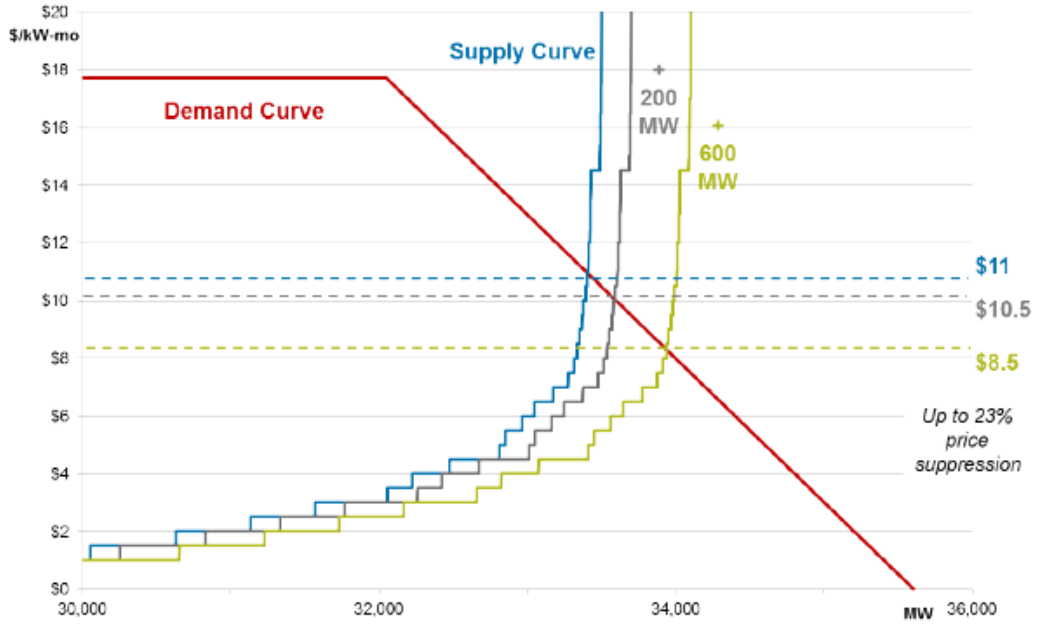
Petitioners protested the Renewable Technology Resource exemption and introduced or adopted expert testimony that described and quantified the effect the exemption would have on capacity prices.[4] Petitioners argued the exemption was contrary to the core purposes of the Forward Capacity Market and conflicted with FERC's large body of precedent approving minimum offer price rules to prevent uneconomic entry in New England and other regional capacity markets, including FERC's rejection of a nearly identical exemption the year before in *NESCOE*. *See, e.g.*, NextEra Protest 4-11, 14, JA____-__, ____. They rejected ISO-NE's premise that uneconomic entry is justifiable merely because it is rendered "less harmful" by a sloped demand curve and contested ISO-NE's claim that artificial price suppression would be offset by anticipated load growth. *Id.* at 12-15, JA____-__. At bottom, the exemption unreasonably requires "value transfers from one private interest (sellers of capacity) to another (buyers of capacity)," *id.* at 2, JA___, and

[4] *See* NextEra Protest 4-18, JA___-__; *id.* Kalt Test., JA____-__; NRG Protest 10-11, JA____ (adopting the Protest of NEPGA and the Electric Power Supply Ass'n 10-24, JA____-__, and Hunger Aff., JA____-__); PSEG Protest 10-12, JA____-__; Entergy Nuclear Generating/Exelon Protest 5-18, JA____-__; *id.* Schnitzer Aff., JA____-__.

imposing that expropriation to enable uneconomic resources to enter the market is unduly discriminatory, *see* PSEG Protest 10-12, JA____-__.

Dr. Hunger graphically depicted the price effect of the 200 MW exemption and the 600 MW carry-forward exemption as follows, using the fixed-slope demand curve proposed by ISO-NE and the Representative Supply Curve modeled by ISO-NE's witnesses:

Figure 1: Impact of Renewable OOM Resource Exemptions on Price, using representative curves



Hunger Aff. ¶19, fig. 1, JA____; *id.* ¶17 (explaining incorporation of ISO-NE's Representative Supply Curve). This exercise showed that "moving from a vertical to a sloped demand curve reduces the price-suppression effect" of uneconomic entry, but the supply curve still remains "highly inelastic at the margin." *Id.* ¶18, JA____. Thus, "[e]ven a small change in supply conditions at the margin can have a significant effect." *Id.*

Dr. Hunger demonstrated the price effect of the renewable exemption was, in fact, very significant: each 200 MW increment of uneconomic new entry permitted by the exemption would lower capacity prices by up to 8% annually, reducing payments by approximately $370 million per year, with no sunset, and potentially over $1 billion under the carry forward provision. *Id.*; *accord* NextEra Protest 11-12, JA____-__. This table presented the results:

Table 1	Exemptions (MW)	0	100	200	300	400	500	600
price off demand curve	Price ($/kW-mo)	10.95	10.50	10.02	9.59	9.14	8.74	8.30
	diff from orig		0.45	0.93	1.36	1.81	2.22	2.65
	% diff		5%	9%	13%	17%	21%	25%
	Total Cost ($million)	4,390	4,222	4,039	3,875	3,703	3,549	3,381
	cost diff ($million)		-188	-370	-535	-706	-861	-1,028
	% diff		-4%	-8%	-12%	-16%	-20%	-23%

NextEra Protest at 12, tbl. 1, JA____. Exelon's witness, Mr. Schnitzer, reached a similar conclusion using ISO-NE's fixed-slope demand curve and a flatter supply curve he devised himself. *See* Schnitzer Aff. 6, JA____. No party contested these calculations, which FERC mentioned only once in the background section of its initial order. *See* Order P 67 & n.70, JA____-__.

Notwithstanding this evidence, FERC approved the Renewable Technology Resource exemption because it disagreed, for three reasons, "that price suppression resulting from the exemption is still a significant concern." *Id.* P 83, JA____. First, FERC found the exemption "is coupled with a sloped demand curve that will limit the impact of price suppression as compared to the existing vertical demand

curve." *Id.* Second, FERC noted the "renewable resource exemption is also tied to load growth . . . , so entry of renewable resources will, in most cases, only displace the new entry required to meet load growth." *Id.* And third, FERC found "that ISO-NE's inclusion of 1,100 MW of zero-priced state-sponsored entry [from past auctions] in its modeling adequately addresses concerns that the renewable exemption would severely suppress prices under a sloped demand curve." *Id.* P 84, JA____. FERC noted that PJM does not apply minimum price rules to renewable resources, *id.* P 81, JA____, and distinguished *NESCOE* as a complaint case under FPA section 206, 16 U.S.C. § 824e, that did not prevent FERC from accepting ISO-NE's broader exemption under FPA section 205, *id.* P 86, JA____.

Petitioners jointly requested rehearing on three specifications of error. Rehearing 2-3, JA____-__. First, FERC erred in finding the renewable exemption was just and reasonable despite undisputed record evidence it permits significant artificial price suppression. *See id.* at 3-19, JA____-__. Specifically, FERC could not justify imposing significant losses on competitive suppliers merely because those losses might be lessened to some unspecified degree by a sloped demand curve, which does not exist at the zonal level; or by load growth, which should be served through competition; or because FERC had allowed uneconomic entry in the past. *See id.* Second, FERC failed to explain its departure from a significant body of precedent. *See id.* at 20-24, JA____-__. And third, FERC erred in failing

to set the exemption for hearing to resolve disputed issues of material fact regarding the extent of price suppression the exemption would cause. *See id.* at 24-26, JA____-__.

FERC denied rehearing for substantially the same reasons given in its initial order. *See* Rehearing Order PP 17-27, JA____-__. Petitioners sought review in this Court in Case No. 15-1070, which on December 1, 2015 granted FERC's request for voluntary remand after the petitioner's brief was filed.

B. Orders on Remand

FERC did not take the opportunity to gather additional evidence on remand, but instead affirmed its original position in an order responding to the petitioners' brief in Case No. 15-1070. Remand Order P 2, JA____.

FERC found the renewable exemption "is not *per se* unjust and unreasonable." *Id.* P 32, JA____. Conceding the "exemption was likely to result in some degree of price suppression," FERC continued to find "the impact on price would not be significant when paired with a downward-sloping demand curve." *Id.* P 35, JA____. FERC acknowledged it "previously agreed with arguments that uneconomic capacity suppresses prices, regardless of intent," but now found that "limiting the amount of renewable resources that may qualify for the exemption each year mitigates concerns about the potential for artificial price suppression."

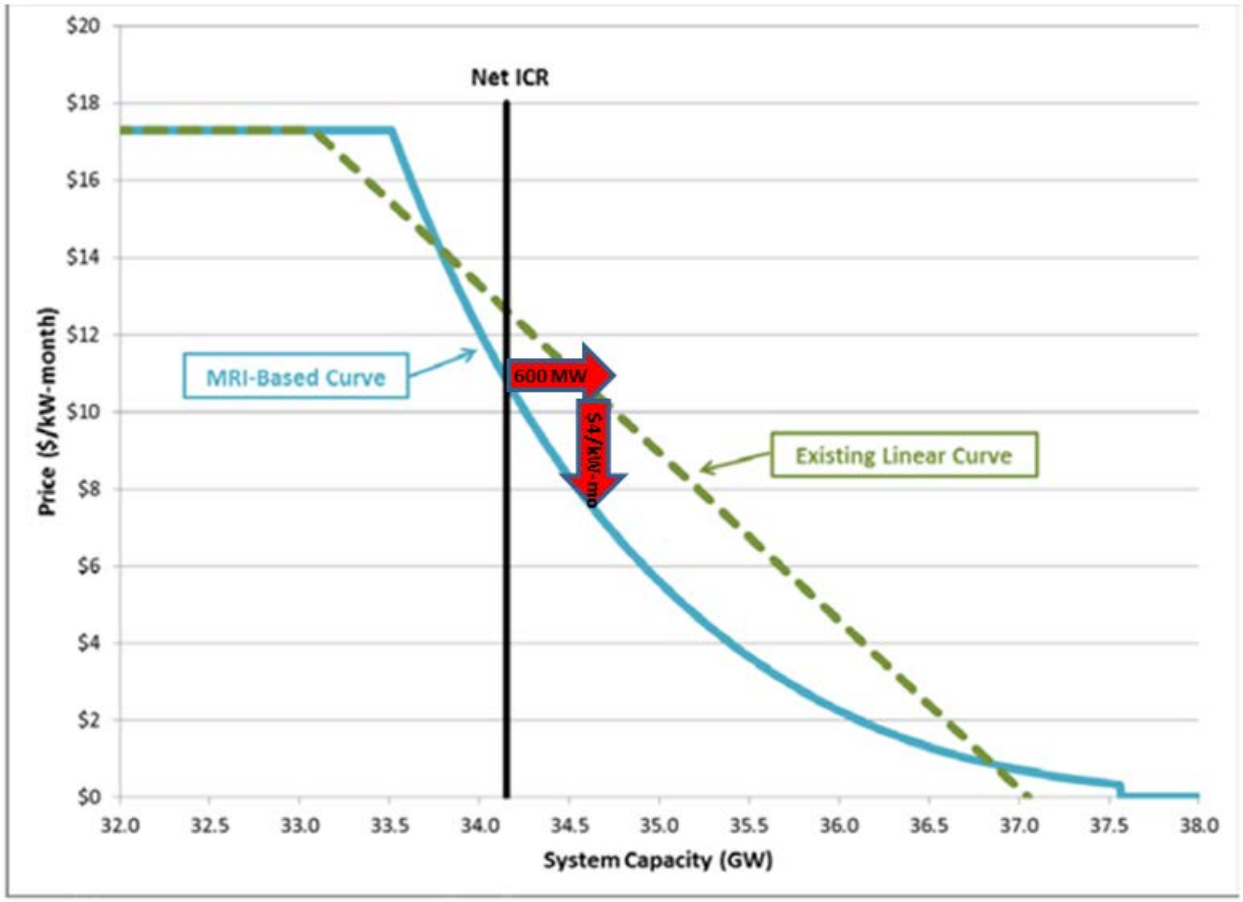
Id. P 36, JA____. FERC claimed the tension with precedent merely demonstrates its position "has evolved." *Id.* P 68, JA____.

FERC argued it did not ignore the petitioners' evidence that the renewable exemption would significantly reduce prices and "reject[ed] the implied assumption [it] must develop a bright line for the amount of artificial price suppression that is or is not acceptable." *Id.* P 39, JA____. FERC said it was confronted with "conflicting estimates," *id.* P 40, JA____, and claimed "the auctions to date have resulted in a lower price impact than predicted by Dr. Hunger and Mr. Schnitzer" because new renewable resources in the first two auctions were below the 200 MW annual limit. *Id.* P 44, JA____. In FERC's view, this limited participation also excused ISO-NE's failure to implement sloped demand curves at the zonal level, contrary to FERC's repeated directives. *Id.* PP 46-48, JA____-__.

Although the renewable exemption was explicitly tied to projected load growth, FERC discounted the significant decline in ISO-NE load demonstrated by petitioners; instead, FERC argued the exemption would be offset by retirements of existing generation, which ISO-NE predicted could reach 6,500 MW by 2020. *Id.* PP 52-53, JA____-__.

Petitioners requested rehearing once again, specifying substantially the same errors they had previously raised in response to FERC's unmodified conclusions. Remand Rehearing 7-8, JA____-__. Petitioners also challenged FERC's responses

to evidence it had not previously addressed, based on FERC's backward-looking analysis of the two auctions held while this case was still pending. *See id.* at 15-20, JA____-__. In addition, petitioners explained that the new demand curve proposed by ISO-NE would greatly exacerbate the price-suppressing effects of the renewable resource exemption, as demonstrated below:



Id. at 14, JA____. This change would permit the exemption to "suppress capacity prices by approximately $1.32/kW-month—a 42% increase over the current system-wide curve." *Id.* at 13, JA____.

FERC denied rehearing. FERC's fundamental holding remained unchanged, although it agreed on further reflection that several of petitioners' arguments were correct. *See*, *e.g.*, Remand Rehearing Order PP 8, 29, 40, 52, 86, 93, JA____, ____, ____, ____, ____, ____. This petition for review followed.

SUMMARY OF THE ARGUMENT

Artificial suppression of capacity prices through new out-of-market entry is *per se* unjust, unreasonable, and unduly discriminatory because it requires competitive merchant generation resources to bear the cost of new entry by uneconomic resources. This is true regardless of whether the subsidized new entry is composed of renewable wind and solar resources—which petitioners support and also compete to build—or more traditional large-capacity resources. FERC vigorously defended this principle in the past in orders affirmed by this Court and sister courts. The orders below present this Court with a striking reversal of policy that FERC has failed to support with substantial evidence or reasoned explanation.

The orders do exactly what FERC has repeatedly said it has a statutory duty to prevent: they allow uneconomic entry to undermine the capacity market by artificially suppressing capacity prices. FERC expressly exempted state-sponsored renewable resources that enter the Forward Capacity Market from submitting offers that reflect their actual costs, permitting 200 MW of uneconomic new entry each year coupled with a carry-forward provision up to 600 MW in any future

year. The exemption has no sunset provision, which means it has no cumulative limit either. Neither ISO-NE nor FERC attempted to quantify the immediate or long-term price effects of the exemption, whether for the 200 MW initial allowance or the 600 MW carry-forward allowance. But unrebutted expert testimony submitted by the petitioners, using the same supply and demand curves submitted by ISO-NE itself, demonstrates the exemption will permit significant artificial price suppression: each 200 MW increment of out-of-market new entry artificially depresses capacity prices by as much as 8%, or approximately $370 million annually.

FERC found the price suppression caused by the renewable exemption was acceptable because it would be "limited"—to some unspecified degree—by a sloped demand curve, load growth, or anticipated retirements. But FERC cannot find a proposed rule change just and reasonable if FERC does not first establish, even roughly, what the actual effect on rates will be. Moreover, contrary to FERC's insistence the exemption would only limit competition for new demand because the 200 MW cap was expressly set to match annual load growth, wholesale load materially declined and will continue to decline for the foreseeable future. Aware of this undisputed fact on remand, FERC left the now-arbitrary 200 MW exemption in place, relying exclusively on retirements to "limit" or "temper"

price suppression. And price suppression was further exacerbated by ISO-NE's adoption of new, more steeply-sloped regional and local demand curves.

FERC improperly declined to set the renewable exemption for hearing despite genuine issues of disputed fact material to the justness and reasonableness of the resulting rates. FERC could not have determined the proposed exemption was just and reasonable on the paper record because neither ISO-NE nor FERC quantified the price effects of the exemption beforehand, and neither challenged the long-run validity of the petitioner's evidence.

STANDING

Petitioners are electric power generators that sell energy, capacity, and ancillary services in the markets administered by ISO-NE. FERC's orders aggrieve petitioners and all other competitive capacity suppliers in ISO-NE by artificially suppressing capacity prices. Specifically, the orders permit significant amounts of renewable resources supported by out-of-market revenues to offer their capacity into Forward Capacity Auctions at below-market prices. This in turn lowers capacity prices paid to all suppliers, prevents new competitive resources from entering the market, and causes existing resources to retire prematurely. Granting this petition will redress those injuries.

ARGUMENT

I. STANDARD OF REVIEW

FERC's determination that a rate is "just and reasonable" under the FPA is generally entitled to "great deference" because the statutory standard is "incapable of precise judicial definition." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008). "The Commission's discretion is, however, bounded by the requirements of reasoned decisionmaking." *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010). The Court must "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] (E) unsupported by substantial evidence . . . ." 5 U.S.C. § 706(2).

An agency acts arbitrarily when it "entirely fail[s] to consider an important aspect of the problem, [or offers] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In addition, agencies must offer a reasonable explanation when they deviate from contrary precedent. *See id.* at 41-42.

II. AUTHORIZING SYSTEMATIC PRICE SUPPRESSION TO ACCOMMODATE STATE POLICIES CONTRADICTS FERC'S STATUTORY MANDATE AND GOVERNING PRECEDENT

It is unjust, unreasonable, and unduly discriminatory to permit subsidized resources to enter the capacity market through below-cost offers that artificially suppress market-wide clearing prices. FERC vigorously defended this principle in prior orders reviewed by this Court and sister courts, which affirmed FERC's assertion that the FPA both authorizes and requires FERC to prevent state-sponsored generation resources from artificially suppressing wholesale capacity prices. *See NEPGA*, 757 F.3d at 290 (citing *CTDPUC*, 569 F.3d at 481-83); *NJBPU*, 744 F.3d at 97-98 (same); *id.* at 100-101 (quoting *PJM Interconnection, L.L.C.*, 135 FERC ¶61,022 at PP 142-43, *reh'g denied*, 137 FERC ¶61,145 at PP 3, 96); *NESCOE*, 142 FERC ¶61,108 at PP 34-35.

This principle was applied regardless of whether states sought to exempt subsidized renewable resources, as in *NEPGA*, or traditional combustion resources, as in *NJBPU*. FERC's position was crystal clear: "We find that all uneconomic entry has the effect of depressing prices below the competitive level and that this is the key element that mitigation of uneconomic entry should address." *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶61,301 at P 29; *accord, e.g., PJM Interconnection, L.L.C.*, 128 FERC ¶61,157 at P 90 ("A capacity market will not be able to produce

the needed investment to serve load and reliability if a subset of suppliers is allowed to bid non-competitively to suppress market clearing prices.").

In this case, FERC reverses precedent and retreats from its statutory duty by requiring competitive generation suppliers to bear the cost of enabling new entry by state-sponsored renewable resources. But this case is *not* about the merits of renewable resources as compared to any other form of generation; it is about the unjust, unreasonable, and unduly discriminatory effects of deliberately authorizing uneconomic entry, regardless of generation type.[5] FERC claims its position has "evolved" to accommodate state public policy objectives. Remand Order P 68, JA____; Remand Rehearing Order P 58, JA____-__. However, FERC's basis for doing so is an unprincipled departure from precedent and its attempt to retroactively redefine the purpose of the Forward Capacity Market on remand is disingenuous.

A. FERC and Reviewing Courts Have Repeatedly Rejected FERC's Sole Rationale for the Renewable Exemption

On remand, FERC states that the renewable exemption was necessary to "protect[] consumers from paying for redundant capacity"—that is, "paying for capacity that cleared through the [Forward Capacity Auction] and separately

[5] NextEra, for example, is developing wind and solar resources in New England and "is the largest generator in the world of renewable energy from the wind and sun." NextEra Energy, Inc., Form 10-Q at 40 (July 26, 2017). And PSEG not only objects to state-sponsored renewable resources, but also led the litigation against state-sponsored fossil-fired resources in *NJBPU*, *Solomon*, and *Nazarian*.

paying for renewable resources built by state entities to meet state policy objectives." Remand Order P 33, JA____; *accord, e.g.*, Remand Rehearing Order P 43, JA____-__. However, that "redundant capacity" theory is exactly the same rationale FERC, this Court, and the Third Circuit have squarely rejected as an acceptable justification for permitting uneconomic entry in the past.

In prior orders, FERC has held it is "statutorily mandated" to protect wholesale capacity markets against the effects of below-cost entry that suppresses capacity prices. *NJBPU*, 744 F.3d at 100 (quoting 135 FERC ¶61,022 at P 143); *see id.* at 101 (finding that FERC is "forced to act" in such circumstances). Now FERC claims "[t]he renewables exemption fulfills the Commission's statutory mandate by protecting consumers from paying for redundant capacity." Remand Order P 33, JA____. FERC's conflicting assertions of statutory obligation cannot be reconciled.

As this Court originally explained in 2009, the Forward Capacity Market leaves states "free to make their own decisions" regarding the type and quantity of generation resources they prefer, "but they 'will appropriately bear the costs of [those] decision[s],' including possibly having to pay twice for capacity." *NJBPU*, 744 F.3d at 97 (quoting *CTDPUC*, 569 F.3d at 481, and extending the same holding to PJM). And this Court forcefully reiterated this point in 2014, when it explained that permitting states to insert uneconomic resources into the capacity

market was unacceptable because it constitutes "definitional market distortion in favor of buyers." *NEPGA*, 757 F.3d at 294; *see id.* (explaining that uneconomic entry "has the same price effect as offering the resource into the auction at a price of zero" and "will serve to displace a higher-priced resource that otherwise would have set the clearing price" (citing 138 FERC ¶ 61,027 at PP 60, 72) (alterations omitted)).

In *NEPGA*, the Court noted "FERC specifically found that '[out-of-market] capacity suppresses prices regardless of intent.'" 757 F.3d at 292 (quoting *ISO New England Inc.*, 135 FERC ¶61,029 at P 170). In *NJBPU*, the Third Circuit likewise found the intent of "state and local policies and objectives with regard to the development of new capacity resources" was irrelevant because FERC is "forced to act . . . when subsidized entry supported by one state's or locality's policies has the effect of disrupting the competitive price signals." 744 F.3d at 100-01 (quoting *PJM Interconnection, L.L.C.*, 137 FERC ¶61,145 at P 3), *quoted in Hughes*, 136 S. Ct. at 1296. FERC's unambiguous position was that "all uneconomic entry has the effect of depressing prices below the competitive level." *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶61,301 at P 29; *see PJM Interconnection, L.L.C.*, 128 FERC ¶61,157 at PP 87, 90.

On remand, FERC concedes its position "has evolved." Remand Order P 68, JA____; Remand Rehearing Order P 58, JA____-__; *see id.* P 48 (stating

petitioners "are correct that the Commission has acknowledged that exemptions can reduce prices, regardless of intent"), JA____. FERC claims "developments, over time, have tipped the scales," but the only "development" FERC identifies is that "[s]tates continue to support the development of renewable resources." Remand Rehearing Order P 43, JA___. As FERC stated elsewhere, its "acceptance of the renewables exemption is an acknowledgement that those resources will be constructed with or without a renewables exemption." Remand Order P 62, JA____-__; *accord* Remand Rehearing Order P 48, JA____-__.

FERC provides no principled basis to reverse judicially-affirmed precedent finding that FERC has a statutory duty to protect the integrity of wholesale markets against uneconomic entry. *See Hughes*, 136 S. Ct. at 1296 (citing *NJBPU*, 744 F.3d at 79-80, and quoting *PJM Interconnection, L.L.C.*, 137 FERC ¶61,145 at P 3). Surrendering a federal statutory duty to accommodate state policy choices is simply capricious. FERC's justification is not rational either. If, as FERC says, states would continue to subsidize new renewable resources regardless of the exemption, then the states have committed themselves with open eyes and there is no reason to rescue states from their own policy choices by suppressing wholesale capacity rates paid to competitive merchant generators. FERC's orders below simply shift the financial consequences of state policies from the state's constituent

ratepayers to competitive merchant generators contrary to *NEPGA*, *NJBP*U, and *CTDPUC*.[6]

FERC claims its departure from precedent was "reasonable" because the renewable exemption is "limited." *E.g.*, Remand Rehearing Order P 48, JA____. But, as petitioners explain below, that conclusion is unsupported because neither FERC nor ISO-NE attempted to quantify, even roughly, what the price impact of the renewable exemption would be. *See infra* 37-57; *see, e.g.*, *FPC v. Texaco Inc.*, 417 U.S. 380, 399 (1974) (remanding rulemaking because "there is no finding . . . as to the actual impact the projected market price increases would have"). And, if it is true that FERC has a "statutory mandate" to protect the wholesale market against explicitly uneconomic entry, FERC cannot disregard its duty on the ground that the effect will be "limited" to some unspecified degree. The FPA "does not say a little unlawfulness is permitted." *Id.*[7]

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[6] FERC points to a New York case regarding subsidized entry to support its position here. *See* Remand Order P 33, JA____. However, the New York order followed FERC's initial orders here as precedent for changing policy. *See N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022 at P 49 (2015), *reh'g denied*, 154 FERC ¶ 61,088 (2016). The New York case is before this Court in Case No. 16-1107.

[7] *Texaco* was decided under the Natural Gas Act, 15 U.S.C. §§ 717c, 717d, rather than the FPA. But the "constructions of one are authoritative for the other" because they "are 'in all material respects substantially identical.'" *Tenn. Gas Pipeline Co. v. FERC*, 860 F.2d 446, 454 (D.C. Cir. 1988) (quoting *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956)).

B. FERC Lacked an Adequate Basis to Distinguish NESCOE

NESCOE, of course, presents the most obvious conflict with the orders on review because that decision rejected a nearly identical 225 MW exemption for renewable resources the states requested one year earlier. *See NESCOE*, 142 FERC ¶61,108 at PP 15, 34-35. If anything, the exemption proposed in *NESCOE* was more modest because it did not include a 600 MW multi-year rollover. Applying the same core principles from earlier cases, FERC rejected the argument that "any incidental price suppression would be limited." *Id.* at P 15. FERC also rejected the over-procurement argument, agreeing with ISO-NE that "'if the states choose to build uneconomic resources . . . to further various policy interests, the states, not the [Forward Capacity Market] are responsible for procuring redundant capacity.'" *Id.* at P 34. And FERC rejected comparisons with PJM, which does not require price mitigation for renewable resources, "because the ISO-NE capacity market relies on a vertical demand curve [and] the New England market is substantially smaller than the PJM market" *Id.* at P 35.

FERC argues *NESCOE* is distinguishable because that decision rejected a complaint under FPA section 206, rather than a new rate proposal under FPA section 205, which FERC claims is "arguably a more modest standard." Remand Rehearing Order P 49, JA____; *see* Order P 86, JA____; Rehearing Order P 17, JA____; Remand Order P 67, JA____. If FERC applied a lower standard in this

case based on its procedural posture, that is plainly wrong. *See Morgan Stanley*, 554 U.S. at 545 ("There is only one statutory standard for assessing wholesale-electricity rates, whether set by contract or tariff—the just-and-reasonable standard."); *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014) ("The 'just and reasonable' lodestar is no loftier under section 206 than under section 205 . . . .").

And FERC's position rings hollow when the exemptions in each case were so strikingly similar and so close in time. FERC points to only one changed fact: the exemption here was proposed alongside a sloped demand curve. *See* Rehearing Order P 18, JA____. FERC places far too much weight on that lone distinction, given the many other conflicts it must look past to justify a different conclusion, including FERC's explicit rejection of the "redundant capacity" argument FERC now embraces on remand. *Compare NESCOE*, 142 FERC ¶61,108 at P 34, *with* Remand Order P 33, JA____. FERC's heavy reliance on ISO-NE's adoption of a sloped demand curve to distinguish *NESCOE* also fails because FERC lacked substantial evidence a sloped demand curve will prevent significant artificial price suppression. ISO-NE conceded its demand curve study did not examine the renewable exemption, *see* ISO-NE Answer 16, JA____, and ISO-NE's assertions about anticipated load growth were inflated as compared to later pronouncements and actual events. *See infra* 50-51.

C. The Renewable Exemption Undermines the Purpose of the Forward Capacity Market

"The purpose of the New England [Forward Capacity Market] is to attract and retain sufficient capacity to maintain ISO-NE's Installed Capacity Requirement, and to do so, [Forward Capacity Market] capacity prices will need to average out over time to the cost of new entry." *ISO New England Inc.*, 125 FERC ¶61,102 at P 43. That objective is undermined when FERC permits resources supported by out-of-market revenues—which, by definition, all resources covered under the renewable exemption must be—to enter the market at a price below the actual cost of new entry. *See* Rehearing 10-11, JA____-__; *see, e.g.*, *ISO New England Inc.*, 135 FERC ¶ 61,029 at P 14 (finding that unmitigated out-of-market entry destroys accurate price signals because it "suppresses the clearing price below competitive levels").

The renewable exemption undermines the core purpose of the Forward Capacity Market by distorting the market-based price signals it was created to provide, stifling efficient new investment, and causing existing resources to retire prematurely:

> The practice of offering non-economic supplies into the [Forward Capacity Auction] severely impedes the purpose of the ISO-NE capacity market, the [Forward Capacity Market]. The increase in supply in the [Forward Capacity Auction]s arising from subsidized offers crowds out otherwise economic physical supplies that, lacking the critical revenues from clearing in the [Forward Capacity

> Auction]s, may retire or, in the case of new resources, not be built, thus putting ISO-NE resource adequacy and system reliability at risk.

Hunger Aff. ¶6, JA____; Kalt Aff. 15:9-19, JA____ (same). Artificial price suppression undermines both "long-term investment decisions and the reasonable compensation opportunity for investments to date." Hunger Aff. ¶14, JA____. And these distorting effects are not limited to generation, but also infect "transmission planning and investment." *Id.* ¶19, JA____.

While the development of renewable generation is important, the exemption is a clumsy and unreasonable way of attempting to achieve it. By uneconomically suppressing prices, it becomes a tool for transferring value from capacity sellers to capacity buyers by forcing the market-wide clearing price below the true cost of new entry. *See* Remand Rehearing 29, JA____; Rehearing 17, JA____; NextEra Protest 11-12 & tbl. 1, JA____-__. "This price suppression means that such subsidization is effectively paid for by third party suppliers who would otherwise realize competitively-set market-clearing prices." Kalt Aff. 16:2-4, JA____. While merchant resources assume the risk that competition and market forces (*e.g.*, fuel costs and technological advancements) may reduce prices, they do not assume the risk prices will be artificially suppressed.

FERC's initial orders in this case ignored petitioners' arguments that renewable exemption undermined the fundamental purpose of the Forward Capacity Market by deliberately authorizing artificial price suppression. In its

final order, FERC chose a very different path: it decided to rewrite the purpose of the Forward Capacity Market to suit its decision, and the difference is remarkable.

Recall that the original "purpose of the [Forward Capacity Market]" was "to attract and retain sufficient capacity to maintain ISO-NE's Installed Capacity Requirement, and to do so, [Forward Capacity Market] *capacity prices will need to average out over time to the cost of new entry*." *ISO New England Inc.*, 125 FERC ¶61,102 at P 43 (emphasis added). On remand, FERC now states: "It is the purpose of the [Forward Capacity Market] to attract and retain sufficient capacity to meet ISO-NE's reliability targets on average over time, *at least cost to customers, given the renewable generation that will enter as a result of state programs*." Remand Rehearing Order P 58, JA____ (emphasis added). Thus, FERC found "the price that generators receive in the [Forward Capacity Market] with the exemption is the appropriate price because it elicits sufficient entry into the [Forward Capacity Market] to maintain reliability at least cost," adding that this represents "a balance between supplier and customer interests" under FERC's redefined paradigm. *Id.* P 46, JA____-__.

FERC's departure from both precedent and basic economic principles is brightly illuminated by FERC's quibbling denial that competitive generators are "essentially paying for the exemption." *Id.* FERC writes:

> Customers (not generators) are paying for the development of the exempt resources via state policy mechanisms. Generators are not

> "paying for" the exemption; rather, they are receiving an auction price that more accurately reflects the amount of capacity they must supply to the ISO-NE region, given the fact that additional capacity is being provided to the region via these state policy mechanisms.

Id.; *see id.* P 58, JA____ ("[W]e consider Generators' assertions that the renewables exemption will result in an inappropriate wealth transfer—i.e. that Generators will be effectively paying for the cost of the renewable resources—to be a misunderstanding of the purpose of the [Forward Capacity Market].").

FERC's attempt to redefine the key issue in this case through bureau-speak is meritless. It is beyond legitimate dispute that all uneconomic entry causes sellers to pay for out-of-market supplies by lowering market prices. *See, e.g.*, *NEPGA*, 757 F.3d 283 at 294; *PJM Interconnection, L.L.C.*, 128 FERC ¶61,157 at P 90. FERC cannot claim suppliers do not "pay" for the renewable exemption when, contrary to past rulings, it expressly approved the exemption to "protect[] consumers from paying for redundant capacity." Remand Order P 33, JA____.

III. FERC'S DELIBERATE ACCOMMODATION OF ARTIFICIAL PRICE SUPPRESSION THROUGH THE RENEWABLE EXEMPTION IS NOT THE PRODUCT OF REASONED DECISIONMAKING

It is arbitrary and capricious to grant market rule exemptions that completely reverse FERC policy without attempting to quantify price effects. Here, FERC found the deliberate suppression of capacity prices caused by the renewable exemption did not present a "significant concern" because, in FERC's view, it will not "*severely* suppress prices." Order PP 83-84, JA____ (emphasis added). FERC

found the price suppression caused by the renewable exemption was acceptable because it would be "limit[ed]"—to some unexplained extent—by a sloped demand curve and anticipated load growth. *See id.* P 83, JA____; Rehearing Order P 20, JA____-__. Later, when load growth failed to materialize, FERC shifted its emphasis to anticipated retirements. Remand Order P 53, JA____-__; Remand Rehearing Order P 73, JA____. But FERC cannot rest its orders on the bare conclusion that these factors would "help mitigate price suppression created by the renewables exemption." Remand Order P 46 (sloped demand curve), JA____; *accord id.* P 52 (load growth), JA____-__; *id.* P 53 (retirements), JA____-__. That justification is unsustainably inadequate.

The FPA and the Administrative Procedure Act require FERC to assess the actual effect of its rate decisions with some measurable degree of rough approximation. FERC's orders not only fail to meet that standard, FERC flatly rejects that it is required to assess rate impacts before determining whether a proposed rule change is just and reasonable. *See* Remand Order 39, JA____; Remand Rehearing Order 43, JA____. Moreover, as detailed below, each of the asserted mitigating factors FERC relies upon is deeply flawed. FERC's remand orders do not cure those flaws because FERC's post hoc attempt to rebut the petitioners' evidence based on intervening auctions is disingenuous.

A. FERC Cannot Rationally Set Rates Without Quantifying Price Affects

Since the landmark decision in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), the "Supreme Court has repeatedly reaffirmed the 'end result' standard" for determining whether a rate is just and reasonable. *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987) (en banc) (collecting cases). FERC is not required to forecast rates with "exacting precision." *Midwest ISO Trans. Owners v. FERC*, 373 F.3d 1361, 1369 (D.C. Cir. 2004). But FERC is required to provide some "rough" approximation of what the effects of its orders will be. *E.g.*, *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009); *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 898 (D.C. Cir. 1999). If FERC fails to provide "a quantitative estimate" of the effects its orders will have, then it must explain "specifically why it could not have done so." *Sierra Club v. FERC*, No. 16-1329, 2017 WL 3597014, *10 (D.C. Cir. Aug. 22, 2017).

The orders on review fail to meet that standard. Rather than provide any estimate of rate impacts, FERC "reject[s] the implied assumption [it] must develop a bright line for the amount of artificial price suppression that is or is not acceptable." Remand Order P 39, JA____. But FERC's orders do not even amount to a vector in claiming that FERC expects price suppression under the renewable exemption to be "temper[ed]," "mitigate[d]" or "limited." *E.g.*, *id.* PP 28, 36, 38, 39, JA____,____, ____, ____. FERC fails even to decide whether

the renewable exemption "has the potential to suppress prices" or would be "likely to result in some degree of price suppression." *Id.* PP 32, 35, JA____, ____.

FERC disagrees "that the only way to evaluate the justness and reasonableness of the renewables exemption is to quantify the potential price impact [its] policy decision has on suppliers," because FERC may also "rely on economic theory to justify its decisions." Remand Rehearing Order P 43, JA____. But FERC's orders do not say what "economic theory" it relied upon and the laws of economics have not changed since *NEPGA*, *NJBPU*, and *NESCOE* were decided.

The only "theory" FERC relies on is a brief passage in Dr. Ethier's testimony that FERC cites, quotes, paraphrases, and stretches to support every contested finding in this case. Here is all it says:

> By virtue of setting the Renewable Technology Resources limit at the estimate of annual load growth, Renewable Technology Resources entry, even in the unlikely event it occurs up to the cap value, can be expected primarily to displace the new entry required to meet load growth. In such a circumstance, an [Forward Capacity Market] in equilibrium would still be expected [sic] clear near Net [Cost of New Entry], and merchant entry would be required to meet retirements, which are expected to be significant—by some estimates, retirements in New England may exceed 6,500 MW by 2020.

Ethier Test. 41:10-17, JA____. That statement provides no basis for reversing FERC's policy against uneconomic entry because it says nothing new about how uneconomic entry works. The translation is both simple and bromide: so long as

load growth exceeds the renewable exemption, some quantity of merchant generation will be needed to cover the exemption and replace retirements.

Dr. Ethier only claimed the renewable exemption will allow prices to clear "near Net [Cost of New Entry]" under specific circumstances because the exemption can only *reduce* prices, never allow price to rise so that it will "*average* out over time to the cost of new entry." *ISO New England Inc.*, 125 FERC ¶61,102 at P 43 (emphasis added). Immediately before that statement, Dr. Ethier concedes there will be "systematic downward pressure on prices" if "exempted renewable entry does not exceed average annual load growth." Ethier Test. 41:3-5, JA____. Immediately after that statement, he concedes that "when the market is long" (i.e., available supply exceeds peak demand) then "renewable entry would be expected to slow the market's return to equilibrium" (i.e., reduce prices). *Id.* at 42:4-6, JA____. Dr. Ethier never supplies any numbers because he did not have them. ISO-NE conceded the demand curve analysis it used never included the renewable exemption, because the exemption was proposed after the analysis was prepared. *See* ISO-NE Answer 16, JA____.

These defects in the sole testimony FERC relies upon are fatal. From the outset of this case, FERC was unable to "support its decision with enough data to enable an adversely affected party and by extension a reviewing court, to understand its calculation of the comparison rate upon which it would rely, as well

as the underlying assumptions." *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 951 (D.C. Cir. 1999) (quoting *City of Holyoke Gas & Elec. Dep't v. FERC*, 954 F.2d 740, 743 (D.C. Cir. 1992)).

B. A Sloped Demand Curve Does Not Justify Artificial Price Suppression

FERC's chief justification for approving the renewable exemption was that damage to the market would be "limited" in some way by FERC's approval of a system-wide sloped demand curve. FERC did not find—and ISO-NE did not argue—that FERC's approval of a sloped demand curve would eliminate the exemption's price suppressive effects. FERC found only that a sloped demand "*will limit* the impact of price suppression *as compared to the existing vertical demand curve.*" Order P 83, JA____ (emphasis added); *accord, e.g.*, Rehearing Order P 20, JA____. On remand, FERC continued to find "the impact on price would not be significant when paired with a downward-sloping demand curve." Remand Order PP 32, 35, JA____, ____.

No one disputes that the renewable exemption is less harmful under a sloped demand curve than a vertical one. FERC's response is a non sequitur because petitioners never argued "that price suppression under a sloped demand curve will be the same as under a vertical demand curve," but rather "that even under a sloped demand curve, price suppression remains both substantial and unjust and unreasonable." Rehearing 8, JA____. It is arbitrary and capricious for FERC to

find a rate is "reasonable" merely because it is "less unreasonable" than hypothetical alternatives. *Laclede Gas Co. v. FERC*, 997 F.2d 936, 947 (D.C. Cir. 1993). And the hypothetical alternative here—the vertical demand curve—was a straw man because FERC had already directed ISO-NE to eliminate it.

1. Unrebutted Record Evidence Demonstrates the Renewable Exemption Permits Significant and Continuing Artificial Price Suppression Under a Sloped Demand Curve

A sloped demand curve is not a panacea for price suppression. Prices are not simply a function of the demand curve's slope, but the interplay of the demand and supply curves. The renewable exemption increases supply by allowing high-cost resources to avoid being priced in the auction, thus ensuring they will clear. In economic terms, that artificially cheap supply pushes the supply curve to the right and causes it to intersect the demand curve at a lower clearing price, thus lowering aggregate capacity revenues. Hunger Aff. ¶16, JA____.

Although the *demand* curve is no longer vertical, the *supply* curve remains very steep at the margin where it intersects the demand curve. *Id.* ¶18, JA____. The result is a market where "[e]ven a small change in supply conditions at the margin can have a significant effect." *Id.* Those price shifts are vividly illustrated in the chart Dr. Hunger prepared using the Representative Supply Curve developed by ISO-NE's own witness, reproduced *supra* at 16, and the results are summarized in the following table:

Table 1	Exemptions (MW)	0	100	200	300	400	500	600
price off demand curve	Price ($/kW-mo)	10.95	10.50	10.02	9.59	9.14	8.74	8.30
	diff from orig		0.45	0.93	1.36	1.81	2.22	2.65
	% diff		5%	9%	13%	17%	21%	25%
	Total Cost ($million)	4,390	4,222	4,039	3,875	3,703	3,549	3,381
	cost diff ($million)		-188	-370	-535	-706	-861	-1,028
	% diff		-4%	-8%	-12%	-16%	-20%	-23%

NextEra Protest 12 tbl. 1, JA____. Thus, when the capacity clearing price is at criterion, 100 MW of exempt renewables in one year would suppress capacity revenues by 4% or $188 million; 200 MW would suppress revenues by 8% or $370 million; and 600 MW under the carry-forward provision would suppress revenues by 23% or $1.028 billion. *Id.* at 12, JA____; Hunger Aff. ¶¶18-19, JA____-__; Rehearing 7, JA____. Because there is no cumulative limit to the renewable exemption, other than the 600 MW cap on new out-of-market entry in a single auction, the price suppressing effects of the exemption continue indefinitely. NextEra Protest 12, JA____; Rehearing 7, JA____.

Exelon's witness, Mr. Schnitzer, reached similar conclusions to Dr. Hunger using ISO-NE's fixed-slope demand curve and a supply curve he devised himself. *See* Schnitzer Aff. 6, JA____. Both found the exemption would depress capacity prices "$0.50 to $1.50 per KW-month or more," *id.*, but reached different results as the amount of uneconomic entry increased because Mr. Schnitzer employed a flatter supply curve he devised himself rather than the Representative Supply Curve used by ISO-NE and Dr. Hunger. *Id.* at 6 n.1.

It is important to recall why it was necessary for Dr. Hunger and Mr. Schnitzer to calculate the amount of artificial price suppression the renewable exemption permits: The Brattle Group's demand curve modeling and testimony submitted by ISO-NE in support of its proposal *did not examine the effects of the renewable exemption* because the exemption was proposed to stakeholders *after* that analysis was prepared. ISO-NE conceded that point, *see* ISO-NE Answer 16, JA____, and petitioners have repeatedly emphasized it, *see* Rehearing 18, JA____, Remand Rehearing 16, JA____. Thus, the *only* evidence quantifying the price effects of the renewable exemption was submitted by Dr. Hunger and Mr. Schnitzer.

ISO-NE neither disputed that the renewable exemption will cause price suppression under a sloped demand curve nor challenged the quantification of that price suppression by Dr. Hunger and Mr. Schnitzer. ISO-NE's witness, Dr. Ethier, merely stated that the sloped demand curve would "improve[ ]" the price suppressive effects of the renewable exemption as compared to a vertical demand curve, but conceded there will not always be "significant price differences between sloped and vertical demand curves." Ethier Test. 40:3-10, JA____. Dr. Ethier further conceded there will be "systematic downward pressure on prices" if "exempted renewable entry does not exceed average annual load growth," *id.* at 41:3-5, JA____, and that "when the market is long, . . . renewable entry would be

expected to slow the market's return to equilibrium." *Id.* at 42:4-6, JA____. Petitioners raised these points at every opportunity. *See, e.g.*, PSEG Protest 11; JA____; Rehearing 7-8, JA____-__; Remand Rehearing 16-17, JA____-__.

FERC's initial orders below did not purport to examine petitioners' evidence, which was only briefly acknowledged in the background section of its first order. Order P 67 & n.70, JA____-__. Petitioners asked FERC to explain how, if at all, FERC had factored the undisputed evidence of price suppression under a sloped demand curve into its reasoning. *See, e.g.*, Rehearing 8, JA____ ("It is unclear whether the Commission believes the quantifications are incorrect (and if so, why) or whether it believes that they are correct, but does not view price suppression of up to 23 percent in a given year 'significant.'"). FERC gave no answer in either of its initial orders. Nor did FERC purport to balance any particular quantity of price suppression against any particular value (monetary or otherwise) achieved by permitting uneconomic new entry. On remand, FERC disputes it is even required to decide "the amount of artificial price suppression that is or is not acceptable." Remand Order P 39, JA____.

2. FERC's Post Hoc Attacks on the Record Evidence Fail

Rather than take new evidence on remand, FERC defended its original decision on two grounds. First, FERC claimed it resolved "conflicting estimates . . . . based on ISO-NE and petitioners making different assumptions

about the steepness of the supply curve." Remand Order P 40, JA____. Not so. Dr. Hunger used ISO-NE's demand curve *and* its supply curve to measure the impact of the renewable exemption because ISO-NE did not do so; and Mr. Schnitzer's supply curve was more conservative than ISO-NE's. *See supra* 43-45.

Second, FERC claimed petitioners' evidence proved "unrealistic" after the fact, based on FERC's analysis of auctions that occurred after the renewable exemption was accepted. *Id.* P 44; *see* Remand Rehearing Order PP 6, 36-37, 73, 78, JA____, ____-__, ____, ____. Leaving aside that post hoc analysis is a bankrupt defense for failing to analyze evidence before the fact, which FERC did not do, FERC's hindsight review boils down to three dead-end observations.

(a) FERC says "actual auction results . . . show that the supply curves are much flatter than Generators assumed." Remand Rehearing Order P 37, JA____. But FERC forgets Dr. Hunger used ISO-NE's supply curve and Mr. Schnitzer used a flatter one.

(b) FERC says the exempt resources that have cleared cannot have affected prices much because "72 MW are only approximately 0.2 percent of the total 35,567 MW procurement for [Forward Capacity Auction] 10 (2019-2020)." *Id.* P 73, JA____; *see id.* P 78, JA____. But FERC forgets that prices are set by resources on the margin, and that 72 MW is 4.93% of the 1,459 MW of new generation that cleared in that same auction. *See id.* P 36, JA____.

(c) FERC says petitioners concerns must be "overstated" because "the cap has not been reached." *Id.* P 94, JA____. But the cap in the February 2018 auction is as much as 528 MW, and the carry-forward provision remains a constant threat. Moreover, FERC forgets that "more than 4,000 MW of wind is sitting in the ISO-NE interconnection queue waiting to be built." Remand Rehearing 44, JA____. Nor has FERC considered the 1,100 MW Massachusetts Clean energy solicitation now underway, the recent 460 MW Tri-State award, the recent 401 MW Connecticut award, or the Massachusetts solicitation of up to 800 MW off-shore wind expected to be awarded in 2018.[8]

C. Load Growth Does Not Justify Artificial Price Suppression

The second reason FERC asserted that "price suppression" would not be a "significant concern," was that the renewable exemption is "tied to load growth (estimated at 189 MW annually, plus an adjustment for the reserve margin required to meet the installed capacity requirement, resulting in 200 MW)." Order P 83, JA____; Remand Rehearing Order P 71, JA____. Thus, FERC reasoned, "entry of renewable resources will, in most cases, only displace the new entry required to

[8] *Mass Clean Energy RFP* (Mar. 31, 2017), https://macleanenergy.com/83d/; *New England Clean Energy RFP ("Tri-State")* (Nov. 12, 2015), https://cleanenergyrfp.com/; *PURA Review of Pub. Act 15-107(B) Small-Scale Energy Res. Agreements*, No. 17-01-11, Decision (CT PURA Sept. 7, 2017) (approving 401 MW of contracts for the CT Renewable RFP issued March 9, 2016); *Mass Offshore Wind RFP* (June 29, 2017), https://macleanenergy.com/83c/.

meet load growth." Order P 83, JA____; Remand Rehearing Order P 71, JA____. In FERC's view, the renewable exemption's systematic downward pressure on prices was acceptable because merchant entry would still be needed to "meet resource retirement in ISO-NE." Order P 83, JA____; *accord* Rehearing Order P 21, JA____.

Petitioners objected below that it is indefensibly discriminatory and preferential for FERC to erase competition for new load by expropriating the value of merchants generators' sunk investments to enable state-sponsored uneconomic resources to meet that demand. *See* Rehearing 9-10, 17, JA____-__, ____; Remand Rehearing 7-8 (specification 1), 24-28, 34-39, JA____-__, ____-__, ____-__. The Forward Capacity Market cannot meet its most basic design objective if FERC permits uneconomic resources to offer into the market at zero to meet the very amount of load growth that the market was designed to meet through economic merchant projects. *See* Rehearing 9-11, JA____; Remand Rehearing 24-28, JA____-__. The renewable exemption merely reinstituted the error in ISO-NE's earlier Alternative Price Rule, which failed precisely because it was only triggered when new capacity was required to meet demand. *See NEPGA*, 757 F.3d at 292.

FERC's load growth rationale is an essential foundation for its orders, but it is an unsustainably infirm justification in both theory and fact.

1. Neither the 200 MW Annual Exemption Nor the 600 MW Carry-Forward Provision Is Actually "Tied" to Load Growth

FERC's determination that the exemption will have a limited effect on prices because it is "tied" to load growth fails because there actually is no such "tie." The exemption continues *whether or not* demand actually increases, which means the exemption displaces competition for retiring capacity if demand does not grow at the rate ISO-NE represented to FERC. As petitioners explained, this problem is exacerbated "by the carry-forward provision for the renewables exemption, which is in no way related to expected load growth, but instead allows multiples of 200 MW in renewable resources to enter in a given year." Rehearing 12, JA____ (citing NEPGA Protest 17, JA____). FERC failed to address that argument. In fact, FERC orders provide no evidence or justification whatsoever for the 600 MW carry-forward provision; that number is "tied" to nothing at all.

2. Capacity Demand Has Not Grown; Near-Term Peak Load Has Dropped and Long-Term Load Fell from Flat to Negative

Expected load growth cannot offset 200 MW of uneconomic entry because the load growth ISO-NE predicted failed to materialize. Petitioners argued below that load growth may not increase by 200 MW per year for many reasons. *See* Rehearing 11, JA____. That argument was prescient. While this case was pending on review the first time, ISO-NE concluded that "[f]rom 2018 to 2023, state-sponsored [energy efficiency] programs are forecast to save New England 1,518

gigawatt-hours (GWh) per year, *keeping regional load growth essentially flat*."[9] When other studies confirmed that peak demand would drop,[10] ISO-NE changed the Load Forecast and Installed Capacity Requirement values for upcoming auctions. The updated figures for the 2017/18 delivery year decreased the Load Forecast by 589 MW and reduced the Installed Capacity Requirement by 413 MW; the updated figures for the 2018/19 delivery year decreased the Load Forecast by 486 MW and reduced the Installed Capacity Requirement by 305 MW.[11] And ISO-NE has proposed to reduce the Installed Capacity Requirement by another 350 MW in the February 2018 auction.[12]

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[9] ISO-NE, *2015 Regional Electricity Outlook* at 28 (emphasis added), http://www.iso-ne.com/static-assets/documents/2015/02/2015_reo.pdf; *see also* ISO-NE, *Long-Term Forecasts* (May 5, 2015) (forecasting "reduced total peak demand growth of 0.5% annually over the 10-year period, and a flat total energy usage growth rate of 0.0%."), http://isonewswire.com/updates/2015/5/5/long-term-forecasts-electricity-usage-will-remain-flat-and-p.html.

[10] ISO-NE, *2015 CELT/RSP ISO-NE, State, Subarea, and Load Zone Annual Energy & Seasonal Peak Forecast 2015-2024* at 28 (Apr. 28, 2015), http://www.iso-ne.com/static-assets/documents/2015/04/a6_2015_energy_seasonal_peak_forecast_2015_2024.pdf; ISO-NE, *Proposed Installed Capacity Requirement (ICR) Values for the 2019/20 Forward Capacity Auction (FCA10)* at 7 (Sept. 15, 2015), http://www.iso-ne.com/static-assets/documents/2015/09/a9_icr_results.pdf.

[11] ISO-NE, *Proposed Installed Capacity Requirement (ICR) Values* at 13-14 (Sept. 25, 2015), http://www.iso-ne.com/static-assets/documents/2015/09/pspc_082715_a2.2_icr_values_2016_17ara3_2017_18ara2_2018_19ara1.pdf.

[12] *ISO-NE, Proposed ICR Installed Capacity Requirement (ICR) Values for the 2021-2022 Forward Capacity Auction (FCA #12)* at 9 (Aug. 17, 2017),

In light of the significant alterations to ISO-NE's load forecast that were already apparent in 2015, petitioners argued that "intervening facts so changed the complexion of the case," the agency's decision should be vacated and remanded "for further consideration in the light of the changed conditions." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172 (1962). FERC requested a voluntary remand, but did not take the opportunity to reform any of its prior conclusions, even in the face of data demonstrating that "load growth is in decline at a compounded annual rate of -0.2% per year from 2016 to 2025." Remand Rehearing 36, JA____ (quoting ISO-NE, *CELT Report* (May 1, 2016)).[13]

On remand, FERC conceded that "post-implementation of the renewables exemption, load growth in New England has been lower than expected." Remand Rehearing Order P 72, JA____. Nevertheless, FERC argued the 200 MW exemption was supported by "substantial evidence" because it "represented ISO-NE's best estimate of average annual load growth at the time it submitted the Demand Curve Changes filing in 2014." *Id*.; *accord* Remand Order P 52, JA____.

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https://www.iso-ne.com/static-assets/documents/2017/08/a20_pspc_icr_proposed_values_08172017.pdf.

[13] http://www.iso-ne.com/static-assets/documents/2016/04/isone_fcst_data_2016.xls; *see also, e.g.*, ISO-NE, *ISO New England Overview and Regional Update on the Growth of Renewables* at 9 (Feb. 4, 2016), http://www.ncsl.org/Portals/1/Documents/energy/Gray-present.pdf.

That argument has no merit. In this case, FERC has no basis for seeking shelter in the notion that "reasoned decision-making does not require complete prescience." Remand Rehearing Order P 72, JA____ (quoting *Fla. Gas Trans. Co. v.* FERC, 604 F.3d 636, 645 (D.C. Cir. 2010)). FERC took this case back on voluntary remand, at which time it reacquired jurisdiction to "modify or set aside, in whole or in part, any finding or order made or issued by it under the [FPA]." 16 U.S.C. § 825*l*(a). Petitioners are not aware of any precedent, and FERC cites none, that permits FERC to rest an essential component of any ratemaking decision on information the agency knows is false at the time the decision is made.

FERC's next gambit is to claim that the absence of any load growth is harmless error because "retirements continue to more than make up for the deficit in load growth." Remand Rehearing Order P 73, JA____. That defense is unacceptable. The 200 MW annual renewable exemption is explicitly based on annual load growth; if that reference point has no basis, then the 200 MW limit is rendered entirely arbitrary. FERC's argument is also entirely circular: it ignores that the new uneconomic entry hastens the very retirements FERC relies upon to justify the exemption.

D. Retirements Do Not Justify Artificial Price Suppression

On remand, FERC turned its emphasis to anticipated retirements as an ultimate back-stop rationale for finding that the renewable exemption would only

cause "limited" price suppression. *See* Remand Order PP 26, 41, 53, JA____, ____, ___-__; Remand Rehearing Order PP 11, 20-25, 28, 36, 44-45, 49, 52, 79-81, 87, JA____, ____-__, ____-__, ____, ____-__, ____, ____, ____-__, ____. FERC's remand orders pretend as if this were always so, but FERC's initial orders mentioned retirements only one time each when paraphrasing a single sentence in Dr. Ethier's testimony. *See* Order P 83, JA____; Rehearing Order P 21, JA____. That sentence predicted 6,500 MW of retirements by 2020. Ethier Test. 41:14-17, JA____. But the auction for 2020 was held in February 2017 and FERC itself notes that only 4,200 MW of existing resources retired, while retirements each year are much closer the exemption caps (152.5 MW in 2015, and 661.1 MW in 2016). Remand Rehearing Order P 73, JA____-__.

Having chosen to defend its determination based only on the original record, ISO-NE's constantly-recycled retirements estimate is inserted to support FERC's claim that Dr. Hunger's testimony should be disregarded because "he does not take into account future retirements," *id.* P 22, JA____, which FERC says was "[i]n contrast to Dr. Ethier's method," *id.* P 24, JA____; *see, e.g., id.* P 25, JA____-__. That is wrong. Again: Dr. Hunger used ISO-NE's supply curve and Mr. Schnitzer used a flatter curve forecasting more retirements than ISO-NE did. *See supra* 43-45.

Petitioners have always argued "the exemption will cause unjustly and unreasonably low wholesale rate outcomes for existing suppliers regardless of retirements" because it "displace[s] new economically-justified entry (and associated opportunity for existing resources to recover part of the long run net [Cost of New Entry])." Rehearing 9-10, JA____. That is precisely the principle upheld in *NEPGA*, 757 F.3d at 293, which FERC now abandons, and the record evidence regarding retirements in this case failed to demonstrate that FERC's departure from that principle would be "limited."

E. New Demand Curves Do Not Justify Artificial Price Suppression

Although ISO-NE adopted a system-wide sloped demand curve in 2014, ISO-NE failed to implement zonal sloped demand curves for several years. Petitioners argued at FERC, and to this Court, that the continued use of vertical demand curves in each Local Capacity Zone negated any asserted "limiting" effect the system-wide sloped demand curve would have on uneconomic entry. *See* Rehearing 16, JA____; Hunger Aff. ¶18, JA____; Remand Rehearing 9, JA____ (recounting events). Shortly after requesting voluntary remand, FERC issued an order finding the ISO-NE tariff "unjust, unreasonable, unduly discriminatory or preferential because it applies vertical demand curves within constrained zones" and compelled ISO-NE to institute zonal sloped demand curves before the eleventh capacity auction in February 2017. *ISO New England Inc.*, 153 FERC ¶61,338 at

P 1 (2015), JA____. ISO-NE complied, but based the new zonal curves on a new methodology that produced significantly steeper curves on a zonal and system-wide basis. *See* Remand Rehearing 13-15, JA____-__; *see supra* 21 (showing new system-wide curve).

Petitioners argued that the new demand curve methodology would significantly increase price suppression caused by the renewable exemption, because "the new demand curve will be significantly steeper at the margin where it intersects whatever supply curve is in effect, offsetting the mitigation impact from [FERC]'s assumed flatter supply curve it relied upon" in its orders below. Remand Rehearing 17, JA____; *see id.* at 40-41, JA____-__; *id.* at 13-15 (estimating a system-drop of $1.32/kW-month and worse effects in constrained zones), JA____-__. In its final order, FERC "agree[d] that the new zonal sloped demand curves, at both the system-wide and zonal level, could reduce [Forward Capacity Market] capacity prices," but argued, as before, that the now-further-decreased prices shouldn't be so bad because it thought the supply curve would probably be flatter. Remand Rehearing Order P 29, JA____. Moreover, FERC noted its orders on the new demand curve were final, so petitioners would have to live with the result. *See id.* But this case is not final and the now-changed demand curves only underscore that FERC had, and still has, no clear idea what the price effect of the exemption is—other than it will always push prices down.

F. Past Price Suppression Does Not Justify Future Price Suppression

FERC's initial orders found "ISO-NE's inclusion of 1,100 MW of zero-priced state-sponsored entry[14] in its modeling adequately addresses concerns that the renewable exemption would severely suppress prices under a sloped demand curve." Order P 84, JA____; *see* Rehearing Order P 23, JA____-__; Remand Order P 57, JA____. Petitioners argued that past uneconomic entry cannot justify new uneconomic entry and that FERC misunderstood the way ISO-NE's modeled past uneconomic entry. *See* Rehearing 18-19, JA____-__; Remand Rehearing 18-20, JA____-__. In its final order, FERC conceded ISO-NE's incorporation of past uneconomic entry in the demand curve "does not indicate what impact the renewables exemption will have on [Forward Capacity Auction] prices going forward." Remand Rehearing Order P 40, JA___-__. That concession is significant for another reason: it was the only basis upon which FERC even arguably attempted to justify the 600 MW carryover exemption. *See* Rehearing Order P 23, JA____-__.

IV. FERC ERRED IN DECLINING TO SET DISPUTED ISSUES OF MATERIAL FACT FOR HEARING

The extent of price suppression under a sloped demand curve—which is also influenced by other disputed facts, such as anticipated load growth and

[14] Those out-of-market resources entered the market before the minimum offer price rule was accepted. *See NEPGA*, 757 F.3d at 295-96.

retirement—warranted specific fact-finding in an administrative hearing because it is central to the question whether the renewable exemption is just, reasonable, and not unduly discriminatory or preferential under FPA section 205. Petitioners requested a hearing to establish these essential facts or require a stakeholder process to develop alternatives. *See* Rehearing 3 (specification 3), 19, 24-26, JA____, ____, ____-__; Remand Rehearing 8 (specification 3), 45-46, JA____, ____-__. FERC's initial orders ignored that request. On remand, FERC declined to take any evidence, arguing "[t]he record in place when [FERC] accepted the renewables exemption sufficiently supports the exemption." Remand Rehearing Order P 99, JA____.

"In general, the Commission must hold an evidentiary hearing whenever a complainant raises a genuine issue of fact that is material to the justness and reasonableness of a rate and cannot be resolved upon the written record." *La. Pub. Serv. Comm'n*, 184 F.3d at 895; *accord Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994) (listing cases). In this case, petitioners did not make "'mere allegations of disputed fact,'" but also made "'an adequate proffer of evidence to support them.'" *Id.* at 177 (citation omitted). These facts "raise serious doubts concerning" ISO-NE's renewable exemption "that FERC has not adequately addressed and upon which an evidentiary hearing may shed light." *Id.*

Here, all this Court can discern from FERC's orders is that a sloped demand curve would allow "less" artificial price suppression than the already-replaced vertical demand curve. FERC makes no attempt to quantify, even roughly, the extent of artificial price suppression FERC will tolerate to foster subsidized renewable resources. That is not reasoned decisionmaking and this Court has required a hearing in similar circumstances. *See*, *e.g.*, *La. Pub. Serv. Comm'n*, 184 F.3d at 898 ("[W]e cannot on this record tell how rough (that is, unequal) the agency thinks the equalization must be before it grants a hearing—and the equalization in this case seems pretty rough.").

CONCLUSION

For the reasons set forth above, the petition for review should be granted.

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September 18, 2017

CERTIFICATE AS TO LENGTH OF BRIEF

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing document contains no more than 13,000 words (12,988 words using the word-count feature in Microsoft Word) not including the tables of contents and authorities, glossary, and certificates of counsel.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure and Rule 25(c) of the Circuit Rules of this Court, I hereby certify that on September 18, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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