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. 15-1070

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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Initial Brief: October 5, 2015

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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

Based upon the Court's docket sheet and service received by Petitioners to date, Petitioners are aware that the following entities have moved to intervene in this proceeding:

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____-__; and

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____-__.

III. RELATED CASES

Two of the challenged orders are before this Court in a separate petition for review in *New England Power Generators Association, Inc. v. FERC*, No. 15-1071 ("NEPGA petition"). However, that petition challenges FERC's orders on distinct questions of fact and law that have no bearing on the merits of the instant petition. Specifically, the NEPGA petition challenges FERC's decision to extend the period a new supplier may choose to "lock-in" the price from the first capacity auction in which it clears. The instant petition, by contrast, challenges FERC's decision to exempt new renewable capacity resources from ISO-NE's buyer-side mitigation rules. Importantly, the lock-in rule at issue in the NEPGA petition does not apply to renewable resources clearing the auction with the exemption that is the subject

of this petition, which are not permitted to lock-in the price of their first capacity auction award.

The NEPGA petition also challenges FERC's orders in a separate complaint proceeding: FERC Docket No. EL15-23, which concerns the rule that new suppliers who choose to lock-in the price of their first capacity award must act as price-takers in subsequent auctions during the lock-in period. That complaint is still pending before FERC on rehearing and has no bearing on this case. This Court granted NEPGA's unopposed motion to hold the NEPGA petition in abeyance until FERC's orders in that complaint proceeding are final.

Counsel are not aware of any other related proceedings before this Court or any other court.

Respectfully submitted,

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October 5, 2015

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, one of the largest wholesale generators of electric power in the United States, 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 Resources, LLC'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 has a 10% or greater ownership interest in NextEra Energy, Inc.; Jennison Associates LLC reported an 11.13% beneficial ownership interest in NextEra Energy Partners, LP as of June 30, 2015 on its Schedule 13G/A filed with the Securities and Exchange Commission on August 10, 2015.

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 other publicly held company has a 10% or greater ownership interest in NRG Energy, Inc.

The PSEG Companies

PSEG Power is a wholly owned direct subsidiary of Public Service Enterprise Group Incorporated ("PSEG"). PSEG ER&T and PSEG Power CT are each wholly owned indirect subsidiaries of 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 is engaged in, among other things, the generation, transmission and sale of electric energy through its subsidiaries.

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 three 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; and (iii) 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 1000 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, Public Service Electric and Gas Company ("PSE&G"), is a public utility company organized under the laws of the State of New Jersey. PSE&G is presently engaged in, among other things, the transmission and distribution of electricity and the distribution of natural gas in New Jersey. PSE&G owns transmission facilities in PJM Interconnection, L.L.C.

PSEG has publicly-held common stock outstanding. PSE&G has publicly-held debt securities outstanding. PSE&G Transition Funding LLC and PSE&G Transition Funding II LLC, each a wholly owned subsidiary of PSE&G, have

publicly-held debt securities outstanding. PSEG Power has publicly-held debt securities outstanding.

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October 5, 2015

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

GLOSSARY

APA	Administrative Procedure Act
Commission	Federal Energy Regulatory Commission, the Respondent
CONE	Cost of New Entry
Demand Curve Order	*ISO New England Inc.*, 147 FERC ¶ 61,173 (2014), JA____-__
FERC	Federal Energy Regulatory Commission, the Respondent
FCA	Forward Capacity Auction
FCM	Forward Capacity Market
FPA	Federal Power Act
ICAP	Installed Capacity
ICR	Installed Capacity Requirement
ISO-NE	ISO New England Inc.
LOLE	Loss of Load Expectation
LSE	Load serving entity
MOPR	Minimum Offer Price Rule
MW	Megawatt
Net CONE	Net Cost of New Entry

Net ICR or NICR	Net Installed Capacity Requirement
NYISO	New York Independent System Operator, Inc.
PJM	PJM Interconnection, L.L.C.
Rehearing Order	*ISO New England Inc.*, 150 FERC ¶ 61,065 (2015), JA____-__
States Committee	New England States Committee on Electricity

JURISDICTIONAL STATEMENT

Petitioners seek review of Federal Energy Regulatory Commission ("FERC") 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 renewable resources subsidized by state or federal out-of-market revenues to offer up to 200 MW of new capacity per year at below-market prices. *See ISO New England Inc.*, 147 FERC ¶ 61,173 (May 30, 2014) ("*Demand Curve Order*"), JA____, *compliance filing accepted*, Docket No. ER14-1639-002 (Nov. 13, 2014) (delegated letter order), JA____, *reh'g denied*, 150 FERC ¶ 61,065 (Jan. 30, 2015) ("*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 timely petitioned for judicial review on March 30, 2015. 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 THE ISSUES

Petitioners contend that the Renewable Technology Resource exemption FERC approved in its orders on review will cause electric generation capacity rates to be unjust, unreasonable, and unduly discriminatory or preferential under FPA

section 205, 16 U.S.C. § 824d(a)-(b). The questions presented are whether FERC's orders are arbitrary and capricious, contrary to law, or otherwise inconsistent with the requirements of reasoned decisionmaking under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), because:

1. FERC failed to provide a reasoned response to petitioners' arguments and unrebutted expert testimony demonstrating the renewable resource exemption FERC approved would permit significant artificial price suppression, but instead rendered a contrary decision unsupported by substantial evidence.

2. FERC failed to provide a reasoned explanation for its departure from precedent condemning the adverse effects of artificial price suppression caused by out-of-market entry and rejecting exemptions for new suppliers, including renewable resources, as contrary to the core purpose of the New England Forward Capacity Market.

3. FERC failed to hold an evidentiary hearing to resolve genuine issues of disputed fact material to the justness and reasonableness of the proposed exemption.

STATUTORY ADDENDUM

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

STATEMENT OF FACTS

I. THE NEW ENGLAND FORWARD CAPACITY MARKET

ISO-NE is the independent system operator that operates the regional transmission grid and administers wholesale electricity markets in New England. *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 in several prior cases.

"'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 ("LSEs")—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 to this problem was to create a competitive market mechanism to determine the lowest price at which existing suppliers and potential new competitors would agree to provide enough capacity to maintain system reliability.

To accomplish this objective, ISO-NE administers Forward Capacity Auctions ("FCAs") 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* at P 2, JA___. This Court has succinctly described the auction mechanics as follows:

> ISO-NE determines the Installed Capacity Requirement, or ICR, which represents the estimated amount of capacity the system as a whole will require for reliability three years hence. It then announces the starting price-by agreement, . . . and capacity providers state an amount of capacity they would be willing to offer at that price. If these offerings exceed the ICR, ISO-NE lowers the offering price, which in turn lowers the quantity offered in response. This descending price clock "stops" when the quantity offered equals the ICR, and that price point becomes the market clearing price. The capacity charge for each utility in the system is thus its share of the ICR multiplied by the clearing price.

CTDPUC, 569 F.3d at 480; *accord New England Power Generators Ass'n v. FERC*, 757 F.3d 283, 287 (D.C. Cir. 2014) ("*NEPGA*").

The principle at the heart of the Forward Capacity Market design is to allow competition to set prices that reflect the true cost of new entry ("CONE") because it "approximates reasonable compensation for existing as well as new generators," and "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 (citing *Devon Power LLC*, 115 FERC ¶ 61,340 at PP 130-32, *reh'g denied*, 117 FERC ¶ 61,133 (2006)); *see CTDPUC*, 569 F.3d at 480 ("By using competitive bidding for future capacity contracts, this system both incentivizes and accounts for new entry by more efficient generators, while ensuring a price both adequate to support reliability and fair to consumers.").

"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 CONE, in order to attract new entry needed for reliability."); *see NEPGA*, 757 F.3d at 287 ("Cost of New Entry is the price of capacity . . . that is needed to attract new capacity . . . . Theoretically, such a pricing scheme allows for the market to signal its need for additional electrical generation, while enabling generators to recover their costs.") (citation omitted).

These same principles animate the other centralized capacity markets FERC regulates, including the New York Independent System Operator, Inc. ("NYISO") and the vast thirteen-state region operated by PJM Interconnection, LLC ("PJM"). *See, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 99 (2d Cir. 2015) ("These figures—installed capacity and net cost of new entry—help NYISO determine the demand curve for each capacity zone: the demand curve is designed to procure, over time, an amount of capacity equal to the installed capacity requirement for each zone at a price equal to the net cost of new entry for that zone."); *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157 at P 13 (2009) ("[T]he purpose of the capacity market is to ensure that generators receive sufficient total revenue (capacity market payments plus energy and ancillary service revenue) to cover the actual cost of entering the unconstrained region in order to create the proper incentive for new entry."). *See generally Centralized Capacity Mkt. Design Elements*, FERC Docket No. AD13-7, Commission Staff Report at 7 (Aug. 23, 2013) (explaining that capacity markets are designed to procure sufficient capacity at a price equal to the net cost of new entry).

Another common design feature of centralized capacity markets is location-based pricing that signals where capacity should enter or exit the market. FERC's orders on capacity market design emphasize the critical role of location-based pricing to optimize investment decisions and achieve just and reasonable rates:

> Capacity market prices must be locational in order to be fully effective. Because of transmission constraints, capacity in one location is not always deliverable to loads in other locations; in those instances, separate capacity prices are necessary in separate locations in order to reflect the differences in costs and capacity needs among the locations. Further, if a single capacity price is set for the entire region, capacity prices do not reflect the need for generation in particular locations and, as a consequence, generation entry in load pockets or import-constrained areas may not occur, and the transmission constraints may worsen over time as load grows.

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* at 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 with self-supplied capacity enter capacity auctions as suppliers, they "may not have an incentive to submit bids that reflect their true cost of new entry." *Devon*, 115 FERC ¶ 61,340 at P 113. Similarly, new suppliers that receive out-of-market revenues in the form of state-subsidized or state-mandated 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 it "was never triggered in the New England auctions despite the entrance of significant amounts of out-of-market capacity." *Id.* at 292. The rule failed because it "was only set to trigger when the Installed Capacity Requirement was higher than the amount of existing capacity, and thus there was a need for new capacity to make up the difference," which did nothing to prevent uneconomic resources from entering the market "to replace existing capacity entering retirement," *id.*, or to prevent uneconomic entry 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 293 (citations omitted).

To correct this problem, FERC issued a series of orders directing and approving major revisions to ISO-NE's market power mitigation rules, which this Court affirmed in *NEPGA*.[1] 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. FERC rejected claims that "some resources—those which are self-supplied and those which are state-sponsored—should be categorically exempt" from buyer-side mitigation. *Id.* 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

[1] *See ISO New England, Inc.*, 131 FERC ¶ 61,065 (setting complaint and proposed tariff revisions for hearing), *order on reh'g and clarification*, 132 FERC ¶ 61,122 (2010), *order on paper hearing and reh'g*, 135 FERC ¶ 61,029 (2011), *order on reh'g, clarification and compliance*, 138 FERC ¶ 61,027 (2012); *see also NEPGA*, 757 F.3d at 288-89 (summarizing these proceedings).

exception for renewable technology 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.

However, FERC did not require ISO-NE to correct the market distortions caused by uneconomic resources which had already entered the market before FERC accepted ISO-NE's reformed rules, leaving those "self-supply purchasing decisions undisturbed and allowing state-sponsored projects already in the market to fulfill capacity obligations." *Id.* This Court agreed those resources could no longer be prevented from entering the market and applying "the newly-minted offer-floor mitigation construct" would present "a notice problem." *Id.* at 296.

Under the new regime, "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). For example, in the ninth Forward Capacity Auction held in February 2015, the Offer Review Trigger Price was $8.87 for a combined-cycle gas turbine, $10.32 for on-shore wind, and $13.42 for combustion turbines. *ISO New England*

Inc., 146 FERC ¶ 61,084 at PP 8, 18 (2014) (rejecting the proposed zero-price for on-shore wind resources); *ISO New England Inc.*, 147 FERC ¶ 61,109 at P 16 (2014) (accepting the reformed on-shore wind price).

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 New England orders reviewed in *NEPGA*.

For example, in New York, FERC has 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. And FERC rejected proposals to exempt New York City from market mitigation because it "would lead to artificially depressed capacity prices, thus both causing existing generators to be under-compensated and also directly and adversely impacting the Commission's

ability to set just and reasonable rates for capacity sales in the in-City market." *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 the provisions regarding self-supply were "never triggered" and PJM had an express exemption for "resources that were built pursuant to a state mandate intended to correct a capacity deficiency." *NJBPU*, 744 F.3d at 87. FERC conducted a hearing on the elimination of these exemptions from PJM's Minimum Offer Price Rule and reached the same conclusion it had in the parallel New England hearing orders: it is unjust and unreasonable to permit a categorical exemption for uneconomic entry by self-supply and state-sponsored resources because "there is no valid state interest in ensuring that uneconomic [resources] can submit below-cost offers into the [PJM capacity] auction" and it is FERC's "duty under the FPA to assure just and reasonable rates in wholesale markets." *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at PP 142-43, *reh'g denied*, 137 FERC ¶ 61,145 at PP 3, 96 (2011).

"Because below-cost entry suppresses capacity prices and because [FERC] has exclusive jurisdiction over wholesale rates, the deterrence of uneconomic entry falls within [FERC]'s jurisdiction, and [it is] statutorily mandated to protect the [PJM capacity market] against the effects of such entry." 135 FERC ¶ 61,022 at P 143. FERC held the intent of "state and local policies and objectives with regard

to the development of new capacity resources" was not relevant, 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 that PJM's [capacity market] is designed to produce, and that PJM as a whole, including other states, rely on to attract sufficient capacity." 137 FERC ¶ 61,145 at P 3. The Third Circuit affirmed those holdings. *See NJBPU*, 744 F.3d at 100-01. Adopting this Court's holding in *CTDPUC*, the Third Circuit found states remain "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).

As reformed by FERC, 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 too long to build) or renewable resources (because they are too small to affect a market that large).[2] *Id.* at 106-07. Self-supply resources in PJM do not receive an automatic exemption, but utilities can justify new self-supply if they pass the "net long" and "net short" tests. *Id.* at 105. The PJM Minimum Offer Price Rule has no sunset because the "objectives of the MOPR are not time-limited," 135 FERC ¶ 61,022 at P 182.

[2] By comparison, PJM's all-time peak demand is over five times greater than ISO-NE's (144,644 MW compared to 28,130 MW). *See* http://www.ferc.gov/market-oversight/mkt-electric/pjm#.asp (updated Feb. 26, 2015); http://www.ferc.gov/market-oversight/mkt-electric/new-england#.asp (updated Feb. 26, 2015).

PJM's rule changes were prompted by state initiatives in New Jersey and Maryland that required utilities to enter capacity contracts with new gas-fired resources, who were paid the difference between a contract price set by the state and the amount the resource received in PJM's capacity auctions. *See NJBPU*, 744 F.3d at 87-88. Several generators and utilities filed preemption actions in federal district court to enjoin those state directives programs, which were litigated concurrently with the FERC proceeding, and the federal district courts in Maryland and New Jersey held that both state programs were preempted under the FPA while the FERC case was still pending in the Third Circuit. *See id*. at 88 n.12.

After *NJBPU* was decided, the Third Circuit found New Jersey's program was field preempted. *See PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 246, 255 (3d Cir. 2014). It explained New Jersey is free to build (or not build) whatever form of capacity it prefers, and may also "directly subsidize generators so long as the subsidies do not essentially set wholesale prices." *Id.* at 253 n.4. The Fourth Circuit found that Maryland's program was "field preempted because it functionally sets the rate that [a supplier] receives for its sales in the PJM auction" and conflict preempted because it "disrupts [the PJM capacity market] by substituting the state's preferred incentive structure for that approved by FERC." *See PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476, 479 (4th Cir. 2014).

Consolidated petitions for certiorari of the *Solomon* and *Nazarian* decisions are now pending before the Supreme Court. FERC, through the Solicitor General, has opposed certiorari and argued those decisions were correct for the same reasons FERC removed the state-mandate exemption in PJM:

> If a state-supported bid clears the auction market when it would not have done so without the state support, another unsupported bid (which otherwise would have cleared) may not clear. And lower market-clearing prices that result from the state-supported generators' participation affect all participants in the PJM market and suppress the price signals that would otherwise indicate a need for new capacity.

Amicus Br. of the United States at 16, *Nazarian v. PPL EnergyPlus, LLC*, Nos. 14-614 et al. (U.S. Sept. 16, 2015). "Thus," the Solicitor General argues, the New Jersey and Maryland "programs directly interfere with the competitive market mechanisms that the auction uses to set wholesale capacity rates." *Id.* at 17; *accord id.* at 16 (quoting *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 3). This is the same position the government earlier took as an amicus in the *Solomon* case. *See id.* at 10 n.2 (quoting FERC's Third Circuit amicus brief).

C. The NESCOE Order

In December 2012—as briefing in the *NEPGA* case came to a close—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 States 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 under its exemption proposal," *id.* at P 15.

FERC denied the complaint.[3] It found the States Committee "failed to provide any evidentiary support for [its] claim" a renewable resource exemption would "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:

> 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. Most importantly, that is because the ISO-NE capacity market relies on a vertical demand curve while PJM's capacity market relies on a sloped demand curve. . . . In addition, the New England market is substantially smaller than the PJM market. . . . Thus an exemption for renewables is likely to have a greater depressing effect on capacity prices in New England than in PJM.

[3] *Id.* In *NEPGA*, this Court cited *NESCOE* to indicate the petitions for review were ripe, since FERC had not retreated from its policy against exemptions for uneconomic resources. 757 F.3d at 294.

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. FERC also reiterated its preference for "case-by-case, not categorical, exemptions" from ISO-NE's minimum offer price rule. *Id.* at P 32.

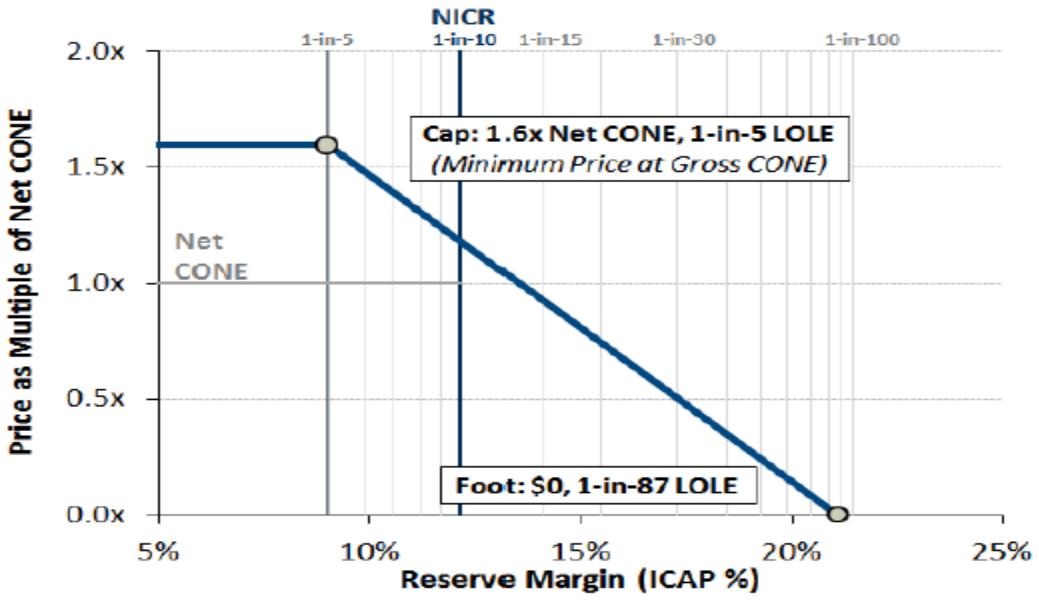
III. THE PROCEEDINGS BELOW

The orders on review arise from FERC's directive that ISO-NE change its Forward Capacity Auction mechanism by replacing the vertical demand curve with a sloped demand curve no later than April 1, 2014 to allow sufficient time for implementation before the ninth auction in February 2015. *ISO New England Inc.*, 146 FERC ¶ 61,038 at P 30 (2014). The purpose of FERC's directive was to "obviate" the contentious "need for administrative pricing," because a sloped demand curve would allow the auction to set "a uniform clearing price rather than two separate prices (one for new resources and one for existing resources)," which "should reduce price volatility and improve market efficiency." *Id.* P 30 & n.41.

ISO-NE timely filed a system-wide sloped demand curve, but stated "there was not sufficient time" to develop sloped demand curves for individual zones and committed "to fully implement sloped demand curves at the zonal level" before the tenth auction in 2016. ISO-NE Transmittal Letter at 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"):[4]

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. at 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 from the minimum offer price rule that allows up

[4] Net ICR is the amount of capacity needed to be procured in the auction and is less than the Installed Capacity Requirement ("ICR") because it excludes hydroelectric imports from Canada and energy efficiency forecasts.

to 200 MW per year of out-of-market renewable resources to enter the market and carries forward any unused portion of that allowance up to 600 MW in a single auction. *Id.* at 12 & n.42, JA____.[5] The 200 MW annual allowance reflects 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. at 41:5-9, JA____. The exemption has no sunset provision and only applies to subsidized resources:

> To qualify as a Renewable Technology Resource, a resource must: (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. The resource must qualify as a renewable or alternative energy generating resource in the state in which it is geographically located.

Ethier Test. at 37:11-17, JA____; 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

[5] The exemption quantity is not based on nameplate generation capacity, but instead on a specific unit's Qualified Capacity—*i.e.*, the resource expected net output counted for system reliability. *See* ISO-NE Tariff § III.13.1.1.2.2.6, JA____. In ISO-NE, the capacity factor used in the Offer Review Trigger Price for wind and solar resources is 35% and 14%, respectively. *See ISO-NE Offer Review Trigger Prices 2013 Study* at 4, 6 (Sept. 10, 2013), http://www.iso-ne.com/static-assets/documents/committees/comm_wkgrps/mrkts_comm/mrkts/mtrls/2013/sep10112013/a02_the_brattle_group_presentation_09_10_13.ppt. Thus, 200 MW of Qualified Capacity for wind turbines requires construction of approximately 571 MW of nameplate capacity.

suppress market-clearing prices, while being sufficiently limited to alleviate design concerns." ISO-NE Transmittal Letter at 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 at 16, JA____.

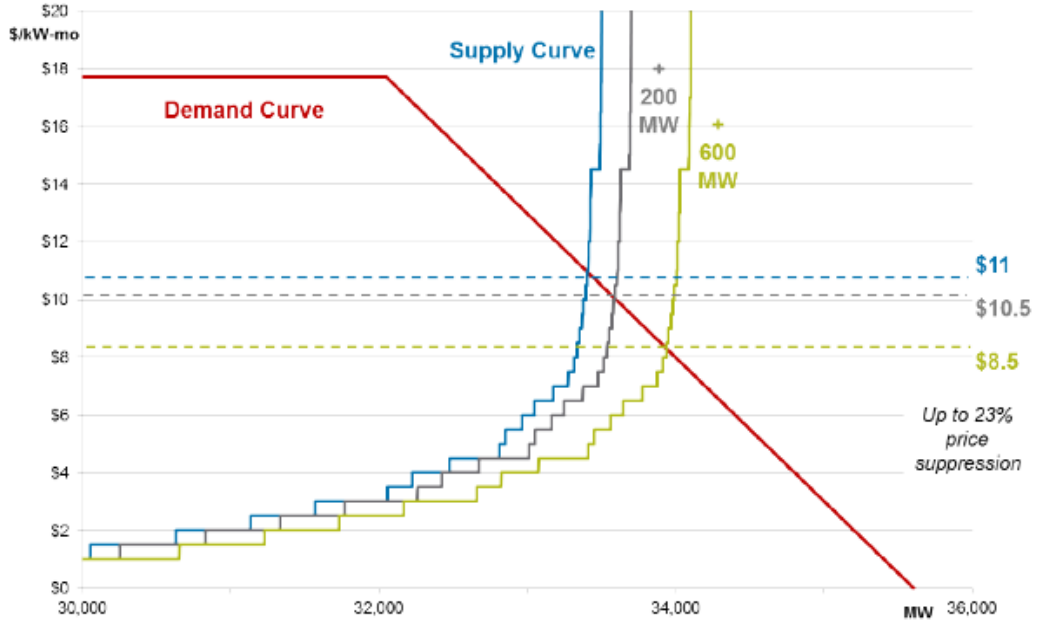
Petitioners and their supporting intervenors separately protested the Renewable Technology Resource exemption and introduced or adopted expert testimony that described and quantified the effect the exemption would have on capacity prices.[6] Petitioners argued the exemption was contrary to the core purposes 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 at 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

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

exemption unreasonably requires "value transfers from one private interest (sellers of capacity) to another (buyers of capacity)," *id.* at 2, JA___, and imposing that expropriation to enable uneconomic resources to enter the market is unduly discriminatory, *see* PSEG Protest at 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, which FERC accepted, and the Representative Supply Curve modeled by ISO-NE's witnesses, who had not included the eleventh-hour renewable exemption proposal in their demand curve analysis:

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 at 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. at 6, JA____. No party contested these calculations, which FERC mentioned only once in the background section of its initial order. *See Demand Curve Order* at 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.* at P 83, JA____. First, "while exemptions in general can lower prices," 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.* at P 84, JA____. In response to arguments that approving a renewable resource exemption in New England contradicts precedent, FERC noted that PJM does not apply minimum price rules to renewable resources, *id.* at P 81, JA____, and distinguished *NESCOE* as a complaint case under FPA section 206 that did not prevent FERC from accepting ISO-NE's broader exemption under FPA section 205, *id.* at P 86, JA____.

Petitioners jointly requested rehearing on three specifications of error. Rehearing Request at 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, including *NESCOE*. *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* at PP 17-27, JA____-__. This petition followed.

SUMMARY OF THE ARGUMENT

Artificial suppression of capacity prices through out-of-market entry is *per se* unjust and unreasonable because it constitutes an unduly discriminatory preference that requires competitive merchant generation resources who are already in the market 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 like natural gas and nuclear facilities. FERC has vigorously defended this principle in the past and adopted minimum

offer price rules to prevent buyer-side suppression of capacity prices in regional capacity markets, including New England. Those decisions have been affirmed by this Court and sister courts. The orders on review now present this Court with a striking reversal of policy in New England that FERC has failed to support with substantial evidence or reasoned explanation.

Here, FERC expressly exempted state-sponsored renewable resources that enter the New England 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 that allows any unused portion of that allowance up to 600 MW in any future year. This exemption has no sunset provision, which means it has no cumulative quantity limit either. The unrebutted expert testimony in this case demonstrates the exemption FERC approved will permit significant artificial price suppression: using the new sloped demand curve and representative supply curve submitted by ISO-NE itself, each 200 MW increment of out-of-market new entry will artificially depresses capacity prices by as much as 8%, or approximately $370 million annually, and that amount could surpass $1 billion in a single auction under the 600 MW carry-forward provision.

Petitioners made numerous arguments against FERC's decision to reverse course and explicitly permit artificial suppression of capacity market prices through buyer-side market power, but FERC swept most of those arguments under

the rug. Instead, FERC relied on four broad defenses, each of which falls short of the minimum requirements for reasoned decisionmaking.

First, FERC acknowledges that explicit subsidization of renewable generation resources will artificially suppress prices, but FERC contends that its approval of a sloped demand curve *will limit* the impact of price suppression. That is not a reasoned response and is unsupported by substantial evidence. Petitioners argue that deliberately authorizing artificial price suppression is *per se* unjust and unreasonable; it is a *non sequitur* for FERC to reply that artificial price suppression may be *less* unjust because FERC happened to adopt a sloped demand curve for independent reasons. Worse, FERC did not attempt to quantify the degree of artificial price suppression it authorized—whether for the 200 MW initial allowance or the 600 MW carry-forward allowance—with no sunset. FERC ignored the expert evidence demonstrating that merchant generators must bear very large losses to enable the uneconomic entry of new resources favored by state regulators. But FERC cannot lawfully find a proposed rule change is just and reasonable if FERC does not first establish, even roughly, what the actual effect on rates will be based on substantial evidence.

Second, FERC contends that the quantity of uneconomic new entry it has permitted should be roughly offset by load growth (*i.e.*, forecasted increases in demand). FERC's load-growth rationale translates as follows: merchant

generation may not compete on a level playing field to supply anticipated increases in demand because FERC has already authorized subsidized renewable resources to meet anticipated demand by entering the market with below-cost offers that merchant generators must pay for in lost revenues. But it is indefensibly discriminatory and preferential for FERC to erase competition for new demand by forcing merchant generators to accept lower market prices to enable renewable resources to meet that demand. Moreover, the ever-expanding out-of-market entry FERC authorized is not tied to real load growth; the exemption continues *whether or not* demand actually increases, which means the exemption metastasizes into demand served by merchant generation unless it increases at the rate FERC accepted. And demand in New England is not growing. ISO-NE now forecasts annual load growth will be "essentially flat" for the next eight years and the recently-published parameters for the next capacity auction in February 2016 *decrease* peak load 144 MW *below* the last auction in February 2015. Where, as here, the factual predicate for FERC's decision proves false, the Court should remand FERC's orders for reconsideration in light of changed circumstances.

Third, FERC observed New England's capacity market already includes 1,100 MW of grandfathered state-subsidized generation built before FERC forestalled the abuse of buyer-side market power in ISO-NE and other regional markets by adopting minimum offer price rules. From that observation, FERC

irrationally concluded that allowing new state-subsidized resources at a rate of 200 MW per year would not *severely* suppress prices. While 200 MW is less than 1,100 MW, the exemption has a three-year carry-forward allowing up to 600 MW with no sunset; nothing stops the exemption from exceeding 1,100 MW over time. FERC's bizarre response also completely failed to address petitioners' actual objection that allowing *new* uneconomic resources into the market will suppress prices even *more* than the grandfathered 1,100 MW *already* have.

Fourth, in addition to sabotaging the purpose of the New England capacity market and contradicting the policy behind minimum offer price rules, FERC reversed its decision rejecting a nearly-identical exemption in *NESCOE* the year before. Instead, FERC distinguished *NESCOE* on procedural grounds, pointing to differences between proposals under FPA section 205 and complaints under FPA section 206. But FERC cannot pretend it did not reject NESCOE's proposed exemption on the merits and it cannot pretend that ISO-NE's proposal fell short of the minimum requirements the *NESCOE* order required for any future renewable exemption proposal. And, more fundamentally, FERC evaded arguments that it has undermined both the central purpose of the capacity market and the policy against out-of-market subsidies reflected in numerous FERC orders affirmed on judicial review—policies FERC and the Solicitor General are presently defending in the Supreme Court.

Finally, FERC improperly failed to set ISO-NE's proposed renewable exemption for hearing and failed to explain why a hearing was not necessary. Expert testimony demonstrated the exemption would cause substantial artificial price suppression and raised genuine issues of disputed fact material to the justness and reasonableness of the rate. 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.

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, promotes the inclusion of uneconomic resources into the Forward Capacity Market, prevents new competitive resources from entering the market, and causes existing resources to retire prematurely. Granting this petition will prevent artificially-suppressed capacity prices, and forestall the detrimental consequences FERC's orders have on the reliability of electricity service in New England.

ARGUMENT

I. STANDARD OF REVIEW

FERC's determination whether a tariff 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 Administrative Procedure Act directs the Court to "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).

"To survive this review, FERC 'must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."'" *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011) (quoting *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))). 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*, 463 U.S. at 43. "Among other things, an agency's failure to respond meaningfully to objections raised by a party renders its decision arbitrary and capricious." *PSEG Energy*, 665 F.3d at 208 (alterations omitted) (citations omitted). Thus, FERC "must respond to objections and address contrary evidence in more than a cursory fashion." *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 543-44 (D.C. Cir. 2010). In addition, FERC must offer a reasonable explanation when it deviates from contrary precedent. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-42, 57 (citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971)); *Mich. Pub. Power Agency v. FERC*, 405 F.3d 8, 12 (D.C. Cir. 2005).

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

The FPA authorizes and requires FERC to prevent state-sponsored generation resources from artificially suppressing capacity prices. *See NEPGA*, 757 F.3d at 290 (citing *CTDPUC*, 569 F.3d at 481-83); *NJBPU*, 744 F.3d at 97-101 (same); *Solomon*, 766 F.3d at 253-54; *Nazarian*; 753 F.3d at 476, 479; *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at PP 142-43. In this case, FERC retreats from that 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.[7] This case is about the unjust, unreasonable, and unduly discriminatory effect of uneconomic entry, regardless of generation type, through the "expropriation of existing capacity suppliers' sunk investments." Rehearing Request at 17, JA____.

Here, FERC finds deliberate suppression of capacity prices is not a "significant concern" because, in FERC's view, it will not "severely suppress prices." *Demand Curve Order* at PP 83-84, JA____. That rationale is "illogical and troubling" as it is "akin to arguing that it is acceptable to let a losing team cheat because it is unlikely to have an effect on the outcome of the game," even though "cheating will have an effect on both the process—which can no longer be trusted—and potentially the outcome, even if it only changes the final score." Rehearing Request at 13, JA____. Assuming FERC's rationale is even permissible under the FPA, which petitioners do not concede, FERC's conclusion that the renewable exemption will not significantly suppress capacity prices is unsustainable under the APA for the reasons below.

[7] NextEra, for example, has wind resources in the interconnection queue in New England, and "is the largest generator in North America of renewable energy from the wind and sun." NextEra Energy, Inc., Form 10-Q at 68 (Aug. 3, 2015). 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*.

A. FERC's Determination That a Sloped Demand Curve Excuses Artificial Price Suppression Because It "Limits" Market Harm Is Not a Reasoned Response to Petitioners' Central Objection and Is Unsupported By Substantial Evidence

FERC's chief rationale for excusing the deliberate artificial suppression of capacity prices through a fixed exemption for subsidized renewable resources is that damage to the market would be "limited" to some unspecified degree 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 "the exemption proposed here is coupled with a sloped demand curve that *will limit* the impact of price suppression *as compared to the existing vertical demand curve.*" *Demand Curve Order* at P 83, JA____ (emphasis added). FERC reiterated its position on rehearing as follows:

> [C]oupling the Renewable Technology Resource exemption with the particular parameters of ISO-NE's sloped demand curve will *limit* the impact of price suppression. The less steep the slope of a demand curve, the *less* impact any exemption will have. For example, an exemption will have *a greater impact* with a vertical demand curve than it will with a sloped demand curve.

Rehearing Order at P 20, JA____ (emphasis added).

That is undoubtedly true. But no one disputes that the price suppression resulting from the Renewable Technology Resource exemption should be *less* under the ISO-NE's new sloped demand curve than under the old vertical demand

curve FERC directed ISO-NE to replace for independent reasons. That observation evades the point. Petitioners clearly stated their "argument is not that price suppression under a sloped demand curve will be the same as under a vertical demand curve. It is that even under a sloped demand curve, price suppression remains both substantial and unjust and unreasonable." Rehearing Request at 8, JA____. FERC's error is that it does not address petitioners' argument that the price suppression remaining under the sloped demand curve—which Dr. Hunger and Mr. Schnitzer calculated—is unjust and unreasonable in and of itself.

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) ("[T]he increase in value to United's customers in the final offer demonstrates not that the final offer was reasonable, but only that it was less unreasonable than its predecessors."). And the hypothetical alternative here—the vertical demand curve—was a straw man because FERC had already directed its elimination.

1. FERC Ignored Unrebutted Evidence That 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 21, 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 at 12 tbl. 1, JA____. Thus, when the capacity clearing price is at criterion, the entry of 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 Request at 7, JA____. As 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 suppression effects of the exemption continue for years to come. NextEra Protest at 12, JA____; Rehearing Request at 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. at 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 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 in its answer to protests at FERC, *see* ISO-NE Answer at 16, JA____, and petitioners emphasized that point on rehearing, *see* Rehearing Request at 18, JA____. Thus, the *only* evidence

quantifying the price effects of the renewable exemption was submitted by Dr. Hunger and Mr. Schnitzer, which FERC disregarded as irrelevant in its decisions below. *See Demand Curve Order* at PP 81-88 (omitting any discussion of this evidence), JA____-__; *Rehearing Order* at PP 17-27 (same), JA____-__.

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. Robert 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 and conceded there will not always be "significant price differences between sloped and vertical demand curves." Ethier Test. at 40:3-10, JA____. Dr. Ethier further conceded 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____. In other words, exempt renewable resources will perpetuate suppressed prices whenever there is a surplus of capacity. Petitioners raised these concessions below, Rehearing Request 7-8, JA____, but FERC failed to address them.

Petitioners respectfully submit that the level of artificial price suppression demonstrated by Dr. Hunger and Mr. Schnitzer represents a "significant concern," *Demand Curve Order* at P 83, JA____, and indicates "the renewable exemption would severely suppress prices under a sloped demand curve," *id.* at P 84, JA____.

FERC's contrary decision does not purport to examine petitioners' evidence, which is only briefly acknowledged in the background section of its initial order. *See id.* at P 67 & n.70, JA____-__. Petitioners squarely 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 Request at 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 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. That is not reasoned decisionmaking.

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). Here, as in *Jersey Central*, FERC fell short of that requirement because, among other things, it "performed no balancing" and "offered no reasoned consideration of [petitioners'] allegations and proffered testimony." *Id.* at 1178.

In this case, evidence showing the price-suppressive impact of the renewable exemption under the sloped demand curve was not merely "an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. It was the heart of the problem. FERC may not simply decline to respond to facially legitimate arguments or ignore record evidence. *See, e.g.*, *PSEG Energy*, 665 F.3d at 208, 209-10. Here, as in prior cases, FERC failed 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)); *see, e.g.*, *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 812 (D.C. Cir. 2007) (remanding orders where, despite "uncertainty regarding the effect of NYISO's [rate] methodology on the price of capacity, the Commission offered no reasons for rejecting [petitioners'] extensive economic analysis").

2. FERC Evaded Petitioners' Objection That Permitting Deliberate Artificial Price Suppression Is *Per Se* Unreasonable and Contrary to 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. Petitioners, and other parties, explained how the renewable exemption undermines the core purpose of the Forward Capacity Market by destroying the market-based price signals it was built 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____; *see* Kalt Aff. at 15:13-19, JA____. "This result would have more than academic consequences. It would hamper investment in the new or upgraded capacity needed to ensure the system reliability for which the capacity markets were created in the first place. It would also distort transmission planning and investment." Hunger Aff. ¶ 19, JA____.

Artificially-suppressed capacity prices not only affect future investment decisions, but also affect existing resources' ability to recoup their investments. Rehearing Request at 9-10, JA____. "[T]hese policies can significantly affect the clearing price in the forward capacity markets, which affect long-term investment decisions and the reasonable compensation opportunity for investments to date." Hunger Aff. ¶ 14, JA____. While resources may assume the risk that market

forces (*e.g.*, fuel costs and technological advancements) may reduce prices, they do not assume the risk prices will be artificially suppressed.

Ultimately, the price suppression caused by the renewable exemption transfers significant quantities of money from generators to ratepayers. Rehearing Request at 17, JA____; NextEra Protest at 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. That is, load's monopsonistic price suppression is effectively an extraction of revenues from third-party capacity suppliers." Kalt Aff. at 16:2-6, JA____. Maintaining low rates is important, but subsidizing the states' renewable policy goals by expropriating competitive generators' capacity revenues through the renewable exemption is unduly discriminatory and preferential.

FERC does not squarely confront any of these arguments. Instead it brushes them aside, finding that the price suppression caused by the exemption will be limited—to some unexplained extent—by load growth and a sloped demand curve. *See Rehearing Order* at P 20, JA____; *Demand Curve Order* at P 83, JA____. But FERC's finding is erroneous and its failure to confront petitioners' legitimate arguments is inexcusable. *See PSEG Energy*, 665 F.3d at 210 (remanding where FERC declined to respond to petitioners argument that FERC's orders were "'inconsistent with the fundamental policy goals' of the forward capacity market").

3. FERC Has Not Justified Artificial Price Suppression in Local Capacity Zones, Which Still Lack Sloped Demand Curves

New England is divided into Local Capacity Zones and the minimum amount of capacity that must be located within a given zone is its Local Sourcing Requirement. *See Rehearing Order* at P 2, JA____. Thus, price suppression caused by uneconomic entry will be commensurately greater in a Local Capacity Zone as compared to the entire region. *See* Rehearing Request at 16, JA____; Hunger Aff. ¶ 18, JA____. Moreover, because the demand curves in Local Capacity Zones remain vertical, FERC could not reasonably contend that a region-wide sloped demand curve would mitigate price suppression in Local Capacity Zones. *See* Rehearing Request at 16, JA____.

FERC downplayed petitioners' concerns about the exacerbation of price suppression in Local Capacity Zones as "overstated" for two reasons. *Rehearing Order* at P 24, JA____.

First, FERC expected ISO-NE to follow through on its commitment to submit "zonal demand curve changes by January 2, 2015, to allow sufficient time for review, approval and implementation for [the tenth Forward Capacity Auction]" to be held in February 2016. *Demand Curve Order* at P 41, JA____. This, of course, was too late for the ninth Forward Capacity Auction held in February 2015. *See id.* at P 36, JA____. Nevertheless, on rehearing, FERC continued to "expect that, based on ISO-NE's statements, ISO-NE will implement

sloped demand curves at the zonal level" on time. *Rehearing Order* at P 24, JA____. But ISO-NE was already four weeks past its deadline when FERC issued the *Rehearing Order* and ISO-NE subsequently reneged on its commitment. On May 18, 2015, ISO-NE submitted a report in FERC Docket No. ER14-1639 (the same docket as the orders below) stating it would not file zonal demand curves for the tenth Forward Capacity Auction in February 2016; on June 22, 2015, suppliers requested that FERC invoke its authority under FPA section 206 and order ISO-NE to file sloped zonal demand curves, consistent with ISO-NE's previous assurances. FERC has not acted on that request and declined to address ISO-NE's continued delay in its order addressing the reconfiguration of ISO-NE's local capacity zones. *ISO New England Inc.*, 151 FERC ¶ 61,183 at P 55 (2015).

Second, FERC found "it is unlikely that all 200 MW would be located within a single zone" because if the annual cap is reached, the amount of exempted resources will be prorated among the states with exempted resources. *Demand Curve Order* at P 24, JA____. But that argument misses the point. The entire 200 MW would not have to clear in a single capacity zone for substantial price suppression to occur because load growth in any single capacity zone will be substantially less than 200 MW. Under FERC's own rationale, systemic price suppression would result. Exempt resources will not be evenly distributed between states and their concomitant zones. Whether a resource is eligible for exemption is

determined by state law or renewable goals and states with more aggressive mandates will attract more projects. Proration changes none of this.

B. Limiting the Renewable Exemption to Expected Load Growth Cripples the Forward Capacity Market and Cannot Remedy Artificial Price Suppression

The second reason why FERC found "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)." *Demand Curve Order* at P 83, JA____. Thus, FERC reasoned, "entry of renewable resources will, in most cases, only displace the new entry required to meet load growth." *Id.* FERC found that the exemption's systematic downward pressure on prices was acceptable because merchant entry would still be needed to "meet resource retirement in ISO-NE." *Id.*; *accord Rehearing Order* at P 21, JA____.

FERC's rationale ultimately means this: non-renewable generation will only compete to replace retiring resources, as generation to meet all load growth will be set aside for renewable resources that merchants must enable to enter by forgoing market-based profits. It is indefensibly discriminatory and preferential for FERC to erase competition to meet new energy demand by expropriating the value of merchants generators' sunk investments to enable uneconomic resources to meet that demand. *See* Rehearing Request at 9-10, 17, JA____-__, ____. Even if the

FPA permits this policy choice, which petitioners do not concede, FERC's position is unsustainable under the APA for three reasons.

1. Tying the Exemption to Expected Load Growth Defeats the Central Objective of the Forward Capacity Market and Conflicts With the Orders Affirmed in *NEPGA*

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 Forward Capacity Market was designed to meet through economic merchant projects. Recall that the central purpose of the Forward Capacity Market is to "attract and retain" resources by setting capacity prices that "average out over time to the cost of new entry." *ISO New England Inc.*, 125 FERC ¶ 61,102 at P 43. That objective is eviscerated if FERC permits resources supported by out-of-market revenues—which, by definition, all resources covered under the exemption must be—to enter the market at a price below the actual cost of new entry, and also to simultaneously block any competition for increased demand by competitive suppliers. *See* Rehearing Request at 10-11, JA____-__.

Recall further that ISO-NE's original Alternative Price Rule failed because it was only triggered by a need for new capacity to meet demand. *See NEPGA*, 757 F.3d at 292. FERC replaced that rule because it did not address the need "to replace existing capacity entering retirement," and "did not account for out-of-

market resources that affect prices even when no new capacity is needed, by displacing other price-setting resources." *Id.* (citing FERC's orders). The renewable exemption flips around the first problem, confining merchant competition to retirement cannibalization, rather than increased demand. And the exemption resurrects the second problem by artificially depressing prices "even when no new capacity is needed, by displacing other price-setting resources." *Id.*

As petitioners explained, "the exemption will cause unjustly and unreasonably low wholesale rate outcomes for existing suppliers regardless of retirements." Rehearing Request at 9, JA____. It causes the "displacement of new economically-justified entry (and associated opportunity for existing resources to recover part of the long run net CONE)" because "new resources that would have cleared in-market but that are displaced by exempt renewable resources well may have established higher prices on the demand curve." *Id.* at 10-11, JA____-__; *see, e.g.*, Kalt Aff. at 13:8-11, JA____. That is precisely what FERC held in the *NEPGA* proceeding, where it found "uneconomic capacity would displace 'what would otherwise be the marginal, price-setting existing resource.'" 757 F.3d at 293 (quoting FERC's first market reform order). But FERC does not acknowledge or explain that reversal.

Nor is FERC's conclusion grounded in substantial evidence. The first assumption in the demand curve study ISO-NE submitted was that "*load growth*

and retirements are sufficient for merchant generation entry to be necessary to maintain resource adequacy into the future," and that "future new entrants will set all-in market prices on average in the long term." Newell/Ungate Test. at 41 (emphasis added), JA____. The renewable exemption upsets that model and ISO-NE concedes it was never part of the study. ISO-NE Answer at 16, JA____. With reduced merchant entry, the model's results with respect to expected prices and expected reliability levels may no longer hold. PSEG pointed out this serious flaw below, explaining the "model relies on new unit pricing from merchant-based supply," PSEG Protest at 11, JA____, and because the "exemption could negate a fundamental requirement of the model," petitioners argued FERC "should have rejected the renewables exemption or, at the least, postponed consideration until the renewables exemption's effects had been properly analyzed." Rehearing Request at 19, JA____. But, once again, FERC ignored that argument.

2. The Exemption Is Not 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 also 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 Request at 12, JA____ (citing NEPGA Protest at 17, JA____). FERC failed to address that argument. In fact, FERC has provided no evidence or justification whatsoever for the carry-forward provision.

3. Capacity Demand Is Not Growing at 200 MW Annually; Near-Term Peak Load Has Dropped and the Long-Term Load Forecast Is Flat

In all events, expected load growth cannot offset 200 MW of uneconomic entry because ISO-NE now forecasts that load growth to be less than that. Petitioners argued below that load growth may not increase by 200 MW per year for many reasons. *See* Rehearing Request at 11, JA____. That argument was prescient. ISO-NE's *2015 Regional Electricity Outlook*,[8] 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] Newer studies likewise lower the 2019 summer peak demand forecast by 447 to 472 MW.[10]

[8] http://www.iso-ne.com/static-assets/documents/2015/02/2015_reo.pdf.

[9] *Id.* at 28 (emphasis added); *see also* ISO-NE, *Long-Term Forecasts* (May 5, 2015) ("Combining [distributed generation and energy efficiency] forecast savings into the base load forecast results in a reduced total peak demand growth of 0.5% annually over the 10-year period, and a flat total energy usage growth rate of

Still more significant, ISO-NE recently published formal parameters for the tenth capacity auction scheduled for February 2016. The peak load for the auction is 144 MW below the last auction and the Installed Capacity Requirement also dropped 16 MW.[11] ISO-NE has also recently published updated Load Forecasts and Installed Capacity Requirement values for its reconfiguration auctions that adjust capacity commitments from earlier auctions as the delivery years approach. The updated assumptions for the 2017/18 delivery year decrease the Load Forecast by 589 MW and decrease the Installed Capacity Requirement 413 MW.[12] The updated assumptions for the 2018/19 delivery year decrease the Load Forecast by 486 MW and decrease the Installed Capacity Requirement by 305 MW.[13]

This new information contradicts core findings upon which FERC approved the renewable exemption and warrants remand. Where, as here, "intervening facts

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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.

[11] 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.

[12] ISO-NE, *Proposed Installed Capacity Requirement (ICR) Values* at 12 (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.

[13] *Id.* at 13.

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) (remanding common carrier approval where conditions were unlikely to reoccur under new labor law).

C. FERC Improperly Relied on Past Price Suppression to Find That Future Price Suppression Would Be Minimal

In response to PSEG's protest, ISO-NE conceded its demand curve modeling did not examine the renewable exemption "as it did not yet exist," but noted its model included "historical entry" of "over 1100 MW of zero-priced state-sponsored natural gas entry that would be prohibited under today's minimum offer price rules," and argued this *past* uneconomic entry is "a more than adequate proxy for the expected renewable entry under the proposed exemption." ISO-NE Answer at 16, JA____. These are the same historical out-of-market resources excused from compliance with minimum offer price rules in *NEPGA*, because they had already entered the market before the rules were revised to prevent uneconomic entry. 757 F.3d at 295-96. Thus, these historical resources participate as "price takers" in the auction and are modeled with other non-competitive resources in the flatter left portion of the supply curve; this pushes the steep right edge of the supply curve, where competitive resources are modeled, further right to intersect the demand curve at a lower price. *See* Newell/Spees Test. at 14-16, JA____-__.

FERC found "ISO-NE's inclusion of 1,100 MW of zero-priced state-sponsored entry in its modeling adequately addresses concerns that the renewable exemption would severely suppress prices under a sloped demand curve." *Demand Curve Order* at P 84, JA____. But petitioners argued that was unreasoned:

> The 1,100 MWs reflected by Brattle are already part of the zero portion of the offer curve and will remain there as existing resources; they have nothing to do with new entry. Our objection to the renewables exemption is that new resources will offer into the FCA at zero and suppress prices beyond the pre-existing price impact of the 1,100 MWs. The fact that zero-priced new entry was allowed to go unmitigated into the capacity auctions in the past does not justify permitting renewable capacity to go unmitigated into future capacity auctions. The fact that past auction results were improperly suppressed cannot justify permitting future price suppression.

Rehearing Request at 18-19, JA____-__.

FERC did not respond to petitioners' argument. Instead, FERC "remain[ed] satisfied" that uneconomic entry under the renewables exemption was not problematic because "[t]he amount of zero-priced entry of Renewable Technology Resources in any year will not exceed 600 MW, a figure significantly below the 1,100 MW figure for zero-priced entry modeled by the Brattle Group." *Rehearing Order* at P 23, JA____. That answer does not explain how *past* uneconomic entry can justify *new* uneconomic entry—a notion that would destroy the purpose of the market reforms affirmed in *NEPGA*, which were meant to *halt* uneconomic entry and "prevent out-of-market resources from distorting prices irrespective of

motivation." 757 F.3d at 294. FERC's *non sequitur* reply is also nonsensical. Yes, 600 MW is less than 1,100 MW. But the renewables exemption has no sunset provision. It will continue to operate indefinitely and, by definition, permits up to 1,200 MW of new uneconomic entry in six years. This Court should remand and require a sensible response to petitioners' straightforward argument. *See, e.g.*, *PSEG Energy*, 665 F.3d at 208, 209-10.

III. FERC DEPARTED FROM PRECEDENT WITHOUT JUSTIFICATION

Petitioners challenged FERC to explain its abrupt departure from "prior and contemporaneous holdings with respect to the New England forward capacity markets, the effects of out-of-market resources entering those markets, and its prior rejection of an exemption similar to the exemption from mitigation for renewable resources"—*i.e.*, *NESCOE*. Rehearing Request at 2 (specification 2) (listing cases), JA____; *see id.* at 22-24, JA____-__. But FERC looked past a forest of precedent to distinguish one tree—*NESCOE*—and that effort itself was wanting. As a result, the orders below do not constitute reasoned decisionmaking, and should be remanded. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-42, 57; *Mich. Pub. Power Agency*, 405 F.3d at 12, 15.

FERC's orders contravene New England capacity market fundamentals laid down as the basis for reforming the market and adopting a minimum offer price rule. *See* Rehearing Request at 22, JA____. There is simply no way to reconcile

the four orders affirmed in *NEPGA*, *see supra* note 1 (listing the orders), with the orders on review here. FERC ploughs along as if those orders did not exist, but the contrasts are difficult to ignore.

Starting with the most obvious conflict, FERC's prior market reform orders squarely rejected the argument that FERC should grant "a categorical exemption for state-sponsored resources" because those resources "are *unlikely to be used for the purpose of suppressing capacity prices*." *NEPGA*, 757 F.3d at 294 (emphasis added). Here, FERC finds "renewable resources are not similarly situated to other types of resources in that they are *unlikely to be used for price suppression*." *Rehearing Order* at P 26, JA____ (emphasis added). It is reasonable to ask FERC to explain what changed about renewable resources or states' motivations that might reasonably have prompted FERC to use the same words to reach opposite conclusions.

In the same vein, FERC's reliance on the representation that the renewable exemption was "not intended to suppress market-clearing prices," ISO-NE Transmittal Letter at 12, JA____, cannot be reconciled with the market reform orders, where "FERC specifically found that '[out-of-market] capacity suppresses prices regardless of intent.'" *NEPGA*, 757 F.3d at 292 (quoting 135 FERC ¶ 61,029 at P 170). "Allowing [out-of-market] capacity to clear," FERC found, "suppresses the clearing prices below competitive levels." 135 FERC ¶ 61,029 at

P 14. That was true regardless of load growth or retirement because a resource offering "at a price of zero" or at a "low price will serve to displace a higher-priced resource that otherwise would have set the clearing price; as a result, a lower offer will then set the clearing price." *NEPGA*, 757 F.3d at 294 (reviewing FERC's fourth market reform order, 138 FERC ¶ 61,027 at PP 60, 72).

In PJM, FERC held "[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." Rehearing Request at 22 n.86, JA____ (quoting *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157 at P 90); *see also, e.g.*, *id.* (quoting *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301 at P 29 ("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."). FERC also held the intent of "state and local policies and objectives with regard to the development of new capacity resources" was irrelevant, and 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 that PJM's [capacity market] is designed to produce, and that PJM as a whole, including other states, rely on to attract sufficient capacity." *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 3; *accord PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 143; *see NJBPU*, 744 F.3d at

100-01. And, as of this writing, FERC is defending the preemption holdings in *Solomon* and *Nazarian* against certiorari petitions. *See supra* at 15.

In short, FERC's orders below turn a blind eye to what FERC previously held, and continues to argue, in other proceedings. The orders do exactly what FERC has repeatedly said should not be done: they allow uneconomic entry to undermine the purpose of the capacity market by artificially suppressing capacity prices. FERC must either square its orders with its own fundamental principles of capacity market design or explain why those principles no longer apply in ISO-NE. It failed to do either.

Instead, FERC chose only to distinguish its decision in *NESCOE*, which rejected a strikingly similar exemption without a carry-forward provision, on procedural grounds. Because *NESCOE* was a complaint case under FPA section 206, FERC held "[n]othing in that proceeding prevents ISO-NE from itself proposing an exemption under section 205 of the FPA." *Demand Curve Order* at P 86, JA____; *accord Rehearing Order* at P 17, JA____. That claim rings hollow when the exemptions in each proceeding were so similar and so close in time because the statutory standard does not change. *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 . . . .").

The question is whether anything *else* changed to justify a different outcome in this case than in *NESCOE*. In the end, FERC has only one answer: the sloped demand curve. *See Rehearing Order* at P 18, JA____. But that answer gets FERC nowhere if FERC lacks substantial evidence to show a sloped demand curve will prevent significant artificial price suppression. And, as petitioners explain above, FERC failed to do so. *See supra* Part II. Moreover, the *NESCOE* decision denied a renewable exemption for a number of reasons FERC's narrow response ignores. Those prior rulings do not vanish simply because the instant case had a different procedural posture at FERC.

First, consistent with the market reform orders affirmed in *NEPGA*, FERC found that "[e]xempting renewables whose costs exceed the market price would result in the uneconomic entry of renewables and thereby reduce capacity prices." *NESCOE*, 142 FERC ¶ 61,108 at P 35. Here, FERC announces the opposite conclusion, but the only changed fact is a sloped demand curve.

Second, FERC rejected the argument that "any incidental price suppression would be limited under its exemption proposal" because the annual 225 MW cap was tied to state renewable portfolio standards. *Id.* at P 15. FERC found there was no "evidentiary support for this claim," *id.* at P 34, adding that 225 MW would

exceed anticipated load growth, *id.* at P 35. Here, FERC accepts nearly the same annual allowance of uneconomic entry plus a carry-forward provision, because it is purportedly tied to load growth. But there is no "evidentiary support" for ISO-NE's claim in this case either. ISO-NE concedes its demand curve study did not examine the renewable exemption, *see* ISO-NE Answer at 16, JA____, and ISO-NE's assertions about anticipated load growth were inflated as compared to later pronouncements, *see supra* Part II.B.3.

Third, in *NESCOE*, FERC rejected the argument that ISO-NE should have a renewable exemption like PJM for two reasons. The absence of a sloped demand curve in ISO-NE was only one. FERC also found "[t]he effect of an exemption for renewables would likely be much greater in New England than in PJM," because "the New England market is substantially smaller than the PJM market" and "[a] given additional quantity of capacity will have a larger effect on capacity prices in the smaller New England market compared with the larger PJM market." 142 FERC ¶ 61,108 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.

ISO-NE did not do that here. While ISO-NE's regional vertical demand curve has been replaced by a sloped demand curve, ISO-NE remains one-fifth the size of PJM. *See supra* note 2. Neither ISO-NE nor FERC address this market

size characteristic or the fact that a given amount of uneconomic capacity will have greater impact in ISO-NE than PJM, which is true under either a vertical or sloped demand curve. And this difference is exacerbated because ISO-NE has still failed to propose sloped demand curves for Local Capacity Zones, which are smaller and even more vulnerable to price suppression. *See supra* Part II.A.3. Thus, neither ISO-NE nor FERC followed FERC's own directive to address *both* characteristics or explained why it failed to do so. *NESCOE* remains, at best, only half-distinguished.

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

The expert evidence submitted below demonstrated that genuine issues of material fact existed with respect to the effect ISO-NE's proposed exemption would have on rates, and thus whether the proposed exemption was just, reasonable, unduly discriminatory under FPA section 205. That evidence squarely contradicts ISO-NE's claims that the renewable exemption was "not intended to suppress market-clearing prices, while being sufficiently limited to alleviate design concerns." ISO-NE Transmittal Letter at 12, JA____. The disputed questions include, *inter alia*: the extent of artificial price suppression caused by the renewable exemption on a system-wide basis using the new sloped demand curve; the extent of artificial price suppression within local capacity zones, where there is still no sloped demand curve; whether ISO-NE's load forecast was reliable; and

whether the purported goals of the renewable exemption could be accomplished without artificial price suppression.

In light of these disputes over essential facts, petitioners requested that FERC establish a hearing to resolve them or require a stakeholder process to ventilate the facts and develop alternatives. *See* Rehearing Request at 3 (specification of error 3), 19, 24-26, JA____, ____, ____-__. FERC noted petitioners' request in the background section of it order, *see Rehearing Order* at P 11 & n.14, JA____, but FERC's decision never addressed that specification of error, *see id.* at PP 16-27, JA____-___, and thus effectively rejected it *sub silentio*.

"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 v. FERC*, 184 F.3d 892, 895 (D.C. Cir. 1999); *accord Cajun Elec. Power Co-op., Inc. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994) (listing cases). In this case, petitioners have not made "'mere allegations of disputed fact,'" but have also made "'an adequate proffer of evidence to support them.'" *Cajun Elec.*, 28 F.3d 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, as in *Cajun Electric*, FERC relies upon a separate tariff provision—specifically the newly-approved sloped demand curve—to find the artificial price suppression caused by the renewable exemption is sufficiently mitigated. *See id.* And, as in *Cajun Electric*, the Court should find that FERC's reasoning is "seriously flawed," *id.*, because petitioners have demonstrated the exemption permits significant artificial price suppression, notwithstanding FERC's adoption of a sloped demand curve for independent reasons. The extent of that price suppression—which is also influenced by other disputed facts, such as anticipated load growth—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.

Petitioners anticipate FERC will attempt to excuse its failure to explain why a hearing was unnecessary because FERC's orders implicitly indicate that FERC believed this case could be resolved on the record before it, making remand an empty gesture. That is not true and this Court has previously rejected such arguments. *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."). Here, all this Court can discern from FERC's orders is that a sloped demand curve will result in "less" artificial price suppression than would have

occurred under the now-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.

CONCLUSION

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

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CERTIFICATE AS TO LENGTH OF BRIEF

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Circuit Rule 32(a)(2), I hereby certify that the foregoing document contains no more than 14,000 words (13,887 words using the word-count feature in Microsoft Word) not including the tables of contents and authorities, glossary, and certificates of counsel.

Respectfully submitted,

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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 October 5, 2015, 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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