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

SIERRA CLUB, NATURAL RESOURCES DEFENSE COUNCIL, RENEW NORTHEAST, INC., AND CONSERVATION LAW FOUNDATION *Petitioners*	)	
v.	)	Case No. _____
FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*.	)	

PETITION FOR REVIEW

Pursuant to Section 313(b) of the Federal Power Act ("FPA") (16 U.S.C. § 825l(b)) and Rule 15(a) of the Federal Rules of Appellate Procedure, Sierra Club, Natural Resources Defense Council, RENEW Northeast, Inc., and Conservation Law Foundation petition this Court to review and set aside the following order of the Federal Energy Regulatory Commission:

1. *ISO New England, Inc.*, "Order on Tariff Filing," Docket No. ER18-619-000, 162 FERC ¶ 61,205 (March 9, 2018) (attached as Exhibit A). Petitioners requested rehearing of this order on April 9, 2019 (attached as Exhibit B), and it

may be deemed to have been denied pursuant to Section 313(a) of the FPA (16 U.S.C. § 825l(b)).

Dated: August 31, 2020

Respectfully submitted,

/s/ Charles Carter Hall
Charles Carter Hall
Senior Associate Attorney, Clean Energy Program
Earthjustice
1001 G Street NW, Suite 1000
Washington, DC 20001
chall@earthjustice.org

Attorney for Sierra Club, Natural Resources Defense Council, and RENEW Northeast, Inc.

/s/ Casey Roberts
Casey Roberts
Senior Staff Attorney
Sierra Club
1536 Wynkoop Street, Suite 312
Denver, CO 80202
casey.roberts@sierraclub.org

Attorney for Sierra Club only

/s/ John N. Moore
John N. Moore
Senior Attorney
Natural Resources Defense Council
20 North Wacker Drive, Suite 1600
Chicago, IL 60201
(312) 651-7927
jmoore@nrdc.org

Attorney for Natural Resources Defense Council only

/s/ Emily K. Green
Emily K. Green
Senior Attorney
Conservation Law Foundation
53 Exchange St., Suite 200
Portland, ME 04101
(207) 210-6439
egreen@clf.org

Attorney for Conservation Law Foundation only

DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1 of the United States Court of Appeals for the District of Columbia Circuit, Sierra Club, Natural Resources Defense Council, RENEW Northeast, Inc., and Conservation Law Foundation hereby submit the required Disclosure Statements.

Sierra Club is a corporation organized and existing under the laws of the State of California. It is a national nonprofit organization focused on protection of the environment and conservation of natural resources. Petitioner Sierra Club does not have any parent companies, nor outstanding shares or debt securities in the hands of the public, nor any parent, subsidiary, or affiliates that have issued shares or debt securities to the public.

Natural Resources Defense Council Inc. ("NRDC") is a national not-for-profit corporation organized under the laws of the State of New York and committed to the preservation and protection of the environment, public health, and natural resources. NRDC has no parent companies, subsidiaries, or affiliates and has not issued shares or other securities to the public. No publicly held corporation owns any stock in NRDC.

RENEW Northeast, Inc. is a corporation organized and existing under the laws of the Commonwealth of Massachusetts. It has no parent companies, and

there are no publicly held companies that have a 10% or greater ownership interest in RENEW Northeast, Inc. RENEW Northeast, Inc. non-profit association whose mission involves coordinating the ideas and resources of its members in the renewable energy industry and environmental interest groups, with the goal of promoting and increasing renewable energy in New England and New York.

Conservation Law Foundation ("CLF") is a nonprofit, membership-supported corporation organized and existing under the laws of the Commonwealth of Massachusetts. CLF's mission is to protect New England's environment for the benefit of all people and uses the law, science, and markets to create solutions that preserve our natural resources, build healthy communities, and sustain a vibrant economy. CLF works to promote renewable energy and combat the threat of climate change; to stop air and water pollution; to protect marine habitat; and to develop clean, safe, and affordable communities and transport. CLF does not have any parent corporations, and no publicly held corporation has a ten percent or greater ownership interest in CLF.

Dated: August 31, 2020

/s/ Charles Carter Hall
Charles Carter Hall
Senior Associate Attorney, Clean Energy Program
Earthjustice
1001 G Street NW, Suite 1000
Washington, DC 20001
chall@earthjustice.org

Attorney for Sierra Club, Natural Resources Defense Council, and RENEW Northeast, Inc.

/s/ Emily K. Green
Emily K. Green
Senior Attorney
Conservation Law Foundation
53 Exchange St., Suite 200
Portland, ME 04101
(207) 210-6439

CERTIFICATE OF SERVICE

Pursuant to Rule 15(c) of the Federal Rules of Appellate Procedure, I hereby certify that on this 31st day of August, 2020, I caused to be served copies of the foregoing Petition for Review and Corporate Disclosure Statements via electronic mail to:

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

David L. Morenoff, Acting General Counsel
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

and by electronic mail on all parties on the Commission's service list in the underlying proceeding Docket Nos. ER18-619-000 and ER18-619-001.

Dated: August 31, 2020

/s/ Charles Carter Hall
Charles Carter Hall

Attorney for Sierra Club, Natural Resources Defense Council, and RENEW Northeast, Inc.

Party	Primary Person or Counsel of Record to be Served	Other Contact to be Served
American Public Power Association	Elise Caplan EMRI Coordinator American Public Power Association 1875 Connecticut Avenue, NW Suite 1200 Washington, DISTRICT OF COLUMBIA 20009 UNITED STATES ecaplan@publicpower.org	
American Public Power Association	John McCaffrey Regulatory Counsel American Public Power Association 2451 Crystal Drive Suite 1000 Arlington, VIRGINIA 22202 UNITED STATES jmccaffrey@publicpower.org	
American Wind Energy Association	eugene grace Regulatory Attorney 1501 M St NW, Ste 1000 washington, DISTRICT OF COLUMBIA 20005 UNITED STATES ggrace@awea.org	
Avangrid Networks, Inc.	Justin Atkins Regulatory Counsel Avangrid Renewables, LLC 1125 NW Couch St. Suite 700 Portland, OREGON 92709 UNITED STATES justin.atkins@avangrid.com	Noelle M. Kinsch Deputy General Counsel Iberdrola USA Management Corporation 99 Washington Avenue, Suite 2018 Albany, NEW YORK 12210 noelle.kinsch@iberdrolausa.com
Avangrid Networks, Inc.		Debra Mills Lead Analyst, Regulatory Admin Central Maine Power Company

		83 Edison Drive Augusta, MAINE 04330 CMPRegAdmin@avangrid.com
Avangrid Renewables, LLC	Toan-Hao Nguyen Deputy General Counsel Avangrid Renewables, LLC 1125 NW Couch, Suite 700 Portland, OREGON 97209 UNITED STATES toan.nguyen@avangrid.com	Adam Sokolski 517 Marquette, Suite 1600 Minneapolis, MINNESOTA 55402 adam.sokolski@avangrid.com
Calpine Corporation	Sarah Novosel Senior VP and Managing Counsel Calpine Corporation 805 15th Street, NW Suite 708 Washington, DISTRICT OF COLUMBIA 20005 UNITED STATES snovosel@calpine.com	
Calpine Corporation		Brett Kruse bkruse@calpine.com
Champlain VT, LLC	Jay Ryan Partner Baker Botts LLP Baker Botts, LLP - The Warner 1299 Pennsylvania Avenue, NW Washington, DISTRICT OF COLUMBIA 20004 UNITED STATES jay.ryan@bakerbotts.com	
Cogentrix Energy Power Managemen t, LLC	Christopher Sherman Vice President, Cogentrix Cogentrix Energy Power Management, LLC 3 Mill Street Arlington, MASSACHUSETTS 02476 UNITED STATES chrissherman@cogentrix.com	

Connecticut Department of Energy & Environmental Protection	Kirsten Rigney Connecticut Department of Energy & Environmental Protection 10 Franklin Square New Britain, CONNECTICUT 06051 UNITED STATES Kirsten.Rigney@ct.gov	Kirsten Rigney Connecticut Department of Energy & Environmental Protection 10 Franklin Square New Britain, CONNECTICUT 06051 Kirsten.Rigney@ct.gov
Connecticut Municipal Electric Energy Cooperative	Scott Strauss Spiegel & McDiarmid LLP 1875 Eye Street NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006 UNITED STATES Scott.Strauss@spiegelmcd.com	Jeffrey A Schwarz Spiegel & McDiarmid LLP 1875 Eye Street, N.W., Suite 700 Washington, DISTRICT OF COLUMBIA 20036 jeffrey.schwarz@spiegelmcd.com
Connecticut Municipal Electric Energy Cooperative		E Service Spiegel & McDiarmid LLP 1875 Eye St, NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006 eService@spiegelmcd.com
Connecticut Municipal Electric Energy Cooperative		Michael P Lane Chief Financial Officer, Inter Connecticut Municipal Electric Energy Cooperative 30 Stott Avenue Norwich, CONNECTICUT 06360 mlane@cmeec.org
Connecticut Public Utilities Regulatory Authority		Seth A. Hollander Assistant Attorney General 10 Franklin Square New Britain, CONNECTICUT 06051 seth.hollander@ct.gov
Conservation Law Foundation	Jerry Elmer Staff Attorney Conservation Law Foundation 55 Dorrance Street, Suite 202	

	Providence, RHODE ISLAND 02903 UNITED STATES JElmer@CLF.org	
Consolidated Edison Energy, Inc.	Jeff Dannels Senior Manager, Market Analyti Con Edison Clean Energy Businesses, Inc. 100 Summit Lake Drive Valhalla, NEW YORK 10595 UNITED STATES dannelsj@conedceb.com	
CPV Towantic, LLC	Larry Eisenstat Partner Crowell & Moring LLP 1001 Pennsylvania Ave. N.W. Washington, DISTRICT OF COLUMBIA 20004 UNITED STATES leisenstat@crowell.com	Patricia M Alexander Advisor Crowell & Moring LLP 1001 Pennsylvania Ave. N.W. Washington, DISTRICT OF COLUMBIA 20004 palexander@crowell.com
CPV Towantic, LLC		Diana Jeschke Crowell & Moring LLP 1001 Pennsylvania Ave NW Washington, DISTRICT OF COLUMBIA 20004 djeschke@crowell.com
CPV Towantic, LLC		thomas rumsey 50 Braintree Hill Office Park, Suite 300 Braintree, MASSACHUSETTS 02184 trumsey@cpv.com
CPV Towantic, LLC		Daniel Pierpont Manager Competitive Power Ventures, Inc. 50 Braintree Hill Office Park Suite 300 Braintree, MASSACHUSETTS 02184 dpierpont@cpv.com

Direct Energy	Marjorie Philips VP, Wholesale Market Policy 1700 Broadway, 38th Floor New York, NEW YORK 10019 UNITED STATES mphilips@lspower.com	
Direct Energy Business Marketing, LLC	Marjorie Philips VP, Wholesale Market Policy 1700 Broadway, 38th Floor New York, NEW YORK 10019 UNITED STATES mphilips@lspower.com	
Direct Energy Business, LLC	Marjorie Philips VP, Wholesale Market Policy 1700 Broadway, 38th Floor New York, NEW YORK 10019 UNITED STATES mphilips@lspower.com	
Dynegy Marketing and Trade, LLC	Michelle Grant Corporate Counsel INDIVIDUAL 601 Travis Street Suite 1400 Houston, TEXAS 77002 UNITED STATES michelle.d.grant@dynegy.com	
Eastern New England Consumer-Owned Systems	John Coyle Duncan & Allen LLP Suite 700 1730 Rhode Island Avenue, N.W. Washington, DISTRICT OF COLUMBIA 20036-3115 UNITED STATES jpc@duncanallen.com	
Edison Electric Institute	Lopa Parikh Edison Electric Institute 701 Pennsylvania Avenue Washington, DISTRICT OF COLUMBIA 20004-2696 UNITED STATES lparikh@eei.org	

Electric Power Supply Association	Nancy Bagot Vice President Electric Power Supply Association 1401 New York Ave. NW 11th FLoor Washington, DISTRICT OF COLUMBIA 20005 UNITED STATES NancyB@epsa.org	
Emera Energy Services, Inc.	Michael Henry Senior U.S. Counsel Emera Energy Inc. 101 Federal St Ste. 1101 Boston, MASSACHUSETTS 02110 UNITED STATES michael.henry@emeraenergy.com	
ENERGY NEW ENGLAND, LLC	David Cavanaugh Vice President, Regulatory & M ENERGY NEW ENGLAND, LLC 100 Foxborough Boulevard Suite 110 Foxborough, MASSACHUSETTS 02035 UNITED STATES dcavanaugh@ene.org	
Eversource Energy Service Company	Andrew Katz Senior Counsel Northeast Utilities Service Company 901 F Street Suite 602 Washington, DISTRICT OF COLUMBIA 20004 UNITED STATES katzas@nu.com	
Exelon Corporation	Christopher Wilson Director, Federal Regulatory	Jeanne Dworetzky Assistant General Counsel

	A Exelon Corporation 101 Constitution Ave, NW Suite 400E Washington, DISTRICT OF COLUMBIA 20001 UNITED STATES FERCe-filings@exeloncorp.com	Exelon BSC-Legal Regulatory 101 Constitution Avenue Suite 400 East Washington, DISTRICT OF COLUMBIA 20001 jeanne.dworetzky@exeloncorp.com
Exelon Corporation		Steven Kirk Constellation Energy Commodities Group 100 Cocstellation Way, Ste 600 Candler Bldg, Drop E Baltimore, MARYLAND 21202 steven.kirk@constellation.com
FirstLight Power Resources, Inc.	Julia Wood Van Ness Feldman, LLP 1050 Thomas Jefferson Street, NW Washington, DISTRICT OF COLUMBIA 20007 UNITED STATES jsw@vnf.com	Marc A Silver FirstLight Power 850 Old Road to Nine Acre Corner Concord, MASSACHUSETTS 01742 marc.silver@firstlightpower.com
H.Q. Energy Services (U.S.) Inc.	Louis Guilbault Manager - Regulatory Affairs - Hydro-Quebec Energy Services (U.S.) Inc. 75 blvd Rene-Levesque West 18th floor Montreal, QUEBEC H2Z 1A4 CANADA guilbault.louis.2@hydro.qc.ca	Helene Cossette Legal Counsel H.Q. Energy Services (U.S.) Inc. 75 Rene-Levesque Blv 17th Floor Montreal, QUEBEC H2Z 1A4 cossette.helene@hydro.qc.ca
ISO New England Inc.	Maria Gulluni Senior Counsel ISO New England and New York ISO 1 Sullivan Rd Holyoke, MASSACHUSETTS 01040	Julie A Horgan eTariff Coordinator One Sullivan Road Holyoke, MASSACHUSETTS 01040 jhorgan@iso-ne.com

	UNITED STATES mgulluni@iso-ne.com	
ISO New England Inc.	Chris Hamlen Regulatory Counsel ISO New England Inc. ISO New England Inc. One Sullivan Road Holyoke, MASSACHUSETTS 01040 UNITED STATES chamlen@iso-ne.com	Linda M Morrison Docket Administrator ISO New England Inc. One Sullivan Rd Holyoke, MASSACHUSETTS 01040 LMorrison@iso-ne.com
ISO New England Inc.		Linda Maile-Smith Legal Administrative Assistant ISO New England Inc. One Sullivan Road Holyoke, MASSACHUSETTS 01040 lmailesmith@iso-ne.com
LS Power Associates, L.P.	Neil Levy 500 North Capitol Street, NW Washington, DISTRICT OF COLUMBIA 20001 UNITED STATES nlevy@mwe.com	
LS Power Associates, L.P.	Tom Hoatson 1 Tower Center East Brunswick, NEW JERSEY 08816 UNITED STATES thoatson@lspower.com	
Maine Public Utilities Commission	Lisa Fink Maine Public Utilities Commission Maine Public Utilities Commission 18 State House Station Augusta, MAINE 04333 UNITED STATES lisa.fink@maine.gov	
Massachusetts Attorney	Christina Belew Assistant Attorney General	

General Maura Healey	Massachusetts Attorney General Martha Coakley One Ashburton Place 18th Floor Boston, MASSACHUSETTS 02108 UNITED STATES christina.belew@state.ma.us	
Massachusetts Department of Public Utilities	Greggory Wade Massachusetts Department of Public Utilities Massachusetts Department of Public Utilities 1 South Station boston, MASSACHUSETTS 02110 UNITED STATES greggory.wade@mass.gov	
Massachusetts Municipal Wholesale Electric Company	Scott Strauss Spiegel & McDiarmid LLP 1875 Eye Street NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006 UNITED STATES Scott.Strauss@spiegelmcd.com	Jeffrey A Schwarz Spiegel & McDiarmid LLP 1875 Eye Street, N.W., Suite 700 Washington, DISTRICT OF COLUMBIA 20036 jeffrey.schwarz@spiegelmcd.com
Massachusetts Municipal Wholesale Electric Company		E Service Spiegel & McDiarmid LLP 1875 Eye St, NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006 eService@spiegelmcd.com
Massachusetts Municipal Wholesale Electric Company		David Tuohey Massachusetts Municipal Wholesale Electric Company PO Box 426 Ludlow, 01056-0426 dtuohey@mmwec.org
Massachusetts Municipal		Brian K Thomson bthomson@mmwec.org

Wholesale Electric Company		
National Grid	Patrick Tarmey Senior Counsel, FERC Regulator National Grid 40 Sylvan Rd. Waltham, MASSACHUSETTS 02451 UNITED STATES patrick.tarmey@nationalgrid.com	
National Rural Electric Cooperative Association	Randolph Elliott Partner National Rural Electric Cooperative Association 1301 K Street N.W. Washington, DISTRICT OF COLUMBIA 20005 UNITED STATES relliott@mccarter.com	
NATURAL RESOURCES DEFENSE COUNCIL	Jackson Morris Director, Eastern Energy NATURAL RESOURCES DEFENSE COUNCIL 40 West 20th St New York, NEW YORK 10011 UNITED STATES jmorris@nrdc.org	
New England Power Pool Participants Committee	David Doot Day Pitney LLP 242 Trumbull Street Hartford, CONNECTICUT 06103 UNITED STATES dtdoot@daypitney.com	
New England Power Pool Participants Committee	Sebastian Lombardi Day Pitney LLP 242 Trumbull Street Hartford, CONNECTICUT 06103-1212	

	UNITED STATES slombardi@daypitney.com	
New England Power Pool Participants Committee	Sophia Browning Associate Day Pitney LLP 555 11th St NW Washington, DISTRICT OF COLUMBIA 20004 UNITED STATES sbrowning@daypitney.com	
New England States Committee on Electricity	Jason Marshall Senior Counsel New England States Committee on Electricity New England States Committee on Electricity 4 Bellows Road Westborough, MASSACHUSETTS 01581 UNITED STATES jasonmarshall@nescoe.com	
NEW HAMPSHIRE CONSUMER ADVOCATE	D. Maurice Kreis Consumer Advocate New Hampshire Office of Consumer Advocate Office of Consumer Advocate 21 South Fruit Street, Suite 18 Concord, NEW HAMPSHIRE 03301 UNITED STATES donald.kreis@oca.nh.gov	
New Hampshire Electric Cooperative, Inc.	Scott Strauss Spiegel & McDiarmid LLP 1875 Eye Street NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006 UNITED STATES Scott.Strauss@spiegelmcd.com	Jeffrey A Schwarz Spiegel & McDiarmid LLP 1875 Eye Street, N.W., Suite 700 Washington, DISTRICT OF COLUMBIA 20036 jeffrey.schwarz@spiegelmcd.com

New Hampshire Electric Cooperative, Inc.		E Service Spiegel & McDiarmid LLP 1875 Eye St, NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006 eService@spiegelmcd.com
New Hampshire Public Utilities Commission	F. Anne Ross Director of the Legal Division New Hampshire Office of Consumer Advocate 21 South Fruit Street Suite 10 Concord, NEW HAMPSHIRE 03301 UNITED STATES f.anne.ross@puc.nh.gov	George McCluskey Analyst New Hampshire Public Utilities Commission 21 South Fruit Street Suite 10 Concord, NEW HAMPSHIRE 03301 george.mccluskey@puc.nh.gov
New Hampshire Public Utilities Commission		Catherine A Marsellos Paralegal New Hampshire Public Utilities Commission 21 South Fruit Street Concord, NEW HAMPSHIRE 03301 catherine.marsellos@puc.nh.gov
NextEra Energy Resources, LLC	Joel Newton Senior Attorney NextEra Energy Resources, LLC 801 Pennsylvania Ave NW Suite 220 Washington, DISTRICT OF COLUMBIA 20004 UNITED STATES joel.newton@nee.com	Michelle C Gardner Director of Regulatory Affairs NextEra Energy Resources, LLC 82 Longwater Drive Hanover, MASSACHUSETTS 02339 michelle.gardner@nee.com
NRG Power Marketing LLC and GenOn Energy	Abraham Silverman Assistant General Counsel - Re NRG Energy, Inc. 211 Carnegie Center Drive Princeton, NEW JERSEY	

Managemen t, LLC	08540 UNITED STATES abe.silverman@nrg.com	
NRG Power Marketing LLC and GenOn Energy Managemen t, LLC	Cortney Slager Assistant General Counsel - Re NRG Companies 804 Carnegie Center Princeton, NEW JERSEY 08540 UNITED STATES cortney.slager@nrg.com	
NRG Power Marketing LLC and GenOn Energy Managemen t, LLC	Jennifer Hsia NRG Energy 211 Carnegie Center Princeton, NEW JERSEY 08540 UNITED STATES jennifer.hsia@nrg.com	
Potomac Economics, Ltd.	David Patton Potomac Economics 9990 Fairfax Blvd Suite 560 Fairfax, VIRGINIA 22030 UNITED STATES dpatton@potomaceconomics.com	
PSEG Energy Resources & Trade LLC	Cara Lewis Assistant Regulatory Counsel 80 Park Plaza, T5 Newark, NEW JERSEY 07102 UNITED STATES cara.lewis@pseg.com	Kenneth R. Carretta, ESQ Deputy General Counsel/Chief PSEG Energy Resources & Trade LLC 80 Park Plaza, T5G Newark, NEW JERSEY 07102 kenneth.carretta@pseg.com
PSEG Energy Resources & Trade LLC		Raymond V. DePillo 80 Park Plaza T19 Newark, NEW JERSEY 07102 Raymond.Depillo@pseg.com

PSEG Power Connecticut LLC	Cara Lewis Assistant Regulatory Counsel 80 Park Plaza, T5 Newark, NEW JERSEY 07102 UNITED STATES cara.lewis@pseg.com	Kenneth R. Carretta, ESQ Deputy General Counsel/Chief PSEG Energy Resources & Trade LLC 80 Park Plaza, T5G Newark, NEW JERSEY 07102 kenneth.carretta@pseg.com
PSEG Power Connecticut LLC		Joel S. Gordon Director, Market Policy PSEG Power Connecticut LLC 7 Steeple Lane Amherst, NEW HAMPSHIRE 03031 Joel.Gordon@PSEG.com
PSEG Power LLC	Cara Lewis Assistant Regulatory Counsel 80 Park Plaza, T5 Newark, NEW JERSEY 07102 UNITED STATES cara.lewis@pseg.com	Kenneth R. Carretta, ESQ Deputy General Counsel/Chief PSEG Energy Resources & Trade LLC 80 Park Plaza, T5G Newark, NEW JERSEY 07102 kenneth.carretta@pseg.com
PUBLIC CITIZEN, INC	Tyson Slocum Director Public Citizen's Energy Program 215 Pennsylvania Ave SE Washington, DISTRICT OF COLUMBIA 20003 UNITED STATES tslocum@citizen.org	
RENEW Northeast, Inc.	Francis Pullaro RENEW Northeast, Inc. PO Box 383 Madison, CONNECTICUT 06443 UNITED STATES fpullaro@renew-ne.org	
Retail Energy Supply Association	Elizabeth Whittle Partner Nixon Peabody LLP 401 Ninth Street, N.W Suite 900	Joseph Oliker Interstate Gas Supply, Inc. 6100 Emerald Parkway Dublin, OHIO 43016 joliker@igsenergy.com

	Washington, DISTRICT OF COLUMBIA 20004 UNITED STATES ewhittle@nixonpeabody.com	
Shell Energy North America (US), L.P.	Matthew Picardi Vice President Shell Energy North America (US), L.P. 36 Pinewood Ave. Saratoga Springs, NEW YORK 12866 UNITED STATES Matthew.Picardi@shell.com	
Sierra Club	Casey Roberts Senior Attorney Sierra Club 1536 Wynkoop St, Suite 200 Denver, COLORADO 80202 UNITED STATES casey.roberts@sierraclub.org	Mark Kresowik Sierra Club 408 C Street NE Washington, DISTRICT OF COLUMBIA 20002 mark.kresowik@sierraclub.org
Sustainable FERC Project	Bruce Ho Senior Advocate Sustainable FERC Project 40 W. 20th St. New York, NEW YORK 10011 UNITED STATES bho@nrdc.org	
Vermont Public Power Supply Authority	Scott Strauss Spiegel & McDiarmid LLP 1875 Eye Street NW Suite 700 Washington, DISTRICT OF COLUMBIA 20006 UNITED STATES Scott.Strauss@spiegelmcd.com	Jeffrey A Schwarz Spiegel & McDiarmid LLP 1875 Eye Street, N.W., Suite 700 Washington, DISTRICT OF COLUMBIA 20036 jeffrey.schwarz@spiegelmcd.com
Vermont Public Power Supply Authority		E Service Spiegel & McDiarmid LLP 1875 Eye St, NW Suite 700 Washington, DISTRICT OF

		COLUMBIA 20006 eService@spiegelmcd.com
Vermont Public Power Supply Authority		Kenneth A Nolan General Manager Vermont Public Power Supply Authority 5195 Waterbury-Stowe Road PO Box 126 Waterbury Center, VERMONT 05677 knolan@vppsa.com
Verso Corporation	Robert Fallon Counsel ENGELMAN FALLON, PLLC 1717 K Street, NW Suite 900 Washington, DISTRICT OF COLUMBIA 20006 UNITED STATES rfallon@efenergylaw.com	St. John Daugherty Deputy General Counsel Verso Paper Corp. 6775 Lenox Center Court Memphis, TENNESSEE 38115 St.John.Daugherty@Versoco.com
Verso Corporation		Steven Brooks Energy Optimization Manager Verso Paper Corp. PO Box 211 Norway, MICHIGAN 49870 steve.brooks@versopaper.com

Exhibit A

ISO New England, Inc., "Order on Tariff Filing," Docket No. ER18-619-000, 162 FERC ¶ 61,205 (March 9, 2018)

162 FERC ¶ 61,205

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

ISO New England Inc. Docket No. ER18-619-000

ORDER ON TARIFF FILING

(Issued March 9, 2018)

Paragraph Numbers

1. On January 8, 2018, pursuant to section 205 of the Federal Power Act (FPA),[1] ISO New England Inc. (ISO-NE) submitted proposed revisions to its Transmission, Markets and Services Tariff (Tariff) to modify its Forward Capacity Market (FCM) to better accommodate actions taken by New England states to procure certain resources outside of ISO-NE's wholesale markets. The collection of revisions, referred to as Competitive Auctions with Sponsored Policy Resources (CASPR), adds a secondary auction to the Forward Capacity Auction (FCA) process to facilitate the transfer of capacity supply obligations from existing capacity resources, which commit to permanently exit ISO-NE's wholesale markets, to new state-supported resources (Sponsored Policy Resources). In this order, we accept ISO-NE's proposed Tariff revisions, to be effective March 9, 2018, in part, and June 1, 2018, in part, as requested.

I. Background

2. As part of its FCM, ISO-NE holds an annual FCA in which capacity suppliers compete to provide capacity to the New England region for the relevant delivery year, three years in the future. Suppliers of capacity that receive a capacity supply obligation in an FCA commit to, and receive payment for, providing capacity for that one-year period associated with that FCA.

3. ISO-NE utilizes a minimum offer price rule, or MOPR, that requires new capacity resources to offer their capacity at prices that are at or above a price floor set for each type of resource (referred to as the Offer Review Trigger Price).[2] The MOPR does not allow resources receiving out-of-market revenue to reflect that support in their offer prices, unless the support is widely available to other market participants.[3] The FCM rules permit a limited exemption from the MOPR for certain renewable resources (the Renewable Technology Resource (RTR) exemption).[4] In any FCA, up to 200 MW of

[1] 16 U.S.C. § 824d (2012).

[2] Tariff § III.A.21.1 (50.0.0).

[3] Tariff § III.A.21.2(b)(i) (50.0.0).

[4] To participate in the FCM as an RTR, a resource must qualify as a renewable or alternative energy generating resource under any New England state's mandated (either by statute or regulation) renewable or alternative energy portfolio standards as in effect

(continued ...)

renewable resources may qualify for the RTR exemption and enter the FCA without being subject to the MOPR. Any unused portion of that 200 MW can carry forward for up to three years (two additional FCAs) for a possible maximum of 600 MW of exempt renewable resource capacity in any given FCA.[5]

II. ISO-NE's Competitive Auctions with Sponsored Policy Resources Filing

4. On January 8, 2018, ISO-NE made the instant filing as a means to accommodate the entry of Sponsored Policy Resources[6] into the FCM over time while maintaining competitive capacity pricing. ISO-NE explains that, over the past decade, New England states have sought to reduce greenhouse gas emissions and meet climate goals through various mechanisms outside of the ISO-NE-administered wholesale markets. ISO-NE states that such state efforts have included mandates that state-regulated utilities enter into long-term contracts with certain resources.[7] ISO-NE states that, while each of the six New England states has adopted a renewable target, recently, some states have increased both their renewable targets and their efforts to promote the development of state-

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on January 1, 2014, or, in states without a standard, qualify under that state's renewable energy goals as a renewable resource (either by statute or regulation) as in effect on January 1, 2014. In addition, the resource must qualify as a renewable or alternative energy generating resource in the state in which it is geographically located. Tariff § III.13.1.1.1.7 (48.0.0); *see also ISO New England Inc.*, 147 FERC ¶ 61,173, at PP 81-88 (2014) (First RTR Order), *order on reh'g*, 150 FERC ¶ 61,065 (2015) (RTR Rehearing Order); *ISO New England Inc.*, 155 FERC ¶ 61,023, at P 33 (2016) (RTR Remand Order), *order on reh'g*, 158 FERC ¶ 61,138, at PP 43, 48 (2017) (RTR Remand Rehearing Order), *appeal pending sub nom. NextEra Energy Res., LLC v. FERC*, Case No. 17-1110 (D.C. Cir., filed Apr. 3, 2017).

[5] Tariff § III.13.1.1.2.10 (48.0.0).

[6] Tariff § I.2.2 defines a Sponsored Policy Resource as "a New Capacity Resource that: receives an out-of-market revenue source supported by a government-regulated rate, charge or other regulated cost recovery mechanism, and; qualifies as a renewable, clean or alternative energy resource under a renewable energy portfolio standard, clean energy standard, alternative energy portfolio standard, renewable energy goal, or clean energy goal enacted (either by statute or regulation) in the New England state from which the resource receives the out-of-market revenue source and that is in effect on January 1, 2018." Tariff § I.2.2 (107.0.0).

[7] ISO-NE states that some New England states have established legal requirements, while others have non-binding goals, related to emissions reductions.

preferred new generation resources.[8] According to ISO-NE, the most recent state actions include the Multi-State Clean Energy request for proposals that aims to procure the rough equivalent of 460 MW (nameplate) of new renewable resources and the 2016 Massachusetts Energy Diversity Act that requires clean energy procurements in the range of 2,800 MW (nameplate).[9] ISO-NE views these expected procurements as "a potentially significant increase in the quantities of qualified capacity receiving out-of-market contracts."[10] ISO-NE also contends that these resources will likely exceed or not qualify for the RTR exemption, resulting in a potentially significant overbuild of the system.

5. According to ISO-NE, these out-of-market actions could result in price suppression and thus negatively impact the market's ability to retain and justly compensate needed existing resources and to attract new, competitively-compensated resources. Another concern, ISO-NE states, is that the MOPR may cause consumers to "pay twice" for the same capacity—i.e., pay once for capacity procured in the FCM to serve their demand, and pay a second time for the additional capacity obtained through out-of-market contracts with state-supported resources.[11]

6. As a result of the New England states' increase in out-of-market procurements, ISO-NE states that it, along with the states and the New England Power Pool Participants Committee (NEPOOL), sought a "better way to integrate these state policies into the competitive wholesale markets."[12] ISO-NE states that it identified four design principles that it sought to satisfy with CASPR: (1) maintain competitively-based capacity auction prices by minimizing the price-suppressive effect of out-of-market subsidies on competitive (i.e., unsubsidized) resources in the FCA; (2) accommodate the entry of new

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[8] ISO-NE Transmittal at 3-4.

[9] *Id.* at 3-4 & n.12. We note that the 3,260 MW discussed here represent nameplate capacity and that the amount of qualified capacity that the resources procured pursuant to the Massachusetts legislation could sell in the FCM would be lower than this figure.

[10] Geissler Testimony at 8.

[11] ISO-NE Transmittal at 3 & n.8 (citing New England States Committee on Electricity's Policies and Markets Problem Statement (May 17, 2016), p. 2 at http://nepool.com/uploads/IMAP_20160517_Problem_Statement.pdf ("At best, additional consumer costs occur when the capacity market does not consider such resources, so that consumers purchase a public policy resource and are then forced to purchase some redundant capacity in the market")).

[12] *Id.* at 4.

Sponsored Policy Resources into the FCM over time; (3) avoid cost shifts by decreasing the potential for one state's consumers to bear the costs of another state's subsidies; and (4) develop a transparent, market-based approach. ISO-NE states that the first two objectives are fundamentally in tension, so it had to make a number of design decisions to balance these objectives and, wherever possible, elected to prioritize the preservation of competitive prices in the FCM.[13]

7. ISO-NE states that under CASPR it will conduct the annual FCA in two stages. The first stage, the primary auction, will maintain the current FCA process and its corresponding MOPR.[14] The second stage, known as the substitution auction, will immediately follow the primary auction. The capacity prices to be paid by ISO-NE loads will be determined in the primary auction.[15] In the second stage, the substitution auction, existing resources that have acquired capacity supply obligations through the primary auction will be permitted to offer a demand bid in the substitution auction, indicating a willingness to permanently retire from all ISO-NE markets at a certain price. In the substitution auction, the supply curve consists of capacity sell offers from Sponsored Policy Resources that did not already obtain a capacity supply obligation in the primary auction. ISO-NE states that existing resources that clear the substitution auction will transfer their capacity supply obligations to Sponsored Policy Resources and will pay the substitution auction clearing price, which Sponsored Policy Resources obtaining the capacity supply obligations will receive. Accordingly, ISO-NE states that existing resources that clear in the substitution auction generally will be able to shed their capacity supply obligations at a lower price than they received in the primary auction and retain a one-time net payment equal to the difference between the primary auction clearing price and the substitution auction clearing price, much like a severance payment. In exchange, those existing resources will agree to permanently exit ISO-NE's wholesale markets through termination of their interconnection rights.[16]

8. ISO-NE states that Sponsored Policy Resources that clear in the substitution auction take on the same obligations and rights—including the Pay for Performance

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[13] *Id*.

[14] ISO-NE proposes to phase out the current RTR exemption by allowing accrued exempt MWs to be used through FCA 15. *See infra* P 87.

[15] ISO-NE also states that clearing the substitution auction can, under certain circumstances, result in "side payments" to cleared demand bids, and that those side payments will be borne by load. When this occurs, the total cost to load of capacity can increase from the primary auction results. *See* Geissler Testimony at 142-149.

[16] ISO-NE Transmittal at 6-7.

obligations—as resources that obtain a capacity supply obligation through the primary auction. According to ISO-NE, in future years' FCAs, Sponsored Policy Resources that clear the secondary auction will be treated as existing resources and will therefore not be subject to the MOPR.

9. ISO-NE states that, because the substitution auction will match the voluntary demand bids (i.e., existing resources that are willing to permanently exit the markets) and supply offers (i.e., Sponsored Policy Resources) submitted in the sealed-bid substitution auction, it does not require the use of an administratively-determined capacity demand curve. ISO-NE states that, because it will not apply the MOPR in the substitution auction, new Sponsored Policy Resources are allowed to account for out-of-market revenues and offer at the lowest price at which they are willing to accept a capacity supply obligation. ISO-NE states that, by closely coordinating the entry of new Sponsored Policy Resources and the exit of retiring capacity, CASPR meets ISO-NE's two most significant objectives—to maintain competitively-based FCM prices and to accommodate the entry of new Sponsored Policy Resources into the FCM.[17]

10. ISO-NE requests that most of the CASPR rules become effective on March 9, 2018, to coincide with the start of the approximately year-long auction administration cycle for FCA 13, to be held in February 2019 for delivery year 2022-2023. ISO-NE explains that FCA 13 is the first opportunity for FCM participation by up to 1,200 MW of nameplate clean energy supply to be procured by Massachusetts pursuant to statute. ISO-NE requests a separate effective date of June 1, 2018, for a number of Tariff changes dealing with FCM settlements.[18]

III. Notice of Filing and Responsive Pleadings

11. Notice of the filing was published in the *Federal Register*, 83 Fed. Reg. 1611 (2018), with interventions and protests due on or before January 29, 2018. Notices of intervention, timely motions to intervene, and comments and/or protests were submitted by entities listed in the Appendix to this order. Answers were filed by the External Market Monitor, FirstLight, ISO-NE, National Rural Electric Cooperative Association, NEPOOL, and Connecticut Parties.

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[17] *Id.* at 6.

[18] *Id.* at 29.

12. A number of parties generally support ISO-NE's filing and urge the Commission to accept it.[19] Several parties argue that CASPR will benefit the New England region by providing a reasonable balance between maintaining meaningful FCM prices and accommodating state-supported resources.[20]

13. AEMA states that it supports CASPR because the status quo is unsustainable and CASPR is an improvement.[21] Massachusetts DPU argues that CASPR provides just and reasonable market adjustments without which Massachusetts ratepayers will be harmed by being forced to pay twice for the capacity associated with Sponsored Policy Resources and because the region will otherwise inefficiently develop more generation than it requires.[22] NRG-GenOn states that it reluctantly supports most elements of CASPR because it is incrementally better than the status quo, but urges the Commission to see CASPR as a short-term "accommodation" mechanism that does little to protect the long-term integrity of the FCM. NRG-GenOn urges the Commission to insist that stakeholders use the additional time afforded by CASPR to develop next-generation market structures that utilize competitive market principles to facilitate state policy outcomes.[23] Exelon similarly argues that, in addition to modifying the current market structure through CASPR, ISO-NE should also affirmatively seek to help states "achieve" their policy objectives.[24]

14. NEPGA asserts that the entry of subsidized resources through CASPR will still put downward pressure on FCA clearing prices, but that NEPGA nonetheless supports CASPR as a measure made necessary by the New England states' increasing interest in subsidizing certain resources to carry out clean, renewable, and alternative energy laws

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[19] These parties include AEMA; Dominion; Exelon; FirstLight; Maine PUC; Massachusetts DPU; NEPGA; NESCOE; New Hampshire Parties; NRG-GenOn; Public Systems; Retail Energy Supply Association; and Verso.

[20] Calpine Comments at 1; Dominion Comments at 4-5; Exelon Comments at 2-4; FirstLight Comments at 2; Maine PUC Comments at 5; Massachusetts DPU Comments at 7; NEPGA Comments at 2; New Hampshire Parties Comments at 3; Retail Energy Supply Association Comments at 4.

[21] AEMA Comments at 2.

[22] Massachusetts DPU Comments at 12.

[23] NRG-GenOn Comments at 1-2.

[24] Exelon Comments at 2.

and policies.[25] Dominion similarly states that it has concerns about CASPR's effect on long-term capacity prices and that ISO-NE and its stakeholders should continue to evaluate market design changes that promote competitive entry of Sponsored Policy Resources through accurate market price signals and price transparency.[26]

15. Public Systems state that CASPR is only a modest improvement on the status quo and that it offers no improvement for non-renewable consumer-preferred resources. Public Systems state that they do not ask the Commission to reject CASPR but instead urge the Commission to initiate and expeditiously complete an investigation under section 206 of the FPA[27] to determine whether the Commission should require ISO-NE to expand the eligibility for participation in the substitution auction or make other necessary modifications for FCA 14 and future auctions.[28]

16. Notwithstanding their general support, Exelon, NEPGA, and NRG-GenOn protest limited aspects of CASPR. We address the issues raised in those protests below.

17. Clean Energy Advocates, Connecticut Parties, Consumer-Owned Systems, CPV Towantic, External Market Monitor, Massachusetts AG, NGSA, NextEra, and Public Citizen protest ISO-NE's filing and urge the Commission to reject it. We address the issues raised in those protests below.

IV. Procedural Matters

18. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[29] the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. In addition, given its interest in the proceedings, the early stage of the proceedings, and the absence of undue prejudice or delay, we grant the unopposed, late-filed interventions of Connecticut Office of Consumer Counsel and the External Market Monitor and late-filed comments of the External Market Monitor.

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[25] NEPGA Comments at 3-4.

[26] Dominion Comments at 5.

[27] 16 U.S.C. § 824e (2012).

[28] Public Systems Comments at 8-9.

[29] 18 C.F.R. § 385.214 (2017).

19. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[30] prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the aforementioned answers because they have provided information that assisted us in our decision-making process.

V. Substantive Matters

20. We accept ISO-NE's proposed Tariff revisions as a just and reasonable and not unduly discriminatory or preferential modification to the FCM design.

21. In assessing ISO-NE's proposal—and the larger issue of how to address the impact of state policies on wholesale markets—we are guided by the first principles of capacity markets. A capacity market should facilitate robust competition for capacity supply obligations, provide price signals that guide the orderly entry and exit of capacity resources, result in the selection of the least-cost set of resources that possess the attributes sought by the markets, provide price transparency, shift risk as appropriate from customers to private capital, and mitigate market power.[31] Ultimately, the purpose of basing capacity market constructs on these principles is to produce a level of investor confidence that is sufficient to ensure resource adequacy at just and reasonable rates. Where participation of resources receiving out-of-market state revenues undermines those principles, it is our duty under the FPA to take actions necessary to assure just and reasonable rates.[32] In previous settings of that nature, to address the impact of out-of-market state support on wholesale capacity markets, the Commission has accepted market rules that impose a MOPR on resources receiving such out-of-market support.

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[30] *Id.* § 385.213(a)(2).

[31] RTR Remand Rehearing Order, 158 FERC ¶ 61,138 at P 9 ("[o]ne purpose of capacity markets is to send appropriate price signals regarding where and when new resources are needed."); RTR Remand Order, 155 FERC ¶ 61,023 at P 35 (purpose of the FCM is to provide price signals "so that ISO-NE meets its reliability requirements at least cost"); *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,057, at P 36 (2012) (approving PJM pricing proposal for demand resources on the basis that "the improved transparency and price predictability that will result . . . will increase investor confidence in market outcomes"); *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157, at PP 90-91 (2009) ("The MOPR . . . maintains a role for private investment so that investment risk will not be shifted to captive customers over time.").

[32] *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, at P 143 (2011) ("While the Commission acknowledges the rights of states to pursue legitimate policy interests . . . it is our duty under the FPA to assure just and reasonable rates in wholesale markets.").

22. Absent a showing that a different method would appropriately address particular state policies, we intend to use the MOPR to address the impacts of state policies on the wholesale capacity markets. However, we acknowledge that there can be more than one valid method of managing such impacts, and that methods may be tailored to the specific challenges posed by the state policies in a given region. Accordingly, while we will use the MOPR as our standard solution, we will consider supplemental or alternative proposals to manage the impact of state policies, provided that those proposals are sufficiently consistent with the above-mentioned principles of capacity markets. We consider ISO-NE's proposal to be an acceptable means of managing the impact of state policies in the New England region while maintaining just and reasonable rates.

23. The objective of the FCM, a market mechanism adopted by the New England region, is to ensure resource adequacy at just and reasonable rates. In meeting this objective, the FCM provides ISO-NE with the supply resources it requires to reliably operate its system, and investors—rather than ratepayers—bear resource investment risk in exchange for an opportunity to earn a market return commensurate with that risk. In turn, New England consumers receive cost-effective, reliable electric service.[33]

24. A key to sustaining these benefits over time is maintaining sufficient investor confidence in the FCM. In recent years, some New England states, which previously opted to restructure their retail markets, have begun pursuing policy goals through contractual support for certain resources outside the wholesale markets. This out-of-market state support raises a potential conflict with the Commission's interest in maintaining efficient and competitive wholesale electric markets. Specifically, out-of-market state support can result in the region building more capacity than it needs. This type of overbuilding can require customers to pay twice for capacity[34] or lower capacity market prices to levels that deprive non-state-supported resources of the opportunity to recover their investment costs through the capacity market. Absent market mechanisms to limit the impact on FCM prices, which serve as both a revenue stream and a price signal for investors, those state actions can erode the investor confidence on which the FCM relies to meet its objective. Erosion of investor confidence can prevent the FCM

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[33] *See, e.g.*, *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 479-80 (D.C. Cir. 2009) (discussing evolution of the resource adequacy construct in New England and acknowledging that the Forward Capacity Market "both incentivizes and accounts for new entry by more efficient generators, while ensuring a price both adequate to support reliability and fair to consumers"); *accord New York v. FERC*, 535 U.S. 1, 5-13 (2002) (explaining evolution of competitive markets); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 768 (2016) (same).

[34] That is, customers pay once for the capacity acquired in the capacity market and again for resources that could serve as capacity but were procured outside the market.

from attracting investment in new and existing non-state-supported resources when investment is needed, or can lead to excessive costs for consumers as capacity sellers include significant risk premiums in their offers. It is, therefore, imperative that such a market construct include rules that appropriately manage the impact of out-of-market state support, to ensure that the market's underlying principles are met and that the resulting rates are just and reasonable. The Commission has previously found that ISO-NE's current MOPR construct, including a limited exemption for a set quantity of renewable resources each year (RTR exemption), would adequately limit the impact of out-of-market state actions on FCM prices, and thus yield just and reasonable rates. However, as ISO-NE indicates, the New England states recently have significantly increased both their targets and their efforts to promote the development of specific state-supported resources in the region.[35]

25. Recognizing the implications of these state policies, ISO-NE proposes, in the instant filing, to phase out the RTR exemption in favor of an alternative mechanism to allow state-supported resources the opportunity to obtain capacity supply obligations. In evaluating whether, under CASPR, the FCM will continue to maintain resource adequacy at just and reasonable rates, we must assess, as an initial matter, whether the FCM can continue to attract and maintain resource investment when the system requires it, and to do so at a reasonable cost. We conclude that CASPR meets this criterion. While decisions about entry into and exit from the FCM may, in some years, be driven by the substitution auction price, the price paid to all other capacity resources will be set by the primary auction where the MOPR is applied to all new resource offers. This design thereby reasonably mitigates the impacts of Sponsored Policy Resources entering the FCM through the substitution auction. And to the extent CASPR allows state-supported resources to obtain capacity supply obligations without clearing the primary auction, it does so by carefully coordinating the entry of those resources into the FCM with the exit of an equal quantity of retiring capacity—capacity that chooses to retire based on the combination of price signals from the primary auction and the substitution auction. This coordination attempts to avoid the sudden and dramatic shifts in the supply curve from year to year that can undermine confidence that potential investors have in the FCM as a means to recoup the costs of their investments in new capacity over the long term. We find that because of these design choices, and based on the evidence presented in this record, CASPR will allow the FCM to continue to meet its objective of providing resource adequacy at just and reasonable rates.

[35] ISO-NE Transmittal at 3.

26. We reiterate that the Commission's policies are fuel-neutral.[36] Although the state policies that are driving ISO-NE's proposal are intended to increase the development of clean energy resources, we are reviewing this proposal under section 205 of the FPA to determine whether the proposal before us is just and reasonable and not unduly discriminatory. Our acceptance of this proposal should not be read as a departure from our fuel-neutral policies, but only as a finding based on the record before us.

27. We address individual aspects of ISO-NE's proposal and related pleadings in turn below.[37]

A. Sponsored Policy Resource Definition

1. ISO-NE's Proposal

28. ISO-NE proposes to define a "Sponsored Policy Resource" as follows:

> a New Capacity Resource that: receives an out-of-market revenue source supported by a government-regulated rate, charge or other regulated cost recovery mechanism; and qualifies as a renewable, clean or alternative energy resource under a renewable energy portfolio standard, clean energy standard, alternative energy portfolio standard, renewable energy goal, or clean energy goal enacted (either by statute or regulation) in the New England state from which the resource receives the out-of-market revenue source and that is in effect on January 1, 2018.[38]

29. ISO-NE states that this definition limits the resources that can participate in the substitution auction to "renewable, clean or alternative resources that receive revenue from a state or municipal government entity outside of the ISO-administered markets."[39]

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[36] We consider this resource-agnostic rationale to be particularly important given ISO-NE's acknowledged concerns with the region's fuel security, and its implications for the resilience of the bulk power system.

[37] We note that because we accept ISO-NE's proposal as just and reasonable and not unduly discriminatory or preferential, we need not address any alternative proposals. *See OXY USA Inc. v. FERC*, 64 F.3d 679, 692 (1995); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (1984).

[38] Tariff § I.2.2 (107.0.0).

[39] ISO-NE Transmittal at 13; *see also* Geissler Testimony at 62.

ISO-NE explains that this definition reflects one of the key objectives of the CASPR proposal—for the FCM to accommodate procurements required by states in order to meet their renewable and clean energy resource requirements. ISO-NE further notes that the requirement that the resource receive out-of-market revenue is intended to be consistent with the current use of that concept by the Internal Market Monitor (IMM) for purposes of setting a new resource's minimum offer price in the FCA, and that the definition seeks to ensure that "capacity sold via [the substitution auction] is sponsored to meet public policy objectives."[40]

30. As discussed further below, the definition of Sponsored Policy Resource limits the types of technologies that can enter the substitution auction based on the laws in effect on January 1, 2018, in the state from which a resource receives supplemental revenue. ISO-NE states that this date limitation "provides more clarity to the market regarding the types of technologies that are eligible to participate . . . in the substitution auction."[41] ISO-NE points out that:

> If there was no cutoff date, then the set of technologies that would satisfy this condition could expand in unanticipated ways as state policies changed, such as if a future state regulation decreed a conventional combined-cycle gas generator to be an "alternative" technology for purposes of entering such a technology into the substitution auction.[42]

ISO-NE represents, however, that if state policies change in the future, it will work with stakeholders to determine if the new laws can and should be accommodated by CASPR.[43]

2. <u>Comments</u>

31. Multiple parties assert that the definition of Sponsored Policy Resource is unduly discriminatory. Consumer-Owned Systems urge the Commission to reject CASPR, and APPA and Public Systems do not oppose CASPR but urge the Commission to institute a proceeding under section 206 of the FPA to determine whether ISO-NE should expand substitution auction eligibility or make other modifications for the fourteenth FCA and future FCAs. Public Systems, APPA, and Consumer-Owned Systems question why the

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[40] ISO-NE Transmittal at 14.

[41] *Id*.

[42] Geissler Testimony at 66.

[43] ISO-NE Transmittal at 14.

definition of Sponsored Policy Resource reflects some government policy preferences, such as state renewable and clean energy policies, but not others, such as the preferences of public power entities. Public Systems and APPA assert that public power utilities base their preferences for resource types on issues such as fuel-type, lowering costs to consumers, environmental concerns, and reliability,[44] and CASPR will not incorporate these entities' public power preferences into the FCA. Public Systems additionally argue that ISO-NE has not demonstrated that CASPR's ability to protect FCA prices is dependent on limiting the eligibility to participate in the substitution auction to only state-supported renewable resources, because the fact that the substitution auction replaces retiring capacity on a MW-for-MW basis will tend to protect FCA prices regardless of the fuel or technology used by the resources participating in the substitution auction.[45] Public Systems, therefore, argue that all new consumer-preferred resources should be eligible to offer capacity in the substitution auction, regardless of fuel or technology type.[46]

32. Consumer-Owned Systems challenge ISO-NE's determination that the renewable resources that will be permitted to participate in CASPR "are not similarly situated to other, more traditional resources" on the basis that those renewable resources are being procured by the states outside of the wholesale markets and cannot be directly procured through markets that are not designed to value carbon-free characteristics.[47] Consumer-Owned Systems state that any resources procured through bilateral contracts, such as those procured by Consumer-Owned Systems, are by definition procured outside of ISO-NE's markets, and ISO-NE has not demonstrated why the need to address state renewable resource procurements, also procured through bilateral contracts, justifies CASPR.[48]

33. In response to ISO-NE's statement that public power entities' lower cost of financing makes their new natural gas-fired resources more likely to clear the primary

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[44] Public Systems Comments at 6-7, 16-17; APPA Comments at 5.

[45] Public Systems Comments at 15.

[46] *Id.* at 9-10; *see also* APPA Comments at 10. National Rural Electric Cooperative Association states in its answer that it supports this request.

[47] Consumer-Owned Systems Comments at 7-8 (citing ISO-NE Transmittal at 17).

[48] *Id.* at 8; *see also Id.* at 10 & n.9 (citing *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137, at 61,865 (2017) (Bay, Comm'r, concurring)) ("All generating resources are 'subsidized' to one extent or another, and a State-mandated purchase of renewables has no greater claim to preferential treatment than any other form of 'out-of-market' support.").

auction, so that such resources would not need to enter the substitution auction,[49] APPA asserts that some public power projects may have higher costs of financing than ISO-NE posits, and in any case, the fact that a resource can enter the primary auction is not a guarantee that it will clear.[50] Consumer-Owned Systems state that ISO-NE could accomplish the goals of CASPR in a manner that is not unduly discriminatory through: (1) using a technology-neutral definition of Sponsored Policy Resources, thus enabling all resources to compete on an equal footing to participate in the substitution auction; (2) allowing resources to bid competitively, on a cost-justified basis, through the use of the resource-specific bid review by ISO-NE's IMM; or (3) enabling self-supply to meet its own capacity needs without being subject to the MOPR.[51]

34. AEMA, Connecticut Parties, and NGSA raise concerns with the definition of Sponsored Policy Resource being limited to resource types selected by state policies prior to the January 1, 2018 date. AEMA argues that this limitation unduly discriminates against technologies that may be developed in the future and supported by states—in particular, energy storage. AEMA points out that the Commission has recognized energy storage's attributes as important to the future electric grid and that, while energy storage is not currently part of a state renewable or clean energy standard, it could be in the future. AEMA is concerned that in the near term, the MOPR could result in new storage resources not clearing the primary auction and that, if storage cannot participate in the substitution auction, the market could lose the benefits of a valuable resource that could assist states in meeting their emissions-reduction goals and ISO-NE in meeting its flexibility needs. AEMA acknowledges that ISO-NE has indicated that it will work with stakeholders if state policies change, and new laws can be accommodated through CASPR. AEMA asks, however, that to provide necessary certainty to energy storage developers, the Commission should approve CASPR as filed, but impose a compliance

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[49] ISO-NE Transmittal at 14.

[50] APPA Comments at 7-8 (citing ISO-NE Transmittal at 14).

[51] Consumer-Owned Systems Comments at 8-9 ("ISO-NE could . . . link[] self-supply resources with associated load, without reference to any bid floor mitigation, and remove[] both the resource and the associated load from the Forward Capacity Auction.").

obligation on ISO-NE and stakeholders to review what resources would be eligible to participate in the substitution auction on an annual/biannual basis.[52]

35. Connecticut Parties note that ISO-NE has not yet answered Connecticut Parties' question of whether large-scale hydro that Connecticut seeks to procure would qualify as a Sponsored Policy Resource under CASPR. Connecticut Parties argue that CASPR is unduly discriminatory to the extent it excludes Connecticut's imported hydro as a Sponsored Policy Resource but includes imported hydro developed as a Massachusetts policy preferred resource.[53]

36. Connecticut Parties further assert that CASPR is unduly discriminatory because it limits the opportunities for Sponsored Policy Resources to obtain capacity supply obligations based on retirements and inter-zonal transactions, limitations that do not affect resources participating in the primary auction.[54]

37. NGSA states that as states make future out-of-market procurements to meet their clean energy objectives, they will strive for certainty that those resources will be able to recover their costs. Therefore, NGSA states, although ISO-NE has committed to considering modifications to CASPR based on state laws that may be enacted after January 1, 2018, in practice, states will be reluctant to make out-of-market procurements of resource types that are not already within the current definition of Sponsored Policy Resources using the January 1, 2018 date. In this way, NGSA argues, ISO-NE is exercising an inappropriate influence over state decision-making policy, and states should make their own decisions about what types of resources to procure to meet their obligations, while ISO-NE remains fuel-neutral.[55]

38. NRG-GenOn states that limiting participation in CASPR to only those resource types recognized as of January 1, 2018, was a critical part of the compromise that enabled the development of the CASPR proposal (noting that, for example, Canadian hydropower is not currently recognized as eligible to participate in the CASPR substitution auction). NRG-GenOn urges the Commission to clarify that only renewable resources recognized under state law as of January 1, 2018, will be allowed to participate in CASPR, on the

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[52] AEMA Comments at 5-7.

[53] Connecticut Parties Comments at 36-37.

[54] Connecticut Parties Comments at 39.

[55] NGSA Comments at 2.

basis that routine changes to the CASPR eligibility list will only undermine market certainty.[56]

3. Answers

39. ISO-NE disagrees with the argument that the definition of Sponsored Policy Resource is unduly discriminatory.[57] ISO-NE asserts that resources that are both cost-effective and do not receive out-of-market support will choose the more advantageous route of submitting offers in the primary auction at their preferred price. If these resources sell capacity in the primary auction, ISO-NE posits that they can expect to receive a higher clearing price than they would in the substitution auction, and it is therefore not unduly discriminatory to prevent such resources from participating in the substitution auction.[58] ISO-NE further asserts that a broader definition of Sponsored Policy Resources as desired by public power entities could have broad negative ramifications for the FCM. According to ISO-NE, if non-renewable resources are included in the definition and states begin sponsoring conventional generators, the FCM may no longer serve its purpose of guiding competitive, cost-effective entry and exit decisions to maintain resource adequacy. ISO-NE contends that, at that point, the FCM should be dismantled and the states should affirmatively resume responsibility for resource adequacy in New England. ISO-NE further asserts that, while its proposed definition discriminates among types of resources, that discrimination is not "undue" because the proposed CASPR rules narrowly address the specific problem that ISO-NE is facing.[59]

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[56] NRG-GenOn Comments at 10.

[57] ISO-NE reiterates that the defined Sponsored Policy Resources are not similarly situated to other, more traditional resources, in that: (1) they are procured by the states outside of the wholesale markets to meet the states' legal requirements, including renewable and clean energy mandates and (2) that procurement cannot be directly accomplished through ISO-NE's wholesale markets, which are not designed to value high-cost renewables' carbon-free characteristics. ISO-NE Answer at 15.

[58] ISO-NE Answer at 15; *see also* Geissler Testimony at 39 (explaining that the substitution auction clearing price is expected to be below the primary auction clearing price because supply offers in the substitution auction will generally be at lower prices than the primary auction, and demand bids in the substitution auction will generally be priced below the FCA clearing price).

[59] ISO-NE Answer at 16.

40. FirstLight opposes expanding the definition of Sponsored Policy Resources to public power self-supplied resources. It states that the IMAPP stakeholder process that led to the development of CASPR sought to address "a clear and present danger to the market posed by existing state legislation which seeks large quantities of new policy resource megawatts…[and] the self-supply request is simply at odds with the objectives of CASPR."[60] FirstLight asserts that the operation of CASPR will depress the market clearing price (albeit less than the RTR exemption did), but is nevertheless acceptable as a reasonable balancing of interests, provided the CASPR design, including its proposed scope of the eligibility of resources to enter the substitution auction, remains intact. FirstLight argues that if gas-fired resources sponsored by public power entities could enter the market unhindered by the MOPR, then states would similarly be able to introduce gas-fired resources into the substitution auction—and the end result would be the collapse of the competitive market envisioned by the FCM. FirstLight, therefore, supports the compromise inherent in CASPR, under which resource eligibility for the substitution auction is limited to the technologies each state needs to comply with its *existing* clean energy mandates.[61]

41. The National Rural Electric Cooperative Association argues that the Commission should initiate section 206 proceedings to require ISO-NE to open the substitution auction to other state and consumer-preferred resources in the future and address the limitation on public power resource choices in the ISO-NE-administered markets. Furthermore, the National Rural Electric Cooperative Association argues the Commission should use these proceedings to investigate accommodating and removing barriers to self-supply resources in the FCA.[62]

42. Connecticut Parties state that the complex CASPR mechanism will not fully accommodate state policy preferred resources. Connecticut Parties argue that if the Commission accepts CASPR, ISO-NE may exclude other technologies, such as storage, from qualifying as Sponsored Policy Resources. Connecticut Parties also argue that it is arbitrary to exclude from the definition of Sponsored Policy Resources all technologies developed by the states after January 1, 2018. (Connecticut Parties further assert that ISO-NE improperly imposed this arbitrary cut-off date only a few days before the Participants Committee vote, knowing that the states would not have time to change their state regulatory mechanisms before January 1, 2018.)[63] Additionally, Connecticut Parties

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[60] FirstLight Answer at 8.

[61] FirstLight Answer at 9.

[62] National Rural Electric Cooperative Association Answer at 1-2.

[63] Connecticut Parties Answer at 1, 6-7.

assert that they would support a solution that would enable all New England states to realize their environmental goals, whereas the CASPR program simply accommodates Massachusetts' goals.[64]

4. Commission Determination

43. We disagree with arguments that ISO-NE's proposed definition of Sponsored Policy Resources is unduly discriminatory or preferential.

44. As the Commission has previously explained, "the FPA does not forbid preferences, advantages, and prejudices *per se*. Rather, FPA section 205(b) prohibits 'undue' preferences, advantages and prejudices."[65] The determination as to whether a Commission-regulated rate or practice that provides different treatment to different classes of entities is unduly discriminatory is fact-based, and turns on whether those classes of entities are similarly situated. "To say that entities are similarly situated does not mean that there are no differences between them; rather, it means that there are no differences that are material to the inquiry at hand."[66]

45. We find that the definition of Sponsored Policy Resource proposed by ISO-NE does not unduly discriminate against resources that do not fit within that definition because those two classes of resources are not similarly situated. ISO-NE contends that the development of Sponsored Policy Resources will result in the presence of more capacity in the New England region than ISO-NE has deemed necessary to satisfy its capacity requirements, and thus ISO-NE seeks to accommodate the entry of new Sponsored Policy Resources into the FCM over time. ISO-NE has provided record evidence of specific projects and megawatts of capacity that will be developed by the operation of state environmental and clean energy mandates, whether that capacity clears

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[64] *Id.* at 3-4.

[65] RTR Rehearing Order, 150 FERC ¶ 61,065 at P 26.

[66] *See N.Y. Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,124, at P 10 & n.30 (2017) (citing *Iberdrola Renewables, Inc. v. Bonneville Power Admin.*, 137 FERC ¶ 61,185, at P 62 (2011), *reh'g denied*, 141 FERC ¶ 61,233 (2012). *See also Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010); *Cities of Newark v. FERC*, 763 F.2d 533, 546 (3d Cir. 1985) ("[D]ifferences in rates are justified where they are predicated upon factual differences between customers . . . ."); *Town of Norwood v. FERC*, 202 F.3d 392, 402 (1st Cir. 2000) ("[D]ifferential treatment does not necessarily amount to undue preference where the difference in treatment can be explained by some factor deemed acceptable by the regulators (and the courts).").

the FCM or not.[67] At this time, these projects involve renewable, clean, or alternative energy resources. By contrast, there is no similar record evidence that there are currently resources that do not meet the definition of Sponsored Policy Resource, such as other self-supply resources, that will be built or procured even if those resources do not receive capacity supply obligations.[68] Thus, rather than giving an undue preference to renewable resources in particular, ISO-NE's proposed definition of Sponsored Policy Resource is narrowly tailored to meet ISO-NE's objective of limiting the impact of out-of-market state procurements on the FCM. Accordingly, we find that Sponsored Policy Resources are not similarly situated to non-Sponsored Policy Resources.

46. We also note that, like all other resources subject to the MOPR in ISO-NE, self-supply resources that do not qualify as Sponsored Policy Resources can submit documentation to the IMM justifying an offer price below the MOPR level based on their unit-specific costs.[69] Such a resource could, by this means, enter the primary auction unimpeded by the MOPR. Furthermore, ISO-NE committed that, "should state policies change, ISO-NE will work with stakeholders to determine if the new laws can and should be accommodated by CASPR."[70]

47. For similar reasons, we find that the cut-off date of January 1, 2018, for the definition of Sponsored Policy Resource is not unduly discriminatory or preferential. It is not unduly discriminatory or preferential to distinguish between the types of resources that have been identified and are currently eligible to receive "an out-of-market revenue source supported by a government-regulated rate,"[71] and future resource types that are speculative and/or that are not currently eligible to receive "an out-of-market revenue source supported by a government-regulated rate." As discussed above, CASPR addresses the development of resources supported by out-of-market revenue pursuant to

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[67] ISO-NE Transmittal at 3-4 (explaining that the Multi-State Clean Energy request for proposals aims to procure 460 MW of new renewable resources, and the 2016 Massachusetts Energy Diversity Act requires clean energy procurements in the range of 2,800 MW); *see also* Geissler Testimony at 8-9.

[68] ISO-NE also points out that a resource that receives out-of-market revenue from a municipality or collection of municipalities could qualify as a Sponsored Policy Resource "if the resource qualifies as renewable, clean, or alternative in the state in which the municipality or collection of municipalities is located." Geissler Testimony at 64-65.

[69] Tariff § III.A.21 (50.0.0).

[70] ISO-NE Transmittal at 14.

[71] Tariff § I.2 (107.0.0).

existing state statutes and regulations. It is impossible to know whether resources supported by any not-yet-enacted state statutes and regulations should be included in the definition of Sponsored Policy Resource because we do not know whether those resources would be similarly situated to resources that currently meet the definition of Sponsored Policy Resource. As noted above, ISO-NE commits to reconsider the definition of Sponsored Policy Resource to the extent state statutes and regulations change.

B. Auction Design

1. ISO-NE's Proposal

48. ISO-NE explains that under the proposal, all resources that clear in the primary auction and receive a capacity supply obligation will receive a capacity payment set by the primary auction. In the substitution auction, each existing resource whose capacity supply obligation is bought out by a Sponsored Policy Resource must pay the Sponsored Policy Resource a portion of their capacity revenue, which is set by the substitution auction's clearing price.[72] ISO-NE explains that an existing resource bought out in the substitution auction will typically receive a net payment equal to the difference between the primary auction and substitution auction clearing prices and a Sponsored Policy Resource clearing the substitution auction will receive a net payment equal to the substitution auction clearing price.[73] ISO-NE states that all offers into the substitution auction are capped at the primary auction clearing price and have a floor equal to negative one times the primary auction's starting price.[74]

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[72] ISO-NE Transmittal at 6-7.

[73] ISO-NE explains that the exception to this outcome is when the substitution auction cannot—because demand bids are non-rationable—produce a uniform clearing price that all cleared supply offers and demand bids would willingly accept. ISO-NE states that in such a case, a side payment to some portion of accepted supply offers or demand bids will be necessary. Geissler Testimony at 142-144.

[74] ISO-NE states that this offer cap prevents the market from paying more to Sponsored Policy Resources than to existing resources for meeting the same capacity supply obligations, and notes that demand (i.e., an existing resource) would not seek to buy out of its commitment at a higher price than it received for undertaking the obligation. ISO-NE explains that the offer floor is negative because a Sponsored Policy Resource expects to clear in subsequent capacity auctions, so it may be willing to pay an amount equal to what it expects to earn in the next capacity auction to clear in the current auction. ISO-NE states that a Sponsored Policy Resource would not pay any more than this amount because it would instead expect to make more money by deferring for one

(continued ...)

49. ISO-NE proposes to limit existing resource participation in the substitution auction to resources that can "permanently" retire, in whole or in part, in order to prevent their return as new resources at a later date. ISO-NE also proposes that new resources that obtain a capacity supply obligation in the primary auction may not participate in the substitution auction as demand. ISO-NE reasons that this latter restriction would most effectively maintain competitively-based capacity auction prices (objective 1) by achieving the competitively-based capacity price – the "same price signals and incentives for competitive new resources as would exist if there was no substitution auction (and resources could not include out-of-market revenues in their supply offer prices)."[75] ISO-NE concedes that this exclusion could lead to an inefficient capacity surplus if a new Sponsored Policy Resource is available yet primary auction prices are high enough to attract and clear a new non-sponsored resource.[76] However, ISO-NE recognizes the treatment of new non-sponsored resources presents a fundamental tension between retaining the competitively-based capacity price and accommodating Sponsored Policy Resources in the FCM. ISO-NE states that it evaluated alternative proposals such as permitting or requiring new non-sponsored resources to participate in the substitution auction as demand, and determined that such proposals would likely be more effective in accommodating Sponsored Policy Resources but less effective in maintaining the competitively-based capacity prices. ISO-NE explained that it ultimately decided to exclude new non-sponsored resources from offering as demand in the substitution auction because the proposal tends to favor the objective of maintaining the competitively-based capacity price.[77] ISO-NE adds that allowing new non-sponsored resources to participate in the substitution auction as demand would also have significant potential risks and undesirable consequences, such as fictitious entry and capacity prices above the cost of new entry for non-sponsored resources.[78]

50. Further, ISO-NE explains that allowing non-sponsored resources to be eligible to receive a severance payment in the substitution auction would likely incent fictitious entry in the FCA. Fictitious entry would occur when participants seek to sell new non-sponsored capacity for the sole intent of receiving a severance payment in the substitution

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year. For illustrative purposes, ISO-NE notes that the floor would have been -$12.864 per kw-Month in FCA 12. Geissler Testimony at 105-107.

[75] Geissler Testimony at 77.

[76] *Id.* at 79.

[77] *Id.* at 79-80.

[78] ISO-NE Transmittal at 19-21.

auction, with no intention of fulfilling a capacity supply obligation.[79] That is, ISO-NE states that such participants would have no intention of actually constructing new non-sponsored capacity, therefore providing nothing of value to the New England region.[80] ISO-NE adds that such fictitious entrants would likely lower their primary auction bids below their true costs to increase the likelihood of clearing the primary auction so that they would be eligible to participate in the substitution auction, which could suppress the primary auction price below the cost of new entry.[81] ISO-NE states that it is not always possible to identify such fictitious entrants because it is difficult to distinguish between legitimate new non-sponsored resources and potential fictitious entrants at the early stages of project development.[82]

51. With respect to the primary auction clearing at prices above the cost of new non-sponsored entry, ISO-NE explains that it considered allowing new non-sponsored policy resources to participate as demand in the substitution auction, but not compensating those that clear (i.e., no severance payment) as a means to address the fictitious entry problem and associated below-cost bidding. ISO-NE states that it determined that doing so could fundamentally undermine the FCM, discourage new non-sponsored resource participation in the FCM, and thus cause the primary auction to clear at levels above the cost of new non-sponsored entry.[83] ISO-NE states that developing a new non-sponsored capacity resource is costly and that stripping such resources of their capacity supply obligation without any compensation would make FCA participation a "money-losing endeavor" for new non-sponsored resources.[84] ISO-NE states that if new non-sponsored resources decline to develop and qualify new capacity for the primary auction in a given year given the risks of losing their capacity supply obligation and new capacity is needed in that year, the clearing price could increase above the cost of entry for that new non-sponsored resource and thus raise costs to FCM customers.[85]

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[79] *Id.* at 19.

[80] *Id.* at 19; Geissler Testimony at 82.

[81] Geissler Testimony at 83-84.

[82] *Id.* at 81-82.

[83] *Id.* at 84-86.

[84] *Id.* at 86-87.

[85] *Id.* at 89-91.

52. ISO-NE states that participation as demand is limited to capacity resources that require formal agreements for capacity interconnection service to deliver their products (e.g., Existing Generation Capacity and Capacity Imports with an Elective Transmission Upgrade), and that these agreements will be terminated upon retirement.[86] In the case of an offer from an existing resource to retire only a portion of its capacity, ISO-NE explains the agreement may be reduced to reflect the appropriate reduction in available MWs.[87]

53. ISO-NE also explains that supply offers from Sponsored Policy Resources in the substitution auction are all considered to be rationable (i.e., a supply offer block can partially clear). While an existing resource may submit a demand offer for all or a portion of its resource, demand offers from existing resources are considered non-rationable (i.e., a demand offer block must clear in full or not at all) because a resource, or relevant portion thereof (i.e., a demand block for less than the resource's full capacity supply obligation) that clears the substitution auction must retire and cease operation.[88] ISO-NE argues that, consistent with how its current FCM works, non-rationability of demand offers[89] can result in the substitution auction clearing at a price higher than that of the highest demand offer. ISO-NE explains that "side payments" may be necessary given that demand bids are non-rationable to determine a clearing price that maximizes market surplus in the substitution auction and makes all cleared demand offers whole. The cost of side payments in the substitution auction will be allocated to load via the Net Regional Clearing Price.[90]

2. Comments

54. The External Market Monitor protests the proposal to exclude new non-sponsored resources from participating in the substitution auction. It argues that this exclusion is a serious design flaw that will cause the FCM to produce inefficient investment and retirement decisions in the long term and will substantially raise costs to ISO-NE

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[86] ISO-NE Transmittal at 18 (citing Tariff § III.13.2.5.2.5.3(a)(i) (46.0.0)).

[87] Geissler Testimony at 59-60 (explaining the possibility of partial retirements under the substitution auction).

[88] Tariff § III.13.2.5.2.5.3(a)(ii) (46.0.0).

[89] In the current FCA, supply offers may be non-rationable. In the proposed substitution auction, only demand offers may be non-rationable.

[90] Geissler Testimony at 56-59.

customers.[91] The External Market Monitor argues that the core economic objective of any capacity market, including the FCM, should be to "facilitate efficient long-term investment and retirement decisions to satisfy ISO-NE's capacity needs at the lowest cost."[92] The External Market Monitor asserts that the proposal excludes this economic objective because it will cause new non-sponsored resources to clear the primary auction when they are not economic or needed and will cause the premature retirement of existing resources with going-forward costs below those of new non-sponsored resources.[93]

55. The External Market Monitor states that ISO-NE's concern that permitting new non-sponsored resources to participate in the substitution auction could result in fictitious entry is unwarranted and could be resolved by eliminating any payments to new non-sponsored resources that do not retain a capacity supply obligation.[94] The External Market Monitor also disagrees with ISO-NE that requiring the substitution auction to include new resources may discourage participation in the FCA; it argues that the risk of failing to obtain a capacity supply obligation is common to all investment decisions—be it from Sponsored Policy Resources or competitive resources.[95] The External Market Monitor also asserts that concerns that discouraging new non-sponsored entry will result in primary auction clearing prices well above the cost of new non-sponsored capacity are misplaced.[96]

56. The External Market Monitor argues that the Commission should adopt its alternative proposal, which has two components: (1) allow new non-sponsored resources to participate in the substitution auction as demand; and (2) revise the MOPR applied in the primary auction so that Sponsored Policy Resources are subject to an offer floor that is no higher than the cost of a new non-sponsored resource.[97] The External Market

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[91] External Market Monitor Comments at 4.

[92] *Id.* at 9-10.

[93] *Id.* at 4-5.

[94] *Id.* at 12-13.

[95] *Id.* at 14 (citing Geissler Testimony at 85).

[96] Many resources with out-of-market support have their offers mitigated to a price that would exceed the auction starting price. Offers that would otherwise be mitigated above the auction starting prices are instead set at the auction's starting price. *See* Tariff § III.13.A.21.1.1 (50.0.0).

[97] External Market Monitor Comments at 6.

Monitor argues its alternative proposal would eliminate unneeded investment from new non-sponsored resources and prevent sponsored entry from reducing wholesale market prices for existing resources. The External Market Monitor reasons that requiring new non-sponsored resources to participate in the substitution auction will reduce the double payment problem by allowing more sponsored resource capacity to clear. The External Market Monitor also argues that network operating requirements may prevent certain existing resources from retiring. It states that this creates a greater risk that a sufficient quantity of existing units may not be available as demand in future substitution auctions, or that they will only be available at a high cost to sponsored resources. It concludes that excluding these non-sponsored resources will likely guarantee that ratepayers will be required to pay elevated primary auction prices to new resources for the span of the seven year lock-in.[98]

57. Connecticut Parties assert that Sponsored Policy Resources will have an incentive to offer at very low prices, possibly at the (negative) offer floor, in the substitution auction due to the value of being an existing resource in future capacity auctions over the life of the resource. They argue that the substitution auction therefore creates an "entry fee" for Sponsored Policy Resources to become existing resources in the FCA, which will in turn provide a windfall for existing resources that retire through the substitution auction. Connecticut Parties claim that this "entry fee" could constitute a barrier to the development of Sponsored Policy Resources.[99]

58. Exelon and NEPGA state that existing resources participating in the substitution auction should be permitted to submit "spread bids"—a specified amount, in dollars per kW-month, below the primary auction clearing price that indicates the amount the resource is willing to accept to shed its capacity supply obligation and permanently retire. Exelon and NEPGA argue that allowing, but not requiring, spread bids would enhance existing resources' ability to reflect their true willingness to retire in their bids and would produce a more efficient substitution auction outcome.[100] They assert that because an existing resource's severance payment is equal to the primary auction clearing price minus the substitution auction clearing price, those resources should be permitted to submit a spread bid that reflects the minimum severance payment they will accept to retire. They state that, absent this allowance, existing resources will be incented to bid lower in the substitution auction to protect against a lower than expected primary auction

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[98] *Id.* at 18-22. Under ISO-NE's Tariff, a new capacity resource that clears in an FCA may elect to receive the clearing price of that FCA for its capacity supply obligation in the next six subsequent auctions. Tariff § III.13.1.1.2.2.4 (48.0.0).

[99] Connecticut Parties Comments at 7.

[100] Exelon Comments at 8-10; NEPGA Comments at 14-17.

clearing price that would reduce their severance payment.

59. Consumer-Owned Systems state that their members, which are publicly owned utilities, are not subject to the same requirements to procure renewables as other state-regulated utilities. Consumer-Owned Systems take issue with ISO-NE's proposal to allocate "side payments" arising from the non-rationability of demand offers from existing resources to load via the Net Regional Clearing Price.[101] Since their utilities are not subject to the same renewable mandates, Consumer-Owned Systems argue that they will not benefit from any "side payment" in the substitution auction, but will be allocated a portion of the cost. Consumer-Owned Systems assert that imposing these costs on their members would constitute an unjust and unreasonable cost shift.[102]

3. Answers

60. In its answer, ISO-NE argues that the External Market Monitor's proposed modifications would be both unfair to new resources and ineffective.[103] ISO-NE asserts that the External Market Monitor's proposal to strip new non-sponsored resources of their capacity supply obligations without compensation is unfair to new non-sponsored resources and would deter new non-sponsored resource entry, even if it is needed.[104] ISO-NE adds that stripping a non-sponsored capacity resource of its capacity supply obligation without compensation would change the meaning of the primary auction

[101] The Net Regional Clearing Price is defined in the Tariff as "the sum of the total payments [] paid to resources with Capacity Supply Obligations in the Capacity Zone [] less [Peak Energy Rent] adjustments for resources in the zone [] and including any applicable export charges or credits [] divided by the sum of all Capacity Supply Obligations (excluding (i) the quantity of capacity subject to Capacity Supply Obligations Bilaterals and (ii) the quantity of capacity clearing as Self-Supplied FCA Resources) assumed by resources in the zone." Tariff § III.13.7.3 (47.0.0).

[102] Consumer-Owned Systems Comments at 12.

[103] ISO-NE Answer at 23.

[104] *Id.* at 22-24.

clearing price because a high clearing price would no longer serve its fundamental purpose as a market signal to encourage commercial investment.[105]

61. ISO-NE also argues that the External Market Monitor's proposal would fail to protect ratepayers from large price increases—or "price blowouts"—because it relies on two assumptions holding: (1) that non-sponsored resource developers have accurate information about both how long they will take to qualify and when Sponsored Policy Resources will participate; and (2) Sponsored Policy Resources are not located in export-constrained zones.[106] ISO-NE argues that if assumption (1) does not hold, new resources may opt not to participate in the FCM, even in years when they may otherwise clear, such as in years when Sponsored Policy Resources do not offer into the FCM.[107] ISO-NE poses an example where a new non-sponsored resource chooses not to participate in the FCA based on that resource's expectation that it will be forced to relinquish its capacity supply obligation in the substitution auction without compensation. ISO-NE also assumes in this example that the new non-sponsored resource is needed for resource adequacy and estimates that, under this example, the CASPR proposal would be significantly cheaper than the External Market Monitor's alternative proposal.[108]

62. Addressing Connecticut Parties' concern, ISO-NE argues that it is unlikely, and speculative, that the substitution auction will clear at the price floor. ISO-NE contends that a Sponsored Policy Resource may choose not to offer at a very negative price because it would rather delay becoming an existing resource than pay to take on an obligation in the first year. To the extent the substitution auction does clear at a low or negative price, ISO-NE states that such a low price may reflect that the existing resources' interconnection rights have great value, and Sponsored Policy Resources must pay these existing resources more than the primary auction clearing price to voluntarily

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[105] *Id.* at 23.

[106] *Id.* at 24.

[107] *Id.* at 24-25.

[108] *Id.* at 24-25. Specifically, ISO-NE assumes that under CASPR, a new 350 MW non-sponsored resource offers at $8/kW-month, which establishes the clearing price in the primary auction and implies a total capacity cost of $3.29 billion. ISO-NE assumes that under the External Market Monitor's alternative proposal, the new non-sponsored resource will choose not to participate in the FCA and no additional supply is offered above $8/kW-month. ISO-NE then estimates that the External Market Monitor's alternative proposal will result in a primary auction clearing price of $10.35/kW-month and $4.15 billion/year in total capacity costs. ISO-NE characterizes this price increase as an example of a price blowout.

relinquish those rights and transfer their capacity supply obligations.[109] If a Sponsored Policy Resource is unwilling to accept a low substitution auction clearing price—or pay if the clearing price is negative—ISO-NE states that it will still have the opportunity to clear in subsequent substitution auctions.

63. ISO-NE argues that spread bids in the substitution auction are not necessary in CASPR for bidders to maximize their profits and that spread bidding strategies will result in lower profits under CASPR.[110] ISO-NE refers to its testimony, which explains that an existing resource would maximize its profits by submitting a demand bid at the maximum price at which it would willingly buy out of its obligation. The ISO-NE testimony states that unlike a spread bid, a fixed price demand bid is not dependent on the primary auction clearing price. It further states that because a resource that has obtained a capacity supply obligation in the primary auction will receive the primary auction clearing price whether it retains the capacity supply obligation or buys out of it in the substitution auction, the optimal demand bid price that the resource should submit in the substitution auction is not dependent on the primary auction clearing price. Rather, the testimony asserts, the optimal demand bid price should be equal to the price at which the resource would be indifferent between retaining its capacity supply obligation and buying out of this obligation and permanently exiting the market. ISO-NE states that a spread bid format would not enable a resource to convey the specific price at which it is indifferent between retaining its capacity supply obligation and permanently exiting the market.

64. In addition, ISO-NE adds in its answer that spread bidding would exponentially increase the number of reliability reviews ISO-NE must conduct before the FCA.[111] ISO-NE explains that reliability reviews assess whether local reliability issues are created by generators' unavailability, in the context of the other offers made at each price level. ISO-NE asserts that contingent bids like spread bids would require multiple reliability reviews for each generator based on different assumptions about the clearing price. For these reasons, ISO-NE asks the Commission to reject NEPGA's and Exelon's request.

65. Responding to Consumer-Owned Systems' concerns, ISO-NE argues that side payments are allocated through the Net Regional Clearing Price, and most publicly owned entities do not pay this price. ISO-NE states that side payments are likely to be relatively small and uncommon. ISO-NE asserts that not allocating these side payments would result in fewer Sponsored Policy Resources clearing in the substitution auction. ISO-NE argues that allocating the side payments to supply resources in the substitution

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[109] *Id.* at 29-30.

[110] *Id.* at 28 (citing Geissler Testimony at 102-105).

[111] *Id.* at 28-29.

auction would change bidding incentives and reduce efficiency. ISO-NE adds that allocating side payment costs to existing resources would increase the risk that existing resources would lose money by participating in the substitution auction and thus decrease the likelihood that Sponsored Policy Resources will acquire capacity supply obligations in that auction.[112]

66. In its Answer, the External Market Monitor responds to arguments ISO-NE raises about prohibiting non-sponsored resource participation in the substitution auction. The External Market Monitor asserts that ISO-NE's argument that stripping a new non-sponsored resource of its capacity supply obligation in the substitution auction is unfair is based on the false premise that such a resource is entitled to a severance payment.[113] The External Market Monitor also refutes ISO-NE's argument that the External Market Monitor's proposal would change the meaning of clearing prices in the FCA.[114] The External Market Monitor argues that a new non-sponsored resource is not entitled to the primary auction clearing price and that this price should not govern entry decisions. Rather, the External Market Monitor argues that under CASPR, the substitution auction price should govern entry and exit decisions because the primary auction does not include all of ISO-NE supply due to the application of the MOPR to Sponsored Policy Resources.[115]

67. The External Market Monitor also argues that the price blowout concerns ISO-NE raises regarding non-sponsored resource participation in the substitution auction are misplaced. Instead, the External Market Monitor argues that price blowout concerns are caused by "over-mitigating" Sponsored Policy Resources with MOPRs that exceed the net cost of new entry for non-sponsored policy resources.[116]

68. The External Market Monitor argues that ISO-NE incorrectly implies that new non-sponsored resources will only participate in the FCA if they are "highly confident" that they will clear.[117] The External Market Monitor states that ISO-NE provides no evidence of this implication and asserts that it is economically rational for new non-

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[112] *Id.* at 32.

[113] External Market Monitor Answer at 4.

[114] *Id.* at 5 (citing ISO-NE Answer at 23).

[115] *Id.* at 5.

[116] *Id.* at 4.

[117] *Id.* at 6.

sponsored resources to offer into the FCA even if the probability of clearing is relatively low.[118] The External Market Monitor states that new non-sponsored resources have offered into every FCA and a large quantity have failed to clear and that there is no reasonable basis to assume that no new non-sponsored resources will participate in future FCM auctions.[119]

69. The External Monitor also refutes ISO-NE's claims that the External Market Monitor's proposal would increase costs to load, arguing that ISO-NE incorrectly compares the lost-capacity revenues to Sponsored Policy Resources to a maximum consumer cost estimate that assumes all capacity is procured through the primary auction.[120]

70. ISO-NE filed a second answer to respond to arguments made by the External Market Monitor's answer. ISO-NE points to the External Market Monitor's statement that the "price blowout" it fears is really caused not by CASPR, but by a flaw in the existing MOPR rules that would over-mitigate Sponsored Policy Resources even without the CASPR provisions.[121] Thus, ISO-NE asserts, the External Market Monitor's arguments are beyond the scope of this filing, since the only question before the Commission is whether the CASPR provisions are just and reasonable.[122] ISO-NE further states that, although the MOPR has generally worked to preserve competitive price signals in the FCM, no design can fully accommodate substantial new Sponsored Policy Resources and maintain competitively-based capacity prices, and the External Market Monitor's proposal would eviscerate competitively-based pricing and result in price-setting by administrative dictate.[123]

71. ISO-NE asserts that the External Market Monitor's proposal to require the involuntary transfer of capacity supply obligations is fundamentally different from the outcome of a normal competitive auction, and will result in a perversion of the market's price signal, a chilling of participation by competitive new resources, and eventual higher

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[118] *Id.* at 6-7.

[119] *Id.* at 8.

[120] *Id.* at 6.

[121] ISO-NE Second Answer at 3 (citing External Market Monitor Answer at 4).

[122] *Id.* at 3-4.

[123] *Id.* at 4 (citing Geissler Testimony at 24-28).

prices.[124] ISO-NE reiterates that the External Market Monitor's proposal could increase consumer costs by $908 million per year if competitive developers have insufficient information about the Sponsored Policy Resources that will participate in the substitution auction, so that competitive resources are deterred from participating in the FCM by the possible entry of Sponsored Policy Resources that ultimately do not materialize, and so competitive entry will not come to New England when necessary.[125] Finally, ISO-NE states that the External Market Monitor's proposal is insufficiently developed and would require additional further details to be implementable.[126]

4. Commission Determination

72. We find the proposed auction design to be just and reasonable. In proposing CASPR, ISO-NE asserts that it seeks to balance accommodating the entry of Sponsored Policy Resources in the FCM over time with maintaining competitively-based capacity auction prices. ISO-NE explains that, "[b]ecause these objectives are fundamentally in tension," ISO-NE had to make design choices to balance these objectives "and, wherever possible . . . elected to prioritize the preservation of competitive prices in FCM."[127] According to ISO-NE, it favored this objective "because FCM's capacity clearing price guides competitive entry and exit decisions for the region," and therefore "is essential to achieving the region's resource adequacy over the long term."[128] ISO-NE's proposed limitations on the types of resources that can participate as supply and demand in the substitution auction reflect this balance. We find that ISO-NE appropriately focuses on ensuring that the substitution auction, as a means to allow Sponsored Policy Resources to enter the FCM, does not undermine the FCM's ability to attract resource investment in new and existing resources when the system requires it, and to do so at a reasonable cost. In so doing, these design choices support the FCM's ability to continue to maintain resource adequacy at just and reasonable rates.

73. The External Market Monitor raises a concern that excluding new non-sponsored resources that receive a capacity supply obligation in the primary auction from the substitution auction may result in a capacity surplus, and advocates that such resources should instead be entered into the substitution auction as demand bids. We recognize, as

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[124] *Id.* at 5-6.

[125] *Id.* at 6-7.

[126] *Id.* at 8-9.

[127] ISO-NE Transmittal at 1.

[128] *Id.* at 5.

ISO-NE notes, that developing a new non-sponsored capacity resource is costly. We are persuaded by ISO-NE's arguments that requiring such new non-sponsored resources to participate in the substitution auction could discourage development of those resources because the risk of incurring the development costs to be able to qualify as a new resource and immediately losing the capacity supply obligation obtained in the primary auction will render such investment unattractive. We disagree with the External Market Monitor that there is no reasonable basis to assume, as ISO-NE does, that requiring new non-sponsored resources to participate in the substitution auction will discourage such resources from participating in future ISO-NE capacity auctions altogether. The External Market Monitor relies on historical offer behavior in the FCM to support this assertion, but it is not clear that past offer behavior will reasonably predict future offer behavior under alternative market designs like the External Market Monitor's design.

74. We also agree with ISO-NE that allowing new non-sponsored resources to participate in the substitution auction introduces concerns about fictitious entry that are difficult to address while still supporting the FCM's key function of attracting and sustaining investment in new capacity when needed. For these reasons, we are concerned that the change advocated by the External Market Monitor may present more problems than it addresses and, critically, may negatively impact the FCM's ability to meet its core objective of maintaining resource adequacy, particularly in periods where new non-sponsored entry is necessary.

75. We also disagree with the External Market Monitor's claim that the substitution auction should govern entry and exit decisions. As we note above, the primary auction serves a key role in attracting investment in new capacity when it is needed. Unlike the substitution auction, the primary auction constitutes a complete market that calculates the clearing price based on the intersection of a given zone's (or group of zones') demand curve for capacity and the market supply curve, even if some resources in that supply curve are subject to the MOPR. Further, the primary auction is an important source of revenue upon which a potential new resource will depend over the life of the resource, so expectations regarding future primary auction clearing prices will contribute substantially to entry and exit decisions. Given that we are not adopting the External Market Monitor's alternative proposal, we decline to comment on the various examples and counter-examples ISO-NE and the External Market Monitor put forth in reference to this alternative.

76. Turning to the Connecticut Parties' argument that the substitution auction creates an unjust and unreasonable barrier to Sponsored Policy Resources' access to the FCM, we disagree. We agree with ISO-NE that low, or even negative, prices in the substitution auction would simply reflect the significant value of the entitlements being relinquished by an existing resource, and obtained by a Sponsored Policy Resource, when each clear in a substitution auction. That is, the existing resource relinquishes not only its capacity supply obligation for the applicable delivery year but also permanently relinquishes its

interconnection rights that permit it to sell energy, ancillary services, and capacity in ISO-NE's markets in the future. The Sponsored Policy Resource obtains a capacity supply obligation and thus achieves existing resource status in future FCAs, which allows it the opportunity to earn capacity revenues for the associated future delivery years. It is therefore reasonable that a Sponsored Policy Resource may be willing to accept a low payment—or even pay an existing resource—in its first year to enter the FCM.[129] Such a result would be efficient and consistent with market fundamentals.

77. We are not convinced by Exelon's and NEPGA's argument that we should require ISO-NE to allow existing resources to submit spread bids in the substitution auction. This allowance is not necessary for CASPR to be a just and reasonable means to accommodate the exit of certain existing resources and the entry of new Sponsored Policy Resources into the FCM over time. We acknowledge that spread bidding could present existing resources with an alternative way to express their willingness to exit the market at a specific severance payment amount, and thus could enhance liquidity in the substitution auction. However, we nonetheless conclude that ISO-NE's proposal for fixed price bidding in the primary and substitution auctions is reasonable. Fixed price bidding allows an existing resource to express the minimum capacity revenue it requires to fulfill a capacity supply obligation for the associated delivery year, ensuring that no resource will be required to sell capacity at a price below its minimum required price. This is consistent with current bidding principles in the FCM, and we find it just and reasonable.

78. We find unpersuasive Consumer-Owned Systems' concerns about the allocation of side payments to load, including to the load of publicly owned utilities. We find that CASPR balances an opportunity for Sponsored Policy Resources to receive capacity supply obligations with the FCM's need to secure private investment in the long term to achieve its primary objective of providing resource adequacy at just and reasonable rates. In these circumstances, we find it reasonable for load to assume additional costs associated with meeting these two goals.

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[129] Note that if the substitution auction clearing price is positive, cleared Sponsored Policy Resources receive a payment based on that price, and cleared (i.e., retiring) existing resources make a payment based on that price. If the substitution auction clearing price is negative, cleared Sponsored Policy Resources make a payment based on that price, and cleared existing resources receive a payment based on that price.

C. Offer Behavior and Market Power

1. ISO-NE's Proposal

79. ISO-NE states that, while certain de-list bids (e.g., retirement or static de-list bids)[130] in the primary auction are and will continue to be reviewed by the IMM for supply-side market power, demand bids in the substitution auction will not be reviewed by the IMM.[131] ISO-NE argues that, because the transfer of capacity supply obligations in the substitution auction does not reduce aggregate capacity supply and raise capacity prices, ISO-NE and the IMM concluded that demand bids in the substitution auction do not present a market power risk to the FCM.

80. ISO-NE notes that stakeholders have raised concerns that resources wishing to participate in the substitution auction may "shade" (or lower) their bids in the primary auction to improve the probability of retaining their capacity supply obligations and then being bought out in the substitution auction.[132] Such behavior could potentially lower the primary auction clearing price below the competitively-based capacity clearing price. Although it did not ultimately adopt the proposal, ISO-NE states that in the stakeholder process, it was suggested that the IMM review the primary auction bids of existing resources that choose to participate in the substitution auction in order to detect and mitigate any potential bid shading.

81. ISO-NE states that it does not expect bid shading to be a significant risk under its proposal because the likelihood and price impacts of such behavior depend on many factors, and an existing resource that engages in this behavior would run the significant risk that it would retain its capacity supply obligation at a lower capacity clearing price and therefore receive compensation that is less than its costs. However, ISO-NE states that it does not oppose enhancing the FCM's mitigation rules to further deter this potential behavior. Noting that such mitigation process enhancements cannot be

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[130] De-list bids specify a price below which a supplier in the primary auction is not willing to provide capacity from an existing resource. A resource that does not obtain a capacity supply obligation in the primary auction based on its static de-list bid price will exit the FCM for one auction, whereas a resource that does not obtain a capacity supply obligation based on its retirement de-list bid price will permanently exit all ISO-NE wholesale markets.

[131] ISO-NE Transmittal at 22.

[132] *Id.* at 9.

implemented in time for FCA 13, ISO-NE states that it will work with stakeholders in 2018 to develop a mitigation-related proposal to address this issue beginning with FCA 14.

2. Comments

82. NRG-GenOn and NEPGA assert that bid shading presents a real concern that, if left unmitigated, could result in market distortions and adversely impact all remaining capacity suppliers in the primary auction.[133] NEPGA supports ISO-NE's efforts and commitment to develop an appropriate remedy to the bid shading concern, and NRG-GenOn requests that the Commission condition its acceptance of ISO-NE's proposal on the completion of these efforts.[134]

83. Connecticut Parties state that ISO-NE's proposal creates new incentives and opportunities for strategic behavior within and between the primary auction and the substitution auction.[135] They explain that the quantity of capacity supply obligations available to be acquired by Sponsored Policy Resources in the substitution auction will always be determined by incumbent participants. Accordingly, Connecticut Parties are concerned that the substitution auction will have few incumbent generators participating as demand in the substitution auction, which creates significant market power and concentration concerns that ISO-NE has not addressed. Connecticut Parties note that there is no market monitor oversight in ISO-NE's proposal to protect against an exercise of market power in the substitution auction and that the Commission should reject the proposal because ISO-NE has not addressed these market power problems.[136]

3. Answers

84. ISO-NE states that Connecticut Parties misunderstand the nature of a voluntary market.[137] It argues that the substitution auction is a two-sided market where participation is voluntary on both sides and neither side entirely dictates market outcomes, such as the amount and timing of what clears, or the clearing price. Additionally, ISO-NE states that market power concerns arise when anticompetitive

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[133] NRG-GenOn Comments at 9; NEPGA Comments at 5.

[134] NRG-GenOn Comments at 10; NEPGA Comments at 5.

[135] Connecticut Parties Comments at 45.

[136] *Id.* at 46.

[137] ISO-NE Answer at 30.

actions impact the market clearing price paid to competitive suppliers or the costs borne by consumers. However, ISO-NE argues that the substitution auction impacts neither. ISO-NE explains that competitive suppliers are paid the primary auction clearing price, and the substitution auction does not generally impact the total capacity costs incurred by New England customers.

4. Commission Determination

85. The Commission is not persuaded that concerns regarding offer behavior and market power under CASPR render the proposal unjust and unreasonable. We agree with ISO-NE that the likelihood and potential price impact of such behavior will be mitigated by various factors. As ISO-NE explains, the primary auction's clearing price will only be affected by bid shading if the resource engaging in this behavior would not sell capacity in the primary auction but-for the shaded bid (i.e., its competitive bid would be higher than the clearing price so that the resource would not clear the auction) or it would be the marginal supplier if it offered at its true costs (i.e., the primary auction would otherwise clear at the supplier's bid). While such an event is possible, the resource engaging in bid shading runs the risks of receiving a capacity supply obligation at a price below its actual costs should it fail to transfer that capacity supply obligation in the substitution auction. We find that such factors should reasonably be expected to temper concerns of bid shading. While we find ISO-NE's proposal to be just and reasonable, we nevertheless encourage ISO-NE to work with its stakeholders to pursue market enhancements that will further protect against potentially uncompetitive market results.

86. We disagree with Connecticut Parties' position that demand-side market power in the substitution auction may render ISO-NE's proposal unjust and unreasonable. We agree that market power mitigation in the primary auction is critical because uncompetitive supplier actions have the ability to impact the primary auction clearing price, which guides entry and exit decisions from competitive resources, determines the capacity payment for the large majority of suppliers, and determines the total cost to consumers. However, as ISO-NE explains in its testimony, the substitution auction clearing price does not directly impact the capacity price paid to the suppliers who do not participate in it.[138] Rather, the substitution auction functions as a mechanism to transfer capacity supply obligations between existing capacity suppliers and Sponsored Policy Resources that voluntarily elect to participate. In the substitution auction, supply and demand participation is voluntary and neither side entirely dictates the amount and timing of what clears, or at what price. Accordingly, based on the record in this proceeding, we agree with ISO-NE that the same market power concerns motivating IMM review in the primary auction are not present in the substitution auction and find the substitution auction rules, as proposed, to be just and reasonable.

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[138] Geissler Testimony at 112.

D. Renewable Technology Resource Exemption

1. ISO-NE's Proposal

87. ISO-NE proposes to phase out and replace the current RTR exemption with the CASPR proposal. As compared to when the RTR exemption was initially proposed and given changes in market conditions (including the states' accelerated out-of-market procurements), ISO-NE states the RTR exemption now presents a greater risk of price suppression because New England has significant excess capacity.[139] Therefore, ISO-NE believes that it is prudent to phase out the RTR exemption and replace it with CASPR now. According to ISO-NE, CASPR improves on the RTR exemption by accommodating a broader range of new technology resources while more effectively preventing sponsored new entry from depressing capacity prices. ISO-NE argues that, while the RTR exemption and CASPR may coexist from an implementation standpoint, the continued presence of the RTR exemption would undermine the efficacy of the substitution auction; given the choice, sponsored new resources would prefer to clear via the RTR exemption with the associated higher primary auction price over the substitution auction. Furthermore, contrary to the position of some stakeholders, ISO-NE argues that a guarantee that some amount of sponsored renewable resources will obtain capacity supply obligations each year is antithetical to competitive markets and that the use of the market-based CASPR mechanism instead will accommodate state entry over time without suppressing competitively-based prices.

88. However, in order to minimize adverse impacts to investments already underway, ISO-NE proposes to phase out the RTR exemption by allowing the remaining accrued exempt MWs to be used through FCA 15, to be conducted in 2021 for the 2024-2025 delivery year. ISO-NE commits to assessing the performance of CASPR and working with stakeholders to refine or replace it, as it also committed to with the RTR exemption.[140]

2. Comments

89. NRG-GenOn and NextEra argue that continuation of the RTR exemption undermines the CASPR proposal, and they request that the Commission immediately eliminate the RTR exemption.[141] NRG-GenOn states, as identified by ISO-NE, the RTR exemption presents a substantial risk of price suppression and disrupts competitive

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[139] ISO-NE Transmittal at 11.

[140] *Id.* at 12-13.

[141] NRG-GenOn Comments at 2; NextEra Comments at 1.

markets, rendering this portion of ISO-NE's proposal unjust and unreasonable.[142] NextEra also argues that the RTR exemption has already allowed an extraordinary degree of accommodation of state policies, and the Commission should not amplify the financial consequences of the RTR exemption on existing capacity resources by allowing the accrued exempt MWs to be used through FCA 15.[143] Accordingly, NextEra contends the Commission should sever and reject the extension of the RTR exemption, finding the extension a distinct issue.[144]

90. Alternatively, Clean Energy Advocates, Connecticut Parties, and Public Systems protest the elimination of the RTR exemption because ISO-NE has not properly justified its elimination or explained how the circumstances have changed to warrant a replacement.[145] Clean Energy Advocates state that the Commission has previously concluded that the RTR exemption is just, reasonable, and not unduly discriminatory, finding that the limited size of the RTR exemption limits potential price suppression.[146] Public Systems argue with ISO-NE's finding that load growth and resource retirements have not been realized and state that the Commission did not rely primarily on those expectations as the basis for concluding the exemption would not unreasonably reduce FCA prices.[147] Clean Energy Advocates further state that the price sensitivity of the FCM demand curve has been substantially less than opponents claimed and that new competitive capacity resources have continued to enter the market.[148] Connecticut Parties argue that the RTR exemption was part of a carefully negotiated package of revisions, unfairly upended now by ISO-NE and that market conditions have not changed so radically to warrant the elimination of the RTR exemption.[149] Connecticut Parties further

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[142] NRG-GenOn Comments at 6-7 (citing ISO-NE Transmittal at 11-12); *see also* NextEra Comments at 5-6.

[143] NextEra Comments at 6-7.

[144] *Id.* at 3.

[145] Clean Energy Advocates Comments at 13-16; Connecticut Parties Comments at 18; Public Systems Comments at 18.

[146] Clean Energy Advocates Comments at 9 (citing RTR Remand Rehearing Order, 158 FERC ¶ 61,138 at P 49).

[147] Public Systems Comments at 19 (citing First RTR Order, 147 FERC ¶ 61,173 at PP 83-84).

[148] Clean Energy Advocates Comments at 14.

[149] Connecticut Parties Comments at 23, 27.

argue that the RTR exemption is working as expected and that no basis exists to seek changes to the RTR cap, much less eliminate the entire exemption.[150]

91. In defense of not eliminating the RTR exemption, Clean Energy Advocates and Connecticut Parties argue that ISO-NE has not provided any studies or analysis to corroborate its assertion that CASPR is an improvement to the RTR exemption and will better accommodate state policies. Moreover, they argue ISO-NE has not demonstrated what CASPR's effects will be, including whether CASPR will likely enable more or fewer state sponsored resources to enter the market than the RTR exemption.[151] Connecticut Parties contend that the RTR exemption provides all capacity sellers with an equal degree of certainty and predictability[152] and, conversely, argue CASPR creates uncertainty and unnecessary complexity.[153] Clean Energy Advocates argue that without the RTR exemption, overbuild is likely, leading to unjust and unreasonable rates.[154] They further argue that ISO-NE's approach would raise prices preemptively, which is precisely the wrong signal to send in an oversupplied market.[155]

92. Clean Energy Advocates argue that, while the RTR exemption ensures that the capacity contributions of up to 200 MW per year of state-sponsored resources are recognized in the FCM, CASPR provides no such guarantee. Instead, they argue that CASPR is only a potential mechanism for state-sponsored resources to enter the FCM, subject to the willingness of existing resources to retire.[156] Although ISO-NE argues that a guarantee is antithetical to competitive markets, Public Systems argue that this cannot be squared with either ISO-NE's earlier support for, or the Commission's acceptance of, the RTR exemption.[157] Furthermore, Connecticut Parties contend that the RTR exemption is not a guarantee; rather, it reduces risk by providing predictability and certainty to the market that an opportunity exists for a handful of policy preferred

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[150] *Id.* at 24-25.

[151] Clean Energy Advocates Comments at 20; Connecticut Parties Comments at 3.

[152] Connecticut Parties Comments at 19.

[153] *Id.* at 4.

[154] Clean Energy Advocates Comments at 2.

[155] *Id.* at 12.

[156] *Id.* at 18.

[157] Public Systems Comments at 20.

resources to clear the auction and obtain a nominal amount of capacity supply obligations.[158] According to Clean Energy Advocates, it is possible that CASPR could provide space for more state-mandated resources to enter the FCM than the RTR exemption, but it is also plausible that CASPR could provide less room or no room at all for resources currently eligible to enter under the exemption if existing resources do not elect to retire their resources in the substitution auction.[159] Consequently, they argue delaying the entry of state-mandated resources may force customers to pay for unnecessary and duplicative entry, which the RTR exemption was designed to prevent.[160]

93. To address such concerns, Massachusetts AG recommends the Commission require the inclusion of the backstop provision proposed by NESCOE during the stakeholder process, which would take effect after the phase-out of the RTR exemption and allow up to 200 MW of state sponsored resources to participate in the FCM regardless of whether there were corresponding retirements in that year to offset such entry.[161] Massachusetts AG states that, through a "proxy supply offer," MWs that enter through the backstop could be matched with eventual retirements over time and that the backstop presents no danger of price suppression because state sponsored resources would enter the substitution auction at lower prices not subject to the MOPR only after the primary FCA was run.[162] Massachusetts AG states that the backstop proposal received support during the stakeholder process, although it was not presented as an amendment during the final CASPR vote.[163] Without inclusion of this backstop provision, Massachusetts AG protests the elimination of the RTR exemption.[164] Massachusetts AG argues that ISO-NE has not provided information on projected retirements to give an idea of when and how many MWs of Sponsored Policy Resources it expects to be able to enter the market through CASPR; instead, Massachusetts AG represents that forecast retirements will be insufficient to accommodate Massachusetts' resource procurements through CASPR, much less those of other New England states,

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[158] Connecticut Parties Comments at 21.

[159] Clean Energy Advocates Comments at 19.

[160] *Id.* at 19-20.

[161] Massachusetts AG Comments at 8-9.

[162] *Id.* at 9.

[163] *Id.* at 7.

[164] *Id.* at 2.

underscoring the need for a backstop mechanism.[165]

94. Alternatively, Public Systems state the RTR exemption and the CASPR substitution auction are complementary tools to address overbuild and overpayment and both should be retained.[166] Public Systems state that the RTR exemption would continue to provide assurance that a limited quantity of certain consumer-preferred resources can acquire capacity supply obligations, while the substitution auction offers the potential to accommodate a greater quantity and broader variety of resources without any material negative impact on FCA prices.[167] Public Systems further state that keeping the RTR exemption would not eliminate the need for the substitution auction, which is needed to accommodate resources ineligible for the exemption.[168]

95. Clean Energy Advocates recommend the Commission reject the portion of ISO-NE's proposal to eliminate the RTR exemption, arguing this would not redesign the proposal but rather maintain a safeguard with value to the prior rate and current proposal.[169] Alternatively, Connecticut Parties and Clean Energy Advocates request the Commission consider rejecting the entire CASPR proposal as a long-term replacement for the RTR exemption.[170]

3. Answers

96. FirstLight urges the Commission to reject calls by some commenters to extend the RTR exemption beyond the proposed phase-out period or require the use of an RTR backstop. FirstLight asserts that the strength of CASPR lies in its ability to mobilize market forces to rearrange the regional resource mix to accommodate state policy resources by requiring such resources to pair their out-of-market megawatts with offsetting early retirements.[171] FirstLight further states that the draw for resources to

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[165] *Id.* at 11.

[166] Public Systems Comments at 18-19; *see also* Clean Energy Advocates Comments at 23.

[167] Public Systems Comments at 19-21.

[168] *Id.* at 21; *see also* Clean Energy Advocates Comments at 24.

[169] Clean Energy Advocates Comments at 29.

[170] Connecticut Parties Comments at 28; Clean Energy Advocates Comments at 34.

[171] FirstLight Answer at 3.

offer early retirements needed to "fuel the Substitution Auction hinges on elimination of other opportunities for state-sponsored new entry to bypass the MOPR and gain unmitigated entry."[172] FirstLight states that the RTR exemption is an inferior method of accommodating Sponsored Policy Resources because, contrary to what Connecticut Parties assert, the RTR exemption can push FCA clearing prices below competitive levels.[173] FirstLight argues that continuing the RTR exemption beyond the ISO-NE proposed phase-out would undermine the substitution auction's effectiveness and that an RTR exemption in the form of a backstop would undermine CASPR.[174] FirstLight argues that CASPR provides the opportunity, but not the guarantee, to find a retirement pairing match in any given substitution auction, and a backstop mechanism to assure immediate capacity supply obligations for policy resources in the event of a failed attempt to pair up with an early retirement would both undermine the operation of CASPR and permit FCA clearing price suppression.[175]

97. ISO-NE acknowledges that the conditions that made the RTR exemption just and reasonable upon its adoption will no longer exist going forward. According to ISO-NE, the RTR exemption now presents a greater risk of price suppression and ISO-NE's motivation to replace the RTR exemption with CASPR is forward-looking.[176] However, ISO-NE argues that while it is true that conditions have changed, there are circumstances that warrant a transition away from the status quo RTR exemption rather than an abrupt departure. ISO-NE reiterates that the Commission has accepted transition mechanisms in the past and argues a similar transition is appropriate in this case to enable the developers of state sponsored resources, who may have relied upon the continuance of the RTR exemption in completing their contract arrangements, to avail themselves of it. ISO-NE

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[172] *Id.* at 4.

[173] *Id.* at 10-12.

[174] *Id.* at 5.

[175] *Id.* at 6.

[176] ISO-NE Answer at 8 and 11.

further argues the lack of a transition could increase investor perceptions of regulatory risks inherent in new project development and raise costs unnecessarily.[177]

98. ISO-NE responds that Clean Energy Advocates and others are correct when they state that CASPR does not guarantee that Sponsored Policy Resources will obtain a capacity supply obligation in the substitution auction.[178] ISO-NE reiterates that there is no perfect solution that completely meets the objectives to maintain competitive pricing and accommodate Sponsored Policy Resources.[179] ISO-NE notes that it agrees with NEPGA's comments that the lack of such a guarantee puts Sponsored Policy Resources on a level playing field with other new resources, which may need more than one attempt to clear the primary auction given market supply and demand conditions.[180] ISO-NE adds that the RTR exemption is an administrative solution that is not market-based and that the RTR exemption cannot accommodate any of the imported hydro capacity Massachusetts seeks to procure.[181] ISO-NE argues that the RTR exemption and CASPR are not compatible in the long term and asserts continuing the RTR exemption with a backstop would undermine CASPR because no Sponsored Policy Resource would elect to sell capacity at a low price in the substitution auction if it could instead use the RTR exemption and receive a higher price in the primary auction.[182]

4. Commission Determination

99. We accept ISO-NE's proposal to phase out the RTR exemption by allowing the remaining accrued exempt MWs to be used through FCA 15. We find ISO-NE's transition proposal to be a balanced approach for implementing CASPR's alternative means of accommodating state policies, while attenuating any potential adverse impacts on pending investments that could result from an immediate change to the market rules. We are not persuaded by arguments that the CASPR proposal is rendered unjust and unreasonable by the transition period leading up to the RTR exemption elimination or the eventual elimination of the exemption.

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[177] *Id.* at 9.

[178] *Id.* at 10.

[179] *Id.* at 10.

[180] *Id.* at 10-11 (citing NEPGA Comments at 10).

[181] *Id.* at 11.

[182] *Id.* at 10.

100. To begin, we disagree with NRG-GenOn and NextEra's arguments that the RTR exemption transition period should be rejected. As noted above, to ensure that the FCM remains just and reasonable, CASPR seeks to maintain a stable investment environment. Thus, since investors may have made decisions based on the continuation of the RTR exemption, the transition period will mitigate some of the negative impacts that could have resulted from an abrupt termination. Furthermore, it is consistent with Commission precedent to permit a transition mechanism to a new regulatory construct.[183]

101. With respect to arguments by Clean Energy Advocates, Connecticut Parties, and Public Systems that the RTR exemption should be retained in tandem with CASPR, we also disagree. We find that CASPR is a just and reasonable means to accommodate the entry of new Sponsored Policy Resources into the FCM over time, in a way that maintains investor confidence in FCM market outcomes. By doing so, the RTR exemption is no longer necessary to accommodate the entry of state sponsored resources. Further, although CASPR replaces the RTR exemption, ISO-NE is not required to demonstrate that this proposal is superior to the status quo. Rather, ISO-NE need only show that the instant proposal itself is just and reasonable, which we find it has.[184] We find that ISO-NE has provided a reasonable justification to phase out the RTR exemption as CASPR is a market-based rather than an administrative solution.[185] The substitution

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[183] *See ISO New England Inc.*, 155 FERC ¶ 61,319, at P 62 (2016) (approving the use of a transition mechanism for implementing zonal demand curves in ISO-NE); *ISO New England Inc.*, 147 FERC ¶ 61,172, at P 73 (2013) (approving a transition plan to phase in ISO-NE's Pay for Performance provisions to allow parties to "gain experience with the new market design at a reduced risk exposure").

[184] *See, e.g.*, *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,157, at P 229 (2016) ("[T]he FPA does not require PJM to demonstrate that its existing tariff was unjust and unreasonable, only that its proposal is just and reasonable."), *aff'd, Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656 (D.C. Cir. 2017); *Cal. Indep. Sys. Operator Corp*., 119 FERC ¶ 61,076, at P 45 (2007) ("Since the CAISO filed its proposal under FPA section 205, it must show that its proposed changes are just and reasonable, but it is not required to show that the existing policy is unjust and unreasonable."), *reh'g granted in part and denied in part*, 120 FERC ¶ 61,023, at P 45 & n.34 (2007) ("For a proposal to be acceptable, it need not be perfect nor even the most desirable; it need only be reasonable."), *reh'g denied*, 124 FERC ¶ 61,094 (2008), *aff'd, Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520 (D.C. Cir. 2010).

[185] We note that, in its current form, the RTR exemption would not be able to accommodate certain resources, such as the Massachusetts resource procurement. ISO-NE Answer at 11; *see supra* P 4.

auction will appropriately allow new Sponsored Policy Resources the opportunity to obtain capacity supply obligations, while additionally ensuring that, because each MW of new entry is coordinated with a MW that exits, the FCM maintains investor confidence by avoiding sudden and dramatic shifts in the supply curve that could result from state sponsored entry without a corresponding amount of supply exiting the market. Furthermore, we agree with ISO-NE that the long-term continuation of the RTR exemption could limit participation in the substitution auction, undermining the purpose of CASPR.[186]

102. We also deny the request to institute a 200 MW backstop replacement for the RTR exemption. We agree with ISO-NE that CASPR provides a reasonable opportunity to accommodate state sponsored resources in the FCM over time, and the lack of a backstop to provide a guarantee of that accommodation does not render the proposal unjust and unreasonable.

E. Other Issues

1. ISO-NE's Proposal

103. ISO-NE proposes to allow inter-zonal transfers of capacity supply obligations through the substitution auction only when the two zones did not price-separate in the primary auction. In addition, ISO-NE states that transfers across a zonal boundary of two capacity zones that were modeled separately (but did not price-separate) will be limited, such that any permitted transfers do not shift total capacity in an import-constrained zone to the left of the truncation point, and in an export-constrained zone to the right of the truncation point.[187]

104. ISO-NE explains that this limitation is effectuated through the use of two constraints in clearing import-constrained and export-constrained zones. In the case of an import-constrained zone, ISO-NE explains that the first constraint applies if, based on the results of the primary auction, capacity located in the import-constrained zone is less than

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[186] ISO-NE Answer at 10.

[187] ISO-NE uses zonal capacity demand curves based on the marginal reliability impact of each MW of capacity located in each capacity zone that is modeled separately due to transmission constraints. For an import-constrained zone, the truncation point represents the quantity on the zonal demand curve below which each MW of capacity in the zone has a greater reliability value than a MW in the unconstrained Rest of Pool zone. For an export-constrained zone, the truncation point represents the quantity on the zonal demand curve above which each MW of capacity in the zone has less reliability value than a MW in the Rest of Pool zone.

(to the left of) the truncation point. According to ISO-NE, such an outcome means that capacity's reliability value is greater in the import-constrained zone than in the unconstrained Rest of Pool. ISO-NE states that the constraint prevents any transfer of capacity into or out of that zone in the substitution auction. The second constraint applies if, based on the results of the primary auction, capacity in the import-constrained zone is greater than or equal to (to the right of or even with) the truncation point. ISO-NE argues that such an outcome means that capacity's reliability value in the import-constrained zone is equal to that in Rest of Pool. ISO-NE states that the constraint limits transfers out of the zone such that total capacity in the zone remains greater than or equal to the truncation point.

105. In the case of an export-constrained zone, ISO-NE explains that the first constraint applies if, based on the results of the primary auction, capacity located in the export-constrained zone is greater than (to the right of) the truncation point. According to ISO-NE, such an outcome means that capacity's reliability value is lesser in the export-constrained zone than in the unconstrained Rest of Pool. ISO-NE states that the constraint prevents any transfer of capacity into or out of that zone in the substitution auction. ISO-NE explains that the second constraint applies if, based on the results of the primary auction, capacity in the export-constrained zone is less than or equal to (to the left of or even with) the truncation point. According to ISO-NE, such an outcome means that capacity's reliability value in the export-constrained zone is equal to that in Rest of Pool. ISO-NE states that the constraint limits transfers into the zone such that total capacity in the zone remains less than or equal to the truncation point.

106. ISO-NE argues for these limitations on the grounds that allowing transfers in the substitution auction to increase or decrease the relative reliability level between one capacity zone and another would also affect the zonal prices in those zones in future primary auctions, which ISO-NE argues is inconsistent with ISO-NE's objective to maintain competitively-based capacity prices.

2. Comments

107. Exelon asserts that CASPR inappropriately restricts transfers of capacity in the substitution auction between capacity zones. Exelon argues that CASPR should instead allow transfers between any zones as long as the transferred quantities reflect the marginal reliability value of the capacity exchange. Under such a design, Exelon explains, 500 MW of new capacity in export-constrained Northern New England may be needed to provide the same reliability benefits to the system as 100 MW of existing capacity in the southern part of the region. Exelon states that allowing transfers such as this one would produce a more liquid and efficient market in the substitution auction. Exelon further argues that such transfers would be allowed under the ISO-NE's recent

Annual Reconfiguration Transaction proposal and that allowing inter-zonal trading would harmonize CASPR with this proposal.[188]

108. Several parties comment that the Commission should take additional action in response to ISO-NE's instant filing. Verso states that it should require ISO-NE to make periodic filings on ways to improve CASPR going forward.[189] Public Systems argue that the Commission should accept CASPR for FCA 13 but institute a section 206 proceeding to broaden substitution auction eligibility to self-supply resources beginning with FCA 14. APPA asserts that CASPR is yet another incremental change to FCM rules that fails to address the misalignment between the capacity market rules and state and consumer resource preferences. APPA states that a more fundamental change, such as a move to a residual capacity market, is necessary, but that if the Commission accepts CASPR, it should initiate a separate proceeding to address the limitations on public power resource choices in the FCM.[190] Calpine requests the Commission impose a date certain for completing the mitigation related to bid shading in the primary auction.[191] Clean Energy Advocates argue that the Commission should reconsider the applicability of the MOPR to state-sponsored renewable energy resources.[192]

109. CPV Towantic asserts that the Commission should apply a consistent set of principles when evaluating proposals, like CASPR, to accommodate state-supported resources while limiting the effect of the entry of those resources on energy and capacity market prices.[193] Among the principles CPV Towantic offers is that energy markets must also be protected from price suppression arising from the entry of state-supported resources. CPV Towantic argues that CASPR will negatively impact the competitiveness of ISO-NE's energy markets because the Sponsored Policy Resources whose entry CASPR facilitates have either no or low marginal energy costs, which will reduce energy market clearing prices and increase pressure on existing competitive resources. CPV Towantic asserts that, if ISO-NE's energy markets are not protected, the resulting uncertainty will increase the risk associated with competitive resources in the energy markets and either discourage the entry of new competitive resources or at least increase

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[188] Exelon Comments at 7.

[189] Verso Comments at 1-2.

[190] APPA Comments at 11-12.

[191] Calpine Comments at 4.

[192] Clean Energy Advocates Comments at 26.

[193] CPV Towantic Comments at 5-13.

the cost of new entry, as investors increase their required risk premiums. CPV Towantic states that this concern is exacerbated because in regions like New England, with retail choice, competitive resources must rely heavily on revenue from ISO-NE's energy and capacity markets, rather than on long-term bilateral contracts that may be available in regions where retail suppliers have captive customers. CPV Towantic argues that CASPR bifurcates ISO-NE's energy market into Sponsored Policy Resources with access to long-term energy contracts that make them indifferent to the prices received from ISO-NE's markets and non-state-supported resources without access to such long-term contracts. CPV Towantic states that, in response to this dynamic, non-state-supported resources will either be forced to prematurely exit the market or, if they are needed to support reliability, will seek out their own out-of-market contracts to continue operating.

110. Public Citizen and Consumer-Owned Systems argue that the lack of stakeholder support for CASPR is evidence that the proposal is unjust and unreasonable. Public Citizen argues that CASPR was not properly vetted through the stakeholder process and therefore is premature and likely to lead to unjust and unreasonable rates.[194] Consumer-Owned Systems claim that CASPR did not garner stakeholder support because the proposal is unduly discriminatory.[195] Connecticut Parties argue that CASPR contains two features (specifically, the definition of Sponsored Policy Resources and the limitations on capacity transfers between zones) that were added by ISO-NE at the last minute despite having been previously rejected by stakeholders earlier in the development of CASPR.[196] Consequently, Connecticut Parties contend, these two features of the CASPR proposal currently before the Commission have not been properly developed and vetted through the stakeholder process.

111. Several commenters assert that CASPR will undermine regional reliability and exacerbate fuel security concerns by speeding the retirement of non-natural gas-fired resources. Connecticut Parties and NEPGA argue that CASPR is likely to incentivize the retirement of coal- and oil-fired generation that they contend are essential for winter reliability and fuel security.[197] NEPGA also argues that these same resources provide ramping, voltage control, and other ancillary services needed for reliability. NEPGA

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[194] Public Citizen Comments at 1.

[195] Consumer-Owned Systems Comments at 11.

[196] Specifically, Connecticut Parties argue that ISO-NE made two last-minute additions to CASPR: the January 1, 2018 cut-off date to the definition of Sponsored Policy Resource, and added limitations on capacity transfers between zones. Connecticut Parties Comments at 47.

[197] Connecticut Parties Comments at 28; NEPGA Comments at 11-12.

asks the Commission to direct ISO-NE, contemporaneously with implementing CASPR, to identify needed reliability services and design market mechanisms to compensate those services.[198]

3. Answers

112. ISO-NE states that it prioritized CASPR's ability to preserve competitively-based capacity prices over the potentially more rapid accommodation of additional Sponsored Policy Resources when it proposed to limit transfers between zones in the substitution auction.[199] ISO-NE asserts that Exelon's argument that inter-zonal transfers are permitted in the recent redesign of Annual Reconfiguration Transactions is not an apt comparison because Annual Reconfiguration Transactions occur within the FCM's annual reconfiguration auctions, which use demand curves based on the marginal reliability impact of capacity resources whereas the substitution auction is a "matching market" between capacity resources.[200] ISO-NE adds that the reconfiguration auctions do not require that system reliability be held constant and allow additional capacity to be cleared or previously cleared capacity to be shed based on the marginal reliability impact demand curves. ISO-NE argues that, by contrast, the substitution auction must hold system reliability constant and maintain competitively-based capacity prices in each zone, which requires ensuring that capacity transfers between zones have the same reliability impact in each zone on a MW-for-MW basis.[201] ISO-NE states that the proposed inter-zonal transfer limits avoid degrading reliability and exacerbating future price separations between capacity zones.[202] ISO-NE also argues that the zonal price decrease Exelon notes in its argument about cost-shifts between capacity zones would adversely impact capacity suppliers in Northern New England by depressing capacity prices below the competitively-based level and that Exelon ignores the fact that the price increases in another zone.[203]

113. ISO-NE asks the Commission to refrain from setting deadlines or other reporting

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[198] NEPGA Comments at 11.

[199] *Id.* at 34.

[200] *Id.* at 34.

[201] *Id.* at 35.

[202] *Id.* at 35 (citing Testimony of Andrew G. Gillespie in Docket No ER18-455-000, December 15, 2017, at 58-59).

[203] *Id.* at 35-36.

requirements related to CASPR that Verso, AEMA, Calpine, and Public Systems have requested. ISO-NE states that it has already committed to monitor CASPR and work with stakeholders as needed and asserts that there is no way to predict a timeline for when future stakeholder discussions about CASPR will be ripe.[204]

114. In response to arguments about an insufficient stakeholder process, NEPOOL highlights that CASPR was fully vetted through, and received the benefit of, the NEPOOL participant process.[205] NEPOOL also asks the Commission to avoid further changes that are not properly raised in this proceeding and/or would potentially prevent full participant processes to consider future changes.[206]

4. Commission Determination

115. We disagree with Exelon's contention that CASPR's restriction on inter-zonal capacity supply obligation transfers is not just and reasonable. Exelon points to an example where Sponsored Policy Resources enter the export-constrained Northern New England zone and obtain capacity supply obligations from existing resources in the import-constrained Southeastern New England zone to demonstrate that northern New England states may actually benefit from the actions of southern New England states. However, as ISO-NE points out, the opposite exchange could also occur under Exelon's proposed change and yield undesirable cost shifts between states. For example, suppose a 100 MW Sponsored Policy Resource enters the import-constrained zone and obtains a capacity supply obligation from an existing resource in the export-constrained zone. While total system reliability may remain unchanged, the transfer could affect the following year's primary auction results by lowering the primary auction clearing price in the import-constrained zone and increasing the primary auction clearing price in the export-constrained zone. The result is that ratepayers in the export-constrained zone face higher capacity costs due to the actions of the state or states in the import-constrained zone that are providing out-of-market state revenues to support the Sponsored Policy Resources. We find ISO-NE's proposal to limit transfers between zones in certain circumstances and, thus, alleviate concerns about such a cost shift between states, is just and reasonable.

116. Regarding Verso's and others' requests that the Commission require ISO-NE to submit periodic filings on ways to improve CASPR, we do not find that such a requirement is necessary or appropriate. Having found the proposed revisions to be just

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[204] *Id.* at 4-5.

[205] NEPOOL Answer at 5.

[206] *Id.* at 2.

and reasonable, we find no basis for directing additional filings or reporting requirements from ISO-NE.

117. Regarding APPA's assertion that more fundamental changes to the FCM are necessary, and Clean Energy Advocates' request that the Commission reconsider the applicability of mitigation measures for state-sponsored renewable resources, we do not find that such additional steps are necessary at this time. ISO-NE proposes CASPR as a new mechanism to maintain resource adequacy in light of the interaction of state policies with the FCM. Having found this proposal just and reasonable, we decline to take these parties' additional requested action.

118. CPV Towantic argues that CASPR will lead to unjust and unreasonable rates because the entry of Sponsored Policy Resources will suppress both energy and capacity market prices. We acknowledge that, to the extent CASPR enables the entry of Sponsored Policy Resources with low marginal energy costs, it may reduce energy market prices and, over time, alter the composition of resources on the ISO-NE system. CPV Towantic's argument therefore presents the question of whether these potential effects, which are byproducts of ISO-NE's proposal seeking to accommodate the entry of Sponsored Policy Resources, lead to unjust and unreasonable rates. We find that they do not. There is an inherent and intended feedback between the energy and capacity markets in ISO-NE. If lower energy market prices result in some resources needing to submit higher capacity market prices to express their breakeven point between revenues and going-forward costs, that result is consistent with the complementary design of ISO-NE's markets. We are not persuaded by CPV Towantic's argument that the cited side effects of ISO-NE's proposed compromise between competing objectives is unjust and unreasonable.

119. Public Citizen, Connecticut Parties, and Consumer-Owned Systems assert that CASPR is not just and reasonable because it was not fully vetted in the NEPOOL stakeholder process and did not receive supermajority support from NEPOOL stakeholders. We disagree. The Commission evaluates each FPA section 205 filing on the merits of the proposed tariff revisions and based on the record developed in the proceeding. While the Commission may choose to consider stakeholder support or opposition for a section 205 proposal, lack of stakeholder support does not alone render a section 205 filing unjust and unreasonable.[207] In the discussion above, we address the merits of ISO-NE's filing and conclude that it is just and reasonable, notwithstanding the fact that it did not receive supermajority support from NEPOOL stakeholders. Further,

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[207] *See, e.g.*, *ISO New England Inc.*, 139 FERC ¶ 61,178, at P 27 (2012) (citing *Am. Elec. Power Serv. Corp. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,083, at P 172 (2008)) (approving proposed tariff change under section 205 despite assertion of strong stakeholder opposition).

none of these parties explain in what way they believe the NEPOOL process violated any governance rules in the Participants Agreement.[208] The record is therefore devoid of any evidence that ISO-NE or NEPOOL violated its agreement during that process.

120. Connecticut Parties and NEPGA assert that CASPR will exacerbate regional fuel security concerns by speeding the retirement of non-natural gas-fired resources. We take seriously the fuel security concerns raised by these parties and that are the subject of ongoing discussions in the NEPOOL stakeholder process. ISO-NE states that its fuel security concern is primarily driven by the region's dependence on constrained natural gas supplies. Commenters are concerned about the likelihood that retiring resources will be primarily non-natural gas-fired resources. However, as ISO-NE explains, to the extent CASPR facilitates the retirement of existing coal- and oil-fired generation, that generation will be replaced with alternative non-natural gas-fired resources on a one-for-one basis.[209] CASPR will therefore replace any non-natural gas-fired resources with other non-natural gas-fired resources—rather than with natural gas-fired resources as may be the case under current auction rules—and as a result, CASPR will not increase the region's dependence on natural gas-fired generation and exacerbate the current fuel security concern. CASPR also leaves in place the current FCM practice of conducting reliability reviews to assess the local reliability impact of potential retirements on a resource-by-resource basis and limiting participation in the substitution auction where necessary.[210] Furthermore, as ISO-NE states, the resources that clear in the substitution auction take on the same obligations and rights—including the Pay for Performance obligations—as resources that obtain a capacity supply obligation through the primary auction. The Pay for Performance obligations, in particular, provide a strong incentive for capacity resources to maximize the reliability and adequacy of their fuel supply, particularly before and during critical operational periods. For these reasons, we are not persuaded that CASPR is unjust and unreasonable simply because it may accelerate the retirement of certain older non-natural gas-fired generators.

121. With respect to NEPGA's request to direct ISO-NE to design market mechanisms to identify and compensate certain reliability services, we agree with ISO-NE that such a request is beyond the scope of this proceeding. Furthermore, ISO-NE states that it will continue to address fuel security issues through, among other channels, the proceeding on

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[208] New England Power Pool, Second Restated NEPOOL Agreement, https://www.iso-ne.com/static-assets/documents/2015/01/op_2d_rna.pdf.

[209] ISO-NE Transmittal at 7-8; ISO-NE Answer at 18-19.

[210] ISO-NE Transmittal at 8.

grid resilience that the Commission has initiated in Docket No. AD18-7-000 and ISO-NE's own recently published fuel security study.[211]

The Commission orders:

ISO-NE's filing is hereby accepted, as discussed in the body of this order. ISO-NE's revisions to Tariff section III.13.7 are effective June 1, 2018, and all other revisions are effective March 9, 2018, as requested.

By the Commission. Commissioner LaFleur is concurring in part with a separate statement attached.
Commissioner Powelson is dissenting with a separate statement attached.
Commissioner Glick is dissenting in part and concurring in part with a separate statement.

(S E A L)

Kimberly D. Bose,
Secretary.

[211] ISO-NE Answer at 5.

Appendix

Intervention and Protest and/or Comment

Advanced Energy Management Alliance (AEMA)‡
American Public Power Association (APPA)
American Wind Energy Association**
Avangrid Networks, Inc.*
Avangrid Renewables, LLC*
Calpine Corporation (Calpine)
Champlain VT, LLC*
Cogentrix Energy Power Management, LLC*
Connecticut Department of Energy & Environmental Protection**
Connecticut Municipal Electric Energy Cooperative; Massachusetts Municipal Wholesale Electric Company; New Hampshire Electric Cooperative, Inc.; Vermont Public Power Supply Authority (Public Systems)
Connecticut Office of Consumer Counsel** †
Connecticut Public Utilities Regulatory Authority**
Conservation Law Foundation**
Consolidated Edison Energy, Inc.*
CPV Towantic, LLC (CPV Towantic)
Direct Energy; Direct Energy Business Marketing, LLC; Direct Energy Business, LLC*
Dominion Energy Services, Inc. (Dominion)
Dynegy Marketing and Trade, LLC*
Eastern New England Consumer-Owned Systems (Consumer-Owned Systems)
Edison Electric Institute*
Emera Energy Services, Inc.*
Energy New England, LLC*
Eversource Energy Service Company; Northeast Utilities Service Company*
Exelon Corporation (Exelon)
FirstLight Power Resources, Inc. (FirstLight)
H.Q. Energy Services (U.S.) Inc., Hydro-Quebec Energy Services (U.S.) Inc.*
LS Power Associates, L.P.*
Maine Public Utilities Commission (Maine PUC)
Massachusetts Attorney General Maura Healey (Massachusetts AG)
Massachusetts Department of Public Utilities (Massachusetts DPU)
National Grid*
National Rural Electric Cooperative Association*
Natural Gas Supply Association (NGSA)
New England Power Generators Association Inc. (NEPGA)
New England Power Pool Participants Committee (NEPOOL)
New England States Committee on Electricity (NESCOE)
New Hampshire Public Utilities Commission; New Hampshire Office of Consumer

Advocate (New Hampshire Parties)
NextEra Energy Resources, LLC (NextEra)
NRG Power Marketing LLC and GenOn Energy Management, LLC (NRG-GenOn)
Potomac Economics (External Market Monitor)†
PSEG Companies*
Public Citizen
RENEW Northeast, Inc.**
Retail Energy Supply Association
Shell Energy North America (US), L.P.*
Sierra Club Environmental Law Program**
Sustainable FERC Project; Natural Resources Defense Council**
Verso Corporation (Verso)

* Entities submitting interventions only
** Entities submitting comments as part of a coalition
† Entities submitting motions to intervene out of time
‡ Entities submitting comments and no motion to intervene

List of Coalitions' Individual Members

Clean Energy Advocates
American Wind Energy Association
Conservation Law Foundation
Natural Resources Defense Council
RENEW Northeast, Inc.
Sierra Club Environmental Law Program
Sustainable FERC Project

Connecticut Parties
Connecticut Public Utilities Regulatory Authority
Connecticut Department of Energy & Environmental Protection
Connecticut Office of Consumer Counsel

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc. Docket Nos. ER18-619-000

(Issued March 9, 2018)

LaFLEUR, Commissioner *concurring in part*:

In today's order, the Commission finds that ISO New England, Inc.'s (ISO-NE) Competitive Auctions with Sponsored Policy Resources (CASPR) is a just and reasonable proposal that accommodates actions taken by New England states to procure certain resources to achieve policy objectives outside of the ISO-NE's competitive wholesale markets. I strongly support the Commission's approval of CASPR. I am concurring, however, because I disagree with the generic guidance set forth in the order regarding how the Commission should address the interplay of state policies and the wholesale markets.[1] Because that guidance is not directly pertinent to the CASPR proposal, and in my view is not necessary to support the Commission's decision today, it has no bearing on my determination to approve CASPR.

How to address the interplay of competitive wholesale markets and state policy initiatives is one of the most important and complex issues facing the Commission and the nation's electricity markets. Last May, the Commission held a two-day technical conference to closely examine this interplay, and to consider how ISO-NE, the New York Independent System Operator Inc., and PJM Interconnection, L.L.C., which rely on mandatory centralized capacity markets for resource adequacy, should approach it. At that technical conference, I strongly encouraged those RTOs and ISOs to develop market design proposals to either accommodate or achieve state policy initiatives through forward-looking market reforms. ISO-NE developed such a proposal, CASPR, and I am pleased to support the Commission's order approving it today.

I am a strong supporter of wholesale capacity markets, which I believe have delivered substantial benefits to customers through regional resource selection and deployment, protecting reliability at least cost, and promoting innovation and efficiency. At the same time, I recognize that these markets exist due to the decisions of the states to

[1] *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 22 (2018).

change the structure of their regulated utilities, leading the regions to rely upon mandatory centralized capacity markets to sustain resource adequacy and reliability.

In recent years, some states in these regions have increasingly focused on supporting specific resources through out-of-market compensation to promote various policy objectives, rather than relying on market prices to attract desired investment. I agree with ISO-NE that there is an inherent tension between relying on capacity markets to attract investment and state-mandated support for specific resources. Indeed, there were strong disagreements among stakeholders, and even among states, regarding the path that ISO-NE should take to address this tension. To its credit, I believe that ISO-NE crafted a just and reasonable proposal that balances these competing objectives. I particularly appreciate that ISO-NE utilized a competitive, auction-based approach to introduce state-supported resources into the wholesale capacity market. I intend to closely monitor the effectiveness of this market construct in practice. As noted in the order, I also appreciate ISO-NE's commitment to continue to work with stakeholders on the definition of sponsored policy resources if state laws and regulations change.[2]

I agree with today's order that the minimum offer price rule (MOPR) is an important tool that the Commission can utilize in certain instances to address the interplay between state policies and our wholesale markets. I reject the notion, however, that we should use the MOPR as a "standard solution" – a blunt instrument – against the impacts of all state policies. First of all, I believe that there are different MOPR constructs that could be developed to protect market pricing in those instances where out-of-market subsidies undermine the goals of the wholesale capacity markets. For example, those constructs could include certain exemptions to the MOPR or, like CASPR, allow resources subject to the MOPR to obtain a capacity award while not impacting or necessarily receiving the market clearing price. In addition, other market design constructs, such as, carbon pricing, can also achieve state objectives within the market. I expect that other proposals will emerge over time as these issues are considered.

I acknowledge that these issues are not easy, as evidenced by the split Commission decision today. I also believe that these issues do not lend themselves to a cookie-cutter solution to be broadly applied across all regions. I therefore hope we receive market design proposals developed by other RTO/ISOs and their stakeholders. Without pre-judging any specific proposal, I believe we should be open to region-specific solutions of different types.

As I have stated many times, the nation is undergoing a transformation in its

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[2] *Id.* at P 47.

energy resource mix, and clean energy policies set by individual states to address climate change and other environmental goals are a key driver of this transformation. If the affected regional markets do not adapt their market design to the reality of the growing number of state targets and initiatives, I fear that the result could be gradual, unplanned reregulation, making the transition to clean energy in those regions more expensive than necessary and less reliable for customers. The value of markets to customers makes it well worth the effort to adapt them to accommodate or achieve state policy objectives, and today's order approving CASPR is an important milestone in that ongoing effort.

For these reasons, I respectfully concur.

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Cheryl A. LaFleur
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ISO-New England Inc. Docket No. ER18-619-000

(Issued March 9, 2018)

POWELSON, Commissioner, *dissenting*:

Today's order accepts as just and reasonable ISO-New England Inc.'s (ISO-NE) Competitive Auctions with Sponsored Policy Resources (CASPR) proposal. Supporters state that the proposal will achieve a necessary balance between allowing states to accomplish certain policy goals, while also protecting the viability of the Forward Capacity Market (FCM) and the benefits it provides. In this respect, both CASPR, and today's order accepting it, are well intentioned. However, good intentions do not necessarily lead to just and reasonable outcomes. The two goals that CASPR tries to achieve are fundamentally in conflict and cannot coexist in one market. By trying to both accommodate state policies *and* protect the FCM, CASPR will likely only accomplish one goal at the expense of the other. Today's decision threatens the viability of the FCM to serve as a mechanism to ensure resource adequacy in ISO-NE, and therefore, it is unjust and unreasonable and should be rejected.

In the late 1990s and early 2000s, states across the country, including many in New England, restructured their investor owned public utilities.[1] These states moved away from the vertically integrated model, where utilities not only control the generation, transmission, and distribution of electricity, but are responsible for resource planning, and voluntarily relinquished resource planning to regional grid operators. Under the new model, regional grid operators collaborated with stakeholders to create competitive markets to procure sufficient generation to meet regional resource adequacy goals (*e.g.*, reserve margins) based on operational constraints and resource production costs. The Commission became responsible for ensuring those capacity markets yield a reliable resource mix at just and reasonable rates.

The primary goal of capacity markets has been to leverage the forces of competition to select resources needed to meet resource adequacy requirements at least cost in a non-discriminatory and non-preferential manner. Under this approach, the risk of deploying capital has largely been borne by private investors, not captive utility customers. The benefits of this approach have been substantial, particularly in terms of

[1] A major driving force behind electric restructuring was the belief, which I share, that competitive markets produce greater efficiencies, and therefore lower prices for consumers, than traditional regulation.

lower wholesale energy and capacity rates and increased technological innovation (*e.g.*, improved heat-rate efficiency).

In recent years, however, certain restructured states in New England have again taken an active role in resource planning by attempting to procure select types of generation resources in their state. These efforts began with the enactment of renewable/alternative energy portfolio standards and more recently, have involved other forms of out-of-market support for select resources. Absent state support, these resources would likely fail to be procured through the market due to their relatively high costs.

There is no question that states are entitled to procure any resources they prefer. It is important to note, however, that no New England state has signaled a desire to change current responsibilities for resource adequacy.[2] Grid reliability and resource adequacy remain within the purview of the regional grid operator, and it is the Commission's responsibility to ensure that this objective is accomplished at just and reasonable rates.

To complicate matters further, restructured states are providing financial support to resources outside of the market and, in turn, expecting the market to accommodate those resources to ensure their ratepayers do not "pay twice" for capacity. Generally, I share this concern. However, the states had the opportunity to foresee this "double-payment" problem when they made the decision to support resources outside the market. In many cases, market rules such as the Minimum Offer Price Rule (MOPR) were already in place when those decisions were made. So unless the states are willing to reassume complete responsibility for resource adequacy, they must accept that the Commission is required to take action to ensure the viability of the capacity markets. Thus, ISO-NE is in a conundrum where states chose to join an organized market, and yet want the ability to procure certain resources of their choosing.

The CASPR proposal appears attractive because it is the result of extensive compromise and presents a solution to this complicated situation. However, the major flaw in the proposal, and one that I believe cannot be overcome by the benefits of a compromise solution, is that the "competitively-based" market clearing price will not provide a meaningful signal to the marketplace. Markets for resource adequacy are designed to signal when and where new generation resources are needed, and when and where existing generation resources are no longer needed. These price signals are skewed when resources receiving out-of-market revenue participate in the market alongside resources that do not receive similar support, because they are able to offer into the market at a lower price that is reflective of the out-of-market revenues they are receiving rather than a price that is reflective of their total costs. This is precisely what CASPR permits, after the first year, once a state-supported resource obtains a capacity

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[2] New England States Committee on Electricity, Post-Technical Conference Comments, Docket No. AD17-11 (June 22, 2017), at 8.

supply obligation. Consequently, under CASPR's "competitively-based" pricing, total resource costs are not internalized in the market clearing price, and the ability of the market to produce a transparent price is eroded. As more subsidized resources enter the market, the less reflective the "competitively-based" price will be of total resource costs.

The "competitively-based" market clearing price under the CASPR proposal delays the suppressive effect that subsidized resources have on the market clearing price from the first year to subsequent years. As a result, the "competitively-based" price in any given year will not be reflective of the total costs of the resources procured to meet resource adequacy requirements in ISO-NE. It is unclear what value, if any, such a price signal will provide. Without clear price signals, private investment will not respond when needed, and as a result, the market will no longer achieve what it was designed to do – ensure that the least-cost capacity resources are there when needed. Thus, while CASPR appears to avoid a tradeoff between the two objectives of accommodation and competitive capacity pricing, ultimately it cannot.

I am further concerned about the signals that today's decision sends to New England stakeholders. Instead of incentivizing developers to compete for market revenues, the message the Commission is sending to market participants is that the best way to ensure the future viability of a particular resource is to seek state support. This is not a prudent policy choice. Additionally, today's decision makes it less likely that states will pursue long-term market solutions, such as putting a price on carbon, or valuing other desired resource attributes within wholesale energy and capacity markets, because those resources could be accommodated by CASPR. The Secretary of Energy, Rick Perry, has expressed a belief that our nation's electricity markets are not "pure" markets. Today's decision underscores that sentiment by further diluting market signals.

Critically, CASPR will not be a final resolution to the problem. Rather, CASPR is one of many incremental attempts by grid operators to unsuccessfully revise markets to respond to state interventions. In 2014, stakeholders in New England came together to address states' desires to allow certain preferred resources to enter the market. The result was the current Renewable Technology Resource MOPR exemption (RTR Exemption).[3] However, after the Commission accepted the RTR Exemption, Massachusetts enacted legislation to procure roughly 2,800 MW of state-supported resources.[4] Thus, CASPR is

[3] *ISO New England, Inc.*, 147 FERC ¶ 61,173 (2014).

[4] "An Act to Promote Energy Diversity" was signed by the Governor of Massachusetts on August 8, 2016, and requires electric utilities in the state to procure 9.45 terawatt-hours per year from "clean energy generation" and 1,600 MW of nameplate capacity from offshore wind.

not the first, and will not be the last, attempt to accommodate the New England states. Instead, it is a complicated, patchwork solution that will neither accommodate the desires of the states, nor send proper price signals to market participants. I will not be surprised if, in the near future, the Commission is once again in the position of changing market rules to accommodate the states.

In some cases, there may be sufficient justification to accommodate a limited amount of state-supported resources in the market. Today's order acknowledges this but ultimately goes too far. Innovative technologies just entering the marketplace that have relatively high costs could benefit from such accommodation. However, accommodation is only acceptable if two conditions are met. First, the impact of such resources on market prices would need to be limited. Some approaches have tied the amount of state-supported resources eligible to be accommodated to the amount of expected load growth; I believe that is a reasonable approach. Second, any state-supported resources accommodated in the market should be accommodated with the expectation that those resources would eventually become competitive with other, non-supported resources in the market. Accommodate, in this sense, would support the development of new and innovative resources types for a limited amount of time until those resources could compete without state support. It would not provide a point of entry for any and all resources desired by the state, with no relation to a resource's actual costs.

While the majority of my concerns with CASPR focus on the impact that it will have on the FCM, it is also apparent that CASPR may not effectively achieve its other goal of accommodating state-supported resources. The FCM has been clearing at lower prices over the past few years, making it unlikely – if this trend continues – that a resource near retirement (*i.e.*, one with high going forward costs) would clear in the primary auction. As a result, there may be few or no resources eligible to swap capacity supply obligations with eligible state-supported resources. Further, even those resources that may be good candidates for participation in CASPR's substitution auction will still need to pass a reliability assessment by ISO-NE to determine if the system can be reliably maintained if that resource retires. Given ISO-NE's recent fuel security study[5] and its operational experience during cold weather events this winter, it appears that the resources most likely to participate in the substitution auction (*e.g.*, old oil-fired resources) are either anticipated to be critical to fuel-security in the region, or were used heavily during recent weather events to avoid emergency actions, making it more likely that such resources will not meet the qualifications necessary to participate in the substitution auction because ISO-NE will need to retain them for reliability. Thus, it is questionable whether CASPR will even accommodate state policy resources.

Notwithstanding my dissent today, I commend ISO-NE, market participants, and the states for working together to address a complex issue. CASPR is the result of an

[5] *ISO-New England Inc.*, Operational Fuel-Security Analysis, January 17, 2018.

impressive stakeholder process dating back to late 2016. However, despite the appeal of supporting a proposal that is the outcome of such negotiations, I must stay firm in my beliefs regarding the value of competitive markets and the role of the Commission to protect the integrity of those markets. I understand that states wish to choose the resources that produce energy in their state. Nevertheless, if states do want to be in control of those choices, they should also assume the responsibility for resource adequacy and reliability.

Ultimately, CASPR is unjust and unreasonable because it attempts to accomplish two fundamentally conflicting goals, and in doing so, jeopardizes the integrity of the FCM.[6] Today's decision fails to recognize this, and therefore precludes us from considering the future of the New England market. If the region wants to focus on state-supported resources as the source of entry in the market, then states should first consider whether a change in the current responsibilities for resource adequacy is necessary. However, if the states are comfortable with the *status quo* with respect to the responsibilities for resource adequacy, they should work with stakeholders to develop a long-term solution that considers alternative market designs that solve the problem as opposed to accommodating it.

Accordingly, I respectfully dissent.

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Robert F. Powelson,
Commissioner

[6] State policies that require utilities to procure resources in such a way that the procurement requirements can only be met by one type of resource, or resources in one particular location, are not policies that any market could achieve.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc. ER18-619-000

(March 9, 2018)

GLICK, Commissioner, *dissenting in part and concurring in part*:

In today's order, the Commission accepts ISO New England Inc.'s (ISO-NE) Competitive Auctions with Sponsored Policy Resources (CASPR) proposal. Although I agree with the decision to accept the CASPR proposal, I disagree strongly with the order's suggestion that state sponsored resources must either be subject to a Minimum Offer Price Rule (MOPR) or some alternative mechanism for "accommodating" the effects of state public policies. That rationale—which is not adopted by a majority of the Commissioners that support the order[1]—is ill-conceived, misguided, and a serious threat to consumers, the environment and, in fact, the long-term viability of the Commission's capacity market construct. The suggestion in today's order that the Commission will rely on MOPRs—or something similar—to mitigate the impacts of state public policies will eventually come to rank as a historically serious misstep.

I am concerned that a broad application of the MOPR usurps the authority over generation resource decisions that Congress left to the states when it enacted the Federal Power Act (FPA). The better course of action would be for the Commission and the RTOs/ISOs to stop using the MOPR to interfere with state public policies and, instead, apply the MOPR in only the limited circumstance for which it was originally intended: to prevent the exercise of buyer-side market power.

[1] My colleagues' separate statements indicate that paragraphs 22 of today's order did not receive the votes of a majority of the Commission. Accordingly, I will refer to those paragraphs as the order's rationale rather than that of the Commission.

The FPA is clear that states, not the Commission, are the entities primarily responsible for shaping the generation mix.[2] Of course, by virtue of the FPA's jurisdictional scheme, in which authority over the electricity sector is divided between the Commission and the various states, actions taken pursuant to the states' legitimate authority will inevitably affect matters within the Commission's jurisdiction. As the Supreme Court has explained, the federal and state spheres of jurisdiction "are not hermetically sealed from each other"[3] and are instead the product of a '"congressionally designed interplay between state and federal regulation."'[4] Accordingly, the fact that state policies are affecting matters within the Commission's jurisdiction is not necessarily a problem for the Commission to "solve," but rather the natural consequence of congressional intent.

Given Congress' design and, in particular, the allocation of jurisdiction over generation to the states, I believe that a Commission policy of "mitigating," rather than facilitating, state public policy preferences places the Commission in a role that Congress never intended it to play.[5] Although a broad application of the MOPR may not technically amount to the regulation of generation,[6] it has the potential to erect a

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[2] 16 U.S.C. § 824(b) (2012); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016); *see also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 205 (1983) (recognizing that issues including the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States"). Although these cases deal with the question of preemption, which is, of course, different from the question of whether a rate is just and reasonable under the FPA, the Supreme Court's discussion of the respective roles of the Commission and the states remains instructive when it comes to evaluating how the MOPR squares with the Commission role under the FPA.

[3] *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 776 (2016), *as revised* (Jan. 28, 2016).

[4] *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (quoting *Northwest Central Pipeline Corp. v. State Corporation, Comm'n of Kan.*, 489 U.S. 493, 518 (1989); *id.* ("recogniz[ing] the importance of protecting the States' ability to contribute, within their regulatory domain, to the Federal Power Act's goal of ensuring a sustainable supply of efficient and price-effective energy").

[5] *Cf. Ari Peskoe, Easing Jurisdictional Tensions by Integrating Public Policy in Wholesale Markets*, 38 Energy L.J. 1, 38-40 (2017) (discussing the potential for the Commission to address these issues by designing capacity market rules to accommodate or reflect state public policy priorities).

[6] My point is not that the MOPR is *ultra vires*, even as it applies to state public policies. The courts have upheld the Commission's broad authority over capacity

(continued ...)

significant impediment to states' efforts to shape the generation mix within their borders. By effectively making a state pay twice for capacity that is subject to the MOPR, the Commission is greatly increasing the cost that a state must bear in order to exercise the authority that Congress reserved to the state under the FPA.

Our federal, state, and local governments have long played a pivotal role in shaping all aspects of the energy sector, including electricity generation. The extent of government involvement in the electricity sector is neither surprising nor concerning. After all, the electricity sector "is affected with a public interest" and the manner in which electricity is generated, transmitted, and consumed presents numerous important social and economic considerations.[7] I do not believe that it is—or should be—the Commission's mission to create an electricity market free from governmental programs aimed at legitimate policy considerations, such as clean air and combatting climate change.[8]

Nevertheless, today's order appears to suggest that it is appropriate for the Commission to insert itself into the states' domain and to single out particular forms of state government involvement for application of the MOPR. Notably, however, today's order stops short of articulating a principled basis, rooted in the FPA, for determining *a*

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markets, including against specific challenges that such regulation amounts to an impermissible regulation of generation. *See, e.g.*, *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 96 (3d Cir. 2014); *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009). By the same token, the Supreme Court has recognized that certain state efforts to incentivize the construction of new generation resources can intrude on FERC's exclusive jurisdiction where the state's action effectively "sets an interstate wholesale rate." *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016). But these cases provide no answer to the argument that the MOPR interferes with the states' prerogatives in way that Congress neither foresaw nor intended or the argument that applying a MOPR to generation procured pursuant to states public policies is misguided insofar as it impairs the states' ability to make a political decision regarding the generation mix within their borders—a decision that they are far better equipped to make than we are.

[7] 16 U.S.C. § 824(a) (2012); *see generally* Shelley Welton, *Electricity Markets and the Social Project of Decarbonization*, Colum. L. Rev., (Forthcoming 2018) (discussing the social and political values represented in state policies to shape the generation mix).

[8] This principle is critically important because capacity markets do not account for arguably the most significant consequence of generating electricity: the unpriced externalities associated with greenhouse gas emissions, which are causing climate change.

priori when government support warrants subjecting a resource subject to a MOPR and when it does not. That may be because any such effort is, in the words of former Commission Chairman Norman Bay, "unsound in principle and unworkable in practice."[9] There is no way to truly untangle the capacity market from the various government programs that shape the current electricity sector, and there is nothing in the FPA that supports the Commission's current approach of applying the MOPR to only particular forms of state government involvement while ignoring other, perhaps more significant, governmental actions.[10]

In addition, the Commission's application of the MOPR is constructed on the tenuous theoretical basis that capacity markets should treat certain types of government support as a "cost" when determining the lowest-cost set of resources needed to provide adequate capacity. Where implemented, this means that the Commission is using its authority over wholesale rates to effectively require load-serving entities (LSEs) to meet their capacity needs through resources that may conflict with the public policy priorities of the state in which the LSE is located. That is not, in my opinion, the role that Congress envisioned for the Commission when it provided the Commission with the authority to ensure that wholesale rates are just and reasonable and not unduly discriminatory or preferential.

Today's order suggests that "investor confidence" is the Commission's guiding principle for capacity market design.[11] This vague term —which today's order makes no effort to define—implies that the Commission must ensure that a capacity market construct provides investors with certainty that they will recover their costs (presumably also with a handsome return on their investments). But that misses the mark for competitive markets. In the past, the Commission has always sought to protect competition, but not individual competitors.[12] This pursuit of investor confidence will

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[9] *New York Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137 (Chairman Bay, Concurring).

[10] The Commission has never seriously attempted to justify its policy of picking and choosing which types of government support should implicate the MOPR. For instance, the Commission has not come close to explaining why it is appropriate to apply the MOPR to Massachusetts' clean energy procurements while ignoring Federal government programs that subsidize a discrete group of generating resources, such as the Price Anderson Act, which imposes indemnity limits for nuclear power generators, *see* 42 U.S.C. § 2210(c) (2012). Even assuming that the Commission could justify its selective application of the MOPR, its failure to do so to date is both arbitrary and capricious and not the product of reasoned decision-making.

[11] *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 21 (2018).

[12] *El Paso Elec. Co. v. Sw. Pub. Serv. Co.*, 68 FERC ¶ 61,182, 61,939 n.41 (1994)

(continued ...)

cause the *over*-procurement of capacity, the imposition of unnecessary costs on consumers, and the outright frustration of state public policies. [13]

ISO-NE states in its transmittal letter that its region now has significant excess capacity,[14] demonstrating that the capacity market should send a price signal that induces existing resources to retire rather than cause new resources to enter the market. There is nothing in the record that supports the conclusion that, to ensure resource adequacy in New England, the Commission must act to ensure that investors in all forms of generation—both existing and new—remain confident that they will recover their costs.

My concerns with the MOPR go beyond its effect on state public policies. By preventing state-sponsored resources from clearing the capacity market, the MOPR has the potential to impose enormous costs on consumers. In particular, by not giving a capacity supply obligation to resources that will be built *regardless* whether they receive such an obligation, the MOPR will force LSEs to procure more capacity than is needed to maintain resource adequacy, all of which consumers will be required to pay for. In addition, by increasing the market-clearing price in the capacity market, the MOPR increases the cost of *every* unit of capacity that clears the capacity auction. Indeed, it appears to me that this is precisely the motivation underlying certain generators' support for applying the MOPR to state policies: propping up their capacity-market revenues in order to address the economic pressure created by, among other things, continued low natural gas prices and increasingly competitive renewable energy technologies.

These costs are even more difficult to justify in light of the fact that, as noted, the extra capacity market revenues may be used to support some of the very resources that state public policies are seeking to displace. In other words, the MOPR will, in certain cases, prevent states from relying on their chosen resource mix while also using the funds extracted from consumers to further impede those state policies. The MOPR, thus, not only blunts the impact of state policies, it forces consumers to prop up generators with attributes that may be inconsistent with the policies adopted by state legislators and

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(explaining that the role of the "Commission is to protect competition in the bulk power markets, not individual competitors in those markets") (citing *Environmental Action, Inc. v. FERC*, 939 F.2d 1057, 1061 (D.C. Cir. 1991)).

[13] It is not without irony that today's order espouses the need to promote investor confidence even as it fundamentally revises the purpose that the Commission's regulation of capacity markets is designed to serve. Indeed, change has been the only consistent feature of capacity markets in recent years. These repeated changes to the basic principles and components of capacity markets can only serve to undermine investors' confidence in their assessment of the current capacity markets.

[14] ISO-NE January 8, 2018 Filing at 11.

regulators.

In short, the Commission should get out of the business of mitigating the effects of state public policies and instead encourage the RTOs/ISOs to work with the states to pursue a resource adequacy paradigm that respects states' role in shaping the generation mix and while at the same time ensuring that we satisfy our responsibilities under the FPA.

* * *

Nevertheless, notwithstanding my concerns regarding the MOPR more generally, I believe that ISO-NE has satisfied its burden to show that the CASPR proposal is just and reasonable and not unduly discriminatory or preferential. The CASPR proposal addresses aspects of the current ISO-NE MOPR that could frustrate state clean energy policies within New England. For example, without CASPR, certain zero-carbon resources procured pursuant to Massachusetts' clean energy and diversity goals[15] would be subject to MOPR and might not clear the Forward Capacity Auction (FCA). This would result in an over-procurement of capacity in ISO-NE and require consumers to pay

[15] An Act to Promote Energy Diversity, St. 2016, c. 188, § 12 (requiring that electric distribution companies jointly and competitively solicit cost-effective long-term contracts for clean energy generation, in part to help meet Massachusetts' greenhouse gas emission reductions requirements); *see also* Global Warming Solutions Act, MASS. GEN. LAWS ch. 21N, § 3 (2016) (creating a comprehensive framework for reducing greenhouse gas emissions in the state). CASPR applies only to state policies that were enacted prior to January 1, 2018. ISO-NE, however, states in its transmittal letter that it will work with stakeholders should states subsequently enact additional state policies that are not covered by CASPR. ISO-NE January 8, 2018 Filing at 14. I believe that it is critically important that ISO-NE do so. The failure to accommodate state public policies based only on their date of enactment may well render ISO-NE's tariff unjust and unreasonable or unduly discriminatory or preferential.

twice for capacity. Absent a mechanism to better accommodate state public policies, state efforts to meet clean energy targets will be stymied and the region could develop more generation resources than needed, all at an unnecessarily high total cost to consumers.

The CASPR proposal will establish a substitution auction to enable certain state supported resources to receive a capacity supply obligation, displacing existing resources that elect to retire. I believe that this mechanism is just and reasonable and not unduly discriminatory or preferential insofar as it provides a mechanism by which state sponsored resources may secure a capacity supply obligation in the Forward Capacity Market (FCM), even if those resources are subjected to a MOPR that prevents them from clearing the primary auction. However, CASPR's success will ultimately depend on whether it facilitates the entry of state supported resources into the FCM. To the extent that, as implemented, the CASPR proposal does not facilitate the entry of state-sponsored resources, it may render ISO-NE's tariff unjust and unreasonable insofar as it leads to the over-procurement of capacity and the imposition of unjustifiable costs on consumers.

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Richard Glick
Commissioner

Document Content(s)

Exhibit B

ISO New England, Inc., "Request for Rehearing of Clean Energy Advocates", Docket Nos. ER18-619-000 and ER18-619-001 (Apr. 9, 2018)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

	)	
ISO New England Inc.	)	Docket Nos. ER18-619-000
	)	ER18-619-001

REQUEST FOR REHEARING OF CLEAN ENERGY ADVOCATES

Pursuant to Section 313 of the Federal Power Act, 16 U.S.C. § 825l(a), and Rule 713 of the Federal Energy Regulatory Commission's ("Commission" or "FERC") Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2018), Natural Resources Defense Council, Sierra Club, Sustainable FERC Project, Conservation Law Foundation, and RENEW Northeast, Inc. (collectively "Clean Energy Advocates") hereby request rehearing of the Commission's Order on Tariff Filing, 162 FERC ¶ 61,205 (March 9, 2018) ("CASPR Order"), which approves new rules for ISO New England Inc. ("ISO-NE") under a proposal known as Competitive Auctions with Sponsored Policy Resources ("CASPR") while phasing out ISO-NE's current minimum offer price rule for Renewable Technology Resources ("RTR").

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I. Summary of Argument

The Commission must reconsider its decision to subject state-sponsored resources to the minimum offer price rule ("MOPR"), with only a convoluted and untested path to market participation. Consistent with their authority under the Federal Power Act, states across New England have enacted and are implementing policies to increase the amount of clean energy serving the region. The Commission should provide for capacity market rules that meet ISO-NE's reliability needs at least cost to customers when accounting for the capacity contributions of state-sponsored clean energy resources. There is a simple way to achieve that goal: allow state-sponsored clean energy resources to participate in ISO-NE's Forward Capacity Market (referred to herein as the "capacity market" or "FCM"). Rather than taking this simple approach, however, ISO-NE proposed and the Commission approved CASPR, a convoluted scheme that in practice only permits a state-sponsored resource to sell in ISO-NE's market if the resource purchases the ability to enter the market from an equivalent amount of capacity that is retiring. Not only is this scheme inherently unjust and unreasonable, the Commission also has no evidence demonstrating that it will work. The predictable result is that thousands of megawatts of clean energy will be barred from accessing the ISO-NE capacity market, and the region's customers will be forced to spend vast sums to buy an equivalent amount of redundant capacity. The Commission should reconsider and reverse its decision.

By approving a rule that prevents new state-sponsored capacity resources from participating in the capacity market whenever such resources cannot be paired with existing capacity that chooses to exit the market, FERC is essentially declaring that it will set ISO-NE capacity prices in a manner that assumes the capacity from these state-sponsored resources does not exist. But FERC has already found that new renewables capacity will be built pursuant to

state environmental policies regardless of ISO-NE's capacity market rules, and the CASPR mechanism is likely to prevent a significant amount of that capacity from clearing in the ISO-NE market.

Ignoring the capacity contributions of these state-sponsored resources will not lead to a more efficient capacity market; rather, it will incent the construction of more generation than necessary to meet the region's reliability needs, imposing potentially more than a billion dollars in unjust and unreasonable costs on customers.[1] Customers will pay both for the costs of state-sponsored resources and the costs of excess, duplicative capacity in the market. The Commission's rationale in approving CASPR is to ensure "investor confidence" in capacity market prices. But CASPR ensures confidence in the *wrong* prices. Market prices will ignore the presence of cheap supply from state-sponsored resources when it is available, incenting the construction and retention of more capacity than ISO-NE customers need.

It is not FERC's role to frustrate state environmental policy decisions that account for benefits not priced in its markets, and FERC must regulate its markets by taking legitimate state policies into account, not ignoring them. Because FERC does not have the authority to coerce states into changing their policies and because FERC has already found that state-sponsored capacity *will be built* regardless of capacity market signals, FERC's decision to close its eyes to the existence of state-sponsored capacity and thereby force customers to buy more capacity than needed to meet the region's reliability needs is arbitrary and capricious and violates the Commission's mandate to ensure that rates are just and reasonable.

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[1] *See* Appendix A: Comments of Robert Gramlich, Grid Strategies, LLC, on behalf of Clean Energy Advocates ("Gramlich Appendix").

It is inherently unjust and unreasonable for FERC to force customers to pay for more capacity than necessary to meet reliability needs where FERC's purpose in doing so is not to deter exercise of buyer-side market-power. However, even assuming that it would be appropriate to balance the costs of over-procurement against a need for "investor confidence," the decision approving CASPR is entirely unsupported because the customer side of the scale is left unexamined. There is insufficient evidence in the record to conclude that CASPR's substitution auction mechanism will facilitate the entry of state-sponsored resources and thereby avert massive system overbuild. ISO-NE offers *no* evidence suggesting the scheme will work, and in fact provides testimony indicating it will fall short. Meanwhile, convincing testimony explaining why CASPR is likely to fail at facilitating the entry of state-sponsored resources into the capacity market is left unrebutted. The CASPR decision violates the Commission's statutory duty by making the interests of incumbent generators the sole and overriding criteria to determine whether CASPR is just and reasonable. Because no evidence in the record adequately assesses customer interests, the decision to approve CASPR must be reversed.

II. Statement of Issues

Pursuant to Rules 203(a)(7) and 713, 18 C.F.R. §§ 385.203(a)(7) and 385.713 (2018), Clean Energy Advocates present the following identification of errors and statement of issues:

The Commission erred in holding that ISO-NE's CASPR proposal will produce capacity rates that are just and reasonable. In so doing, the Commission violated the Federal Power Act, and failed to engage in reasoned decision-making based on substantial evidence as required by the Administrative Procedure Act.[2] In particular:

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[2] Federal Power Act, 16 U.S.C. § 824d; *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009); *New York State Pub. Serv. Comm'n et al.*,

1. The CASPR Order sets rates in a manner that ignores the existence of state-sponsored capacity, thereby requiring customers to pay for more resources than necessary to meet ISO-NE's reliability needs. FERC's decision to approve the CASPR proposal despite finding that the relevant state environmental programs are legitimate and that the state-sponsored resources will be built regardless of capacity market signals is arbitrary and capricious, and violates its duty to ensure just and reasonable rates.[3]

2. In approving CASPR, FERC put its thumb on the scale in favor of incumbent generators to achieve "investor confidence," when in fact CASPR will undermine efficient price signals and confidence in the market.

3. While ostensibly framing its decision as a balancing question, FERC failed to gather the evidence that would allow the Commission to engage in such balancing in a manner that satisfies its duties under the Federal Power Act.[4] FERC failed to assess the degree to which phasing out the RTR exemption and replacing it with the substitution auction would prevent state-sponsored resources from participating in the market, and thereby entirely failed to consider the costs the CASPR proposal would place on customers.

4. In approving CASPR, the Commission departs without explanation from its long-held interpretation of the Federal Power Act and prior precedent that a determination of just and reasonable rates requires a balancing of investor and consumer interests.[5] The CASPR Order adopts a standard that elevates the interests of incumbent generators

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158 FERC ¶ 61,137 (Feb. 3, 2017); *ISO New England Inc. and New England Power Pool Participants Comm.*, 158 FERC ¶ 61,138 (Feb. 3, 2017); *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,229 (Nov. 20, 2015); *Consol. Edison Co. of New York, Inc. et al.*, 150 FERC ¶ 61,139 (Feb. 26, 2015) ("*Con Edison*"); Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

3 *ISO New England Inc. and New England Power Pool Participants Committee*, 158 FERC ¶ 61,138.

4 *Maryland People's Counsel v. FERC*, 761 F.2d 780 (D.C. Cir. 1985). As explained in Section IV.A of this Request for Rehearing, balancing was not appropriate in the CASPR case because FERC's failure to account for state-sponsored capacity was inherently unjust and unreasonable and provides the wrong price signals. But even if balancing were appropriate, FERC has failed to satisfy its duties.

5 *Pennsylvania Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 418 (1952); *New England Power Generators Ass'n, Inc. v. FERC*, 881 F.3d 202 (D.C. Cir. 2018); *ISO New England Inc. and New England Power Pool Participants Comm.*, 155 FERC ¶ 61,023 (Apr. 8, 2016); *New England Power Generators Ass'n, Inc.*, 146 FERC ¶ 61,039 (Jan. 24, 2014).

above those of customers in a manner that is inconsistent with FERC's statutory mandate under the Federal Power Act.[6]

III. Background

A. New England state Renewable Portfolio Standards are driving the construction of new clean energy resources in the region.

The Federal Power Act grants states broad authority "to direct the planning and resource decisions of utilities under their jurisdiction," including by "order[ing] utilities to purchase renewable generation."[7] Acting on that authority to achieve environmental goals, states across the ISO-NE region have enacted and are implementing ambitious Renewable Portfolio Standard programs to advance the construction of new renewable energy generators. In recent years, pursuant to these programs, states such as Connecticut, Massachusetts, and Rhode Island have issued competitive solicitations for new renewable energy resources that facilitate long-term contracts between utilities in those regions and winning generators.[8] The contracts provide for

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6 *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944); *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987); *Promoting Transmission Investment through Pricing Reform*, 116 FERC ¶ 61,057 at P 21 (July 20, 2006), *reh'g granted in part by* 117 FERC ¶ 61,345 (Dec. 22, 2006), *decision clarified on denial of reh'g by* 119 FERC ¶ 61,062 (Apr. 19, 2007) ("The longstanding rule is that utility rate regulation must adequately balance both consumer and investor interests. It is not enough to ensure that investors are properly compensated, and it is not enough to ensure that consumers are protected against excessive rates. Our polices must ensure both outcomes and, in doing so, strike the appropriate balance between these twin objectives.").

7 *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) (quoting *S. California Edison Co. San Diego Gas & Elec. Co.*, 71 FERC ¶ 61,269, 62,080) (June 2, 1995) (internal quotation marks omitted).

8 New England states make complex policy determinations about which plants are eligible for these long-term contracts based on a variety of factors including not only avoided emissions, but also other environmental considerations such as land use impacts of various technologies and other environmental harms caused further up the production chain. FERC has affirmed that these policy goals are "legitimate," noting that "states have jurisdiction over generation and set renewable resources targets and renewable portfolio standards." *See, e.g., ISO New England Inc. and New England Power Pool Participants Comm.*, 158 FERC ¶ 61,138 at PP 9, 68.

compensation for both the environmental benefits as well as energy and capacity that these generators supply.[9] One such solicitation facilitated by Connecticut regulatory agencies was specifically approved in federal court as consistent with the state's authority under the Federal Power Act.[10]

As ISO-NE described, "recently, some states have increased both their renewable targets and their efforts to promote the development of state-preferred new generation resources."[11] The "most recent state actions include the Multi-State Clean Energy request for proposals that aims to procure the rough equivalent of 460 MW (nameplate) of new renewable resources and the 2016 Massachusetts Energy Diversity Act that requires clean energy procurements in the range of 2,800 MW (nameplate)."[12]

Understanding that states' motives are to achieve environmental goals, the Commission recognized that capacity from these projects "will be developed by the operation of state environmental and clean energy mandates, whether that capacity clears the FCM or not."[13] The Commission has previously found that the states' purpose in carrying out these policies is not to manipulate prices, noting that because of renewables' "low capacity factors and high development costs," those sponsoring development of such resources have "limited or no

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9 Docket No. ER 18-619, *ISO-NE, Revisions to ISO New England Transmission, Markets and Services Tariff Related to Competitive Auctions with Sponsored Policy Resources* at 3-4 (Jan. 8, 2018) ("CASPR Filing").

10 *See Allco Fin. Ltd. v. Klee*, 861 F.3d 82 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 926 (2018).

11 CASPR Order at P 4.

12 *Id.*

13 *Id.* at P 45.

incentive and ability to exercise buyer market power to artificially suppress capacity market prices."[14]

B. FERC's use of minimum offer price rules has inappropriately expanded far beyond its initial tailored purpose in a manner that threatens to increase costs for customers while providing little benefit.

1. The ISO-NE minimum offer price rule ("MOPR")

Against this backdrop of state clean energy legislation and regulation, FERC is tasked with regulating the ISO-NE capacity market in a manner that ensures just and reasonable rates. The purpose of the market is "to attract and retain sufficient capacity to meet ISO-NE's reliability targets on average over time, at least cost to customers."[15] To achieve that purpose, FERC "ensure[s] that capacity prices will reflect the price needed to elicit new entry **when new capacity is needed**."[16]

ISO-NE's capacity market rules function by soliciting offers from capacity suppliers and matching them with demand that is set by the ISO based on an assessment of reliability needs. The point of intersection between supply and demand determines the capacity price that all resources in the market are paid. The rules have evolved over time, but the ISO currently employs a system of sloped demand curves both for the region overall and for particular capacity-constrained zones.[17] ISO-NE aims to award capacity supply obligations "to the set of capacity bids and offers that maximize social surplus."[18] Because it employs sloped demand curves, ISO-NE may procure more capacity than strictly necessary to meet the region's reserve

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14 *ISO New England Inc. and New England Power Pool Participants Comm.*, 158 FERC ¶ 61,138 at P 10.

15 *Id.* at P 58.

16 *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318 at P 165 (June 25, 2007) (quoting *Devon Power LLC*, 115 FERC ¶ 61,340 at P 113 (June 16, 2006)) (emphasis added) (internal quotation marks omitted).

17 CASPR Filing at 5-6.

18 *Id.*at 6.

margins, but the market design is supposed to produce this result only where that increased capacity more than justifies its costs. Herein, we simplify the concepts discussed by referring to procuring the amount of capacity to maximize social surplus as "meeting the region's reliability needs at least cost" or "satisfying the region's reliability requirements."

ISO-NE prevents the exercise of buyer-side market power in its capacity market in part through use of a MOPR, which requires most new resources to offer their capacity at or above a technology-specific price floor set by ISO-NE. The ISO-set price floor prevents a resource owner who has buyer-side market power and buys more capacity than it sells from submitting an artificially low offer that does not reflect the resource's true costs. Such activity, if not policed, could benefit such a supplier by reducing market prices and allowing the owner to recoup more savings through artificially reduced purchasing prices than the amount the owner loses from the artificially low offer.

The MOPR works as follows: For a supplier of a new resource whose offer is below a technology-specific "trigger" price set by ISO-NE, the ISO determines a resource-specific offer floor based on an estimate of the resource's anticipated costs and revenues.[19] This estimate allows ISO-NE to assess whether the offer is reflective of the "true" economics for the resource owner, or whether it is instead an "artificial" attempt to suppress prices. Where a resource makes an offer below ISO-NE's estimate, it provides an indication that the resource's offer could be an exercise of buyer-side market power. ISO-NE "mitigates" the offer up to the offer floor (i.e. mandating that the offer be at least as high as the floor price rather than the lower amount originally submitted), thereby preventing the exercise of buyer-side market power. ISO-NE's

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[19] ISO New England Inc. Transmission, Markets, and Services Tariff ("Tariff") § III.A.21.2(b).

estimate of revenues does not include so-called "out-of-market revenues," which ISO-NE defines as "any revenues that are: (a) not tradable throughout the New England Control Area or that are restricted to resources within a particular state or other geographic sub-region; or (b) not available to all resources of the same physical type within the New England Control Area, regardless of the resource owner."[20]

2. MOPR was designed to deter exercise of buyer-side market power; FERC's expansion of its use has added complexity without achieving deterrence.

"The original purpose of buyer-side mitigation rules—and minimum offer price rules (MOPR) generally—was to address buyer-side market power, i.e., the market power exhibited by entities seeking to lower capacity market prices for the capacity they buy."[21] The core motivation underlying MOPR has been to deter entities who could benefit from exercising such buyer market power, by precluding them from reaping the reward of their conduct.[22] To this end, some buyer-side mitigation rules initially contained screens to identify the entities that would have incentive and ability to manipulate prices downward through buyer-side market power.[23] Over

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20 Tariff § III.A.21.2(b)(i).

21 *Con Edison*, 150 FERC ¶ 61,139 at P 2; *see also* Brief of Respondent FERC, *NRG Power Marketing, LLC v. FERC*, Case Nos. 15-1452, 15-1454 (D.C. Cir., filed Sept. 27, 2016) at 11 ("The Minimum Offer Price Rule was designed to prevent the exercise of monopsony power . . . .") ("*NRG v. FERC*").

22 *New York Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170 at P 43 (May 20, 2010) ("new entry mitigation is intended to deter the construction of uneconomic capacity"); *Con Edison*, 150 FERC ¶ 61,139 at P 46 (The Commission has approved buyer-side mitigation provisions to "deter the exercise of buyer-side market power"); *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,199 at PP 66-67 (June 11, 2012) (because buyers lack incentive to exercise market power, there is no need for deterrence and therefore no need for MOPR); *ISO New England Inc. and New England Power Pool Participants Comm.*, 155 FERC ¶ 61,023 at P 36 n.76 (characterizing the purpose of the MOPR as "deterrence of uneconomic entry").

23 *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 103 (Dec. 22, 2006) (MOPR provisions address "the concern that net buyers might have an incentive to depress market clearing prices"); *PJM Interconnection, L.L.C. PJM Power Providers Grp. v. PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 6 (Apr. 12, 2011) (describing three

time the Commission expanded the use of MOPR beyond the clearly-defined context of buyer-side market power. It eliminated its incentive screen, expanding MOPR's reach to capture a wider range of so-called "uneconomic" behavior. Having moved away from screens, the Commission has found it increasingly challenging to achieve its objective to deter exercise of buyer market power while avoiding the harms of over-mitigation. At the height of its reach, the Commission asserted all "[out of market] capacity suppresses prices regardless of intent," hinting that the effect of entry of the resource on the market eclipsed whether it is behavior that could be deterred.[24] But even then, as it adopted a broad MOPR reaching nearly all resources including those supported by state policies,[25] the Commission pointed to the opportunity for affected entities to request and provide support for mitigation exceptions.[26]

The shift in focus toward whether entry is "uneconomic," rather than whether it can be deterred, significantly expanded MOPR's potential reach, failed to provide bright lines on the outer limits of its scope, and sharply increased the tension between wholesale market rules and state policy objectives. Supply, which benefits financially from exclusion of new entry, had a powerful incentive to push for the broadest possible definition of so-called "uneconomic" entry.

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screens, including an "incentive screen" in place to identify and deter buyer market power).

24 *ISO-NE, Inc. & New England Power Pool Participants Comm. New England Power Generators Ass'n v. ISO New England Inc. PSEG Energy Resources & Trade LLC*, 135 FERC ¶ 61,029 at P 170 (Apr. 13, 2011), *reh'g denied in pertinent part*, 138 FERC ¶ 61,027 (Jan. 19, 2012) ("*ISO-NE, Inc. v. PSEG*"); *New England Power Generators Ass'n v. FERC*, 757 F.3d 283, 290-291 (D.C. Cir. 2014) ("The Commission also found that uneconomic entry, regardless of resource and regardless of intent, 'can produce unjust and unreasonable prices by artificially depressing capacity prices.'") ("*NEPGA v. FERC*").

25 *ISO-NE, Inc. v. PSEG*, 135 FERC ¶ 61,029 at P 165.

26 *NEPGA v. FERC*, 757 F.3d at 289 ("[N]othing in the order eliminated any right that entities might have to request mitigation exemptions.") (citing *ISO-NE, Inc. v. PSEG*, 135 FERC ¶ 61,029 at P 91).

By 2013, just a few short years after the initial ISO-NE MOPR Order, Commission staff described in a report on capacity market design elements that, "the existing buyer-side market power mechanisms have continued to present difficult issues."[27] The report explained that all mitigation measures should aim to avoid over-mitigation, which can also impede accurate market signals, and acknowledged that these measures "could capture conduct that is not intended to artificially impact market prices."[28] Specifically, application of MOPR to resources procured to meet RPS standards raised a host of concerns about the purchase of excess capacity and additional costs to consumers.[29] The staff report laid out a number of options to narrow MOPR's scope in order to address those concerns, each with its own set of flaws.[30]

Even as it issued its broadest, wrongly-decided MOPR decisions, FERC still understood that "over-mitigation" in the market was costly, and sought to avoid it in other contexts.[31] The Commission concluded, for example, that a MOPR is not needed in the Midcontinent Independent System Operator (MISO) market because the load serving entities who could conceivably exercise buyer market power would have no incentive to do so.[32] Where the

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27 Docket No. AD13-7-000, *Commission Staff Report* at 26 (Aug. 23, 2013), https://perma.cc/SME5-XWFD ("*Commission Staff Report*").

28 *Id.*

29 *Id*. at 27-28.

30 *Id*. at 28 ("[Exemptions to MOPR] can be difficult to implement and administer and present their own challenges with respect to meaningfully distinguishing between offers made with the intent to impact prices, offers reflecting legitimate cost advantages, and offers made without intent to impact prices. A more particularized, unit-specific review of offers can address these concerns, but raises additional issues regarding transparency, the potential erosion of market participant confidence, regulatory uncertainty, and the need to guard against undue discrimination or preference.").

31 *PJM Interconnection, L.L.C. PJM Power Providers Grp. v. PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at PP 52-55 (Nov. 17, 2011) (concluding the net-short test was ineffective and unnecessary with addition of unit-specific review).

32 The Commission has upheld this determination over protests filed by supplier who would benefit from application of MOPR to new entrants in 2012, 2015 and most recently again

"potential benefits of, and thus incentive to engage in, price suppression are greatly diminished . . . a MOPR is unnecessary."[33] Subsequent FERC decisions have adopted a number of adjustments to tailor MOPR's ambit, exempting renewable resources entirely or those procured in order to meet state renewable policy goals.[34] More recently, FERC has concluded that existing or proposed expansions of MOPR provisions result in unjust and unreasonable rates absent an exemption, or unit-specific review sufficient to ease the risk of over-mitigation.[35]

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in 2018. *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,199 at PP 66-67 (vertically integrated utilities own most of capacity but don't have to procure significant capacity in the market, so have little reason to seek to suppress prices); *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,229 at P 105 (a MOPR is not necessary because even though there is merchant capacity in MISO, "most merchant capacity has been sold under long-term contracts" and "[t]he purchasers of this capacity would not benefit significantly from suppressing prices in the MISO capacity market"); *Midcontinent Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,176 at P 78 (Feb. 28, 2018) (rejecting, *inter alia*, that low clearing prices in the auction show price suppression by load serving entities rather than market fundamentals)

33 *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,229 at P 106; *see also Con Edison*, 150 FERC ¶ 61,139 at P 45 (finding NYISO's buyer-side mitigation rules to be "unjust and unreasonable because they are unnecessarily applied to unsubsidized, competitive entrants who have no incentive to inappropriately suppress capacity market prices").

34 *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 166 (May 2, 2013) (exempting, *inter alia*, renewable resources because "MOPR may be focused on those resources that are most likely to raise price suppression concerns."); *New York Pub. Serv. Comm'n, New York Power Auth., & New York State Energy Research & Dev. Auth. v. New York Indep. Sys. Operator*, 153 FERC ¶ 61,022 at PP 2, 47 (Oct. 9, 2015) (granting an exemption to buyer-side mitigation rules for certain renewable resources that have "limited or no incentive and ability to exercise buyer-side market power" up to a megawatt cap to be established by NYISO ("*NY PSC*").

35 Brief of Respondent FERC at 20, 22, *NRG v. FERC*, Case Nos. 15-1452, 15-1454 (D.C. Cir., filed Sept 27, 2016) (Allowing only categorical exceptions without unit-specific review would fail to "balance[e] the need to mitigate buyer-side market power against the risk of over-mitigating competitive entry"); *NY PSC*, 153 FERC ¶ 61,022 at P 2 (Oct. 9, 2015) (applying MOPR to certain renewables up to a megawatt cap is unjust, unreasonable, or unduly discriminatory or preferential under section 206); *Con Edison*, 150 FERC ¶ 61,139 at PP 45, 50; *cf. PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at PP 210-212 (declining to expand MOPR mitigation period from one to three years).

In 2014, FERC approved a package of changes to the ISO-NE MOPR, including the Renewable Technology Resource ("RTR") exemption which, in ultimate effect and as described more fully below, exempted from MOPR resources receiving a particular class of out-of-market revenues. [36]

3. ISO-NE's RTR exemption

ISO-NE's RTR exemption allowed up to 200 MW per year of capacity from eligible new renewable energy resources to enter the capacity market without being subject to the MOPR.[37] In practice, the exemption has accommodated all eligible resources seeking to enter the market since its adoption (roughly 135 MW in total).[38] To qualify for the RTR exemption, a resource was required to:

> (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.[39]

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36 *ISO-NE, Inc. & New England Power Pool Participants Comm.*, 147 FERC ¶ 61,173 at PP 81-86 (May 30, 2014). For the full procedural history by which this exemption was eventually approved, see *infra* n.40.

37 If fewer than 200 MW of resources take advantage of the exemption in a given year, the unused exemption MWs remain available for up to two additional years, providing for a maximum of 600 MW of capacity from eligible resources (including carryover MWs) that can enter the capacity market under the exemption in any one year. CASPR Order at PP 2-3.

38 *See* Docket No. ER18-619, *Protest of Clean Energy Advocates* at n. 41 (Jan. 29, 2018) (providing results for FCA 9-11) ("Protest of Clean Energy Advocates"). An additional 33 MW entered in FCA 12 (which provides for capacity commitments from June 1, 2021 to May 31, 2022). *See* ISO New England, Forward Capacity Market (FCA 12) Result Report, https://www.iso-ne.com/static-assets/documents/2018/02/fca_12_result_report.pdf.

39 *ISO New England Inc. & New England Power Pool Participants Comm.*, 158 FERC ¶ 61,138 at P 2 n.5 (citing ISO-NE's then-current Tariff at Section III.13.1.1.1.7).

These interlocking tariff provisions, while overbroad in sweeping beyond the strict exercise of buyer-side market power, at least acknowledged state authority to pursue environmental goals under the Federal Power Act, and protected customers from purchasing unneeded capacity. The bar on using certain "out-of-market" revenues in the minimum offer price calculation prevented states from subsidizing a particular generator with the intent to artificially suppress prices. At the same time, the exemption for resources supported by state Renewable Portfolio Standards ensured that this state conduct aimed at accounting for environmental benefits not fully captured in FERC market prices would not be inappropriately discouraged.

In adopting the RTR exemption, FERC stated that "the purpose of the minimum offer price rule is to mitigate the exercise of buyer-side market power," backing away from the specter of an approach based solely on effect and realigning with its longstanding view that the exercise of buyer-side market power is MOPR's core concern.[40] While FERC erred in linking the size of the exemption to an expectation of load growth in an effort to minimize perceived potential economic impact from entry of RTR resources,[41] the Commission also gave significant weight to the benefits of the exemption to customers and market pricing: "To the extent that resources built

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40 *Id.* at P 10. The procedural history of the Commission's decisions upholding the RTR exemption is a long one, beginning with the initial approval of proposed changes by ISO-NE under Federal Power Act section 205 in 2014; an order affirming the decision in 2015, 150 FERC ¶ 61,065 (Jan. 30, 2015); a subsequent order on voluntary remand from a petition for review in the D.C. Circuit in 2016, 155 FERC ¶ 61,023 (Apr. 8, 2016); and, finally, an order on rehearing upholding the decision as remanded, 158 FERC ¶ 61,138 (Feb. 3, 2017). Across these successive reviews and approvals by a varyingly-composed Commission, the RTR exemption did not change in substance.

41 The Commission considered that any potential price suppressive effects would be limited as a result of the megawatt cap considering future load growth. *ISO-NE, Inc. & New England Power Pool Participants Comm.*, 147 FERC ¶ 61,173 at P 83 (RTR resources are likely to "only displace the new entry required to meet" projected growth in capacity demand.).

pursuant to state incentive programs contribute toward meeting the region's resource adequacy requirements, the renewables exemption decreases the likelihood that customers must pay for more resources than are necessary to provide for resource adequacy or that the capacity market will provide a false signal that new investment is needed when this is not the case."[42]

4. FERC has not grappled with the mounting impacts of applying MOPR where mitigation cannot deter the underlying behavior.

Importantly, because the broadest reach of the MOPR in the capacity markets has thus far been reined in by subsequent decisions, FERC has not yet confronted the logical outgrowth of its overly-broad mitigation of resources that make low offers based on the receipt of revenues pursuant to state policies rather than as an exercise of buyer-side market power. FERC's initial use of MOPR rightly limited its use to deterring entities with an incentive and ability to exercise buyer-side market power from doing so. Where MOPR is triggered by the resource's incentive to exercise buyer market power, there would be little reason to consider the mounting impacts to market efficiency and customers. Because FERC could reasonably assume MOPR would deter the behavior, there would be no significant cumulative effects of these resources' exclusion from the market.

In contrast, where MOPR is used indiscriminately against resources being built predominantly due to factors that are exogenous to the markets (such as state legislative mandates or policy objectives), it is not reasonable to expect the activity to be deterred by MOPR. Such resources will be built notwithstanding the application of MOPR. Brought to its logical conclusion, use of MOPR to preclude participation of these resources will result in substantial quantities of capacity being built and arbitrarily ignored. Indeed, by pursuing a MOPR policy that is not narrowly focused on intent and ability to exercise market power, the

[42] 158 FERC ¶ 61,138 at P 26.

Commission's reasoning suggests only two possible rationales: either it is aiming to *deter state policy* from being achieved, which is prohibited under section 201 of the Federal Power Act,[43] or it is not expecting to deter buildout of these resources, and is allowing customers to bear the costs of building new capacity while ignoring an existing fleet of otherwise capable resources. FERC's posture is especially concerning in light of the growing threat of climate change, which is a key independent driver of the New England states' renewable energy policies.

C. CASPR replaces a proven mechanism for reconciling state policies with competitive capacity markets with a totally unproven construct that offers little likelihood of integrating renewable resources.

CASPR provides that ISO-NE will conduct the annual capacity auction "in two stages."[44] The first stage applies ISO-NE's previously established auction process, with one very large caveat: It will phase out the current RTR exemption by allowing accrued exempt MWs to be used only for three additional annual capacity auctions, through ISO-NE's 15th forward capacity auction (which covers capacity commitments for 2024-25).[45] In the second stage, known as the "substitution auction," certain resources that cleared in the primary auction are permitted to make demand offers "indicating a willingness to permanently retire from all ISO-NE markets at a certain price."[46] ISO-NE will attempt to match these demand offers with supply offers from Sponsored Policy Resources[47] that did not clear in the primary auction stage. Sponsored Policy

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43 To the extent that the state policies do not, themselves, overstep and aim to usurp the Commission's rightful role in regulating the federal markets (as some state policies have been found to do). *See Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016) ("*Hughes*").

44 CASPR Order at P 7.

45 *Id.* at P 7 n.14.

46 *Id.* at P 7.

47 A Sponsored Policy Resource is defined as "a New Capacity Resource that: receives an out-of-market revenue source supported by a government-regulated rate, charge or other regulated cost recovery mechanism; and qualifies as a renewable, clean or alternative energy resource under a renewable energy portfolio standard, clean energy standard,

Resources clearing in this auction stage will receive only the substitution auction price, with the difference between that price and the primary auction clearing price constituting, in FERC's words, a "severance payment" for "agree[ing] to permanently exit ISO-NE's wholesale markets."[48] Sponsored Policy Resources that clear the substitution auction will be treated as existing resources and will not be subject to the MOPR in subsequent capacity auctions.[49]

Significantly, although the Order deems CASPR a just and reasonable means of reconciling state policies with ISO-NE's capacity market, it makes no finding that the substitution auction is likely to function as intended. Under CASPR, once the RTR exemption is fully phased out, the substitution auction is for practical purposes the sole means for state-sponsored resources to participate in the capacity auction. Conspicuously absent from the CASPR Order, however, is any conclusion that the substitution auction will, in fact, facilitate the entry of new state-sponsored resources. The Order discusses the participation of state-sponsored resources as a hypothetical scenario: "decisions about entry and exit from the FCM *may*, in some years, be driven by the substitution auction price . . . " and "*to the extent* CASPR allows state-supported resources to obtain capacity supply obligations . . . ."[50] The Commission, at most, finds that the substitution auction provides "a reasonable opportunity" to allow entry of state-sponsored resources over time.[51] The Commission approved CASPR notwithstanding that it could not conclude as to whether CASPR will actually enable any new state-sponsored resources

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alternative energy portfolio standard, renewable energy goal, or clean energy goal enacted (either by statute or regulation) in the New England state from which the resource receives the out-of-market revenue source and that is in effect on January 1, 2018." *Id.* at P 28.

48 *Id.* at P 7.

49 *Id.* at P 8.

50 *Id.* at P 25 (emphasis added).

51 *Id.* at P 102.

to participate in the FCM over time after the RTR exemption is entirely eliminated. The order further invents a novel concept of "investor confidence" as a "key" to sustaining the benefits of capacity markets, while ignoring past precedent requiring customer interests to be taken into account in determining whether the proposal is just and reasonable.

IV. Request for Rehearing

Rather than proposing its convoluted CASPR framework, ISO-NE should simply stop applying the MOPR to state-sponsored resources. Where state policies are enacted to accomplish goals that Commission-regulated markets are not designed to meet, the Commission should not implement measures that essentially undo, counteract, or deter these policies. CASPR is not just and reasonable because it will require customers to pay for vast quantities of capacity they do not need. Further, while the CASPR Order wrongly suggests that the costs to customers of procuring redundant capacity are to be balanced against a need to stabilize capacity market prices, even were that the case, the Commission cannot approve CASPR on this record because there is no information that allows it to adequately account for the customer side of the scale.

A. CASPR sets rates that are not just and reasonable, requiring customers to procure more capacity than needed.

CASPR will increase capacity costs in an unjust and unreasonable manner, inducing the procurement of more capacity than necessary to meet the region's reliability needs. By applying MOPR to state-sponsored resources in the primary auction and offering a flawed secondary auction as the only opportunity to access ISO-NE's capacity market, CASPR will block state-sponsored resources from selling capacity, even though ISO-NE and FERC have found that state-sponsored capacity will be constructed regardless of ISO-NE's capacity market price signals. Yet unlike preventing the exercise of buyer-side market power, blocking state-sponsored resources from accessing the capacity market cannot be justified based on a need to deter the

behavior in question. Blocking market access for state-sponsored resources with the purpose of countering state environmental policy decisions would overstep FERC's role under the Federal Power Act.

The CASPR Order justifies the ISO-NE tariff provisions that erect a barrier to market entry from state-sponsored resources based on a purported need to provide "investor confidence" in the Commission's rates. But setting rates in a manner that prevents state-sponsored renewable resources from offering into the capacity market provides the *wrong* near-term price signals.[52] Far from fixing a deficiency in the market, it virtually guarantees that rates will not be just and reasonable. The Commission's approval of CASPR is therefore arbitrary and capricious and violates the Federal Power Act.

ISO-NE's decision to propose CASPR is premised on the idea that tariff revisions were necessary because states have increased their renewable energy procurement targets beyond the amount for which the RTR exemption would facilitate capacity market entry. But by *phasing out* the RTR exemption and replacing it with a scheme that renders market access more difficult to achieve, ISO-NE's proposal revises the tariff in exactly the opposite direction from what is necessary to ensure just and reasonable rates.

With states increasing their renewables targets and procurement amounts, ISO-NE should have updated the RTR exemption in a manner that continued to facilitate state environmental

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52 *See* Docket No. ER18-619, *Protest by the Connecticut Public Utilities Regulatory Authority, the Connecticut Department of Energy and Environmental Protection, and the Connecticut Office of Consumer Counsel* (Jan. 29, 2018) ("Connecticut Protest"), Affidavit of Cliff W. Hamal ("Hamal Affidavit") at P 28 ("Absent the RTR exemption, capacity can be added that contributes to system reliability, but is not counted in the ISO marketplace specifically designed to achieve resource adequacy. This will inevitably lead to excess capacity, prices that do not reflect underlying supply and demand, and the risk of FCA price reductions in the future if the market is rationalized and those resources eventually do clear the market.").

goals while maintaining reliability in the region in a manner that maximizes social surplus. The simplest and easiest way to do this would have been to update the RTR exemption to ensure that eligibility rules provided that all state resources procured pursuant to climate goals were exempt and to eliminate annual exemption limits.[53] An alternative fix to ISO-NE's MOPR would have been to update its definition of "out-of-market" revenues to exclude revenues from these procurements, reflecting the fact that the revenues are earned through a competitive process and credit benefits that are not accounted for in FERC's markets.

But instead of ensuring that the contributions of state-sponsored resources are reflected in its capacity market, ISO-NE upset the balance of its interlocking set of MOPR provisions and approached increased renewables procurement from states in a manner that incorrectly characterized those actions as in conflict with its objective to "maintain competitively-based capacity auction prices."[54] Competitive and efficient market rules would allow state-sponsored resources to make competitive offers based on the revenues they earn through competitive state procurement processes. Allowing that capacity to enter the market would create price signals that would ultimately incent the correct amount of capacity to meet the region's reliability needs. Instead, CASPR will prevent state-sponsored resources from accessing the market, requiring customers to spend an enormous amount of money to build many more megawatts of generation than are needed.

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53 As discussed in Protest of Clean Energy Advocates, FERC should eliminate MOPR for state-sponsored resources. Doing so would provide accurate price signals and avoid FERC over-stepping its role under the Federal Power Act. Protest of Clean Energy Advocates at 25-29.

54 CASPR Order at PP 6, 49.

1. CASPR will require customers to pay for more capacity than is necessary to meet the region's reliability needs.

CASPR requires customers to procure too much capacity because where a previously exempt RTR resource or other state-sponsored resource cannot be paired with an exiting resource in ISO-NE's substitution auction, it will not "clear" in the market and its capacity contributions will not be credited.[55] Where a resource does not clear, but is nevertheless built (as FERC has found will occur in this case due to "the operation of state environmental and clean energy mandates"[56]) the market will procure an equivalent amount of redundant capacity. That will, in the Commission's words, "result in the region building more capacity than it needs."[57] The Commission characterizes this as requiring "customers to pay twice for capacity."[58] Yet in its CASPR Order, the Commission approves rules that will saddle customers with such excessive costs.

In fact, not only will the tariff changes approved in the CASPR Order unnecessarily increase capacity costs for customers in ISO-NE's markets, they will also increase costs for utility customers in the states with Renewable Portfolio Standard programs covered by CASPR. State-sponsored resources will receive less compensation in ISO-NE's market than the amount reflective of those resources' contributions to reliability because they will be paid only the lower

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55 As described *supra* III.C, the Commission did not issue any finding regarding whether CASPR will adequately enable such pairing and entry. There is not substantial evidence in the record enabling a demonstration that it will do so. Rather, the evidence indicates that it will not. *See infra* Section IV.B.1.

56 CASPR Order at P 45.

57 *Id.* at P 24. CASPR provides a twisted feedback loop on this front, inducing system overbuild, then requiring customers to pay generators to retire to lessen the amount of overbuild.

58 *Id.* at P 24.

substitution auction clearing price rather than the price arrived at in the primary auction.[59] And because the prospects of clearing even in the substitution auction are far from clear, the resource will also face increased uncertainty as to whether it will receive any revenues at all.[60] Given the prospect of increased risk and lower revenues in the ISO-NE market, resources will demand higher prices in state-facilitated solicitations for long-term contracts. Increased costs from those solicitations will ultimately be passed on from the utility counterparties to those contracts to their end-use customers. Thus, not only will customers be forced to buy redundant capacity, but capacity will cost more in both settings.

Having found that state-sponsored capacity will be built regardless of ISO-NE's capacity market signals, FERC cannot then ignore the existence of that capacity. FERC is knowingly requiring customers to procure redundant capacity, even where there is no legitimate rationale for doing so, such as the need to prevent the exercise of buyer-side market power. As economists Cliff Hamal and Robert Gramlich explain, FERC's role is to regulate for just and reasonable rates when accounting for exogenous market inputs, not in spite of them.[61] For example, the ISO-NE states participate in the Regional Greenhouse Gas Initiative (RGGI), which requires carbon-

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59 As Hamal explains, because of the bidding incentives created by the CASPR Order, the difference between the substitution auction price and the primary auction price is likely to be quite high. *See* Connecticut Protest, Hamal Affidavit at PP 54-69 (explaining how incentives for supply and demand bidders in the substitution action are such that "the overwhelming bias is toward very low [substitution auction] prices, large rewards for retirement, and high costs for consumers").

60 *See* Connecticut Protest, Hamal Affidavit at P 43 ("The more uncertain that revenue stream is, the higher price is reasonably demanded under the PPA. And customers pay this higher amount over the long term. Risk alone, in addition to actual prices, becomes an added cost to consumers.").

61 *See* Connecticut Protest, Hamal Affidavit at P 23-24; Gramlich Appendix.

emitting power plants in the region to purchase and retire allowances.[62] The policy only partially accounts for the costs to society of carbon emissions, but to the extent it does so, it increases the price at which carbon-emitting plants offer their capacity into the market. ISO-NE's rules do not attempt to cancel out or neutralize the effect of this policy by adjusting for the "price inflation" that it causes. Rather, FERC accepts its effects like any other exogenous factor affecting market prices.[63]

The same would be true were a state environmental regulation to force the closure of a power plant. That would create a need for *more* capacity to meet reliability needs. ISO-NE rules approved by FERC naturally take this need into account, because under FERC's rules the supply of the retiring capacity will no longer clear in the market. It would be illogical, unjust, and unreasonable for FERC to set market rules in a manner that administratively treated the plant as though it were still participating in the capacity market, bizarrely trying to "correct the market" for the effect of the state's environmental regulatory decision and reverse price inflation caused by the policy. The shutdown plant's capacity would be no longer available, and the market should reflect that reality. This case is no different simply because the state environmental policies at issue drive the construction rather than retirement of capacity. As with state policies that reduce the amount of capacity, FERC must set capacity market rules to procure the correct amount of capacity when taking state policies that increase available capacity into account.

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62 *See generally* Elements of RGGI at: https://www.rggi.org/program-overview-and-design/elements .

63 *See e.g.*, *PSEG Power Connecticut LLC*, 127 FERC ¶ 61,023 (April 3, 2009) (approving changes to an RMR-agreement to include CO2 emissions allowance costs under RGGI).

The Commission's Order appears to pin the blame for the over-procurement that CASPR will surely cause on the states.[64] But the fault lies squarely with FERC. States, in enacting renewables procurement policies, are operating within the ambit of their envisioned role under the Federal Power Act: determining a preferred generation mix.[65] By contrast, as Commissioner Glick states, "a Commission policy of 'mitigating,' rather than facilitating, state public policy preferences places the Commission in a role that Congress never intended it to play."[66] In approving the creation of ISO-NE's capacity market, the D.C. Circuit made clear that FERC's role in regulating capacity procurement is to ensure resource adequacy without reversing state policies, but rather taking them into account: "State and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from the Commission."[67] The court's determination that FERC had not engaged in "direct regulation of generation facilities in violation of section 201" of the Federal Power Act hinged upon the fact that states, entrusted with the regulation of generation facilities, retained the authority to control decisions regarding the construction of new capacity. The Court explained that FERC had not

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64 CASPR Order at P 24. ("Out-of-market state support can result in the region building more capacity than it needs.")

65 *Hughes*, 136 S. Ct. at 1299 ("Nothing in this opinion should be read to foreclose [States] from encouraging production of new or clean generation through measures 'untethered to a generator's wholesale market participation.'"); *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d at 417; *Allco Fin. Ltd. v. Klee*, 861 F.3d at 86.

66 CASPR Order, Commissioner Richard Glick, *dissenting in part and concurring in part* at 2.

67 *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009). These rights retained by states and municipal authorities are meaningless if FERC can ignore or block market access for resources preferred by states even where states are not exceeding their authority under the Federal Power Act.

exceeded its authority under the Federal Power Act because the installed capacity requirement set by FERC "necessarily affects prices **but not necessarily new capacity construction**."[68] To avoid directly regulating generation by imposing its own view on the mix of plants needed, FERC *must* allow generation built pursuant to state policies to affect the market.

This critical fact—that FERC has no role in dictating state environmental policies—is what separates this case from FERC's regulation of manipulative conduct or other "uneconomic" activity that does not relate to policies accounting for benefits that are external to FERC's markets. Where a given resource is too expensive to clear when bidding in its true costs but submits a manipulative offer to take advantage of buyer-side market power, FERC purposefully does not rely on the capacity contributions of that resource in order to deter the manipulative conduct. In other words, FERC's purpose in not crediting the offer from the entity exercising market power is to prevent the manipulation and induce behavior that responds to real economic signals. Here, however, FERC acknowledges the existence of state-facilitated contracts supporting particular resources, recognizes the authority of states to grant those contracts, and understands that state-sponsored resources will be built "whether that capacity clears the FCM or not."[69]

2. CASPR sends inaccurate capacity market price signals that will cause inefficient decisions.

The Commission essentially acknowledges that CASPR will procure more capacity than necessary, but justifies this supplier-friendly approach based on its determination that it must maintain "sufficient investor confidence" in capacity market prices.[70] The CASPR Order, however, gives investors confidence in the wrong prices. CASPR sets rates in a manner that

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68 *Id.* at 482 (emphasis added).
69 CASPR Order at P 45.
70 *Id.* at P 24.

assumes new state-sponsored renewable resources will only be constructed to the extent that equivalent resources exit the market. That is not true.

As the Commission has explained, "[i]f renewable resources are being built, but are not reflected in the FCM, then the FCM may send an incorrect signal to construct new capacity that is not needed."[71] Similarly, artificially high near-term rates resulting from elimination of the RTR exemption and failure of resources to clear in the substitution auction could incorrectly signal to older and less efficient resources that they are needed, when a more efficient outcome given the existence of state-sponsored renewable energy would be for these older and less efficient resources to retire. When new renewable generation required by state policy is in fact built, near-term capacity prices *should* be lower to reflect the fact that less capacity from other sources is needed.[72] As Cliff Hamal explains, prices should respond to the offers of state-sponsored resources to signal that "fewer generic generators [are] built when there are more renewable ones."[73] In fact, because "'otherwise built' generic resources come into the market in response to price signals, it is imperative that the prices with the preferred resources be different than would have occurred in their absence."[74]

Long-term market prices[75] will likely be similar whether or not state-sponsored resources are reflected in the market even as precise, short-term signals diverge, because where state-

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71 *ISO New England Inc. and New England Power Pool Participants Comm.*, 158 FERC ¶ 61,138 at P 9.

72 *Id.* at P 46 (stating that with the RTR exemption, the auction price "more accurately reflects the amount of capacity [generators] must supply to the ISO-NE region, given the fact that additional capacity is being provided to the region via these state policy mechanisms").

73 Connecticut Protest, Hamal Affidavit at P 15.

74 *Id.*

75 By long-term prices, we mean average prices across the course of many annual auctions. Demand is set in capacity auctions such that predicted revenues over the course of many

sponsored resources are barred from entering the market, more construction of non-state-sponsored capacity will be incented, causing near-term prices to dip in a similar manner to how they would in response to market entry from state-sponsored resources.[76] But the critical difference between the two scenarios is that by ignoring state-sponsored resources, the CASPR system will cause a massive overbuild of resources.

While CASPR's complex administrative framework is designed to prevent "price suppression" caused by state policies, any price impacts resulting from these state environmental policies are appropriate and not "artificial." It is the RTR exemption that allows state-sponsored resources to "offer at a price based on their true marginal cost."[77] When a resource earns revenues outside of FERC's markets, it is entirely appropriate for those revenues to be accounted for in the resource's offer price so long as the revenues are not the product of behavior FERC aims to deter. It is particularly appropriate to allow revenues compensating a resource's environmental benefits to be reflected in a resource's offer price, because environmental benefits are not fully accounted for in FERC's markets. Allowing such revenues to be included mirrors

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auctions will provide a generic new resource with the revenues necessary to enter the market when it is needed to serve reliability needs.

76 *See* Connecticut Protest, Hamal Affidavit at P 18. This dynamic is why the Commission justifiably concluded, in approving the RTR exemption, that "the FCM will continue to clear at or near Net CONE on average over time." (quoting *ISO New England Inc. and New England Power Pool Participants Committee*, 158 FERC ¶ 61,138 at P 54) (internal quotation marks omitted). Long-term prices would only diverge in the two scenarios if no new entry were needed even in the long-term when accounting for the entry of state-sponsored resources. But in that case, prices lower that net CONE would be *appropriate* because no new entry would be required to meet the region's reliability needs. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,229 at P 110 ("[L]ow prices, in and of themselves, do not demonstrate that a market is not just and reasonable. For instance, such prices are justified in instances where a region contains substantial excess capacity unrelated to intentional uneconomic entry.").

77 Connecticut Protest, Hamal Affidavit at P 27 (stating, *inter alia*, that an at or near zero capacity offer "represents the rational competitive response of a new resource that has taken on a commitment to meet the requirements of a state policy").

FERC's practice for other revenue streams that compensate for products beyond energy and capacity. For example, where a waste-to-energy facility sells fertilizer outside of FERC's market, a fuel cell produces and sells hydrogen, or a co-generation facility produces and sells steam, the revenues from those out-of-market sales are appropriately factored into that resource's capacity market offer. Similarly, FERC has held that offers reflecting revenue from retail demand response services do not cause "artificial price suppression."[78] Lower capacity market offers facilitated by those revenues may lower market prices in the near term, but that reduction is merely reflective of the cost of supply.[79]

Further, while CASPR is justified on the need to create market confidence, it does the exact opposite. By inducing overbuild, CASPR will eventually force the Commission to reckon with the fact that the system will come to have far more supply than necessary. But while stakeholders can anticipate that the situation will eventually be resolved through yet more capacity market rule changes, they have absolutely no way of knowing what those rule changes will be, leaving future market prices a complete mystery. By contrast, state policies supporting the construction of new capacity are well communicated and clearly telegraph significant construction of state-sponsored resources over the next several years.[80]

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78 *New York State Pub. Serv. Comm'n et al.*, 158 FERC ¶ 61,137 at P 33.

79 As Cliff Hamal points out, this same type of near-term price reduction is inherent in the capacity market model. When a new competitive non-state-sponsored resource enters the market, it reduces near-term prices. But such near-term reductions do not mean that the long-term price will not approximate net CONE. Rather, prices on average approximate net CONE in both cases.

80 Massachusetts, for example, requires the state's electric distribution companies to procure at least 1600 MW of offshore wind by 2027, while also setting requirements for more general clean energy procurement by 2022. *See* Bill H.4385, Chapter 188 of the Acts of 2016, An Act to Promote Energy Diversity, 189th Gen. Ct. (Mass. 2016), https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter188. Rhode Island's

In sum, ISO-NE's attempt to create "investor confidence" in prices distorts market signals in a manner that is inherently unjust and unreasonable. At the same time, ISO-NE's convoluted market design will not even achieve its intended objective because it sets up an unworkable situation that will inevitably result in significant changes to the very market rules that it aims to instill confidence in. Rather than embarking upon the impossible and misguided attempt to create a "pure" market free from the impacts of policy choices by other regulators, FERC should reverse its approval of CASPR on the grounds that effectively blocking state-sponsored resources from offering their capacity into the ISO-NE market results in rates that are not just and reasonable.[81] At minimum, FERC should immediately reinstate the RTR exemption or an equivalent 200-megawatt RTR backstop replacement.[82]

B. The CASPR Order erred by approving a new capacity market mechanism without considering the impacts on customers.

As discussed above, the Commission is wrong in framing entry of additional state policy resources as posing a threat to the market, and in presenting its role as ensuring that CASPR adequately protects the market from unacceptable impacts from these resources. But *even assuming* that the Commission correctly characterized the risks of state policy resources and its tasks were to properly weigh whether CASPR strikes the right balance with regard to the degree to which such resources are permitted to participate in the capacity market, the Commission still

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Renewable Energy Standard sets specific amounts of electricity that must come from renewable sources up until 2035. 39 R.I. Gen. Laws § 39-26-4 (2017).

81 ISO-NE would have several options to address the flaw following such an order, including the most direct: limiting the application of MOPR to address cases of buyer-side market power.

82 As requested by the Massachusetts Attorney General. Docket No. ER18-619, *Partial Protest and Comments of the Massachusetts Attorney General* at 13 (Jan. 29, 2018) ("Massachusetts AG Protest").

has erred in approving CASPR. The Commission lacks substantial evidence upon which to base a determination that CASPR is just and reasonable.

On this record, the Commission cannot even reasonably conclude that CASPR will function as ISO-NE suggests. By failing to premise approval of CASPR on a finding of whether or the degree to which state-sponsored resources will actually participate in the capacity market, the Order wrongly disregards the consequences of excluding these resources, both on the functioning of the market and on customers. While the endorsement in paragraph 22 of the CASPR Order of the MOPR as a default rule absent an "alternative" such as CASPR is supported by only two of FERC's five Commissioners, the Order's approval of CASPR manifests the same deeply flawed reasoning underlying that paragraph: that the Commission need not *even consider* the scale of the capacity resources sidelined under CASPR, or the impacts of that exclusion on market dynamics and customers, before determining the market design is just and reasonable.[83]

The Commission also relies upon the wrong standard, holding up the totem of investor confidence (which in this case largely amounts to considering the interests of incumbent generators), rather than looking to the balance of customer and investor interests that has long been the hallmark of just and reasonable rates under the Federal Power Act.[84] Because FERC

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83 Only Commissioner Richard Glick, in a separate statement, conditioned his support for CASPR on the substitution auction actually providing for entry of state-sponsored resources into the FCM. CASPR Order, Commissioner Richard Glick, *dissenting in part and concurring in part* at 7 ("I believe that this mechanism is just and reasonable and not unduly discriminatory or preferential *insofar as it provides a mechanism* by which state sponsored resources may secure a capacity supply obligation in the Forward Capacity Market . . . .") (emphasis added).

84 Because CASPR prevents new market entrants relying on state-facilitated contracts from accessing the capacity market, it does not even protect all investor interests but rather only the narrower category of incumbent generator interests.

framed the test as one solely focused on investor interests, it never even considered whether CASPR adequately protects customers. To the extent the Commission may believe that assuring investor confidence in the markets is adequate to protect consumers, it is gravely mistaken. The Commission's omission of an assessment of the direct and cumulative effects of CASPR on customers leaves wholesale customers unprotected, forced to pay for a vast quantity of unneeded capacity in an already oversupplied market. CASPR also artificially forces the market to ignore actual conditions of oversupply. In sum, the Commission's approval of CASPR on these facts is arbitrary, capricious, or an abuse of discretion, and the Commission should reverse course.

1. There is insufficient evidence in the record to conclude that the substitution auction will function to prevent thousands of megawatts from being over-procured in the capacity market.

The Commission did not make an evidentiary finding that CASPR will actually work.[85] Had the Commission considered the issue, it would have found that there is insufficient evidence to conclude that the substitution auction will work to allow state-sponsored resources to enter the ISO-NE capacity market, thereby avoiding the procurement of thousands of megawatts of unneeded capacity. While it is Clean Energy Advocates' view that it is inherently unjust and unreasonable for customers to pay the cost to retain or build more power plants while perfectly good, low-cost capacity resources are administratively being forced to sit on the sidelines, even under a balancing approach in which some degree of over-procurement is acceptable, the factual record is wholly inadequate to support a determination that CASPR results in just and reasonable rates.

ISO-NE offered no estimate of the quantity or extent to which state-sponsored resources are likely to participate in the capacity market under CASPR. Rather than offer assurances that a

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85 *See supra* III.C.

significant share of the state-sponsored projects will ultimately participate in the capacity market through the substitution auction, ISO-NE emphasized the opposite—that reducing the development of unneeded capacity by accommodating state-sponsored resources was a secondary goal in CASPR's design.[86] The Geissler testimony, which provides the sole evidentiary backing for the proposal, openly acknowledges that CASPR's design will "fare less well with respect to promptly accommodating sponsored policy resources into the FCM and preventing inefficient overbuild due to states' out-of-market revenues to sponsored new resources."[87] ISO-NE explained that its proposal "could lead FCM to procure [new non-sponsored] resources in the [capacity auction] instead of acquiring capacity from new sponsored policy resources that will be built to meet legislative mandates."[88] ISO-NE is explicit that CASPR will provide no "guarantee that these resources will acquire a [capacity supply obligation] at their first opportunity," and implies by omission that the ISO-NE market's procurement of capacity from state-sponsored resources may well be negligible under the new rules.[89]

As Clean Energy Advocates and other protestors point out, participation of state-sponsored capacity resources through the substitution auction hinges upon a number of assumptions, none of which has been adequately demonstrated to be true.[90] A sufficient quantity of struggling resources must clear in the primary auction *and* their owners must conclude it would be financially beneficial to permanently retire the resources, given the right payoff to do

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86 CASPR Filing at 5.

87 *Id.*, Geissler Test. at 78:9-14.

88 CASPR Filing at 21.

89 *Id*. at 2. Under ISO-NE's rules, a resource acquires a "capacity supply obligation" when it clears in the capacity market.

90 Protest of Clean Energy Advocates at 20-21; Connecticut Protest at 38-40 (citing Hamal Affidavit); Massachusetts AG Protest at 1, 7-14.

so.[91] Moreover, these potential retirements must occur on the right timeframes (around the time significant build out of state-sponsored resources occurs), in the right location (i.e., not located across import- or export- constrained zones[92]), and without triggering reliability concerns that would prevent these existing resources from retiring.[93] A lack of information available to generators at the time they submit bids to retire in the substitution auction will further decrease the chances that offers from state-sponsored resources are able to be paired with offers to exit from retiring resources.[94] Given these additional constraints on the substitution auction, simply projecting the likelihood of future retirements in the ISO-NE footprint would be an inadequate basis to conclude CASPR will enable state-sponsored resources to enter the capacity market; such projections would, at best, overstate the potential for state-sponsored resource participation.

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91 Geissler describes such existing resources as having a "low option value," that is such resources find little value to retaining the option to participate in future auctions. If the option value is high, the resource will need to be paid a lot more to exit, or will elect not to participate in the substitution auction as demand at all. CASPR Filing, Geissler Test. at 52-53.

92 *Id.*, Geissler Test. at 149-154 (describing the rules that limit transfers between export- and import-constrained zones).

93 *Id.*, Geissler Test. at 184 (describing applicability of reliability review to demand bid process).

94 As Exelon explained in comments on the CASPR proposal, "existing resources do not know the clearing price in the forward capacity auction when they construct their bids in the substitution auction. This lack of information produces inefficient bidding by existing resources" because their revenue depends on the difference in price between the primary auction and the substitution auction. Docket No. ER18-619, *Comments and Limited Protest of Exelon Corporation* at 9 (Jan. 29, 2018). Without knowing what the primary auction price will be, generators are likely to be "risk-averse." *Id.* Yet FERC summarily dismissed these comments by Exelon, who, along with the New England Power Generators Association, had offered a "spread bidding" proposal that would have allowed generators to account for uncertainty in primary auction prices by making offers in the substitution auction that were dependent on primary auction prices, thereby making it more likely state-sponsored resources would enter the market through the substitution auction. *See* CASPR Order at P 77. FERC's disregard for the potential benefits to customers of this auction feature further demonstrates the CASPR Order's lack of care for the costs CASPR places on customers.

The Massachusetts Attorney General compared a recent ISO-NE forecast of retirements, prepared for other purposes, to the timeline of buildout that will occur due to state legislative mandate. Even this overly generous measure of CASPR's potential, which ignores restrictions that CASPR places on the operation of the substitution auction, revealed that the mechanism would be "wholly insufficient," showing that thousands of megawatts of capacity procured to meet Massachusetts legal requirements will be unable to enter the capacity market, much less the substantial quantities of renewable resources to be procured by other states in ISO-NE.[95]

ISO-NE did not even take the step of offering its projections of retirements in the footprint as a basis for its filing. In response to objections that it had failed to offer any evidentiary basis to conclude the substitution auction would actually work, ISO-NE agreed that CASPR offers "no guarantee" of state-sponsored resource participation in the capacity market, glibly arguing that no resource in a competitive market is guaranteed participation.[96] ISO-NE evades a valid and central challenge to the function of the market design by recasting it into a strawman argument: Even under a balancing framework that erroneously views the capacity market as in tension with state policies, the question would not be whether ISO-NE can ensure prompt participation of *every* individual state-sponsored resource, but rather whether ISO-NE can point to any evidence at all, much less substantial evidence, that CASPR will avoid the

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95 Massachusetts AG Protest at 10-11.

96 Docket No. ER18-619, *ISO-NE Mot. for Leave to Answer and Answer of ISO-NE* at 10 (Feb. 13, 2018). While ISO-NE argues that a MOPR exemption for state-sponsored resources guarantees that such resources will obtain capacity supply obligations, that characterization ignores the fact that to earn revenues pursuant to a state-facilitated contract, a resource must first win the rights to such a contract through a competitive process. Nor is the concept of a virtual guarantee antithetical to FERC's capacity markets, as ISO-NE suggests. Rather, the market construct similarly "guarantees" that other resources with very low or zero marginal costs of supplying the capacity, such as existing renewable resources, will also clear.

extensive and costly buildout of thousands of megawatts of unneeded capacity that will otherwise occur. ISO-NE's non-response leaves the record barren on this key question.

Commissioner Powelson recognized precisely these flaws in his separate dissent, concluding that multiple factors make it "questionable whether CASPR will even accommodate state policy resources."[97] As Commissioner Powelson explained, market conditions suggest that state-sponsored resources will have little opportunity to participate in the capacity market because of insufficient demand offers in the substitution auction. With low capacity market prices, resources near retirement are unlikely to clear in the primary auction (meaning they cannot offer as demand in the substitution auction); and those that do pass this initial hurdle, he concludes, are likely to be excluded from the substitution auction because of reliability constraints.[98] The weight of evidence (indeed all of the evidence) presented to the Commission shows that little to no state-sponsored resources will access the capacity market through the substitution auction. If it had examined the matter as the Federal Power Act requires, the Commission could not reasonably have concluded on this record that CASPR will prevent customers from paying for thousands of megawatts of unneeded capacity.[99]

2. The Commission failed to meet its statutory duty by making investor interests the sole and overriding criteria to determine whether CASPR is just and reasonable.

The Commission's core statutory duty under the Federal Power Act is to protect consumers.[100] The Commission fails to meet this obligation in the CASPR Order by ignoring

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97 CASPR Order, Commissioner Powelson, dissenting at 4.

98 *Id*.

99 *Maryland People's Counsel v. FERC*, 761 F.2d 780, 786 (D.C. Cir. 1985) (remanding for failure to consider "highly relevant factors" related to an order's impacts on consumers)

100 *Fed. Power Comm'n v. Sierra Pac. Power Co*., 350 U.S. 348, 355 (1956) ("That the purpose of the power given the Commission by [section] 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in [section] 201 of the Act that the scheme of regulation imposed 'is necessary

customer impacts of the market reforms entirely, instead holding up "investor confidence" as the only relevant determinant that the capacity market design results in just and reasonable rates. Under its myopic focus on investor interests (to the great benefit of incumbent generators), as described herein, the Commission fails to weigh the cumulative effect of the different CASPR design decisions on ISO-NE customers. The Commission's radical shift to this new investor confidence standard is inconsistent with the Federal Power Act, court precedent, and its own long-established interpretation of its mandate to ensure just and reasonable rates.

a. The Commission ignores longstanding precedent that impacts on consumers are central to determining whether rates are just and reasonable.

"[F]rom the earliest cases, the end of public utility regulation has been recognized to be protection of consumers from exorbitant rates."[101] Markets that incent participation by private investors can be an effective means of ensuring the reliable provision of electricity at reasonable rates, but the ultimate touchstone of the Commission's responsibilities under the Federal Power Act remains the "public interest," i.e., the interests of consumers.[102] Against this backdrop, the Commission has long held, and a rich body of caselaw affirms, that ensuring just and reasonable rates entails balancing investor and customer interests.[103]

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in the public interest.'"); *Pa. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 418 (1952) ("A major purpose of the whole Act is to protect power consumers against excessive prices."); *Elec. Dist. No. 1 v. FERC*, 774 F.2d 490, 492–93 (D.C. Cir. 1985), abrogated on other grounds by *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570 (D.C. Cir. 1990); *Towns of Alexandria, Minn. v. Fed. Power Comm'n*, 555 F.2d 1020, 1028 (D.C. Cir. 1977); *Duke Energy Carolinas, et al., LLC*, 156 FERC ¶ 61,201 at P 36 (Sept. 22, 2016).

101 *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987).

102 16 U.S.C. § 824(a); *cf. Envtl. Action, Inc. v. FERC*, 939 F.2d 1057, 1061 (D.C. Cir. 1991) ("Competition is valued not for its own sake but because it is most likely to maximize the satisfaction of consumer wants.")

103 *Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239, 262-63 (D.C. Cir. 2007) ("[S]etting a just and reasonable rate necessarily 'involves a balancing of the investor and the

In the context of the capacity markets whose purpose is to ensure availability of the capacity needed to meet reliability needs at the lowest cost, this means the Commission must consider both providing the correct price signals to trigger entry and exit of capacity resources *and* the impacts of rate design choices on customers.[104] The Commission has applied this standard in past orders addressing capacity market reforms, weighing consumer and investor interests and aiming to strike a balance between the two. "[P]rotecting consumers from overpaying for [] capacity" is central to striking the right balance.[105] For example, in 2014 the Commission rejected changes to ISO-NE's capacity market proposed by the New England Power Generators Association ("NEPGA") in a complaint under Section 206 of the Federal Power Act: "Although NEPGA's proposal might be sufficient to retain existing resources, we do not find that it appropriately protects consumers and the market from sudden, significant price increases."[106] Similarly, when the Commission reaffirmed its approval of the RTR exemption to the MOPR in ISO-NE's prior capacity market rules in 2016, it carefully weighed the fact that the

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consumer interests.'" (citing *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944)); *New England Power Generators Ass'n, Inc.*, 146 FERC ¶ 61,039 at P 52 (Jan. 24, 2014) ("[I]t has long been established that the 'fixing of "just and reasonable" rates, involves a balancing of the investor and consumer interests'").

104 *See e.g.*, *New York Indep. System Operator, Inc*., 122 FERC ¶ 61,064 at P 54 (Jan. 29, 2008), order on reh'g, 125 FERC ¶ 61,299 (Dec. 18, 2008) (rejecting use of updated demand curve factors that "do not recognize the need to balance the impact on consumers with the need to provide correct price signals for new generation entry"); Docket No. AD13-7, *"Centralized Capacity Market Designs Elements" Commission Staff Report* at 14 (Aug. 23, 2013) (analyzing how various design elements of the capacity markets "balance risk between suppliers and customers" and noting, for example how longer commitment periods address short-term volatility but place the risk on consumers that the investment becomes uneconomic).

105 *New England Power Generators Ass'n, Inc.*, 146 FERC ¶ 61,039 at P 52 (Jan. 24, 2014) ("[T]he Commission must strike a balance between, on one hand, setting a price that will retain enough existing resources to maintain reliability and, on the other hand, protecting consumers from overpaying for that capacity and minimizing price volatility that could undermine both investor and consumer confidence in the market.").

106 *Id.* at P 51.

"renewables exemption fulfills the Commission's statutory mandate by protecting consumers from paying for redundant capacity" against the perceived effect of the renewable exemption on price signals.[107] The Commission applied parallel reasoning in its 2008 approval of mitigation measures in MISO's ancillary services market, noting that mitigation must "reflect an appropriate trade-off between the interests of buyers and sellers—and, of course, setting a just and reasonable rate necessarily 'involves balancing of the investor and the consumer interests.'"[108]

The Commission determined that CASPR will provide for just and reasonable rates without considering the customer side of the scale. The Commission explained that its assessment of CASPR was guided by the "first principles of capacity markets" with the ultimate goal to ensure that the capacity market construct will "produce a level of investor confidence that is sufficient to ensure resource adequacy at just and reasonable rates."[109] While the Commission offers a passing acknowledgement that it must evaluate whether the new construct incents investment "at a reasonable cost,"[110] the Commission boils the test of just and reasonable rates down to investor interests: "A key to sustaining these benefits [i.e., reliability and just and reasonable rates] over time is maintaining sufficient investor confidence in the FCM."[111] Under the Commission's novel and deeply flawed formulation, so long as investors have confidence in

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107 *ISO New England Inc. & New England Power Pool Participants Comm.*, 155 FERC ¶ 61,023 at P 33-35 (Apr. 8, 2016). As discussed *supra* Section IV.A, such balancing was inappropriate because it is economically correct and efficient for state-sponsored resources to reflect revenue from state-facilitated contracts in their capacity offers; it is mitigation of state-sponsored resources that distorts the market.

108 *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,172 at P 121 (Feb. 25, 2008) (quoting *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944))).

109 CASPR Order at P 21.

110 *Id*. at P 25

111 *Id*. at P 24.

the market, "cost-effective, reliable electric service" will follow.[112] In other words, if incumbent generators' expectations are being met, there is no need, according to the Commission, to separately assess how customers are impacted by a new market construct. Such a stark departure from FERC's decades-old interpretation of its regulatory responsibilities is breathtaking, utterly unwarranted, and wrong. Approving CASPR on the basis of this misreading of the Federal Power Act is arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with law, and must be reversed.[113]

b. The Commission's application of the wrong standard led it to improperly ignore customer interests.

The Commission's application of its incumbent generator-focused standard predictably gives short shrift to customer interests. The Commission failed to assess evidence of customer impacts, discounted arguments raised about the risks to customers of certain CASPR design features, never considered whether those disparate risks could, in the aggregate, result in an unreasonable shifting of risk from supply to customer, and failed to develop the record necessary to demonstrate that customers are protected from exorbitant rates.

The clearest and most egregious consequence of the Commission's overriding focus on investor expectations is the absence of any weighing of the risk to ISO-NE customers of paying the tremendous cost of building new capacity when supply is not needed, which amounts to over a billion dollars.[114] There is no factual dispute that, absent participation of the state-sponsored

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112 *Id*. at P 23.

113 *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 110 (D.C. Cir. 2017) (reversing Commission order based on an erroneous reading of the Federal Power Act).

114 Gramlich Appendix at Section IX. *See also* Massachusetts AG Protest at 13 (unclear how many additional millions of dollars customers must pay before ISO-NE will recognize the problem with CASPR); Connecticut Protest, Hamal Affidavit at P 7 ("CASPR will cost consumers dearly")).

resources in the FCM through the substitution auction, customers will pay for the development of new resources even though the capacity needed to ensure reliability is already available. Indeed, ISO-NE presents the risk of that "significant overbuild" as a key motivation for the CASPR proposal.[115] But the Commission, presented with substantial evidence that CASPR will *not* work to allow the participation of state-sponsored resources, did not even consider how this could harm customers, or whether the purported benefits of getting the price signals "right" warrants the risk of saddling customers with exorbitant, unnecessary costs. The Commission's treatment of the costs of this overbuild is, again, framed primarily in terms of the consequences to investors. Such overbuild can "deprive non-state-supported resources of the opportunity to recover their investment costs"; "erode the investor confidence"; and "prevent the FCM from attracting investment in new and existing non-state-supported resources."[116]

The Commission's narrow focus on the interests of incumbent generators also colors its assessment of individual substitution auction design features. While various protestors raised significant concerns that elements of the auction's design unduly shift risk to customers, the Commission waved them away in the end because "ISO-NE appropriately focuses on ensuring that the substitution auction . . . does not undermine the FCM's ability to attract resource investment" when needed at reasonable costs.[117]

For example, the ISO-NE External Market Monitor ("External Market Monitor") pressed ISO-NE to correct a "serious design flaw" that would produce inefficient investment and

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115 CASPR Order at P 4.

116 *Id*. at P 24. The Commission makes a passing reference to the fact that overbuild can result in excessive costs to customers if capacity developers incorporate risk premiums into their offers but never explains, substantiates or otherwise qualifies this risk. *Id*.

117 *Id*. at P 72.

retirement decisions and "substantially raise costs to ISO-NE customers."[118] The External Market Monitor explains that, because the supply of state-sponsored resources is not taken into account during the primary auction, new non-sponsored resources will "appear to be needed and economic when, in fact, they are not given the existence of the sponsored resources."[119] Participation of these new resources in the substitution auction would allow them to be displaced by sponsored resources, avoiding overbuild. CASPR's exclusion of such new resources from participation in the substitution auction, according to the External Market Monitor, works as "intentional bias in favor of new conventional resources" and harms customers.[120] Moreover, under New England's lock-in provisions, customers face the risks of excessive payments for the full seven years of the price guarantee provided to new resources clearing in the primary auction.[121] The External Market Monitor offered alternative design options to address the flaw.[122]

ISO-NE concedes that the exclusion can result in overbuild as described by the External Market Monitor, but explains that CASPR is intended to favor maintaining price signals over other objectives.[123] ISO-NE raised, in turn, concerns about the External Market Monitor's alternate proposals, including that requiring new resources to participate in the substitution auction would be "unfair" to these resources.[124] The Commission, in weighing the arguments presented by ISO-NE and the External Market Monitor, conspicuously did not address the

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118 *Id*. at P 54.

119 Docket No. ER18-619, *Motion to Intervene and Protest of the ISO-New England External Market Monitor* at 10 (Jan 30, 2018) ("External Market Monitor Protest").

120 Docket No. ER18-619, *Motion for Leave to Answer of the ISO-New England External Market Monitor* at 8 (Feb. 19, 2018) (exclusion "harm[s] existing generators, the states sponsoring the resources, and consumers").

121 External Market Monitor Protest at 22.

122 *Id*. at 23-34.

123 CASPR Order at P 49.

124 *Id.* at PP 50-51, 60.

customer impacts and shift in risk to customers raised by the External Market Monitor's protest.[125] Instead, the Commission again turns to investor expectations as its new touchstone:

> We recognize, as ISO-NE notes, that developing a new non-sponsored capacity resource is costly. We are persuaded by ISO-NE's arguments that requiring such new non-sponsored resources to participate in the substitution auction could discourage development of those resources . . . .[126]

This same pattern of discounting the customer side of the equation persists throughout the CASPR Order. In response to Connecticut Parties' evidence that the substitution auction design is likely to result in low or negative prices, which could grant retiring units a large windfall payout at customers' expense,[127] the Commission is again silent on the customer impacts.[128] Likewise, when protestors raised concerns that limits on inter-zonal transfers of capacity supply obligations may unduly constrain the ability of state-sponsored resources to enter the FCM through the substitution auction,[129] the Commission weighed other concerns rather than how these restrictions shift further risk to the customer.[130] Nor does the Commission look across these individual design elements to consider whether, in aggregate, the market construct has struck the right balance between investor and customer risks. Having failed to assess consumer impacts at every step, the Commission cannot satisfy its core statutory duty and lacks a basis to conclude that CASPR ensures just and reasonable rates.

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125 *Id*. at P 73.

126 *Id*.

127 As Connecticut Parties' expert, Cliff Hamal, explained, "There should be no mistake, this windfall is a dramatic difference in how the markets operate. This is a windfall in the truest sense, as the supply resource on the cusp of retirement based on FCA prices enjoys a substantial payment for doing nothing and no longer taking any risks. Consumers fund these windfalls." Connecticut Protest, Hamal Affidavit at P 41.

128 CASPR Order at P 76.

129 *Id.* at P 107; *see also* Connecticut Protest at 38.

130 *Id*. at P 115.

3. Absent evidence the substitution auction will function, CASPR is not just and reasonable because it requires customers to purchase a vast amount of unneeded capacity and disregards market fundamentals.

Upon consideration of the balance of customer and investor interests, it is plain that CASPR tilts heavily, if not totally, toward the interests of incumbent generators. Indeed, ISO-NE has all but admitted that truth, by making elimination of the "price suppressive" effects of state-sponsored resources its determinative factor.[131] The undeniable fact is that, without evidence that CASPR will actually work to substitute state-sponsored resources into the market, customers will pay in the range of a billion dollars more in wholesale capacity prices for *capacity they don't need*.[132] Incumbent generators, however, can have confidence that they get the benefit of all the key design features of CASPR: built-in preferences for new conventional resources;[133] assurances that competition from renewables entering the market will be eliminated or dampened;[134] and new "windfall" payments at the end of the end of a plant's economic life.[135]

Nor can the Commission simply assume that by focusing on getting the prices "right"—which is what it suggests it achieves through a focus on "investor confidence" in this proceeding[136]—it is ensuring CASPR is adequately protective of customer interests. At the start, even under a charitable interpretation that ignores its focus on incumbent generators at the expense of new entrants, "investor confidence" is simply another term for "investor interests". The Commission's long practice of looking at the balance between investor interests and

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131 CASPR Filing at 4.

132 Beyond these costs, customers will also pay higher retail electricity costs due to increased Renewable Portfolio Standard procurement costs, as discussed *supra* n.60.

133 *See supra* IV.B.2.a (discussing what the External Market Monitor describes a "serious design flaw").

134 *See supra* IV.B.1 (discussing huge hurdles for state policy resources to enter market).

135 *See supra* IV.B.2.a (discussing Connecticut Parties' arguments that the substitution auction is likely to result in windfall payments to retiring generators).

136 CASPR Order at P 24.

customer interests is rooted in the basic understanding that market design involves many administrative decisions, and that tweaks in those decisions that accrue to the favor to investors and supply (greater certainty that investments will be recovered with profit) often cut against customers (greater likelihood customers are saddled with a high-cost investment when a lower-cost resource providing the same service is available).[137] While perhaps one could say that customers are served where the market construct most closely approximates the supply and demand fundamentals that exist in the real world, such a gross simplification would ignore that the many design features that translate those fundamentals into a market price each entail administrative determinations that can accrue to the benefit of investors or customers. A standard that focuses solely on whether investors get the right price signal is, at its essence, one that ignores whether customers are unduly burdened with the risks imposed by the greater certainty afforded to investors.[138]

V. Conclusion

For the foregoing reasons, Clean Energy Advocates request rehearing of the CASPR Order. The Commission should reject ISO-NE's CASPR filing on the grounds that a capacity market structure that risks not reflecting the contributions of state-sponsored resources is not just

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137 The Commission staff's discussion of the trade-offs in the design of elements of the capacity market is illustrative. For example, the length and duration of the forward period of a capacity market has implications for risks to investors and customers. A long forward period increases competition among resource types and reduces the extent to which investors must commit to developing a resource themselves and incur significant costs prior to the auction. On the flipside, a longer forward period increases the risk to customers, because forecasts will be less accurate over longer period times, increasing the risk of procuring the wrong amount (at an economic and reliability cost to customers). Commission Staff Report at 13.

138 None of which is to say that supply interests and ensuring investors receive price signals reflective of supply and demand fundamentals aren't also an important consideration in ensuring just and reasonable rates. But they are not proxies for customer interests.

and reasonable. ISO-NE should update its RTR exemption to ensure that eligibility rules provided that all state resources procured pursuant to climate goals are exempt. Alternatively, ISO-NE could modify its definition of "out-of-market" resources so as to exclude from that definition revenues that are competitively awarded pursuant to long-term contracts facilitated by the implementation of state Renewable Portfolio Standards.

Respectfully submitted,

/s/ Kim Smaczniak
Clean Energy Staff Attorney
Earthjustice
1625 Massachusetts Avenue, N.W.,
Suite 702
Washington, DC 20036-2243
ksmaczniak@earthjustice.org
Counsel for Sierra Club

/s/ Bruce Ho
Senior Advocate
Sustainable FERC Project
40 W. 20th St
New York, NY 10011
bho@nrdc.org

/s/ Miles Farmer
Staff Attorney
Climate & Clean Energy Program
Natural Resources Defense Council
40 W. 20th St.
New York, NY 10011
mfarmer@nrdc.org

/s/ David Ismay
Senior Attorney
Conservation Law Foundation
62 Summer St.
Boston, MA 02110
dismay@clf.org

/s/ Casey Roberts
Senior Staff Attorney
Sierra Club
1536 Wynkoop St., Suite 312
Denver, CO 80202
Casey.roberts@sierraclub.org

/s Francis Pullaro
Executive Director
RENEW Northeast, Inc.
PO Box 383
Madison, CT 06443
fpullaro@renew-ne.org

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010, I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding by electronic means.

Dated at Washington, D.C. this 9th day of April, 2018.

/s/ *Kim Smaczniak*
Kim Smaczniak
Clean Energy Attorney
Earthjustice
1625 Massachusetts Avenue, NW
Suite 702
Washington, DC 20036-2212
(202) 797-5247
ksmaczniak@earthjustice.org

Appendix A: Comments of Robert Gramlich, Grid Strategies LLC,[1] on Behalf of Clean Energy Advocates

I. Introduction

I have been asked by Natural Resources Defense Council, Sierra Club, Sustainable FERC Project, Conservation Law Foundation, and RENEW Northeast, Inc. (Collectively "Clean Energy Advocates") to evaluate ISO New England's Competitive Auctions with Sponsored Policy Resources ("CASPR") proposal, and its consistency with past FERC pricing policies. The purpose of these comments is to highlight certain evidence already in the record in this proceeding and to put that evidence in the context of FERC's existing policies and economic principles. To understand the impact of the CASPR proposal on New England customers, including those who are members of the above-listed organizations, I have estimated the cost to customers if state-sponsored resources do not clear in CASPR's substitution auction. I agree with other commenters that the proposal results in rates that are unjust and unreasonable for several reasons.[2]

II. The proposal violates FERC price-setting policies.

The proposal fails to meet FERC policy on price-setting in power markets. For rates to be just and reasonable, FERC has found that prices should be set by the interaction of supply and demand as long as market power is either absent or mitigated. This has been the general

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1 My bio can be found at https://gridstrategiesllc.com/about/.

2 *See, e.g.*, Docket No. ER18-619, *Protest by the Connecticut Public Utilities Regulatory Authority, the Connecticut Department of Energy and Environmental Protection, and the Connecticut Office of Consumer Counsel* at 17 (Jan. 29, 2018) ("Connecticut Protest"); Docket No. ER18-619, *Partial Protest and Comments of the Massachusetts Attorney General* at 9 (Jan. 29, 2018) ("Massachusetts AG Protest"); Docket No. ER18-619, *Motion to Intervene and Comments of the American Public Power Association* at 8-12 (Jan. 29, 2018) ("APPA Comments").

framework established by FERC and the courts since electricity competition began in the early 1990s.[3,4,5] In this proposal, many supply sources are effectively excluded from participation in the capacity market because the supply bids of resources procured pursuant to state policies are subject to the Minimum Offer Price Rule (MOPR) in the initial auction, and there has been no demonstration that the secondary auction would meaningfully bring them back into the market. The supply curve in the initial auction is not the true market supply curve because of the administratively raised bids. Thus, prices will not be set by the true intersection of supply and demand as has been longstanding Commission policy.[6]

III. Market Power is absent so there is no basis for mitigation.

FERC policy calls for prices to be set by supply and demand as long as market power is absent or has been mitigated. That requirement has led to various FERC-approved and RTO-implemented market power mitigation measures including Minimum Offer Price Rules (MOPR) for buyer-side market power mitigation. Here the mitigation of renewable resources from full market participation is not based on any finding or even allegation of market power, as stated by ISO-NE witness Geissler:

> "Importantly, the MOPR is not limited to preventing price suppression in cases where an entity explicitly attempts to exercise buyer-side market power. Rather the MOPR seeks to prevent the price suppressive effects that are consistent with buyer-side market power,

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3 *Elizabethtown Gas Co. v. FERC*, 10 F.3d. 866, 870 (DC Cir. 1993).

4 "[I]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that price is close to marginal cost, such that the seller makes only a normal return on its investment." *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990).

5 Robert Gramlich, "The Role of Energy Regulation in Addressing Generation Market Power," Environmental and Energy Law and Policy Journal, Vol 1. No. 1, 2005.

6 *See, e.g.*, Connecticut Protest at 19.

without attempting to discern or require the ISO to adjudicate whether the new sponsored resources (and their sponsors) seek to impact capacity market prices."[7]

The Commission has found in the past that renewable energy would be very unlikely to be used to exercise buyer side market power, given its lower capacity value and higher prices.[8]

IV. FERC has traditionally allowed public policies to affect prices, as should be expected.

Prices have been deemed just and reasonable even when public policies affected them. A wide range of state and federal policies have affected quantities and prices in power markets since the inception of US electricity markets. For example, there might not be any nuclear generation in operation were it not for the Price-Anderson Act limiting liability for unit owners. We might not have as much natural gas generation if intangible drilling costs and depletion allowances were not allowed to be deducted under federal tax law. Many states provide incentives for the production of fuels that are used in electricity generation. A large amount of generation participating in markets is part of a state regulatory rate base which affected the development of those sources and influences their ongoing behavior. Health and safety regulations affect firm behavior in electricity markets as with most other industries. Public infrastructure affects delivery costs of most products in most industries. The existence of these policies affects the amount of supply, the cost of that supply, the point at which supply and demand intersect, and the resulting price.

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7 Docket No. ER18-619, *ISO-NE, Revisions to ISO New England Transmission, Markets and Services Tariff Related to Competitive Auctions with Sponsored Policy Resources*, Geissler Testimony at 14:15-20 (Jan. 8, 2018) ("CASPR Filing").

8 *ISO New England Inc. and New England Power Pool Participants Committee*, 158 FERC ¶ 61,138 at P 10 (Feb. 3, 2017).

FERC's regulatory framework has been to set market rules in a manner that accounts for public policies in the same way as other exogenous factors that impact markets. While FERC has deviated slightly from this paradigm in recent years through its limited expansion of the MOPR to certain new generating units, the basic framework of treating public policies like other exogenous factors has generally held true since the establishment of organized wholesale markets. This proposal's grand expansion of state policy mitigation in a way that will administratively set prices for gigawatts of supply, solely because those units are affected by one particular exogenous factor, is a significant change in policy.

Just like any cost of production, a public policy is something that can affect a seller's willingness to accept or a buyer's willingness to pay. Quite directly, some generation owners must purchase sulfur dioxide allowances through EPA-regulated markets (that have existed for as long as power markets), and those suppliers may reflect the cost of such allowances in their sales or bid prices. Air emission regulations can affect allowable generation run times. Some policies may tend to raise certain suppliers' bids and/or prices such as emissions allowances, and others may tend to decrease bids and/or prices, such as renewable energy incentives. For many years, markets have been deemed workably competitive and prices have been deemed just and reasonable by the Commission throughout the Northeast organized markets as well as the rest of the country, despite public policies affecting their outcomes.

If public policies were to be mitigated, deterred, or otherwise specially adjusted for by the Commission rather than accounted for in the same manner as other exogenous factors, there would be no clear boundary governing when the Commission might intervene and when it might not. Policies vary in many dimensions: state vs. federal, capital cost vs. operating cost support, forms of insurance vs. direct cost support, environmental vs. economic development vs. other

social objectives, forms of zoning and resource access vs. economic factors, and more. Sometimes impacts are direct and sometimes they flow indirectly from upstream sectors. Some policies such as Renewable Portfolio Standards do not pick a single technology or resource but allow a measure of competition. Determinations would need to be made on which policies count as "subsidies" and how to mitigate each one. Such decisions, subjective as they are, could easily be changed over time so there would be little regulatory certainty.

V. The proposal raises costs for consumers and forces them to pay twice for the same capacity

As the Commission found in the order accepting the proposal, Minimum Offer Price Rules can make consumers pay twice for capacity."[9] However, the Commission did not find that the secondary auction prevents this double payment.

There is little dispute that MOPR will in most cases raise prices, by substituting higher bids that will lead to either no change or a higher market-clearing price.[10] It follows that reducing the exemption from MOPR tends to increase prices, because more resources are made subject to MOPR.

The impact on consumers in New England could be substantial. If all resources covered by state Renewable Portfolio Standard policies were subject to MOPR and the CASPR

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9 *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 24 (Mar. 9, 2018) ("This type of overbuilding can require customers to pay twice for capacity.") ("CASPR Order"). Numerous parties highlighted the problem of over-procurement and "paying twice" in their comments and protests. *See, e.g.*, Connecticut Protest at 20 and attached Affidavit of Cliff W. Hamal at P 28 ("Hamal Affidavit"); APPA Comments at 9-10; Massachusetts AG Protest at 13-15.

10 CASPR Filing, at 10-11 (acknowledging that its intention in eliminating the RTR exemption is to maintain "competitive prices" in the region's capacity markets).

substitution auction does not work,[11] I estimate that the cost to consumers in New England could be near $1.5 billion (see Section IX).[12]

VI. The proposal harms rather than improves investor confidence

The Commission concluded without any supporting analysis that "[a]bsent market mechanisms to limit the impact on FCM prices, which serve as both a revenue stream and a price signal for investors, those state actions can erode the investor confidence on which the FCM relies to meet its objective."[13]

Investors should not be surprised about Renewable Portfolio Standards. They have been in place in most states that restructured their electricity markets since the beginning of restructuring.[14] Approximately 30 states in the country have Renewable Portfolio Standards, overlapping closely with the states that restructured. The Federal Power Act and Supreme Court

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11 Many parties critiqued the workability of the substitution auction, raising significant doubts as to whether it will succeed in allowing state sponsored resources to enter the market rather than being sidelined. See, e.g., Connecticut Comments at 32-41; more

12 My estimate uses a very rough methodology simply to give a sense of the scale of costs at issue here to the lay reader. It is not intended to provide record evidence of the precise costs, which are not necessary for purposes of this Request for Rehearing. My estimate does not account for the gradual phase-out of the exemption, which will provide for slightly lower costs than a sudden and complete elimination of the Renewable Technology Resources ("RTR") exemption (which is what I assume to calculate this rough estimate).

13 CASPR Order at P 24.

14 *See* Renewable Portfolio Standards of CT: 1998 (http://programs.dsireusa.org/system/program/detail/1950); MA: 1997 (http://programs.dsireusa.org/system/program/detail/479); ME: 1997 (http://programs.dsireusa.org/system/program/detail/452); NH: 2007 (http://programs.dsireusa.org/system/program/detail/2523); RI: 2004 (http://programs.dsireusa.org/system/program/detail/1095); VT: 2015 (http://programs.dsireusa.org/system/program/detail/5786, replacing a previous renewable energy program). *See also* Docket ER18-619, Protest of Clean Energy Advocates at 5-6 (Jan. 29, 2018).

decisions reflect the centrality of states' jurisdiction over generation which investors should recognize as well.

While it is true that any change in policy can create uncertainty, that is also true for this rule change to remove the renewable exemption. The Commission had been clear in previous orders that using renewable energy is an ineffective way to exercise buyer-side market power so it was reasonable to assume that the RTR exemption would remain in place. The change may create more uncertainty than it mitigates.

Confidence would be higher if the traditional boundaries governing RTO/ISO intervention in competitive markets in response to exogenous factors were maintained. Commission policy had been clear that prices would be set where supply and demand meet, if market power is absent or has been mitigated. Thus, it would have been reasonable for investors to assume that state policies would not be mitigated unless they crossed the line into buyer-side market power or some other form of market power. An expansion of FERC's policy of mitigating state policies significantly changes the line between state and federal roles in wholesale markets and moves the line to an ambiguous place given the slippery slope of deciding which interventions count as "out-of-market revenue sources," likely creating more uncertainty than it resolves.

Market uncertainty is more a function of the centralized nature of capacity markets and capacity obligations in regions like ISO-NE than state policy, because even small changes in rules affect all participants. This is in contrast to well-functioning markets such as the Electric Reliability Council of Texas, in which market participants execute a wide range of non-standard long-, medium-, and short-term contracts for different resource portfolios of their choice.

VII. State policies do not raise costs for other states as alleged by ISO-NE.

In its filing, ISO-NE expressed concerns about alleged cost shifting from one state to another as a result of state policies to procure certain kinds of resources. This issue was one of the four design objectives that led to CASPR: "Avoidance of cost shifts. To the extent possible, decrease the potential for one state's consumers to bear the costs of other states' subsidies."[15] "The . . . objective addresses an additional concern regarding inadvertent cost shifts within the region that was emphasized by the New England states during the IMAPP process."[16] ISO-NE does not explain its premise, and to the contrary, it is evident that RPS policies do not cause cost shifts. In fact, a Renewable Portfolio Standard tends to add supply and thus lower wholesale prices for load in other states. Allowing resources subject to Renewable Portfolio Standards to be exempt from MOPR (through the RTR exemption) actually reduces costs on those other states. Thus, the removal of the RTR exemption as proposed and approved in CASPR hurts consumers in other states.

VIII. Removing the renewable exemption will exacerbate the capacity surplus and will be unsustainable.

Any renewable resources driven by state policy that do not clear in either auction will be surplus capacity. There will also likely be new, non-renewable capacity attracted into the market above the target reserve margin according to the External Market Monitor in this proceeding.[17] In effect, the states are choosing one fleet of resources and ISO-NE is choosing a supplemental

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15 CASPR Filing at 4.

16 *Id.* at 5 (citing NESCOE's memorandum *Policy and Markets: Goal Posts* at 11 (June 21, 2016), https://www.iso-ne.com/static-assets/documents/2016/06/npc_20160621_23_composite8.pdf.

17 Docket No. ER18-619, *Motion for Leave to Answer of the ISO-New England External Market Monitor* at 1 (Feb. 18, 2018).

fleet. This dynamic is unsustainable. Even if CASPR works to reduce some of the excess, more and more state-sponsored renewables will be coming in over time, exacerbating the current dynamic. Costs will increase and investments will be based on market rules rather than supply and demand fundamentals, imposing costs on consumers and creating more risk for investors.

IX. Cost of Mitigating State Resource Policies in ISO-NE's Capacity Markets.

This section explains my estimate of the upper end cost of mitigating Renewable Portfolio Standard policies in New England, based on the policies in place at the time of CASPR's adoption.

a. Methodology

A cost estimate can be developed through the following method:

i. Determine **Adjusted Capacity (MW)** in current New England state policies.

- Determine **capacity of resources** currently covered under New England state policies.
- Adjust **capacity values** of resources covered. This is necessary because no resource is available all the time. Land-based wind, for example has a 17 percent capacity value, essentially reflecting the probability wind will be producing at a summer peak time (sometimes the proper and sophisticated method of "Effective Load Carrying Capability" is used, other times rules of thumb are used).
- Multiply **Capacities (MW)** by **Capacity Value (%)** to get **Adjusted Capacity (MW)**.

ii. Determine **Cost of Capacity**.

- Benchmark 1: Average price in ISO-NE capacity markets over last five years.
- Benchmark 2: Cost of a new combustion turbine.

iii. Determine Cost of Capacity covered by New England state policies.

- Multiply **Total Adjusted Capacity (MW)** by **Cost of Capacity** using benchmarks 1 and 2.
- Compare results from the two methods to see if they yield roughly the same result.

b. Data

i. Capacity of resources currently covered in New England state policies:[18]

Resource	Nameplate Capacity (MW)
MA hydro	1200
MA offshore wind	1600
CT, MA, and RI Clean RFP[19]	460
Additional RE needed for existing Renewable Portfolio Standards	967

ii. Capacity value[20]:

Resource	Nameplate Capacity (MW)	Capacity Value (%)	Notes
MA hydro	1200	96%	Includes forced outage rate on resource and HQ line
MA offshore wind	1600	27%	
CT, MA, and RI Clean RFP PV[21]	306	24%	Marginal rate declining per ISO-NE

18 Doug Hurley, Synapse Energy Economics, for Vermont Energy Investment Corporation, *Monster in the Closet!: Integrating Markets and Public Policies* at 17 (May 17, 2017), http://www.nepool.com/uploads/IMAPP_20170517_Synapse.pdf.

19 New England Clean Energy RFP, https://cleanenergyrfp.com/ (last updated Oct. 25, 2016).

20 ISO-NE, *Assumptions for Calculating the Installed Capacity Requirement (ICR) Values for the 2020-2021 Forward Capacity Auction (FCA11)* (May 26, 2016), https://www.iso-ne.com/static-assets/documents/2016/05/PSPC_05262016_ICR_Resource_Load_Assumption_A5_2.pdf.

21 ISO-NE, *Final 2018 PV Forecast* (Mar. 19, 2018), https://www.iso-ne.com/static-assets/documents/2018/03/a03-2018-pv-forecast.pdf.

CT, MA, and RI Clean RFP land-based wind	155	17%	
Additional RE needed for existing Renewable Portfolio Standards	967	22%	2/3 PV, 1/3 land-based wind, based on ratio under 3 state RFP

iii. Cost of Capacity ($/MW).

- Cost of Capacity Benchmark 1:[22]

	5 year average FCM price	**2018**	**2017**	**2016**	**2015**	**2014**
Cost of Capacity ($/kW per month)	$8.30	$4.63	$5.30	$7.03	$9.55	$15.00

- Cost of Capacity Benchmark 2: Cost of a combustion turbine. $680/kW[23]

c. Results

i. Determine **Adjusted Capacity** by multiplying **Nameplate Capacity** by **Capacity Value**. Sum up **Adjusted Capacity** to get **Total Adjusted Capacity** in MW:

Resource	**Nameplate Capacity (MW)**	**Capacity Value (%)**	**Adjusted Capacity (MW)**
MA hydro	1200	96%	1156
MA offshore wind	1600	27%	432
CT, MA, and RI Clean RFP PV	306	24%	74
CT, MA, and RI Clean RFP land-based wind	155	17%	26
Additional RE needed to meet existing Renewable Portfolio Standards	967	22%	209
Total			**1897**

22 ISO-NE, *FCM Auction Results*, https://www.iso-ne.com/isoexpress/web/reports/auctions/-/tree/fcm-auction-results.

23 U.S. Energy Information Administration, *Cost and Performance Characteristics of New Generating Technologies, Annual Energy Outlook 2018* (Feb. 2018), https://www.eia.gov/outlooks/aeo/assumptions/pdf/table_8.2.pdf.

ii. Cost of Capacity covered by New England state policies.

Multiply **Total Adjusted Capacity (MW)** by **Cost of Capacity** using benchmarks 1 and 2.

Benchmark 1: Convert $8.30/kW per month to $99,600/MW per year by multiplying by 1000 and again by 12. Convert to annual cost of $188,980,215 by multiplying by **Adjusted Capacity (MW)**. Take Net Present Value over 20 years to get total cost of **$1,608,895,110**.

Benchmark 2: Convert Capacity Cost in $/kw to $/MW by multiplying by 1000. Multiply capacity cost ($/MW) by Total Adjusted Capacity (MW) to get a total cost of $**1,442,893,318.**

Using two benchmarks for cost of capacity resulted in close to the same result of approximately **$1.5 billion**.

d. Conclusion

If all Renewable Portfolio Standard policies were mitigated and the substitution auction did not work, consumers in New England could pay nearly **$1.5 billion**.