

## ORAL ARGUMENT NOT YET SCHEDULED

Case No. 17-1110

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

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**NextEra Energy Resources, LLC, et al.,**  
*Petitioners,***v.****Federal Energy Regulatory Commission,**  
*Respondent.*

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

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**BRIEF AMICUS CURIAE OF  
NATURAL RESOURCES DEFENSE COUNCIL AND  
CONSERVATION LAW FOUNDATION  
IN SUPPORT OF RESPONDENT**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned certify as follows:

(A) **Parties and Amici.** Except for Natural Resources Defense Council (NRDC) and Conservation Law Foundation (CLF), all parties, intervenors, and amici appearing in this Court are listed in the (i) Brief of Petitioners NextEra Energy Resources, LLC, the NRG Companies, and the PSEG Companies, and (ii) Brief of Respondent Federal Energy Regulatory Commission (FERC).

(B) **Rulings Under Review.** References to the following orders under review appear in the Brief of Petitioners: *ISO New England Inc. & New England Power Pool Participants Comm.*, 147 FERC ¶ 61,173 (2014); *ISO New England Inc. & New England Power Pool Participants Comm.*, 150 FERC ¶ 61,065 (2015); *ISO New England Inc. & New England Power Pool Participants Comm.*, 155 FERC ¶ 61,023 (2016); and *ISO New England Inc. & New England Power Pool Participants Comm.*, 158 FERC ¶ 61,138 (2017).

(C) **Related Cases.** This case is before this Court for a second time following FERC's request for a voluntary remand of a prior petition for review. *See NextEra Energy Resources, LLC et al. v. FERC*, No. 15-1070 (D.C. Cir. Dec. 1, 2015). References to other related cases are listed in the Brief of Respondent.

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## **GLOSSARY**

|        |                                      |
|--------|--------------------------------------|
| CLF    | Conservation Law Foundation          |
| FPA    | Federal Power Act                    |
| FERC   | Federal Energy Regulatory Commission |
| ISO-NE | ISO New England                      |
| NRDC   | Natural Resources Defense Council    |

## **ADDENDUM**

Amici NRDC and CLF have included all statutes and regulations referenced in this Brief in a separately-bound addendum.



## STATEMENT OF INTEREST OF AMICI CURIAE

Natural Resources Defense Council, Inc. (NRDC) is a national non-profit environmental advocacy organization, with hundreds of thousands of members throughout the United States. Curbing climate change and building a clean-energy future are among NRDC's top institutional priorities, and NRDC frequently advocates before the Federal Energy Regulatory Commission (FERC or the Commission), wholesale electricity market operators, and federal and state courts to defend clean energy policies, including the state policies at issue in this case.

Conservation Law Foundation, Inc. (CLF) is a regional non-profit advocacy organization with offices in Massachusetts, New Hampshire, Maine, Vermont, and Rhode Island, and with several thousand members across New England. CLF maintains extensive interests and expertise concerning energy projects and markets, and advocates at the state and federal levels for policies that advance clean energy, reduce energy sector pollution, and decarbonize our electric grid.

Removal of ISO New England's (ISO-NE) limited exemption for renewable resources would undermine New England states' clean energy policies, as well as federal regulatory goals, by increasing costs to consumers and leading to the inefficient overbuild and retention of fossil fuel-fired generators. A decision by this Court reversing FERC's order could also lead to complaints against similar FERC-approved rules that affect state clean energy policies in other regions. As

organizations that devote a significant amount of resources towards advocating on behalf of these policies, NRDC and CLF have substantial knowledge regarding state renewable energy policies, as well as a strong interest in safeguarding them.

NRDC and CLF also have direct experience with the ISO-NE regulatory scheme at issue in this case. NRDC and CLF actively promote market rules under the Federal Power Act (FPA) that harmonize with state clean energy choices. NRDC, for example, recently submitted comments to FERC as part of a technical conference regarding the interplay between state clean energy policies and markets operated by ISO-NE. As active members of the New England Power Pool, CLF and NRDC have participated in the formation and refinement of New England's electricity markets and planning of the region's electric transmission grid.

For the reasons stated above, NRDC and CLF have strong interests in this case, and our relevant experiences will allow us to provide the Court with important policy and legal reasons for affirming FERC's order.<sup>1</sup>

### **SUMMARY OF ARGUMENT**

In adopting the FPA, Congress provided the federal government with important regulatory authority over the interstate sale and transmission of

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<sup>1</sup> No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief.

electricity, while leaving states with broad powers to promote electricity generation and enact policies designed to achieve legitimate state goals. Eighty years later, under this system of collaborative federalism, the federal government—via FERC—oversees regional grid operators, such as ISO-NE, that manage wholesale electricity markets to ensure the efficiency and reliability of our energy supply. States, meanwhile, have enacted various policies to promote the generation of clean energy, helping to cause an upsurge in new renewable energy projects across the country.

Prior to 2014, the price floor rule in ISO-NE’s wholesale forward capacity market—called the minimum offer price rule—functioned in a way that had the potential to undermine state efforts to promote renewable energy, creating unnecessary costs and inefficiencies for consumers. To remedy this potential conflict, ISO-NE created, and FERC approved, a limited exemption to the rule that allows a certain amount of new renewable resources built pursuant to state clean energy policies to bid in the forward capacity market’s annual auctions at prices below the administratively-set price floor.

FERC’s reasons for approving this limited exemption were consistent with its statutory obligation to guarantee “just and reasonable” rates, as well as the rationale behind the minimum offer price rule. As FERC mentioned in its decision, unlike traditional fuel sources, renewable resources do not pose a risk of market

price manipulation (which is what the rule was created to guard against). Instead, the exemption ensures that the market incorporates the future generating potential of renewable resources mandated by state policies. As a result, the exemption avoids the unnecessary construction and retention of fossil fuel-fired generators, and respects states' efforts to achieve environmental and public health objectives.

At the same time, the exemption reduces costs for consumers, who otherwise would be required to pay for state-mandated renewable resources, as well as for the construction and retention of unnecessary capacity from redundant non-renewable resources. Removal of the exemption would create an unjust and unreasonable outcome for states and consumers by preventing new renewable resources from participating in the market, raising costs for consumers and hampering states' ability to achieve their environmental priorities. Accordingly, the Court should affirm FERC's order.

## ARGUMENT

### **I. ISO-NE created the renewables exemption to avoid market inefficiencies and unnecessary consumer costs**

Before discussing why this Court should affirm FERC's approval of the limited renewables exemption, it is important to explain ISO-NE's reasons for establishing the exemption in the first place. ISO-NE operates a forward capacity market, in which resources compete in annual auctions to provide capacity to meet the region's future electricity needs. Before ISO-NE created the exemption, its

auction bid-pricing rule made it difficult for new renewable energy generators built pursuant to state clean energy policies to enter the forward capacity market. This had the potential to lead to unnecessary investments in more fossil fuels and increased costs for consumers. Recognizing that state clean energy policies were enacted to achieve legitimate environmental and public health goals, rather than to distort capacity market prices, ISO-NE created a limited exemption to avoid the inefficiencies that otherwise would result if these state-mandated resources were excluded from the market.

**A. Acting within powers reserved to them under the FPA, states have enacted renewable energy policies to promote environmental and public health objectives**

Fossil-fuel combustion (the largest energy source for electricity) contributes to over 75% of total greenhouse gas emissions in the United States.<sup>2</sup> Within the last half century, the amount of greenhouse gases entering the atmosphere from fossil-fuel combustion has risen substantially, leading to changes in the Earth's climate, increased temperatures, sea-level rise, and extreme weather patterns.<sup>3</sup> Fossil fuels

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<sup>2</sup> EPA, *Sources of Greenhouse Gas Emissions*, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last visited Nov. 22, 2017), App., Ex. A.

<sup>3</sup> See Intergovernmental Panel on Climate Change, *Climate Change 2014: Synthesis Report* 2-4, 7-8 (Core Writing Team, R.K. Pachauri, and L.A. Meyer eds., 2015), [http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR\\_AR5\\_FINAL\\_full\\_wcover.pdf](http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf), App., Ex. B.

harm the environment and public health in other ways as well: fossil-fuel extraction can contaminate water and soil<sup>4</sup>; accidents related to transportation, such as oil spills, can destroy ecosystems<sup>5</sup>; and air pollution from combusting fossil fuels causes asthma and disease.<sup>6</sup>

Due to the social and environmental costs of fossil fuels, states across the country are encouraging more investment in renewable energy.<sup>7</sup> Unlike fossil fuels, electricity produced from renewable resources like solar and wind is pollution-free, and the resources themselves are virtually inexhaustible. Further, electricity produced by renewable resources has significantly lower operating costs because it does not require purchases of fuel. Developing renewable energy also has considerable economic benefits, including job creation, new capital investment, and increased energy security.<sup>8</sup>

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<sup>4</sup> Thomas W. Merrill & David M. Schizer, *The Shale Oil and Gas Revolution, Hydraulic Fracturing, and Water Contamination: A Regulatory Strategy*, 98 Minn. L. Rev. 145, 147 (2013), App., Ex. C.

<sup>5</sup> See, e.g., Charles H. Peterson, *Long-Term Ecosystem Response to the Exxon Valdez Oil Spill*, Vol. 302 Science 2082 (Dec. 2003), App., Ex. D.

<sup>6</sup> National Research Council, *Hidden Costs of Energy: Unpriced Consequences of Energy Production and Use* 4-5 (Nat'l Academy Press 2010), App., Ex. E.

<sup>7</sup> See *infra* note 9.

<sup>8</sup> See, e.g., R.I. Gen. Laws § 39-26-4 (citing energy stability, job creation, and capital investment as reasons behind renewable energy policy).

To recognize these benefits, acting within the powers reserved to them under the FPA and their independent constitutional authority to address a variety of state interests, states have enacted policies to promote renewable energy and diversify their energy mix. *See Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) (“States have broad powers . . . . to direct the planning and resource decisions of utilities under [their] jurisdiction,” including by “order[ing] utilities to . . . purchase renewable generation.”) Renewable portfolio standards, which require utility companies to supply an annually increasing percentage of their electricity from renewable energy sources, are among the most common ways that states facilitate the development of renewable energy. Twenty-nine states, including all six New England states and the District of Columbia, have adopted renewable portfolio standards with mandatory renewable energy targets.<sup>9</sup> The New England states have some of the most ambitious targets in the country.<sup>10</sup>

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<sup>9</sup> *See* National Conference of State Legislatures, *State Renewable Portfolio Standards and Goals* (Aug. 1, 2017), <http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx> (last visited Nov. 21, 2017), App., Ex. F.

<sup>10</sup> *See* Mass. Gen. Laws ch. 25A, § 11F (requiring 15% renewable energy by 2020); Conn. Gen. Stat. § 16-245a (requiring 28% renewable energy by 2020); Vt. Stat. Ann. tit. 30, § 8005 (requiring 75% of renewable energy by 2032); R.I. Gen. Laws § 39-26-4 (requiring 38.5% renewable energy by 2035); N.H. Rev. Stat. Ann. § 362-F:3 (requiring 25.2% renewable energy by 2025); Me. Rev. Stat. tit. 35-A § 3210 (requiring 40% renewable energy by 2017).

As part of these policies, many states direct their regulated utilities to enter into long-term contracts (typically 10 years or longer) with renewable energy generators.<sup>11</sup> Long-term contracts created pursuant to state renewable portfolio standards not only help utilities meet their renewable energy obligations, but also encourage the development of new renewable energy projects by providing investors with a guaranteed stream of revenue.<sup>12</sup> They are therefore critical to the growth of new renewable energy and states' abilities to meet their renewable portfolio standard goals.<sup>13</sup>

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<sup>11</sup> See, e.g., Vt. Stat. Ann. tit. 30, § 8005a (Vermont contract requirement).

<sup>12</sup> Drs. Jurgen Weiss & Mark Sarro, Brattle Group, *The Importance of Long-Term Contracting for Facilitating Renewable Energy Project Development* 8-9 (2013), [http://www.brattle.com/system/publications/pdfs/000/004/927/original/The\\_Importance\\_of\\_Long-Term\\_Contracting\\_for\\_Facilitating\\_Renewable\\_Energy\\_Project\\_Development\\_Weiss\\_Sarro\\_May\\_7\\_2013.pdf?1380317003](http://www.brattle.com/system/publications/pdfs/000/004/927/original/The_Importance_of_Long-Term_Contracting_for_Facilitating_Renewable_Energy_Project_Development_Weiss_Sarro_May_7_2013.pdf?1380317003), App., Ex. G. Although renewable energy facilities involve minor operating costs once they are built, the upfront costs can be significant. As a result, many investors have been reluctant to build or finance new renewable energy facilities, unless they receive certain financial assurances. *Id.*

<sup>13</sup> *Id.* at 23-28; see also Peregrine Energy Group, *Study on Long-Term Contracting Under Section 83 of the Green Communities Act* 4, 29-34 (Dec. 31, 2012), <http://www.mass.gov/eea/docs/doer/pub-info/long-term-contracting-section-83-green-communitiesa-act.pdf>, App., Ex. H (finding that, between 2005 and 2012, only one new renewable energy project was *not* built pursuant to a long-term contract).



According to a recent U.S. Department of Energy study, state renewable portfolio standards have been a key driver of innovation and growth in renewable energy in the United States, with 58% of new renewable energy projects since 1998 being driven by these policies.<sup>14</sup> Renewable portfolio standards have also already yielded significant benefits for the public, including an estimated \$2.2 billion in benefits from reduced greenhouse gas emissions and \$5.2 billion from reductions in other air pollutants.<sup>15</sup>

**B. The renewables exemption reduces costs and inefficiencies by allowing renewable resources developed pursuant to state clean energy policies to enter the forward capacity market**

ISO-NE's minimum offer price rule imposes a price floor on bids of new resources, based on technology type, participating in the region's forward capacity market auctions. In these auctions, which deal with the sale of future electricity-generating capacity, the rule operates as follows. First, ISO-NE sets a minimum bid price, known as the Offer Review Trigger Price, for each type of new

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<sup>14</sup> Ryan Wiser *et al.*, *Nat'l Renewable Energy Lab. & Lawrence Berkeley Nat'l Lab., A Retrospective Analysis of the Benefits and Impacts of U.S. Renewable Portfolio Standards* 1 (Jan. 2016), <https://www.nrel.gov/docs/fy16osti/65005.pdf>, App., Ex. I.

<sup>15</sup> *Id.* at 26-32.

resource.<sup>16</sup> The minimum bid price for each resource type reflects the lowest price that ISO-NE believes a new generator would need from the forward capacity market to break even financially, considering other available sources of revenue, costs typically incurred in developing that type of resource, and operating costs.<sup>17</sup>

Second, a generator interested in supplying capacity must bid into the forward capacity market auction at or above its assigned minimum bid price.<sup>18</sup> The assigned minimum bid price for new renewable resources is often higher than the capacity auction's "clearing" price, i.e. the bid price below which resources are selected in the auction to provide their capacity. *See ISO New England Inc.*, 142 FERC ¶ 61,107, at P 86 (2013). This is because even though renewable energy generators have low operating costs, building these facilities is often more capital intensive than maintaining existing fossil generation or building a natural gas-fired plant.<sup>19</sup> As a result, it is very difficult for a new renewable generator bidding at its assigned minimum bid price to enter the forward capacity market.

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<sup>16</sup> *See* ISO-NE, *FCM New Capacity Offer Price Development* 5, 10 (Feb. 2017) [https://www.iso-ne.com/static-assets/documents/2017/02/2017-02-16\\_fcm\\_offer-price-development-presentation.pdf](https://www.iso-ne.com/static-assets/documents/2017/02/2017-02-16_fcm_offer-price-development-presentation.pdf), App., Ex. J.

<sup>17</sup> *Id.* at 10, 25.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> *See supra* note 12.

At the same time, the number of new renewable generators in the region has grown over the past several years, in part because of state renewable portfolio standards and long-term contracts created pursuant to these policies. *See supra* Part I.A. Although these long-term contracts are intended to support state environmental and public health goals, generators that enter into these contracts do not need to recoup as much money from the forward capacity market as they would if they were not receiving contract revenue. In other words, an indirect consequence of these state-mandated contracts is that they provide new renewable generators with the financial ability to bid in the market's capacity auction at prices below their assigned minimum bid price.

Under the minimum offer price rule, however, this cannot happen. The rule prohibits new generators from considering the revenue from these contracts when formulating their bids. As a result, the rule effectively prohibits new renewable generators receiving revenue from portfolio standard contracts from submitting bids below their assigned minimum bid price, making it unlikely these generators will clear the forward capacity market auction.

Soon after the minimum offer price rule went into effect, ISO-NE realized that the inability of state-mandated renewable resources to clear the capacity auction created an "inherent conflict" with the goals of state clean energy policies and had the potential to create inefficient and costly outcomes. *ISO New England*

*Inc. & New England Power Pool Participants Comm.*, 147 FERC ¶ 61,173, at P 78 (2014). Namely, ISO-NE recognized that renewable resources will be built in order to meet renewable portfolio standard requirements regardless of whether the resources can enter the forward capacity market. If these state-mandated resources cannot clear the capacity auction, however, the market will not account for their future electricity-generating potential. This will send an incorrect signal to the market that more resources are needed to meet the region's future electricity requirements, when in fact no need exists, and lead to the unnecessary construction of new fossil fuel plants or the retention of existing fossil fuel-fired generators that would otherwise retire. *See ISO New England Inc. & New England Power Pool Participants Comm.*, 155 FERC ¶ 61,023, at P 25 (2016) (explaining ISO-NE's concern that the inability of renewable resources to enter the forward capacity market would result in the purchase of excess capacity in that market); *see also id.* at P 12 (quoting ISO-NE's expert testimony that "it would be economically inefficient [for the market] not to include" resources "built pursuant to state-sponsored initiatives . . . , because [it] would require the building of a second, redundant set of resources to meet the same need"). In addition to creating economic inefficiencies, the inability of state-mandated renewable resources to clear the forward capacity market auction would also unnecessarily increase costs for consumers, by requiring them to pay for both the renewable resources built

outside of the market to meet state portfolio standard targets and the fossil fuel resources that enter the market.

ISO-NE further recognized that, while state renewable portfolio standards may affect wholesale capacity prices, they were not enacted for this purpose. *Id.* at P 24. Rather, states have enacted these policies under their authority to oversee energy generation and utility resource planning, and to promote environmental and public health benefits. Without an exemption, the minimum offer price rule would undermine state clean energy goals by imposing economically inefficient costs on consumers and encouraging the retention and construction of fossil fuel-fired generators.

In light of these concerns, as well as other considerations not addressed in this brief, ISO-NE created a limited exemption for state-mandated renewable energy resources. *ISO New England Inc.*, 155 FERC ¶ 61,023, at P 1. As this Court is aware, the exemption allows up to 200 megawatts per year of capacity from new state-mandated renewable energy projects to bid in the forward capacity market auction without being subject to the minimum offer price rule. *Id.* at P 10.

Although Amici believe an unlimited exemption for state-mandated renewable resources would result in more efficient outcomes, the 200-megawatt exemption is also valuable for New England consumers and their states' efforts to promote clean energy.

**II. FERC’s finding that the renewables exemption is “just and reasonable” was not only supported by substantial evidence, but also consistent with precedent and FERC’s statutory obligations under the FPA**

In determining that the limited renewables exemption was “just and reasonable” under the FPA, FERC agreed with evidence presented by ISO-NE that, because of state renewable portfolio standards, without the exemption, the minimum offer price rule would likely result in surplus investments, unnecessarily raising consumers’ electricity costs. *ISO New England Inc. & New England Power Pool Participants Comm.*, 158 FERC ¶ 61,138, at P 9 (2017). FERC also based its decision on evidence that the exemption would not unreasonably lower market prices and was consistent with the purpose of the price floor rule. *ISO New England Inc.*, 147 FERC ¶ 61,173, at PP 81, 83. The Commission further noted that it had approved a similar exemption in the capacity market managed by another regional grid operator. *Id.* at P 81. These findings were consistent with precedent and FERC’s statutory obligations to ensure “just and reasonable” rates. *See* 16 U.S.C. § 824d(a). Further, while any one of these findings would have been sufficient grounds for FERC’s approval of the exemption, together they demonstrate that FERC had ample support for its decision.

**A. It was not arbitrary or capricious for FERC to base its decision on evidence that the renewables exemption would further consumer interests and state policies, while also assuring a reliable energy supply**

Petitioners incorrectly argue that it was arbitrary and capricious for FERC to consider state renewable energy policies and consumer interests in deciding that the exemption was just and reasonable. *See* Pet'rs' Br. at 25-28. It is well-settled that "setting a just and reasonable rate necessarily 'involves a balancing of the investor and the consumer interests,'" *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 262 (D.C. Cir. 2007) (quoting *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944)), and does not merely focus on the price-suppressive price effects that might flow from the decision, *see North Carolina v. FERC*, 584 F.2d 1003, 1012 (D.C. Cir. 1978) (evaluation of just and reasonable rates requires findings as to impact on consumers). Here, based on the evidence, FERC found that the renewables exemption "struck [the] appropriate balance" between these competing interests by protecting New England consumers, while also ensuring that the exemption would not unreasonably suppress market prices. *ISO New England Inc.*, 155 FERC ¶ 61,023, at P 36.

Specifically, FERC found that, without the exemption, consumers would be forced to pay twice: once for new renewable resources built pursuant to state renewable portfolio standards and then again for the fossil fuel resources ultimately

purchased in the forward capacity market auction. *ISO New England Inc.*, 158 FERC ¶ 61,138, at P 9; *see also ISO New England Inc.*, 155 FERC ¶ 61,023, at P 33; *supra* Part I.B. At the same time, the Commission found that the exemption would have a limited effect on market prices, citing factors that would create continued demand for other resources. *ISO New England Inc.*, 155 FERC ¶ 61,023, at P 26. The Commission determined that these mitigating factors would allow ISO-NE to secure enough reliable capacity to meet the region’s future electricity needs. *Id.* at P 28. FERC’s findings were reasonable and based on the evidence in the record.

Petitioners are also incorrect that the Commission’s attempt to “accommodate state public policy objectives . . . [was] an unprincipled departure from precedent” and its duties under the FPA. *See* Pet’rs’ Br. at 27. Federal court precedent establishes that states have authority to enact policies to promote renewable energy, and that FERC is required to coordinate with and complement these policies, instead of implementing measures that undo or undermine them. *See Conn. Light & Power Co. v. Fed. Power Comm’n*, 324 U.S. 515, 526 (1945) (noting that Congress intended for the FPA “to be a complement to and in no sense a usurpation of State regulatory authority . . . [and for] the [Commission] to receive and consider the views of State[s]”); *see also Panhandle E. Pipe Line Co. v. Pub. Serv. Comm’n*, 332 U.S. 507, 517-18 (1947) (holding that “federal regulation” of



the energy sector “had no purpose or effect to cut down state power”). As the Second Circuit explained in *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, “FERC’s and the states’ respective areas of jurisdiction [under the FPA] were designed to coordinate with each other,” in order to avoid “ineffective regulation at either [the state or federal] level.” 754 F.2d 99, 103 (2d Cir. 1985); *see also Hughes v. Talen Energy Mktg.*, 136 S. Ct. 1288, 1300 (2014) (Sotomayor, J., concurring) (describing the FPA as a “collaborative federalism” statute that “envisions a federal-state relationship marked by interdependence”). For this reason, when setting wholesale rates, FERC may “take into account activities it cannot regulate,” such as state clean energy policy objectives. *Rochester Gas & Elec. Corp.*, 754 F.2d at 103. The minimum offer price rule undermines state renewable portfolio standards by preventing state-mandated renewable resources from clearing the capacity auction, and encouraging the construction and retention of fossil fuel-fired generators. *See supra* Part I.B. Accordingly, to the extent FERC considered the rule’s negative effects on these policies, this was consistent with its statutory obligations to respect states’ jurisdictional authority under the Act and avoid counteracting legitimate state policies.

In fact, approving the exemption is the minimum that FERC could have done to respect states’ policy goals under the FPA, while also carrying out its responsibility to ensure just and reasonable wholesale rates. FERC could have

found, for example, that the 200-megawatt exemption was too small, and that a larger exemption would better prevent inefficiencies. To date, the number of renewable resources entering the forward capacity market auction has not met the exemption's 200-megawatt threshold. If the amount of new renewable resources exceeds the exemption, however, these resources will be assigned a minimum bid price, and may be prevented from clearing the auction. *See supra* Part I.B. This would lead to the same over-investment in non-renewable resources and adverse consumer impacts that FERC sought to avoid by approving the exemption. FERC could have also reconsidered whether the minimum offer price rule should apply to renewable resources at all, obviating the need for an exemption. *See infra* Part II.B (noting that the market manipulation concern that prompted ISO-NE to establish the rule is not implicated by state environmental policies). Either of these outcomes would have been consistent with FERC's duties to ensure just and reasonable rates. Petitioners' position, on the other hand, disregards the collaborative federalism purpose of the FPA, and would result in an unjust and unreasonable outcome by undercutting states' regulatory authority, *see Conn. Light & Power Co.*, 324 U.S. at 526, resulting in unnecessary costs and inefficiencies.

Further, FERC's consideration of state policy objectives is consistent with its prior orders, which have sought to balance the need to "incent economically-efficient existing resources to stay in the capacity market and new resources to

enter,” while also “accommodat[ing] the ability of states to pursue their policy goals.” *ISO New England Inc.*, 155 FERC ¶ 61,023, at P 23 (citing *New England States Comm. on Elec. v. ISO New England Inc.*, 142 FERC ¶ 61,108, at P 35 (2013)); *see also N.Y. Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170, at P 137 (2010) (“[I]t is not [the Commission’s] intent to interfere with state programs that further specific legitimate policy goals.”); *Cal. Indep. Sys. Operator Corp. Green Energy Express LLC & 21st Century Transmission Holdings, LLC*, 133 FERC ¶ 61,224, at P 2 (2010) (finding that regional grid operator’s plan was a “positive step toward . . . enabl[ing] California utilities to meet California’s ambitious renewable portfolio standards and other environmental goals”).

In a 2010 Notice of Proposed Rulemaking seeking comment on potential changes to FERC’s electric transmission planning and cost allocation requirements, FERC emphasized that “the failure to account for [state] public policy requirements in the transmission planning process may result in undue discrimination and rates, terms, and conditions of service that are not just and reasonable.” *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utilities*, 131 FERC ¶ 61,253, at P 37 (2010). After receiving extensive comments from industry participants and other stakeholders, the Commission adopted a final rule that requires regional grid operators like ISO-NE to create procedures to identify transmission needs driven by public policy

requirements established by state or federal laws or regulations. Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, 76 Fed. Reg. 49842 (Aug. 11, 2011). In *S.C. Pub. Serv. Auth. v. FERC*, this Court held that FERC's final rule was not arbitrary or capricious, and found that the Commission "reasonably determined that regional planning must include consideration of . . . [state] public policy requirements." 762 F.3d 41, 49 (D.C. Cir. 2014); *see also Emera Me. v. FERC*, 854 F.3d 662, 674 (D.C. Cir. 2017) (requiring ISO-NE to consider transmission needs that arise from state public policy requirements was a "reasonable implementation" of FERC's final rule).

In other words, FERC's own precedent and rules, affirmed by this Court, acknowledge that the failure to account for state policies can result in unjust and unreasonable rates. FERC followed this precedent, and its duties under the FPA, when it determined that the renewables exemption reasonably accommodates state policy goals. If FERC had ignored the impact of ISO-NE's forward capacity market on state renewable portfolio standards, on the other hand, it would have violated the FPA and created unjust and unreasonable consequences for both states and consumers.

**B. It was not arbitrary or capricious for FERC to base its decision on evidence that state-mandated renewable energy poses no risk of market manipulation**

FERC's decision to approve the exemption, based on evidence that renewable resources do not pose a risk of market manipulation, was also reasonable and consistent with its prior orders. *See ISO New England Inc.*, 158 FERC ¶ 61,138 at P 10. Among the entities that purchase capacity in the forward capacity market are "net-buyers." These entities sell more electricity to consumers than they generate themselves, and therefore must purchase capacity from other suppliers. As net-buyers, they would prefer to lower capacity prices. The purpose of the minimum offer price rule is to prevent a net-buyer from bidding capacity resources into the forward capacity market auction at artificially low prices, to suppress the auction clearing price and reduce the entity's overall costs. *See id.* at P 2; *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 24 (2011).

FERC has determined that state policies that support renewable resources like wind and solar do not create a net-buyer concern. *ISO New England Inc.*, 155 FERC ¶ 61,023, at P 33 (citing *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, at P 36 (2015)). As FERC recognized in its orders approving the renewables exemption, renewable resources would be inefficient market manipulation tools because of both their high upfront costs and their variable nature (wind and sun are not always available), which reduces the

amount of capacity renewable energy generators can bid into the auction. *Id.*; see also *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, at P 153 (2011) (noting that “wind and solar resources would need to offer as much as eight times the [ ] capacity [of other resources] in order to achieve the same price suppression effect”). It would therefore be very difficult for a net-buyer to lower its overall costs by bidding new renewable resources into the auction at artificially low prices.

For these reasons, in 2013, FERC approved a minimum offer price rule in another regional capacity market that applies to new natural gas resources only and does not apply to new renewable resources. FERC found that excluding renewable resources from that market’s price floor rule was just and reasonable, and served the purpose of the rule by “targeting those resources most likely to raise price suppression concerns (i.e., gas-fired resources).” *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 26 (2013). At the same time, FERC rejected arguments by non-renewable energy generators that the market’s minimum offer price rule should apply to all resources. *Id.* at P 166. FERC’s approval of ISO-NE’s renewables exemption is consistent with that order.

### **III. Without the exemption, ISO-NE’s forward capacity market would unduly discriminate against state-mandated renewable resources**

Petitioners also object to FERC’s decision on the grounds that ISO-NE’s renewables exemption is “indefensibly discriminatory and preferential” because it authorizes the “uneconomic [market] entry” of state-mandated renewable

resources. Pet'rs' Br. at 49, 27. In fact, the opposite is true: The minimum offer price rule itself discriminates against resources by singling-out state-mandated renewable resources and not accounting for all the other resources that are, and have been, supported by government policies.

While ISO-NE's minimum offer price rule does not allow renewable energy generators receiving payments from state renewable portfolio standard contracts to account for such payments in calculating their forward capacity market auction bids, new generators that receive certain other forms of government support can incorporate these benefits into their bids. For example, a new fossil fuel-fired generator benefiting from lower fuel expenses due to federal tax incentives that reduce the costs of oil and natural gas production can account for these benefits. Additionally, existing resources that previously received state or federal benefits prior to the minimum offer price rule's adoption can continue to participate in the market without being subject to the rule. *See, e.g., ISO New England Inc.*, 158 FERC ¶ 61,138, at P 38 n.97 (discussing historical entry of 1100 megawatts of zero-priced state-sponsored natural gas into ISO-NE's capacity market auction "that would be prohibited under today's [minimum offer price rule]"). As a result, new and existing resources developed pursuant to these other government policies can bid into the market at lower prices than they could if they did not receive, or

had not received, government support. However, resources developed pursuant to state renewable portfolio standard contracts cannot.

In other words, the argument that the renewables exemption unfairly suppresses prices in ISO-NE's capacity auction is based on the false premise that there are no other government policies affecting wholesale market prices.

However, ISO-NE's forward capacity market, is not, and has never been, a "free market" unencumbered by government intervention. Government incentives and subsidies for energy resources have been around for a long time and have assisted virtually all resources in electricity markets.<sup>20</sup> As former Commission Chairman Norman Bay explained in FERC's rehearing order in this case,

The fact of the matter is that all energy resources receive federal subsidies, and some resources have received subsidies for decades. Yet the [minimum offer price rule] is only concerned with state subsidies, not federal ones, though both can have a similar impact on markets.

*ISO New England Inc.*, 158 FERC ¶ 61,138 (C. Bay, concurring).

A review of recent U.S. energy incentives and subsidies illustrates the influence of government policies on energy markets, and shows that the minimum offer price rule's focus on certain types of state support, such as renewable

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<sup>20</sup> Joshua P. Fershee, *Promoting an All of the Above Approach or Pushing (Oil) Addiction and Abuse?: The Curious Role of Energy Subsidies and Mandates in U.S. Energy Policy*, 7 *Env't'l & Energy L. & Pol'y J.* 125, 134 (2012), App., Ex. K.



portfolio standards, is unjustified. According to a recent report by Oil Change International, in 2015 and 2016, U.S. federal and state governments provided \$20.5 billion in production subsidies to the oil, gas, and coal industries.<sup>21</sup> Federal subsidies for fossil fuels during these years included support for exploration of new fossil fuel sources, tax credits for using carbon pollution to pump more oil, low-cost leasing for coal production on public land, and deductions for costs related to oil and natural gas manufacturing.<sup>22</sup> And while federal tax credits for renewable energy resources are set to expire over the next five years, tax breaks for fossil fuels are permanent.<sup>23</sup> In fact, one of the largest fossil fuel subsidies—a deduction for intangible costs of oil and natural gas drilling—has existed as part of the country’s tax policy for over 100 years.<sup>24</sup> The nuclear industry has also benefited from an array of government incentives, including loan guarantees that allow

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<sup>21</sup> Oil Change International, *Dirty Energy Dominance: Dependent on Denial 5* (Oct. 2017), [http://priceofoil.org/content/uploads/2017/10/OCI\\_US-Fossil-Fuel-Subs-2015-16\\_Final\\_Oct2017.pdf](http://priceofoil.org/content/uploads/2017/10/OCI_US-Fossil-Fuel-Subs-2015-16_Final_Oct2017.pdf), App., Ex. L.

<sup>22</sup> *Id.* at 9, 17.

<sup>23</sup> *Id.* at 12.

<sup>24</sup> *Id.*

investors to obtain lower-cost debt, special depletion allowances for uranium mining, and production tax credits.<sup>25</sup>

These government incentives and subsidies are reducing the costs of non-renewable fuel production, and in turn the costs of electricity for fossil fuel-fired generators—just as long-term contracts created pursuant to state renewable portfolio standards are reducing costs for renewable generators. A 2011 study by the Union of Concerned Scientists, for example, found that without government subsidies to the nuclear industry between 1960 and 2008, many nuclear reactors would never have been built.<sup>26</sup> The economic competitiveness of coal, meanwhile, has declined significantly over the past decade due to the rise in energy efficiency, competition from other resources, and regulations to improve air quality. Yet, federal laws and regulations have helped to keep this industry afloat. The Tax Code, for example, continues to encourage investment in coal by allowing individuals to treat income from coal mines as a capital gain instead of regular income, which would be taxed at a higher rate, 26 U.S.C. § 631, and by providing tax credits for the construction of advanced coal plants, *id.* § 48A-B.

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<sup>25</sup> Doug Koplow, *Nuclear Power: Still Not Viable Without Subsidies* 5-7 (2011) [http://www.ucsusa.org/sites/default/files/legacy/assets/documents/nuclear\\_power/nuclear\\_subsidies\\_report.pdf](http://www.ucsusa.org/sites/default/files/legacy/assets/documents/nuclear_power/nuclear_subsidies_report.pdf), App., Ex. M.

<sup>26</sup> *Id.* at 3.

In sum, state and federal policies have aided both traditional fuels and renewable energy, and these policies are likely to continue into the foreseeable future. Currently, the minimum offer price rule only accounts for the market impact of certain state energy policies, such as renewable portfolio standards, while ignoring other preferential state and federal policies that support (or previously supported) other resources. Accordingly, Petitioners' claim that the exemption for renewables will "distort" the market should be disregarded because prices in the wholesale market already are affected by the myriad of government policies that have supported various energy resources for decades.

### **CONCLUSION**

For the foregoing reasons, NRDC and CLF urge the Court to affirm FERC's order.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,490 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface with serifs using Microsoft Office Word 2016 in Times New Roman 14-point type.

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**PROOF OF SERVICE**

I HEREBY CERTIFY THAT on November 28, 2017, I filed the foregoing **Brief Amicus Curiae of Natural Resources Defense Council and Conservation Law Foundation in Support of Respondent** with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

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