

**ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED**

Nos. 15-1139 and 15-1141 (consolidated)

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

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EMERA MAINE, FORMERLY KNOWN AS BANGOR HYDRO-ELECTRIC COMPANY, ET AL.,  
PETITIONERS IN 15-1139

NEW ENGLAND STATES COMMITTEE ON ELECTRICITY, INC., ET AL.,  
PETITIONERS IN 15-1141

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT

LS POWER TRANSMISSION, LLC, ET AL.,  
INTERVENORS

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

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**REPLY BRIEF FOR PETITIONERS IN NO. 15-1141**

John Michael Adragna  
Phyllis G. Kimmel  
Jeffrey K. Janicke  
McCarter & English, LLP  
1015 Fifteenth Street, N.W., 12<sup>th</sup> Floor  
Washington, DC 20005  
(202) 753-3400  
[pkimmel@mccarter.com](mailto:pkimmel@mccarter.com)

Jason Marshall  
General Counsel  
New England States Committee  
on Electricity, Inc.  
655 Longmeadow Street  
Longmeadow, MA 01106  
(617) 913-0342  
[jasonmarshall@nescoe.com](mailto:jasonmarshall@nescoe.com)

*Attorneys for New England States  
Committee on Electricity, Inc.*

*Attorney for the New England States  
Committee on Electricity, Inc.*

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Robert Snook, AAG  
Office of the Attorney General  
Ten Franklin Square  
New Britain, CT 06051  
(860) 827-2657  
[Robert.Snook@ct.gov](mailto:Robert.Snook@ct.gov)

*Attorney for the Connecticut  
Department of Energy and  
Environmental Protection*

Maura Healey  
Massachusetts Attorney General  
Cecile M. Fraser, Counsel  
Special Assistant Attorney General  
Jeffrey M. Leupold, Senior Counsel  
Massachusetts Department of Public  
Utilities  
One South Station, Fifth Floor  
Boston, MA 02110  
(617) 305-3621  
[Cecile.Fraser@state.ma.us](mailto:Cecile.Fraser@state.ma.us)  
[Jeffrey.Leupold@state.ma.us](mailto:Jeffrey.Leupold@state.ma.us)

*Attorneys for the Massachusetts  
Department of Public Utilities*

Leo J. Wold  
Assistant Attorney General  
150 South Main Street  
Providence, RI 02903  
(401) 274-4400, ext. 2218  
[lwold@riag.ri.gov](mailto:lwold@riag.ri.gov)

*Attorney for the Rhode Island Public  
Utilities Commission*

Clare Kindall, AAG  
Office of the Attorney General  
Ten Franklin Square  
New Britain, CT 06051  
(860) 827-2683  
[Clare.kindall@ct.gov](mailto:Clare.kindall@ct.gov)

*Attorney for the Connecticut Public  
Utilities Regulatory Authority*

F. Anne Ross  
General Counsel  
New Hampshire Public Utilities  
Commission  
21 South Fruit Street, Suite 10  
Concord, New Hampshire 03301-2429  
(603) 271-2431  
[f.anne.ross@puc.nh.gov](mailto:f.anne.ross@puc.nh.gov)

*Attorney for the New Hampshire Public  
Utilities Commission*

Edward McNamara  
Regional Policy Director  
Vermont Department of Public Service  
112 State Street  
Montpelier, VT 05620  
(802) 828-4007  
[ed.mcnamara@state.vt.us](mailto:ed.mcnamara@state.vt.us)

*Attorney for the Vermont Department of  
Public Service*

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Authorities upon which we chiefly rely are marked with asterisks.

## GLOSSARY

Br.	Brief
Compliance Filing	Order No. 1000 Compliance Filing of ISO New England Inc. and the Participating Transmission Owners Administrative Committee, Docket Nos. ER13-193-000, <i>et al.</i> (October 25, 2012), R. 1
Compliance Order	<i>ISO New England Inc.</i> , 143 FERC ¶ 61,150 (2013), R. 53
FPA	Federal Power Act
FERC	Federal Energy Regulatory Commission
ISO-NE	ISO New England Inc.
NESCOE	New England States Committee on Electricity, Inc.
OATT	Open Access Transmission Tariff
Order No. 1000 Order No. 1000-A	<i>Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities</i> , Order No. 1000, FERC Stats. & Regs. ¶ 31,323, 76 Fed. Reg. 49,842 (Aug. 11, 2011), <i>order on reh'g</i> , Order No. 1000-A, 139 FERC ¶ 61,132, 77 Fed. Reg. 32,184 (May 31, 2012), <i>order on reh'g</i> , Order No. 1000-B, 141 FERC ¶ 61,044, 77 Fed. Reg. 64,890 (Oct. 24, 2012), <i>aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC</i> , 762 F.3d 41 (D.C. Cir. 2014).
Public policy requirements	Those policy requirements established by state or federal laws and regulations, including enacted statutes and regulations promulgated by a relevant jurisdiction, whether within a state or at the federal level, and including duly enacted laws or regulations passed by a local governmental entity, such as a municipal or county government.

Regional System Plan	ISO-NE’s determination, over a ten-year horizon, of the region’s electricity system needs and plans for meeting those needs, including a list of selected transmission facilities
Rehearing Order	<i>ISO New England Inc.</i> , 150 FERC ¶ 61,209 (2015), R. 101
State Agencies	The Commissioner of the Connecticut Department of Energy and Environmental Protection, the Connecticut Public Utilities Regulatory Authority, the Department of Public Utilities of the Commonwealth of Massachusetts, the Rhode Island Public Utilities Commission, the State of New Hampshire Public Utilities Commission, and the Vermont Public Service Department
States	NESCOE and the State Agencies

## SUMMARY OF ARGUMENT

FERC's brief generally repeats the arguments made in the orders below but fails to address directly the core arguments made by the States. Instead, FERC attempts to portray the States as challenging FERC's authority over interstate transmission. The States have made no such argument. The States narrowly confined their objection to a specific action that FERC took, *i.e.*, imposing an obligation on ISO New England Inc. ("ISO-NE") to select a public policy-driven transmission project in the Regional System Plan for cost allocation purposes. ISO-NE must select a project unless, in a very unlikely scenario, ISO-NE were to determine that notwithstanding the highly integrated regional transmission system in New England, a local transmission project is the more efficient or cost-effective solution.<sup>1</sup> Even in this unlikely case, the result is still a substantive outcome. FERC has thus converted this component of Order No. 1000<sup>2</sup> from a process-only

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<sup>1</sup> Reference in this brief to "local" projects, alternatives, or solutions describes projects considered through a single utility's (and not ISO-NE's) transmission planning process. *See* States Br. at 16 (ISO-NE has planning authority over higher voltage regional transmission facilities serving the whole New England region, while each individual public utility owner in New England has planning authority over lower voltage local transmission facilities serving its utility's customers or connecting electrical power resources to the regional system).

<sup>2</sup> *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323, 76 Fed. Reg. 49,842 (Aug. 11, 2011) ("Order No. 1000"), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, 77 Fed. Reg. 32,184 (May 31, 2012) ("Order No. 1000-A"), *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044, 77

rule, under which transmission providers are required only to identify and evaluate transmission solutions to public policy needs, to one that results in the selection of a transmission project. This selection is a critical milestone for that project to secure financing and move to the next steps of project construction.

FERC fails to rebut the States' arguments that this action exceeds FERC's authority under the Federal Power Act ("FPA"), as FERC may not determine how a state should implement its own public policies. FERC also fails to rebut the States' arguments that the challenged orders impermissibly expand the scope of the Order No. 1000 rulemaking, contrary to the Administrative Procedure Act, 5 U.S.C. § 553. As the States demonstrated in their initial brief, FERC, without statutory authority, has stripped New England states of their ability to decide whether, how and at what cost to satisfy their own public policies and what project or projects might be the optimal or even preferred means to advance their own statutory requirements.

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Fed. Reg. 64,890 (Oct. 24, 2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) ("*South Carolina*").



## ARGUMENT

### **I. FERC Has Substantively Failed to Rebut the States' Argument that the Challenged Orders Expanded the Requirements of Order No. 1000.**

#### **A. The States' Threshold Issue for Review Is FERC's Unlawful Expansion of Order No. 1000 by Requiring Project Selection.**

The States illustrated in their initial brief (at 25-34) how the challenged orders unlawfully expanded the scope of Order No. 1000. FERC's brief seeks to shift the focus of the argument to *which entity should select* a public policy-driven transmission project (*i.e.*, ISO-NE) and away from the real issue, *i.e.*, whether FERC's rulings unlawfully obligate *the selection of* a public policy-driven transmission project. Br. at 3-4, 21-23, 56-59. FERC mischaracterizes the States' petition at the outset of its brief (at 3-4) to comport with this line of argument. The Court should disregard this gambit.

The States demonstrated that FERC expanded the scope of the Order No. 1000 directives in a subsequent compliance proceeding by requiring, for the first time, that ISO-NE select a specific project at the culmination of the public policy planning process. The States had asked FERC to clarify that this was not FERC's intent (R. 26 at 22), but the Rehearing Order failed to so clarify. Instead, the Rehearing Order included (at P 126, R. 101 at 60) a double-negative statement that can only mean that ISO-NE is required to select a transmission project in the regional transmission plan for purposes of cost allocation unless ISO-NE were to

find the regional transmission solution less efficient or cost-effective than a local transmission alternative, a highly unlikely outcome in New England as explained in the States' initial brief (at 29-30).

FERC's arguments that ISO-NE is the appropriate entity to select specific projects to satisfy state policies ignore the fundamental unlawfulness of the agency's expansion of Order No. 1000. FERC includes several other statements that might also distract from the fundamental issues before the Court. For example, FERC implies that the States are asking the Court to impose a package of proposed changes already rejected by FERC as part of the compliance process (Br. at 21-23, 55-57) and that the States are challenging FERC's determination that ISO-NE may not delegate its obligation to evaluate potential solutions to transmission needs driven by public policy requirements (*see id.* at 58). Neither proposition is correct. The only issue before this Court is FERC's unlawful expansion of Order No. 1000 by leaping from that order's requirement that ISO-NE *consider* public policy requirements in the regional planning process (*see, e.g.*, Order No. 1000-A at PP 320-321) to dictating a substantive outcome by imposing an affirmative obligation on ISO-NE to *select* a specific transmission project in the regional plan for cost allocation purposes (except, again, in the unlikely event that there is a local transmission solution that is more efficient or cost-effective than the regional transmission solution).

**B. FERC’s Claim That the Challenged Orders Did Not Require Project Selection Is Contrary to the Very Language of those Orders and Is Contradicted by the Mechanisms It Has Required ISO-NE to Employ.**

FERC attempts to rebut the States’ claim that the agency impermissibly expanded Order No. 1000 by arguing that its rulings did not focus on the “outcome” of the evaluation of policy-driven transmission solutions (Br. at 22), and “did not . . . mandate that the transmission provider select a project.” *Id.*; *see also id.* at 59. These arguments are contradicted by the language of the challenged orders and by the tariff provisions that FERC has required ISO-NE to implement.

FERC’s brief fails to address the operative sentence in the Rehearing Order where, although purporting to clarify otherwise, FERC confirms that it is, in fact, requiring a substantive outcome:

We . . . provide clarification that, if ISO-NE determines that there is not a more efficient or cost-effective solution to transmission needs driven by public policy requirements in the regional transmission planning process, ISO-NE need not select a transmission project in the regional transmission plan for purposes of cost allocation.

Rehearing Order at P 126, R. 101 at 60.

The States explained in their initial brief (at 29-30) that, despite FERC’s circuitous language, there is only one reasonable interpretation of this ruling: FERC permits ISO-NE *not* to select a project *only* if ISO-NE finds there is not a more efficient or cost-effective transmission solution (*i.e.*, when a local

transmission solution is determined to be more efficient or cost-effective than the regional solution).<sup>3</sup> In every other circumstance, ISO-NE *must* select a project to meet a public policy objective. Moreover, whether a regional project or local transmission alternative is selected as the solution to a public policy-driven need, a substantive outcome must be reached. Such a result is divorced from the process-only description of Order No. 1000 that FERC characterizes earlier in its brief (at 11, 14), and upon which this Court relied in upholding Order No. 1000.<sup>4</sup> *See* States Br. at 28-29 (citing *South Carolina*, 762 F.3d at 89, 91).

FERC asserts that it explicitly rejected in the Rehearing Order any interpretation that it mandated project selection (Br. at 59, citing to Rehearing Order at P 126, R. 101 at 60), citing a particular sentence of the order. But that sentence cannot be read in isolation. FERC’s cited language immediately follows the “clarifying” declaration of Paragraph 126 discussed above, which, as explained, can only be read to require ISO-NE to select a project for inclusion in the Regional System Plan, unless a local project is found to be more efficient or cost-effective—in either case, a substantive outcome.

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<sup>3</sup> As the States explained, this “off-ramp” is essentially non-existent in New England given the fact that the ISO-NE regional planning process was expressly designed to identify regional facilities that were more efficient or cost-effective than local projects. Br. at 30-31; *see also id.* at 15-16.

<sup>4</sup> As noted in the States’ initial brief (at 10, 42), NESCOE did not oppose these procedural reforms to the transmission planning process as FERC had originally articulated them.

FERC's claim that it is not requiring project selection is belied by the public policy planning structure that FERC mandated for New England. FERC acknowledges that it "directed the filing parties to submit a compliance filing to modify the process for public policy-driven projects." Br. at 18. This included removing NESCOE's proposed role in identifying "potential public policy-driven solutions that it would like to have further evaluated" and instead requiring that ISO-NE be the entity that selects projects. *Id.* at 22. However, FERC fails to acknowledge that its rulings have established a process that inevitably culminates in a substantive outcome: (1) once transmission needs driven by public policy requirements are identified, ISO-NE studies potential solutions to meet those needs;<sup>5</sup> (2) once the study is complete, ISO-NE issues a solicitation for projects to meet the public policy needs;<sup>6</sup> (3) after evaluating the responses to the solicitation, ISO-NE identifies the most efficient or cost-effective solution to that need;<sup>7</sup> and (4)

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<sup>5</sup> Pursuant to Section 4A.2 of the public policy planning process, ISO-NE prepares a proposed scope for the public policy transmission study, and pursuant to Section 4A.3, ISO-NE performs the initial phase of the public policy transmission study. *See* R. 68 at 177.

<sup>6</sup> Pursuant to Section 4A.4, ISO-NE provides the results of the public policy transmission study to qualified transmission project sponsors for their use in preparing stage-one proposals to develop the project(s). R. 68 at 178. Pursuant to Section 4A.5, ISO-NE performs a preliminary feasibility review of each proposal, and lists the stage-one proposals that meet specified criteria. R. 68 at 178-181.

<sup>7</sup> Pursuant to Section 4A.7, ISO-NE reports the preliminary stage-two solutions to the planning advisory committee. R. 68 at 182-183. Pursuant to Section 4A.8(a), ISO-NE's identification of the preferred solution "will select the project that best

in the absence of an alternative local project that is more efficient or cost-effective, ISO-NE will “include the project as a Public Policy Transmission Upgrade in the Regional System Plan.”<sup>8</sup>

As ISO-NE has acknowledged, inclusion in the Regional System Plan has meaning: It entitles a project to regional cost allocation and thus is a material and required step towards construction. *See* States Br. at 8 (citing Compliance Filing, R. 1 at 9). Indeed, a project developer invests in and works through the prolonged ISO-NE process for the purpose of being selected and included in the Regional System Plan. FERC, nonetheless, ignores the significance of a project being placed in New England’s Regional System Plan. *See* Br. at 11 (“Nothing in Order No. 1000 . . . requires that a facility in a regional plan be built.”), 61. The States explained how placing a project in New England’s Regional System Plan “is a critical and material step toward project financing and construction, allowing the costs of a project to be recovered from all customers taking regional network service under the ISO-NE OATT and triggering a series of next steps including application for state siting review.” States Br. at 36 (footnote omitted); *see also id.* at 7-9, 36. FERC, however, fails to confront this direct nexus between the

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addresses the identified Public Policy Requirement while utilizing the best combination of electrical performance, cost, future system expandability and feasibility to meet the need in the required timeframe.” R. 68 at 183.

<sup>8</sup> *See* Section 4A.8 (a), R. 68 at 183.

operation of New England's Regional System Plan and project construction.

Under the structure FERC has required, once the evaluation process commences, it essentially acts on autopilot through selection of a project for purposes of cost allocation and inclusion in the Regional System Plan.

Once ISO-NE places a project in the Regional System Plan based on its judgment of state policy requirements, states may be forced to be more cautious about pursuing other more cost-effective non-transmission approaches to meeting policy requirements. Even if less expensive options were available, with a pending ISO-NE transmission solution, there would be concern about increasing overall costs to consumers by having duplicate solutions to meet the same need.

The States have explained that ISO-NE, the entity that FERC charged with implementing the public policy planning process, shared the States' view that the Compliance Order expanded the requirements of Order No. 1000 by imposing an obligation to select projects. States Br. at 27 (citing R. 57 at 55). Certainly, other interests, particularly those that stand to gain millions or billions of dollars through project development, will press the same interpretation absent a definitive ruling from FERC, on remand, that it is requiring only what this Court interpreted as the Order No. 1000 mandate, *i.e.*, "*processes for identifying and evaluating public policies that might affect transmission needs*" (*South Carolina*, 762 F.3d at 91 (emphasis in original)), and nothing more.

## **II. FERC’s Undisputed Authority over Interstate Transmission Planning and Cost Allocation Does Not Give FERC License to Decide how State Policies Should Be Implemented.**

The rules under review require ISO-NE to make judgments about how state policies are to be executed. As the States have explained, this ruling represents an unlawful encroachment into state authority. It exceeds the limits of FERC’s jurisdiction under the FPA, 16 U.S.C. § 791a, *et. seq.*, and implicates the constitutional boundaries of federal authority. States Br. at 34-43.

FERC takes two approaches in an attempt to rebut the States’ claim, neither of which demonstrates that the FPA grants FERC the power to implement state policies or to direct ISO-NE to supplant states’ decision-making regarding the most efficient or cost-effective way to implement state policies.

### **A. Contrary to FERC’s Characterization, the Challenged Orders Require ISO-NE Selection of Transmission Projects to Meet State Public Policy Needs, Thus Requiring Substantive Outcomes and Infringing on State Authority.**

FERC doubles down on its claim that the challenged orders required only a “consideration” of policy-driven transmission needs. Br. at 60-62. It states that “ISO New England would not make judgments about state policies or the means by which States would satisfy their policy objectives; rather, it would consider ‘only *transmission needs* driven by public policy requirements’ – ‘a role appropriate for its function as a regional transmission organization and independent system operator.’” *Id.* at 61-62 (emphasis in original) (quoting Rehearing Order at P 133,



R. 101 at 64). But as explained above and in the States' initial brief (at 7-9, 30-31), the effect of the changes mandated by the orders under review is that, once the process for evaluating potential solutions commences, ISO-NE is ultimately required to select a project. Once the "go" button is pressed on the study process, in light of FERC's rulings, an ISO-NE-selected project will be placed in the Regional System Plan except in the unlikely event a local alternative is found to be more efficient or cost-effective. Thus, FERC's contention that the challenged orders only require ISO-NE to "consider" policy-driven transmission needs is not accurate.

Selecting a transmission project on the basis that it is the most efficient and cost-effective transmission solution to meet a state public policy requirement *is* making a judgment about the best means to satisfy that particular state's law or regulation. Such selection requires a choice of one specific type of infrastructure solution to satisfy a state's public policy. Once the transmission solution is selected, other non-transmission and non-utility related solutions may be precluded. For example, as illustrated in the States' initial brief (at 38-39), some states have set greenhouse gas limits as a matter of public policy, reflected in those states' laws. Based on this identified public policy, ISO-NE may study transmission projects to interconnect with clean energy resources (*e.g.*, wind) and determine which of those projects is the most efficient or cost-effective. However,

that solution would fail to account for other mechanisms a state might prefer to pursue to achieve its emissions reductions, such as more proximate distributed generation (*e.g.*, solar) or solutions through non-energy sectors (*e.g.*, transportation and buildings).

As discussed above (*supra* at 9), ISO-NE's placement of a project in the Regional System Plan could limit a state's ability to pursue other, less costly options. A state's preferred solution to address its own public policy requirements may be based on how the solution interacts with and advances other state policies as well, such as economic development, job growth, tax revenue, remediation of underutilized lands, and so forth. The state's preferred solution may not include a transmission project at all, notwithstanding that ISO-NE may have found a particular transmission project to be more efficient or cost-effective than others. The act of selecting a transmission project to move forward requires ISO-NE inevitably to substitute its judgment for that of state authorities over how to best implement a particular state's public policies.

The structure required by FERC in the challenged orders unlawfully relegates that state to the same non-decisional role in ISO-NE's public policy transmission planning process accorded to private sector stakeholders in New England. The Court should not permit this overstepping of FERC's authority.

Neither ISO-NE nor FERC is designated by states to implement state laws or regulations, and the FPA provides no such authority.

States' authority in connection with state public policy does not begin and end with "developing" or "setting" policies, as FERC suggests. *See* Br. at 23 ("States continue to be able to exercise their traditional authority to develop public policy . . . ."), 60 ("The Commission . . . appropriately respected the States' prerogative to set public policy . . . ."). States undeniably have the authority and obligation to *implement* their own public policies as well. FERC focuses on the fact that Order No. 1000 has left to states the ability to develop and set public policies. Its argument ignores that after state legislatures develop and set policies, it is the essential function of the executive branch of state governments to execute them. FERC's claim to respect state authority by respecting only a state's ability to develop public policies – and overlooking a state's ability to execute those policies – reflects a deeply flawed and unsupported view of the constitutional obligations of the executive branch of state governments and the demarcation between federal and state jurisdiction.

FERC's claim that it "appropriately respected the States' prerogative to set public policy and their traditional authority over siting, permitting, and construction of transmission facilitates" (Br. at 60; *see also id.* at 23, 61) misses the mark. The States have not asserted that the challenged orders invade those specific

state authorities. FERC's claim is a distraction from the narrow inquiry at issue in this case, *i.e.*, whether, by requiring ISO-NE to select specific projects to satisfy public policies, the orders on review exceed the bounds of FERC's authority. FERC's brief never comes to grips with the argument made by the States.

To the extent that FERC's implication (Br. at 23, 61) is that the existence of state authorities such as denying permits or siting approval constitutes a "silver bullet" that states can use if they disagree with a state public policy-driven project that ISO-NE selects, the States have already corrected this misinterpretation. The States explained that:

There is no assurance whatsoever of alignment between the location of an ISO-NE-selected transmission upgrade to meet a state's policy objectives and that state's siting jurisdiction. In other words, while State A could choose not to site transmission within its boundaries, there is no certainty that a transmission project that ISO-NE selects to meet State A's policy needs would be located within State A's borders and thus subject to its permitting requirements. Accordingly, the project ISO-NE selects in furtherance of State A's policy objectives might still move forward even if state officials in State A object to such project on economic, environmental or other grounds, and State A's consumers would still be responsible for paying for a portion of the ISO-NE preferred transmission upgrades.

States Br. at 37. FERC does not rebut this potential outcome in its response.

Similarly, FERC's suggestion that NESCOE's role in identifying policies that drive transmission needs should mitigate the States' concerns about FERC

requiring ISO-NE to select state public policy-driven transmission projects (Br. at 61) is unpersuasive. As a threshold matter, affording the states a role in policy *identification* does not justify FERC expanding its authority by requiring ISO-NE to *select* state-policy driven transmission projects. Nor does it cure the need for FERC to provide notice and opportunity to comment before expanding the scope of a final rule. *See* States Br. at 31-33. In any case, NESCOE’s request for a study is just that – it is a request for information about the costs of potential transmission projects, not the endorsement of any particular project. As explained above, a state with policies at issue may ultimately not view *any* transmission project as its preferred means to advance a given state policy, but under FERC’s process, ISO-NE would nonetheless be required to select a project, as long as it is found to be more efficient or cost-effective than a local transmission solution.

**B. FERC’s Authority Over Interstate Transmission and Cost Allocation Does Not Grant FERC the Authority to Determine How to Implement State Public Policies.**

FERC argues that if “the States are claiming that they must be entitled to determine whether to select a project for cost allocation purposes . . . that contention is without merit.” Br. at 62 (citation omitted). The States make no such claim. What the States contend is that the process FERC established in the orders on review results in ISO-NE selecting a transmission project in the Regional System Plan for purposes of cost allocation that is intended to meet the

requirements of a state’s laws or regulations, and that this process<sup>9</sup> exceeds the scope of Order No. 1000 and exceeds FERC’s authority.

The States recognize FERC’s jurisdiction over interstate transmission. *See, e.g., States Br. at 41-42* (“The States do not challenge FERC’s authority over interstate transmission . . . . Nor do the States challenge FERC’s authority to direct transmission providers to engage in transmission planning for public policies in general.”). The States ask that FERC likewise respect states’ fundamental authority over decisions about whether, how and at what cost to execute their own laws. Order No. 1000 only concerned process (*i.e.*, consideration—identification and evaluation of—public policy requirements that drive transmission) and purported not to dictate any substantive outcomes. The rulemaking did not address the appropriate role of state officials in the context of selecting public policy-driven projects. Instead, FERC determined that the specific role that state officials would play in considering how public policies drive transmission could be addressed in the compliance filings. *See Br. at 57-58*. For New England, however, FERC rejected ISO-NE’s proposed approach to project selection whereby NESCOE and/or state regulatory authorities would submit a “public policy

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<sup>9</sup> As the States explained, the process that FERC rejected in the Compliance Orders was one that did *not* require ISO-NE to select a project at the conclusion of the study process and competitive solicitation. *States Br. at 17* (citing *R. 1 at 60* (the process “permits, but does not require, projects to be . . . added to the Regional System Plan for construction.”)).

transmittal” as a pre-condition for ISO-NE’s selecting a policy-driven transmission project for placement in the Regional System Plan. Instead, FERC expanded Order No. 1000 beyond process (*see* States Br. at 17-18), and in so doing, failed to give the states any meaningful role in the selection of projects studied to satisfy transmission needs stemming from their own public policies.

The FPA does not confer on FERC authority to decide how to implement state laws. States Br. at 34-43 (citing Section 201(a), 16 U.S.C. § 824(a)). FERC misreads *South Carolina* to the extent it believes that the Court has countenanced such an intrusion. *See* Br. at 62-63. First, *South Carolina* validates the States’ understanding of the Order No. 1000 requirements, with the Court holding that the FERC rule “merely require[s] regions to establish *processes* for identifying and evaluating public policies that might affect transmission needs.” *South Carolina*, 762 F.3d at 91 (emphasis in original); *see also id.* at 89. Second, contrary to FERC’s claim (Br. at 62), the arguments the Court rejected in *South Carolina* are inapposite to the current proceeding. Petitioners in *South Carolina* challenged FERC’s authority over transmission *planning*. *See id.* at 63-64. The States have not petitioned this Court for review of that authority. As stated above, the States do not contest that FERC may require transmission planning for public policies in general. *See supra* at 16; *see also* States Br. at 41-42. Indeed, before FERC rewrote the rules during the compliance phase, NESCOE had been generally

supportive of this planning process reform as it was originally articulated by FERC. *See* States Br. at 10, 42. The States’ petition only concerns FERC’s unlawful expansion of its final rule and the imposition of an obligation on ISO-NE to *select* projects that that ISO-NE concludes are designed to meet public policy needs.

Similarly, FERC’s oversight over transmission cost allocation (*see* FERC Br. at 63) does not provide authority for FERC to require that ISO-NE select transmission projects to meet state public policy needs, thus choosing the specific way in which one or more state’s policies will be implemented. First, as a point of fact, cost allocation is triggered *after* project selection. Before ISO-NE can apply cost allocation to a project, it must first select a project as the solution to a state public policy need. Second, the States are not challenging FERC’s authority over interstate transmission rates (*see* Br. at 41-42), and such a line of argument is irrelevant to the core issues in this proceeding.

FERC’s reference to two recent Supreme Court cases is also unavailing. As support for its argument that it has broad authority over transmission, FERC cites *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2016) (“*EPSA*”) and *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) as standing for the proposition that federal and state jurisdiction may overlap. Br. at 62-63. FERC’s next stroke of the pen, however, contradicts this view. FERC effectively argues that its jurisdiction



over transmission rates provides authority to determine, solely and without any state role, the appropriate means to execute state laws. Br. at 63 (asserting that jurisdiction over cost allocation sanctions FERC’s rulings). Such an outcome runs contrary to *EPSA* and *Oneok*.

The demand response program in *EPSA* stands in sharp contrast to the structure for state public policy-driven transmission projects that FERC has mandated through the orders on review. Under that demand response program, FERC allowed states “veto power” over demand response participation in the wholesale market “in recognition of the linkage between wholesale and retail markets and the [s]tates’ role in overseeing retail sales.” *EPSA*, 136 S. Ct. at 779. The Supreme Court characterized this arrangement as “cooperative federalism, in which the [s]tates retain the last word.” *Id.* at 780; *see also id.* at 776 (noting that wholesale and retail markets “are not hermetically sealed from each other”). The challenged orders represent a retrenchment from this ideal of “cooperative federalism,” as FERC’s rulings exceed the agency’s authority by directing ISO-NE to take actions that constitute determinations about the best way to advance a state public policy. Likewise, in holding that state antitrust claims were not preempted by the Natural Gas Act, the Supreme Court rejected in *Oneok* the notion that there was a “clear division between areas of state and federal authority in natural-gas regulation.” 135 S. Ct. at 1601.

In examining its own authority over interstate transmission, FERC is not heeding this principle of cooperative federal and state jurisdiction. It turns the ruling in *EPISA* on its head: By removing any role for states in the project evaluation process, FERC has given ISO-NE a veto over a state official's decision regarding whether, how and at what cost to satisfy a state policy need. Through the challenged orders, FERC creates a new jurisdictional line, which did not exist in Order No. 1000, whereby its regulation of transmission empowers FERC to make state policy implementation decisions.

### **CONCLUSION**

The States reiterate that FERC could remedy the deficiencies of the orders on review by issuing in the proceeding below a definitive statement that (1) ISO-NE is not required to select a policy-driven transmission project and, consistent with FERC's prior declarations, is only required to identify needs and evaluate potential solutions, and (2) ISO-NE has no authority to substitute its judgment for a state whose laws are at issue in selecting a project. States Br. at 25. For the reasons discussed above and in their initial brief, the States respectfully request that the Court vacate the relevant aspect of the orders and remand the case to FERC.

Respectfully submitted,

**New England States Committee on  
Electricity, Inc.:**

*/s/ Phyllis G. Kimmel*

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John Michael Adragna  
Phyllis G. Kimmel  
Jeffrey K. Janicke  
McCarter & English, LLP  
1015 Fifteenth Street, N.W.  
Twelfth Floor  
Washington, DC 20005  
(202) 753-3400  
[pkimmel@mccarter.com](mailto:pkimmel@mccarter.com)

*/s/ Jason Marshall*

---

Jason Marshall  
General Counsel  
New England States Committee  
on Electricity, Inc.  
655 Longmeadow Street  
Longmeadow, MA 01106  
(617) 913-0342  
[jasonmarshall@nescoe.com](mailto:jasonmarshall@nescoe.com)

Attorneys for the New England States  
Committee on Electricity, Inc.

**Connecticut Department of Energy and  
Environmental Protection:**

*/s/ Robert Snook* \_\_\_\_\_

Robert Snook, AAG  
Office of the Attorney General  
Ten Franklin Square  
New Britain, CT 06051  
(860) 827-2657  
[Robert.Snook@ct.gov](mailto:Robert.Snook@ct.gov)

Attorney for the Connecticut Department of  
Energy and Environmental Protection

**Connecticut Public Utilities  
Regulatory Authority:**

*/s/ Clare Kindall* \_\_\_\_\_

Clare Kindall, AAG  
Department Head – Energy  
Office of the Attorney General  
Ten Franklin Square  
New Britain, CT 06051  
(860) 827-2683  
[Clare.kindall@ct.gov](mailto:Clare.kindall@ct.gov)

Attorney for the Connecticut Public Utilities  
Regulatory Authority

**Massachusetts Department of Public  
Utilities:**

*/s/ Jeffrey M. Leupold* \_\_\_\_\_  
Maura Healey, Massachusetts Attorney General  
Cecile M. Fraser, Counsel  
Special Assistant Attorney General  
Jeffrey M. Leupold, Senior Counsel  
Massachusetts Department of Public Utilities  
One South Station, Fifth Floor  
Boston, MA 02110  
(617) 305-3621  
[Cecile.Fraser@state.ma.us](mailto:Cecile.Fraser@state.ma.us)  
[Jeffrey.Leupold@state.ma.us](mailto:Jeffrey.Leupold@state.ma.us)

Attorneys for the Massachusetts Department of  
Public Utilities

**New Hampshire Public Utilities  
Commission:**

*/s/ F. Anne Ross* \_\_\_\_\_  
F. Anne Ross  
General Counsel  
New Hampshire Public Utilities Commission  
21 South Fruit Street, Suite 10  
Concord, New Hampshire 03301-2429  
(603) 271-2431  
[f.anne.ross@puc.nh.gov](mailto:f.anne.ross@puc.nh.gov)

Attorney for the New Hampshire Public  
Utilities Commission

**Rhode Island Public Utilities Commission:**

*/s/ Leo J. Wold*

---

Leo J. Wold  
Assistant Attorney General  
150 South Main Street  
Providence, RI 02903  
(401) 274-4400, ext. 2218  
[lwold@riag.ri.gov](mailto:lwold@riag.ri.gov)

Attorney for the Rhode Island Public Utilities  
Commission

**Vermont Department of Public Service:**

*/s/ Edward McNamara*

---

Edward McNamara  
Regional Policy Director  
Vermont Department of Public Service  
112 State Street  
Montpelier, VT 05620  
(802) 828-4007  
[ed.mcnamara@state.vt.us](mailto:ed.mcnamara@state.vt.us)

Attorney for the Vermont Department of Public  
Service

Dated: April 22, 2016

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of the Court's Order dated November 6, 2015, because this brief contains 4,904 words as determined by the word-counting feature of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of the brief of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated this 22nd day of April, 2016.

*/s/ Phyllis G. Kimmel*

Phyllis G. Kimmel  
McCarter & English, LLP  
1015 Fifteenth Street, N.W.  
Twelfth Floor  
Washington, DC 20005  
(202) 753-3400

Attorney for the New England States  
Committee on Electricity, Inc.

## CERTIFICATE OF SERVICE

I hereby certify that, pursuant to D.C. Cir. R. 25(c), service of the foregoing will be made electronically via CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated this 22nd day of April, 2016.

*/s/ Phyllis G. Kimmel* \_\_\_\_\_

Phyllis G. Kimmel  
McCarter & English, LLP  
1015 Fifteenth Street, N.W.  
Twelfth Floor  
Washington, DC 20005  
(202) 753-3400

Attorney for the New England States  
Committee on Electricity, Inc.

<b>Contact Information</b>	<b>Case Number/s</b>	<b>Service Preference</b>
Carol Jayne Banta Federal Energy Regulatory Commission (FERC) Office of the Solicitor 888 First Street, NE Washington, DC 20426 Email: Carol.Banta@ferc.gov	15-1139 15-1141	Email



<b>Contact Information</b>	<b>Case Number/s</b>	<b>Service Preference</b>
<p>Gunnar Birgisson  Florida Power &amp; Light Company  220  801 Pennsylvania Avenue, NW  Suite 220  Washington, DC 20004-0000  Email:  gunnar.birgisson@nexteraenergy.com</p>	<p>15-1139</p>	<p>Email</p>
<p>Charles G Coleon Cole  Steptoe &amp; Johnson LLP  1330 Connecticut Avenue, NW  Washington, DC 20036-1795  Email: ccole@steptoe.com</p>	<p>15-1141</p>	<p>Email</p>
<p>Michael Ray Engleman  Squire Patton Boggs (US) LLP  2550 M Street, NW  Washington, DC 20037-1350  Email: michael.engleman@squirepb.com</p>	<p>15-1139</p>	<p>Email</p>
<p>Jason J. Fleischer  Gibson, Dunn &amp; Crutcher LLP  1050 Connecticut Avenue, NW  Washington, DC 20036-5306  Email: jfleischer@gibsondunn.com</p>	<p>15-1139  15-1141</p>	<p>Email</p>
<p>Mary Ellen Grover  NSTAR Electric &amp; Gas Corporation  800 Boylston Street  P1700  Boston, MA 02199-8003  Email: mary.grover@nstar.com</p>	<p>15-1139  15-1141</p>	<p>Email</p>

<b>Contact Information</b>	<b>Case Number/s</b>	<b>Service Preference</b>
Kenneth G. Jaffe Alston & Bird LLP The Atlantic Building 950 F Street, NW Washington, DC 20004-1404 Email: kenneth.jaffe@alston.com	15-1139 15-1141	Email
Jeffrey Martin Jakubiak Gibson, Dunn & Crutcher LLP 200 Park Avenue New York, NY 10166-0193 Email: jjakubiak@gibsondunn.com	15-1139 15-1141	Email
Phyllis E Lemell Eversource Energy 107 Selden Street Berlin, CT 06037-0000 Email: phyllis.lemell@eversource.com	15-1139 15-1141	Email
Paul Alessio Mezzina King & Spalding LLP 1700 Pennsylvania Avenue, NW Suite 200 Washington, DC 20006-4706 Email: pmezzina@kslaw.com	15-1139	Email
Gary Arthur Morgans Steptoe & Johnson LLP 1330 Connecticut Avenue, NW Washington, DC 20036-1795 Email: gmorgans@steptoe.com	15-1141	Email

<b>Contact Information</b>	<b>Case Number/s</b>	<b>Service Preference</b>
<p>Ashley Charles Parrish  King &amp; Spalding LLP  1700 Pennsylvania Avenue, NW  Suite 200  Washington, DC 20006-4706  Email: aparrish@kslaw.com</p>	<p>15-1139</p>	<p>Email</p>
<p>David Russell Poe  Bracewell LLP  2001 M Street NW  Suite 900  Washington, DC 20036  Email: david.poe@bracewelllaw.com</p>	<p>15-1139  15-1141</p>	<p>Email</p>
<p>David Barry Raskin  Steptoe &amp; Johnson LLP  1330 Connecticut Avenue, NW  Washington, DC 20036-1795  Email: draskin@steptoe.com</p>	<p>15-1139  15-1141</p>	<p>Email</p>
<p>S. Mark Sciarrotta  VT Transco, Vermont Electric Power  Company  366 Pinnacle Ridge Road  Rutland, VT 05701  Email: msciarrotta@velco.com</p>	<p>15-1139  15-1141</p>	<p>Email</p>
<p>Robert Harris Solomon  Federal Energy Regulatory Commission  (FERC) Office of the Solicitor  Room 9A-01  888 First Street, NE  Washington, DC 20426  Email: robert.solomon@ferc.gov</p>	<p>15-1139  15-1141</p>	<p>Email</p>

<b>Contact Information</b>	<b>Case Number/s</b>	<b>Service Preference</b>
Stephen Matthew Spina Morgan, Lewis & Bockius LLP 1111 Pennsylvania Avenue, NW Washington, DC 20004-2541 Email: sspina@morganlewis.com	15-1139 15-1141	Email
David G. Tewksbury King & Spalding LLP 1700 Pennsylvania Avenue, NW Suite 200 Washington, DC 20006-4706 Email: dtewksbury@kslaw.com	15-1139	Email
Michael E. Ward Alston & Bird LLP The Atlantic Building 950 F Street, NW Washington, DC 20004-1404 Email: michael.ward@alston.com	15-1139 15-1141	Email