ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

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

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JOINT BRIEF FOR PETITIONERS IN NO. 15-1141

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January 11, 2016
Final Brief May 20, 2016

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

1. Case No. 15-1141 Petitioners:[1]

Commissioner of the Connecticut Department of Energy and Environmental Protection
Connecticut Public Utilities Regulatory Authority
Department of Public Utilities of the Commonwealth of Massachusetts
New England States Committee on Electricity, Inc.
Rhode Island Public Utilities Commission
State of New Hampshire Public Utilities Commission
Vermont Public Service Department

2. Respondent and Intervenors in Case No. 15-1141

Federal Energy Regulatory Commission (Respondent)
Central Maine Power Company
Emera Maine, formerly known as Bangor Hydro-Electric Company
Maine Electric Power Company, Inc.
New England Power Company, doing business as National Grid
Eversource Energy Service Company, dba Eversource Energy Service Company, on behalf of its electric utility company affiliates The Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire, and NSTAR Electric Company, doing business as Eversource Energy Service Company, on behalf of its electric utility company affiliates The Connecticut Light and Power Company, Western Massachusetts Electric Company, Public Service Company of New Hampshire, and NSTAR Electric Company
United Illuminating Company
Vermont Electric Power Company, Inc.
Vermont Transco LLC

[1] Although Case Nos. 15-1139 and 15-1141 were consolidated, because the briefing order provides for separate briefs, the parties are identified separately by case.

3. Case No. 15-1139 Petitioners:

Central Maine Power Company
Emera Maine, formerly known as Bangor Hydro-Electric Company
Maine Electric Power Company, Inc.
New England Power Company, doing business as National Grid
Eversource Energy Service Company
United Illuminating Company
Vermont Electric Power Company, Inc.
Vermont Transco LLC

4. Respondent and Intervenors in Case No. 15-1139

Federal Energy Regulatory Commission (Respondent)
LS Power Transmission, LLC
LSP Transmission Holdings, LLC.
New England States Committee on Electricity, Inc.
New Hampshire Transmission LLC

5. Parties Below

The following listed parties and intervenors appeared in the proceedings below before the Federal Energy Regulatory Commission:

American Wind Energy Association
Belmont Municipal Light Department
Central Maine Power Company
Connecticut Department of Energy and Environmental Protection
Connecticut Office of Consumer Counsel
Connecticut Public Utilities Regulatory Authority
Conservation Law Foundation
Department of Public Utilities of the Commonwealth of Massachusetts
Eastern Massachusetts Consumer-Owned Systems
ENE (Environment Northeast)
Energy New England, Inc.
Exelon Corporation
Iberdrola Renewables, LLC
ISO New England Inc.
Long Island Power Authority

LS Power Transmission, LLC
LSP Transmission Holdings, LLC
Maine Public Advocate Office
Maine Public Utilities Commission
Massachusetts Municipal Wholesale Electric Company
Massachusetts Office of the Attorney General
National Grid Generation LLC
National Rural Electric Cooperative Association
Natural Resources Defense Council
New England Power Pool Participants Committee
New England States Committee on Electricity
New Hampshire Consumer Advocate
New Hampshire Electric Cooperative, Inc.
New Hampshire Public Utilities Commission
New Hampshire Transmission, LLC
NRG Companies
Participating Municipal Systems (Braintree Electric Lt Dpt, Concord Muni Lt Plt, Groveland Elec Lt, Hingham Muni Ltg Plt, Littleton Elec Lt & Wtr, Merrimac Muni Lt Dpt, Middleton Elec Lt Dpt, Rowley Muni Ltg, Taunton Muni Ltg Plt Wellesley Muni Ltg)
Poweroptions Inc.
PSEG Energy Resources & Trade LLC
PSEG Power LLC
Public Service Electric and Gas Company
Rhode Island Public Utilities Commission
The Sustainable FERC Project
The United Illuminating Company
Transource Energy, LLC
Vermont Department of Public Service
Vermont Public Service Board
Vermont Transco, LLC

Rule 26.1 Corporate Disclosure Statement: The New England States Committee on Electricity, Inc. ("NESCOE") is a non-profit entity governed by a board of managers appointed by the Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Its general purpose

is to represent the collective perspective of the six New England states in regional electricity matters. NESCOE has no parent company, is not a publicly held corporation, and there is no publicly held company that has any ownership interest in NESCOE.

All of the other Petitioners in Case No. 15-1141 are governmental entities.

B. Rulings Under Review

Petitioners seek review of the following orders issued by the Federal Energy Regulatory Commission:

1. *ISO New England Inc.*, Order on Compliance Filings, 143 FERC ¶ 61,150 (May 17, 2013) (FERC Docket Nos. ER13-193-000 and ER13-196-000); and

2. *ISO New England Inc.*, Order on Rehearing and Compliance, 150 FERC ¶ 61,209 (Mar. 19, 2015) (FERC Docket Nos. ER13-193-001, ER13-193-003, ER13-196-001 and ER13-196-002).

C. Related Cases

This case has not previously been before this Court or any other court. There are no other cases related to Case No. 15-1141 currently pending in this Court or any other court.[2]

[2] The States expect that the petitioners in Case No. 15-1139 will identify in their brief cases related to Case No. 15-1139 pending in this Court or any other court.

The above information is certified to be correct to the best of our knowledge, information, and belief.

Respectfully submitted,

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TABLE OF AUTHORITIES

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Authorities upon which we chiefly rely are marked with asterisks (*).

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GLOSSARY

Compliance Filing	Order No. 1000 Compliance Filing of ISO New England Inc. and the Participating Transmission Owners Administrative Committee, Docket Nos. ER13-193-000, *et al*. (October 25, 2012), JA 1-103
Compliance Order	*ISO New England Inc.*, 143 FERC ¶ 61,150 (2013), JA 207-296
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
The Filing Parties	ISO-NE and the participating transmission owners administrative committee
ISO-NE	ISO New England Inc.
JA	Joint Appendix
NESCOE	New England States Committee on Electricity, Inc.
NOPR	*Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Notice of Proposed Rulemaking, 75 Fed. Reg. 37,883 (June 30, 2010)
OATT	Open Access Transmission Tariff
Order Nos. 1000, 1000-A; the Final Rule	*Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49,841 (Aug. 11, 2011) ("Order No. 1000"), *order on reh'g*, Order No. 1000-A, 77 Fed. Reg. 32,184 (May 31, 2012) ("Order No. 1000-A"), *order on reh'g and clarification*, Order No. 1000-B, 77 Fed. Reg. 64,890 (Oct. 24, 2012) (together, the "Final Rule"), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014)

Pool Transmission Facilities	Higher voltage facilities that are required to allow energy from significant power sources to move freely on the New England Transmission System
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	*ISO New England Inc.*, 150 FERC ¶ 61,209 (2015), JA 373-452
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

JURISDICTIONAL STATEMENT

The Court has jurisdiction to review the orders of the Federal Energy Regulatory Commission ("FERC" or "Commission") under section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*(b).

Petitioners in this Case No. 15-1141 are the New England States Committee on Electricity, Inc. ("NESCOE"), jointly with 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 (collectively referred to as the "State Agencies," with NESCOE and the State Agencies collectively referred to as "the States"). The States timely filed a joint request for rehearing within 30 days of FERC's Order on Compliance Filings issued on May 17, 2013, *ISO New England Inc.*, 143 FERC ¶ 61,150 (2013) ("Compliance Order"), JA 207-296. *See* FPA section 313(a), 16 U.S.C. § 825*l*(a). FERC denied the request for rehearing in its March 19, 2015 Order on Rehearing and Compliance, *ISO New England Inc.*, 150 FERC ¶ 61,209 (2015) ("Rehearing Order"), JA 373-452, and the States timely filed a joint petition for review within 60 days of FERC's order denying the request for rehearing. *See*

FPA section 313(b), 16 U.S.C. § 825*l*(b). The States seek review of final rulings in these orders.

STANDING

The petitioners are individual state government agencies, *i.e.*, the State Agencies, and a regional state committee, *i.e.*, NESCOE. NESCOE is governed by a board of managers appointed by the Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

The States meet the standing requirements. As this Court has explained, "[t]he 'irreducible constitutional minimum of standing contains three elements': (1) injury-in-fact, (2) causation, and (3) redressability." *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The orders on review inflict an injury in fact on the State Agencies by interfering with their authority to execute public policies regarding matters within their jurisdiction. This harm is concrete and particularized and actual or imminent, as public policy implementation is a core, ongoing function of state government. The orders on review are the direct cause of the State Agencies' injury, and the Court can provide redress by vacating the orders in relevant part.

An association has standing on behalf of its members if "(1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim

asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Sierra Club*, 292 F.3d at 898. NESCOE, as a committee of the New England states, meets these criteria. First, as indicated above, the orders on review inflict an injury in fact on New England state governments by interfering with their functioning. This injury is directly caused by the orders and may be redressed here. Hence, any one of the individual states would have standing in its own right. Second, the interests that NESCOE seeks to protect are germane to its purpose, which includes representing the collective perspective of the six New England states in regional electricity matters. And third, neither the claim asserted (that FERC departed from its own rule and governing statute, infringing on states' authority) nor the relief requested (vacating the relevant aspects of the orders) requires the participation of an individual state.

STATEMENT REGARDING ADDENDUM

The relevant statutes and regulations are attached in an addendum.

ISSUES PRESENTED FOR REVIEW

1. Whether the orders of FERC are arbitrary and capricious, or not otherwise in accordance with law, in that they unlawfully depart from and, without an opportunity for notice and comment, expand the scope of FERC's Order No.

1000,[3] by requiring ISO New England Inc. ("ISO-NE") to select public policy-driven projects in the region-wide transmission plan, rather than, as in Order No. 1000, solely to establish procedures for ISO-NE to consider transmission needs driven by federal, state and local public policy requirements, and whether FERC's orders fail to constitute reasoned decision-making.

2. Whether, in obligating ISO-NE to select policy-driven transmission projects, the orders exceed FERC's jurisdiction under the Federal Power Act, 16 U.S.C. § 791a *et seq.*, as well as constitutional boundaries that unambiguously reserve authorities to the states, by abrogating the role that the New England states have over the execution of their own public policies that are reflected in state statutes and regulations.

STATEMENT OF THE CASE

I. Overview

This case arises from FERC orders addressing proposed new rules in the ISO-NE region to meet the requirements of Order No. 1000. Despite very clear language in the Final Rule assuring states and others that transmission providers were only required to *consider* in regional planning processes transmission needs

[3] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49,841 (Aug. 11, 2011) ("Order No. 1000"), *order on reh'g*, Order No. 1000-A, 77 Fed. Reg. 32,184 (May 31, 2012) ("Order No. 1000-A"), *order on reh'g and clarification*, Order No. 1000-B, 77 Fed. Reg. 64,890 (Oct. 24, 2012) (together, "the Final Rule"), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

driven by public policy requirements, in the orders under review, FERC imposed a new obligation on ISO-NE to *select* in the regional plan for purposes of cost allocation the more efficient or cost-effective transmission solution that resolves an identified transmission need driven by public policy requirements.

This ruling impermissibly expands the scope of Order No. 1000. In so doing, it significantly infringes upon states' authority. A state has various options in determining how to best implement its own state laws. FERC's orders intrude into that determination and exceed FERC's statutory authority. Neither ISO-NE nor FERC has the authority, expertise, or accountability to substitute its judgment for that of a state in connection with implementing its own laws, many of which contemplate that state officials will exercise their judgment in balancing the interests and goals identified under state law.

In the Final Rule, upheld by this Court, FERC required transmission providers to develop "procedures to *identify* transmission needs driven by public policy requirements established by federal, state, or local laws or regulations *and evaluate* potential solutions to those needs." *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 52 (D.C. Cir. 2014) ("*South Carolina*") (citing Order No. 1000, at PP 2, 146, 203-05) (emphasis supplied). FERC's Final Rule expressly did not require transmission providers to select any transmission project. This Court emphasized that the Final 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).

In the orders under review, FERC imposed a new requirement on ISO-NE – one that goes beyond the requirements of Order No. 1000 – that ISO-NE *must select* the project that, in ISO-NE's view, is the more efficient or cost-effective solution among the transmission options it studied to meet a public policy need. ISO-NE itself sought rehearing of FERC's failure "to comply with Order No. 1000's provisions by introducing a new requirement that is not in Order No. 1000: imposing an obligation on the ISO to select more efficient or cost-effective public policy driven transmission solutions to be included in the regional transmission plan for purposes of cost allocation." JA 337.[4]

In their rehearing request, the States asked FERC to clarify that this was not what it intended. JA 333-335. FERC did not so clarify. The States now petition for review of FERC's orders that, for the New England region, have effectively expanded the requirements of Order No. 1000 in a way that violates the Administrative Procedure Act, exceeds FERC's jurisdiction, and interferes with authority reserved solely to the states.

[4] Because some of the documents in the record have unnumbered pages, in the previously-filed initial brief, all record citations were to the .pdf page numbers.

II. ISO-NE and the Regional System Plan

ISO-NE oversees and administers New England's wholesale electricity market and is responsible for ensuring the reliable operation of the region's electric power system. It has no authority, delegated or otherwise, in connection with state policies in such administration and operation. As part of its duties as New England's regional transmission organization, ISO-NE manages the region's transmission planning process, the rules of which are included in ISO-NE's Open Access Transmission Tariff ("OATT"). ISO-NE completes a "Regional System Plan," which is ISO-NE's determination, over a ten-year horizon, of the region's electricity system needs and its plans for meeting those needs. JA 357-360. The Regional System Plan, which must be approved by the ISO-NE Board of Directors, includes a project list that identifies proposed regulated transmission solutions to meet the identified needs. JA 360, 362. This project list is updated periodically throughout the year.

Once ISO-NE has selected a transmission upgrade, modification or addition to the transmission system – referred to as a "planned" project (JA 363, there is an established, preapproved method for cost recovery for such planned project under Schedule 12 of the ISO-NE OATT. Pursuant to Schedule 12, the costs of all upgrades included in the Regional System Plan for reliability, market efficiency (*i.e.*, economic) or public policy purposes are recoverable under the ISO-NE

OATT from all transmission customers taking service under the ISO-NE OATT. JA 355. By contrast, the costs of "elective" transmission upgrades, which are developed outside the ISO-NE planning process, are allocated solely to the entity volunteering to make and pay for such upgrades and assuming the market risk of the project (JA 354). The costs of local projects are recovered by transmission owners pursuant to Schedule 21 of the ISO-NE OATT and allocated to their respective local loads. JA 30-31, 74.

Because inclusion in the Regional System Plan comes with "cost-recovery certainty" (*see* JA 51), ISO-NE's selection of a transmission project for inclusion in the plan is a critical and material step in a project obtaining financing and moving towards siting and construction. *See* Compliance Filing, JA 7(once a project is placed on the Regional System Plan project list it moves forward to siting and construction).[5] Indeed, NESCOE is unaware of *any* major transmission project constructed wholly within New England over the past decade that was not

[5] *See also* JA 53 (once a preferred solution is developed and identified in the planning process, the transmission owners move the project "forward through siting and permitting, through the construction bid process and then to construction."); *id.* at 14 (earlier reforms "provided for the establishment of robust, open and transparent cost certainty and cost allocation rules that also ensured recovery of prudently incurred planning study and construction costs.").

first placed in the Regional System Plan as a preferred solution to a regional reliability need.[6]

III. Order No. 1000

A. Rulemaking

In 2010, FERC issued a Notice of Proposed Rulemaking, setting forth a number of potential reforms to transmission planning processes and associated cost allocation for new transmission infrastructure. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Notice of Proposed Rulemaking, 75 Fed. Reg. 37,883 (June 30, 2010) ("NOPR"). FERC proposed, among other things, "to require that each regional transmission planning process consider and evaluate transmission facilities and other non-transmission solutions that may be proposed and develop a regional transmission plan that identifies the transmission facilities that cost-effectively meet the needs of transmission providers, their transmission customers, and other stakeholders." NOPR at P 51. Additionally, as relevant to this case, FERC proposed that "local and regional transmission planning processes explicitly provide for consideration

[6] Between 2002 and 2012, ISO-NE's planning process led to the addition of $4.7 billion in new transmission facilities to meet reliability needs. JA 3. And as of late 2012, another $6 billion in transmission investment for reliability-related projects was under review, study or construction. JA 125-126, citing ISO-NE 2012 Regional System Plan at Table 5.1.

of public policy requirements established by State or Federal laws or regulations that may drive transmission needs." NOPR at P 64.

Several of the States participated in the rulemaking. For example, NESCOE expressed a generally favorable view of FERC's proposal to establish procedures in the regional planning process to consider public policy-driven transmission needs, noting that NESCOE shared "the Commission's interest in helping to bring to fruition projects and associated transmission that meet state and federal policy objectives" and that "[i]f properly structured and implemented, inserting policy considerations in the planning analysis could help the states identify the most cost-effective means to achieve the policy objectives."[7]

B. Order No. 1000

The NOPR culminated in FERC's adoption of Order No. 1000, in 2011. Among other things, FERC determined that existing regulatory requirements were insufficient to ensure that public utility transmission providers in each region, with input from stakeholders, "identify and evaluate transmission alternatives at the regional level that may resolve the region's needs more efficiently or cost-effectively than solutions identified in the local transmission plans of individual

[7] *See* JA 331 (citing Comments of the New England States Committee on Electricity on Notice of Proposed Rulemaking, FERC Docket No. RM10-23-000 (Sept. 29, 2010), at 1, 17).

public utility transmission providers." Order No. 1000 at P 78. Order No. 1000 sought to address this identified deficiency.

Among the directives in Order No. 1000, FERC required that "the regional transmission planning processes . . . provide an opportunity to consider transmission needs driven by Public Policy Requirements." *Id.* at P 6.[8] FERC explained that "by considering transmission needs driven by Public Policy Requirements, we mean: (1) the identification of transmission needs driven by Public Policy Requirements; and (2) the evaluation of potential solutions to meet those needs." *Id.* at P 205. FERC explained that there are many ways potential upgrades to the transmission system can be evaluated, ranging from the use of scenario analyses to production cost or power flow simulations, and emphasized that as with any proposed solution offered in the planning process for transmission needs driven by reliability issues or economic considerations, there is no assurance that any proposed transmission facility will be found to be an efficient or cost-effective solution to meet local or regional needs. Order No. 1000 at P 211.

[8] FERC defined "Public Policy Requirements" as public policy requirements established by state or federal laws and regulations, including "enacted statutes (*i.e.*, passed by the legislature and signed by the executive) 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." Order No. 1000-A at P 319 (footnote omitted).

Order No. 1000 required each public utility transmission provider to revise its OATT to "describe procedures that provide for the consideration of transmission needs driven by Public Policy Requirements in the local and regional transmission planning processes." Order No. 1000 at P 203. FERC determined that it would "leave to public utility transmission providers to determine, in consultation with stakeholders, the procedures for how such evaluations will be undertaken, subject to the Commission's review on compliance and with the objective of meeting the identified transmission needs more efficiently and cost-effectively." Order No. 1000 at P 211. FERC confirmed in Order No. 1000 that states would play a significant role:

> In response to commenters that urge us to recognize the role of the states in transmission planning, especially as it relates to compliance with Public Policy Requirements . . . nothing in this Final Rule is intended to alter the role of states in that regard . . . . In Order No. 890, the Commission stated its expectation that 'all transmission providers will respect states' concerns' when engaging in the regional transmission planning process. This is equally true with regard to the consideration of transmission needs driven by Public Policy Requirements.

Order No. 1000 at P 212 (footnote omitted).

Finally, FERC expressly held that there need *not* be a project selected at the end of the identification and evaluation process. FERC's holding appropriately recognized that project selection is a different act than identification of

transmission needs and evaluation of potential solutions to meet those needs: "while a public utility transmission provider is required under this Final Rule to evaluate in its local and regional transmission planning processes those identified transmission needs driven by Public Policy Requirements, that obligation does not establish an independent requirement to satisfy such Public Policy Requirements." Order No. 1000 at P 213.

C. Order 1000-A

On rehearing, FERC clarified that with respect to the requirement to consider public policy requirements in transmission planning processes, it was "not requiring anything more than what [it] directed in Order No. 1000, namely, the two-part identification and evaluation process." Order No. 1000-A at P 321. More generally, FERC confirmed that "Order No. 1000's transmission planning reforms are concerned with process; these reforms are not intended to dictate substantive outcomes, such as what transmission facilities will be built and where." Order No. 1000-A at P 188.

FERC provided assurances that it would not intrude into states' authority, clarifying that it was "not placing public utility transmission providers in the position of being policymakers or allowing them to substitute their public policy judgments in the place of legislators and regulators." *Id*. at P 318. FERC added that "[i]t is not the function of the transmission planning process to reconcile state

policies" (*id.* at P 327), emphasizing that it did not intend to interfere with states' public policy efforts (*id.* at P 330) ("Order No. 1000 and state-level Public Policy Requirements should be complementary – Order No. 1000's intent is to establish a space in the transmission planning process to identify transmission needs driven by Public Policy Requirements and to evaluate potential solutions to identified needs").

In upholding challenges to Order No. 1000, including challenges to whether regional planning must include consideration of transmission needs driven by public policy requirements, this Court similarly recognized that "[r]ather than mandating any particular outcome, the challenged orders require transmission providers to establish procedures to address the effects of public policy on the electricity grid." *South Carolina,* 762 F.3d at 89. The Court emphasized that Order No. 1000 "merely require[d] regions to establish *processes* for identifying and evaluating public policies that might affect transmission needs." *Id.* at 91 (emphasis in original).

IV. Orders on Review

A. 2012 Compliance Filing

On October 25, 2012, following a regional stakeholder process lasting over a year, ISO-NE and the participating transmission owners administrative committee[9] (collectively, the "Filing Parties") filed with FERC a package of proposed changes to the OATT and other governing documents in order to comply with Order No. 1000. Order No. 1000 Compliance Filing of ISO New England Inc. and the Participating Transmission Owners Administrative Committee, Docket Nos. ER13-193-000, *et al*. (October 25, 2012) ("Compliance Filing"), JA 1-103.

The Compliance Filing addressed the Final Rule's general requirement that public utility transmission providers participate in a regional transmission planning process that, with input from stakeholders, produces a regional transmission plan. The planning process evaluates alternative transmission solutions that might meet needs within a region more efficiently or cost-effectively than solutions identified in the local transmission plans of individual public utility transmission providers (*see* Order No. 1000 at PP 6, 78, 148). If an alternative solution is determined to be "more efficient or cost-effective than transmission facilities in one or more local transmission plans," then that solution "can be selected in the regional transmission

[9] Under a transmission operating agreement governing the rights and responsibilities of ISO-NE and the participating transmission owners, which has been accepted by FERC, filing rights under FPA section 205, 16 U.S.C. § 824d, are allocated to both ISO-NE and the participating transmission owners. JA 9.

plan for purposes of cost allocation." (Order No. 1000 at P 148). The Filing Parties explained that ISO-NE already had such a process in place, and described the distinction between the *regional* and *local* planning processes in New England that followed ISO-NE's transition to becoming a FERC-approved regional transmission organization.

Specifically, pursuant to the ISO-NE OATT and other agreements, ISO-NE has planning authority over regional transmission facilities that serve the whole New England region, referred to as "Pool Transmission Facilities" (JA 15). Pool Transmission Facilities are generally those higher voltage facilities that are "required to allow energy from significant power sources to move freely on the New England Transmission System." JA 77. By contrast, individual public utility owners in New England have planning authority over local transmission facilities, *i.e.*, non-Pool Transmission Facilities, which "typically are lower-voltage radial transmission facilities that serve load or generation to connect to bulk power system." JA 29. The Filing Parties told FERC that the then-existing New England planning process in the ISO-NE OATT, as modified by their Compliance Filing, met the Order No. 1000 requirement that a region develop a plan for identifying facilities that meet the region's reliability and economic requirements on a more efficient or cost-effective basis than local planning. JA 33-34.

The Compliance Filing also included the addition of new procedures in ISO-NE's OATT to meet Order No. 1000's requirement to consider public policy requirements in the regional transmission planning process. JA 36-44. A new Section 4A of Attachment K of the ISO-NE OATT described the process that ISO-NE proposed to use to plan regionally for public policy-driven transmission projects. Specifically, proposed Section 4A detailed a process for (1) identifying public policy requirements driving transmission needs, (2) evaluating potential transmission solutions, and (3) determining how a project or projects, *if any*, would be selected for inclusion in the Regional System Plan. JA 79-87.

Most relevant to this petition for review, the proposed process did not require ISO-NE to select any project at the conclusion of a competitive solicitation. The Filing Parties stated that "[t]his process, collaboratively developed between the ISO and the New England states, with substantial input from stakeholders, permits, but does not require, projects to be further developed into full engineering plans and added to the Regional System Plan for construction." JA 44. Instead, under the proposed process, as a pre-condition for ISO-NE selecting a policy-driven transmission project for placement in the Regional System Plan, NESCOE and/or state regulatory authorities would first need to submit a "public policy transmittal." JA 76. Such transmittal would specify which states supported the

project(s) and would identify the cost allocation among the states associated with particular project(s).

The Filing Parties also proposed a planning process that would apply to the individual participating transmission owners for local public policy-driven transmission projects (*i.e.*, non-Pool Transmission Facilities), contained in Appendix 1 of Attachment K, Attachment K-Local. JA 89-95. Following the identification of public policy requirements, the individual participating transmission owners would each use their existing local planning processes to determine if non-Pool Transmission Facilities should be built to address transmission needs driven by such public policy requirements. JA 46.

B. Compliance Order

On May 17, 2013, FERC issued an order finding that the Compliance Filing partially complied with the requirements set forth in Order No. 1000. Compliance Order at P 108, JA 239. As relevant to this petition for review, FERC found that the proposal met Order No. 1000's requirement to establish a just and reasonable and not unduly discriminatory process for *identifying* transmission needs driven by Public Policy Requirements (Compliance Order at PP 110-112, JA 240-242),[10] but rejected the Filing Parties' proposed process for *evaluating* transmission solutions

[10] In ways that are not relevant to this petition, FERC found the Filing Parties' proposed procedures inconsistent with Order No. 1000 with respect to identifying *federal* public policy requirements not identified by NESCOE. Compliance Order at PP 113-114, JA 242-244.

to identified transmission needs driven by Public Policy Requirements (Compliance Order at PP 64, 67, 116, JA 220-222, 244-245).

In addition to finding that the Filing Parties' process failed "to *evaluate* at the regional level potential transmission solutions to identified transmission needs driven by public policy requirements" (*id.* at P 67, JA 222), FERC found that the proposed process failed "to *select* more efficient or cost-effective transmission solutions to address transmission needs driven by public policy requirements in the regional transmission plan for purposes of cost allocation" (*id.*) (emphasis supplied). FERC directed changes to the evaluation process that would make ISO-NE, not NESCOE or the states, the entity responsible for "evaluating whether to select a proposed Public Policy Transmission Upgrade in the regional transmission plan for purposes of cost allocation." Compliance Order at P 315, JA 295-296.

In discussing its objection to giving NESCOE and the states a primary role in evaluation of transmission projects to meet public policy needs, FERC conflated the concepts of evaluating transmission needs driven by public policy requirements and selecting a public-policy driven project to be cost allocated. FERC found that "the Filing Parties' proposed *evaluation process* fails to comply with Order No. 1000's requirement that public utility transmission providers *select* more efficient or cost-effective transmission solutions to address transmission needs driven by public policy requirements in the regional transmission plan for purposes of cost

allocation." Compliance Order at P 314, JA 295 (emphasis supplied). FERC misstated Order No. 1000's requirements when it articulated that Order No. 1000 "places an affirmative *obligation* on public utility transmission providers *to select* transmission solutions that may meet the region's transmission needs driven by public policy requirements more efficiently or cost-effectively." Compliance Order at P 119 (emphasis supplied), JA 246 (citing Order No. 1000 at PP 80, 148-149). *See also* Compliance Order at P 67, JA 222 (finding that the Filing Parties' proposed process "prevent[s] the public utility transmission provider from meeting its *obligation* under Order No. 1000 to evaluate *and select* the transmission solution that more efficiently or cost-effectively meets the needs of the transmission planning region") (emphasis supplied).

Order No. 1000, in fact, stated that "it is necessary to have an affirmative obligation in these transmission planning regions to *evaluate"* – not *select* – "alternatives that *may meet* the needs of the region more efficiently or cost-effectively" (P 80) and that "[i]f the public utility transmission providers in the transmission planning region, in consultation with stakeholders, determine that an alternative transmission solution is more efficient or cost-effective than transmission facilities in one or more local transmission plans, then the transmission facilities associated with that more efficient or cost-effective transmission solution *can* be" – not *must* be – "selected in the regional

transmission plan for purposes of cost allocation" (emphasis supplied). Order No. 1000 at P 148.

FERC's rulings in the Compliance Order went beyond simply stating that it was ISO-NE, rather than the states, that should consider transmission projects to meet public policy needs. Rather, FERC created and overlaid an additional obligation on ISO-NE, suggesting for the first time that ISO-NE *must select* a public policy transmission project for inclusion in the Regional System Plan if found to be the more efficient or cost-effective solution. Compliance Order at P 119, JA 246.

The States did not agree with this characterization of Order No. 1000 and, therefore, sought clarification and, in the alternative, rehearing.

C. Rehearing Request and Rehearing Order

The States' rehearing request asked FERC to clarify that the Compliance Order "was not intended to expand the scope of Order No. 1000 by requiring not just the establishment of a process for determining which projects driven by Public Policy Requirements should be selected in the regional transmission plan for purposes of cost allocation, but also the actual selection of the more efficient or cost-effective solutions among those considered." JA 333 (citing Order No. 1000 at P 211).

In its Rehearing Order, FERC purported to grant the request for clarification, stating that:

> 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, JA 400-401.

This statement, however, failed to provide the requested clarification.

SUMMARY OF ARGUMENT

FERC's Compliance Order includes statements that are inconsistent with, and that go beyond the scope of, Order No. 1000. In Order No. 1000, FERC assured states and others that it was merely requiring public utility transmission providers to consider in their regional transmission planning processes transmission needs driven by public policy requirements. FERC explained that this meant, simply, that once transmission needs were identified to meet public policy requirements, the public utility transmission provider was authorized only to evaluate potential transmission solutions to meet those needs. FERC was not purporting to supplant the states' judgment as to how to best meet their own statutory mandates. FERC emphasized that it was not requiring any particular substantive outcome; rather, it merely was requiring that processes be established

for the consideration of public policy requirements. The States relied on these assurances, as did this Court in *South Carolina*.

In the orders under review, FERC reversed course and held that ISO-NE must not only have in place a process to identify transmission needs driven by public policy requirements and evaluate potential transmission solutions that could meet those needs, but must also select the more efficient or cost-effective project. This ruling, issued less than a year after this Court affirmed that FERC's public policy requirements were intended only to establish procedures for evaluation (*South Carolina*, 762 F.3d at 52, 89, 91), expanded the scope of Order No. 1000 in a substantive way. Had the States been on notice that FERC's rulemaking was going to require transmission providers such as ISO-NE to *select* transmission projects designed to address state public policy requirements, they could have filed comments in the rulemaking opposing such a requirement. However, because the rulemaking did not make such a proposal – to the contrary, it expressly stated that such an interpretation was incorrect – the States were deprived of their opportunity under the Administrative Procedure Act to be apprised of and respond to the proposal. 5 U.S.C. § 553.

FERC's expansion of the Order No. 1000 requirements inflicts significant harm on the States. States, not FERC or a FERC-regulated public utility transmission provider, have the authority and responsibility to determine the best

means of implementing their own policy requirements reflected in their state laws. FERC exceeded its statutory authority and impermissibly infringed upon the authority of states by requiring ISO-NE to select transmission projects to meet the requirements of state policies.

FERC claimed in response to the States' arguments below that FERC was "in no way interfering" with state policy execution (Rehearing Order at P 133, JA 404-405). However, by placing an obligation on ISO-NE to select a transmission project if found to be the more efficient or cost-effective solution to a state policy need, FERC's orders do, in fact, interfere with state officials' judgments about how to implement state policies. FERC's orders strip a state of the ability to determine, for example, that a transmission solution is not the most appropriate means by which a state can implement its clean energy requirements. Even if cost-effective, a transmission solution may not provide the range of benefits or risk mitigation that a state official might capture for consumers by pursuing other potential solutions, which could include developing incentives for renewable generation or reducing greenhouse gas emissions through transportation initiatives. Once ISO-NE selects a regional transmission project for inclusion in the Regional System Plan to address a state public policy need, it has exercised its own judgment, rather than the state's, over the appropriate means of executing the state's laws.

FERC could end any uncertainty now 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. Absent such a declaration, and in the face of the language of the Rehearing Order, it is clear that FERC intends to require ISO-NE to make these decisions. FERC's orders are arbitrary and capricious in that, without explanation, they depart from and expand the scope of the Order No. 1000 rulemaking in a manner that interferes with states' implementation of their own laws. The Court should, accordingly, vacate this aspect of the orders under review and remand them to FERC.

ARGUMENT

I. FERC Unlawfully Expanded the Scope of Order No. 1000.

The Administrative Procedure Act requires that interested parties be given notice of, and an opportunity to comment on, proposed rulemakings, including amendments to existing rules. 5 U.S.C. § 553, 5 U.S.C. § 551(5). Because FERC established Order No. 1000 through notice-and-comment rulemaking, FERC can only amend the order through further notice-and-comment rulemaking. *City of Idaho Falls, Id. v. FERC*, 629 F.3d 222, 227, 231 (D.C. Cir. 2011). FERC's ruling

that ISO-NE is required not just to consider transmission needs driven by public policy requirements, but also to select transmission projects to meet such needs expands the scope of the Final Rule without providing required notice and opportunity to comment to the States and other interested parties.

There is nothing on the face of Order No. 1000 that requires the transmission provider to select a project for inclusion in the Regional System Plan. Rather, as FERC explained in Order Nos. 1000 and 1000-A, all that is required is the "opportunity to consider transmission needs driven by Public Policy Requirements" (Order No. 1000 at PP 6, 109) and nothing more than "the two-part identification and evaluation process" (Order No. 1000-A at P 321). In fact, FERC expressly held that public utility transmission providers need not select a project at all: "In requiring the consideration of transmission needs driven by Public Policy Requirements, the Commission is not mandating fulfillment of those requirements. Instead, the Commission is acknowledging that the requirements in question are facts that may affect the need for transmission services and these needs must be considered." Order No. 1000 at P 109. An obligation to consider – *i.e.*, *identify* needs and *evaluate* potential transmission solutions to public policy-driven needs – is materially different from an obligation to *select* a transmission project to meet those needs.

The States' view that FERC imposed a new obligation on ISO-NE in the orders under review was shared by ISO-NE itself. ISO-NE sought rehearing of FERC's Compliance Order, objecting to the introduction of a new requirement not in Order No. 1000: "Contrary to Order No. 1000 . . . the Compliance Order *did* require something more than identification and evaluation – it requires that the ISO 'select' the public policy project." JA 340. ISO-NE pointed out in its rehearing request, as did the States, that in Order No. 1000, FERC "only referred to an obligation to 'identify' transmission needs and 'evaluate' potential solutions, not to select solutions and turn them into projects included in the regional plan." JA 339 (citing Order No. 1000 at P 205).

FERC explained in the rulemaking proceeding that "Order No. 1000's transmission planning reforms are concerned with process; these reforms are not intended to dictate substantive outcomes." Order No. 1000-A at P 188; *see also supra* at 13. At no point in the proceeding did the agency propose that the actual selection of a transmission project to meet such public policy needs would ever be mandatory. An obligation to select such a transmission project goes beyond the requirements of the Final Rule, and therefore, cannot be imposed as a compliance

matter.[11] In the rulemaking, FERC explicitly denied any intention to interfere with or supplant state decision making on public policy projects, or to require a substantive outcome. *See, e.g.*, Order No. 1000-A at PP 188, 318.

In upholding the petitions for review of Order No. 1000, this Court made several statements that corroborate the States' view of Order No. 1000:

- "Rather than mandating any particular outcome, the challenged orders require transmission providers to establish procedures to address the effects of public policy on the electricity grid." *South Carolina*, 762 F.3d at 89 (citing Order No. 1000 at PP 109, 111, 206-10 and Order No. 1000-A at PP 209, 318-21).
- Order No. 1000 "merely require[s] regions to establish *processes* for identifying and evaluating public policies that might affect transmission needs." *Id.* at 91 (citing Order No. 1000 PP 205-11, 214-16; Order No. 1000-A PP 318, 327-29, 332-33 (emphasis in original)).
- "[R]egions must only create procedures to 'identify, out of the larger set of potential transmission needs driven by public policy requirements that may be proposed, those transmission needs for which transmission solutions will

[11] As FERC has stated, "[t]he only issue on compliance is whether the filing complies with the directives of the Commission's order." *High Point Gas Transmission, LLC*, 140 FERC ¶ 61,259, at P 26 (2012), *reh'g denied*, 143 FERC ¶ 61,207 (2013).

be evaluated in the . . . regional transmission planning process.'" *Id.* at 89 (quoting *NorthWestern Corp.*, 143 FERC ¶ 61,056, at P 85 (2013)).

FERC attempts to rewrite its own history by now declaring that Order No. 1000 did, in fact, mandate the selection of transmission projects to meet public policy needs: "Order No. 1000 places an affirmative obligation on public utility transmission providers *to select* transmission solutions that may meet the region's transmission needs driven by public policy requirements more efficiently or cost-effectively." Compliance Order at P 119, JA 246 (emphasis supplied). This obligation "to select" a transmission solution was created by FERC after the fact and from whole cloth. FERC has pointed to nothing in the Order No. 1000 rulemaking containing such a mandate, and it has ignored its own numerous statements to the contrary. Simply stated, "the rulemaking process tells a different story." *Idaho Falls,* 629 F.3d at 228.

In response to the States' rehearing request, FERC stated 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, JA 400-401. The only logical inferences that can be drawn from this cryptic, double-negative declaration are that (1) if the regional project(s) studied

are found by ISO-NE to be more efficient or cost-effective than a local transmission alternative, ISO-NE must, in fact, select the regional public policy transmission project for inclusion in the Regional System Plan; and (2) if a local project is found to be the more efficient or cost-effective alternative (which, as explained below, is highly unlikely in New England), ISO-NE need not select the regional transmission alternative(s) for inclusion in the Regional System Plan.

The distinction that this purported clarification may draw between a comparison of regional and local projects is essentially meaningless in New England. Even before the Final Rule was issued, the ISO-NE regional planning process was designed to identify regional facilities that were more efficient or cost-effective than those identified through local planning. The Filing Parties explained in their Compliance Filing that "the existing planning process has been highly successful at identifying the most cost-effective regional alternative as a solution to an identified need and getting that solution built and into service." JA 4. Thus, the regional planning process in New England has for years been designed precisely to identify regional transmission projects that are more efficient or cost-effective than those that individual utilities would identify through their local planning processes. The States believe that it is, therefore, highly unlikely that a preferred transmission project that ISO-NE identifies through the regional process would ever not be selected because a local project is more efficient or cost-effective.

FERC's ruling that ISO-NE is required not just to consider transmission needs driven by public policy requirements, but also to select transmission projects to meet such needs, expands the scope of the Final Rule without providing required notice to the States and other interested parties. In direct contravention of its repeated assurances to states and stakeholders in the rulemaking proceeding – some of which this Court relied upon in rejecting challenges to the Final Rule – FERC now seeks to dictate particular outcomes. *See, e.g.,* Order No. 1000-A at P 188.

The Administrative Procedure Act requires that notice of a proposed rulemaking be published in the Federal Register and that interested persons be given an opportunity to participate. 5 U.S.C. § 553. Further, the Administrative Procedure Act defines "rule making" to include the process of amending an existing rule. 5 U.S.C. § 551(5). Because FERC established Order No. 1000 through notice-and-comment rulemaking, the agency can only amend the order through further notice-and-comment rulemaking. *Idaho Falls*, 629 F.3d at 227, 231.

FERC earlier assured States and others in the Order No. 1000 rulemaking that nothing about the public policy transmission planning process – other than a requirement to develop procedures for identification of needs driven by public policy requirements and evaluation of potential transmission solutions to meet

those needs – was prescriptive. Had FERC been prescriptive in Order No. 1000, as it became in the contested orders, the States would have had the opportunity to object and seek rehearing. As it was, there was no reason for States to anticipate that FERC would implement Order No. 1000 in a manner inconsistent with the very language of that rule.

The mandate to select transmission projects to satisfy policy objectives is a new substantive rule and not simply an interpretation of the preexisting rule. The mere consideration of transmission needs cannot under any reasonable interpretation be construed to encompass an obligation to select a transmission option, regardless of how cost effective it may be. The orders under review, therefore, amend, rather than interpret Order No. 1000. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1207-09 (2015) (distinguishing amendment from interpretation). To broaden the scope of Order No. 1000 in this manner, FERC was required to follow the notice-and-comment requirements of the Administrative Procedure Act. FERC's failure to do so dictates that this aspect of the orders be vacated. *See Idaho Falls*, 629 F.3d at 231; *cf. Dominion Resources, Inc. v. FERC*, 286 F.3d 586, 587, 593 (D.C. Cir. 2002) (vacating compliance order because it "was far broader than the order on which it purportedly rested" and holding that "if the Commission has a general case for broader restrictions, it can make that case in the rulemaking that it has launched").

Additionally, FERC's orders violate the requirements of reasoned decision-making. FERC's orders must be vacated if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). FERC's Rehearing Order does not explain why, following the project evaluation process, ISO-NE would be obligated to select one or more policy-driven projects for inclusion in the Regional System Plan, or why ISO-NE would not have discretion to decline to select any project. FERC's response is so vague and cryptic that it falls short of its obligation to engage in reasoned decision-making. *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D. C. Cir. 1992) ("It most emphatically remains the duty of this court to ensure that an agency engage the arguments raised before it — that it conduct a process of *reasoned* decisionmaking.") (emphasis in original); *American Mining Congress v. EPA*, 907 F.2d 1179, 1187 (D.C. Cir. 1990) (emphasizing that deference to an agency's judgment does not relieve a reviewing court of its responsibility to ensure that the agency has articulated a satisfactory explanation for its action); *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984) (explaining that the Court will uphold agency's decision "if, but only if, we can discern a reasoned path from the facts and considerations before the [agency] to the decision it reached."); *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("it is the agency's responsibility, not this Court's, to explain its decision").

In sum, because the Commission failed in the contested orders to conform its rulings with those in the Order No. 1000 rulemaking, the Court should remand the orders on review.

II. FERC Exceeded the Bounds of Its Limited Authority and Infringed Upon State Sovereignty.

Courts hold unlawful and set aside agency actions that are found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). "As a federal agency, FERC is a 'creature of statute,' having 'no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.'" *Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)) (emphasis in *Atlantic City*). Hence, the Court must determine whether the agency, in granting ISO-NE authority to determine the means of meeting state public policy requirements, "*has stayed within the bounds of its statutory authority*." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868 (2013) (emphasis in original). The States submit that FERC has not.

Section 201(a) of the Federal Power Act provides that FERC regulation under the Federal Power Act is "to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). The Supreme Court has explained that, while this declaration "cannot nullify a clear and specific grant of jurisdiction," it is nonetheless "relevant and entitled to respect as a guide in

resolving any ambiguity or indefiniteness in the specific provisions which purport to carry out its intent." *Conn. Light & Power Co. v. Fed. Power Comm'n*, 324 U.S. 515, 527 (1945).

The Federal Power Act does, in fact, include several "clear and specific" grants of jurisdiction over certain matters. For example, it is indisputable that FERC is authorized to regulate the rates charged for transmission of electricity in interstate commerce and for its sale at wholesale. 16 U.S.C. §§ 824(a) and 824d(a). The Federal Power Act also requires FERC to "facilitate the planning of a reliable grid." *South Carolina*, 762 F.3d at 90 (citing 16 U.S.C. § 824q(b)(4)). However, nothing in the Federal Power Act, express or implied, can be construed as granting FERC authority over the means by which states meet their own public policy mandates. Yet that is precisely the effect of FERC's orders.

By way of example, all New England states have enacted statutes mandating that certain percentages of electricity sold at retail be generated from renewable energy resources (*i.e.*, renewable portfolio standards).[12] State A's preference in meeting its own targets might be to encourage the siting of renewable generation close to population centers. But under the process that FERC established in the contested orders, ISO-NE could trump a state official's preferences in connection

[12] *See, e.g.*, Mass. Gen. Laws ch. 25A, § 11F; N.H. Stat. § 362-F:3; R.I. Gen. Laws § 39-26-4.

with State A's policies. As the contested orders stand, once ISO-NE commences a study to evaluate potential solutions to transmission needs driven by State A's renewable portfolio standards law, ISO-NE would be required to select the more efficient or cost-effective transmission project for inclusion in the Regional System Plan for purposes of cost allocation.[13] Inclusion in the Regional System Plan comes with the benefit of an established, preapproved method of cost recovery under the ISO-NE OATT. Therefore, inclusion in the 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[14] and triggering a series of next steps including application for state siting review. Notwithstanding State A's judgment in connection with its own statutes, which could be that transmission is not the best means to achieve the relevant statutory objectives, State A would not be able to override ISO-NE's decision to move forward under the tariff procedures that FERC directed. Hence, ISO-NE – as authorized by FERC – would decide how the requirements of State A's public policy requirements would be met.

[13] As discussed above, *supra* at 30, given the design of the ISO-NE planning process, there would likely never be a more a viable local transmission alternative when compared to the regional project.

[14] *See supra* at 7-9.

A state's siting authority does not protect a state from FERC's usurpation of state authority. 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. *See* Rehearing Order at P 380, JA 445 (approving cost allocation proposal allocating 70 percent of the costs of public policy upgrades region-wide based on load-ratio share, and the remaining 30 percent to those states whose public policy necessitated a given project).

In implementing state laws, state officials use their judgment in considering a wide range of consumer costs and benefits of various approaches to achieving state policy objectives. These often include hard-to-quantify societal benefits that state officials consider relevant and important to consumers in their states. In each instance, the judgment and ultimate decision about whether, how and at what price

state public policies will be executed is uniquely the state's to make. The state is ultimately accountable to its citizens for every aspect of state policy decision-making.

By contrast, ISO-NE is a transmission operator/planner and wholesale market administrator. It does not, as an institutional or jurisdictional matter, have the authority to make judgments on states' behalf about state policies or the means or costs by which a state will satisfy its public policy objectives. Similarly, FERC does not, as an institutional and jurisdictional matter, have authority in connection with decisions about the means of implementing state public policies. Neither ISO-NE nor FERC has the authority, expertise, or accountability to substitute its judgment for that of the states in connection with implementing state laws, many of which contemplate that state officials will balance various interests and goals, including those related to energy, the environment and economic development, and all of which cannot be viewed in isolation without considering the impacts on other state policies.

The Massachusetts Global Warming Solutions Act, for example, provides that "[i]n implementing its plan for statewide greenhouse gas emissions limits, the commonwealth and its agencies shall promulgate regulations that reduce energy use, increase efficiency and encourage renewable sources of energy in the sectors of energy generation, buildings and transportation." Mass. Gen. Laws ch. 21N, §

6. This language makes clear that state officials must consider myriad factors and multiple industries in determining the best approach for the citizens of the state. Similarly, Connecticut law requires the reduction of greenhouse gas emissions for the years 2020 and 2050. Conn. Gen. Stat. § 22a-200a. Connecticut state officials must be the ones to determine whether, for example, a large-scale hydro-electric project, a transmission project, or small biomass projects are best suited to achieve the greenhouse gas limits, while balancing economic considerations for the state. These state-specific processes and judgments cannot be overridden by a FERC-mandated, unilateral ISO-NE determination that consumers must instead pay for a transmission solution that ISO-NE selects.

As a federal agency, FERC "may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it." *Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976, 982 (D.C. Cir. 1990); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) ("[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.") (internal quotations omitted); *Solid Waste Agency of N. Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (internal citations and quotation omitted) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.").

In the instant case, FERC cannot point to any such unambiguous grant to justify its intrusion. Nothing in the Federal Power Act, for example, allows FERC to interfere with a state's decision as to how it will satisfy a renewable-energy target established by the state.

As explained by the Supreme Court, FERC itself has recognized that states retain "significant control" over matters of local concern. *New York v. FERC*, 535 U.S. 1, 24 (2002). The Court recently reaffirmed that general principle by holding that state antitrust claims were not preempted by the Natural Gas Act, a parallel statute administered by FERC. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015); *see also Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n. of Ind.*, 332 U.S. 507, 517-18 (1947) ("The [Natural Gas] Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.").

FERC cannot step into the shoes of the state and govern on its behalf. FERC's orders not only exceed the agency's statutory authority but also implicate the constitutional boundaries of federal authority: "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992); *see also Printz v. United States*,

521 U.S. 898, 928 (1997) ("It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."). The Federal Power Act cannot be construed to countenance FERC's intrusion here.

FERC's encroachment into state public policies in this case is readily distinguishable from FERC's general authority to regulate transmission planning, as upheld by this Court in denying challenges to Order No. 1000. *South Carolina*, 762 F.3d at 63-64. Key to the Court's decision there was that, because the planning mandate "is directed at ensuring the proper functioning of the interconnected grid spanning state lines . . . the mandate fits comfortably within Section 201(b)'s grant of jurisdiction over the transmission of electric energy in interstate commerce." *Id.* at 63 (internal quotation omitted). The planning of interstate transmission to ensure reliable and uninterrupted service, which is indisputably within the realm of FERC's authority, is starkly different from planning for the purpose of meeting state policy objectives as codified in state statutes and regulations.

The States do not challenge FERC's authority over interstate transmission or its responsibility to ensure "the proper functioning of the interconnected grid." Nor do the States challenge FERC's authority to direct transmission providers to engage in transmission planning for public policies in general. To the contrary, as

noted above, NESCOE was generally supportive of this reform to the transmission planning process as originally articulated by FERC, before FERC recreated its own history. *See supra* at 10. The grant of authority under the Federal Power Act over transmission service, however, does not extend to determining whether a specific transmission project is *the* way to advance state policies or to authorizing what is effectively an ISO-NE veto power over a state official's preference about whether, how and at what cost to satisfy a state's policies. State energy policies, many of which are largely aimed at achieving environmental benefits, undoubtedly fall within the scope of state authority to protect citizen welfare. *See Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) ("the structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons") (internal quotations omitted).

FERC has unlawfully leapt from process and procedure into a substantive outcome culminating in the required selection of a state public policy-driven transmission project. FERC, without statutory authority, has stripped New England states of their ability to decide whether, how and at what cost a project or projects are the optimal or even preferred means to advance their own state policies, and instead transferred state policy implementation decisions to a public utility under FERC jurisdiction.

CONCLUSION

For the reasons discussed above, the States respectfully request that the Court vacate the relevant aspect of the orders and remand the case to FERC.

Respectfully submitted,

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Dated: January 11, 2016
Final Brief May 20, 2016

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation,
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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and D.C. Cir. R. 32(a)(2), because this brief contains 9,466 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) and D.C. Cir. R. 32(a)(2).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of the brief exempted by 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 20th day of May, 2016.

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ADDENDUM

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5 U.S.C. § 551. Definitions

[Subsections (6)-(14) omitted.]

For the purpose of this subchapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title--

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

5 U.S.C. § 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

16 U.S.C. § 824. Declaration of policy; application of subchapter

[Subsections (b) through (g) omitted.]

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

16 U.S.C. § 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

[Subsection (f) omitted.]

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and

the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

16 U.S.C. § 824q. Native load service obligation

[Subsections (a), (b)(1) through (b)(3), and (c) through (k) omitted.]

(b) Meeting service obligations

(4) The Commission shall exercise the authority of the Commission under this chapter in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities, and enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.

Conn. Gen. Stat. § 22a-200a. Reduction of greenhouse gas emissions: Mandated levels. Reports.

(a) The state shall reduce the level of emissions of greenhouse gas:

(1) Not later than January 1, 2020, to a level at least ten per cent below the level emitted in 1990; and

(2) Not later than January 1, 2050, to a level at least eighty per cent below the level emitted in 2001.

(3) All of the levels referenced in this subsection shall be determined by the Commissioner of Energy and Environmental Protection.

(b) On or before January 1, 2010, and biannually thereafter, the state agencies that are members of the Governor's Steering Committee on Climate Change shall submit a report to the Secretary of the Office of Policy and Management and the Commissioner of Energy and Environmental Protection. The report shall identify existing and proposed activities and improvements to the facilities of such agencies that are designed to meet state agency energy savings goals established by the Governor. The report shall also identify policies and regulations that could be adopted in the near future by such agencies to reduce greenhouse gas emissions in accordance with subsection (a) of this section.

(c) Not later than January 1, 2012, and every three years thereafter, the Commissioner of Energy and Environmental Protection shall, in consultation with the Secretary of the Office of Policy and Management and the Governor's Steering Committee on Climate Change, report, in accordance with the provisions of section 11-4a, to the joint standing committees of the General Assembly having cognizance of matters relating to the environment, energy and transportation on the quantifiable emissions reductions achieved pursuant to subsection (a) of this section. The report shall include a schedule of proposed regulations, policies and strategies designed to achieve the limits of greenhouse gas emissions imposed by said subsection, an assessment of the latest scientific information and relevant data regarding global climate change and the status of greenhouse gas emission reduction efforts in other states and countries.

(d) At least one year prior to the effective date of any federally mandated greenhouse cap and trade program including greenhouse gas emissions subject to any state cap and trade requirements adopted pursuant to this section, the Commissioner of Energy and Environmental Protection and the Secretary of the

Office of Policy and Management shall report, in accordance with the provisions of section 11-4a, to the joint standing committees of the General Assembly having cognizance of matters relating to the environment, energy and technology and transportation. Such report shall explain the differences between such federal and state requirements and shall identify any further regulatory or legislative actions needed to achieve consistency with such federal program.

Mass. Gen. Laws ch. 21N, § 6. Regulations.

In implementing its plan for statewide greenhouse gas emissions limits, the commonwealth and its agencies shall promulgate regulations that reduce energy use, increase efficiency and encourage renewable sources of energy in the sectors of energy generation, buildings and transportation.

Mass. Gen. Laws ch. 25A, § 11F. Renewable Energy -- Portfolio Standard.

(a) The department shall establish a renewable energy portfolio standard for all retail electricity suppliers selling electricity to end-use customers in the commonwealth. By December 31, 1999, the department shall determine the actual percentage of kilowatt-hours sales to end-use customers in the commonwealth which is derived from existing renewable energy generating sources. Every retail supplier shall provide a minimum percentage of kilowatt-hours sales to end-use customers in the commonwealth from Class I renewable energy generating sources, according to the following schedule: (1) an additional 1 percent of sales by December 31, 2003, or 1 calendar year from the final day of the first month in which the average cost of any renewable technology is found to be within 10 per cent of the overall average spot-market price per kilowatt-hour for electricity in the commonwealth, whichever is sooner; (2) an additional one-half of 1 per cent of sales each year thereafter until December 31, 2009; and (3) an additional 1 per cent of sales every year thereafter. For the purpose of this subsection, a new renewable energy generating source is one that begins commercial operation after December 31, 1997, or that represents an increase in generating capacity after December 31, 1997, at an existing facility. Commencing on January 1, 2009, such minimum percentage requirement shall be known as the "Class I" renewable energy generating source requirement.

(b) For the purposes of this subsection, a renewable energy generating source is one which generates electricity using any of the following: (1) solar photovoltaic or solar thermal electric energy; (2) wind energy; (3) ocean thermal, wave or tidal energy; (4) fuel cells utilizing renewable fuels; (5) landfill gas; (6) waste-to-energy which is a component of conventional municipal solid waste plant technology in commercial use; (7) naturally flowing water and hydroelectric; (8) low emission advanced biomass power conversion technologies using fuels such as wood, by-products or waste from agricultural crops, food or animals, energy crops, biogas, liquid biofuel including but not limited to biodiesel, organic refuse-derived fuel, or algae; or (9) geothermal energy; provided, however, that the calculation of a percentage of kilowatt-hours sales to end-use customers in the commonwealth from new renewable generating sources shall exclude clause (6). The department may also consider any previously operational biomass facility retrofitted with advanced conversion technologies as a renewable energy generating source. A renewable energy generating source may be located behind the customer meter within the ISO-NE, as defined in section 1 of chapter 164, control area if the output is verified by an independent verification system participating in the New England

Power Pool Generation Information System, in this section called NEPOOL GIS, accounting system and approved by the department.

(c) New renewable energy generating sources meeting the requirements of this subsection shall be known as Class I renewable energy generating sources. For the purposes of this subsection, a Class I renewable energy generating source is one that began commercial operation after December 31, 1997, or represents the net increase from incremental new generating capacity after December 31, 1997 at an existing facility, where the facility generates electricity using any of the following: (1) solar photovoltaic or solar thermal electric energy; (2) wind energy; (3) ocean thermal, wave or tidal energy; (4) fuel cells utilizing renewable fuels; (5) landfill gas; (6) energy generated by new hydroelectric facilities, or incremental new energy from increased capacity or efficiency improvements at existing hydroelectric facilities; provided, however, that (i) each such new facility or increased capacity or efficiency at each such existing facility must meet appropriate and site-specific standards that address adequate and healthy river flows, water quality standards, fish passage and protection measures and mitigation and enhancement opportunities in the impacted watershed as determined by the department in consultation with relevant state and federal agencies having oversight and jurisdiction over hydropower facilities; (ii) only energy from new facilities having a capacity up to 30 megawatts or attributable to improvements that incrementally increase capacity or efficiency by up to 30 megawatts at an existing hydroelectric facility shall qualify; and (iii) no such facility shall involve pumped storage of water or construction of any new dam or water diversion structure constructed later than January 1, 1998; (7) low emission advanced biomass power conversion technologies using fuels such as wood, by-products or waste from agricultural crops, food or animals, energy crops, biogas, liquid biofuel including but not limited to biodiesel, organic refuse-derived fuel, or algae; (8) marine or hydrokinetic energy as defined in section 3; or (9) geothermal energy. A Class I renewable generating source may be located behind the customer meter within the ISO-NE control area if the output is verified by an independent verification system participating in the NEPOOL GIS accounting system and approved by the department.

(d) Every retail electric supplier providing service under contracts executed or extended on or after January 1, 2009 , shall provide a minimum percentage of kilowatt-hour sales to end-use customers in the commonwealth from Class II renewable energy generating sources. For the purposes of this section, a Class II renewable energy generating source is one that began commercial operation before December 31, 1997 and generates electricity using any of the following: (1) solar

photovoltaic or solar thermal electric energy; (2) wind energy; (3) ocean thermal, wave or tidal energy; (4) fuel cells utilizing renewable fuels; (5) landfill gas; (6) energy generated by existing hydroelectric facilities, provided that such existing facility shall meet appropriate and site-specific standards that address adequate and healthy river flows, water quality standards, fish passage and protection measures and mitigation and enhancement opportunities in the impacted watershed as determined by the department in consultation with relevant state and federal agencies having oversight and jurisdiction over hydropower facilities; and provided further, that only energy from existing facilities up to 7.5 megawatts shall be considered renewable energy and no such facility shall involve pumped storage of water nor construction of any new dam or water diversion structure constructed later than January 1, 1998; (7) waste-to-energy which is a component of conventional municipal solid waste plant technology in commercial use; (8) low emission advanced biomass power conversion technologies using fuels such as wood, by-products or waste from agricultural crops, food or animals, energy crops, biogas, liquid biofuel including but not limited to biodiesel, organic refuse-derived fuel, or algae; (9) marine or hydrokinetic energy as defined in section 3; or (10) geothermal energy. A facility in clause (7) shall not be a Class II renewable generating source unless it operates or contracts for one or more recycling programs approved by the department of environmental protection. At least 50 per cent of any revenue received by the facility through the sale of Massachusetts RPS-eligible renewable energy certificates shall be allocated to such recycling programs. A Class II renewable generating source may be located behind the customer meter within the ISO-NE control area provided that the output is verified by an independent verification system participating in the NEPOOL GIS accounting system and approved by the department.

(e) Every retail supplier shall annually provide to end-use customers in the commonwealth generation attributes from Class II energy facilities in an amount approved by the department; provided, however, that the department shall specify that a certain percentage of these requirements shall be met through energy generated from a specific technology or fuel type in subsection (d). Such minimum percentage requirement for kilowatt-hour sales from Class II energy generating sources may be adjusted by the department as necessary to promote the continued operation of existing energy generating resources that meet the requirements of said subsection (d), and may be met through kilowatt-hour sales to end-use customers from any energy generating source meeting the requirements of said subsection (d).

(f) After conducting administrative proceedings, the department may add technologies or technology categories to any list; provided, however, that the following technologies shall not be considered renewable energy supplies: coal, oil, natural gas and nuclear power. The department shall establish and maintain regulations allowing for a retail supplier to discharge its obligations under this section by making an alternative compliance payment in an amount established by the department for Class I and Class II renewable energy generating sources. The department shall establish and maintain regulations outlining procedures by which each retail supplier shall annually submit for the department's review a filing illustrating the retail supplier's compliance with the requirements of this section.

(g) In satisfying its annual obligations under subsection (a), each retail supplier shall provide a portion of the required minimum percentage of kilowatt-hours sales from new on-site renewable energy generating sources located in the commonwealth and having a power production capacity of not more than 6 megawatts which began commercial operation after December 31, 2007, including, but not limited to, behind the meter generation and other similar categories of generation determined by the department. The portion of the required minimum percentage required to be sup-plied by such on-site renewable energy generating sources shall be established by the department; provided, however, that the department may specify that a certain percentage of these requirements shall be met through energy generated from a specific technology or fuel type.

(h) The department shall adopt regulations allowing for a retail supplier to discharge its obligations under subsection (g) by making an alternative compliance payment in an amount established by the department; provided, however, that the department shall set on-site generation alternative compliance payment rates at levels that shall stimulate the development of new on-site renewable energy generating sources.

(i) A municipal lighting plant shall be exempt from the obligations under this section so long as and insofar as it is exempt from the requirements to allow competitive choice of generation supply under section 47A of chapter 164.

N.H. Stat. § 362-F:3.

Minimum Electric Renewable Portfolio Standards. – For each year specified in the table below, each provider of electricity shall obtain and retire certificates sufficient in number and class type to meet or exceed the following percentages of total megawatt-hours of electricity supplied by the provider to its end-use customers that year, except to the extent that the provider makes payments to the renewable energy fund under RSA 362-F:10, II:

	2008	2009	2010	2011	2012	2013	2014	2015	2025 and thereafter
Class I	0.0%	0.5%	1%	2%	3%	3.8%	5%	6%	15% (*)
Class II	0.0%	0.0%	0.04%	0.08%	0.15%	0.2%	0.3%	0.3%	0.3%
Class III	3.5%	4.5%	5.5%	6.5%	1.4%	1.5%	3.0%	8.0%	8.0%
Class IV	0.5%	1%	1%	1%	1%	1.3%	1.4%	1.5%	1.5%

*Class I increases an additional 0.9 percent per year from 2015 through 2025. A set percentage of the class I totals shall be satisfied annually by the acquisition of renewable energy certificates from qualifying renewable energy technologies producing useful thermal energy as defined in RSA 362-F:2, XV-a. The set percentage shall be 0.4 percent in 2014, 0.6 percent in 2015, 1.3 percent in 2016, and increased annually by 0.1 percent per year from 2017 through 2023, after which it shall remain unchanged. Classes II-IV remain at the same percentages from 2015 through 2025 except as provided in RSA 362-F:4, V-VI.

R.I. Gen. Laws § 39-26-4. Renewable energy standard

(a) Starting in compliance year 2007, all obligated entities shall obtain at least three percent (3%) of the electricity they sell at retail to Rhode Island end-use customers, adjusted for electric line losses, from eligible renewable energy resources, escalating, according to the following schedule:

(1) At least three percent (3%) of retail electricity sales in compliance year 2007;

(2) An additional one half of one percent (0.5%) of retail electricity sales in each of the following compliance years 2008, 2009, 2010;

(3) An additional one percent (1%) of retail electricity sales in each of the following compliance years 2011, 2012, 2013, 2014, provided that the commission has determined the adequacy, or potential adequacy, of renewable energy supplies to meet these percentage requirements;

(4) An additional one and one half percent (1.5%) of retail electricity sales in each of the following compliance years 2015, 2016, 2017, 2018 and 2019, provided that the commission has determined the adequacy, or potential adequacy of renewable energy supplies to meet these percentage requirements;

(5) In 2020 and each year thereafter, the minimum renewable energy standard established in 2019 shall be maintained unless the commission shall determine that such maintenance is no longer necessary for either amortization of investments in new renewable energy resources or for maintaining targets and objectives for renewable energy.

(b) For each obligated entity and in each compliance year, the amount of retail electricity sales used to meet obligations under this statute that is derived from existing renewable energy resources shall not exceed two percent (2%) of total retail electricity sales.

(c) The minimum renewable energy percentages set forth in subsection (a) above shall be met for each electrical energy product offered to end-use customers, in a manner that ensures that the amount of renewable energy of end-use customers voluntarily purchasing renewable energy is not counted toward meeting such percentages.

(d) To the extent consistent with the requirements of this chapter, compliance with the renewable energy standard may be demonstrated through procurement of NE-GIS certificates relating to generating units certified by the commission as using eligible renewable energy sources, as evidenced by reports issued by the NE-GIS administrator. Procurement of NE-GIS certificates from off-grid and customer-sited generation facilities, if located in Rhode Island and verified by the commission as eligible renewable energy resources, may also be used to demonstrate compliance. With the exception of contracts for generation supply entered into prior to 2002, initial title to NE-GIS certificates from off-grid and customer-sited generation facilities and from all other eligible renewable energy resources shall accrue to the owner of such a generation facility, unless such title has been explicitly deemed transferred pursuant to contract or regulatory order.

(e) In lieu of providing NE-GIS certificates pursuant to subsection (d) of this section, an obligated entity may also discharge all or any portion of its compliance obligations by making an alternative compliance payment to the Renewable Energy Development Fund established pursuant to § 39-26-7.

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 20th day of May, 2016.

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