ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

No. 17-1110

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEXTERA ENERGY RESOURCES, LLC, ET AL.,
Petitioner

V.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF INTERVENOR IN SUPPORT OF RESPONDENT

Phyllis G. Kimmel
McCarter & English, LLP
1015 Fifteenth Street, N.W.,
12th Floor
Washington, DC 20005

Attorney for New England States Committee on Electricity, Inc.

Jason Marshall, General Counsel
New England States Committee
on Electricity, Inc.
655 Longmeadow Street
Longmeadow, MA 01106

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

DATED: December 12, 2017

Additional Counsel listed on next page

Clare E. Kindall,
Assistant Attorney General
Robert Louis Marconi,
Assistant Attorney General
Office of the Attorney General,
State of Connecticut
10 Franklin Square
New Britain, CT 06051

Attorneys for the State of Connecticut Public Utilities Regulatory Authority

Larry F. Eisenstat
Richard Lehfeldt
Crowell & Moring LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004

Counsel for CPV Towantic, LLC

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

All parties and intervenors appearing in the proceeding below before the Federal Energy Regulatory Commission are listed in the Petitioner's Brief, at pages ii-iii.

All parties and intervenors appearing in this Court in this cases are listed in the Petitioner's Brief, at page i. Amici appearing in this Court are the Natural Resources Defense Council and Conservation Law Foundation.

B. Rulings Under Review

References to the rulings at issue appear in FERC's Brief, at page i.

C. Related Cases

References to related cases appear in Respondent FERC's Brief, at pages i-ii.

/s/ Phyllis G. Kimmel

McCarter & English, LLP
1015 Fifteenth Street, N.W., 12th Floor
Washington, DC 20005
(202) 753-3400
pkimmel@mccarter.com

Attorney for New England States Committee on Electricity, Inc.

December 12, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and the rules of this Court, Intervenor-Respondents state as follows:

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.

The State of Connecticut Public Utilities Regulatory Authority is a governmental entity.

CPV Towantic is a non-governmental entity having its principal place of business at 8403 Colesville Road, Suite 915, Silver Spring, Maryland 20910. CPV Towantic is a direct, wholly owned subsidiary of the following companies: CPV Towantic Holding Company, LLC and Towantic Energy Holdings, LLC. Towantic Energy Holdings, LLC is in turn an indirect wholly owned subsidiary of General Electric Company, a publicly traded company on the New York Stock Exchange. General Electric Company is the only public company owning a 10% or more interest in CPV Towantic or its parents.

/s/ Phyllis G. Kimmel

Phyllis G. Kimmel
McCarter & English, LLP

On behalf of Intervenor-Respondents

December 12, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Court Cases

Administrative Cases

Federal Statutes

State Statutes

GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
FERC Br.	Brief for Respondent FERC
FPA	Federal Power Act
Generators	Petitioners NextEra Energy Resources, LLC, the PSEG Companies, and the NRG Companies
Initial Filing	Demand Curve Changes Filing, *ISO New England Inc. and New England Power Pool*, FERC Docket No. ER14-1639-000 (Apr. 1, 2014), JA __
Initial Order	*ISO New England, Inc.*, 147 FERC ¶ 61,173 (2014), JA __
Intervenor-Respondents	New England States Committee on Electricity, Inc., State of Connecticut Public Utilities Regulatory Authority, and CPV Towantic
ISO	Independent System Operator
NESCOE	New England States Committee on Electricity
P	Paragraph in a FERC order
Pet. Br.	Petitioners' Initial Brief
PJM	PJM Interconnection, L.L.C.
Rehearing Order	*ISO New England Inc.*, 150 FERC ¶ 61,065 (2015), JA __
Remand Order	*ISO New England Inc.*, 155 FERC ¶ 61,023 (2016), JA ___
Remand Rehearing Order	*ISO New England Inc.*, 158 FERC ¶ 61,138 (2017), JA __

System Operator	ISO New England Inc.
Tariff	ISO New England Inc. Transmission, Markets and Services Tariff

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

No. 17-1110

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____

NEXTERA ENERGY RESOURCES, LLC, ET AL.,
Petitioner

V.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

_____

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

_____

BRIEF OF INTERVENOR IN SUPPORT OF RESPONDENT

_____

STATEMENT OF ISSUES

Intervenor-Respondents[1] concur in the Statement of the Issues of the Respondent Federal Energy Regulatory Commission ("FERC" or "Commission"). FERC Br. at 1-2.

---

[1] The following intervenors are joining this brief: New England States Committee on Electricity, Inc. ("NESCOE"); State of Connecticut Public Utilities Regulatory Authority; and CPV Towantic (collectively, "Intervenor-Respondents").

STATUTORY ADDENDUM

The relevant sections of the Federal Power Act are contained in FERC's brief. The relevant sections of the other statutes discussed in this brief are contained in the Addendum.

STATEMENT OF FACTS

Intervenor-Respondents concur in FERC's Statement of Facts and provide this supplemental Statement of Facts to provide additional relevant information and perspective.

I. FORWARD CAPACITY MARKET

ISO New England Inc. (or the "System Operator") administers the Forward Capacity Market, in which eligible resources compete in an annual Forward Capacity Auction to provide capacity three years in advance of the delivery year.[2] *New England Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 286 (D.C. Cir. 2014) ("*New England*"). Bidders in the Forward Capacity Market include both existing resources and new entrants, whose "bids commit them to supply the amount they offer at the clearing price." *Conn. Dep't of Pub. Util. v. FERC*, 569 F.3d 477, 480 (2009) ("*Connecticut*"). The Forward Capacity Market has been in place for approximately eleven years, following extensive settlement negotiations

[2] Each Forward Capacity Auction takes place a little over three years in advance of the capacity year. Thus, for example, the ninth Forward Capacity Auction took place in February 2015, for the capacity year June 1, 2018 through May 31, 2019.

among ISO New England, over 100 stakeholders and the New England States, and subsequent challenges to the settlement which was approved by FERC. *See Devon Power LLC*, 115 FERC ¶ 61,340, P 15 (2006) ("*Devon Power*"), *order on reh'g*, 117 FERC ¶ 61,133 (2006), *aff'd in relevant part, Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (2008), *rev'd in part on other grounds sub nom.*, *NRG Power Mktg.*, 558 U.S. 165 (2010). The market rules governing the Forward Capacity Market are detailed and complex, the product of multiple years-long stakeholder processes in the regions.

"[A]s Generators acknowledge, the overarching purpose of the [Forward Capacity Market] is to enable [ISO New England] to procure sufficient capacity to meet its reliability needs." *ISO New England Inc.*, 158 FERC ¶ 61,138, P 24 (2017) ("Remand Rehearing Order"), JA ___. "By using competitive bidding for future capacity contracts . . . [the Forward Capacity Market] both incentivizes and accounts for new entry by more efficient generators, while ensuring a price both adequate to support reliability and fair to consumers." *Connecticut*, 569 F.3d at 480. Under the construct, capacity resources bid into Forward Capacity Auctions, which "procure capacity three-plus years ahead of the commitment period, which is intended to provide for a planning period for new entry and allow potential new capacity to compete in the auctions." *Devon Power LLC*, 115 FERC ¶ 61,340, P 16. The Forward Capacity Auction generally produces a single clearing price for

all resources whose bids clear the auction.[3] The price is set at the point where the supply curve (established by the resources' offers) intersects with the demand curve. Prior to ISO New England's adoption of a sloped demand curve, which FERC accepted in the proceeding below, the Forward Capacity Market used a vertical demand curve. *See ISO New England Inc.*, 147 FERC ¶ 61,173, P 3 (2014) ("Initial Order"), JA ___, *order on reh'g*, 150 FERC ¶ 61,065 (2015) ("Rehearing Order"). Numerous variables drive the clearing price, including economic trends, resource performance, system operational requirements, type and volume of new entrants, retirements, and natural gas and other fuel price impacts in the energy market.

II. RENEWABLES EXEMPTION

A. New England States' Laws Promoting the Development of Renewable Resources

The New England states have proactively advanced and provided significant financial support for the development of renewable resources for the past two decades. All six New England states have enacted state laws that require renewable and alternative portfolio standards or comparable programs, with four of those states having established programs that predate the existence of the Forward

[3] For example, ISO New England may classify some locations in New England as different "zones" reflecting limitations of the transmission system.

Capacity Market.[4] These renewable portfolio standard laws require utility companies and other electric suppliers to provide a specified percentage of their electricity from state-qualified renewable energy sources. New England state renewable portfolio standard targets for 2020 range from 10% to 59%, with the wide range of percentages resulting, in part, from the different statutory definitions of renewable resources. Most of the New England states have, or are considering, renewable portfolio standard targets that extend to 2030 and beyond.[5]

The laws and regulations governing the New England states' renewable portfolio standards require load-serving entities (both load-serving utilities and competitive suppliers) to purchase renewable energy certificates in proportion to a

---

[4] Conn. Gen. Stat. §§ 16-1 and 16-245a et seq. (requiring 28% renewable energy by 2020); 35-A Maine Rev. Stat. §§ 3210 et seq. and 3401 et seq. (requiring 40% renewable energy by 2017); Mass. Gen. Laws ch. 25A, § 11F (requiring 15% renewable energy by 2020); R.I. Gen. Laws §§ 39-26 et seq. (requiring 38.5% renewable energy by 2035). New Hampshire enacted its renewable portfolio standard in May 2007, one year after the Forward Capacity Market settlement was approved in *Devon Power*. N.H. Revised Stat. Ann., Chapter 362-F (requiring 25.2% renewable energy by 2025). Vermont established a renewable energy standard that took effect on January 1, 2017. Vt. Stat. Ann. tit. §§ 8002-8005 (requiring 75% renewable energy by 2032).

[5] *See, e.g.*, Conn. Dep't of Energy and Envir. Protection, Draft 2017 Comprehensive Energy Strategy: CT General Statutes Section 16a-3d at 65-67 (July 28, 2017), *available at* http://www.ct.gov/deep/lib/deep/energy/ces/2017_draft_comprehensiveenergystrategy.pdf. Initial renewable portfolio standards compliance deadlines included: Maine (2000), Massachusetts (2003), and Connecticut (2004). Wiser, R. and Barbose, G., *Renewable Portfolio Standards in the United States: A Status Report with Data Through 2007*, Lawrence Berkeley National Laboratory, at 12 (Apr. 25, 2008).

percentage of their load. These programs have given rise to a secondary market in which qualifying renewable resources may sell the renewable energy certificates created by their energy generation to load-serving entities and others, establishing a market-based approach to incentivizing renewable resource development. In addition, some New England states have enacted other statutes and regulations to promote the development of renewable resources, including facilitating the financing of new renewable resources through long-term power purchase agreements between utility companies and clean energy resources.[6]

B. ISO New England's Minimum Offer Price Rule

The Forward Capacity Market rules include supplier-side and buyer-side mitigation measures, both a product of FERC having undertaken "its balancing responsibilities in the capacity market." *New England*, 757 F.3d at 286. According to FERC, "[w]hile seller market power typically involves the uneconomic withholding of capacity from the market in order to increase prices above competitive levels, buyer market power typically involves the converse: the uneconomic injection of capacity into the market in order to decrease prices below competitive levels. This buyer-side conduct can be profitable in circumstances directly analogous to withholding, since subsidized capacity offerings can

[6] *See, e.g.*, Conn. Public Act 15-107, Conn. Public Act 13-303, and Conn. Public Act 17-144; Massachusetts Act to Promote Energy Diversity, St. 2016 Mass. Acts ch. 188, § 12.

significantly lower capacity prices." *ISO New England Inc.*, 135 FERC ¶ 61,029, P 9 n.21 (2011) ("Buyer Market Power Order"), *order on reh'g*, 138 FERC ¶ 61,027, P 82 (2012), *aff'd, New England*, 757 F.3d 283 (2014).

Buyer-side mitigation in the Forward Capacity Market takes the form of a minimum offer price rule. The rule establishes offer floors, administratively set by the System Operator at a level intended to approximate the net cost of entry of new resources. These minimum offer floors restrict the ability of supply resources to offer their capacity below asset-class-specific benchmark prices. *See* Buyer Market Power Order, PP 165-66, *order on reh'g*, 138 FERC ¶ 61,027, P 82.

Offers above the relevant offer floor are automatically deemed competitive, while new resources offering capacity at a price below the relevant offer floor (referred to as a "trigger price") must justify their cost structure. If any portion of a new resource's revenue arises from an out-of-market source—including, for example, revenues received by renewable resources under long-term contracts—its offer will be mitigated upwards, in most cases, to the minimum offer floor for that asset class. ISO New England Inc. Transmission, Markets and Services Tariff ("Tariff"), Sections III.13.1.1.2.2.3. and III.A.21.2(b), JA ___, ___.

Under the Forward Capacity Auction's descending clock auction (*see* FERC Br. at 9), new resources that have been mitigated upwards to that floor/trigger price must leave the auction when their bid exceeds the bid price in a given round. Since

renewable resources generally have higher offer floors than gas-fired resources, renewable resources, including those supported by state statutory programs, are unlikely to clear the auction. ISO New England Compliance Filing, Transmittal at 10, *ISO New England Inc., et al*. FERC Docket No. ER10-787-000 (May 13, 2011); Tariff, Section III.A.21.1.1, JA ___. Thus, even though those resources would be operating in furtherance of state statutory requirements and providing capacity to the ISO New England system, absent an exemption from the minimum offer price floor rule, the auction will not select these resources and, as a result, they would not be counted towards ISO New England's capacity requirement, and consumers would pay excessive capacity costs.

This Court upheld FERC's decision to implement this minimum offer price floor as a "proper exercise of its role in balancing competing interests." *New England*, 757 F.3d at 293. At the time FERC initially approved the minimum offer price rule, it rejected an exemption from that rule for resources developed pursuant to state policies, noting that "[p]arties have not provided sufficient specificity to allow us to approve an appropriately narrow exemption . . . ." Buyer Market Power Order, P 171. While FERC rejected arguments that it should grant such a categorical exemption in the context of this earlier and multi-faceted Forward Capacity Market proceeding, *New England*, 757 F.3d at 294-95, FERC provided "parties an opportunity to develop appropriately tailored exemptions for . . . state-

sponsored resources through the stakeholder process." *Id.* at 295. FERC also stated that parties were free to return with additional specificity and file a complaint under FPA section 206, 16 U.S.C. § 824e, to seek such an exemption. *Id*. NESCOE did just that.

C. NESCOE Complaint

NESCOE filed its complaint in December 2012, asserting that ISO New England's Tariff revisions were unjust and unreasonable because they implemented buyer-side mitigation without an exemption for state-sponsored public policy resources. Complaint and Motion to Consolidate Proceedings of the New England States Comm. on Electricity, *New England States Comm. on Electricity v. ISO New England Inc.*, FERC Docket No. EL13-34-000 (Dec. 28, 2012). NESCOE argued that without an exemption, ISO New England would over-procure capacity needed for resource adequacy, ignoring resources that are operational and providing system capacity and resulting in unjust and unreasonable rates. *Id*. at 9-17. The Commission rejected NESCOE's complaint. The rejection focused on the fact that NESCOE did not provide the requisite evidence under FPA section 206 to justify the exemption. *New England States Comm. on Electricity v. ISO New England Inc.*, 142 FERC ¶ 61,108, P 33 (2013) ("*NESCOE* Complaint Order"), *order on reh'g*, 151 FERC ¶ 61,056 (2015).

FERC also addressed NESCOE's argument that a renewables exemption would be consistent with an exemption FERC approved for another regional transmission operator, PJM Interconnection, L.L.C. ("PJM"). FERC emphasized that the categorical renewables exemption would have a greater impact in New England because the New England market is smaller than PJM's and "because the [ISO New England] capacity market relies on a vertical demand curve while PJM's capacity market relies on a sloped demand curve." *Id.*, P 35.

Concurrent with the *NESCOE* Complaint Order, FERC issued an order addressing a package of reforms to ISO New England's capacity market rules. There, FERC noted "the large number of stakeholders that supported some form of renewable resource exemption" from the minimum offer price rule and "encourage[d] [ISO New England] to undertake the development of a stakeholder process for such an exemption, which could include the development of a [downward-sloping] demand curve." *ISO New England Inc.*, 142 FERC ¶ 61,107, P 97 (2013). That is precisely the path that the region followed.

III. PROCEEDING BELOW

A. Package of Reforms

On April 1, 2014, ISO New England, jointly with the region's stakeholder group, the New England Power Pool Participants Committee, made a filing with FERC proposing to change the market rules in two respects relevant to this

proceeding: (i) to incorporate a system-wide downward-sloping demand curve, in place of the vertical curve; and (ii) to establish a narrowly tailored exemption from buyer-side mitigation for certain state-sponsored renewable resources.[7] The "package of rule changes" was supported by all six New England States (*see* Demand Curve Changes Filing at 2, *ISO New England Inc. and New England Power Pool*, FERC Docket No. ER14-1639-000 (Apr. 1, 2014) ("Initial Filing"), JA ___), and the majority of commenters supported the proposed changes as a whole:[8] "While these parties might not support every element of the sloped demand curve, if viewed in isolation, they state that it represents a balanced and comprehensive package." Initial Order, P 18, JA ___. FERC cited NESCOE's comments (*id*. at n.23, JA ___), which explained that "these capacity market reforms work together to align the incentives for resource adequacy, financial stability, consumer cost impacts, market power mitigation, and state statutory requirements." Motion to Intervene and Comments of the New England States

---

[7] Other proposed changes not at issue in this proceeding included extending the option new resources had to lock-in capacity prices for up to five years by another two years, and eliminating system-wide administrative pricing rules in the event of insufficient competition and insufficient supply. Initial Order at P 5, JA ___. The first issue is currently pending before this Court in *New England Power Generators v. FERC*, No. 15-1071 (D.C. Cir. argued Oct. 6, 2017).

[8] "Supporters generally include generators, state parties, project financiers, and renewable resource developers." Initial Order, P 18 n.22, JA ___.

Committee on Electricity at 6-7, *ISO New England Inc.*, FERC Docket No. ER14-1639-000 (Apr. 22, 2014), JA ___.

As NESCOE stated to FERC in the proceeding, the parameters of the proposed sloped demand curve were "more generous to resources" than the curves in other eastern wholesale markets and "would be perceived by the States as one-sided" but for the suite of other Forward Capacity Market changes contained in the package of rule changes. *Id.* at 8. These changes included the renewables exemption, and NESCOE explained to FERC how the exemption was necessary to achieve a balance between market pricing and state statutory requirements. *Id.* at 6, 8-11.

Ultimately, FERC found that the proposed sloped demand curve design "reasonably balances the multiple considerations identified by Filing Parties, including reducing price volatility, susceptibility to the exercise of market power, frequency of low reliability events, and avoiding falling below" a specified reliability level "in any individual time period." Initial Order, P 29, JA ___

B. Narrowly Tailored Renewables Exemption

The renewables exemption permits a limited quantity of certain new renewable resources to offer their capacity in the Forward Capacity Auction at prices below those established by the minimum offer price rule, subject to several limiting factors. These factors include:

- No more than 200 MW of capacity are permitted to participate under the exemption in a single auction, with any amount greater than 200 MW in a single auction being prorated and eligible for the renewables exemption in future auctions. Initial Filing at 12, JA ___. The Commission found that "if a developer's primary purpose is to suppress capacity market prices" the 200 MW cap makes renewable resources "an undesirable choice" for lowering market prices. Rehearing Order, P 26, JA __.
- The rules limit any unused portion of the 200 MW cap to be carried forward for up to two years, with a maximum of 600 MW of renewable technology resources eligible to clear a future auction if no renewable technology resource cleared the prior two auctions. *Id*., P 21, JA ___. *See also ISO New England Inc.*, 155 FERC ¶ 61,023, P 10 (2016) ("Remand Order"), JA ___ , JA __ (citing Initial Filing, Prepared Testimony of Robert G. Ethier on behalf of ISO New England Inc. at 37-38 ("Ethier Testimony"), JA __).
- Eligibility for the exemption is restricted to new resources that qualify under state renewable or alternative energy portfolio standards (or in a state without a portfolio standard, under that state's renewable energy goals as a renewable resource), as in effect on January 1, 2014. *See* Initial Filing at 12-13, JA ___; Ethier Testimony at 37-42, JA ___; and Tariff, Section III.13.1.1.7, JA ___. Thus, to the extent a state enacted a new policy on

January 2, 2014 or thereafter, which expanded such standards or goals to cover additional resource types, those resources would be ineligible for the exemption.

Since implementation of the renewables exemption, it has been used in a limited fashion. Just 16 MW of renewables (only eight percent of the 200 MW cap) cleared in the ninth Forward Capacity Auction (Remand Rehearing Order, P 78 & n.206, JA ___); 56 MW cleared in the tenth Forward Capacity Auction (less than 15 percent of the 384 MW cap for that year) (*id.*); and 30 MW cleared in the most recent auction, the eleventh Forward Capacity Auction[9] (less than six percent of the 528 MW cap for that year).

The Forward Capacity Market has attracted a significant number of new entrants and has demonstrated an overall competitiveness since the renewables exemption has been implemented. For the ninth Forward Capacity Auction, for example, ISO New England concluded that the auction "attracted significant competition" and secured "more than 1,400 megawatts of new capacity," including

[9] Carissa P. Sedlacek, Director, Resource Adequacy, ISO New England Inc., Eleventh Forward Capacity Auction for the 2020/2021 Capacity Commitment Period Results Summary & Trends at 8, Presentation to ISO New England Reliability Committee Meeting (Mar. 21, 2017), *available at* https://www.iso-ne.com/static-assets/documents/2017/03/a6_fca_11_auction_results.pdf.

three new power plants at a combined 1,060 MW. These resources helped the region make up shortfalls from generation retirements.[10]

For the tenth Forward Capacity Auction, 40,131 MW of resources, including 6,700 MW of new resources, qualified to compete in the auction to provide the 34,151 MW of capacity needed for resource adequacy for 2019-2020.[11] "More than 1,450 MW of new generation capacity cleared, of which three natural gas-fired generators made up 90%."[12] In the eleventh Forward Capacity Auction, 40,421 MW of resources qualified to compete in the auction, and the market procured 35,835 MW, almost 1,800 above the resource adequacy target of 34,075 MW.[13]

Again, putting these numbers in perspective, the capacity resources that cleared under the renewables exemption represented less than 0.2% percent of the

---

[10] Press Release, ISO New England Inc., Annual Forward Capacity Market Auction Acquires Major New Generations Resources for 2018-2019: Auction attracts investment in new resources needed to address New England's resource shortage at 1 (Feb. 2015), *available at* https://www.iso-ne.com/static-assets/documents/2015/02/fca9_initialresults_final_02042015.pdf.

[11] ISO New England Inc. Internal Market Monitor, ISO New England's Internal Market Monitor 2016 Annual Markets Report at 142 (May 30, 2017), *available at* https://www.iso-ne.com/static-assets/documents/2017/05/annual_markets_report_2016.pdf.

[12] *Id*.

[13] *Id*. at 144.

capacity resources procured in each of the ninth, tenth and eleventh Forward Capacity Auctions.

C. Orders on Review

FERC approved ISO New England's package of reforms, including the system-wide sloped demand curve and the limited renewables exemption from the minimum offer price rule. *See* Initial Order and Rehearing Order, JA __, __. NextEra Energy Resources, LLC, the PSEG Companies, and the NRG Companies (collectively, "Generators") sought review of FERC's approval of the renewables exemption, *NextEra Energy Resources, LLC v. FERC*, No. 15-1070 (D.C. Cir. dismissed Dec. 1, 2015). FERC sought a voluntary remand, which the Court granted on December 1, 2015.

On remand, FERC affirmed that ISO New England took appropriate steps "to minimize any price suppression that might result from the renewables exemption so that the [Forward Capacity Market] can still accomplish its purpose of procuring sufficient capacity for the region's reliability needs," focusing in particular on the implementation of the sloped demand curve and the 200 MW annual cap on resources that may use the exemption. Remand Order, P 28, JA ___ . FERC explained that although there could be a price impact from the renewables exemption, it fulfills the Commission's statutory mandate by protecting consumers from paying for redundant capacity, and its ruling is consistent with the purpose of

the Forward Capacity Market. *Id*., PP 33, 35, JA ___. FERC denied rehearing on February 3, 2017. Remand Rehearing Order, P 99, JA ___.

SUMMARY OF THE ARGUMENT

FERC reasonably exercised its discretion to approve an exemption from buyer-side mitigation for a limited amount of renewable resources to be able to participate in New England's Forward Capacity Market. Based on evidence from the System Operator, FERC found that the renewables exemption was needed to ensure that customers were not being charged excessive rates for capacity.

Specifically, FERC reasonably recognized that absent this limited renewables exemption, consumers would pay both for capacity that cleared ISO New England's capacity market and for renewable technology capacity that was being built to satisfy public policy mandates of the six New England states. Although FERC had previously rejected a categorical exemption from the buyer-side mitigation offer floor price, here, following a stakeholder process that FERC encouraged, FERC reasonably approved a limited exemption developed by the System Operator, in conjunction with the states and industry stakeholders, that was part of an integrated package of reforms designed to ensure that both supplier-side and buyer-side market power are mitigated so that capacity prices remain just and reasonable.

FERC's prior decisions addressing supplier and buyer-side mitigation rules in New England have been upheld as reasonable exercises of discretion. Now that FERC has approved a tailored exemption to buyer-side mitigation rules, based on substantial evidence and balancing the different interests, FERC's determination here, too, should be upheld. FERC relied on substantial evidence in the record, in particular, testimony from the System Operator in finding that the renewables exemption does not unreasonably lower capacity prices. FERC's acceptance of the renewable exemption was consistent with precedent in other regions where FERC determined that intermittent renewable resources have limited or no incentive and ability to exercise buyer market power to artificially suppress capacity market prices. Far from being inconsistent with prior precedent, as Generators argue, FERC's decision here reflects a reasoned approach that appropriately balances suppliers' needs with the statutory duty to prevent consumers from being charged excessive rates.

ARGUMENT

I. STANDARD OF REVIEW

Intervenor-Respondents concur in the standard of review in FERC's Brief at 20-22.

II. APPROVAL OF THE RENEWABLES EXEMPTION—A MARKET RULE DESIGNED TO PROMOTE JUST AND REASONABLE CAPACITY RATES—IS SQUARELY WITHIN FERC'S STATUTORY MANDATE.

A. FERC Fulfilled Its Statutory Responsibility in Approving the Limited Exemption for Renewable Resources.

One of FERC's core obligations under section 205 of the Federal Power Act, 16 U.S.C. § 824d, is to ensure that energy rates, including rates for capacity prices in wholesale markets like the one that ISO New England administers, are just and reasonable. *See Connecticut*, 569 F.3d at 479. "To ensure reliable electrical power, a system operator such as [ISO New England] must implement a scheme that will incent resources to provide sufficient energy capacity, or energy available for later use." *New England* at 757 F.3d at 286. Limiting capacity purchases to the "installed capacity requirement," *i.e.*, the amount that the System Operator determines is necessary to ensure reliability, "is a 'bedrock' principle of the [Forward Capacity Market] model." Buyer Market Power Order, P 164.

Here, FERC appropriately found that consumers should not have to overpay for capacity when the Forward Capacity Market sends false price signals that new capacity is needed. ISO New England's expert testified that "if resources are to be built pursuant to state-sponsored initiatives, it would be economically inefficient not to include them as counting toward meeting regional capacity requirements, because excluding them would require the building of a second, redundant set of

resources to meet the same need." Ethier Testimony at 39, JA ___. FERC's conclusion logically followed:

> One purpose of capacity markets is to send appropriate price signals regarding where and when new resources are needed. If renewable resources are being built, but are not reflected in the [Forward Capacity Market], then the [Forward Capacity Market] may send an incorrect signal to construct new capacity that is not needed. Not only would the capacity market send an incorrect signal, but customers would have to pay for capacity twice – first, for renewable resources via out-of-market mechanisms and second, for additional capacity that is procured because the capacity market has sent the incorrect signal that additional capacity is needed.

Remand Rehearing Order, P 9, JA ___.

Codified New England state policies supporting new renewable energy, some of which predate the Forward Capacity Market, are designed to incentivize the development of clean energy. As discussed above, most New England states have renewable portfolio standard targets in place through the end of this decade and have extended, or are considering extending, these targets to 2030 and beyond. In addition, New England states have enacted into law additional requirements, such as mandates related to long-term contracting for renewable and clean energy resources. The renewables exemption approved by FERC mitigates the over-procurement of capacity in the Forward Capacity Market. Without this mechanism under the current market structure, customers would end up paying excessive costs. This would be contrary to the Federal Power Act, a major purpose of which is

"protection of consumers from excessive rates and charges." *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016); *accord*, *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952), *Mun Light Boards v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972). "The Commission stands as the watchdog providing 'a complete, permanent and effective bond of protection from excessive rates and charges.'" *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1207 (D.C. Cir. 1987) (quoting *Atl Ref. Co. v. Pub. Service Comm'n*, 360 U.S. 378, 388 (1959)).

Generators argue that FERC provides no basis to reverse precedent finding that FERC has a "statutory duty to protect the integrity of wholesale markets against uneconomic entry." Pet. Br. at 30 (citations omitted). This argument ignores that FERC's responsibility under the Federal Power Act is to ensure that wholesale electric rates are just and reasonable, and that overseeing the competitiveness of the wholesale markets is a means to that end. "Rather than setting rates for each public utility, FERC now seeks to ensure that market-based rates are 'just and reasonable' largely by overseeing the integrity of the interstate energy markets." *N.J. Bd. of Pub. Util. v. FERC*, 744 F.3d 74, 81 (3rd Cir. 2014) ("*New Jersey*"). "Improving the competitiveness of organized wholesale markets is integral to the Commission fulfilling its statutory mandate to ensure supplies of electric energy at just, reasonable and not unduly discriminatory or preferential

rates." *Wholesale Competition in Regions with Organized Elec. Mkts.*, Order No. 719, 125 FERC ¶ 61,071, P 1 (2008), 73 Fed. Reg. 64,100, 64,101 (Oct. 28, 2008), *order on reh'g*, Order No. 719-A, 128 FERC ¶ 61,059 (2009), 74 Fed. Reg. 37,776 (July 29, 2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009). *See also Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1294 (2016) ("FERC extensively regulates the structure of the PJM capacity auction to ensure that it efficiently balances supply and demand, producing a just and reasonable clearing price.").

Here, FERC appropriately considered the impact of the rule on suppliers and consumers (*see, e.g.*, Rehearing Order, PP 44-46, JA __), which it must do to ensure just and reasonable prices in the New England capacity market. "[S]etting a just and reasonable rate necessarily 'involves a balancing of the investor and the consumer interests.'" *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 262 (D.C. Cir. 2007) (quoting *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944)). FERC performed this balancing and found the renewables exemption would not prevent effective competition but, rather, was necessary to protect consumers against excessive costs. Thus, FERC's approval of the renewables exemption is in accordance with its statutory mandate.

B. FERC Appropriately Balanced Various Interests in Approving the Tailored Renewables Exemption.

FERC's decision to approve the limited renewables exemption was based on balancing "competing goals to assure just and reasonable rates." Remand Order, P 33, JA ___. The renewables exemption was specifically designed to "permit[] market participants to satisfy their renewable portfolio standard obligations without imposing additional costs on consumers and minimizes potential concerns about price suppression." Initial Order, P 64, JA ___. As the System Operator explained to FERC, the exemption "acknowledges that [renewable] state-sponsored resources do or will exist and reasonably addresses the inherent conflict between certain legitimate state actions and setting appropriate prices in the [Forward Capacity Market]." Ethier Testimony at 39, JA ___.

FERC here determined that a narrowly tailored exemption to the buyer-side mitigation rules was part of a just and reasonable package of changes implementing a sloped demand curve. Just because that decision may be, in Generators' view, "unfortunate does not make it arbitrary." *New England*, 757 F.3d at 295; *accord New Jersey*, 744 F.3d at 109 ("Surely FERC is permitted to weigh the danger of price suppression against the counter-danger of over-mitigation, and determine where it wishes to strike the balance.").

FERC's articulation of the factors it considered is appropriate and consistent with the purpose of the Forward Capacity Market: "In assuring just and reasonable

rates, the Commission must strike a balance between setting a price that will provide an incentive to develop and retain a sufficient level of capacity to ensure reliability, and protecting customers from overpaying for that capacity." Remand Rehearing Order, P 11 (citing *FPC v. Hope Nat. Gas Co.*, 320 U.S. at 603). The Commission's decision to approve a limited exemption to buyer-side power mitigation rules should be treated no differently than its decision to "mitigate buyer-side power" in the first place. As this Court stated:

> [W]e defer to the Commission's decision to mitigate buyer-side power because its determination was not arbitrary or capricious, but instead a proper exercise of its role in balancing competing interests. FERC evaluated the relative importance of several parameters—allowing uneconomic resources to clear the market, preventing uneconomic resources from distorting the market clearing price, and limiting the purchased capacity to the Installed Capacity Requirement—and reasonably determined that it was more important to prevent price distortion and excess capacity purchase than it was to allow out-of-market resources to clear. Such a juggling act would not benefit from our rearranging.

New England, 757 F.3d at 293 (citing *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 541-42 (D.C. Cir. 2010)).

FERC's balancing of competing interests here is also consistent with other orders in which it has addressed mitigation rules, and exemptions to those rules, in other capacity markets. *See N.Y. State Pub. Service Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137, P 34 (2017) (*reh'g pending*) ("the

Commission seeks to ensure that buyer-side market power mitigation rules strike a careful balance between over-mitigating and under-mitigating new capacity resources"); *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,088, P 31 (2016) ("[T]he focus on incentive and ability appropriately balances the need to mitigate the exercise of buyer-side market power to ensure just and reasonable [installed capacity] market prices with the risk of over-mitigating new entrants."); *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, P 26 (2013) *order on reh'g*, 153 FERC ¶ 61,066 (2015) (finding that PJM's buyer-side market power mitigation rules "appropriately balance[] the need for mitigation of buyer-side market power against the risk of over-mitigation").

Furthermore, with its orders in the proceeding below, FERC has appropriately exercised its statutory obligation to ensure just and reasonable wholesale power rates in a manner that respects state policies. FERC correctly recognized that "[w]hile the Commission is responsible for maintaining well-functioning markets, states have jurisdiction over generation and set renewable resource targets and renewable portfolio standards." Remand Rehearing Order, P 9, JA ___. States, for example, "retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct

interference from the Commission." *Connecticut*, 569 F.3d at 481. States also have authority, *inter alia*, over integrated resource planning and their utilities' generation and resource portfolios. *See Allco Finance Ltd. v. Klee*, 861 F.3d 82, 101 (2nd Cir. 2017), *petition for cert. filed* (U.S. Nov. 15, 2017) (No. 17-737). *See also PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 255 (3rd Cir. 2014), *cert. denied*, 136 S. Ct. 1728 (2016) ("The states may select the type of generation to be built—wind or solar, gas or coal—and where to build the facility. Or states may elect to build no electric generation facilities at all. The states' regulatory choices accumulate into the available supply transacted through the interstate market. The Federal Power Act grants FERC exclusive control over whether rates are 'just and reasonable,' but FERC's authority over interstate rates does not carry with it exclusive control over any and every force that influences interstate rates.").

FERC's approval of the limited exemption as a "just and reasonable market design" was predicated in part on balancing "state policy considerations" with its statutory mandate, leading to its reasonable conclusion that the renewables exemption enables the Forward Capacity Market "to fulfill its function of procuring sufficient capacity to meet reliability targets, on average, over time, at just and reasonable prices to customers." Remand Rehearing Order, P 8, JA ___. FERC appropriately sought to harmonize its statutory mandate with state laws. *See, e.g.*, *N.Y. Indep. Sys. Operator, Inc.*, 131 FERC ¶ 61,170, P 137 (2010), *order on*

reh'g, 150 FERC ¶ 61,208 (2015) ("it is not [FERC's] intent to interfere with state programs that further specific legitimate policy goals").

C. The Renewables Exemption Is Not Unduly Discriminatory.

Generators fail to show that FERC's orders approving the renewable exemption result in undue discrimination. Generators make several broad-based references to undue discrimination claims in their brief. Pet. Br. at 22 (the renewables exemption is "unduly discriminatory because it requires competitive merchant generation resources to bear the cost of new entry by uneconomic resources."); *id*. at 27 (this case "is about the unjust, unreasonable, and unduly discriminatory effects of deliberately authorizing uneconomic entry, regardless of generation type"). The only articulation of their undue discrimination claim is that it was "indefensibly discriminatory and preferential for FERC to erase competition for new load by expropriating the value of merchants generators' sunk investments to enable state-sponsored uneconomic resources to meet that demand." *Id*. at 49.

However, as FERC explained, "[c]ustomers (not generators) are paying for the development of the exempt resources via state policy mechanisms. Generators are not 'paying for' the exemption; rather, they are receiving an auction price that more accurately reflects the amount of capacity they must supply to the [ISO New England] region, given the fact that additional capacity is being provided to the region via these state policy mechanisms." Remand Rehearing Order, P 46, JA

___. This Court has recognized that it is not the generators but "the consumers who ultimately shoulder the costs in their utility bills." *Connecticut*, 569 F.3d at 479.

FERC found that, here, Generators provided "no actual evidence that the renewables exemption has operated tantamount to a narrow version of buyer-side market power by reducing payments to generators." Remand Rehearing Order, P 46, JA ___. FERC's finding here is an adequate explanation. The court must uphold an agency's decision "if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Generators do not articulate any other undue discrimination claim, and do not demonstrate—let alone attempt to show—that the treatment of resources eligible for the exemption was unduly preferential. The Court should not entertain these unsupported claims of undue discrimination.

III. FERC'S ORDERS ARE CONSISTENT WITH COURT AND FERC PRECEDENT.

A. The Precedent Cited by Generators Supports FERC's Orders Below.

Generators argue that FERC and the Courts have "repeatedly rejected FERC's sole rationale for the renewable exemption." Pet. Br. at 27. Specifically, Generators argue that FERC's "'redundant capacity' theory is exactly the same rationale FERC, this Court, and the Third Circuit have squarely rejected as an acceptable justification for permitting uneconomic entry in the past." Pet. Br. at 28.

Generators rely on *New Jersey*, where at issue was FERC's elimination of a different type of exemption, in the PJM region, for "any planned resource being developed in response to a state regulatory or legislative mandate to resolve a projected capacity shortfall." *New Jersey*, 744 F.3d at 86 (quoting *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, P 124 (2011)). The Court found that FERC sufficiently explained its reason for eliminating this exemption—namely that FERC's decision relied on substantial evidence (a "mounting evidence of risk") grounded in facts unique to that proceeding, including the breadth of the exemption and competing views from states in the PJM region. *New Jersey*, 744 F.3d at 100-102. The Court's holding is consistent with FERC's orders on review here, where FERC has relied on substantial evidence to support a narrowly tailored and broadly supported exemption. *See, e.g.*, FERC Br. at 22-32 (explaining how

FERC's finding that the renewables exemption has limited potential to depress prices is supported by substantial evidence). In fact, *New Jersey* affirms that FERC acted within its statutory authority in considering and balancing the risk of price impacts for suppliers against the risk of excessive costs for consumers. *Id.* at 109 ("Surely FERC is permitted to weigh the danger of price suppression against the counter-danger of over-mitigation, and determine where it wishes to strike the balance.").

Generators also contend that FERC's orders below are inconsistent with *New England* because, in upholding FERC's orders, the Court noted that "'FERC specifically found that '[out-of-market] capacity suppresses prices regardless of intent.'" Pet. Br. at 29 (citing *New England*, 757 F.3d at 292 (quoting *ISO New England Inc.*, 135 FERC ¶ 61,029, P 170) (2011)). However, this ignores FERC's explanation that, unlike in the prior cases, here the System Operator "presented substantial evidence that, even with the renewable resources exemption, the [Forward Capacity Market] would be able to fulfill its function of procuring capacity at just and reasonable prices." Remand Rehearing Order, P 10 (citing Ethier Testimony at 38-41). History has borne this out, with Forward Capacity Auctions nine through eleven resulting in the procurement of capacity to meet the region's resource adequacy needs. *See supra* at 14-15. It also ignores the fact that FERC's finding is also "consistent with precedent involving other regional

transmission organizations in which [FERC] determined that intermittent renewable resources with low capacity factors and high development costs have limited or no incentive and ability to exercise buyer market power to artificially suppress capacity market prices." *Id*. (citing *N.Y. Pub. Service Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022, PP 47, 51 (2015), *reh'g denied*, 154 FERC ¶ 61,088, PP 13-14 (2016)) (applying buyer-side market power mitigation to certain renewable resources that have limited or no incentive and ability to artificially inflate capacity market clearing prices is unjust and unreasonable or unduly discriminatory or preferential); *PJM Interconnection L.L.C.*, 143 FERC ¶ 61,090, P 26 (2013). *See also PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, P 153 (2011) ("wind and solar resources are a poor choice if a developer's primary purpose is to suppress capacity market prices. . . ."), upheld in *New Jersey*, 744 F.3d at 106.

Moreover, *New England* does not stand for the proposition that there can never be any exemptions to the minimum offer price rule, as Generators suggest. FERC's prior rulings did not create, as FERC's Brief notes, a bright-line rule against any amount of price suppression. *See* FERC Br. at 51-56. Rather, as discussed above (*see* supra at 23-24), *New England* stands for the proposition that "[i]n determining whether rates are just and reasonable, FERC is charged with balancing . . . competing interests." *Cent. Hudson Gas & Elec. Corp. v. FERC*,

783 F.3d 92, 111 (2nd Cir., 2015) (citing *New England*, 757 F.3d at 298).[14] As discussed above (*see supra* at 23-27), FERC balanced competing concerns in arriving at its decision. Remand Rehearing Order, P 43 ("States continue to support the development of renewable resources, which customers pay for through out-of-market mechanisms. The Commission, in balancing generators' and customers' interests, reasonably recognized how these developments, over time, have tipped the scales, and accepted a narrowly tailored exemption to reduce the likelihood that customers will have to pay for redundant capacity"); P 96 (FERC "accepted the cap because it balanced competing goals of maintaining reliability, preventing overpayment for capacity, and reducing price volatility to assure just and reasonable rates"). By balancing supplier and consumer interests in arriving at its decision here, FERC's "assertions of statutory obligation" are not "conflicting" and they have indeed, been "reconciled" (*see* Pet. Br. at 28).

Finally, as discussed above, FERC directly addressed the possibility of a renewables exemption in New England in numerous proceedings and provided guidance to the region on how such an exemption could be developed. *See supra* at 8-9. Consistent with FERC's direction, the System Operator convened a

[14] In that case, the competing interests were defined as "preventing excessive rates, including protecting against inadequate service and promoting the orderly development of plentiful supplies of electricity." *Id. (*quoting *Consolidated Edison Co. of N.Y., Inc. v. FERC,* 510 F.3d 333, 342 (D.C. Cir. 2007)).

stakeholder process which culminated in the development of the demand curve and other market design changes, including the renewables exemption, as part of balanced package that achieved broad support among ISO New England, market participants, and all six New England states. *See* Initial Order, PP 5-6, JA ___. In short, the Commission provided consistent and specific guidance to New England over several years and several orders regarding the development of a renewables exemption. Accordingly, Generators are clearly incorrect in implying that FERC precedent prohibits any exemption to the minimum offer price rule.

B. FERC's Orders Logically Follow the NESCOE Complaint.

Generators argue that the *NESCOE* Complaint Order "presents the most obvious conflict with the orders on review," Pet. Br. at 32, contending that FERC rejected a nearly identical exemption for renewable resources requested by the states a year earlier. *Id*. (citing *NESCOE* Complaint Order, PP 15, 34-35). Generators are wrong. FERC did not find in *NESCOE* that a renewables exemption to the minimum offer price rule in New England's Forward Capacity Market was inherently unlawful and would in all circumstances frustrate the purpose of the Forward Capacity Market. To the contrary, FERC simply found that NESCOE had not met its Federal Power Act section 206 burden of demonstrating that without a categorical exemption for all renewable resources, ISO New England's minimum offer price rule was unjust, unreasonable or unduly

discriminatory. *NESCOE* Complaint Order, P 32. By contrast, here FERC found that the System Operator had met its Federal Power Act section 205 burden of demonstrating that the exemption was just and reasonable. Remand Rehearing Order, P 49, JA __.

Moreover, FERC expressly allowed that nothing in the *NESCOE* Complaint Order "preclude[d] either [ISO New England] from proposing a similar provision at a later date or the Commission from accepting it if it is shown to be just and reasonable." Rehearing Order, P 26, JA ___ (citing *Cities of Bethany, et al. v. FERC*, 727 F.2d 1131 (D.C. Cir. 1984); *Oxy USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995)). *See also NESCOE* Complaint Order, P 35 n.44 (quoting ISO New England Inc.'s Answer in Opposition to Motion to Consolidate, Motion for Summary Dismissal of Complaint, and Answer to Complaint at 15, *NESCOE v. ISO New England*, FERC Docket No. EL13-34-000 (Jan. 14, 2013)) (indicating that "an exemption could be acceptable if paired with the inclusion of a downward-sloping demand curve in the capacity market.") and PP 32-33 (permitting the possibility that an exemption was possible). Additionally, as discussed in FERC's Brief, FERC adequately explained that the factors that led it to deny the *NESCOE* Complaint are no longer applicable. *See* FERC Br. at 48-49.

Generators' arguments are further misplaced because FERC found in the Rehearing Order that its prior rulings in the *NESCOE* Complaint Order were

superseded by events—ISO New England's filing of the demand curve and renewables exemption package, and FERC's subsequent acceptance of that filing, in the proceeding below. NESCOE submitted its request for rehearing of the NESCOE Complaint Order in March 2013. While that rehearing request was pending, ISO New England made its filing in the proceeding below in April 2014. Initial Filing, JA __. After conditionally accepting the demand curve changes (Initial Order, JA __), and addressing rehearing requests (Rehearing Order, JA __), FERC issued its order on rehearing of the NESCOE Complaint. FERC did not address the substance of NESCOE's rehearing request, but rather, found "that the Commission's rulings in those two orders [*i.e.*, the Initial Order and the Rehearing Order] *have superseded our previous rulings in this proceeding*." *New England States Comm. on Electricity v. ISO New England Inc.*, 151 FERC ¶ 61,056, P 20 (2015) (emphasis supplied). Generators did not seek review of the NESCOE Complaint Order or order on rehearing.

Courts do not entertain review of superseded orders. *See, e.g., Robinson v. Napolitano*, 689 F.3d 888, 892 (8th Cir. 2012) ("We need not consider the validity of the two earlier orders, which the agency acknowledges are superseded by the Second Amended Final Order . . . ."). Similarly, this Court should not entertain arguments that FERC's orders on review are inconsistent with an earlier order that has been superseded by the very orders on review here.

CONCLUSION

For the reasons discussed above, the Intervenor-Respondents respectfully request that the Court uphold the orders on review.

Respectfully submitted,

New England States Committee on Electricity, Inc.:

/s/ Phyllis G. Kimmel
Phyllis G. Kimmel
McCarter & English, LLP
1015 Fifteenth Street, N.W., 12th Floor
Washington, DC 20005
(202) 753-3400
Email: pkimmel@mccarter.com

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

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

State of Connecticut Public Utilities Regulatory Authority:

/s/ Clare E. Kindall

Clare E. Kindall, Assistant Attorney General
Robert Louis Marconi, Assistant Attorney General
Office of the Attorney General, State of Connecticut
10 Franklin Square
New Britain, CT 06051
(860) 827-2620
Email: robert.marconi@ct.gov
Clare.Kindall@ct.gov

Attorneys for the State of Connecticut Public Utilities Regulatory Authority

CPV Towantic, LLC:

/s/ Larry F. Eisenstat

Larry F. Eisenstat
Richard Lehfeldt
Crowell & Moring LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 624-2500

Counsel for CPV Towantic, LLC

Dated: December 12, 2017

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements and Type Style Requirements

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 7,763 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 12th day of December, 2017.

/s/ Phyllis G. Kimmel

McCarter & English, LLP
1015 Fifteenth Street, N.W., 12th Floor
Washington, DC 20005
(202) 753-3400
pkimmel@mccarter.com

Attorney for New England States Committee on Electricity, Inc.

ADDENDUM

STATUTES

ADDENDUM

TABLE OF CONTENTS

Conn. Gen. Stat. § 16-1. Definitions

(a) Terms used in this title and in chapters 244, 244a, 244b, 245, 245a and 245b shall be construed as follows, unless another meaning is expressed or is clearly apparent from the language or context:

***

(29) "Class I renewable energy source" means (A) energy derived from solar power, wind power, a fuel cell, methane gas from landfills, ocean thermal power, wave or tidal power, low emission advanced renewable energy conversion technologies, a run-of-the-river hydropower facility provided such facility has a generating capacity of not more than five megawatts, does not cause an appreciable change in the river flow, and began operation after July 1, 2003, or a sustainable biomass facility with an average emission rate of equal to or less than .075 pounds of nitrogen oxides per million BTU of heat input for the previous calendar quarter, except that energy derived from a sustainable biomass facility with a capacity of less than five hundred kilowatts that began construction before July 1, 2003, may be considered a Class I renewable energy source, or (B) any electrical generation, including distributed generation, generated from a Class I renewable energy source;

(30) "Class II renewable energy source" means energy derived from a trash-to-energy facility, a biomass facility that began operation before July 1, 1998, provided the average emission rate for such facility is equal to or less than .2 pounds of nitrogen oxides per million BTU of heat input for the previous calendar quarter, or a run-of-the-river hydropower facility provided such facility has a generating capacity of not more than five megawatts, does not cause an appreciable change in the riverflow, and began operation prior to July 1, 2003;

Conn. Gen. Stat. §16-245a. Renewable portfolio standards.

(a) An electric supplier and an electric distribution company providing standard service or supplier of last resort service, pursuant to section 16-244c, shall demonstrate:

(1) On and after January 1, 2006, that not less than two per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable energy sources and an additional three per cent of the total output or services shall be from Class I or Class II renewable energy sources;

(2) On and after January 1, 2007, not less than three and one-half per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable energy sources and an additional three per cent of the total output or services shall be from Class I or Class II renewable energy sources;

(3) On and after January 1, 2008, not less than five per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable energy sources and an additional three per cent of the total output or services shall be from Class I or Class II renewable energy sources;

(4) On and after January 1, 2009, not less than six per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable energy sources and an additional three per cent of the total output or services shall be from Class I or Class II renewable energy sources;

(5) On and after January 1, 2010, not less than seven per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable energy sources and an additional three per cent of the total output or services shall be from Class I or Class II renewable energy sources;

(6) On and after January 1, 2011, not less than eight per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable energy sources and an additional three per cent of the total output or services shall be from Class I or Class II renewable energy sources;

(7) On and after January 1, 2012, not less than nine per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable energy sources and an additional three per cent of the total output or services shall be from Class I or Class II renewable energy sources;

(8) On and after January 1, 2013, not less than ten per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable energy sources and an additional three per cent of the total output or services shall be from Class I or Class II renewable energy sources;

(9) On and after January 1, 2014, not less than eleven per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable

energy sources and an additional three per cent of the total output or services shall be from Class I or Class II renewable energy sources;

(10) On and after January 1, 2015, not less than twelve and one-half per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable energy sources and an additional three per cent of the total output or services shall be from Class I or Class II renewable energy sources;

(11) On and after January 1, 2016, not less than fourteen per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable energy sources and an additional three per cent of the total output or services shall be from Class I or Class II renewable energy sources;

(12) On and after January 1, 2017, not less than fifteen and one-half per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable energy sources and an additional three per cent of the total output or services shall be from Class I or Class II renewable energy sources;

(13) On and after January 1, 2018, not less than seventeen per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable energy sources and an additional three per cent of the total output or services shall be from Class I or Class II renewable energy sources;

(14) On and after January 1, 2019, not less than nineteen and one-half per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable energy sources and an additional three per cent of the total output or services shall be from Class I or Class II renewable energy sources;

(15) On and after January 1, 2020, not less than twenty per cent of the total output or services of any such supplier or distribution company shall be generated from Class I renewable energy sources and an additional three per cent of the total output or services shall be from Class I or Class II renewable energy sources.

(b) An electric supplier or electric distribution company may satisfy the requirements of this section (1) by purchasing certificates issued by the New England Power Pool Generation Information System, provided the certificates are for (A) energy produced by a generating unit using Class I or Class II renewable energy sources and the generating unit is located in the jurisdiction of the regional independent system operator, or (B) energy imported into the control area of the regional independent system operator pursuant to New England Power Pool Generation Information System Rule 2.7(c), as in effect on January 1, 2006; (2) for those renewable energy certificates under contract to serve end use customers in the state on or before October 1, 2006, by participating in a renewable energy trading program within said jurisdictions as approved by the Public Utilities Regulatory Authority; or (3) by purchasing eligible renewable electricity and associated attributes from residential customers who are net producers.

(c) Any supplier who provides electric generation services solely from a Class II renewable energy source shall not be required to comply with the provisions of this section.

(d) An electric supplier or an electric distribution company shall base its demonstration of generation sources, as required under subsection (a) of this section on historical data, which may consist of data filed with the regional independent system operator.

(e) (1) A supplier or an electric distribution company may make up any deficiency within its renewable energy portfolio within the first three months of the succeeding calendar year or as otherwise provided by generation information system operating rules approved by New England Power Pool or its successor to meet the generation source requirements of subsection (a) of this section for the previous year.

(2) No such supplier or electric distribution company shall receive credit for the current calendar year for generation from Class I or Class II renewable energy sources pursuant to this section where such supplier or distribution company receives credit for the preceding calendar year pursuant to subdivision (1) of this subsection.

(f) The authority shall adopt regulations, in accordance with the provisions of chapter 54, to implement the provisions of this section.

(g) Notwithstanding the provisions of this section and section 16-244c, for periods beginning on and after January 1, 2008, each electric distribution company may procure renewable energy certificates from Class I, Class II and Class III renewable energy sources through long-term contracting mechanisms. The electric distribution companies may enter into long-term contracts for not more than fifteen years to procure such renewable energy certificates. The electric distribution companies shall use any renewable energy certificates obtained pursuant to this section to meet their standard service and supplier of last resort renewable portfolio standard requirements.

(h) On or before January 1, 2014, the Commissioner of Energy and Environmental Protection shall, in developing or modifying an Integrated Resources Plan in accordance with sections 16a-3a and 16a-3e, establish a schedule to commence on January 1, 2015, for assigning a gradually reduced renewable energy credit value to all biomass or landfill methane gas facilities that qualify as a Class I renewable energy source pursuant to section 16-1, provided this subsection shall not apply to anaerobic digestion or other biogas facilities, and further provided any reduced renewable energy credit value established pursuant to this section shall not apply to any biomass or landfill methane gas facility that has entered into a power purchase agreement (1) with an electric supplier or electric distribution company in the state of Connecticut on or before June 5, 2013, or (2) executed in accordance with section 16a-3f or 16a-3h. The Commissioner of Energy and Environmental Protection may review the schedule established pursuant to this subsection in preparation of each subsequent Integrated Resources Plan developed pursuant to section 16a-3a and make any necessary changes thereto to ensure that the rate of reductions in renewable energy credit value for biomass or landfill methane gas facilities is appropriate given the availability of other Class I renewable energy sources.

Conn. Public Act 15-107: An Act Concerning Affordable And Reliable Energy.

Be it enacted by the Senate and House of Representatives in General Assembly convened: Section 1. (NEW) (*Effective from passage*) (a) In order to secure cost effective resources to provide more reliable electric service for the benefit of the state's electric ratepayers and to meet the state's energy and environmental goals and policies established in the Integrated Resources Plan, pursuant to section 16a-3a of the general statutes, and the Comprehensive Energy Strategy, pursuant to section 16a-3d of the general statutes, the Commissioner of Energy and Environmental Protection, in consultation with the procurement manager identified in subsection (l) of section 16-2 of the general statutes, the Office of Consumer Counsel and the Attorney General, may, in coordination with other states in the control area of the regional independent system operator, as defined in section 16-1 of the general statutes, as amended by this act, or on behalf of Connecticut alone, issue multiple solicitations for long-term contracts from providers of resources described in subsections (b), (c) and (d) of this section.

(b) In any solicitation for resources to reduce electric demand and improve resiliency and grid reliability in the state, issued pursuant to this subsection, the commissioner shall seek proposals for (1) passive demand response measures, including, but not limited to, energy ***Substitute Senate Bill No. 1078*** **Public Act No. 15-107 2** of 7 efficiency, load management, and the state's conservation and load management programs, pursuant to section 16-245m of the general statutes, that are capable, either singly or through aggregation, of reducing electric demand by one megawatt or more; and (2) Class I renewable energy sources and Class III sources, as defined in section 16-1 of the general statutes, as amended by this act, provided any such project proposal is for a facility that has a nameplate capacity rating of more than two megawatts and less than twenty megawatts. The commissioner may also seek proposals for energy storage systems, as defined in section 16-1, of the general statutes, as amended by this act, that are capable of storing up to twenty megawatts of energy. Proposals pursuant to this subsection shall not have a contract term exceeding twenty years. Each electric distribution company, as defined in section 16-1 of the general statutes, as amended by this act, shall, in consultation with the Energy Conservation Management Board established pursuant to section 16-245m of the general statutes, assess whether the submission of a proposal for passive demand response measures is feasible pursuant to any solicitation issued pursuant to subdivision (1) of this subsection, provided such proposal only includes electric demand reductions that are in addition to existing and projected demand reductions obtained through the conservation and load management programs.

(b) In any solicitation issued pursuant to this subsection, the commissioner shall seek proposals from (1) Class I renewable energy sources, as defined in section 16-1 of the general statutes, as amended by this act, having a nameplate capacity rating of twenty megawatts or more, and any associated transmission; and (2) verifiable large-scale hydropower, as defined in section 16-1 of the general statutes, as amended by this act, and any associated transmission. The commissioner may also seek proposals for energy storage systems, as defined in section 16-1, as amended by this act, having a nameplate capacity rating of twenty megawatts or more. Proposals under this subsection shall not have a contract term exceeding twenty years. In soliciting Class I renewable energy sources, and any associated transmission, pursuant to this subsection, the commissioner may, for the purpose of balancing such Class I energy deliveries and improving the economic viability of such proposals, also seek proposals for electricity and capacity from

Class II renewable energy sources, as defined in section 16-1 of the general statutes, as amended by this act, and existing hydropower resources other than those described under section 16-1 of the general statutes, as amended by this act, provided such resources are interconnected to such associated transmission and are located in the control area of the regional independent system operator or imported into the control area of the regional independent system operator from resources located in an adjacent regional independent system operator's control area.

* * *

(n) The Commissioner of Energy and Environmental Protection, in consultation with the procurement manager identified in subsection (l) of section 16-2 of the general statutes, the Office of Consumer Counsel and the Attorney General, shall evaluate project proposals received under any solicitation issued pursuant to subsection (b), (c) or (d) of this section, based on factors including, but not limited to, (1) improvements to the reliability of the electric system, including during winter peak demand; (2) whether the benefits of the proposal outweigh the costs to ratepayers, (3) fuel diversity; (4) the extent to which the proposal contributes to meeting the requirements to reduce greenhouse gas emissions and improve air quality in accordance with sections 16-245a, 22a-174, and 22a-200a of the general statutes; (5) whether the proposal is in the best interest of ratepayers; and (6) whether the proposal is aligned with the policy goals outlined in the Integrated Resources Plan, pursuant to section 16a-3a of the general statutes, and the Comprehensive Energy Strategy, pursuant to section 16a-3d of the general statutes, including, but not limited to, environmental impacts. In conducting such evaluation, the commissioner may also consider the extent to which project proposals provide economic benefits for the state. In evaluating project proposals received under any solicitation issued pursuant to subsection (b), (c) or (d) of this section, the commissioner shall compare the costs and benefits of such proposals relative to the expected or actual costs and benefits of other resources eligible to respond to the other procurements authorized pursuant to this section.

* * *

(r) Certificates issued by the New England Power Pool Generation Information System for any Class I renewable energy source or Class III source procured by an electric distribution company pursuant to this section may be: (1) Sold into the New England Power Pool Generation Information System renewable energy credit market to be used by any electric supplier or electric distribution company to meet the requirements of section 16-245a of the general statutes, so long as the revenues from such sale are credited to electric distribution company customers as described in this subsection; or (2) retained by the electric distribution company to meet the requirements of section 16-245a of the general statutes. In considering whether to sell or retain such certificates the company shall select the option that is in the best interest of such company's ratepayers.

Approved June 19, 2015

Conn. Public Act 13-303: An Act Concerning Connecticut's Clean Energy Goals.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

* * *

Sec. 5. Section 16-245a of the general statutes is amended by adding subsection (h) as follows (*Effective from passage*): (NEW) (h) On or before January 1, 2014, the Commissioner of Energy and Environmental Protection shall, in developing or modifying an Integrated Resources Plan in accordance with sections 16a-3a and 16a-3e, establish a schedule to commence on January 1, 2015, for assigning a gradually reduced renewable energy credit value to all biomass or landfill methane gas facilities that qualify as a Class I renewable energy source pursuant to section 16-1, as amended by this act, provided this subsection shall not apply to anaerobic digestion or other biogas facilities, and further provided any reduced renewable energy credit value established pursuant to this section shall not apply to any biomass or landfill methane gas facility that has entered into a power purchase agreement (1) with an electric supplier or electric distribution company in the state of Connecticut on or before the effective date of this section, or (2) executed in accordance with section 6 or 8 of this act. The Commissioner of Energy and Environmental Protection may review the schedule established pursuant to this subsection in preparation of each subsequent Integrated Resources Plan developed pursuant to section 16a-3a and make any necessary changes thereto to ensure that the rate of reductions in renewable energy credit value for biomass or landfill methane gas facilities is appropriate given the availability of other Class I renewable energy sources.

Sec. 6. (NEW) (*Effective from passage*) On or after January 1, 2013, the Commissioner of Energy and Environmental Protection, in consultation with the procurement manager identified in subsection (l) of section 16-2 of the general statutes, the Office of Consumer Counsel and the Attorney General, may, in coordination with other states in the region of the regional independent system operator, as defined in section 16-1 of the general statutes, as amended by this act, or on the commissioner's own, solicit proposals, in one solicitation or multiple solicitations, from providers of Class I renewable energy sources, as defined in section 16-1 of the general statutes, as amended by this act, constructed on or after January 1, 2013. If the commissioner finds such proposals to be in the interest of ratepayers including, but not limited to, the delivered price of such sources, and consistent with the requirements to reduce greenhouse gas emissions in accordance with section 22a-200a of the general statutes, and in accordance with the policy goals outlined in the Comprehensive Energy Strategy, adopted pursuant to section 16a-3d of the general statutes, the commissioner may select proposals from such resources to meet up to four per cent of the load distributed by the state's electric distribution companies. The commissioner may direct the electric distribution companies to enter into power purchase agreements for energy, capacity and environmental attributes, or any combination thereof, for periods of not more than twenty years. Certificates issued by the New England Power Pool Generation Information System for any Class I renewable energy sources procured under this section shall be sold in the New England Power Pool Generation Information System renewable energy credit market to be used by any electric supplier or electric distribution company to meet the requirements of section 16-245a of the general statutes, as amended by this act. Any such agreement shall be subject to review and approval by the Public Utilities

Regulatory Authority, which review shall commence upon the filing of the signed power purchase agreement with the authority. The authority shall issue a decision on such agreement not later than thirty days after such filing. In the event the authority does not issue a decision within thirty days after such agreement is filed with the authority, the agreement shall be deemed approved. The net costs of any such agreement shall be recovered through a fully reconciling component of electric rates for all customers of electric distribution companies. Such costs may include reasonable costs incurred by electric distribution companies pursuant to this section.

Sec. 7. (NEW) (*Effective from passage*) On or after July 1, 2013, the Commissioner of Energy and Environmental Protection, in consultation with the procurement manager identified in subsection (l) of section 16-2 of the general statutes, the Office of Consumer Counsel and the Attorney General, may, in coordination with other states in the region of the regional independent system operator, as defined in section 16-1 of the general statutes, as amended by this act, or on the commissioner's own, solicit proposals, in one solicitation or multiple solicitations, from providers of Class I renewable energy sources, as defined in section 16-1 of the general statutes, as amended by this act, or verifiable large-scale hydropower, as defined in section 16-1 of the general statutes, as amended by this act. If the commissioner finds such proposals to be in the interest of ratepayers, including, but not limited to, the delivered price of such sources, and consistent with the requirements to reduce greenhouse gas emissions in accordance with section 22a-200a of the general statutes, and in accordance with the policy goals outlined in the Comprehensive Energy Strategy, adopted pursuant to section 16a-3d of the general statutes, and section 129 of public act 11-80, including, but not limited to, base load capacity, peak load shaving and promotion of wind, solar and other renewable and low carbon energy technologies, the commissioner may select proposals from such resources to meet up to five per cent of the load distributed by the state's electric distribution companies. The commissioner may on behalf of all customers of electric distribution companies, direct the electric distribution companies to enter into power purchase agreements for energy, capacity and any environmental attributes, or any combination thereof, for periods of not more than (1) fifteen years, if any such agreement is with a provider of verifiable large-scale hydropower, or (2) twenty years, if any such agreement is with a provider of a Class I renewable energy source. Certificates issued by the New England Power Pool Generation Information System for any Class I renewable energy sources procured under this section shall be sold in the New England Power Pool Generation Information System renewable energy credit market to be used by any electric supplier or electric distribution company to meet the requirements of section 16-245a of the general statutes, as amended by this act. Any such agreement shall be subject to review and approval by the Public Utilities Regulatory Authority, which review shall (A) include a public hearing, and (B) be completed not later than sixty days after the date on which such agreement is filed with the authority. The net costs of any such agreement shall be recovered through a fully reconciling component of electric rates for all customers of electric distribution companies. Such costs may include the reasonable costs incurred by the electric distribution companies pursuant to this section.

Sec. 8. (NEW) (*Effective from passage*) On or after October 1, 2013, the Commissioner of Energy and Environmental Protection, in consultation with the procurement manager identified in subsection (l) of section 16-2 of the general statutes, the Office of the Consumer Counsel and the Attorney General, may solicit proposals, in one solicitation or multiple solicitations, from providers of run-of-the-river hydropower, landfill methane gas or biomass,

provided such source meets the definition of a Class I renewable energy source pursuant to section 16-1 of the general statutes, as amended by this act. In making any selection of such proposals, the commissioner shall consider factors, including, but not limited to (1) whether the proposal is in the interest of ratepayers, including, but not limited to, the delivered price of such sources, (2) the emissions profile of a relevant facility, (3) any investments made by a relevant facility to improve the emissions profile of such facility, (4) the length of time a relevant facility has received renewable energy credits, (5) any positive impacts on the state's economic development, (6) whether the proposal is consistent with requirements to reduce greenhouse gas emissions in accordance with section 22a-200a of the general statutes, and (7) whether the proposal is consistent with the policy goals outlined in the Comprehensive Energy Strategy adopted pursuant to section 16a-3d of the general statutes. The commissioner may select proposals from such resources to meet up to four per cent of the load distributed by the state's electric distribution companies. The commissioner may direct the electric distribution companies to enter into power purchase agreements for energy, capacity and environmental attributes, or any combination thereof, for periods of not more than ten years on behalf of all customers of the state's electric distribution companies. Certificates issued by the New England Power Pool Generation Information System for any Class I renewable energy sources procured under this section shall be sold in the New England Power Pool Generation Information System renewable energy credit market to be used by any electric supplier or electric distribution company to meet the requirements of section 16-245a of the general statutes, as amended by this act. Any such agreement shall be subject to review and approval by the Public Utilities Regulatory Authority, which review shall be completed not later than sixty days after the date on which such agreement is filed with the authority. The net costs of any such agreement shall be recovered through a fully reconciling component of electric rates for all customers of electric distribution companies. Such costs may include the reasonable costs incurred by the electric distribution companies pursuant to this section.

* * *

Approved June 5, 2013

Conn. Public Act §17-144: An Act Promoting The Use Of Fuel Cells For Electric Distribution System Benefits And Reliability And Amending Various Energy-Related Programs And Requirements.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

* * *

Sec. 4. Subdivision (1) of subsection (h) of section 16-244c of the general statutes is repealed and the following is substituted in lieu thereof (Effective from passage):

(h) (1) Notwithstanding the provisions of subsection (b) of this section regarding an alternative standard service option, an electric distribution company providing standard service, supplier of last resort service or back-up electric generation service in accordance with this section shall contract with its wholesale suppliers to comply with the renewable portfolio standards. The Public Utilities Regulatory Authority shall annually conduct an [unconstested] uncontested proceeding in order to determine whether the electric distribution company's wholesale suppliers met the renewable portfolio standards during the preceding year. On or before December 31, 2013, the authority shall issue a decision on any such proceeding for calendar years up to and including 2012, for which a decision has not already been issued. Not later than December 31, 2014, and annually thereafter, the authority shall, following such proceeding, issue a decision as to whether the electric distribution company's wholesale suppliers met the renewable portfolio standards during the preceding year. An electric distribution company shall include a provision in its contract with each wholesale supplier that requires the wholesale supplier to pay the electric distribution company an amount of: (A) For calendar years up to and including calendar year 2017, five and one-half cents per kilowatt hour if the wholesale supplier fails to comply with the renewable portfolio standards during the subject annual period, and (B) for calendar years commencing on and after January 1, 2018, five and one-half cents per kilowatt hour if the wholesale supplier fails to comply with the renewable portfolio standards during the subject annual period for Class I renewable energy sources, and two and one-half cents per kilowatt hour if the wholesale supplier fails to comply with the renewable portfolio standards during the subject annual period for Class II renewable energy sources. The electric distribution company shall promptly transfer any payment received from the wholesale supplier for the failure to meet the renewable portfolio standards to the Clean Energy Fund for the development of Class I renewable energy sources, provided, on and after June 5, 2013, any such payment shall be refunded to ratepayers by using such payment to offset the costs to all customers of electric distribution companies of the costs of contracts entered into pursuant to sections 16-244r, as amended by this act, and 16-244t. Any excess amount remaining from such payment shall be applied to reduce the costs of contracts entered into pursuant to subdivision (2) of this subsection, and if any excess amount remains, such amount shall be applied to reduce costs collected through nonbypassable, federally mandated congestion charges, as defined in section 16-1, as amended by this act.

* * *

Sec. 9. Subsection (c) of section 16-244r of the general statutes is repealed and the following is substituted in lieu thereof (Effective July 1, 2017):

(c) (1) The aggregate procurement of renewable energy credits by electric distribution companies pursuant to this section shall (A) be eight million dollars in the first year, and (B) increase by an additional eight million dollars per year in years two to four, inclusive.

(2) After year four, the authority shall review contracts entered into pursuant to this section and if the cost of the technologies included in such contracts have been reduced, the authority shall seek to enter new contracts for the total of six years.

(3) After year six, the authority shall seek to enter new contracts for the total of seven years.

(A) The aggregate procurement of renewable energy credits by electric distribution companies pursuant to this subdivision shall (i) increase by an additional eight million dollars per year in years five, [and] six and seven, (ii) be [forty-eight] fifty-six million dollars in years [seven] eight to fifteen, inclusive, and (iii) decline by eight million dollars per year in years sixteen to [twenty-one] twenty-two, inclusive, provided any money not allocated in any given year may roll into the next year's available funds.

(B) For the sixth and seventh year [solicitation] solicitations, each electric distribution company shall solicit and file with the Public Utilities Regulatory Authority for its approval one or more long-term contracts with owners or developers of Class I generation projects that: (i) Emit no pollutants and that are less than one thousand kilowatts in size, located on the customer side of the revenue meter and serve the distribution system of the electric distribution company, provided such contracts do not exceed fifty per cent of the dollar amount established for [year] years six and seven under subparagraph (A) of this subdivision; and (ii) are less than two megawatts in size, located on the customer side of the revenue meter, serve the distribution system of the electric distribution company, and use Class I technologies that have no emissions of no more than 0.07 pounds per megawatt-hour of nitrogen oxides, 0.10 pounds per megawatt-hour of carbon monoxide, 0.02 pounds per megawatt-hour of volatile organic compounds, and one grain per one hundred standard cubic feet, provided such contracts do not exceed fifty per cent of the dollar amount established for [year] years six and seven under subparagraph (A) of this subdivision. The authority may give a preference to contracts for technologies manufactured, researched or developed in the state.

[(3)] (4) The production of a megawatt hour of electricity from a Class I renewable energy source first placed in service on or after July 1, 2011, shall create one renewable energy credit. A renewable energy credit shall have an effective life covering the year in which the credit was created and the following calendar year. The obligation to purchase renewable energy credits shall be apportioned to electric distribution companies based on their respective distribution system loads at the commencement of the procurement period, as determined by the authority. For contracts entered into in calendar year 2012, an electric distribution company shall not be required to enter into a contract that provides a payment of more than three hundred fifty dollars, per renewable energy credit in any year over the term of the contract. For contracts entered into in calendar years 2013 to 2017, inclusive, at least ninety days before each annual electric distribution company solicitation, the Public Utilities Regulatory Authority may lower the renewable energy credit price cap specified in this subsection by three to seven per cent annually, during each of the six years of the program over the term of the contract. For contracts

entered into in calendar year 2018, at least ninety days before the electric distribution company solicitation, the Public Utilities Regulatory Authority may lower the renewable energy credit price cap specified in this subsection by sixty-four per cent, during year seven of the program over the term of the contract. In the course of lowering such price cap applicable to each annual solicitation, the authority shall, after notice and opportunity for public comment, consider such factors as the actual bid results from the most recent electric distribution company solicitation and reasonably foreseeable reductions in the cost of eligible technologies.

Sec. 10. Section 16a-3h of the general statutes is repealed and the following is substituted in lieu thereof (Effective from passage):

On or after October 1, 2013, the Commissioner of Energy and Environmental Protection, in consultation with the procurement manager identified in subsection (l) of section 16-2, the Office of Consumer Counsel and the Attorney General, may solicit proposals, in one solicitation or multiple solicitations, from providers of [run-of-the-river] the following resources or any combination of the following resources: Run-of-the-river hydropower, landfill methane gas, [or] biomass, fuel cell, offshore wind or anaerobic digestion, provided such source meets the definition of a Class I renewable energy source pursuant to section 16-1, as amended by this act, or energy storage systems. In making any selection of such proposals, the commissioner shall consider factors, including, but not limited to (1) whether the proposal is in the interest of ratepayers, including, but not limited to, the delivered price of such sources, (2) the emissions profile of a relevant facility, (3) any investments made by a relevant facility to improve the emissions profile of such facility, (4) the length of time a relevant facility has received renewable energy credits, (5) any positive impacts on the state's economic development, (6) whether the proposal is consistent with requirements to reduce greenhouse gas emissions in accordance with section 22a-200a, [and] including, but not limited to, the development of combined heat and power systems, (7) whether the proposal is consistent with the policy goals outlined in the Comprehensive Energy Strategy adopted pursuant to section 16a-3d, (8) whether the proposal promotes electric distribution system reliability and other electric distribution system benefits, including, but not limited to, microgrids, (9) whether the proposal promotes the policy goals outlined in the state-wide solid waste management plan developed pursuant to section 22a-241a, and (10) the positive reuse of sites with limited development opportunities, including, but not limited to, brownfields or landfills, as identified by the commissioner in any solicitation issued pursuant to this section. The commissioner may select proposals from such resources to meet up to four per cent of the load distributed by the state's electric distribution companies, provided the commissioner shall not select proposals for more than three per cent of the load distributed by the state's electric distribution companies from offshore wind resources. The commissioner may direct the electric distribution companies to enter into power purchase agreements for energy, capacity and environmental attributes, or any combination thereof, for periods of not more than [ten] twenty years on behalf of all customers of the state's electric distribution companies. Certificates issued by the New England Power Pool Generation Information System for any Class I renewable energy sources procured under this section [shall be sold] may be: (A) Sold in the New England Power Pool Generation Information System renewable energy credit market to be used by any electric supplier or electric distribution company to meet the requirements of section 16-245a, as amended by this act, provided the revenues from such sale are credited to all customers of the contracting electric distribution company; or (B) retained by the electric distribution company to meet the requirements of section 16-245a, as amended by this act. In

considering whether to sell or retain such certificates, the company shall select the option that is in the best interest of such company's ratepayers. Any such agreement shall be subject to review and approval by the Public Utilities Regulatory Authority, which review shall be completed not later than sixty days after the date on which such agreement is filed with the authority. The net costs of any such agreement, including costs incurred by the electric distribution companies under the agreement and reasonable costs incurred by the electric distribution companies in connection with the agreement, shall be recovered through a fully reconciling component of electric rates for all customers of electric distribution companies. All reasonable costs incurred by the Department of Energy and Environmental Protection associated with the commissioner's solicitation and review of proposals pursuant to this section shall be recoverable through the nonbypassable federally mandated congestion charges, as defined in section 16-1, as amended by this act.

Me. Rev. Stat. § 3210. Renewable resources

1. Policy. In order to ensure an adequate and reliable supply of electricity for Maine residents and to encourage the use of renewable, efficient and indigenous resources, it is the policy of this State to encourage the generation of electricity from renewable and efficient sources and to diversify electricity production on which residents of this State rely in a manner consistent with this section.

[1999, c. 398, Pt. I, §1 (AMD) .]

2. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Efficient resource" means a source of electrical generation that:

(1) Qualifies as a qualifying cogeneration facility under the Federal Energy Regulatory Commission rules, 18 Code of Federal Regulations, Part 292, Subpart B, as in effect on January 1, 1997, was constructed prior to January 1, 1997 and meets the following efficiency standard:

(a) During any calendar year, the sum of the useful power output and the useful thermal energy output of the facility is no less than 60% of the total energy input to the facility.

For purposes of this paragraph, the term "useful power output" means the electrical or mechanical energy made available for use, exclusive of any energy used in the power production process. For purposes of this paragraph, the term "useful thermal energy" means thermal energy made available to an industrial or commercial process, net of any heat contained in condensate return and makeup water, used in a heating application or used in a space cooling application. [1999, c. 398, Pt. I, §2 (RPR).]

A-1. "Alternative compliance payment rate" means a certain dollar amount per kilowatt-hour set by the commission that a competitive electricity provider may pay to the commission to satisfy the portfolio requirements of subsection 3-A. [2007, c. 403, §1 (NEW).]

B. "Eligible resource" means a source of electrical generation that:

(1) Generates power that can physically be delivered to the control region in which the New England Power Pool, or its successor as approved by the Federal Energy Regulatory Commission, has authority over transmission, or to the Maritimes Control Area; and

(112) Is either a renewable resource or an efficient resource. [1999, c. 398, Pt. I, §2 (RPR).]

B-1. [2009, c. 542, §1 (RP).]

B-2. “Renewable energy credit” means a tradable instrument that represents an amount of electricity generated from eligible resources or renewable capacity resources. [2009, c. 542, §2 (AMD).]

B-3. “Renewable capacity resource” means a source of electrical generation:

(1) Whose total power production capacity does not exceed 100 megawatts and relies on one or more of the following:

(a) Fuel cells;

(b) Tidal power;

(c) Solar arrays and installations;

(d) Geothermal installations;

(e) Hydroelectric generators that meet all state and federal fish passage requirements applicable to the generator;

(f) Biomass generators that are fueled by wood, wood waste or landfill gas; or

(g) Anaerobic digestion of by-products of waste from animals or agricultural crops, food or vegetative material, algae or organic refuse; or

(2) That relies on wind power installations. [2015, c. 220, §1 (AMD).]

B-4. “New” as applied to any renewable capacity resource means a renewable capacity resource that:

(1) Has an in-service date after September 1, 2005;

(2) Was added to an existing facility after September 1, 2005;

(3) For at least 2 years was not operated or was not recognized by the New England independent system operator as a capacity resource and, after September 1, 2005, resumed operation or was recognized by the New England independent system operator as a capacity resource; or

(4) Was refurbished after September 1, 2005 and is operating beyond its previous useful life or is employing an alternate technology that significantly increases the efficiency of the generation process.

For the purposes of this paragraph, “capacity resource” has the same meaning as in section 3210-C, subsection 1, paragraph A. For the purposes of this paragraph, “to refurbish” means to make an investment in equipment or facilities, other than for routine maintenance and repair, to renovate, reequip or restore the renewable capacity resource. [2011, c. 413, §1 (AMD).]

C. "Renewable resource" means a source of electrical generation:

(1) That qualifies as a small power production facility under the Federal Energy Regulatory Commission rules, 18 Code of Federal Regulations, Part 292, Subpart B, as in effect on January 1, 1997; or

(2) Whose total power production capacity does not exceed 100 megawatts and that relies on one or more of the following:

(a) Fuel cells;

(h) Tidal power;

(i) Solar arrays and installations;

(j) Wind power installations;

(k) Geothermal installations;

(l) Hydroelectric generators;

(m) Biomass generators that are fueled by wood or wood waste, landfill gas or anaerobic digestion of agricultural products, by-products or wastes; or

(n) Generators fueled by municipal solid waste in conjunction with recycling. [2009, c. 542, §5 (AMD).] [2015, c. 220, §1 (AMD) .]

3. Portfolio requirements. As a condition of licensing pursuant to section 3203, each competitive electricity provider in this State must demonstrate in a manner satisfactory to the commission that no less than 30% of its portfolio of supply sources for retail electricity sales in this State is accounted for by eligible resources. If a competitive electricity provider represents to a customer that the provider is selling to the customer a portfolio of supply sources that includes more than 30% eligible resources, the resources necessary to supply more than 30% of that customer's load may not be applied to meet the aggregate 30% portfolio requirement. Rules adopted under this subsection are major substantive rules pursuant to Title 5, chapter 375, subchapter II-A. [1999, c. 398, Pt. I, §3 (AMD) .]

3-A. Portfolio requirements; new renewable capacity resources. Portfolio requirements for new renewable capacity resources are governed by this subsection.

A. Except as provided in paragraph B, beginning January 1, 2008, as a condition of licensing pursuant to section 3203, each competitive electricity provider in this State must demonstrate in a manner satisfactory to the commission that the percentage of its portfolio of supply sources for retail electricity sales in this State accounted for by new renewable capacity resources is as follows:

(1) One percent for the period from January 1, 2008 to December 31, 2008;

(2) Two percent for the period from January 1, 2009 to December 31, 2009;

(3) Three percent for the period from January 1, 2010 to December 31, 2010;

(4) Four percent for the period from January 1, 2011 to December 31, 2011;

(5) Five percent for the period from January 1, 2012 to December 31, 2012;

(6) Six percent for the period from January 1, 2013 to December 31, 2013;

(7) Seven percent for the period from January 1, 2014 to December 31, 2014;

(8) Eight percent for the period from January 1, 2015 to December 31, 2015;

(9) Nine percent for the period from January 1, 2016 to December 31, 2016; and

(10) Ten percent for the period from January 1, 2017 to December 31, 2022.

New renewable capacity resources used to satisfy the requirements of this paragraph may not be used to satisfy the requirements of subsection 3. [2017, c. 291, §1 (AMD).]

B. Suspensions of scheduled increases in the portfolio requirements as provided in paragraph A are governed by this paragraph.

(1) If by March 31st of the years 2010, 2012, 2014 and 2016 the commission determines that investment in new renewable capacity resources in the preceding 2 calendar years has not been sufficient for competitive electricity providers to meet the portfolio requirements under paragraph A and that the resulting use of renewable energy credits pursuant to subsection 8 or the alternative compliance payment mechanism pursuant to subsection 9, or both of these methods, has burdened electricity customers in the State without providing the benefits of new renewable capacity resources, the commission may suspend all or some of the future scheduled increases in the portfolio requirements under paragraph A.

(2) If the commission finds that alternative compliance payments are made pursuant to subsection 9 in 3 consecutive calendar years, the commission shall temporarily suspend all or some of the future scheduled increases in the portfolio requirements under paragraph A.

(3) If the commission suspends any scheduled increases in the portfolio requirements under paragraph A pursuant to subparagraph (1) or (2), the commission may resume increases, limited to no more than one percentage point per year over the previous year, in the portfolio requirements after a minimum of one year. [2007, c. 403, §4 (NEW).]

C. No later than March 31, 2008 and annually thereafter, the commission shall submit a report regarding the status of new renewable capacity resources in the State and compliance with the portfolio requirements under paragraph A to the joint standing committee of the Legislature having jurisdiction over utilities and energy matters. The report must include, but is not limited to, a description of new renewable capacity resources available to meet the

portfolio requirements under paragraph A, documentation of the loss of any existing renewable generation capacity in the State, the status of implementation of the new renewable capacity resources portfolio requirements, including any suspensions pursuant to paragraph B, and recommendations to stimulate investment in new renewable capacity resources. [2007, c. 403, §4 (NEW).]

D. Retail electricity sales pursuant to a supply contract or standard-offer service arrangement executed by a competitive electricity provider that is in effect on the effective date of this subsection is exempt from the requirements of this subsection until the end date of the current term of the supply contract or standard-offer service arrangement. [2007, c. 403, §4 (NEW).]

The commission shall adopt rules to implement this subsection. Rules adopted under this subsection are routine technical rules pursuant to Title 5, chapter 375, subchapter 2-A. [2017, c. 291, §1 (AMD) .]

4. Report. In view of property tax benefits, developments in other states and the development of a market for tradable credits for satisfying eligible resource requirements, the commission shall review the 30% portfolio requirement and make a recommendation for any change to the joint standing committee of the Legislature having jurisdiction over utilities and energy matters no later than 5 years after the beginning of retail competition. [1999, c. 398, Pt. I, §3 (AMD) .]

* * *

8. Credit trading. The commission shall allow competitive electricity providers to satisfy the portfolio requirements of subsections 3 and 3-A through the use of renewable energy credits if the commission determines that a reliable system of electrical attribute trading exists. When renewable energy credits are used to satisfy the portfolio requirements of subsections 3 and 3-A, the value of a renewable energy credit for electricity generated by a community-based renewable energy project, as defined in section 3602, that is participating in the community-based renewable energy pilot program established in section 3603 and elects the renewable energy credit multiplier under section 3605 is 150% of the amount of the electricity. [2009, c. 329, Pt. A, §2 (AMD) .]

9. Alternative compliance payment; portfolio requirements for new renewable capacity resources. The commission shall allow competitive electricity providers to satisfy the portfolio requirements for new renewable capacity resources under subsection 3-A through an alternative compliance payment mechanism in accordance with this subsection.

A. The commission shall set the alternative compliance payment rate by rule and shall publish the alternative compliance payment rate by January 31st of each year. In setting the rate, the commission shall take into account prevailing market prices, standard-offer service prices for electricity, reliance on alternative compliance payments to meet the requirements of subsection 3-A and investment in new renewable capacity resources in the State during the previous calendar year. [2007, c. 403, §7 (NEW).]

B. The commission shall collect alternative compliance payments made by competitive electricity providers and shall deposit all funds collected under this paragraph in the Energy Efficiency and Renewable Resource Fund established under section 10121, subsection 2 to be used to fund research, development and demonstration projects relating to renewable energy technologies and to fund rebates for cost-effective renewable energy technologies. [2011, c. 637, §1 (AMD).]

The commission shall adopt rules to implement this subsection. Rules adopted under this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A

Me. Rev. Stat. § 3401. Short title

This chapter may be known and cited as "the Maine Wind Energy Act." [2003, c. 665, §3 (NEW).]

* * *

§3404. Determination of public policy; state wind energy generation goals

1. Encouragement of wind energy-related development. It is the policy of the State in furtherance of the goals established in subsection 2, to encourage the attraction of appropriately sited development related to wind energy, including any additional transmission and other energy infrastructure needed to transport additional offshore wind energy to market, consistent with all state environmental standards; the permitting and financing of wind energy projects; and the siting, permitting, financing and construction of wind energy research and manufacturing facilities. [2009, c. 615, Pt. A, §3 (AMD) .]

2. State wind energy generation goals. The goals for wind energy development in the State are that there be:

A. A. At least 2,000 megawatts of installed capacity by 2015; [2009, c. 615, Pt. A, §4 (AMD).]

B. B. At least 3,000 megawatts of installed capacity by 2020, including 300 megawatts or more from generation facilities located in coastal waters, as defined by Title 12, section 6001, subsection 6, or in proximate federal waters; and [2009, c. 615, Pt. A, §4 (AMD).]

C. C. At least 8,000 megawatts of installed capacity by 2030, including 5,000 megawatts from generation facilities located in coastal waters, as defined by Title 12, section 6001, subsection 6, or in proximate federal waters. [2009, c. 615, Pt. A, §4 (NEW).]

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).

* * *

Mass. Act to Promote Energy Diversity, St. 2016, c. 188, §12

AN ACT TO PROMOTE ENERGY DIVERSITY

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

* * *

SECTION 12. Chapter 169 of the acts of 2008 is hereby amended by inserting after section 83A, inserted by chapter 209 of the acts of 2012, the following 3 sections:-

Section 83B. For the purposes of this section and sections 83C and 83D, the following words shall have the following meanings, unless the context clearly requires otherwise:-

"Affiliated company", an affiliated company as defined in section 85 of chapter 164 of the General Laws.

"Clean energy generation", either: (i) firm service hydroelectric generation from hydroelectric generation alone; (ii) new Class I RPS eligible resources that are firmed up with firm service hydroelectric generation; or (iii) new Class I renewable portfolio standard eligible resources.

"Distribution company", a distribution company as defined in section 1 of chapter 164 of the General Laws.

"Firm service hydroelectric generation", hydroelectric generation provided without interruption for 1 or more discrete periods designated in a long-term contract, including but not limited to multiple hydroelectric run-of-the-river generation units managed in a portfolio that creates firm service though the diversity of multiple units.

"Long-term contract", a contract for a period of 15 to 20 years for offshore wind energy generation pursuant to section 83C or for clean energy generation pursuant to section 83D.

"New Class I renewable portfolio standard eligible resources", Class I renewable energy generating sources as defined in section 11F of chapter 25A of the General Laws that have not commenced commercial operation prior to the date of execution of a long-term contract or that represent the net increase from incremental new generating capacity at an existing facility after the date of execution of a long-term contract.

"Offshore wind developer", a provider of electricity developed from an offshore wind energy generation project that is located on the Outer Continental Shelf and for which no turbine is located within 10 miles of any inhabited area.

"Offshore wind energy generation", offshore electric generating resources derived from wind that: (1) are Class I renewable energy generating sources, as defined in section 11F of chapter 25A of the General Laws; (2) have a commercial operations date on or after January 1, 2018, that has been verified by the department of energy resources; and (3) operate in a

designated wind energy area for which an initial federal lease was issued on a competitive basis after January 1, 2012.

Section 83C. (a) In order to facilitate the financing of offshore wind energy generation resources in the commonwealth, not later than June 30, 2017, every distribution company shall jointly and competitively solicit proposals for offshore wind energy generation; and, provided, that reasonable proposals have been received, shall enter into cost-effective long-term contracts. Long-term contracts executed pursuant to this section shall be subject to the approval of the department of public utilities and shall be apportioned among the distribution companies.

(b) The timetable and method for solicitations of long-term contracts shall be proposed jointly by the distribution companies and the department of energy resources using a competitive bidding process, and shall be subject to review and approval by the department of public utilities. The distribution companies, in coordination with the department of energy resources, shall consult with the attorney general regarding the choice of solicitation methods. A solicitation may be coordinated and issued jointly with other New England states or entities designated by those states. The distribution companies may conduct 1 or more competitive solicitations through a staggered procurement schedule developed by the distribution companies and the department of energy resources; provided, that the schedule shall ensure that the distribution companies enter into cost-effective long-term contracts for offshore wind energy generation equal to approximately 1,600 megawatts of aggregate nameplate capacity not later than June 30, 2027; and provided further, that individual solicitations shall seek proposals for no less than 400 megawatts of aggregate nameplate capacity of offshore wind energy generation resources. A staggered procurement schedule developed by the department of energy resources, if applicable, shall specify that a subsequent solicitation shall occur within 24 months of a previous solicitation; provided, however, that the department of public utilities shall not approve a long-term contract that results from a subsequent solicitation and procurement period if the levelized price per megawatt hour, plus associated transmission costs, is greater than or equal to the levelized price per megawatt hour plus transmission costs that resulted from the previous procurement. Proposals received pursuant to a solicitation under this section shall be subject to review by the department of energy resources. If the department of energy resources, in consultation with the distribution companies and the independent evaluator, determines that reasonable proposals were not received pursuant to a solicitation, the department may terminate the solicitation, and may require additional solicitations to fulfill the requirements of this section.

(c) In developing proposed long-term contracts, the distribution companies shall consider long-term contracts for renewable energy certificates for energy and for a combination of both renewable energy certificates and energy. A distribution company may decline to pursue a proposal if the proposal's terms and conditions would require the contract obligation to place an unreasonable burden on the distribution company's balance sheet; provided, however, that the distribution company shall take all reasonable actions to structure the contracts, pricing or administration of the products purchased under this section in order to prevent or mitigate an impact on the balance sheet or income statement of the distribution company or its parent company, subject to the approval of the department of public utilities; provided further, that mitigation shall not increase costs to ratepayers. If a distribution company deems all proposals to be unreasonable, the distribution company shall, within 20 days of the date of its decision, submit a filing to the department of public utilities. The filing shall include, in the form and

detail prescribed by the department of public utilities, documentation supporting the distribution company's decision to decline the proposals. Following a distribution company's filing, and within 4 months of the date of filing, the department of public utilities shall approve or reject the distribution company's decision and may order the distribution company to reconsider any proposal. If distribution companies are unable to agree on a winning bid following a solicitation under this section, the matter shall be submitted to the department of energy resources which shall, in consultation with the independent evaluator, issue a final, binding determination of the winning bid; provided, that the final contract executed shall be subject to review by the department of public utilities. The department of energy resources may require additional solicitations to fulfill the requirements of this section.

(d) The department of public utilities shall promulgate regulations consistent with this section. The regulations shall: (1) allow offshore wind developers of offshore wind energy generation to submit proposals for long-term contracts consistent with this section; (2) require that a proposed long-term contract executed by the distribution companies under a proposal be filed with, and approved by, the department of public utilities before becoming effective; (3) provide for an annual remuneration for the contracting distribution company up to 2.75 per cent of the annual payments under the contract to compensate the company for accepting the financial obligation of the long-term contract, such provision to be acted upon by the department of public utilities at the time of contract approval; (4) require associated transmission costs to be incorporated into a proposal; provided that, to the extent there are transmission costs included in a bid, the department of public utilities may authorize or require the contracting parties to seek recovery of such transmission costs of the project through federal transmission rates, consistent with policies and tariffs of the Federal Energy Regulatory Commission, to the extent the department finds such recovery is in the public interest; and (5) require that offshore wind energy generating resources to be used by a developer under the proposal meet the following criteria: (i) provide enhanced electricity reliability; (ii) contribute to reducing winter electricity price spikes; (iii) are cost effective to electric ratepayers in the commonwealth over the term of the contract, taking into consideration potential economic and environmental benefits to the ratepayers; (iv) avoid line loss and mitigate transmission costs to the extent possible and ensure that transmission cost overruns, if any, are not borne by ratepayers; (v) adequately demonstrate project viability in a commercially reasonable timeframe; (vii) allow offshore wind energy generation resources to be paired with energy storage systems; (viii) where possible, mitigate any environmental impacts; and (xi) where feasible, create and foster employment and economic development in the commonwealth. The department of energy resources shall give preference to proposals that demonstrate a benefit to low-income ratepayers in the commonwealth, without adding cost to the project.

(e) A proposed long-term contract shall be subject to the review and approval of the department of public utilities. As part of its approval process, the department of public utilities shall consider recommendations by the attorney general, which shall be submitted to the department of public utilities within 45 days following the filing of a proposed long-term contract with the department of public utilities. The department of public utilities shall consider the potential costs and benefits of the proposed long-term contract and shall approve a proposed long-term contract if the department finds that the proposed contract is a cost-effective mechanism for procuring reliable renewable energy on a long-term basis, taking into account the

factors outlined in this section. A distribution company shall be entitled to cost recovery of payments made under a long-term contract approved under this section.

(f) The department of energy resources and the attorney general shall jointly select, and the department of energy resources shall contract with, an independent evaluator to monitor and report on the solicitation and bid selection process in order to assist the department of energy resources in determining whether a proposal received pursuant to subsection (b) is reasonable and to assist the department of public utilities in its consideration of long-term contracts filed for approval. To ensure an open, fair and transparent solicitation and bid selection process that is not unduly influenced by an affiliated company, the independent evaluator shall: (1) issue a report to the department of public utilities analyzing the timetable and method of solicitation and the solicitation process implemented by the distribution companies and the department of energy resources under subsection (b) and include recommendations, if any, for improving the process; and (2) upon the opening of an investigation by the department of public utilities into a proposed long-term contract for a winning bid proposal, file a report with the department of public utilities that summarizes and analyzes the solicitation and the bid selection process, and provide the independent evaluator's assessment of whether all bids were evaluated in a fair and objective manner. The independent evaluator shall have access to the information and data related to the competitive solicitation and bid selection process that is necessary to fulfill the purposes of this subsection; provided, however, that the independent evaluator shall ensure that all proprietary information remains confidential. The department of public utilities shall consider the findings of the independent evaluator and may adopt recommendations made by the independent evaluator as a condition for approval. If the independent evaluator concludes in the findings that the solicitation and bid selection of a long-term contract was not fair and objective and that the process was substantially prejudiced as a result, the department of public utilities shall reject the winning bid proposal.

(g) The distribution companies shall each enter into a contract with the winning bidders for their apportioned share of the market products being purchased from the project. The apportioned share shall be calculated and based upon the total energy demand from all distribution customers in each service territory of the distribution companies.

(h) A distribution company may elect to use any energy purchased under such contracts for sale to its customers and may elect to retain renewable energy certificates to meet the applicable annual renewable portfolio standard requirements under said section 11F of said chapter 25A. If the energy and renewable energy certificates are not so used, the distribution companies shall sell the purchased energy into the wholesale market and, provided that the department of energy resources has not notified the distribution company that the renewable energy certificates should be retained to facilitate reaching emission reduction targets pursuant to chapter 298 of the acts of 2008 or chapter 21N of the General Laws, shall sell the purchased renewable energy certificates to minimize the costs to ratepayers under the contract; provided, however, that the department of energy resources shall conduct periodic reviews to determine the impact on the energy and renewable energy certificate markets of the disposition of energy and renewable energy certificates under this section. The department of energy resources may issue reports recommending legislative changes if it determines that said disposition of energy and renewable energy certificates is adversely affecting the energy and renewable energy certificate markets.

* * *

(i) Section 83D. (a) In order to facilitate the financing of clean energy generation resources, not later than April 1, 2017, every distribution company shall jointly and competitively solicit proposals for clean energy generation and, provided that reasonable proposals have been received, shall enter into cost-effective long-term contracts for clean energy generation for an annual amount of electricity equal to approximately 9,450,000 megawatts-hours. Long-term contracts executed pursuant to this section shall be subject to the approval of the department of public utilities and shall be apportioned among the distribution companies under this section.

(b) The timetable and method for solicitation of long-term contracts shall be proposed jointly by the distribution companies and the department of energy resources and shall be subject to review and approval by the department of public utilities. The distribution companies, in coordination with the department of energy resources, shall consult with the attorney general's office regarding the choice of solicitation method. A solicitation may be coordinated and issued jointly with other New England states or entities designated by those states. The distribution companies may conduct 1 or more competitive solicitations through a staggered procurement schedule developed by the distribution companies and the department of energy resources; provided, that the schedule shall ensure that the distribution companies enter into cost-effective long-term contracts for clean energy generation equal to approximately 9,450,000 megawatt-hours by December 31, 2022. Proposals received pursuant to a solicitation under this section shall be subject to review by the department of energy resources. If the department of energy resources, in consultation with the distribution companies and the independent evaluator, determines that reasonable proposals were not received pursuant to a solicitation, the department may terminate the solicitation, and may require additional solicitations to fulfill the requirements of this section.

(c) In developing proposed long-term contracts, the distribution companies shall consider long-term contracts for renewable energy certificates for energy and for a combination of both renewable energy certificates and energy, if applicable. A distribution company may decline to pursue a proposal if the proposal's terms and conditions would require the contract obligation to place an unreasonable burden on the distribution company's balance sheet; provided, however, that the distribution company shall take all reasonable actions to structure its contracts pricing or administration of the products purchased to mitigate impacts on the balance sheet or income statement of the distribution company or its parent company, subject to the approval of the department of public utilities; provided further, that mitigation shall not increase costs to ratepayers. If a distribution company deems all proposals to be unreasonable, the distribution company shall, within 20 days of the date of its decision, submit a filing to the department of public utilities. The filing shall include, in the form and detail prescribed by the department of public utilities, documentation supporting the distribution company's decision to decline the proposals. Following a distribution company's filing, and within 4 months of the date of filing, the department of public utilities shall approve or reject the distribution company's decision and may order the distribution company to reconsider any proposal. If distribution companies are unable to agree on a winning bid following a solicitation under this section, the matter shall be submitted to the department of energy resources which shall, in consultation with the independent evaluator, issue a final, binding determination of the winning bid; provided that

the final contract executed shall be subject to review by the department of public utilities. The department of energy resources may require additional solicitations to fulfill the requirements of this section.

(d) The department of public utilities shall promulgate regulations consistent with this section. The regulations shall: (1) allow developers of clean energy generation resources to submit proposals for long-term contracts; (2) require that contracts executed by the distribution companies under such proposals are filed with, and approved by, the department of public utilities before they become effective; (3) provide for an annual remuneration for the contracting distribution company up to 2.75 per cent of the annual payments under the contract to compensate the company for accepting the financial obligation of the long-term contract, such provision to be acted upon by the department of public utilities at the time of contract approval; (4) require associated transmission costs to be incorporated into a proposal; provided that, to the extent there are transmission costs included in a bid, the department of public utilities may authorize or require the relevant parties to seek recovery of such transmission costs of the project through federal transmission rates, consistent with policies and tariffs of the Federal Energy Regulatory Commission, to the extent the department finds such recovery is in the public interest; and (5) require that the clean energy resources to be used by a developer under the proposal meet the following criteria: (i) provide enhanced electricity reliability within the commonwealth; (ii) contribute to reducing winter electricity price spikes; (iii) are cost effective to electric ratepayers in the commonwealth over the term of the contract taking into consideration potential economic and environmental benefits to the ratepayers; (iv) avoid line loss and mitigate transmission costs to the extent possible and ensure that transmission cost overruns, if any, are not borne by ratepayers; (v)allow long-term contracts for clean energy generation resources to be paired with energy storage systems; (vi) guarantee energy delivery in winter months; (vii) adequately demonstrate project viability in a commercially reasonable timeframe; and (viii) where feasible, create and foster employment and economic development in the commonwealth. The department of energy resources shall give preference to proposals that combine new Class I renewable portfolio eligible resources and firm hydroelectric generation and demonstrate a benefit to low-income ratepayers in the commonwealth without adding cost to the project.

(e) A proposed long-term contract shall be subject to the review and approval of the department of public utilities. As part of its approval process, the department of public utilities shall consider recommendations by the attorney general, which shall be submitted to the department of public utilities within 45 days following the filing of such contracts with the department of public utilities. The department of public utilities shall consider both the potential costs and benefits of such contracts and shall approve a contract only upon a finding that it is a cost effective mechanism for procuring low cost renewable energy on a long-term basis taking into account the factors outlined in this section.

(f) The department of energy resources and the attorney general shall jointly select, and the department of energy resources shall contract with, an independent evaluator to monitor and report on the solicitation and bid selection process in order to assist the department of energy resources in determining whether a proposal received pursuant to subsection (b) is reasonable and to assist the department of public utilities in its consideration of long-term contracts or filed for approval. To ensure an open, fair and transparent solicitation and bid selection process that is

not unduly influenced by an affiliated company, the independent evaluator shall: (1) issue a report to the department of public utilities analyzing the timetable and method of solicitation and the solicitation process implemented by the distribution companies and the department of energy resources under subsection (b) and include recommendations, if any, for improving the process; and (2) upon the opening of an investigation by the department of public utilities into a proposed long-term contract for a winning bid proposal, file a report with the department of public utilities summarizing and analyzing the solicitation and the bid selection process, and providing its independent assessment of whether all bids were evaluated in a fair and non-discriminatory manner . The independent evaluator shall have access to all information and data related to the competitive solicitation and bid selection process necessary to fulfill the purposes of this subsection, but shall ensure all proprietary information remains confidential. The department of public utilities shall consider the findings of the independent evaluator and may adopt recommendations made by the independent evaluator as a condition for approval. If the independent evaluator concludes in the findings that the solicitation and bid selection of a long-term contract was not fair and objective and that the process was substantially prejudiced as a result, the department of public utilities shall reject the contract.

(g) The distribution companies shall each enter into a contract with the winning bidders for their apportioned share of the market products being purchased from the project. The apportioned share shall be calculated and based upon the total energy demand from all distribution customers in each service territory of the distribution companies.

(h) An electric distribution company may elect to use any energy purchased under such contracts for resale to its customers, and may elect to retain renewable energy certificates to meet the applicable annual renewable portfolio standard requirements under said section 11F of said chapter 25A. If the energy and renewable energy certificates are not so used, such companies shall sell such purchased energy into the wholesale market and shall sell such purchased renewable energy certificates attributed to Class I renewable portfolio standard eligible resources to minimize the costs to ratepayers under the contract; provided further, that a distribution company shall retain renewable energy certificates that are not attributed to Class I renewable portfolio standard eligible resources. The department of energy resources shall conduct periodic reviews to determine the impact on the energy and renewable energy certificate markets of the disposition of energy and renewable energy certificates under this section and may issue reports recommending legislative changes if it determines that actions are being taken that will adversely affect the energy and renewable energy certificate markets.

* * *

N.H. Rev Stat § 362-F:3 (2014): 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 et seq.

§ 39-26-1 Legislative findings.

The General Assembly finds that:

(a) The people and energy users of Rhode Island have an interest in having electricity supplied in the state come from a diversity of energy sources including renewable resources;

(b) Increased use of renewable energy may have the potential to lower and stabilize future energy costs;

(c) Increased use of renewable energy can reduce air pollutants, including carbon dioxide emissions, that adversely affect public health and contribute to global warming;

(d) Massachusetts, Connecticut, and other states have established renewable energy standard programs to encourage the development of renewable energy sources;

(e) It is in the interest of the people, in order to protect public health and the environment and to promote the general welfare, to establish a renewable energy standard program to increase levels of electric energy supplied in the state from renewable resources.

*** * ***

(15) "New renewable energy resources" means generation units using eligible renewable energy resources and first going into commercial operation after December 31, 1997; or the incremental output of generation units using eligible renewable energy resources that have demonstrably increased generation in excess of ten percent (10%) using eligible renewable energy resources through capital investments made after December 31, 1997; but in no case involve any new impoundment or diversion of water with an average salinity of twenty (20) parts per thousand or less;

* * *

(22) "Renewable energy resource" means any one or more of the renewable energy resources described in subsection 39-26-5(a) of this chapter.

§ 39-26-3 Purposes.

The purposes of this chapter are to define renewable energy resources and to facilitate the development of new renewable energy resources to supply electricity to customers in Rhode Island with goals of stabilizing long-term energy prices, enhancing environmental quality, and creating jobs in Rhode Island in the renewable energy sector.

§ 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, and each year thereafter until 2035, provided that the commission has determined the adequacy, pursuant to § 39-26-6, of renewable-energy supplies to meet these percentage requirements.

(5) [Deleted by P.L. 2016, ch. 144, § 1 and P.L. 2016, ch. 155, § 1].

(b) For each obligated entity and in each compliance year, the amount of retail electricity sales used to meet obligations under this statute that are 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) 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.

§ 39-26-5 Renewable energy resources.

(a) Renewable energy resources are:

(1) Direct solar radiation;

(2) The wind;

(3) Movement or the latent heat of the ocean;

(4) The heat of the earth;

(5) Small hydro facilities;

(6) Biomass facilities using eligible biomass fuels and maintaining compliance with current air permits; eligible biomass fuels may be co-fired with fossil fuels, provided that only the renewable energy fraction of production from multi-fuel facilities shall be considered eligible;

(7) Fuel cells using the renewable resources referenced above in this section;

(8) Waste-to-energy combustion of any sort or manner shall in no instance be considered eligible except for fuels identified in § 39-26-2(6).

(b) For the purposes of the regulations promulgated under this chapter, eligible renewable energy resources are generation units in the NEPOOL control area using renewable energy resources as defined in this section.

(c) A generation unit located in an adjacent control area outside of the NEPOOL may qualify as an eligible renewable energy resource, but the associated generation attributes shall be applied to the renewable energy standard only to the extent that the energy produced by the generation unit is actually delivered into NEPOOL for consumption by New England customers. The delivery of such energy from the generation unit into NEPOOL must be generated by:

(1) A unit-specific bilateral contract for the sale and delivery of such energy into NEPOOL; and

(2) Confirmation from ISO-New England that the renewable energy was actually settled in the NEPOOL system; and

(3) Confirmation through the North American Reliability Council tagging system that the import of the energy into NEPOOL actually occurred; or

(4) Any such other requirements as the commission deems appropriate.

(d) NE-GIS certificates associated with energy production from off-grid generation and customer-sited generation facilities certified by the commission as eligible renewable energy resources may also be used to demonstrate compliance, provided that the facilities are physically located in Rhode Island.

* * *

§ 39-26-8 Interaction with other policies.

(a) Rhode Island has established a system-benefits charge (SBC), a portion of which is dedicated to supporting renewable energy, administered in accordance with the provisions of subsections 39-2-1.2(b) and (c); other states have similar policies. The office of energy resources is hereby directed to collaborate with the division of public utilities, the trustees of the renewable energy development fund, the distribution company with other interests and parties, as appropriate, in maximizing the combined impact and efficiency of the renewable energy program established by subsections 39-2-1.2(b) and (c) and the renewable energy standard.

(b) It is the intent of this chapter that generation attributes and NE-GIS certificates applied towards Rhode Island renewable energy standard compliance may not be used towards compliance with state renewable energy obligations relating to an obligated entity's load in other states.

* * *

Vt. Stat. Ann. Tit. §§ 8002-8005. Definitions

30 V.S.A. § 8002

As used in this chapter:

* * *

(17) "New renewable energy" means renewable energy produced by a specific and identifiable plant coming into service after June 30, 2015.

(A) Energy from within a system of generating plants that includes renewable energy shall not constitute new renewable energy, regardless of whether the system includes specific plants that came or come into service after June 30, 2015.

(B) "New renewable energy" also may include the additional energy from an existing renewable energy plant retrofitted with advanced technologies or otherwise operated, modified, or expanded to increase the kWh output of the plant in excess of an historical baseline established by calculating the average output of that plant for the 10-year period that ended June 30, 2015. If the production of new renewable energy through changes in operations, modification, or expansion involves combustion of the resource, the system also must result in an incrementally higher level of energy conversion efficiency or significantly reduced emissions.

* * *

(21) "Renewable energy" means energy produced using a technology that relies on a resource that is being consumed at a harvest rate at or below its natural regeneration rate.

(A) For purposes of this subdivision (21), methane gas and other flammable gases produced by the decay of sewage treatment plant wastes or landfill wastes and anaerobic digestion of agricultural products, byproducts, or wastes, or of food wastes shall be considered renewable energy resources, but no other form of solid waste, other than silvicultural waste, shall be considered renewable.

(B) For purposes of this subdivision (21), no form of nuclear fuel shall be considered renewable.

(C) The only portion of electricity produced by a system of generating resources that shall be considered renewable is that portion generated a technology that qualifies as renewable under this subdivision (21).

(D) The Commission by rule may add technologies or technology categories to the definition of "renewable energy," provided that technologies using the following fuels shall not be considered renewable energy supplies: coal, oil, propane, and natural gas.

(E) In this chapter, renewable energy refers to either "existing renewable energy" or "new renewable energy."

(22)(A) "Renewable pricing" shall mean an optional service provided or contracted for by an electric company:

(i) under which the company's customers may voluntarily either:

(I) purchase all or part of their electric energy from renewable sources as defined in this chapter; or

(II) cause the purchase and retirement of tradeable renewable energy credits on the participating customer's behalf; and

(ii) which increases the company's reliance on renewable sources of energy beyond those the electric company would otherwise be required to provide under section 218c of this title.

(B) Renewable pricing programs may include:

(i) contribution-based programs in which participating customers can determine the amount of a contribution, monthly or otherwise, that will be deposited in a Commission-approved fund for new renewable energy project development;

(ii) energy-based programs in which customers may choose all or a discrete portion of their electric energy use to be supplied from renewable resources;

(iii) facility-based programs in which customers may subscribe to a share of the capacity or energy from specific new renewable energy resources.

(23) "Retail electricity provider" or "provider" means a company engaged in the distribution or sale of electricity directly to the public.

(24) "Standard Offer Facilitator" means an entity appointed by the Commission pursuant to subsection 8005a(a) of this title.

(25) [Repealed.]

(26) "Tradeable renewable energy credits" means all of the environmental attributes associated with a single unit of energy generated by a renewable energy source where:

(A) those attributes are transferred or recorded separately from that unit of energy;

(B) the party claiming ownership of the tradeable renewable energy credits has acquired the exclusive legal ownership of all, and not less than all, the environmental attributes associated with that unit of energy; and

(C) exclusive legal ownership can be verified through an auditable contract path or pursuant to the system established or authorized by the Commission or any program for

tracking and verification of the ownership of environmental attributes of energy legally recognized in any state and approved by the Commission.

* * *

(29) "RES" means the Renewable Energy Standard established under sections 8004 and 8005 of this title. (Added 2003, No. 69, § 1, eff. June 17, 2003; amended 2005, No. 61, § 2; 2007, No. 92 (Adj. Sess.), § 19; 2009, No. 45, § 2, eff. May 27, 2009; 2009, No. 159 (Adj. Sess.), § 13, eff. July 1, 2012; 2011, No. 47, § 7, eff. May 25, 2011 and § 18; 2011, No. 125 (Adj. Sess.), § 8; 2011, No. 170 (Adj. Sess.), § 2, eff. May 18, 2012 and § 10; 2013, No. 89, § 14; 2013, No. 99 (Adj. Sess.), § 3, eff. Jan. 1, 2017; 2015, No. 56, § 25; 2017, No. 53, § 11.)

* * *

30 V.S.A. § 8004. Sales of electric energy; Renewable Energy Standard (RES)

(a) Establishment; requirements. The RES is established. Under this program, a retail electricity provider shall not sell or otherwise provide or offer to sell or provide electricity in the State of Vermont without ownership of sufficient energy produced by renewable energy plants or sufficient tradeable renewable energy credits from plants whose energy is capable of delivery in New England that reflect the required amounts of renewable energy set forth in section 8005 of this title or without support of energy transformation projects in accordance with that section. A retail electricity provider may meet the required amounts of renewable energy through eligible tradeable renewable energy credits that it owns and retires, eligible renewable energy resources with environmental attributes still attached, or a combination of those credits and resources.

(b) Rules. The Commission shall adopt the rules that are necessary to allow the Commission and the Department to implement and supervise further the implementation and maintenance of the RES.

(c) RECS; banking. The Commission shall allow a provider that has met the required amount of renewable energy in a given year, commencing with 2017, to retain tradeable renewable energy credits created or purchased in excess of that amount for application to the provider's required amount of renewable energy in one of the following three years.

(d) Alternative compliance payment. In lieu of purchasing renewable energy or tradeable renewable energy credits or supporting energy transformation projects to satisfy the requirements of this section and section 8005 of this title, a retail electricity provider in this State may pay to the Vermont Clean Energy Development Fund established under section 8015 of this title an alternative compliance payment at the applicable rate set forth in section 8005.

(e) VPPSA members. In the case of members of the Vermont Public Power Supply Authority, the requirements of this chapter may be met in the aggregate.

(f) Joint efforts. Retail electricity providers may engage in joint efforts to meet one or more categories within the RES. (Added 2003, No. 69, § 1, eff. June 17, 2003; amended 2005, No. 61, § 3; 2005, No. 208 (Adj. Sess.), § 14; 2007, No. 92 (Adj. Sess.), § 21; 2009, No. 45, § 3, eff. May 27, 2009; 2011, No. 47, §§ 18, 20m(a); 2015, No. 56, § 2.)

30 V.S.A. § 8005. RES categories 30 V.S.A. § 8005

(a) Categories. This section specifies three categories of required resources to meet the requirements of the RES established in section 8004 of this title: total renewable energy, distributed renewable generation, and energy transformation.

(1) Total renewable energy.

(A) Purpose; establishment. To encourage the economic and environmental benefits of renewable energy, this subdivision establishes, for the RES, minimum total amounts of renewable energy within the supply portfolio of each retail electricity provider. To satisfy this requirement, a provider may use renewable energy with environmental attributes attached or any class of tradeable renewable energy credits generated by any renewable energy plant whose energy is capable of delivery in New England.

(B) Required amounts. The amounts of total renewable energy required by this subsection shall be 55 percent of each retail electricity provider's annual retail electric sales during the year beginning on January 1, 2017, increasing by an additional four percent each third January 1 thereafter, until reaching 75 percent on and after January 1, 2032.

* * *

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 12th day of December, 2017.

/s/ Phyllis G. Kimmel

McCarter & English, LLP
1015 Fifteenth Street, N.W., 12th Floor
Washington, DC 20005
(202) 753-3400
pkimmel@mccarter.com

Attorney for New England States Committee on Electricity, Inc.