

**ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED**

Nos. 15-1071 and 16-1042 (consolidated)

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

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NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.  
*Petitioner in No. 15-1071*

EXELON CORPORATION  
*Petitioner in No. 16-1042*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent*

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

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**JOINT BRIEF OF INTERVENORS  
IN SUPPORT OF RESPONDENT**

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**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 (“FERC”) are listed in the Petitioners’ Brief, at pages i-ii.

All parties, intervenors and *amici* who have appeared in this Court in these consolidated cases are listed in the Petitioners’ Brief, at page iii.

**B. Rulings Under Review**

References to the rulings at issue appear in the Petitioners’ Brief, at page iii.

**C. Related Cases**

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

*/s/ Jason Marshall* \_\_\_\_\_

Jason Marshall  
New England States Committee on Electricity, Inc.

On behalf of Intervenor-Respondents

## 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 New England Conference of Public Utilities Commissioners (“NECPUC”) is a not-for-profit corporation. NECPUC’s board comprises all of the public utilities commissioners of the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Founded more than 60 years ago, NECPUC’s mission is the promotion of regional cooperation and effective communication on all public utility matters within New England. NECPUC has no parent company, is not a publicly held corporation, and there is no publicly held company that has any ownership interest in NECPUC.

The other Intervenor-Respondents, the State of Connecticut Public Utilities Regulatory Authority and Connecticut Office of Consumer Counsel, are

both governmental entities.

*/s/ Jason Marshall* \_\_\_\_\_

Jason Marshall

New England States Committee on Electricity, Inc.

On behalf of Intervenor-Respondents

## TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES .....	i
CORPORATE DISCLOSURE STATEMENT .....	ii
TABLE OF AUTHORITIES .....	vi
GLOSSARY .....	ix
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF ISSUES .....	1
STATEMENT OF FACTS .....	1
SUMMARY OF ARGUMENT .....	7
STATEMENT REGARDING ADDENDUM .....	10
ARGUMENT .....	10
I. Price Reductions Are Not Synonymous With Unlawful Price Suppression, and Power Generators Fail To Demonstrate Undue Discrimination. ....	10
A. Lower Market Clearing Prices That May Result from the Amended New Entrant Rule Reflect a Market That Is Competitive and Rates that Are Just and Reasonable. ....	10
B. The Alternatives That Power Generators Advocate Would Distort New England’s Capacity Market and Result in Excessive, Unjust and Unreasonable Prices. ....	17
C. There is no Undue Discrimination Between Existing Generators and New Generators in New England As They Are Not Similarly Situated. ....	22
II. Power Generators’ Argument That FERC Did Not Follow PJM Precedent Ignores Salient Differences in Complex Sets of Market Rules Between the Different Regions. ....	24
A. FERC Adequately Distinguished Its Ruling in PJM. ....	24

B. PJM and ISO New England Are Distinct Regions with Different Characteristics and Different Market Rules.....26

C. Capacity Market Rules in PJM and New England Are Complex and Require FERC to Use its Judgment To Balance Various Competing Considerations. ....31

CONCLUSION .....34

## TABLE OF AUTHORITIES

### Court Cases

<i>Atl. Ref. Co. v. Public Service Comm’n</i> , 360 U.S. 378 (1959).....	21
<i>Conn. Dep’t of Pub. Util. v. FERC</i> , 569 F.3d 477 (2009).....	1, 2
<i>Dynegy Midwest Generation, Inc. v. FERC</i> , 633 F.3d 1122 (D.C. Cir. 2011) .....	23
<i>Farmers Union Cen. Exchange, Inc. v. FERC</i> , 734 F.2d 1486 (D.C. Cir. 1984), <i>cert. denied</i> , 469 U.S. 1034 (1984) .....	16
<i>FERC v. Elec. Power Supply Ass’n</i> , 136 S. Ct. 760 (2016).....	12, 13
<i>Jersey Cent. Power &amp; Light Co. v. FERC</i> , 810 F.2d 1168 (D.C. Cir. 1987) .....	21
<i>Matsushita Elec. Industrial Co., Ltd., et al. v. Zenith Radio Corp., et al.</i> 475 U.S. 574 (1986), <i>cert. denied</i> , 481 U.S. 1029 (1986).....	11
<i>Md. Pub. Serv. Comm’n v. FERC</i> , 632 F.3d 1283 (D. C. Cir. 2011) .....	31
<i>Me. Pub. Utils. Comm’n v. FERC</i> , 520 F.3d (2008) .....	2
<i>N. Pacific Ry. Co. v. U.S.</i> , 356 U.S. 1 (1958).....	12
<i>N.J. Bd. of Pub. Utils. v. FERC</i> , 744 F.3d 74 (3d Cir. 2014).....	31
<i>*New England Power Generators Ass’n, Inc. v. FERC</i> , 757 F.3d 283 (D.C. Cir. 2014) .....	1, 12, 22
<i>NRG Power Mktg.</i> , 558 U.S. 165 (2010).....	2



<i>Pa. Water &amp; Power Co. v. Fed. Power Comm’n</i> , 343 U.S. 414 (1952).....	21
<i>Pub. Serv. Elec. &amp; Gas Co. v. FERC</i> , 324 F. App’x 1 (D.C. Cir. 2009) (unpublished).....	31
<i>Public Util, Dist. No. 1 v. FERC</i> , 471 F.3d 1053 (9th Cir. 2006).....	21

### **Administrative Cases**

<i>Devon Power LLC</i> , 115 FERC ¶ 61,340 (2006) .....	2
<i>ISO New England Inc. and New England Power Pool Participants Comm.</i> , 155 FERC ¶ 61,023 (2016), <i>reh’g pending</i> . .....	14
<i>ISO New England Inc.</i> , 142 FERC ¶ 61,107 (2013) .....	12
<i>ISO New England Inc.</i> , 146 FERC ¶ 61,038 (2014) .....	3
* <i>ISO New England Inc.</i> , 147 FERC ¶ 61,173 (2014), <i>order on reh’g</i> , 150 FERC ¶ 61,065 (2015). .....	2, 4, 5, 6, 11, 14, 15, 26, 29
* <i>ISO New England Inc.</i> , 150 FERC ¶ 61,065 (2015) .....	2, 6, 21, 22, 24, 26
<i>Midwest Indep. Transmission Sys. Operator, Inc.</i> , 153 FERC ¶ 61,229 (2015), <i>reh’g denied</i> , 155 FERC ¶ 61,193 (2016). .....	16, 33
<i>PJM Interconnection, L.L.C.</i> , 115 FERC ¶ 61,079 (2006) .....	31
<i>PJM Interconnection, L.L.C.</i> , 117 FERC ¶ 61,331 (2006), <i>on reh’g, clarification, and compliance</i> , 119 FERC ¶ 61,318 (2007) .....	31
<i>PJM Interconnection, L.L.C.</i> , 126 FERC ¶ 61,275 (2009) .....	26

* <i>PJM Interconnection, L.L.C.</i> , 128 FERC ¶ 61,157 (2009) .....	15, 24, 29, 33
<i>PJM Interconnection, L.L.C.</i> , 149 FERC ¶ 61,183 (2014), <i>reh’g denied</i> , 153 FERC ¶ 61,035 (2015) .....	32
* <i>Wholesale Competition in Regions with Organized Elec. Mkts.</i> , Order No. 719, 125 FERC ¶ 61,071 (2008), 73 Fed. Reg. 64,100 (Oct. 28, 2008), <i>order on reh’g</i> , Order No. 719-A, 128 FERC ¶ 61,059 (2009), 74 Fed. Reg. 37,776 (July 29, 2009), <i>order denying reh’g and providing clarification</i> , Order No. 719-B, 129 FERC ¶ 61,252 (2009) (“Order No. 719”). .....	16, 32

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

## GLOSSARY

2009 PJM Order or <i>PJM III</i>	<i>PJM Interconnection, L.L.C.</i> , 128 FERC ¶ 61,157 (2009)
Amended New Entrant Rule	Market rule approved in <i>ISO New England Inc.</i> , 147 FERC ¶ 61,173 (2014), allowing new generators entering the capacity auction in New England to lock-in their clearing price for the next six auctions, during which time they must bid zero to ensure their capacity clears
Br.	Brief
Exelon	Exelon Corporation
Exelon Complaint	Complaint Seeking Fast Track Processing, <i>Exelon Corp. v. ISO New England Inc.</i> , FERC Docket No. EL15-23-000 (Nov. 26, 2014), JA134-JA186
Exelon Initial Order	<i>Exelon Corp. v. ISO New England, Inc.</i> , 150 FERC ¶ 61,067 (2015), JA221-JA231
Exelon Rehearing Order	<i>Exelon Corp. v. ISO New England, Inc.</i> , 154 FERC ¶ 61,005 (2016), JA253-JA260
FERC or Commission	Federal Energy Regulatory Commission
Int.-Pet'rs	Intervenors for the Petitioner in Case Nos. 15-1071 and 16-1042 (PSEG Companies)
ISO	Independent System Operator
ISO New England	ISO New England Inc.
ISO New England EL15-23 Answer	Answer to Complaint of ISO New England Inc., <i>Exelon Corp. v. ISO New England Inc.</i> , FERC Docket No. EL15-23-000 (Dec. 16, 2014), JA187-JA211
ISO New England Sloped Demand Filing	Demand Curve Changes, <i>ISO New England Inc. and New England Power Pool</i> , FERC Docket No. ER14-1639-000 (Apr. 1, 2014)

JA	Joint Appendix
NECPUC	New England Conference of Public Utilities Commissioners, Inc.
New Entrant Rule	Market rule allowing new generators entering the capacity auction in New England to lock-in their clearing price for the next four auctions, during which time they must bid zero to ensure their capacity clears
NESCOE	New England States Committee on Electricity, Inc.
NEPGA	New England Power Generators Association, Inc.
NEPGA Complaint	Complaint of New England Power Generators Association, Inc. and Request for Fast Track Processing, <i>New England Power Generators Ass'n, Inc. v. ISO New England, Inc.</i> , FERC Docket No. EL14-7-000 (Oct. 31, 2013), JA001-JA085
NEPGA Initial Order	<i>New England Power Generators Ass'n, Inc. v. ISO New England, Inc.</i> , 146 FERC ¶ 61,039 (2014), JA103-JA133
NEPGA Rehearing Order	<i>New England Power Generators Ass'n, Inc. v. ISO New England, Inc.</i> , 150 FERC ¶ 61,064 (2015), JA212-JA220
P	Paragraph in a FERC order
Power Generators	Petitioners New England Power Generators Association (NEPGA) and Exelon Corporation (Exelon)
PJM	PJM Interconnection, L.L.C.
R.	Record item

Schnitzer Testimony	Prepared Direct Testimony of Michael M. Schnitzer on behalf of the New England Power Generators Association, Inc., Complaint of New England Power Generators Association, Inc. and Request for Fast Track Processing, <i>New England Power Generators Ass'n, Inc. v. ISO New England, Inc.</i> , FERC Docket No. EL14-7-000 (Oct. 31, 2013), JA050-JA085
Sloped Demand Initial Order	<i>ISO New England Inc.</i> , 147 FERC ¶ 61,173 (2014)
Sloped Demand Rehearing Order	<i>ISO New England Inc.</i> , 150 FERC ¶ 61,065 (2015)
Wilson Testimony	Testimony of James F. Wilson in Support of the Protest of New England States Committee on Electricity, Motion to Intervene and Protest of NESCOE, <i>NEPGA v. ISO New England</i> , FERC Docket No. EL14-7-000 (Nov. 27, 2013), JA092-JA102

## JURISDICTIONAL STATEMENT

Intervenor-Respondents<sup>1</sup> concur in the Statement of Jurisdiction of the Petitioners New England Power Generators Association (“NEPGA”) and Exelon Corporation (“Exelon”) (collectively, “Power Generators”). Pet’rs Br. at 3-4.

## STATEMENT OF ISSUES

Intervenor-Respondents concur in the Statement of the Issue of Respondent Federal Energy Regulatory Commission (“FERC” or “Commission”). FERC Br. at 1-3.

## STATEMENT OF FACTS

ISO New England Inc. (“ISO New England”) 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. *New England Power Generators Ass’n, Inc. v. FERC*, 757 F.3d 283, 286 (D.C. Cir. 2014). 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). This Court has explained that such a competitive structure “both incentivizes and

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<sup>1</sup> The following intervenors are joining this brief: New England States Committee on Electricity, Inc. (“NESCOE”); State of Connecticut Public Utilities Regulatory Authority; Connecticut Office of Consumer Counsel; and New England Conference of Public Utilities Commissioners (collectively, “Intervenor-Respondents”).

accounts for new entry by more efficient generators, while ensuring a price both adequate to support reliability and fair to consumers.” *Id.* ISO New England uses a descending-clock auction, where, among other features, existing suppliers can choose to exit the market when the auction price falls below the resource’s approved “de-list bid.” *See id.* (describing descending-clock auction).

The Forward Capacity Auction generally produces a single clearing price for all resources whose bids clear the auction. The price is set at the point where the supply curve (established by the resources’ bids) intersects with the demand curve. Until recently, ISO New England’s Forward Capacity Market used an administratively-set vertical demand curve. *ISO New England Inc.*, 147 FERC ¶ 61,173, P 3 (2014) (“Sloped Demand Initial Order”), *order on reh’g*, 150 FERC ¶ 61,065 (2015) (“Sloped Demand Rehearing Order”).

Pursuant to the original New Entrant Rule (which had been part of ISO New England’s Forward Capacity Market rules from their inception), new resources were granted the option to lock-in capacity prices for up to five years. *Devon Power LLC*, 115 FERC ¶ 61,340, P 16 (2006), *rev’d in part on other grounds*, *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). FERC explained that the lock-in provision was “intended to provide predictable revenues and facilitate financing for new capacity.” *Devon Power* at P 16. Those new entrants that elected to lock-

in were then obligated to provide capacity at that locked-in price regardless of the market clearing price in the next four auction cycles. Unlike other resources, who may submit a de-list bid to exit the market, those resources that made the lock-in election were not permitted to leave the Forward Capacity Market for the remainder of the locked-in period. Instead, a new entrant who made a lock-in election was a “price taker” in the remaining Forward Capacity Auctions during the locked-in period. To ensure that its resource clears the subsequent auctions, it submits a “zero price” bid in those remaining auctions.

In November 2013, ISO New England told FERC that there had been “an abrupt change in supply and demand in New England, from a years-long capacity surplus to a potential capacity shortage in the upcoming [Forward Capacity Auction], as well as a general decline in the amount of new resources seeking to participate in the auction.” *ISO New England Inc.*, 146 FERC ¶ 61,038, P 7 (2014). FERC noted that a sloped demand curve would help “remove market power concerns associated with potential market power that a new resource would have,” and that ISO New England believes it would “reduce price volatility and improve market efficiency.” *Id.* at n.41.

On April 1, 2014, ISO New England, jointly with the region’s stakeholder group, the New England Power Pool Participants Committee (“Filing Parties”), 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 extend the lock-in period of the New Entrant Rule by two years.<sup>2</sup> The “package of rule changes” was supported by all six New England States (*see* ISO New England Sloped Demand Filing at 2), and the majority of commenters supported the proposed changes as a whole:<sup>3</sup> “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.” Sloped Demand Initial Order at P 18. FERC cited NESCOE’s comments (*id.* at n.23), 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 Committee on Electricity at 6-7, *ISO New England Inc.*, FERC Docket No. ER14-1639-000 (Apr. 22, 2014).

Ultimately, FERC found that the proposed sloped demand curve design “reasonably balances the multiple considerations identified by the Filing Parties,

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<sup>2</sup> Other proposed changes not at issue in this proceeding included adopting a narrow exemption from the capacity market’s buyer-side mitigation rules for renewable resources and eliminating system-wide administrative pricing rules in the event of insufficient competition and insufficient supply. Sloped Demand Initial Order at P 5.

<sup>3</sup> “Supporters generally include generators, state parties, project financiers, and renewable resource developers.” *Id.* at n.22.

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.” Sloped Demand Initial Order at P 29. FERC accepted the two-year extension of the New Entrant Rule, explaining that “the lock-in extension represents an attempt to balance numerous considerations;” and that “[t]he price lock-in period is directly correlated with the sloped demand curve parameters. . . . If ISO-NE were to maintain the current five-year lock-in,” instead of extending the period by two years, “a higher price cap would be needed to achieve the same degree of reliability.” *Id.* at PP 55, 58. FERC concluded that “[t]he proposed extension not only addresses specific issues unique to the New England region, such as the real risk of lack of investment when new capacity is needed and a high reliance on merchant entry, but it is also closely linked to the design of the sloped demand curve and the parameters chosen.” *Id.* at P 58.

In reaching its conclusion, FERC relied on a study conducted by The Brattle Group for ISO New England. The study showed that in order to attract sufficient new resources to meet the desired reliability standard, if the lock-in period were kept at five years, developers would require a price cap of \$23/kW-month, compared to \$17.73/kW-month if the lock-in period were extended by two years. *Id.* at P 42. In addition, FERC noted ISO New England’s explanation that “the

five-year lock-in period coupled with the higher price cap of \$23.00/kW-month would mean a steeper curve and, thus, greater price volatility.” *Id.* FERC upheld its findings on rehearing, explaining that “rejecting the extended price lock-in period would have required a higher price cap in order to achieve the same level of reliability.” Sloped Demand Rehearing Order at P 31.

In the first complaint, filed by NEPGA in October 2013, NEPGA argued, *inter alia*, that one aspect of ISO New England’s rules, the “Capacity Carry Forward Rule,”<sup>4</sup> was unjust, unreasonable and unduly discriminatory because of the purported price suppression effect of the New Entrant Rule. NEPGA argued that a bid floor like that in PJM Interconnection, L.L.C. (“PJM”) should be imposed on these new entrants. NEPGA Complaint at 39-40, JA042-JA043. FERC denied this aspect of NEPGA’s complaint. NEPGA Initial Order at P 1, JA103-JA104.

Following the rejection of the NEPGA Complaint (in January 2014) and FERC’s approval of the Amended New Entrant Rule (in May 2014), in November 2014, Exelon filed its complaint at FERC. JA134-JA186. Although the purported

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<sup>4</sup> The Capacity Carry Forward Rule addresses the situation where some, but not all, of a resource’s capacity clears the auction. *New England Power Generators Ass’n, Inc.*, 146 FERC ¶ 61,039, n.10 (2014), JA105 (“NEPGA Initial Order”), *order on reh’g*, 150 FERC ¶ 61,064 (2015) (“NEPGA Rehearing Order”), JA212-JA220. However, Power Generators did not argue in their brief that the Capacity Carry Forward Rule itself was unjust, unreasonable or unduly discriminatory; therefore, the specifics of the rule are irrelevant here.

object of the complaint was now the two-year extension, rather than the Capacity Carry Forward Rule, the argument was the same. Exelon asserted that the two-year extension contained in the Amended New Entrant Rule was unjust, unreasonable and unduly discriminatory because of a purported price suppression effect. Like NEPGA, Exelon argued that a bid floor like that in PJM should be imposed on these new entrants. Exelon Complaint at 21-23, JA154-JA156. FERC denied the Exelon Complaint. *Exelon Corp. v. ISO New England Inc.*, 150 FERC ¶ 61,067 (2015), JA221-JA231 (“Exelon Initial Order”), *order on reh’g*, 154 FERC ¶ 61,005 (2016) JA253-JA260 (“Exelon Rehearing Order”).

### **SUMMARY OF ARGUMENT**

Power Generators argue that FERC’s orders have resulted in “price suppression” and that the orders therefore violate the Federal Power Act. *See, e.g.*, Pet’rs Br. at 1-2. In essence, Power Generators’ argument is that (i) the Amended New Entrant Rule results in lower prices; (ii) lower prices are equivalent to price suppression; and (iii) the purported price suppression that is occurring is an unlawful violation of the Federal Power Act because it unduly discriminates against existing suppliers. This argument fails in several respects.

The Power Generators are correct that the Amended New Entrant Rule may result in lower prices in the post-entry auctions. However, Power Generators ignore that lower prices may well be, and indeed ought to be, the result of a robust

competitive market. Given the circumstances in New England and the record in this case, FERC appropriately found that lower prices that coincide with the two-year extension of the locked-in period in the Amended New Entrant Rule reflect competitive market pricing and serve to protect against the exercise of market power. In fact, if prices were to have increased instead, one would question whether the markets were sufficiently competitive. Moreover, ISO New England has a minimum offer price rule in place designed to prevent new entrants from submitting artificially low bids that could suppress capacity prices.

The alternatives that Power Generators seek—purportedly a bid floor like in PJM—are not fully consistent with the PJM rule. Such a bid floor would also result in distortions to the market and unjust and unreasonable capacity prices in New England—a large transfer of wealth from consumers to the owners of existing capacity without any clear connection to reliability or any other value to the region.

Power Generators' claims that there is undue discrimination between new and existing resources in New England likewise fails. As a factual matter, new generators and existing generators are not similarly situated: new resources need to sink substantial investment into their facilities, and once they have done so, their going forward costs (*e.g.*, operations and maintenance costs) are very low, generally lower than older existing facilities. FERC determined that given the distinct characteristics of the New England market, incentives are needed to

encourage new generation to ensure adequate reliability and capacity at just and reasonable prices. Accordingly, extending the lock-in period available to new entrants by two years was an integral component of the transition to a sloped demand curve that ISO New England and the region's stakeholders supported and proposed to FERC, and that FERC accepted in order to address the specific, fact-based reliability and market power risks in New England.

Power Generators' argument that FERC's orders were arbitrary and capricious because FERC did not explain its reason for rejecting what Power Generators' contend was a similar rule in PJM also misses the mark. FERC did explain the reason for the different rules in PJM and New England, and it concluded that "due to differing clearing mechanics, neither set of rules results in an inefficient selection of capacity, and therefore both can be just and reasonable." Exelon Rehearing Order at P 17, JA259. New England and PJM have distinct characteristics with correspondingly different rules governing their complex capacity markets. Each set of rules reflects a holistic, interrelated package established through lengthy stakeholder processes, settlement negotiations and/or litigation. FERC is required to consider and apply its judgment to the various competing issues in the record before it as it makes decisions on proposed complex rule changes. In this case, when FERC considered all factors and applied its judgment to New England facts, FERC found that the need to reduce barriers to

entry for new resources, to ensure sufficient reliability and protect against excessive prices, weighed in favor of the Amended New Entrant Rule, notwithstanding the fact that lower market clearing prices might result from implementation of these new rules.

### **STATEMENT REGARDING ADDENDUM**

The relevant statutes, regulations and tariff provisions are reproduced in the statutory addendum to Petitioners' brief.

### **ARGUMENT**

#### **I. Price Reductions Are Not Synonymous With Unlawful Price Suppression, and Power Generators Fail To Demonstrate Undue Discrimination.**

##### **A. Lower Market Clearing Prices That May Result from the Amended New Entrant Rule Reflect a Market That Is Competitive and Rates that Are Just and Reasonable.**

Power Generators argue that the Amended New Entrant Rule causes unlawful price suppression in both the entry auction and in the subsequent six auctions, or the "post-entry auctions." Pet'rs Br. at 20-21. Setting aside for a moment the assertion that lower resulting prices would necessarily constitute unlawful price suppression, which they do not, this argument is still incorrect.

First, Intervenor-Respondents do not dispute that the Amended New Entrant Rule *may* result in lower market clearing prices in the *post-entry* auctions. As discussed below, FERC adequately explained that these lower market clearing

prices are “an acceptable byproduct of a just and reasonable market rule.” Exelon Rehearing Order at P 16, JA258 (citing Sloped Demand Initial Order at P 56). Moreover, when competition is working well, prices can go down as well as up. Indeed, “cutting prices in order to increase business often is the very essence of competition.” *Matsushita Elec. Industrial Co., Ltd., et al. v. Zenith Radio Corp., et al.*, 475 U.S. 574, 594 (1986), *cert. denied*, 481 U.S. 1029 (1986).

Second, Power Generators are not correct in their contention that the Amended New Entrant Rule will necessarily result in lower market clearing prices in the *initial* auction. The evidence of record establishes that the New Entrant Rule “gives new resources that elect multi-year pricing an additional incentive to offer at a high price, because the resulting [capacity clearing price] will be the price the [new] resource is guaranteed for up to four additional years.” Testimony of James F. Wilson in Support of the Protest of New England States Committee on Electricity at 21, JA095 (“Wilson Testimony”).<sup>5</sup> Indeed, testimony submitted by complainants in the NEPGA Complaint proceeding at FERC “predict[ed] that a potential entrant’s initial bid ‘is going to bump up against the price caps in the capacity market—something that has already been observed . . . .’” *Id.* at 32, JA099 (quoting Schnitzer Testimony at 10, JA059). In any event, as FERC

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<sup>5</sup> The testimony was submitted prior to FERC’s approving the Amended New Entrant Rule, which extended the lock-in provision from five years to seven years. *See* Sloped Demand Initial Order at PP 56-59.



pointed out (Exelon Rehearing Order at n.11, JA258 (citing *ISO New England Inc.*, 142 FERC ¶ 61,107 (2013))), all bids from new resources are subject to New England’s “minimum offer price rule,” the purpose of which is to prevent new entrants from submitting artificially low bids that could suppress capacity prices. *New England Generators*, 757 F.3d at 292. See FERC Br. at 10-11.

Cutting to the core of Power Generators’ petition—that lower prices equal unlawful price suppression—the foundation upon which their argument rests likewise falls under the weight of scrutiny. See *N. Pacific Ry. Co. v. U.S.*, 356 U.S. 1, 4 (1958) (Sherman Act “rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices . . . .”); see also *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 784 (2016) (noting that FERC’s “rewarding demand response at [market value prices] will encourage that competition and, in turn, bring down wholesale prices.”). The frequency with which Power Generators invoke the term (*e.g.*, Pet’rs Br. at 1, 8, 11, 20-21, 27; Int. Br. at 3-6) does not establish “price suppression.”

FERC’s orders below cogently explained why, as a practical matter, there is no price suppression as a result of resources electing the lock-in:

A resource whose construction has recently been completed, and that has accepted a price lock-in, typically has very low going-forward costs. It is efficient for such a resource to offer as a price-taker (effectively

submitting a \$0 price offer), because it is efficient for such a resource to be selected in the auction over resources with higher going-forward costs.

Exelon Initial Order at P 30, JA229. *See also* ISO New England EL15-23 Answer at 17, JA203 (the net going-forward costs of new resources are inevitably lower than those of older existing resources because newer resources “are better designed and more efficient”). As ISO New England explained, “newly constructed resources could not, as a practical matter, exit the market even if they wanted to, so the lock-in rules, which prohibit them from doing so, cannot be said to suppress (or even lower) the clearing price in years two through seven of the lock-in period.”

*Id.* Evidence in the record further confirms that decisions “to build new power plants are based on longer-term analysis . . . the notion that there is a single-year price that is needed or sufficient to suddenly attract new entry by long-term resources is mistaken.” Wilson Testimony at 27, JA096. Moreover, the FERC orders on review aptly explain that, to the extent lower prices do result from the Amended New Entrant Rule, this is appropriate to ensure the competitiveness of the Forward Capacity Market and to achieve just and reasonable capacity prices in New England.

The claim that “the price suppressive impact on existing resources of the seven year lock-in is not in dispute” (Int.-Pet’rs Br. at 3) is flatly wrong. This argument rests on Power Generators’ blurring of the line between *lower* prices and

*suppressed* prices. Power Generators state, as a given, that “the Commission acknowledged when it extended the lock-in period from five to seven years that the rule ‘may result in lower market clearing prices.’” Pet’rs Br. at 24 (citing Sloped Demand Initial Order at P 56). But this premise omits part of FERC’s statement: FERC “emphasize[s] that other demand curve parameters, such as a price at net [Installed Capacity Requirement] exceeding net [Cost of New Entry] by 20 percent, help to assure that the demand curve construct overall will support adequate new and existing resources to achieve the stated reliability objective.” Sloped Demand Initial Order at P 56. In other words, FERC’s statement that one component of an integral package of tariff revisions might *on its own* result in lower prices proves nothing. The statement must be considered alongside the other components of the integrated package FERC approved.

Indeed, FERC recently emphasized that one aspect of ISO New England’s rules “is not *per se* unjust and unreasonable simply because it has the potential to suppress prices in the [Forward Capacity Market].” *ISO New England Inc. and New England Power Pool Participants Comm.*, 155 FERC ¶ 61,023, P 32 (2016), *reh’g pending*. Rather, “[t]he Commission must balance competing goals to assure just and reasonable rates.” *Id.* at P 32.

Working from their contention that FERC acknowledged the Amended New Entrant Rule “may result in lower market clearing prices,” Power Generators leap

to the conclusion in the very next sentence that “[a]s the Commission recognized in *PJM III*,<sup>6</sup> that price suppression is unjust, unreasonable, and unduly discriminatory against existing suppliers.” Pet’rs Br. at 24 (emphasis supplied) (footnote added). The Commission drew no such conclusion.

FERC found that, to the extent there is any lowering of the post-entry Forward Capacity Auction clearing prices, this is “an acceptable byproduct of a just and reasonable market rule . . . that achieves particular and distinct objectives in the region”—*i.e.*, “incenting new entry through greater investor assurance and protecting consumers from very high prices.” Exelon Rehearing Order at P 16, JA258 (citing Sloped Demand Initial Order at P 56). “Price suppression” in economic terms suggests that prices are inefficiently low, but that does not mean that all low prices are inefficient. Where a market is not sufficiently competitive, there is the opportunity for market power to be exercised and prices to rise artificially; lowering prices to a just and reasonable level is thus a core goal of markets. Power Generators’ leap from “potentially lower prices” to “price suppression” ignores the fundamental purpose that competition serves in organized markets overseen by FERC. As FERC has explained:

Improving the competitiveness of organized wholesale markets is integral to the Commission fulfilling its statutory mandate to ensure supplies of electric energy at

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<sup>6</sup> *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157 (2009) (“*PJM III*” or “2009 PJM Order”).

just, reasonable and not unduly discriminatory or preferential rates. Effective wholesale competition protects consumers by providing more supply options, encouraging new entry and innovation, spurring deployment of new technologies, promoting demand response and energy efficiency, improving operating performance, exerting downward pressure on costs, and shifting risk away from consumers.

*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 denying reh'g and providing clarification*, Order No. 719-B, 129 FERC ¶ 61,252 (2009) (“Order No. 719”). *See also Farmers Union Cen. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1530 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1034 (1984) (acknowledging that just and reasonable rates could be achieved by a “lightheaded” regulatory scheme that uses competition to keep rates within a “zone of reasonableness.”). FERC has explained that “low prices, in and of themselves, do not demonstrate that a market is not just and reasonable.” *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,229, P 110 (2015), *reh'g denied*, 155 FERC ¶ 61,193 (2016).

The regional system operator in this case, ISO New England, also explained that, when it proposed to extend the lock-in period from five years to seven years, its view at that time was that, “due to the transitory regulatory risk currently present in the New England market, new entrants may be offering into the capacity

market at a level *above* what would otherwise be their competitive cost of entry.”

ISO New England EL15-23 Answer at 16, JA202 (emphasis in original) (citing Prepared Testimony of Robert G. Ethier on behalf on ISO New England Inc. at 13 in ISO New England Sloped Demand Filing (Apr. 1, 2014) (“Ethier Testimony”)). To the extent prices are lowered as a result of the Amended New Entrant Rule, this is a desired result—a result needed to reduce barriers to new entry, ensure that the market is competitive, and fulfill FERC’s statutory mandate that prices resulting from the Forward Capacity Market are just and reasonable. As ISO New England explained:

If the lock-in period functions as intended, it will *lower* the price received by existing resources and paid by consumers in a Forward Capacity Auction in which a new resource that has chosen the price lock clears: instead of receiving (or paying, in the case of consumers) an unnecessary risk premium, existing resources will receive (and consumers will pay) a competitive price. That is not price suppression, it is simply competitive pricing.

ISO New England EL15-23 Answer at 16, JA202 (emphasis supplied) (citation omitted).

**B. The Alternatives That Power Generators Advocate Would Distort New England’s Capacity Market and Result in Excessive, Unjust and Unreasonable Prices.**

Power Generators argue that the Court should order FERC to “remedy the unjust, unreasonable, and unduly discriminatory effects of the lock-in mechanism

and zero-price offer requirement.” Pet’rs Br. at 3. The remedy that Power Generators advocate, however, would lead to excessive, unjust and unreasonable prices in New England. As FERC explained, the requested relief—that ISO New England “enter lock-in resources into capacity auctions in years two through seven at higher prices and purchase uncleared capacity from those resources out-of-market—could have a significant cost impact on New England customers.”

Exelon Rehearing Order at P 19, JA260. FERC further explained that:

In a scenario where one or more new ISO [New England] resources lock in their prices in year one, and auction clearing prices in subsequent years drop such that those resources do not clear at the year-one price, New England customers could incur significant costs to pay the lock-in resources out-of-market.

*Id.*

Power Generators’ desired alternatives would result in the entire capacity of the new resource being offered at what would likely be a very high price for the remaining six years of the locked-in period. The capacity could easily establish a high floor price for the full seven-year period, which would provide an incentive for resources that are actually no longer needed to nevertheless defer retirement and continue to accept capacity supply obligations in the Forward Capacity Market. Clearing prices would be higher than can be justified by supply and demand (given the new entry). *See* Wilson Testimony at 30-32, JA097-JA099. Indeed, Power Generators’ approach is fundamentally at odds with the concept of a

competitive market: by propping up prices it limits the likelihood of efficient entry and exit, which dampens the competitive pressure that the market is designed to provide.

Power Generators assert that they “are not challenging ISO New England’s decision to make the price-lock option available to new entrants” (Pet’rs Br. at 47). Petitioners describe, opaquely, a lofty remedy that would “lift up the disfavored class, existing resources, rather than bringing down the favored class.” *Id.* In fact, Power Generators seek a bid floor like that in PJM which, they state, “does not tie the minimum bid for a price-locked resource to its ‘going forward costs’—which [they contend] would cause the resource to bid as it would absent the price-lock—but to the resource’s entry-auction bid or the cost of new entry.” *Id.* Power Generators’ description of PJM’s new entry rule puts their desired remedy in more concrete terms:

The PJM tariff includes a “bid floor” providing that the price-locked resource must offer its capacity into the two post-entry auctions during the lock-in period at a price “equal to the lesser of: A) the price in such seller’s Sell Offer for the [auction] in which such resource qualified [for the lock-in]; or B) 0.90 times the Net [Cost of New Entry] applicable in the first [auction] in which... [it] cleared.”

Pet’rs Br. at 12 (citing PJM Tariff, Attachment DD, § 5.14(c)(4)).

As a matter of fact, Power Generators’ proposed remedy is not consistent with the PJM rule. As ISO New England pointed out in the Exelon Complaint



proceeding, Power Generators' description of the PJM tariff's provision is not complete. Pursuant to the PJM tariff, if the price-locked resource would not clear at the offer price (of the lesser of the resource's initial clearing price or 90 percent of the net Cost of New Entry), its offer is then resubmitted at a lower price so that all of the price-locked capacity does clear.<sup>7</sup> In other words, "[r]educing the offer of a locked-in resource until it clears would have an effect *identical* to offering the locked-in resource at a price of zero." ISO New England EL15-23 Answer at 22, JA208 (emphasis in original). As testimony in the record reflects, the Power Generators' proposed replacement for the New Entrant Rule's pricing provisions is not consistent with the policy reflected in the PJM approach. *See* Wilson Testimony at 32-33, JA099-JA100; *see infra* at 29-30.

The objective of the New England rule design was not to mirror one specific element of PJM's market rules. Power Generators' desired remedy would upset the deliberate balance that FERC achieved when it approved the package of changes to ISO New England's tariff. Power Generators protest that they are not opposing the price lock-in ("the lock-in option itself is not at issue here" (Pet'rs Br.

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<sup>7</sup> "[I]f the Resource does not clear, it shall be deemed resubmitted at the highest price per MW-day at which the megawatt quantity of Unforced Capacity of such Resource that cleared the first-year [Base Residual Auction] will clear the subsequent-year [Base Residual Auction] pursuant to the optimization algorithm described in section 5.12(a) of this Attachment." PJM Tariff, Attachment DD, § 5.14(c)(5)(iii).

at 47)), but what they seek—the imposition of a bid floor on all resources, including those electing the price lock-in—would prop up the prices existing resources would be paid. This outcome would defeat the very purpose of FERC’s acceptance of the extension of the lock-in period in the first instance, which was to avoid the need for “a higher price cap in order to achieve the same level of reliability” and to avoid “expos[ing] consumers to very high prices in the event that an auction is not competitive.” Sloped Demand Rehearing Order at P 31.

FERC must consider the impact of the rule on consumers and must ensure just and reasonable prices in the New England capacity market. *See, e.g., Pa. Water & Power Co. v. Fed. Power Comm’n*, 343 U.S. 414, 418 (1952) (“A major purpose of the whole [Federal Power] Act is to protect power consumers against excessive prices.”); *Public Util. Dist. No. 1 v. FERC*, 471 F.3d 1053, 1058 (9th Cir. 2006) (“The [Federal Power Act] requires FERC to regulate public utilities for the benefit of consumers.”); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1207 (D.C. Cir. 1987) (quoting *Atl. Ref. Co. v. Public Service Comm’n*, 360 U.S. 378, 388 (1959) (“The Commission stands as the watchdog providing ‘a complete, permanent and effective bond of protection from excessive rates and charges.’”). And as this Court has acknowledged in the context of addressing ISO New England’s markets, “FERC’s duty is to ensure that rates are just and reasonable,

not ensure equitability between participants.” *New England Generators*, 757 F.3d at 296.

**C. There is no Undue Discrimination Between Existing Generators and New Generators in New England As They Are Not Similarly Situated.**

Power Generators’ argument that the Amended New Entrant Rule constitutes undue discrimination against existing resources (Pet’rs Br. at 24-27, 43-44) similarly fails. FERC found below that “resources that are entering the [Forward Capacity Market] now are not similarly situated to resources that entered the market previously.” Sloped Demand Rehearing Order at P 32. There is no evidence in the record supporting Power Generators’ notion that existing and new resources are similarly situated in New England. They are not. To the contrary, “given the [then-]current conditions in New England, the short-term price differential between new and existing resources will bring both short- and long-term benefits, is not undue discrimination and, in fact, is necessary.” ISO New England EL15-23 Answer at 18, JA204.

Power Generators similarly cannot demonstrate that the Amended New Entrant Rule is unduly discriminatory simply by showing that the rule may result in a limited price differential between existing resources and those that, when new, elected multi-year capacity-supply obligations at locked-in prices. New entrants and existing resources were not similarly situated when the new resources made

their election and entered the market. At that point, the existing generators had sunk costs (and in many cases had recouped those costs already through decades of regulated and market rates), while the new entrants were still considering whether to invest. Nor are they similarly situated now. The new entrants that elected multi-year supply obligations and locked-in prices are now under obligations that other existing resources do not have: unlike other existing resources, they cannot de-list and exit the market. *See supra* at 2-3. New resources also cannot choose, as other existing resources can, to sell their capacity at higher prices in other markets. Nor will new resources reap the benefit if, contrary to their initial expectation, subsequent auctions produce prices higher than the initial auction price they locked in. But other existing resources are able to reap those benefits.

In the case on which Power Generators principally rely for their discrimination argument, *Dynegy Midwest Generation, Inc. v. FERC*, 633 F.3d 1122 (D.C. Cir. 2011) (“*Dynegy*”) (*see* Pet’rs Br. at 23, 25, 27), the Court found that FERC “revealed no basis for its contention that generators in different zones are not ‘similarly situated’ for purposes of receiving reactive power compensation.” *Dynegy* at 1127 (citations omitted). Accordingly, the Court found undue discrimination. Unlike in *Dynegy*, however, here FERC has explained that ISO New England’s different treatment of new and existing resources does not reflect undue discrimination, but rather, “simply reflects the design and efficiency

advantages that a resource that recently cleared [a Forward Capacity Auction] as a new resource would be expected to have over the rest of the New England fleet.” Exelon Initial Order at P 35, JA230-JA231. In the order in which FERC adopted the Amended New Entrant Rule, FERC provided a cogent and rational basis for the disparate treatment: “[A]lthough the lock-in extension may result in lower market clearing prices than otherwise, other aspects of the sloped demand curve help to assure that, taken as a whole, the demand curve construct will allow resources to achieve the stated reliability goal while reducing price volatility.” Sloped Demand Rehearing Order at P 31.

## **II. Power Generators’ Argument That FERC Did Not Follow PJM Precedent Ignores Salient Differences in Complex Sets of Market Rules Between the Different Regions.**

### **A. FERC Adequately Distinguished Its Ruling in PJM.**

Power Generators’ argument that, in approving the Amended New Entrant Rule, FERC departed from PJM precedent without explanation (Pet’rs Br. at 29-30) is without merit. FERC distinguished the ruling in New England from the 2009 PJM Order several times over. *See* FERC Br. at 20-21, 43-45.

Power Generators hang their hat on the fact that in the order rejecting NEPGA’s complaint, FERC relied on “substantial differences” between the PJM and ISO New England tariffs, but “identified only one such difference: the fact that ‘unlike [ISO New England], PJM uses a sloped demand curve in its forward

capacity market.” Pet’rs Br. at 29 (citing NEPGA Initial Order at P 58, JA127).

Power Generators contend that this difference is now “nonexistent” because ISO New England has since adopted a system-wide sloped demand curve. Pet’rs Br. at 30.

First, FERC did not rely only on the difference in the demand curve in reaching its decisions: “[ISO New England’s] and PJM’s new entrant pricing rules involve differing mechanics beyond the zero-price offer requirement itself. Therefore, such precedent is not controlling in [ISO New England].” NEPGA Rehearing Order at P 19, JA219-JA220 (footnotes omitted).

Second, this argument is not new. Power Generators ignore that in the very order in which FERC approved the sloped demand curve—and therefore, was obviously aware of the change from a vertical demand curve—FERC disposed of this argument in the context of the fundamental changes to the Forward Capacity Market rules. FERC explained that the proposed extension of the price lock-in period:

is distinguishable from the PJM proposal that the Commission rejected. In that case, the Commission found that the proposed extension went beyond the intent of the original price lock-in provision, which was aimed at addressing the issue of lumpy investment in a small zone. The Commission also rejected PJM’s proposal because it found that “no party has made the case that extending the [lock-in] term to five or seven years strikes a superior balance to the existing provisions.” Here, we find that the extension, as part of the package of Demand

Curve Changes, is a reasonable means to address the New England region's current capacity shortage and investor perceptions regarding risk.

Sloped Demand Initial Order at P 57, (citing *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, PP 149-150 (2009)). *See also* Sloped Demand Rehearing Order at P 33 (contrary to assertions, the Sloped Demand Initial Order “distinguished the Commission’s actions from its earlier rejection of a lock-in extension in PJM.”). Moreover, although ISO New England’s demand curve is now sloped, it does not mean it is identical to PJM’s demand curve. The development of the parameters of the demand curve is a complex technical matter with a number of variables that are tailored to the specific region (*see* Sloped Demand Initial Order at PP 13-17 (describing specific parameters of ISO New England Demand Curve)).

FERC has explained that there was no departure from precedent. Even if there were, FERC explained that as markets have evolved, so too has its view that zero-priced offers by new resources reflect low going-forward costs and are just and reasonable. Exelon Rehearing Order at P 18, JA259. *See* FERC Br. at 42-50.

**B. PJM and ISO New England Are Distinct Regions with Different Characteristics and Different Market Rules.**

Power Generators’ reliance on FERC’s order approving a new entry rule for PJM is misplaced and premised on the unfounded assumption that both the markets and rules in PJM and New England are sufficiently similar to warrant this approach. They are not.

As FERC Staff has explained:

The particular market design choices of each region have been different, with each market arriving at its specific approach through stakeholder processes and settlement agreements, evolving over time to address emerging issues. In recent years, refinements have been pursued or discussed to address the impact that broader industry changes have had on the markets, including an evolution in the mix of available resources driven by low natural gas prices, state and federal policies encouraging the entry of renewable resources and other technologies, state policies supporting the development of resources in particular areas or with particular characteristics, the retirement of aging generation resources, and the need to retain certain resources.

Commission Staff, *Centralized Capacity Market Design Elements*, FERC Docket

No. AD13-7-000 (Aug. 13, 2013), *available at*

<https://www.ferc.gov/CalendarFiles/20130826142258-Staff%20Paper.pdf>.

The physical make-up of the regions is different. ISO New England is substantially smaller, serving six New England states over approximately 72,000 square miles, with a generating capacity of 31,000 MW (summer), and peak demand of over 28,000 MW.<sup>8</sup> By comparison, PJM serves 13 states plus the

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<sup>8</sup> See FERC, *Market Oversight: Elec. Power Mkts—New England*, available at <http://www.ferc.gov/market-oversight/mkt-electric/new-england/elec-ne-glance.pdf>.



District of Columbia, over 243,417 square miles, with a generating capacity of over 171,648 MW and peak demand of 165,492 MW.<sup>9</sup>

Additionally, New England's geology, available natural resources, weather patterns, infrastructure, import capabilities, population density and load patterns, and state public policies (*e.g.*, addressing renewable resources) are different from those in PJM. As a result, the regions have different fuel mixes. For example, in 2015, 52% of New England's capacity was gas-fired generation, 32% nuclear, 14% hydro and other renewable resources, and only 2% coal,<sup>10</sup> while over a third of PJM's capacity was still coal.<sup>11</sup> New England's increased reliance on natural-gas-fired capacity, in conjunction with the fact that New England's natural gas infrastructure is highly constrained, was identified by ISO New England as one of the region's most pressing challenges in recent years, and as the impetus for certain capacity market rule changes that ISO New England proposed in 2014. *See* Fuel Assurance Status Report of ISO New England at 2-3, *ISO New England Inc.*, FERC Docket Nos. AD13-7-000 et al. (Feb. 18, 2015). By contrast, "new entry in

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<sup>9</sup> *See* FERC, *Market Oversight: Elec. Power Mkts—PJM*, available at <http://www.ferc.gov/market-oversight/mkt-electric/pjm/elec-pjm-glance.pdf>.

<sup>10</sup> FERC Office of Enforcement, *OE Energy Market Snapshot: East Version—March 2016 Data* at 29 (Apr. 2016), available at <http://www.ferc.gov/market-oversight/mkt-snp-sht/2016/04-2016-snapshot-east.pdf>.

<sup>11</sup> PJM, *Mkts. & Operations: System Operations—Capacity by Fuel Type 2015*, available at <http://www.pjm.com/~media/markets-ops/ops-analysis/capacity-by-fuel-type-2015.ashx>.

PJM may have access to somewhat lower-cost natural gas supplies than resources located in New England would be able to access.” Wilson Testimony at 27, JA096.

In its Sloped Demand filing, ISO New England explained to FERC that while there is a range of reasonable demand curves, it was proposing the particular demand curve “because it appropriately balances the competing objectives of a demand curve in the context of the New England markets: limiting price volatility, limiting quantity (reliability) volatility, and limiting total consumer costs.” Ethier Testimony at 24. FERC appropriately recognized the distinct characteristics of New England when, in approving the Amended New Entrant Rule, it held that the lock-in extension “addresses specific issues unique to the New England region, such as the real risk of lack of investment when new capacity is needed and a high reliance on merchant entry,” in addition to being “closely linked to the design of the sloped demand curve and the parameters chosen” for the Forward Capacity Market. Sloped Demand Initial Order at P 58. Conversely, when FERC rejected PJM’s proposed changes to its new entry pricing adjustment rule, it did so for reasons that were specific to PJM, *i.e.*, the changes went beyond the scope of the original three-year provision, which was intended only to address the issue of lumpy investments in a small local deliverability area. 2009 PJM Order at PP 102-103.

In addition to differences between the markets and the market rules, the specific rule about which Petitioners complain is not the same as the PJM rule. NESCOE presented evidence in the NEPGA Complaint proceeding explaining the salient differences between ISO New England's New Entrant Rule and PJM's new entry pricing adjustment rule. Wilson Testimony at 32-35, JA099-JA102.

Compared to ISO New England's rules, (1) the PJM new entry pricing adjustment rule was designed to apply in very limited circumstances, *i.e.*, when a large new resource in a small zone would have a very large price impact on the zone; (2) the PJM new entry pricing adjustment rule allows the option for only two additional years of multi-year pricing; and (3) the PJM new entry pricing adjustment resource's capacity in the two subsequent years of the multi-year pricing period is first offered at the lower of the resource's original offer price or 0.9 times the applicable net cost of new entry in the original auction in which the resource cleared, and if this offer fails to clear the auction, it then is resubmitted at a price sufficiently low to clear the auction. *Id.* at 33, JA100; *see also supra* at 20. The PJM new entrant rule is extremely difficult to trigger and use, has only been used once, and is limited to a three-year period. Wilson Testimony at 33, JA100; *see also id.* at 12, JA094. There is no evidence in the record that would suggest the PJM rule would be appropriate in New England, and Power Generators' proposed remedy is without support.

**C. Capacity Market Rules in PJM and New England Are Complex and Require FERC to Use its Judgment To Balance Various Competing Considerations.**

The market rules governing PJM's capacity market (called the "Reliability Pricing Model") and the market rules governing ISO New England's Forward Capacity Market are both incredibly detailed and complex, the product of multiple years-long stakeholder processes in those regions. Like New England's capacity market rules, PJM's capacity market rules were the subject of a settlement, which by definition involved give-and-take compromises. *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 (2006); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006), *on reh'g, clarification, and compliance*, 119 FERC ¶ 61,318 (2007). And like New England's capacity market rules, PJM's capacity market rules have been the subject of substantial litigation, both past (*see, e.g., Pub. Serv. Elec. & Gas Co. v. FERC*, 324 F. App'x 1 (D.C. Cir. 2009) (unpublished); *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283 (D. C. Cir. 2011); *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014)) and ongoing (*PJM Power Providers Group, et al. v. FERC*, Nos. 15-1453 & 1455 (D.C. Cir. filed Dec. 14, 2015) (on review of FERC orders concerning revisions to the demand curve that PJM proposed in 2014) (briefing in progress); *NRG Power Marketing, LLC v. FERC*, Nos. 15-1452 & 15-1454 (D.C. Cir. filed Dec. 14, 2015) (on review of FERC orders concerning PJM's proposed revisions to its minimum offer price rule applied to its capacity auctions) (briefing

in progress); *Adv. Energy Mgmt. All., et al. v. FERC*, Nos. 16-1234, *et al.*, (D.C. Cir. filed July 8, 2016) (seeking further changes to PJM's capacity market rules).

The many elements that make up New England distinct capacity markets are inextricably woven together, as are the elements that make up PJM's markets rules. Just as FERC has done here, when FERC has issued orders addressing changes to components of PJM's capacity market rules, it has balanced different considerations in reaching its decisions. *See, e.g., PJM Interconnection, L.L.C.*, 149 FERC ¶ 61,183, P 53 (2014), *reh'g denied*, 153 FERC ¶ 61,035 (2015) (“We find that the increase in costs, less than 1 percent on average over the long-term, is reasonable, on balance, given the increase in reliability.”).

That the market rules and mitigation approved for the PJM and ISO New England markets differ does not mean that ISO New England's approach is unlawful. Both approaches mitigate, in their own way and as one component of a set of complex rules, the potential for price suppression in the context of their differing factual constructs and capacity auction structures. FERC has consistently recognized and approved the differences in regional market structures and rules. *See, e.g., Order No. 719 at P 9* (“Significant differences exist between regions, including differences in industry structure, mix of ownership, sources of electric generation, population densities, and weather patterns. . . . We recognize and respect these differences across various regions.”); *Midwest Indep. Transmission*

*Sys. Operator, Inc.*, 153 FERC at P 52 (finding that regional differences between the Midwest region and other regions justified FERC's approval of a difference resource adequacy construct for the Midwest).

Indeed, if the 2009 PJM Order provides any guidance regarding ISO New England's New Entrant Pricing Rule, it is that different pricing for existing and new resources *is* acceptable. In the 2009 PJM Order, the Commission rejected PJM's proposal to extend its current three-year new entrant rule to a seven-year period on the basis that PJM's proposal "goes beyond the justifiable need to protect against lumpy investment." 2009 PJM Order at P 102. Although the Commission recognized that "[b]oth new entry and retention of existing efficient capacity are necessary to ensure reliability and both should receive the same price so that the price signals are not skewed in favor of new entry," *id.*, the Commission left in place PJM's existing three-year multi-year payment period along with its different prices for new and existing resources as a reasonable approach to encouraging new investment. Accordingly, contrary to Power Generators' claim that the Amended New Entrant Rule is at odds with well-established Commission policy (Pet'rs Br. at 27-33), the 2009 PJM Order illustrates that different prices for new and existing generators do not inherently demonstrate undue discrimination and that it may reflect a just and reasonable approach.

## CONCLUSION

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

Respectfully submitted,

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Dated: October 25, 2016



**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 7,931 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 2011 in Times New Roman 14-point font.

Dated this 25th day of October, 2016.

*/s/ Jason Marshall*

Jason Marshall  
New England States Committee on Electricity, Inc.

On behalf of Intervenor-Respondents

**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 25th day of October, 2016.

*/s/ Jason Marshall* \_\_\_\_\_

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