

173 FERC ¶ 61,161
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;
Neil Chatterjee and Richard Glick.

ISO New England Inc.

Docket No. ER18-619-001

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued November 19, 2020)

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1. On March 9, 2018, pursuant to section 205 of the Federal Power Act (FPA),¹ the Commission accepted ISO New England Inc.’s (ISO-NE) proposed revisions to the ISO-NE, Transmission, Markets and Services Tariff (57.0) (ISO-NE Tariff) to modify its Forward Capacity Market (FCM) to better accommodate actions taken by New England states to procure certain resources outside of ISO-NE’s wholesale markets.² The collective revisions are known as Competitive Auctions with Sponsored Policy Resources (CASPR). Clean Energy Advocates;³ Eastern New England Consumer-Owned Systems (Consumer-Owned Systems);⁴ NextEra Energy Resources,

¹ 16 U.S.C. § 824d.

² *ISO New England Inc.*, 162 FERC ¶ 61,205 (2018) (CASPR Order).

³ Clean Energy Advocates are Natural Resources Defense Council, Sierra Club, Sustainable FERC Project, Conservation Law Foundation, and RENEW Northeast, Inc.

⁴ Consumer-Owned Systems’ member systems are: Braintree Electric Light Department; Georgetown Municipal Light Department; Groveland Electric Light Department; Littleton Electric Light & Water Department; Middleton Electric Light Department; Middleborough Gas & Electric Department; Norwood Light & Broadband Department; Pascoag (Rhode Island) Utility District; Rowley Municipal Lighting Plant; Taunton Municipal Lighting Plant; Wallingford (Connecticut) Department of Public Utilities; and Wellesley Municipal Light Plant, which intervened in this proceeding as

LLC and NRG Power Marketing LLC (NextEra-NRG); and Public Citizen timely filed requests for rehearing of the CASPR Order.

2. Pursuant to *Allegheny Defense Project v. FERC*,⁵ the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the FPA,⁶ we are modifying the discussion in the CASPR Order and reach the same result in this proceeding, as discussed below.⁷

I. Background

3. ISO-NE's FCM includes an annual Forward Capacity Auction (FCA) in which capacity suppliers compete to provide capacity to the New England region three years in the future. Suppliers of capacity that receive a capacity supply obligation in an FCA commit to, and receive payment for, providing capacity during the one-year period associated with that particular FCA.⁸

4. ISO-NE utilizes a minimum offer price rule, or MOPR, which requires new capacity resources to offer their capacity into the FCM at prices that are at or above a price floor set for each type of resource.⁹ The MOPR does not allow resources receiving

one of Eastern New England Consumer-Owned Systems, but does not join in ENECOS' request for rehearing of the CASPR Order.

⁵ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

⁶ 16 U.S.C. § 825l(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

⁷ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the CASPR Order. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015). Additionally, we note that ISO-NE submitted a section 205 filing proposing "conforming changes" to CASPR, which the Commission accepted on January 29, 2019; these revisions do not materially impact the issues raised on rehearing. See *ISO New England Inc. and New England Power Pool Participants Committee*, 166 FERC ¶ 61,061 (2019) (CASPR Conforming Changes Order).

⁸ See CASPR Order, 162 FERC ¶ 61,205 at P 2.

⁹ See *id.* P 3 & n.2 (citing ISO-NE Tariff III.A.21.1).

out-of-market support to reflect that revenue in their offer prices, unless such support is widely available to other market participants.¹⁰ As ISO-NE pointed out in its CASPR filing, New England states have sought to reduce greenhouse gas emissions and meet climate change goals over the past decade through various mechanisms outside the ISO-NE-administered wholesale markets.¹¹ Specifically, some states have enacted legislation to promote development of new state-preferred non-emitting or “clean” generation resources. Many of these new resources are expected to be supported, in significant part, by mandates that state-regulated retail utilities enter into long-term contracts with the resources’ developers. These contracts are often termed “out-of-market contracts” because they are arranged outside the ISO-administered competitive wholesale markets and because they may provide greater compensation to the preferred resources’ developers than the region’s competitive markets would otherwise tender.¹² The MOPR can prevent these resources from clearing the FCA because the rule requires capacity to be offered at a price that more transparently reflects a resource’s actual costs as compared to other competitors and certain resources cannot compete successfully without out-of-market support.

5. The FCM rules in effect when ISO-NE filed CASPR allowed a limited exemption from the MOPR for certain renewable resources (renewables exemption).¹³ In any FCA, up to 200 MW of renewable resources could qualify for the renewables exemption and enter the FCA without being subject to the MOPR. Any unused portion of that 200 MW could carry forward for up to three years (two additional FCAs) for a possible maximum of 600 MW of exempt renewable resource capacity in any given FCA.¹⁴ The United

¹⁰ *Id.* P 3 & n.3 (citing ISO-NE Tariff III.A.21.2(b)(i)).

¹¹ CASPR Order, 162 FERC ¶ 61,205 at P 4 & n.7.

¹² *See* Testimony of Christopher Geissler, Attachment to ISO-NE Transmittal (Geissler Testimony) at 7.

¹³ *ISO New England Inc.*, 147 FERC ¶ 61,173, at P 81 (2014) (First Renewables Exemption Order), *reh’g denied*, 150 FERC ¶ 61,065 (2015) (Renewables Exemption Rehearing Order), *on remand*, 155 FERC ¶ 61,023 (2016) (Renewables Exemption Remand Order), *on reh’g*, 158 FERC ¶ 61,138, at P 2 (2017) (Renewables Exemption Remand Rehearing Order), *aff’d*, *NextEra Energy Resources, LLC v. FERC*, 898 F.3d 14 (2018) (*NextEra*).

¹⁴ CASPR Order, 162 FERC ¶ 61,205 at P 3 & n.4 (citing ISO-NE Tariff III.13.1.1.1.7 (48.0.0); First Renewables Exemption Order, 147 FERC ¶ 61,173 at PP 81-88; Renewables Exemption Rehearing Order, 150 FERC ¶ 61,065; Renewables Exemption Remand Order, 155 FERC ¶ 61,023 at P 33; Renewables Exemption Remand Rehearing Order, 158 FERC ¶ 61,138 at PP 43, 48, *aff’d*, *NextEra*, 898 F.3d at 19, 25).

States Court of Appeals for the D.C. Circuit (D.C. Circuit) recently upheld the limited renewables exemption, noting, among other things, that setting a just and reasonable rate necessarily involves a balancing of investor and consumer interests.¹⁵

6. ISO-NE explained in its CASPR filing that, from a resource adequacy standpoint, out-of-market mechanisms (such as the state-mandated contracts with renewable resources) could result in price suppression and negatively affect the FCM's ability to retain and justly compensate needed existing resources and to attract new, competitively compensated resources.¹⁶ Thus, responding to states' efforts to promote the development of state-preferred generating resources and some New England states' increase of renewable resource targets, ISO-NE filed CASPR on January 8, 2018.¹⁷ CASPR is a market-based mechanism to accommodate the entry of certain state-supported resources (Sponsored Policy Resources)¹⁸ into the FCM over time, while maintaining competitive pricing for capacity.¹⁹ CASPR adds a second auction, the substitution auction, which runs immediately after the primary auction (the FCA).²⁰ The

¹⁵ *NextEra*, 898 F.3d at 21 (quoting *Wisconsin Pub. Power, Inc. v. FERC*, 493 F.3d 239, 262 (D.C. Cir. 2007) (per curiam) (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603) (1944) (quotations omitted)).

¹⁶ See CASPR Order, 162 FERC ¶ 61,205 at P 8.

¹⁷ See *id.* PP 1, 4-6.

¹⁸ ISO-NE Tariff § 1.2.2 defines "Sponsored Policy Resource" as follows:

Sponsored Policy Resource is a New Capacity Resource that: received an out-of-market revenue source supported by a government-regulated rate, charge or other regulated cost recovery mechanism, and; qualifies as a renewable, clean or alternative energy resource under a renewable energy portfolio standard, clean energy standard, alternative energy portfolio standard, renewable energy goal, or clean energy goal enacted (either by statute or regulation) in the New England state from which the resource receives the out-of-market revenue source and that is in effect on January 1, 2018.

We note that ISO-NE subsequently modified the definition of Sponsored Policy Resources to include offshore wind. See CASPR Conforming Changes Order, 166 FERC ¶ 61,061 at PP 6, 12.

¹⁹ CASPR Order, 162 FERC ¶ 61,205 at PP 4, 6.

²⁰ See *id.* PP 7-9.

primary auction clearing price determines the price that ISO-NE load will pay for capacity. In the substitution auction (where ISO-NE does not apply the MOPR), existing resources that have obtained a capacity supply obligation through the primary auction can make bids indicating a price at or below which they are willing to relinquish their capacity supply obligation and permanently retire (e.g., a price at or below which they are willing to pay to procure replacement capacity), and new Sponsored Policy Resources can place offers indicating a price at (or above) which they are willing to take on those resources' capacity supply obligations and become existing resources (to which the MOPR is not applied) in subsequent auctions.²¹

7. To minimize adverse impacts on investments already in progress, CASPR also includes a three-year phase-out of the renewables exemption.²² The remaining accrued exempt megawatts under the renewables exemption may be used through FCA 15, to be conducted in 2021 for the 2024-2025 delivery year.²³

²¹ As an example, assume that an existing 1 MW Resource X offers competitively in the primary auction, clears the primary auction and gets a capacity supply obligation for the relevant capacity delivery year of \$10/MW, in return for which it must provide 1 MW of capacity to ISO-NE during that capacity delivery year. But X is also willing to retire its plant at the start of the relevant capacity delivery year, if it can receive sufficient compensation. Through the substitution auction, X buys the capacity of Resource Y, a new 1 MW Sponsored Policy Resource that could not clear the primary auction, for \$8/MW. As a result of this transaction, during the relevant capacity delivery year: (a) X pays eight dollars to Y to provide 1 MW of capacity to ISO-NE for that year; (b) X is paid \$10 by ISO-NE; because X is still meeting its capacity supply obligation even though the capacity is actually being provided by Y; and (c) X retires its unit and incurs no further costs. X benefits because it nets two dollars and retires its plant at the start of the corresponding capacity delivery year. Y benefits because it will become an existing resource in the FCM, and in subsequent FCAs can bid in at \$0/MW without being subject to the MOPR.

²² See CASPR Order, 162 FERC ¶ 61,205 at P 88.

²³ See *id.* When CASPR was filed, there were 514 MW remaining to be used under the renewables exemption for FCA 12, see ISO-NE Transmittal at 13, reduced to approximately 481 MW for FCA 13. See CASPR Conforming Changes Filing, Docket No. ER19-444-000, ISO-NE Transmittal at 38. As approximately 145 MW and 137 MW cleared under the renewables exemption in FCA 13 and FCA 14 respectively, there were approximately 336 MW (481 MW-145 MW) available under the renewable exemption going into FCA 14 and there will be approximately 19 MW (336 MW-317 MW) available under the renewables exemption going into FCA 15. See ISO New England, *New England Forward Capacity Auction Closes with Adequate*

8. The Commission accepted CASPR effective March 9, 2018, except for settlement provisions, which were effective June 1, 2018, as requested by ISO-NE.²⁴ CASPR became effective at the beginning of the year-long auction administration cycle for FCA 13.²⁵

II. Requests for Rehearing

9. On April 6, 2018, Public Citizen filed a request for rehearing of the CASPR Order. On April 9, 2018, Clean Energy Advocates, Consumer-Owned Systems, and NextEra-NRG each filed rehearing requests. On April 24, 2018, ISO-NE submitted an answer to Clean Energy Advocates' rehearing request.

III. Commission Determination

A. Procedural Matters

10. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2020), prohibits an answer to a request for rehearing. Accordingly, we reject ISO-NE's answer.

11. Consumer-Owned Systems' member systems, submitting their position jointly through a coalition, seek clarification of their status as individual intervenors in this proceeding, to resolve any ambiguity concerning the intervenor status of individual Consumer-Owned Systems in subsequent proceedings.²⁶ They point out that, in the CASPR Order's Appendix, the Commission identified Consumer-Owned Systems as an intervenor but did not identify the individual Consumer-Owned Systems' member systems in the list of the coalition's individual members. We grant Consumer-Owned Systems' request and clarify that, pursuant to 18 C.F.R. § 385.214(a)(3) (2020), each member system has been granted intervenor status.

12. Clean Energy Advocates' rehearing request includes new evidence, the attached testimony of a new witness, Robert Gramlich of Grid Strategies LLC (Gramlich

Power System Resources for 2022-2023 https://www.iso-ne.com/static-assets/documents/2019/02/20190206_pr_fca13_initial_results.pdf and https://www.iso-ne.com/static-assets/documents/2015/09/FCA_Parameters_Final_Table.xlsx.

²⁴ CASPR Order, 162 FERC ¶ 61,205 at. P 1; *id.* Ordering Paragraph.

²⁵ *Id.* PP 1, 10.

²⁶ *See* Consumer-Owned Systems Joint Request for Rehearing and Clarification (Consumer-Owned Systems Rehearing Request) at 13-14.

Testimony), which purports to quantify the allegedly unreasonable consumer costs that would result from CASPR. We will reject as untimely the proffered Gramlich Testimony and all portions of Clean Energy Advocates' rehearing request that rely on it. Longstanding Commission precedent prohibits the introduction of new evidence at the rehearing stage.²⁷ The Integrating Markets and Public Policies (IMAPP) stakeholder process that culminated in the CASPR filing began in summer 2016.²⁸ Clean Energy Advocates had ample time from the inception of the summer 2016 stakeholder process through the January 29, 2018 public notice²⁹ date by which comments and protests were due on the CASPR filing to provide its analysis of consumer costs, but Clean Energy Advocates failed to do so.³⁰ Allowing this evidence into the record at this late stage of

²⁷ See, e.g., *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 116-117 (D.C. Cir. 2017) (“Parties seeking rehearing of Commission orders are not permitted to include additional evidence in support of their position, particularly when such evidence is available at the time of the initial filing.”) (quoting *PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,187, at P 49 (2004)); *Commonwealth Edison Co.*, 127 FERC ¶ 61,301, at P 14 & n.15 (2009) (rejecting affidavit submitted with rehearing request as an “impermissible moving target” that “would frustrate needed administrative finality”) (citing *PPL Elec. Utils. Corp.*, 124 FERC ¶ 61,229, at P 7 (2008); *TransCanada Power Mktg. Ltd. v. ISO-New England Inc.*, 123 FERC ¶ 61,149, at P 22 (2008); *New York Indep. Sys. Operator, Inc.*, 112 FERC ¶ 61,283, at P 35 n.20 (2005)).

²⁸ Statement of Jeffrey W. Bentz, New England Committee on Electricity, State Policies and Wholesale Markets in ISO-NE, New York Independent System Operator, Inc. and PJM Interconnection, L.L.C., Docket No. AD19-11-000, at 2 (filed Apr. 25, 2017), <https://www.ferc.gov/CalendarFiles/20170426145900-Bentz,%20NESCOE.pdf>

²⁹ CASPR Order, 162 FERC ¶ 61,205 at P 11; *Federal Register*, 83 Fed. Reg. 1611 (Jan. 12, 2018).

³⁰ See Clean Energy Advocates Protest and Comments to CASPR Filing, Docket No. ER19-618-000 (filed Jan. 18, 2018); see also presentations from Clean Energy Advocates' members during the IMAPP proceeding, e.g., NEPOOL, *IMAPP Solution Ideas Day*, Presentations from RENEW 30-36 and Conservation LAW Foundation 37-48 (Aug. 11, 2016), https://www.iso-ne.com/static-assets/documents/2016/08/imapp_20160811_final_notice.pdf; NEPOOL, *IMAPP Plenary Meeting No. 3*, Conservation Law Foundation's New Proposal 8-31 (Sep.14, 2016), https://www.iso-ne.com/static-assets/documents/2016/09/imapp_20160914_composite_4.pdf; NEPOOL, *IMAPP Plenary Meeting No. 8*, Brattle Group's Straw Proposal for a Long Term IMAPP Design 61-80 (May 17, 2017), https://www.iso-ne.com/static-assets/documents/2017/05/imapp_20170517_composite.pdf (Conservation Law

the proceeding would impinge on parties' due process rights to respond to such evidence³¹ and require the Commission and parties to "chase a moving target," undermining the goals of administrative efficiency and finality of proceedings.³² Accordingly, we reject the Gramlich Testimony and all portions of the rehearing request that rely upon it.

B. Substantive Matters

1. Undue Discrimination

a. CASPR Order

13. The Commission accepted ISO-NE's proposed definition of Sponsored Policy Resource,³³ which limits the resources that can participate in the substitution auction to renewable, clean, or alternative resources that receive revenue from a state or municipal government entity outside of the ISO-administered market.³⁴ The Commission found it was not unduly discriminatory to distinguish between resources that meet the definition and those that do not because they are not similarly situated.³⁵ The Commission explained that ISO-NE provided record evidence indicating that, as a result of state statute and/or regulation, a substantial amount of renewable, clean or alternative resources will be developed in New England in the near future, whether that capacity clears the FCM or not, and CASPR was designed to address the impact that the influx of these resources will have on FCM prices. In contrast, there was no similar record evidence that there are new planned resources not meeting the definition of Sponsored

Foundation was part of the coalition sponsoring Brattle Group's Straw Proposal for a Long-Term IMAPP Design).

³¹ 18 C.F.R. § 385.713(d)(1); *see also* *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,024, at P 16 (2015) (noting that the "Commission looks with disfavor on parties raising issues for the first time on rehearing because other parties are not permitted to respond to requests for rehearing"); *California Indep. Sys. Operator Corp.*, 129 FERC ¶ 61,144, at P 59 (2011).

³² *See supra* note 28.

³³ *See* CASPR Order, 162 FERC ¶ 61,205 at PP 43-47 (addressing ISO-NE Tariff § 1.2.2). For the definition of Sponsored Policy Resource, *see supra* note 19.

³⁴ *See id.* P 29 & n.39 (quoting ISO-NE Transmittal at 13 (citing Geissler Testimony at 62)).

³⁵ *See id.* PP 45-46.

Policy Resource that will be constructed or procured even if those resources do not receive capacity supply obligations. The Commission therefore found the definition of Sponsored Policy Resource was “narrowly tailored to meet ISO-NE’s objective of limiting the impact of out-of-market state procurements on the FCM.”³⁶

14. The Commission also noted that all resources that do not qualify as Sponsored Policy Resources, including self-supply resources, can submit documentation to the Internal Market Monitor (IMM) justifying an offer price below the MOPR level, based on their unit-specific costs.³⁷ This process, the Commission noted, is a way to enter the primary auction “unimpeded by the MOPR.”³⁸

15. The Sponsored Policy Resource definition further limits the types of technologies that can enter the substitution auction based on the laws in effect on January 1, 2018 in the state from which a resource receives supplemental revenue.³⁹ As ISO-NE explained, the date limitation “provides more clarity to the market regarding the types of technologies that are eligible to participate . . . in the substitution auction.”⁴⁰ The Commission found that the cut-off date was not unduly discriminatory or preferential, particularly as it is impossible to know whether the resources sponsored by not-as-yet enacted state statutes and regulations would be similarly situated to resources that meet the current definition of Sponsored Policy Resource.⁴¹ Moreover, ISO-NE committed to

³⁶ *Id.* P 45.

³⁷ *See id.* P 46 & n.69 (citing ISO-NE Tariff § III.A.21 (50.0)).

³⁸ *Id.* P 46.

³⁹ 16 U.S.C. § 824(b); ENECOS Rehearing Request at 3, 9. As noted above, *see supra* note 19, in the Conforming Changes Filing, ISO-NE proposed to amend the definition of Sponsored Policy Resources to include offshore wind, which the Commission accepted prospectively.

⁴⁰ CASPR Order, 162 FERC ¶ 61,205 at P 20 & n.40 (citing ISO-NE Transmittal at 14); *see also id.* P 20 & n.42 (citing Geissler Testimony at 66).

⁴¹ We note this is not the first time a cut-off date for determining eligibility to participate in the FCM has been used in New England. For instance, to be eligible for the renewables exemption, a resource must qualify under state renewable or alternative energy portfolio standards in effect on January 1, 2014 (or, in states without a portfolio standard, qualify under that state’s renewable energy goals as a renewable resource) in the state where the resource is geographically located. ISO-NE Tariff Section III.13.1.1.1.7; *see also* Geissler Testimony at 16-19; First Renewables Exemption Order, 147 FERC ¶ 61,073 at P 88 (accepting cut-off date but also requiring compliance filing to rectify conflicting tariff provisions concerning how new resources

work with stakeholders to determine whether CASPR should accommodate new laws, if and when such laws were enacted.⁴²

16. Additionally, the Commission explained that the ultimate purpose of basing capacity market constructs on certain guiding principles⁴³ is “to produce a level of investor confidence that is sufficient to ensure resource adequacy at just and reasonable rates.”⁴⁴ The Commission explained that FCM prices serve as both a revenue stream and a price signal for investors and, without measures in place to limit the impact of out-of-market state policy initiatives on FCM prices, such actions “can erode the investor confidence on which the FCM relies to meet its objective.”⁴⁵ The Commission cautioned that “erosion of investor confidence can prevent the FCM from attracting investment in new and existing non-state-supported resources when investment is needed, or can lead to excessive costs for consumers as capacity sellers include significant risk premiums in their offers.”⁴⁶ Consequently, the Commission deemed it “imperative that such a market construct include rules that appropriately manage the impact of out-of-market state support” on prices, so as not to discourage competitive investment.⁴⁷ The Commission explained that the substitution auction will appropriately allow new Sponsored Policy Resources the opportunity to obtain capacity supply obligations, while additionally ensuring that, because each megawatt of new entry is coordinated with a megawatt that exits, “the FCM maintains investor confidence by avoiding sudden and dramatic shifts in the supply curve that could result from state

may attempt to qualify for the renewables exemption in future auctions).

⁴² See CASPR Order, 162 FERC ¶ 61,205 at P 47; *id.* P 46 & n.70 (noting ISO-NE’s commitment that “should state policies change, ISO-NE will work with stakeholders to determine if the new laws can and should be accommodated by CASPR”) (quoting ISO-NE Transmittal at 14).

⁴³ Those principles include: facilitate robust competition for capacity supply obligations, provide price signals that guide the orderly entry and exit of capacity resources, result in the selection of the least-cost set of resources that possess the attributes sought by the markets, provide price transparency, shift risk as appropriate from customers to private capital, and mitigate market power. *See id.* P 21 & n.31 (citations omitted).

⁴⁴ *Id.* P 21.

⁴⁵ *Id.* P 24.

⁴⁶ *Id.*

⁴⁷ *Id.*

sponsored entry without a corresponding amount of supply exiting the market.”⁴⁸ Accordingly, the Commission determined that CASPR is a just and reasonable means to accommodate the entry of new Sponsored Policy Resources into the FCM over time, in a way that maintains investor confidence in FCM market outcomes.⁴⁹

b. Rehearing Requests

17. Consumer-Owned Systems contend that the CASPR Order results in undue discrimination against municipal utilities by accepting the CASPR program in its current form and allowing some types of resources, but not other types, to participate in the substitution auction. Consumer-Owned Systems assert that the Commission failed to state a rational basis for its finding that conventional generating resources sponsored by New England municipal utilities “are not similarly situated” to renewable resources procured by investor-owned electric distribution companies.⁵⁰ Consumer-Owned Systems describe Sponsored Policy Resources as “renewable resources procured by investor owned electric distribution companies pursuant to a State mandate.”⁵¹ Consumer-Owned Systems argue that, if the objective of this definition is to limit the impact of out-of-market state procurements on the FCM, then limiting the class of resources that may participate in the CASPR substitution auction does not necessarily further that objective, nor does it explain why conventional generation resources developed by municipal electric utilities, which are political subdivisions of the states, should be excluded from participating in the substitution auction.⁵² Consumer-Owned Systems contend that a state’s decision to entrust local government with the development of power supply portfolios for their consumer-owned utilities is “every bit as much a policy determination as the pursuit of power supply de-carbonization.”⁵³ Thus, Consumer-Owned Systems argue that the Commission’s rationale for drawing a distinction between Sponsored Policy Resources and other resources does not satisfy the

⁴⁸ *Id.* P 101. The Commission also explained that by maintaining investor confidence through CASPR, the renewables exemption would no longer necessary to accommodate the entry of state sponsored resources after the three-year phase-in period expires. *Id.*

⁴⁹ *See id.*

⁵⁰ Consumer-Owned Systems Rehearing Request at 8.

⁵¹ *Id.*

⁵² *See id.*

⁵³ *Id.* at 9.

non-discrimination requirements of FPA section 205(b),⁵⁴ is not supported by substantial evidence, and does not reflect reasoned decisionmaking.⁵⁵

18. Consumer-Owned Systems further contend that the cut-off date limiting the types of technologies that can enter the substitution auction based on the laws in effect on January 1, 2018 is arbitrary and capricious.⁵⁶

19. Additionally, Consumer-Owned Systems seek clarification that the Commission's rationale of "maintaining sufficient investor confidence" was not intended to indicate a Commission policy "favoring private sector investment in merchant generation resources over public investment in owned or contracted generation resources developed to meet local needs and objectives."⁵⁷

20. Public Citizen also expresses concern over the Commission's failure to define the term "investor confidence." Contending that investor confidence is a "key variable on which the Commission relie[d] to justify the approval of CASPR,"⁵⁸ Public Citizen argues that the Commission's reference to investor confidence "sounds a lot like guaranteeing profits for generators," which, Public Citizen contends, market-based rates and electricity restructuring were supposed to eliminate.

c. Commission Determination

i. Types of Resources Permitted to Participate in Substitution Auction

21. We disagree with challengers' assertions that CASPR unduly discriminates among resources allowed to participate in the secondary auction. The FPA does not prohibit all differential treatment; it only prohibits *undue* discrimination.⁵⁹

⁵⁴ *See id.*

⁵⁵ *See id.* at 3 (quoting CASPR Order, 162 FERC ¶ 61,205 at P 45).

⁵⁶ *Id.* at 3-4 & n.3 (citing *Ala. Elec. Pwr. Coop. v. FERC*, 684 F.2d 20, 27-28 (D.C. Cir. 1982); *Payne v. Wash. Metro. Area Transit Comm'n*, 415 F.2d 901, 915-916 n.71 (D.C. Cir. 1968)).

⁵⁷ *Id.* at 10-11.

⁵⁸ Public Citizen Rehearing Request at 2.

⁵⁹ 16 U.S.C. § 824d(b); *see, e.g., St. Michaels Utils. Comm'n v. FPC*, 377 F.2d 912, 915 (4th Cir. 1967) (stating that section 205 is designed to "prevent favoritism" by ensuring equality of treatment on rates for substantially similar services and that "differences in rates are justified where they are predicated upon differences in

Discrimination is not undue where, as here, resources that meet the definition of Sponsored Policy Resource and resources that do not meet the definition of Sponsored Policy Resource (non-Sponsored Policy Resources) are not similarly situated.⁶⁰ “To say that entities are similarly situated does not mean that there are no differences between them; rather, it means that there are no differences *that are material to the inquiry at hand.*”⁶¹ The inquiry here is into the impact that Sponsored Policy Resources – resources that will be developed to fulfill state environmental and clean energy mandates, whether that capacity clears the FCA or not – have on the FCM.

22. Consumer-Owned Systems argue that the definition of Sponsored Policy Resource and CASPR reflect an *undue* preference for renewable resources over fossil-fuel resources, for resources developed by investor-owned utilities over resources developed by municipal utilities, and for resources developed pursuant to state environmental policies over resources developed pursuant to other policies. But Consumer-Owned Systems’ focus on the benefits of participation in the substitution auction fails to acknowledge the purpose of the CASPR two-part auction: to address a specific problem created by resources that exist due to state mandates, namely, the impact that these state-mandated resources have on the FCM.⁶²

23. As explained in the CASPR Order, ISO-NE and its stakeholders developed the CASPR program to address the unintended consequences resulting from the interplay between state and Commission policies. The Commission observed that, for the past decade, New England states had employed “various mechanisms outside of the ISO-NE administered wholesale markets” to achieve environmental goals, including “mandates that state-regulated utilities enter into long-term contracts with certain resources.”⁶³ The Commission noted ISO-NE’s concerns that the procurements required by the most recent actions constituted “a potentially significant increase in the quantities of qualified

facts”) (emphasis omitted); *see also Pub. Serv. Co. of Ind. v. FERC*, 575 F.2d 1204, 1211-1212 (7th Cir. 1978) (factual differences justify different rates for different customers); CASPR Order, 162 FERC ¶ 61,205 at n.66 and cases cited therein.

⁶⁰ *See* CASPR Order, 162 FERC ¶ 61,205 at P 44 & n.66 (listing cases).

⁶¹ *Id.* P 44 & n.66 (quoting *N.Y. Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,124, at P 10 & n.30 (2017)).

⁶² ISO-NE explained that the definition of Sponsored Policy Resource reflects one of CASPR’s key objectives – for the FCM to accommodate procurements required by states in order to meet their renewable and clean energy resource requirements. *See* ISO-NE Transmittal at 17.

⁶³ CASPR Order, 162 FERC ¶ 61,205 at P 4.

capacity receiving out-of-market contracts,”⁶⁴ that likely would lead to “a potentially significant overbuild of the system.”⁶⁵

24. According to ISO-NE, if the MOPR did not prevent these Sponsored Policy Resources from entering the FCA unmitigated, they would enter as price-takers and possibly significantly lower the auction clearing price to the point at which non-state-sponsored generation would no longer be willing to participate. Thus, these Sponsored Policy Resources could “negatively impact the market’s ability to retain and justly compensate needed existing resources and to attract new, competitively-compensated resources.”⁶⁶ Conversely, the use of the MOPR to bar these Sponsored Policy Resources from FCA participation could result in the construction of more capacity than is needed to meet ISO-NE’s resource adequacy needs.⁶⁷

25. ISO-NE designed the CASPR program to address this dilemma by balancing the need to preserve the FCM’s ability to retain and attract new capacity when needed (i.e., by maintaining a just and reasonable capacity market clearing price) with the fact that, due to state mandates, state-sponsored capacity is already being built regardless of FCM incentives. As the Commission noted, “ISO-NE has provided record evidence of specific projects and megawatts of capacity that will be developed by the operation of state environmental and clean energy mandates, whether that capacity clears the FCM or not.”⁶⁸ ISO-NE provided evidence that, as a result of these state regulatory requirements, approximately 3,260 MW of new nameplate capacity that meets the definition of Sponsored Policy Resources would enter the New England region between 2020 and 2027.⁶⁹ But, as the Commission pointed out in the CASPR Order,

⁶⁴ *Id.* (quoting Geissler Testimony at 8).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See* Geissler Testimony at 23 (“Under the status quo, the pace and extent of possible procurements of new state-sponsored resources could result in the development of substantially more total electric generation resources on the power system than the ISO requires to reliably operate it – an inefficient and costly outcome for society.”).

⁶⁸ CASPR Order, 162 FERC ¶ 61,205 at P 45 & n.67; Geissler Testimony at 8-9.

⁶⁹ *See id.* P 4 and nn.9-10; *see also* Geissler Testimony at 8 (citing to the three southern New England states’ 2015/16 Multi-State Clean Energy request for proposals aiming to procure 460 MW of new wind and solar capacity and the Massachusetts 2016 Energy Diversity Act requiring clean energy procurements in

Consumer-Owned Systems “provided no evidence that municipalities would construct or procure generation resources that do not meet the definition of Sponsored Policy Resources,” such as other self-supply resources, “even if those resources do not receive capacity supply obligations.”⁷⁰

26. Consumer-Owned Systems contend that the Commission failed to explain why “conventional generation resources developed by municipal electric utilities” should be denied the benefit of participating in the substitution auction. Consumer-Owned Systems assert that “public power-sponsored conventional resources and [s]tate-mandated renewables acquisitions . . . are similarly situated in relevant respects.”⁷¹ However, Consumer-Owned Systems fail to acknowledge that, as noted above,⁷² ISO-NE produced record evidence of specific projects and megawatts of capacity that will be developed by the operation of state environmental and clean energy mandates, whether that capacity clears the FCM or not,⁷³ while Consumer-Owned Systems and other municipal groups have provided no record evidence of projects that will enter the region as a result of municipal sponsorship. In other words, ISO-NE showed that the capacity from state-sponsored projects presents a threat to the efficient operation of the FCM,⁷⁴ which CASPR seeks to alleviate. Moreover, ISO-NE provided

the range of 2,800 MW, including up to 1600 MW of offshore wind generation).

⁷⁰ CASPR Order, 162 FERC ¶ 61,205 at P 45.

⁷¹ Consumer-Owned Systems Rehearing Request at 6.

⁷² See *supra* note 71.

⁷³ *Id.*

⁷⁴ Geissler Testimony at 8-9:

[T]he quantity of new resources receiving out-of-market revenue is expected to grow as states seek to meet their legislative mandates. Much of this capacity is not expected to clear in the FCA [due to the operation of the MOPR]. . . . If these policy resources are unable to sell capacity in the FCA but are built nonetheless, this capacity is not counted towards meeting New England’s resource adequacy objectives, and the region may therefore procure more capacity than is actually needed. Such an outcome would represent a costly and inefficient use of society’s resources. The states have characterized this outcome as customers ‘paying twice’ since they would: (i) pay outside the ISO wholesale administered markets to develop the policy resources (where these payments would be greater than if these policy resources earned capacity market revenues, and therefore required less out-of-market

detailed information as to the amount of capacity that ISO-NE anticipates will enter the New England region from Sponsored Policy Resources between 2020 and 2027.⁷⁵ By contrast, no record evidence suggests either that current municipally-sponsored projects present a similar threat, or that the magnitude of municipally-sponsored resources expected to enter the market poses a threat. As the Commission stated in the CASPR Order, there is record evidence that significant amounts of Sponsored Policy Resources will be built regardless of whether such resources obtain capacity supply obligations,⁷⁶ and to the extent those Sponsored Policy Resources do not obtain capacity supply obligations, they will cause customers to pay twice for capacity.⁷⁷ Conversely, currently there is no evidence as to the potential amount of megawatts anticipated to be developed by municipal utilities or the impact that such municipally-developed capacity would have on the FCM.⁷⁸ If, in the future, municipal parties develop resources in similar quantities that could have a similar impact on the FCM, Consumer-Owned Systems or other parties would be free to revisit the question of municipal participation in the substitution auction through ISO-NE stakeholder proceedings.

27. Additionally, Consumer-Owned Systems contend that a state's decision to allow municipal utilities to develop their own power supply portfolios is as much a "policy choice" as a state's "policy choice" to select power resources for their decarbonization attributes.⁷⁹ Consumer-Owned Systems' argument ignores the fact that CASPR was a response to the consequences of a specific, and large, quantity of generation that will be entering the New England region as a result of state policy actions. Thus, the critical factor for determining whether it is unduly discriminatory to treat municipally-sponsored resources differently from state sponsored resources is whether policy-driven municipal resources are (or would be) similarly situated to policy-driven state sponsored resources

revenue); and (ii) buy duplicative capacity through the FCM because these policy resources are not counted towards meeting the region's resource adequacy objectives.

⁷⁵ See *supra* note 67.

⁷⁶ See CASPR Order, 162 FERC ¶ 61,205 at P 45.

⁷⁷ See *id.* P 24; see also Geissler Testimony at 24-25.

⁷⁸ See CASPR Order, 162 FERC ¶ 61,205 at P 46.

⁷⁹ Consumer-Owned Systems Rehearing Request at 9 ("A State's determination to entrust to local autonomy the development of power supply portfolios for its consumer-owned utilities is every bit as much a policy determination as the pursuit of power supply decarbonization").

with regard to their impact on the FCM. As discussed above, we conclude that they are not similarly situated with regard to the FCM.

28. Consumer-Owned Systems' argument implies that the purpose of CASPR is simply to facilitate the energy policies of non-federal government entities.⁸⁰ This is not the case. Participation in the substitution auction is a narrowly-tailored solution to a particular problem, namely the development of significant amounts of state-supported resources that are or will be unable to clear the FCM under the current FCM rules (the MOPR), which in turn leads to over-procurement of capacity and increased costs for consumers.⁸¹ There is currently no similar record evidence that municipal resources are having a comparable effect. Thus, allowing municipal resources that do not meet the definition of Sponsored Policy Resources to participate in the substitution auction would not address the problem the substitution auction was designed to solve.⁸² For this reason, ISO-NE defined Sponsored Policy Resources to include only the state-supported capacity that would not be able to clear the FCM under the current market rules.

29. Consumer-Owned Systems further object to the Commission's statement that, "like all other resources subject to the MOPR in ISO-NE, self-supply resources that do not qualify as Sponsored Policy Resources can submit documentation to the IMM

⁸⁰ Consumer-Owned Systems strain to present as equivalent two fundamentally different choices: (1) what generation the state favors and chooses to require its citizens to support financially; and (2) how government should be structured – allowing municipalities to choose which types of resources to construct or contract with for the benefit of their municipalities. Consumer-Owned Systems fail to show how the state giving local governments the authority to choose which resources to build has the same impact on the FCM as the state's policy choice to provide out-of-market support to Sponsored Policy Resources.

⁸¹ CASPR Order, 162 FERC ¶ 61,205 at P 44 ("Thus, rather than giving an undue preference to renewable resources, in particular, ISO-NE's proposed definition of Sponsored Policy Resources is narrowly tailored to meet ISO-NE's objective of limiting the impact of out-of-market procurements on the FCM.").

⁸² See *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 92–93 (2d Cir. 2000) (holding that where the "object of the" agency proceeding was to address a single matter, the agency "need not deal in one fell swoop with the entire breadth of a novel development; instead, reform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the regulatory mind." (quoting *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) (citation and alteration omitted)).

justifying an offer price below the MOPR level based on their unit-specific costs.”⁸³ Consumer-Owned Systems assert that the possibility of bidding at a unit-specific offer price fails to justify the discriminatory nature of the definition of Sponsored Policy Resources. Consumer-Owned Systems argue that, because resources meeting the definition of Sponsored Policy Resources can also avail themselves of the unit-specific offer price mechanism, extending this solution to municipal utilities that do not meet the criteria in the Sponsored Policy Resources definition “simply constitutes another form of undue discrimination in affording nominally equivalent treatment to customers confronting substantially different circumstances.”⁸⁴

30. Contrary to Consumer-Owned Systems’ assertion, the Commission did not rely upon the broad availability of the unit-specific review process in order to find the definition of Sponsored Policy Resources just and reasonable and not unduly discriminatory or preferential. Rather, the Commission simply pointed out in the CASPR Order that all resources subject to the MOPR in ISO-NE may seek to obtain a unit-specific offer price by demonstrating their actual costs, and if approved, they may submit a bid that is lower than the default bid in the FCA. In such case, the resource could obtain a capacity supply obligation in the primary auction. We are not persuaded that allowing all resources to demonstrate their costs in the primary auction is unduly discriminatory.

31. Moreover, a municipality or group of municipalities could develop a resource that meets the definition of Sponsored Policy Resource (i.e., it could obtain funding from a state through a state Renewable Portfolio Standard (RPS) or similar program, if it were a renewable resource within that state’s definition). Such municipally-funded resources that meet the definition of Sponsored Policy Resources would be able to participate in the CASPR substitution auction.⁸⁵ It is thus inaccurate to state categorically that municipally-developed resources are unable to enter the FCM through CASPR.

⁸³ CASPR Order, 162 FERC ¶ 61,205 at P 46.

⁸⁴ Consumer-Owned Systems Rehearing Request at 10.

⁸⁵ See Geissler Testimony at 64-65 (stating that a resource that receives out-of-market revenue from a municipality or collection of municipalities can qualify as a Sponsored Policy Resource if it qualifies as renewable, clean, or alternative in the state in which the municipality or collection of municipalities is located). We note that offshore wind resources located in federal waters with a point of interconnection to the ISO-NE grid now also qualify as Sponsored Policy Resources. See CASPR Conforming Changes Order, 166 FERC ¶ 61,061 at PP 6, 12.

ii. **January 1, 2018 Cut-Off Date**

32. Consumer-Owned Systems also argue that the definition of Sponsored Policy Resource is unduly discriminatory because it is limited to renewable generation procured pursuant to state mandates that were in place prior to January 1, 2018.⁸⁶ We disagree and continue to find the cut-off date just and reasonable. As ISO-NE explained, the date limitation “provides more clarity to the market regarding the types of technologies that are eligible to participate . . . in the substitution auction.”⁸⁷ ISO-NE has represented that, if and when such new laws are enacted, it would work with stakeholders to determine whether CASPR should accommodate them.⁸⁸ We note that ISO-NE made a similar commitment to revisit the renewables exemption⁸⁹ – and followed through and fulfilled its commitment by amending the ISO-NE Tariff to phase-out the renewables exemption and implement CASPR.⁹⁰ We expect ISO-NE to uphold its commitment here as well; and, in any event, if this issue becomes ripe through the passage of a new pertinent state statute or regulation, pursuant to section 206 of the FPA,⁹¹ parties may file a complaint if they are not satisfied with ISO-NE’s resolution of the matter.

⁸⁶ See Consumer-Owned Systems Rehearing Request at 3-4 (citing CASPR Order, 162 FERC ¶ 61,205 at PP 43-46).

⁸⁷ CASPR Order, 162 FERC ¶ 61,205 at P 30 & n.41 (citing ISO-NE transmittal at 1); see also Geissler Testimony at 66.

⁸⁸ See *id.* P 30 & n.43 (citing ISO-NE Transmittal at 14); see also *Elec. Consumers Res. Council v. FERC*, 407 F.3d. 1232, 1239 (D.C. Cir. 2005) (deferring to FERC’s predictive judgment, based on substantial evidence, that the new rate design will do “more good than harm,” where “the Commission will monitor its experiment and review it accordingly”).

⁸⁹ See Renewables Exemption Remand Rehearing Order, 158 FERC ¶ 61,138 at P 20.

⁹⁰ See ISO-NE Transmittal at 14 (stating that “should state policies change, ISO-NE will work with stakeholders to determine if the new laws can and should be accommodated by CASPR”); CASPR Order, 162 FERC ¶ 61,205 at P 46 & n.70. And, more generally, see ISO-NE Transmittal at 12 (“Should CASPR not achieve its intended purpose of accommodating state entry over time, ISO-NE commits to working with stakeholders to refine or replace it.”).

⁹¹ See 16 U.S.C. § 824e (2012).

iii. Investor Confidence

33. We disagree with Public Citizen’s and Consumer-Owned Systems’ challenges to the Commission’s finding that maintaining sufficient investor confidence in the FCM is a key to sustaining the benefits of “cost-effective, reliable electric service” for New England consumers.⁹² First, contrary to Public Citizen’s assertion, the meaning of the term “investor confidence” is readily gleaned from the CASPR Order. As the Commission explained, in the context of the FCM, investor confidence is the willingness to “bear resource investment risk in exchange for an *opportunity* to earn a market return commensurate with that risk.”⁹³

34. Next, Consumer-Owned Systems argue that the Commission’s intent to maintain investor confidence indicates a Commission policy “favoring private sector investment in merchant generation resources over public investment.”⁹⁴ To the contrary, as further explained below, the Commission’s acceptance of the CASPR program does not favor private sector investment over public sector investment in generation.

35. The purpose of the FCM is to ensure that sufficient investors will be both available and willing to invest in capacity in New England, as necessary to ensure resource adequacy.⁹⁵ If a municipal or other public power entity wishes to develop a capacity resource and offer it into the FCM, it may compete on the same footing as a private investor. It may also offer into the substitution auction resources that meet the definition of Sponsored Policy Resources, like any other entity.⁹⁶ Maintaining the confidence of all investors that the FCM will continue to provide the opportunity for generation to recover fixed costs over time benefits all parties who seek to invest in generation in New England, whether those investors are public or private.

36. We agree with Consumer-Owned Systems’ statement that, under FPA section 205(b), a regional resource adequacy construct should be open to all potential sources of investment in the resources needed to maintain appropriate resource adequacy, and we continue to find that the FCM and CASPR meet that requirement.⁹⁷

⁹² CASPR Order, 162 FERC ¶ 61,205 at PP 23-24.

⁹³ *Id.* P 23 (emphasis added).

⁹⁴ Consumer-Owned Systems Rehearing Request at 10-11.

⁹⁵ *See* CASPR Order, 162 FERC ¶ 61,205 at P 21.

⁹⁶ *See* Geissler Testimony at 64-65.

⁹⁷ *See* Consumer-Owned Systems Rehearing Request at 11 & n.12 (citing *Cent. Iowa Pwr. Coop. v. FERC*, 606 F.2d 1156, 1172 (D.C. Cir. 1979)). Although we agree

CASPR does not limit investment in resources but rather accommodates state policies by coordinating retirements with the entrance of Sponsored Policy Resources into the FCM.

37. Consumer-Owned Systems add that Commission clarification that “investor confidence” does not favor private merchant investment would be useful “in light of the Commission’s observations elsewhere concerning the ‘statutory weakness’ of the rationale for subjecting reasonable self-supply by load-serving entities to offer floor mitigation in the first place.”⁹⁸ Presumably, based on its citation, Consumer-Owned Systems are referring to the Commission’s directive in an FPA section 206 proceeding for the New York System Operator, Inc. (NYISO) to propose a “well-formulated” exemption to the MOPR for self-supply resources.⁹⁹ First, RTOs may have different just and reasonable rate designs that are “reflective of particular system characteristics and stakeholder input.”¹⁰⁰ Next, in contrast to the *NYISO* proceeding, this is an FPA

with the general point that a regional resource adequacy construct should be open to all potential sources of investment in the resources needed to maintain appropriate resource adequacy, we find Consumer-Owned Systems’ cited precedent to be inapposite. In *Central Iowa*, the court upheld the Commission’s finding that the exclusion of smaller generating systems was not reasonably related to the Mid-Continent Area Power Pool’s objectives and that the pool would not be injured by inclusion of such systems provided they pay for the value of transmission services. *Central Iowa*, 606 F.2d at 1172. In contrast to *Central Iowa*, excluding resources that do not meet the definition of Sponsored Policy Resources is in accordance with the purpose of CASPR; broadening the definition of Sponsored Policy Resources as Consumer-Owned Systems suggest would conflict with and inhibit the secondary auction’s function of coordinating the exit of existing resources with the entrance of out-of-market Sponsored Policy Resources in a manner that maintains the FCM’s ability to attract investment when needed to ensure long-term resource adequacy.

⁹⁸ Consumer-Owned Systems Rehearing Request at 11 n.13 (citing *New York Pub. Serv. Comm’n*, 153 FERC ¶ 61,022, at PP 61-62 (2015) (*NYPSC*)).

⁹⁹ *But see NYISO*, 153 FERC ¶ 61,022 at P 61.

¹⁰⁰ *New England Power Generators Ass’n, Inc. v. ISO New England Inc.*, 150 FERC ¶ 61,064, at P 19 n.36 (2016) (citing *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,063, at P 39 (2007) (“The Commission has permitted different just and reasonable rate designs reflective of particular system characteristics and stakeholder input. In this regard, we have stated our deference to regional preferences a number of times . . . as well as in our approval of rate designs for different regional markets.”) (citing *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110, at PP 218-219 (2004); *Southwest Power Pool, Inc.*, 111 FERC ¶ 61,118, at P 39 (2005); *Cal. Indep. Sys. Operator Corp.*, 109 FERC ¶ 61,301 (2004), *reh’g denied*, 111 FERC ¶ 61,337 (2005); *New England Power Pool*

section 205 proceeding. ISO-NE did not propose to eliminate the MOPR as part of CASPR; rather, it proposed to keep the MOPR for the FCA and create a secondary substitution auction without a MOPR to enable certain resources to obtain capacity supply obligations. In an FPA section 205 proceeding, such as here, the Commission need only consider whether ISO-NE's proposal satisfies the statutory just and reasonable standard. ISO-NE is not required to show and the Commission is not required to find that the existing rate is unjust and unreasonable,¹⁰¹ or that the proposed rate is the only or even the best solution available.¹⁰² Here, the MOPR together with CASPR enables the balancing of multiple regulatory and public policy goals, while preserving the integral function of the FCM to procure sufficient capacity at just and reasonable rates to maintain resource adequacy in New England.

and ISO New England, Inc., 109 FERC ¶ 61,252 (2004), *clarified*, 110 FERC ¶ 61,003 (2005); *Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,109, at P 20 (2009) (“It is well established that there can be more than one just and reasonable rate.”); *New York Indep. Sys. Operator, Inc.*, 126 FERC ¶ 61,320, at P 40 (2009) (“there can be more than one just and reasonable planning process and [different regions] are not required to have identical planning processes”).

¹⁰¹ See, e.g., *City of Winnfield v. FERC*, 744 F.2d 871, 874-75 (D.C. Cir. 1984) (The Commission “need only find the *proposed* rates to be just and reasonable.”) (emphasis added); *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,157, at P 229 (2016) (“[T]he FPA does not require PJM to demonstrate that its existing tariff was unjust and unreasonable, only that its proposal is just and reasonable.”), *aff'd*, *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656 (D.C. Cir. 2017); see also *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61,076, at P 45 (2007) (“Since the CAISO filed its proposal under FPA section 205, it must show that its proposed changes are just and reasonable, but it is not required to show that the existing policy is unjust and unreasonable.”), *reh'g granted in part and denied in part*, 120 FERC ¶ 61,023, at P 45 & n.34 (2007) (“For a proposal to be acceptable, it need not be perfect nor even the most desirable; it need only be reasonable.”), *reh'g denied*, 124 FERC ¶ 61,094 (2008), *aff'd*, *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520 (D.C. Cir. 2010).

¹⁰² See, e.g., *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) (“FERC has interpreted its authority to review rates under this provision of the [FPA] as limited to an inquiry into whether the rates proposed by the utility are reasonable – and not to extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate designs.”); *OXY USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995) (“[T]he Commission may approve the methodology proposed in the settlement agreement if it is ‘just and reasonable;’ it need not be the only reasonable methodology or even the most accurate.”).

38. Additionally, we find unfounded Public Citizen’s assertion that the Commission’s recognition in the CASPR Order of the need to maintain investor confidence establishes a “universal income plan for uneconomic power generators.”¹⁰³ Neither CASPR nor the FCM rules in effect prior to CASPR guarantee a capacity price to any individual generator.¹⁰⁴ The MOPR rules, which predate CASPR, seek to support competitive participation in the FCM by screening out revenues that are only available to a subset of suppliers. However, in recognition of state policy objectives, ISO-NE uses a mechanism to allow the market to accommodate over time states’ preferences for certain resource types. Previously that mechanism was the renewables exemption; now it is CASPR.¹⁰⁵ The CASPR program helps to coordinate the exit of existing generators that may be close to retirement with the entry of Sponsored Policy Resources (e.g., allowing Sponsored Policy Resources to obtain a capacity supply obligation and become an existing resource by acquiring the capacity supply obligation of an existing resource). CASPR thus helps to “avoid the sudden and dramatic shifts in the supply curve from year to year that can undermine confidence that potential investors have in the FCM as a means to recoup the costs of their investments in new capacity over the long term” and “will allow the FCM to continue to meet its objective of providing resource adequacy at just and reasonable rates.”¹⁰⁶ Indeed, CASPR provides an additional incentive for an existing resource to retire and an opportunity for a Sponsored Policy Resource to more timely enter the FCM.

39. Finally, Public Citizen argues that CASPR’s purpose is to sustain resources that would not receive capacity supply obligations if all of the Sponsored Policy Resources developed by states were able to enter the FCM unhindered by the MOPR.¹⁰⁷ To the extent this argument contends that the MOPR should no longer be applied to Sponsored Policy Resources in the primary auction, this argument is beyond the scope of this proceeding.¹⁰⁸ In any event, sustaining existing generation is not the purpose of

¹⁰³ Public Citizen Rehearing Request at 3.

¹⁰⁴ See *CXA La Paloma v. Cal. Indep. Sys. Operator Corp.*, 165 FERC ¶ 61,148, at P 71 (2018) (“The Commission has been clear that suppliers in competitive wholesale electricity markets are not guaranteed full cost recovery, but only the opportunity recover their costs.”) (citing *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311, at P 29 (2005)).

¹⁰⁵ See ISO-NE Transmittal at 6-7.

¹⁰⁶ CASPR Order, 162 FERC ¶ 61,205 at P 25.

¹⁰⁷ Public Citizen Rehearing Request at 2.

¹⁰⁸ See *infra* PP 55, 89-90.

CASPR. The purpose of CASPR, like the renewables exemption that preceded it, is to alleviate the over-procurement problem by enabling capacity developed through state programs to enter the FCM, while at the same time ensuring that FCM prices remain just and reasonable, in order to attract and keep resources in the market when and as they are needed for resource adequacy.

2. **Just and Reasonable Rates**

40. Clean Energy Advocates contend that the Commission erred in holding that CASPR will produce just and reasonable capacity rates in ISO-NE, violating the FPA and failing to engage in reasoned decisionmaking based on substantial evidence as required by the Administrative Procedure Act (APA).¹⁰⁹ We disagree and continue to find that CASPR is a just and reasonable solution to address the potential impact of Sponsored Policy Resources on the FCM, as discussed below.

a. **Failure to Properly Balance Generator and Customer Interests**

i. **Rehearing Request**

41. Clean Energy Advocates assert that, in approving CASPR, the Commission departed without explanation from its long-held interpretation of the FPA and precedent that a determination of just and reasonable rates requires a balancing of investor and consumer interests.¹¹⁰ They state that the CASPR Order adopts a standard that elevates the interests of incumbent generators (suppliers) above those of customers in a manner that is inconsistent with the Commission's mandate under the FPA.¹¹¹

42. Clean Energy Advocates assert that the Commission failed to meet its statutory duty to protect consumers by ignoring the impacts of CASPR on customers, instead holding up "investor confidence" as the relevant determinant that the capacity market design results in just and reasonable rates. Clean Energy Advocates state that this "radical shift to this new investor confidence standard" is not in accord with the FPA, court, and Commission precedent.¹¹² Specifically, Clean Energy Advocates assert that, when ensuring that capacity markets provide capacity to meet resource adequacy needs at the lowest cost, the Commission must consider both: (1) the correct price signals to

¹⁰⁹ Clean Energy Advocates Rehearing Request at 3.

¹¹⁰ *See id.* at 4 & n.5.

¹¹¹ *See id.* at 5.

¹¹² *Id.* at 36 & nn.101, 102.

trigger entry and exit of capacity resources; and (2) the impacts of rate design choices on customers. But here, according to Clean Energy Advocates, the Commission failed to consider the customer side of the scale,¹¹³ instead boiling the test of just and reasonable rates down to investor interests alone.¹¹⁴ Clean Energy Advocates state that, under the Commission’s novel formulation, so long as investors have confidence in the market, “cost-effective, reliable electric service” will follow, and there will be no need to separately assess how customers are impacted by a new market construct. Clean Energy Advocates assert that the Commission’s application of this “generator-focused standard” is a “stark departure from FERC’s decades old interpretation of its regulatory responsibilities,”¹¹⁵ which led it to fail to assess evidence of customer impacts, discount arguments about the risks to customers of certain CASPR design features, fail to consider whether these risks could result in an unreasonable shifting of risk from supply to customers, and fail to develop an appropriate record.

ii. Commission Determination

43. Based on substantial record evidence, we continue to find the Commission reasonably accepted CASPR as a just and reasonable and not unduly discriminatory or preferential modification to the FCM design,¹¹⁶ as discussed below.

44. We agree with Clean Energy Advocates that “[s]etting a just and reasonable rate necessarily ‘involves a balancing of the investor and consumer interests.’”¹¹⁷ We disagree, however, with their contention that, in accepting CASPR, the Commission departed from this precedent. We continue to find that, in accepting CASPR, the Commission appropriately balanced customer as well as supplier interests.

¹¹³ See *id.* at 38 (citing CASPR Order, 162 FERC ¶ 61,205 at P 21). Clean Energy Advocates note that the Commission explained that its assessment of CASPR was guided by the “first principles of capacity markets” with the ultimate goal to ensure that the capacity market construct will “produce a level of investor confidence that is sufficient to ensure resource adequacy at just and reasonable rates.” *Id.*

¹¹⁴ See *id.* at 38 & n.11 (citing CASPR Order, 162 FERC ¶ 61,205 at P 24) (“A key to sustaining [the benefits of reliability and just and reasonable rates] over time is maintaining sufficient investor confidence in the FCM”).

¹¹⁵ *Id.* at 39.

¹¹⁶ See CASPR Order, 162 FERC ¶ 61,205 at P 20.

¹¹⁷ *NextEra*, 898 F.2d at 21 (quoting *Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 262 (D.C. Cir. 2007) (per curiam) (quoting *Hope*, 320 U.S. at 603)).

45. First, focusing on customer interests, the Commission explained that out-of-market state support can result in the region building more capacity than it needs, noting that this type of overbuilding could require “customers having to overpay for capacity” – once for the capacity acquired in the capacity market and again for resources that could serve as capacity but were procured outside the market.¹¹⁸ Second, the Commission explained that the erosion of investor confidence in the FCM can lead to excessive costs for consumers as capacity sellers may include significant risk premiums in their offers.¹¹⁹

46. Third, the Commission evaluated whether, under CASPR, the FCM can continue to meet its key purpose of attracting and maintaining resource investment when the system requires it and doing so at a reasonable cost.¹²⁰ Concluding that the FCM with CASPR does indeed meet this criterion, the Commission explained that the CASPR market design, which coordinates the entry of Sponsored Policy Resources into the FCM with the voluntary exit of retiring capacity, “reasonably mitigates the impacts of Sponsored Policy Resources” entering the FCM and helps maintain the investor confidence needed to ensure resource adequacy.¹²¹

47. Thus, contrary to Clean Energy Advocates’ contention, the Commission did not elevate the interests of suppliers over customers; rather it balanced customer and investor interests. “Investor confidence” is not a one-sided, supplier-only consideration. On the supplier side of the ledger, allowing the primary FCM auction to set the capacity price paid to all but those resources that clear the substitution auction helps ensure that prices will not be so low as to fail to attract investment in new capacity when needed.¹²² On the customer side of the ledger, the Commission found that, when investor confidence is sustained and the FCM continues to attract and maintain resource investment as needed, customers reap the benefit of resource adequacy, and suppliers do not need to include significant risk premiums – the costs of which would ultimately be

¹¹⁸ CASPR Order, 162 FERC ¶ 61,205 at P 24.

¹¹⁹ *See id.*

¹²⁰ *See id.* P 25.

¹²¹ *See id.*

¹²² *See id.* (explaining that the coordination of price signals from the primary and substitution auctions “attempts to avoid the sudden and dramatic shifts in the supply curve from year to year that can undermine confidence that potential investors have in the FCM as a means to recoup the costs of their investments in new capacity over the long term”).

passed on to customers – in their capacity offers.¹²³ As the Commission stated, “investors – rather than customers – bear resource investment risk in exchange for the opportunity to earn a market return commensurate with that risk,” and, “[i]n turn, New England consumers receive cost-effective, reliable electric service.”¹²⁴ Investor confidence is not a separate standard; rather, it ensures that there will be sufficient resources willing to enter the primary auction to enable the auction to meet future resource adequacy needs in the ISO-NE footprint at just and reasonable rates.¹²⁵ Thus, the maintenance of investor confidence aligns customer and supplier interests by ensuring that investors are willing to fund necessary existing and new capacity resources because they believe they will be able to earn a return on their investment.

48. In accepting CASPR, the Commission neither favored supplier interests over customer interests nor shifted to a radical new investor confidence standard. Rather, it accepted ISO-NE’s efforts to harmonize two objectives: (1) ensuring necessary capacity at just and reasonable rates; and (2) accommodating entry of Sponsored Policy Resources into the FCM over time.¹²⁶ And the Commission accepted ISO-NE’s preservation of competitive FCM prices because “FCM’s capacity clearing price guides competitive entry and exit decisions for the region” and “is essential to achieving the region’s resource adequacy over the long term.”¹²⁷ The Commission found that “ISO-NE appropriately focuses on ensuring that the substitution auction, as a means to allow Sponsored Policy Resources to enter the FCM, does not undermine the FCM’s ability to attract resource investment in new and existing resources when the system requires it, and to do so at a reasonable cost.”¹²⁸ CASPR thus both recognizes the New England states’ preference for supporting renewable resources and also provides a mechanism to incorporate them into the FCM as older, traditional resources retire,

¹²³ *See id.* P 24 (“Erosion of investor confidence can prevent the FCM from attracting investment in new and existing non-state-supported resources when investment is needed, or can lead to excessive costs for consumers as capacity sellers include significant risk premiums in their offers.”).

¹²⁴ *Id.* P 23 & n.33.

¹²⁵ *See id.* P 21 (“Ultimately the purpose of basing capacity market constructs on these principles is to produce a level of investor confidence that is sufficient to ensure resource adequacy at just and reasonable rates.”).

¹²⁶ *See id.* P 72 & n.128 (citing ISO-NE Transmittal at 5).

¹²⁷ *Id.* P 75 & n.127 (citing ISO-NE Transmittal at 1).

¹²⁸ *Id.* P 73.

maintaining just and reasonable capacity market prices while attracting future investment sufficient to maintain resource adequacy in the ISO-NE footprint.

49. Furthermore, the Commission agreed with ISO-NE that having the primary auction set the clearing price paid to all non-state-supported resources that take on a capacity supply obligation and allowing Sponsored Policy Resources to enter the FCM via the substitution auction appropriately allows the FCM to provide the proper price signal to trigger entry and exit of capacity supply resources.¹²⁹ Thus, contrary to Clean Energy Advocates' assertion, the Commission considered not only the impacts on customers, as discussed above, but also whether the FCM provides the proper price signals to trigger appropriate entry and exit of capacity resources.

50. In sum, in accepting CASPR, the Commission did not unduly favor investor or supplier interests. Rather, the Commission considered customer impacts, the risks to customers of certain CASPR design features, and whether these risks could result in an unreasonable shifting of risk from suppliers to customers, and appropriately balanced customer and investor interests.¹³⁰

b. Risk of Over-Procurement and Excessive Payments

i. Rehearing Request

51. Clean Energy Advocates assert that CASPR sends the wrong near-term price signals¹³¹ and virtually guarantees that rates will not be just and reasonable. Clean Energy Advocates contend that the CASPR Order sets rates that ignore the existence of Sponsored Policy Resources, which in turn requires customers to pay for more resources than necessary to meet ISO-NE's resource adequacy needs.¹³² Clean Energy Advocates state that, when a previously exempt renewable resource or other Sponsored Policy Resource cannot be paired with an existing resource in ISO-NE's substitution auction, it will not clear in the market and its capacity contribution will not be credited. When a

¹²⁹ See *id.* P 72.

¹³⁰ See, e.g., CASPR Order, 162 FERC ¶ 61,205 at PP 24-25, 72, 77, 99-102.

¹³¹ See Clean Energy Advocates Rehearing Request at 25-26; see also *id.* at 2 (“But CASPR ensures confidence in the *wrong* prices.”). To support their position, Clean Energy Advocates point to the Commission's statement that, “[i]f renewable resources are being built, but are not reflected in the FCM, then the FCM may send an incorrect signal to construct new capacity that is not needed.” *Id.* at 26 & n.71 (citing Renewables Exemption Remand Rehearing Order, 158 FERC ¶ 61,138 at P 9).

¹³² See Clean Energy Advocates Rehearing Request at 4.

resource does not clear but is nevertheless built, the market will procure an equivalent amount of redundant capacity, which will result in the region building more capacity than it needs and require “customers to pay twice for capacity.”¹³³ Clean Energy Advocates posit that “CASPR provides a twisted feedback loop, inducing system overbuild, then requiring customers to pay generators to retire to lessen the amount of overbuild.”¹³⁴

52. Clean Energy Advocates argue that artificially high near-term rates resulting from elimination of the renewables exemption and failure of resources to clear in the substitution auction could incorrectly signal to older and less efficient resources that they are needed when the existence of state-sponsored renewable energy would make it more efficient to retire these older and less efficient resources instead. Clean Energy Advocates assert that long-term market prices will likely be similar whether or not Sponsored Policy Resources are reflected in the market (even if more precise, short-term signals diverge) because, where Sponsored Policy Resources are barred from entering the market, the FCA will provide incentive for the construction of unneeded capacity, causing near-term prices to dip as they would in response to market entry from Sponsored Policy Resources. Clean Energy Advocates contend that the difference between the two scenarios is that, by ignoring Sponsored Policy Resources, the CASPR system will cause a “massive overbuild” of resources.¹³⁵ Clean Energy Advocates claim that, while the Commission justifies CASPR on the basis of needing to create market confidence, CASPR does exactly the opposite; by inducing overbuild, Clean Energy Advocates assert, CASPR will eventually force the Commission to address the fact that the system will eventually have far more supply than necessary.

53. Public Citizen argues that applying the MOPR to Sponsored Policy Resources is inappropriate and not just and reasonable.¹³⁶ Public Citizen asserts that the MOPR was originally intended to prevent the exercise of buyer-side market power and that “contorting” its application to “force” inexpensive renewable energy capacity to submit higher priced bids is not just and reasonable.¹³⁷

¹³³ *Id.* at 21 & n.57 (citing CASPR Order, 162 FERC ¶ 61,205 at P 24 & n.34).

¹³⁴ *Id.* at 21.

¹³⁵ *See id.* at 27.

¹³⁶ *See* Public Citizen Rehearing Request at 1.

¹³⁷ *Id.* at 1-2.

ii. Commission Determination

54. We disagree with Clean Energy Advocates' core contention that the CASPR Order is unjust and unreasonable because it will require customers to pay for more resources than is necessary to meet ISO-NE's resource adequacy needs. As discussed above, CASPR reflects ISO-NE's efforts to harmonize two goals: accommodating the entry of Sponsored Policy Resources in the FCM over time and maintaining competitively-based auction prices.¹³⁸ However, because the FCM's purpose is to ensure resource adequacy at just and reasonable rates, the Commission agreed with ISO-NE's decision to prioritize competitively-based auction prices when developing a mechanism to harmonize the two goals.¹³⁹ Prioritizing the maintenance of competitively-based prices in the FCM helps ensure long-term resource adequacy in ISO-NE at just and reasonable rates, as the FPA requires.

55. The Commission previously found ISO-NE's current MOPR construct,¹⁴⁰ which now includes an annual exemption for a limited quantity of renewable resources,¹⁴¹ adequately limits the impact of out-of-market state actions on FCM prices, yielding just and reasonable rates.¹⁴² However, New England states have since significantly increased their renewable resource targets, as well as their efforts to support the development of specific state-supported resources,¹⁴³ prompting ISO-NE to develop a new approach. Clean Energy Advocates, as well as Public Citizen, seek in essence to eliminate application of the MOPR to Sponsored Policy Resources.¹⁴⁴ But, ISO-NE has

¹³⁸ See CASPR Order, 162 FERC ¶ 61,205 at P 72.

¹³⁹ See *id.*

¹⁴⁰ For the New England market, the MOPR was initially instituted pursuant to a series of Commission orders issued between 2010 and 2013. See *ISO New England Inc. and New England Power Pool Participants Committee*, 131 FERC ¶ 61,065 (2010); *ISO New England Inc. and New England Power Pool Participants Committee*, 135 FERC ¶ 61,029 (2011), *order on reh'g and clarification*, 138 FERC ¶ 61,027 (2012); *ISO New England Inc.*, 142 FERC ¶ 61,107 (2013).

¹⁴¹ See *NextEra*, 898 F.3d. at 21 (affirming renewables exemption).

¹⁴² See *Renewables Exemption Remand Rehearing Order*, 158 FERC ¶ 61,138 at PP 19-29, 67-68.

¹⁴³ See Geissler Testimony at 7-8.

¹⁴⁴ See Clean Energy Advocates Rehearing Request at 20 & n.53 (citing Clean Energy Advocates Protest; Public Citizen Rehearing Request at 1-2).

not proposed to adjust the MOPR, and thus, as further explained below, the application of the MOPR to Sponsored Policy Resources is outside the scope of this FPA section 205 proceeding.¹⁴⁵

56. We acknowledge that the operation of the MOPR generally precludes Sponsored Policy Resources from clearing the FCM in the primary auction. And we would not expect *all* Sponsored Policy Resources to obtain capacity supply obligations via the substitution auction (at least not in a single year), just as not all of the non-Sponsored Policy Resources that enter the FCA are simultaneously able to obtain capacity supply obligations. This is the nature of a competitive market. The purpose of the substitution auction is not to ensure that *all* Sponsored Policy Resources obtain capacity supply obligations, but rather to help to coordinate the exit of retiring resources and the entry of Sponsored Policy Resources in order to maintain a meaningful capacity market price signal. Given the increase in out-of-market state-supported resources, exempting an excessive amount of Sponsored Policy Resources from application of the MOPR would risk undermining the ability of the FCM to attract non-state-supported investment in the near term and increasing customer costs over the longer term as new resource developers would demand greater upfront capital recovery in the face of increasing capacity price volatility.¹⁴⁶ As the Commission explained, when participation of resources receiving out-of-market state revenues undermines capacity market principles, “it is our duty under the FPA to take actions necessary to assure just and reasonable rates,”¹⁴⁷ including protecting the effective functioning of the market.

57. While Clean Energy Advocates are concerned that CASPR may create a risk of over-procurement, we find that CASPR appropriately balances the risk of over-procurement against the risk of not maintaining resource adequacy at just and reasonable rates. First, accommodating the entry of new Sponsored Policy Resources

¹⁴⁵ See *infra* PP 89-90.

¹⁴⁶ See Geissler Testimony at 9-10. As Geissler explained:

[E]limination of the MOPR would introduce a host of new issues and concerns, as it would allow FCA prices to be suppressed below what they would otherwise be if all resources offered at a price that did not account for out-of-market revenue (the “competitively-based price”). This possibility of suppressed price would dissuade investors from developing competitive projects when the region requires them (or lead them to increase their offer price to account for the risk of reduced capacity payments in future years), and increase capacity costs in the long-term.

¹⁴⁷ CASPR Order, 162 FERC ¶ 61,205 at P 21 & n.32 (citing *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, at P 143 (2011)).

into the FCM *over time* will reduce the potential for New England to develop more resources than ISO-NE needs to maintain resource adequacy.¹⁴⁸ While customers may be paying for more overall capacity than they would were the FCM to clear all Sponsored Policy Resources in the primary auction without applying a MOPR, ISO-NE explained that the substitution auction will enable more capacity to obtain a capacity supply obligation than the renewables exemption previously in effect (and which is being phased-out over the next three years), reducing the amount of redundant capacity supported by customers.¹⁴⁹ In crafting CASPR, ISO-NE has balanced the conflicting objectives of accommodating the entry of Sponsored Policy Resources into the FCM over time with the goal of maintaining competitively-based capacity market auction prices. We continue to find that “ISO-NE appropriately focused on ensuring that the substitution auction, as a means to allow Sponsored Policy Resources to enter the FCM, does not undermine the FCM’s ability to attract resource investment in new and existing resources when the system requires it, and to do so at a reasonable cost.”¹⁵⁰ We continue to view these design choices as supporting the FCM’s ability to maintain resource adequacy at just and reasonable rates. Thus, on balance, we find it more acceptable to risk some possible over-procurement than to risk exacerbating the problem that these CASPR revisions to the ISO-NE Tariff are designed to address, i.e., the negative impact that significantly increased procurement of Sponsored Policy Resources could have on the market’s ability to retain and justly compensate necessary resources.

58. Moreover, ISO-NE explained that, in contrast to the renewables exemption, which is an administrative construct, CASPR’s substitution auction is a market-based solution, which has the advantage of harnessing competitive forces to coordinate the exit of existing resources and entry of Sponsored Policy Resources.¹⁵¹ ISO-NE reasonably posits, in this regard, that the substitution auction will accommodate the entry of new Sponsored Policy Resources while more effectively preventing such capacity from depressing FCM prices.¹⁵² ISO-NE further reasonably explains that CASPR will also be

¹⁴⁸ See ISO-NE Transmittal at 4.

¹⁴⁹ See Geissler Testimony at 17-18 (explaining that renewables exemption is not available to some technology types that may be pursued by New England states and that the administratively-determined cap on the renewables exemption does not accommodate as many Sponsored Policy Resources’ entry in the FCM as CASPR does).

¹⁵⁰ CASPR Order, 162 FERC ¶ 61,205 at P 72.

¹⁵¹ See ISO-NE Transmittal at 11-12.

¹⁵² See *id.* at 11.

able to accommodate a broader range of new technology resources than the renewables exemption, including the large-scale hydro resources that Massachusetts may procure.¹⁵³

59. We disagree with Clean Energy Advocates' contention that, under CASPR, the FCM will send the wrong price signal, and that the FCA price will be too high because it does not reflect all of the Sponsored Policy Resources' capacity. The FCM uses competitive bidding for future capacity contracts to provide incentives for new entry "while ensuring a price both adequate to support reliability and fair to consumers."¹⁵⁴ This balancing of interests is reflected in CASPR's revisions to the ISO-NE Tariff.¹⁵⁵

60. We also disagree with Clean Energy Advocates' argument that "long-term market prices will likely be similar whether or not Sponsored Policy Resources are reflected in the market, even as precise, short-term signals diverge[.]"¹⁵⁶ Clean Energy Advocates reason that "where Sponsored Policy Resources are barred from entering the market, more construction of non-state-sponsored capacity will be incurred, causing near-term prices to dip as they would in response to market entry from Sponsored Policy Resources."¹⁵⁷ We find that Clean Energy Advocates' analysis disregards the impact that the addition of Sponsored Policy Resources is likely to have on the FCM over time.

¹⁵³ *Id.*

¹⁵⁴ *NextEra*, 898 F.3d at 20 (quoting *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 480 (D.C. Cir. 2009) (*Connecticut PUC*)).

¹⁵⁵ See CASPR Order, 162 FERC ¶ 61,205 at P 72; see also *NextEra*, 898 F.3d at 21 (upholding the Commission's acceptance of the renewable resources exemption and finding that the Commission reasonably balanced the potential for limited price suppression against competing interests); *id.* (noting that previously the Commission "reasonably acted to balance competing interests" by "mak[ing] the judgment that encouraging renewable energies was less important than allowing such out-of-market entrants to depress capacity prices) (quoting *New England Power Generators Ass'n v. FERC*, 757 F.3d 283, 295 (D.C. Cir. 2014)). In the orders on review in *NextEra*, the Commission considered the price suppression associated with the uneconomic entry of a *small quantity* of renewable resources, rather than the categorical exemption it had considered previously in *NEPGA*. The court found the Commission reasonably explained how the new sloped demand curves mitigated the price suppression associated with the limited renewable exemption. *NextEra*, 898 F.3d at 21-22 (citing Renewables Exemption Remand Order, 153 FERC ¶ 61,023 at PP 32-36, 39-43, 67-68; Renewables Exemption Remand Rehearing Order, 158 FERC ¶ 61,138 at PP 19-29, 67-68).

¹⁵⁶ Clean Energy Advocates Rehearing Request at 27.

¹⁵⁷ *Id.*

Once a Sponsored Policy Resource acquires a capacity supply obligation, it can bid into the FCM the following year without being subject to the MOPR. As noted above, we find that the gradual addition of Sponsored Policy Resources bidding into the FCM over time will help mitigate over-procurement.

c. Insufficient Evidence that CASPR Will Be Effective

i. Rehearing Request

61. Clean Energy Advocates assert that the Commission did not make an evidentiary finding that CASPR will actually work. Clean Energy Advocates claim that, by failing to premise approval of CASPR on a finding of whether, or the degree to which, Sponsored Policy Resources will actually participate in the capacity market, the Commission wrongly disregarded the consequences to both market function and customers that would ensue from effectively “excluding” these Sponsored Policy Resources from the FCM. Clean Energy Advocates contend that the Commission incorrectly assumed that it did not need to consider the scale of the capacity resources sidelined under CASPR, or the impacts of that exclusion on market dynamics and customers, before determining that the market design was just and reasonable.¹⁵⁸

62. Further, Clean Energy Advocates argue that, if the Commission had considered whether CASPR is likely to be effective, it would have found there is insufficient evidence to conclude that the substitution auction will allow Sponsored Policy Resources to enter the ISO-NE capacity market, and thereby avoid the procurement of thousands of megawatts of unneeded capacity. Clean Energy Advocates contend that, even under a balancing approach in which some degree of over-procurement is acceptable, the factual record is wholly inadequate to support a determination that CASPR results in just and reasonable rates.¹⁵⁹ Clean Energy Advocates highlight that ISO-NE expert witness Geissler acknowledged that CASPR’s design may not promptly accommodate the entry of sponsored policy resources into the FCM.¹⁶⁰ Clean Energy Advocates point out that ISO-NE explained that its proposal “could lead FCM to procure

¹⁵⁸ Clean Energy Advocates note that Commissioner Glick conditioned his support for CASPR on the substitution auction providing entry of Sponsored Policy Resources into the FCM. *See id.* at 30 n.83 (citing CASPR Order, 162 FERC ¶ 61,205, (Glick, Comm’r, concurring in part, at 7) (“I believe that this mechanism is just and reasonable and not unduly discriminatory or preferential *insofar as it provides a mechanism* by which state-sponsored resources may secure a capacity supply obligation in the Forward Capacity Market”) (emphasis added by Clean Energy Advocates)).

¹⁵⁹ *See id.* at 31.

¹⁶⁰ *See id.* at 32 (citing Geissler Testimony at 78:9-14).

[new non-sponsored] resources in the [primary (FCA) auction] instead of acquiring capacity from new sponsored policy resources that will be built to meet legislative mandates.”¹⁶¹ Clean Energy Advocates add that ISO-NE stated that CASPR will provide no “guarantee that these resources will acquire a [capacity supply obligation] at their first opportunity[,]” implying by omission that ISO-NE’s procurement of capacity from Sponsored Policy Resources may well be negligible under the new rules.¹⁶²

63. Clean Energy Advocates contend that Sponsored Policy Resources’ participation in the FCM hinges upon a number of unproven assumptions.¹⁶³ Clean Energy Advocates claim that, for CASPR to achieve the desired result, a sufficient quantity of “struggling resources” must clear in the primary auction *and* their owners must conclude it would be financially beneficial to permanently retire the resources, given the right payoff to do so.¹⁶⁴ Clean Energy Advocates add that these potential retirements must occur during the right timeframes (i.e., around the time a significant build-out of Sponsored Policy Resources occurs), in the right location (i.e., not located across import- or export- constrained zones), and without triggering resource adequacy concerns that would prevent these existing resources from retiring. Clean Energy Advocates assert that a lack of information available to generators at the time they submit bids to retire in the substitution auction will further decrease the odds that offers from Sponsored Policy Resources can be paired with offers to exit from retiring resources. Clean Energy Advocates claim that, given these additional constraints on the substitution auction, simply projecting the likelihood of future retirements in the ISO-NE footprint would be an inadequate basis to conclude CASPR will enable Sponsored Policy Resources to enter the capacity market. Clean Energy Advocates add that such projections would, at best, overstate the potential for Sponsored Policy Resource participation. Clean Energy Advocates assert that the CASPR mechanism will leave thousands of megawatts of capacity procured to meet Massachusetts legal requirements unable to enter the capacity market, as well as substantial quantities of renewable resources to be procured by other states located in the ISO-NE footprint.¹⁶⁵

¹⁶¹ *Id.* at 32 & n.88 (citing ISO-NE Transmittal at 21).

¹⁶² *Id.* (citing ISO-NE Transmittal at 2).

¹⁶³ *Id.* at 32 & n.90 (citing Clean Energy Advocates Protest at 20-21; Connecticut Parties Protest at 38-40 (citing Hamal Aff.); Massachusetts Attorney General Protest at 1, 7-14).

¹⁶⁴ *Id.* at 32-33.

¹⁶⁵ *See id.* at 34 & n.95 (citing Massachusetts Attorney General Protest at 10-11).

64. Clean Energy Advocates assert that, by offering no guarantee of Sponsored Policy Resource participation in the capacity market on the basis that no other resource has such a guarantee, ISO-NE has evaded a valid and central challenge to the function of the market design: whether ISO-NE can point to evidence that CASPR will avoid costly buildout of thousands of megawatts of unneeded capacity.¹⁶⁶ Clean Energy Advocates argue that the weight of the evidence presented to the Commission shows that little to no Sponsored Policy Resources will access the capacity market through the substitution auction. Clean Energy Advocates assert that, if the Commission had examined the matter as the FPA requires, it could not reasonably have concluded on the basis of the record in this proceeding that CASPR will prevent customers from paying for thousands of megawatts of unneeded capacity.¹⁶⁷

ii. Commission Determination

65. We continue to find the Commission appropriately determined that ISO-NE has shown that CASPR is just and reasonable based on substantial record evidence, including expert testimony and economic theory.¹⁶⁸

¹⁶⁶ See *id.* at 34-35. Clean Energy Advocates note that Commissioner Powelson recognized these flaws in his separate dissent, concluding that multiple factors make it “questionable whether CASPR will even accommodate state policy resources” because either prices will be too low to allow resources near retirement to clear the primary auction, or else resources that wish to participate in the substitution auction will not be allowed to do so for reliability reasons. *Id.* at 35 & n.97 (citing CASPR Order, 162 FERC ¶ 61,205 (Powelson, Comm’r, dissenting, at 4)).

¹⁶⁷ See *id.* at 35 & n.99 (citing *Md. People’s Counsel v. FERC*, 761 F.2d 780, 786 (D.C. Cir. 1985) (remanding for failure to consider “highly relevant factors” related to an order’s impacts on consumers)).

¹⁶⁸ See CASPR Order, 162 FERC ¶ 61,205 at PP 20-27, 43-47, 72-78, 85-85, 99-102. “Substantial evidence ‘is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014) (*South Carolina*) (quoting *Murray Energy Corp. v. FERC*, 629 F.3d 231, 235 (D.C. Cir. 2011)). It “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.” *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003) (quoting *FPLE Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

66. In the CASPR Order, the Commission grounded its findings in data regarding the existence and projected growth in out-of-market support¹⁶⁹ and economic theory regarding how that out-of-market support produces market distortions.¹⁷⁰ As ISO-NE expert witness Geissler explained, CASPR is based on sound economic foundations and appropriately balances two objectives:¹⁷¹ (1) ensuring necessary capacity at just and reasonable rates; and (2) accommodating the entry of Sponsored Policy Resources into the FCM over time.¹⁷² In accepting ISO-NE's proposal, the Commission explained how, in the primary auction, the MOPR prevents new resources from including out-of-market revenue in offer prices in order to preclude the FCA from clearing at prices below a competitively-based level.¹⁷³ The voluntary substitution auction, conducted immediately after the FCA, coordinates the entry of new policy resources into the FCM with the exit of existing resources that are willing to "buy out" of their obligation at a price that will always be equal to or (typically) less than the primary auction clearing price.¹⁷⁴ As the Commission explained, "[t]his coordination attempts to avoid the sudden and dramatic shifts in the supply curve from year to year that can undermine the confidence that potential investors have in the FCM as a means to recoup the costs of their investments in new capacity over the long term."¹⁷⁵

67. We disagree with Clean Energy Advocates' contention that the likelihood of Sponsored Policy Resources participating through the substitution auction hinges on unproven assumptions. The Commission's findings are based on facts and reasonable

¹⁶⁹ See Geissler Testimony at 8, Table III.1 (regarding state resource procurement initiatives; expected resources; target MWs; target delivery year).

¹⁷⁰ CASPR Order, 162 FERC ¶ 61,205 at PP 24-25. The Commission may rest its market predictions on "basic economic theory," if reasonably explained and applied. See *NextEra*, 898 F.3d at 24 (citing *Sacramento Mun. Util. Dist.*, 616 F.3d at 531; *South Carolina*, 762 F.3d at 65).

¹⁷¹ See Geissler Testimony at 4.

¹⁷² See CASPR Order, 162 FERC ¶ 61,205 at P 45; see also *New England Power Generators Ass'n, Inc.*, 146 FERC ¶ 61,039, at P 52 (2014); *Hope*, 320 U.S. at 603 (evaluating whether end result of agency's balancing customer interests with utility's "legitimate concern with financial integrity of the company" resulted in reasonable rates).

¹⁷³ See CASPR Order, 162 FERC ¶ 61,205 at PP 3, 24.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* P 25.

assumptions (e.g., the fact that resources have a finite useful life, the likelihood that a resource nearing retirement would be willing to exit the market in exchange for a “buy out” payment from the substitution auction,¹⁷⁶ and confidence that a Sponsored Policy Resource would want to obtain a capacity supply obligation through the substitution auction and might even be willing to accept a lower price than that emerging from the primary auction in order to enter the FCM). Like price suppression, the quantity of Sponsored Policy Resources that will obtain a capacity supply obligation “is not a scientific determination, but rather an economic construct.”¹⁷⁷ While there is no guarantee regarding the quantity of Sponsored Policy Resources that will clear the substitution auction, we continue to find that the economic theory underlying CASPR is sound: certain resources that obtain a capacity supply obligation in the FCA will be willing to relinquish that obligation to Sponsored Policy Resources and exit the market.¹⁷⁸ Moreover, using a market mechanism to coordinate the exit of certain existing resources with the entrance of Sponsored Policy Resources is an improvement over the previous administrative renewables exemption approach because this approach: (1) has the potential to enable more Sponsored Policy Resources to enter the FCM; (2) is not administrative and permits greater voluntary commercial decisionmaking; and (3) also provides transparency regarding the value of the transfer of the capacity supply obligation.¹⁷⁹

68. We are unpersuaded by Clean Energy Advocates’ other arguments. First, with respect to capacity supply obligations, we note that no resource – Sponsored Policy Resource or non-state-supported resource – is guaranteed a capacity supply obligation in the FCM. Also, Clean Energy Advocates present no persuasive reason why Sponsored Policy Resources should be more entitled than traditional resources to a capacity supply obligation. Second, we find it speculative to argue that older resources either: (a) will not clear the FCA; or (b) if they do clear the FCA, will be excluded from the substitution auction due to reliability constraints. Under the ISO-NE Tariff, once ISO-NE receives a

¹⁷⁶ See Geissler Testimony at 39.

¹⁷⁷ *NextEra*, 898 F.3d at 23.

¹⁷⁸ See *South Carolina*, 762 F.3d 41, 65 (D.C. Cir. 2014) (“Agencies do not need to conduct experiments in order to rely on prediction that an unsupported stone will fall; nor do they do so for predictions that competition will normally lead to lower prices.”).

¹⁷⁹ See Geissler Testimony at 59-60 (noting that “standard two-settlement design helps to award obligations efficiently and . . . is designed to promote competitive and incentive-compatible bidding in the substitution auction”); *id.* at 60 (“This framework provides transparency through a widely accepted auction clearing logic based on maximizing social surplus . . . and market clearing prices that are published and applied to each resource that buys or sells capacity.”).

retirement request, it performs a reliability analysis. If the retirement will cause a reliability issue, the resource has the option to be retained as a reliability must run (RMR) unit.¹⁸⁰ This is not new. Clean Energy Advocates' argument implies that the substitution auction (and CASPR) will not work because ISO-NE needs every – or at least most – of the older resources. This is not true. The record reflects that resources do indeed retire in ISO-NE (and ISO-NE does not prevent every retirement to maintain reliability), with or without CASPR.¹⁸¹

69. Clean Energy Advocates add that a lack of information available to generators at the time they submit bids to retire in the substitution auction will further decrease the chances that offers from Sponsored Policy Resources can be paired with offers to exit from retiring resources. We agree that resources will have to submit their demand bids in the substitution auction (at a price at which they are willing to pay someone to take over their capacity supply obligation, so they can retire permanently) before they know the clearing price in the primary auction. However, resources are currently required to make the decision to enter the primary auction with limited information. Moreover, if these resources make efficient (i.e., competitive) decisions about whether they are willing to retire, then the price they are willing to pay in the substitution auction to retire should only depend on whether they can at least recover their opportunity costs of foregoing future capacity and energy and ancillary services earnings (i.e., their expected future profits from selling into ISO-NE's energy and ancillary services markets less their

¹⁸⁰ See ISO-NE Tariff § III.13.1.2.3.1.5.1 (Static De-List Bids and Export Bids, Permanent De-List Bids, and Retirement De-List Bids at or Above the Dynamic De-List Bid Threshold); *id.* § III.13.1.2.4.1 (Participant-Elected Retirement or Conditional Treatment); *id.* § III.13.2.5.2.5 (Reliability Review); *see also* *ISO New England, Inc.*, 165 FERC ¶ 61,202 (2018) (accepting ISO-NE § III.13.2.5.2.5A (Fuel Security Reliability Review), which provides for keeping existing (fuel secure) resources from retiring if doing so would cause ISO-NE to run short of energy in the winter under certain specified scenarios).

¹⁸¹ See generally ISO-NE, Power Plant Retirements 1 (June 19, 2019), <https://www.iso-ne.com/about/what-we-do/in-depth/power-plant-retirements> (stating that “more than 5,200 MW of oil, coal, and nuclear power plants will have retired from 2013 to 2022, and another 5,000 MW of oil- and coal-fired generation could be retiring in coming years). And, as to future retirements, *see, e.g.*, ISO New England Inc., Docket No. ER20-311, Informational Filing for Qualification in the Forward Capacity Market, Transmittal at 5 (filed Nov. 5, 2019) (stating that ISO-NE “qualified 14 demand bids, totaling 445.902 MW, and 344 supply offers, totaling 748.852 MW” to participate in the substitution auction).

going forward costs). This retirement decision based on an assessment of going-forward revenues and costs is no different from other market-related decisions.

70. The Commission considered contrary evidence and arguments¹⁸² and concluded that, on balance, accepting CASPR as proposed by ISO-NE would enable the FCM to fulfill its purpose to ensure resource adequacy at reasonable rates. As discussed elsewhere, contrary to Clean Energy Advocates' contention, the Commission did consider the impact on customers that would arise from not allowing all Sponsored Policy Resources the opportunity to obtain a capacity supply obligation.¹⁸³ After considering the evidence and arguments, the Commission agreed with ISO-NE that the higher priority should be maintaining competitive prices in the FCM in order to ensure long-term resource adequacy at reasonable prices.¹⁸⁴

71. Finally, while we continue to find that our acceptance of CASPR is based on substantial record evidence, including expert testimony and economic theory, we note that our acceptance is not the end of the matter; ISO-NE has pledged to revisit and revise CASPR, depending on how CASPR functions over time.¹⁸⁵

¹⁸² See, e.g., CASPR Order, 162 FERC ¶ 61,205 at PP 73-75 (disagreeing with External Market Monitor and finding that requiring new non-sponsored resources to participate in the substitution auction will discourage them from participating in future ISO-NE capacity auctions altogether and introduces concerns about fictitious entry); see also *id.* P 75 (explaining reasons for disagreeing with External Market Monitor's claim that the substitution auction should govern entry and exit decisions); *id.* P 76 (explaining why Commission disagrees with Connecticut Parties' argument that the substitution auction creates an unjust and unreasonable barrier to Sponsored Policy Resources' access to the FCM); *id.* P 77 (acknowledging that Exelon's and NEPGA's suggestion that the Commission should require ISO-NE to allow existing resources to submit spread bids in the substitution auction could enhance liquidity, but concluding that ISO-NE's fixed price bidding proposal is reasonable because it ensures that no resource will be required to sell capacity at a price below its minimum required price, which is consistent with FCM bidding principles); *id.* P 78 (explaining why Commission is not persuaded by Consumer-Owned Systems' concerns about the allocation of side payments to load, including to load of publicly owned utilities); *id.* PP 99-102 (explaining why Commission disagrees with both arguments in favor of immediately terminating or indefinitely retaining the renewables exemption).

¹⁸³ See *supra* PP 43-50.

¹⁸⁴ See CASPR Order, 162 FERC ¶ 61,205 at P 72.

¹⁸⁵ See ISO-NE Transmittal at 12 (committing to refine or replace CASPR as necessary). See generally *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1239

d. Need for an Evidentiary Hearing

i. Rehearing Request

72. Public Citizen asserts that at the heart of CASPR is the unproven claim that state policies promoting new renewable energy deployment in the ISO-NE footprint result in unfairly subsidized generation capacity.¹⁸⁶ Public Citizen states that the Commission concluded that “this proliferation of renewable resources is so unfairly inexpensive that resulting capacity auction prices will be too low for owners of non-renewable energy to compete,”¹⁸⁷ and therefore electricity prices must be higher to foster effective competition. Public Citizen argues that the Commission failed to provide evidence that generation resources are unfairly subsidized because it declined to hold an evidentiary hearing.¹⁸⁸ Public Citizen contends that not holding a hearing where key facts could be established resulted in the Commission relying on theoretical and unproven assumptions in the CASPR Order.¹⁸⁹

73. Like Clean Energy Advocates, Public Citizen also argues that applying the MOPR to Sponsored Policy Resources is not just and reasonable.¹⁹⁰ Public Citizen contends that, in order to approve CASPR, the Commission was required to find, in an evidentiary hearing in this proceeding, that: (1) renewable energy capacity deployed as part of state mandates is unfairly subsidized; (2) lower capacity prices resulting from low-priced renewable energy harms reliability or threatens rates to become unjust and unreasonable; and (3) renewable energy deployed as a result of state policies constitutes buyer-side market power requiring mitigation through application of the MOPR.¹⁹¹

74. Public Citizen contends that the premise underlying electricity restructuring was that markets would deliver efficiencies that would result in lower prices to consumers.

(D.C. Cir. 2005) (deferring to the Commission’s predictive judgment, based on substantial evidence, that the new rate design will do “more good than harm,” where “the Commission will monitor its experiment and review it accordingly”).

¹⁸⁶ See Public Citizen Rehearing Request at 1.

¹⁸⁷ *Id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See *id.* at 2.

Yet, in the CASPR Order, the Commission appears to take the position that “economic efficiencies of some new power generation technologies deliver prices that are too low, and artificial markets must be created to increase wholesale prices, to be fair to inefficient, competing resources.”¹⁹² Public Citizen claims that the Commission has failed to provide evidence that state policies encouraging widespread deployment of inexpensive renewable energy have resulted in that new capacity being artificially subsidized.

ii. Commission Determination

75. We disagree with Public Citizen’s characterization of the heart of CASPR as being the proposition “that state policies promoting the deployment of renewable energy capacity within the ISO-NE footprint results in that deployed renewable capacity being unfairly subsidized.”¹⁹³ Rather, the crux of CASPR is ISO-NE’s use of a market-based solution to harmonize the goals of: (1) ensuring necessary capacity at just and reasonable rates; and (2) accommodating the entry of Sponsored Policy Resources into the FCM over time.¹⁹⁴ The Commission did not find that state subsidization of Sponsored Policy Resources is “unfair.” As the FPA recognizes, states have authority over construction of generation resources.¹⁹⁵ States may choose which generation resources and policies they wish to support “but they ‘will appropriately bear the costs of those decisions.’”¹⁹⁶

76. We also disagree with Public Citizen’s characterization of Sponsored Policy Resources as “economically efficient.” Economic efficiency means the production of goods at lowest cost.¹⁹⁷ Even if Sponsored Policy Resources were allowed to offer their supply to the market at unmitigated prices that do not reflect the out-of-market revenue they receive, this would not indicate that Sponsored Policy Resources are less expensive to build or operate than other resources. Rather, their unmitigated prices would merely reflect the fact that Sponsored Policy Resources receive out-of-market revenue (which

¹⁹² *Id.*

¹⁹³ *Id.* at 1.

¹⁹⁴ *See* Geissler Testimony at 23.

¹⁹⁵ *See* 16 U.S.C. § 824(f).

¹⁹⁶ *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 97 (3rd Cir. 2014) (quoting *Connecticut PUC*, 569 F.3d at 481).

¹⁹⁷ *See, e.g.,* C. Pass, B. Lowes, L. Davies, Collins Dictionary of Economics (4th ed. 2005).

would, in turn, allow them to offer their capacity at a lower price as a consequence of their receiving out-of-market revenue), which non-state-supported resources do not receive.

77. We dismiss Public Citizen’s contention that the Commission should have held a hearing on CASPR. A trial-type evidentiary hearing is unnecessary when there are no material facts in dispute that cannot be resolved on the basis of the written record.¹⁹⁸ The Commission has discretion regarding the process for deciding the issues before it¹⁹⁹ and does not need to hold a hearing where, as here, it can resolve disputes on the basis of the record before it.²⁰⁰

78. We agree with Public Citizen that, in evaluating and ultimately accepting CASPR, the Commission relied on economic theory, assumptions, and projections that have not necessarily been proven.²⁰¹ Even so, we note that the Commission regularly accepts filings based on economic theory, assumptions, and projections, and, as the court has acknowledged, “reasoned decisionmaking does not require complete prescience.”²⁰²

¹⁹⁸ See, e.g., *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 128-29 (D.C. Cir. 1982); *Southern Union Gas Co. v. FERC*, 840 F.2d 964, 970 (D.C. Cir. 1988); *Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 280 (D.C. Cir. 1986).

¹⁹⁹ *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (“[T]his court has upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload.”); *Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001, at 61,001 (1984) (“It is within the Commission’s purview to determine how best to allocate its resources for the most efficient resolution of matters before it.”).

²⁰⁰ See *infra* note 200.

²⁰¹ See Public Citizen Rehearing Request at 1.

²⁰² *Fla. Gas Trans. Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010); see also *NextEra*, 898 F.3d at 23 (“We defer to the Commission’s reasoning when it relies on substantial evidence to make a predictive judgment in an area in which it has expertise, such as in the power markets.”); *Penn. Office of Consumer Advocate v. FERC*, 131 F.3d 182, 187 (D.C. Cir. 1997) (“The task of rate-setting necessarily requires the Commission to make predictive judgments about the operations and costs of regulated entities. Although the Commission must base these judgments on the evidence before it, the Commission cannot guarantee that the results will be error-free.”); *Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 26-61 (D.C. Cir. 2007) (Commission’s prediction that a rate would “provide efficient incentive to invest” was a “reasonable predictive judgment that warrants judicial deference.”); *NextEra*, 898 F.3d at 23-24 (“It is well within the Commission’s expertise to resolve conflicting expert testimony and make a judgment on

Here, the Commission relied upon expert testimony and sound economic theory to accept CASPR. The fact that New England states have taken action to increase their renewable portfolio standards is undisputed in the record of this proceeding.²⁰³ It is also undisputed that, if all the Sponsored Policy Resources in the New England states were allowed to offer into the FCM after factoring into their offers the state support they receive, it would lower the FCM clearing prices below the otherwise competitive prices.²⁰⁴ This is one reason why, prior to CASPR, the renewables exemption limited the amount of renewable resources that could offer into the capacity market in a single FCA without being subject to the MOPR.²⁰⁵

79. Moreover, as the Commission has previously stated, “mere allegations of disputed facts are insufficient to mandate a hearing; petitioners must make an adequate proffer of evidence to support them.”²⁰⁶ Here, Public Citizen fails to describe what additional evidence it would have presented had the Commission set the case for a trial-type evidentiary hearing. Public Citizen’s arguments in favor of a hearing are based solely on unsupported allegations that CASPR will not function as the Commission anticipates. However, the precise question of how many resources would be willing to transfer a capacity supply obligation via the substitution auction is not something that can be definitively resolved at hearing. Moreover, the affidavit of Cliff. W. Hamal that

which best predicts the scope and magnitude of [] price suppression. The Commission is not required to rely only on quantitative predictions.”).

²⁰³ See CASPR Order, 162 FERC ¶ 61,205 at P 4 (“According to ISO-NE, the most recent state actions include the Multi-State Clean Energy request for proposals that aims to procure the rough equivalent of 460 MW (nameplate) of new renewable resources and the 2016 Massachusetts Energy Diversity Act that requires clean energy procurements in the range of 2,800 MW (nameplate).”); see also Connecticut Parties Protest, Attachment A, Cliff W. Hamal Affidavit, Docket No. ER18-619-000, at 17 (filed Jan. 29, 2018) (noting and not disputing ISO-NE’s statement that the region now has significant excess capacity (1,760 MW as of FCA 11), substantial new policy preferred resources being developed in Massachusetts (2,700 MW nameplate) and diminished load growth) (Hamal Aff.).

²⁰⁴ See Geissler Testimony at 9-10.

²⁰⁵ See Renewables Exemption Remand Rehearing Order, 158 FERC ¶ 61,138 at P 11 (“Capping the renewables exemption at 200 MW annually (and limiting the carryover to 600 MW triennially) tempers the price impact.”) (citation omitted).

²⁰⁶ *Cerro Wire & Cable Co. v. FERC*, 677 F.2d at 129.

Connecticut Parties²⁰⁷ submitted in opposition to ISO-NE expert witness Geissler's testimony does not reflect a contradiction in facts so much as a difference in perspective.²⁰⁸ For example, expert witness Hamal's testimony challenges ISO-NE's fundamental notion of balancing the accommodation of state policies with the objective of maintaining competitive FCM prices. Hamal's testimony advocates ceasing application of the MOPR to Sponsored Policy Resources in order to maximize the opportunity for all Sponsored Policy Resources to obtain a capacity supply obligation in the primary auction as soon as possible.²⁰⁹ These arguments are addressed elsewhere in this order.²¹⁰

80. We also find Public Citizen's and Clean Energy Advocates' arguments against continuing to apply the MOPR to Sponsored Policy Resources to be beyond the scope of this proceeding.²¹¹ ISO-NE has had a MOPR in place for a number of years, which the D.C. Circuit upheld.²¹² ISO-NE's CASPR filing did not propose to modify ISO-NE's MOPR. Furthermore, as discussed above, ISO-NE submitted CASPR under FPA section 205, so, to accept it, the Commission need only find that CASPR is just and reasonable and not unduly discriminatory or preferential. There was no need to find that

²⁰⁷ Connecticut Parties are the following: Connecticut Public Utilities Regulatory Authority, the Connecticut Department of Energy and Environmental Protection, and the Connecticut Office of Consumer Counsel.

²⁰⁸ *See generally* Hamal Aff.

²⁰⁹ *See, e.g.*, Hamal Aff. at 22 (taking issue with ISO-NE's definition of "competitive outcome" as one that would occur absent support provided to Sponsored Policy Resources because, among other reasons, ISO-NE's definition does not constitute "accommodation" of Sponsored Policy Resources); *see also id.* at 5 (making a similar argument).

²¹⁰ *See supra* PP 34-36 and PP 43-50 (affirming CASPR as a reasonable balance of competing objectives) and *infra* P 80 (elimination of MOPR is beyond the scope of this proceeding).

²¹¹ *See PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,157 at P 195 (rejecting rehearing arguments that sought to challenge PJM's MOPR rules because those rules were not being changed in that proceeding).

²¹² *See ISO New England Inc.*, 135 FERC ¶ 61,029 at P 165 (2011) (Buyer Market Power Order), *reh'g denied in part*, 138 FERC ¶ 61,027 (2012), *aff'd sub nom. New England Power Generators Ass'n v. FERC*, 757 F.3d 283 (D.C. Cir. 2014) (affirming additional buyer-side and supplier-side mitigation measures for New England capacity market).

the existing rate, including the MOPR, is unjust and unreasonable prior to accepting CASPR.²¹³

e. **CASPR Improperly Blocks State Policies**

i. **Rehearing Request**

81. Like Public Citizen, Clean Energy Advocates argue that, instead of CASPR, ISO-NE should simply stop applying the MOPR to Sponsored Policy Resources. Clean Energy Advocates assert that the Commission's decision to approve the CASPR proposal despite finding that the relevant state environmental programs are legitimate and that the Sponsored Policy Resources will be built regardless of capacity market signals is arbitrary and capricious and violates its duty to ensure just and reasonable rates.²¹⁴ Clean Energy Advocates assert that, when state policies are enacted to accomplish goals that Commission-regulated markets are not designed to meet, the Commission should not implement measures that essentially undo, counteract, or deter these policies.²¹⁵

82. Clean Energy Advocates claim that CASPR will block Sponsored Policy Resources from selling capacity because the MOPR applies to Sponsored Policy Resources in the primary auction and a "flawed" secondary auction is the only opportunity for Sponsored Policy Resources to access ISO-NE's capacity market.²¹⁶ Clean Energy Advocates assert this is the case, even though ISO-NE and the Commission have found that Sponsored Policy Resources will be constructed regardless of ISO-NE's capacity market price signals.²¹⁷ Clean Energy Advocates contend that, unlike the use of the MOPR to prevent the exercise of buyer-side market power, using the MOPR to block Sponsored Policy Resources from accessing the capacity market cannot be justified based on a need to deter Sponsored Policy Resources from accessing the capacity market. They assert that blocking Sponsored Policy Resources from

²¹³ See *NextEra*, 898 F.3d. at 22.

²¹⁴ Clean Energy Advocates Rehearing Request at 4.

²¹⁵ *Id.* at 18.

²¹⁶ *Id.*

²¹⁷ *Id.*

accessing the capacity market with the intent of countering state environmental policy decisions would overstep FERC's role under the FPA.²¹⁸

83. Clean Energy Advocates state that CASPR was premised on the notion that revisions to ISO-NE's Tariff were necessary because states have increased their renewable energy procurement targets beyond the amount for which the renewables exemption would facilitate capacity market entry.²¹⁹ But Clean Energy Advocates argue that phasing out the renewables exemption and replacing it with the CASPR method, which renders market access more difficult to achieve, revises the ISO-NE Tariff in exactly the opposite direction from what is necessary to ensure just and reasonable rates.²²⁰ Clean Energy Advocates contend that, with states increasing their renewables targets and procurement amounts, ISO-NE should have updated the renewables exemption to continue to facilitate state environmental goals while maintaining reliability in the region at least cost.²²¹ Clean Energy Advocates claim that the simplest way to achieve this goal would have been to update the renewables exemption to ensure eligibility.²²²

84. Clean Energy Advocates assert that, not only will CASPR unnecessarily increase capacity costs for its customers in the ISO-NE market, but also it will increase costs for customers in the states covered by CASPR that have Renewable Portfolio Standards programs. Clean Energy Advocates argue that Sponsored Policy Resources will receive less compensation in ISO-NE's market than the amount reflective of those resources' contributions to reliability because they will be paid only the lower substitution auction clearing price rather than the price arrived at in the primary auction. Clean Energy Advocates contend that, given the prospect of increased risk and lower revenues in the ISO-NE market, resources will demand higher prices in state-facilitated solicitations for long-term contracts, and increased costs from those solicitations will ultimately be passed on from the utility counterparties to those contracts to their end-use customers.

²¹⁸ *Id.* at 19.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 19-20; *id.* at 8 (defining social costs as meeting reliability needs at least cost).

²²² Clean Energy Advocates argued that another solution would have been to update the MOPR's definition of "out-of-market" revenues to exclude revenues from these Sponsored Policy Resource procurements, *see id.* at 20, but this MOPR-related suggestion is beyond the scope of this proceeding, as discussed above, *see supra* PP 53, 78.

Clean Energy Advocates conclude that not only will customers be forced to buy redundant capacity, but also capacity will cost more in both settings.²²³

85. Clean Energy Advocates state that the Commission's role is to regulate for just and reasonable rates and to recognize the presence of exogenous market inputs. Clean Energy Advocates note, for example, that the ISO-NE states participate in the Regional Greenhouse Gas Initiative, or RGGI, which requires carbon-emitting power plants in the region to purchase and retire allowances. Clean Energy Advocates claim that the policy only partially accounts for the costs to society of carbon emissions, but to the extent it does, it increases the price at which carbon-emitting plants offer their capacity into the market. Clean Energy Advocates assert that ISO-NE's rules do not attempt to cancel out or neutralize the effect of this policy by adjusting for the "price inflation" that it causes; rather, the Commission accepts its effects like any other exogenous factor affecting market prices.²²⁴ Clean Energy Advocates assert that, if a state's environmental regulation forced the closure of a power plant, the market would and should reflect the reality that the retiring capacity would no longer clear the market. Clean Energy Advocates argue that Sponsored Policy Resources should be treated the same way.²²⁵

86. Clean Energy Advocates contend that the Commission appears to pin the blame on the states for the over-procurement that CASPR will cause when, in their view, "the fault lies squarely with FERC."²²⁶ Clean Energy Advocates assert that, while states are operating within their authority when they enact renewables policies, "mitigating" (via the MOPR) rather than facilitating state public policy preferences places the Commission in a role beyond Congressional authorization. Clean Energy Advocates argue that, in affirming the creation of ISO-NE's capacity market, the court made clear that the Commission's role in regulating capacity procurement is to ensure resource adequacy without reversing state policies but rather taking them into account.²²⁷ Clean Energy Advocates state that the court's determination that the Commission had not engaged in direct regulation of generation facilities in violation of section 201 of the

²²³ Clean Energy Advocates Rehearing Request at 22.

²²⁴ *Id.* at 23 & n.63 (citing *PSEG Power Conn. LLC*, 127 FERC ¶ 61,023 (2009) (approving changes to an RMR-agreement to include CO2 emissions allowance costs under RGGI)).

²²⁵ *Id.* at 23.

²²⁶ *Id.* at 24 & n.64 (citing CASPR Order, 162 FERC ¶ 61,205 at P 24).

²²⁷ *Id.* at 24 & n.67 (citing *Connecticut PUC*, 569 F.3d at 481).

FPA²²⁸ rested upon the states' retention of authority to control decisions regarding the construction of new capacity.²²⁹ Clean Energy Advocates claim that, to avoid directly regulating generation by imposing its own view on the mix of plants needed, the Commission *must* allow generation built pursuant to state policies to affect the market.

87. Clean Energy Advocates argue that the fact that the Commission has no role in dictating state environmental policies is what distinguishes this case from the Commission's regulation of manipulative conduct or other uneconomic activity unrelated to accounting for benefits external to the Commission's markets.²³⁰ Clean Energy Advocates contend that, contrary to when a resource is too expensive to clear the FCA and instead submits a manipulative offer to take advantage of buyer-side market power, here, the Commission acknowledges the existence of state-facilitated contracts supporting particular resources, recognizes states' authority to grant those contracts, and understands that Sponsored Policy Resources will be built "whether that capacity clears the FCM or not."²³¹ Clean Energy Advocates assert that, when a resource earns revenues outside of the Commission's markets, it is entirely appropriate for those revenues to be accounted for in the resource's offer price so long as the revenues are not the product of behavior the Commission intends to deter. Clean Energy Advocates contend that it is particularly appropriate to allow revenues compensating a resource's environmental benefits to be reflected in a resource's offer price because environmental benefits are not fully accounted for in the Commission's markets. Clean Energy Advocates add that allowing such revenues to be included mirrors the Commission's practice for other revenue streams that compensate for products beyond energy and capacity.²³²

²²⁸ 16 U.S.C. § 824(a) (2012).

²²⁹ Clean Energy Advocates Rehearing Request at 24-25 & n.68 (citing *Connecticut PUC*, 569 F.3d at 482 (noting installed capacity requirement set by the Commission "necessarily affects prices *but not necessarily new capacity construction*") (emphasis added by Clean Energy Advocates).

²³⁰ *Id.* at 25.

²³¹ *Id.* at 25 & n.69 (citing CASPR Order, 162 FERC ¶ 61,205 at P 45).

²³² For example, Clean Energy Advocates add that, when a waste-to-energy facility sells fertilizer outside of the Commission's market, a fuel cell produces and sells hydrogen, or a cogeneration facility produces and sells steam, the revenues from those out-of-market sales are appropriately factored into that resource's capacity market offer. Clean Energy Advocates note that the Commission has held that offers reflecting revenue from retail demand response services do not cause artificial price suppression.

88. Clean Energy Advocates argue that, rather than embarking upon the “impossible and misguided” attempt to create a “pure” market free from the impacts of policy choices by other regulators, the Commission should reverse its approval of CASPR on the grounds that effectively blocking Sponsored Policy Resources from offering their capacity into the ISO-NE market results in rates that are not just and reasonable,²³³ and inappropriately interferes with state policies. Clean Energy Advocates ask that, at a minimum, the Commission immediately reinstate the renewables exemption or an equivalent 200 MW renewables backstop replacement.²³⁴

ii. Commission Determination

89. We find that, contrary to Clean Energy Advocates’ contention, the Commission is not blocking state environmental policies through its acceptance of CASPR. The FPA recognizes that states are authorized to procure the generation resources they prefer,²³⁵ and New England states may continue to support Sponsored Policy Resources, regardless whether they clear the FCM or not.²³⁶ Nevertheless, the FPA compels the Commission to ensure that the rates for capacity procured through the FCM are just and reasonable,²³⁷ which in turn requires a market design capable of attracting

Id. at 28 & n.78 (citing *N. Y. State Pub. Serv. Comm’n v. NYISO*, 158 FERC ¶ 61,137, at P 33 (2016)).

²³³ *Id.* at 29. Clean Energy Advocates suggests limiting application of the MOPR to the prevention of buyer-side market power.

²³⁴ *Id.* at 29 & n.82 (citing Partial Protest and Comments of the Massachusetts Attorney General, Docket No. ER18-619-000 (filed Jan. 29, 2018)).

²³⁵ 16 U.S.C. § 824(b)(1); *see also FERC v. EPSA*, 136 S. Ct. 760, 780 (2016) (endorsing wholesale demand response orders as a “program of cooperative federalism, in which states retain the last word”); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 (2016) (“[S]tates, of course, may regulate within the domain Congress assigned to them, even when their laws incidentally affect areas within FERC’s domain.”); *id.* at 1299 (“Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures ‘untethered to a generator’s wholesale market participation.’”) (internal citation omitted).

²³⁶ CASPR Order, 162 FERC ¶ 61,205 at P 45.

²³⁷ *See Hughes*, 136 S. Ct. at 1296 (recognizing that in orders eliminating the MOPR exemption for state-supported resources in PJM, the Commission explained that “[o]ur intent is not to pass judgment on state and local policies and objectives with regard to the development of new capacity resources, or unreasonably interfere with

non-state-supported investment when such investment is necessary to meet resource adequacy objectives.

90. Clean Energy Advocates' line of argument goes to eliminating application of the MOPR to Sponsored Policy Resources or, at least, continuing the limited renewables exemption indefinitely. We reiterate that, because ISO-NE has not proposed to eliminate the MOPR in this section 205 proceeding, the issue of continued application of the MOPR to Sponsored Policy Resources is not before us in this proceeding. We also add that the court has already affirmed ISO-NE's use of a renewables exemption along with the MOPR.²³⁸

91. As discussed below, moreover, we note that CASPR is calibrated to coordinate the entry of new Sponsored Policy Resources with the exit of older resources, unlike the renewables exemption.²³⁹ Furthermore, according to ISO-NE's expert, more Sponsored Policy Resources are capable of entering the FCM under CASPR than via the renewables exemption.²⁴⁰

92. We also sustain our determination to not require a backstop renewable exemption because doing so could hinder CASPR's effectiveness, as discussed below.²⁴¹

93. We disagree with Clean Energy Advocates' contention that CASPR is arbitrary and capricious because Sponsored Policy Resources are paid less for their capacity obligation than resources that clear the primary auction. First, as explained above, Sponsored Policy Resources are not similarly situated to non-state-supported resources.²⁴² Moreover, and significantly, while Sponsored Policy Resources generally

those objectives[,]" but the Commission is "forced to act, however, when subsidized entry supported by one state's or locality's policies has the effect of disrupting the competitive price signals that PJM's [capacity auction] is designed to produce, and that PJM as a whole, including other states, rely on to attract sufficient capacity." (quoting *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 3 (2011), *aff'd*, *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 79-80 (3rd Cir. 2014) (upholding FERC's elimination of the state-supported generation exemption in PJM)).

²³⁸ See *supra* note 14.

²³⁹ See *infra* P 129.

²⁴⁰ Geissler Testimony at 17-18.

²⁴¹ See *infra* PP 129-131.

²⁴² See *supra* PP 21-31.

(although not necessarily always) receive less compensation from the capacity market in the first year of assuming the capacity supply obligation than a resource that clears the primary auction that same year,²⁴³ the key is what happens in subsequent years. The benefit of obtaining a capacity supply obligation through the substitution auction is that, in subsequent years, the Sponsored Policy Resource is an existing resource and can participate in FCAs without having the MOPR applied to it. In all years after a Sponsored Policy Resource enters the FCM through the substitution auction, it will enter the primary auction and, if it clears, will receive the same compensation as traditional resources – that is, the FCA clearing price.²⁴⁴

3. Side Payments

a. Background

94. Typically when a facility retires, the entire facility retires. Under CASPR, when a typical retiring facility submits its demand bid in the substitution auction, it is non-rationable, which means that either the whole or none of the bid is taken and the bid cannot be apportioned.²⁴⁵ In contrast, supply offers submitted by Sponsored Policy Resources in the substitution are rationable, and may be cleared in whole or in part as the economics of the auction determine.²⁴⁶ This feature of CASPR enables a resource seeking to exit the market to retire even when there are insufficient megawatts of Sponsored Policy Resources to take on the retiring resource's entire capacity supply obligation.²⁴⁷ This, in turn, allows more Sponsored Policy Resources to enter the FCM.²⁴⁸ However, because demand bids are non-rationable, it is not always possible to

²⁴³ We further note that when the non-state-sponsored resource transfers its capacity supply obligation to a Sponsored Policy Resource and exits the market, the non-state-sponsored resource is giving up something of value, i.e., its future participation in ISO-NE markets and associated revenue. *See* Geissler Testimony at 30. Accordingly, it is appropriate that the non-state-sponsored resource receive a buy-out payment.

²⁴⁴ ISO-NE Transmittal at 6; Geissler Testimony at 34-38.

²⁴⁵ ISO-NE Transmittal at 24 (“since an accepted demand bid requires the underlying capacity to retire and cease operation, it is not practical to clear only part of a retiring resource”); *see also* Geissler Testimony at 126-127.

²⁴⁶ ISO-NE Transmittal at 24; *see also* Geissler Testimony at 127.

²⁴⁷ Geissler Testimony at 128-29; *id.* at 142-144.

²⁴⁸ *Id.*

clear the market at the intersection of these aggregate supply and demand curves.²⁴⁹ That is, in order to procure adequate supply to clear the *entirety* of the demand bid, the clearing price would need to exceed what the demand bid is willing to pay.²⁵⁰ When this outcome occurs, there is no substitution auction clearing price that will satisfy all accepted supply offers and demand bids.²⁵¹ In such cases, the price will be set by the highest-priced cleared supply offer and, as proposed by ISO-NE, a side payment will be made to affected demand bids (that is, those cleared demand bids that have bid prices below the auction clearing price).²⁵² The cost of these side payments, like other FCM costs, are allocated to Capacity Load Obligations (load) via the Net Regional Clearing Price.²⁵³ ISO-NE anticipates, though, that side payments will not always occur, and when they do, they will be relatively small.²⁵⁴

b. CASPR Order

95. ISO-NE explained that, because demand bids are non-rationable, side payments are deemed necessary “to determine a clearing price that maximizes market surplus in the substitution auction and makes all cleared demand offers whole.”²⁵⁵

Consumer-Owned Systems protested the allocation of these side-payments to its members, which are publicly-owned utilities, and therefore not subject to the same requirements to procure renewables as other state-regulated utilities.²⁵⁶

Consumer-Owned Systems argued that, because they are not subject to the same renewables mandates, their members will not benefit from any side payments in the

²⁴⁹ *Id.* at 127.

²⁵⁰ ISO-NE Transmittal at 24.

²⁵¹ *Id.*

²⁵² Geissler Testimony at 143-144; CASPR Order, 162 FERC ¶ 61,205 at P 53 (“ISO-NE explains that side payments may be necessary given that demand bids are non-rationable to determine a clearing price that maximizes market surplus in the substitution auction and makes all cleared demand offers whole.”).

²⁵³ *See* CASPR Order, 162 FERC ¶ 61,205 at P 53 & n.90 (citing Geissler Testimony at 56-59).

²⁵⁴ Geissler Testimony at 146.

²⁵⁵ CASPR Order, 162 FERC ¶ 61,205 at P 53.

²⁵⁶ *Id.* P 59 & n.102 (citing Consumer-Owned Systems Comments at 12).

auction but will be allocated a portion of the net cost.²⁵⁷ Consumer-Owned Systems asserted that imposing these costs on their members constituted an unjust and unreasonable price shift.²⁵⁸ In the CASPR Order, the Commission found that Consumer-Owned Systems' concerns about the allocation of side payments to load – including to the load of publicly-owned utilities – were unpersuasive.²⁵⁹ The Commission found it reasonable for load, including public power customers, to assume these additional costs because “CASPR balances an opportunity for Sponsored Policy Resources to receive capacity supply obligations with the FCM’s need to secure private investment in the long-term to achieve its primary objective of providing resource adequacy at just and reasonable rates.”²⁶⁰

c. Rehearing Request

96. On rehearing, Consumer-Owned Systems contend that the Commission erred by allocating the costs of CASPR side payments to municipal utilities. Consumer-Owned Systems assert that “a reflexive spreading” of the costs of side payments to all load, including municipal utilities, without regard to cost causation, violates the just and reasonable requirement of section 205 of the FPA.²⁶¹ Consumer-Owned Systems state that municipal utilities are not subject to any state renewables acquisition mandate. Consumer-Owned Systems add that the definition of Sponsored Policy Resources excludes consumer-owned systems (public power) from participation in the substitution auction. Consumer-Owned Systems assert that, given these facts, public power entities do not cause or realize any benefit from the side payments feature of the CASPR substitution auction.²⁶² Consumer-Owned Systems argue that the Commission’s balancing rationale for broadly allocating side payment costs to all load fails to respond to Consumer-Owned Systems’ argument that allocation of side payment costs to load that neither cause those costs nor benefit from their incurrence contravenes the Commission’s fundamental cost allocation principle and is therefore unjust and unreasonable.²⁶³ Consumer-Owned Systems contend that they should not have to “prop

²⁵⁷ *Id.* P 59.

²⁵⁸ *Id.*

²⁵⁹ *Id.* P 78.

²⁶⁰ *Id.*

²⁶¹ Consumer-Owned Systems Rehearing Request at 13.

²⁶² *Id.* at 12.

²⁶³ *Id.*

up” the FCM price via side payments. Therefore, Consumer-Owned Systems ask the Commission to vacate this aspect of the CASPR Order and require ISO-NE to create a method for addressing the non-rationable demand bid feature that does not impose side payment costs on load-serving entities that neither cause nor benefit from such side payments.²⁶⁴

d. Commission Determination

97. We continue to find that allocating these side payments to all load, including municipal utilities, is just and reasonable and consistent with cost causation. As ISO-NE explained, this method allocates these modest costs broadly and without adversely affecting the substitution auction bidding incentives.²⁶⁵

98. Cost causation can be measured by costs or benefits.²⁶⁶ Under CASPR, side payments, when necessary, are paid to resources that are exiting the market and that have transferred their capacity supply obligation to a Sponsored Policy Resource. These side payments are a benefit because they enable the substitution auction to better accommodate Sponsored Policy Resources and mitigate over-procurement and double payment for capacity.²⁶⁷

99. Consumer-Owned Systems’ analysis of the benefits of the side payment feature fails to acknowledge that consumer-owned resources (municipal entities and cooperatives) that obtain a capacity supply obligation in the primary market and transfer this obligation to a Sponsored Policy Resource would also be able to receive the benefit of a side payment, if a side payment is warranted. Additionally, as discussed above, Consumer-Owned Systems can avail themselves of the substitution auction by, for example, obtaining funding from a state through a state Renewable Portfolio Standard (RPS) or similar program.²⁶⁸ Accordingly, Consumer-Owned Systems’ assertion that public power entities cannot benefit from the side payments feature of CASPR is incorrect. Furthermore, when Consumer-Owned Systems’ members self-supply

²⁶⁴ *Id.* at 13.

²⁶⁵ ISO-NE Transmittal at 24; Geissler Testimony at 148.

²⁶⁶ *See, e.g., Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (“Not surprisingly, we evaluate compliance with this unremarkable principle by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party.”).

²⁶⁷ *See* Geissler Testimony at 144; ISO-NE Transmittal at 24.

²⁶⁸ *See supra* P 31.

completely (that is, they generate all of their own energy), they will not be charged for side payments. ISO-NE explained that, when Consumer-Owned Systems and other publicly-owned entities self-supply in the FCM (which ISO-NE states they “tend to do”), they are not subject to the Net Regional Clearing Price through which the side payments are assessed.²⁶⁹ Consumer-Owned Systems do not acknowledge this limit on their likely side payment costs, and it is unclear how this factors into their concerns.

100. Moreover, as noted above, the side payments feature enables the substitution auction to better accommodate Sponsored Policy Resources.²⁷⁰ Thus, in the CASPR Order, the Commission properly considered the costs and benefits of the entire CASPR program in finding that it is just and reasonable to allocate the cost of side payments to all load²⁷¹ because all New England customers benefit from a market that strikes a reasonable balance between: (a) maintaining competition and its resulting efficiencies; and (b) accommodating state policies by coordinating retirements with the entrance of Sponsored Policy Resources into the FCM. Even if a state does not require consumer-owned systems to purchase renewable resources, and even if consumer-owned resources choose not to participate in the substitution auction, like all New England customers, consumer-owned systems and their customers benefit from the balance between appropriate price signals and the incorporation of Sponsored Policy Resources into the FCM that result from CASPR.

101. Finally, we anticipate that side payments are likely to be “uncommon and small relative to total market value, as the substitution auction is unlikely to clear existing resources that would require large side payments to transfer their obligations.”²⁷² Should this projection prove incorrect, we can reconsider this feature of CASPR.

²⁶⁹ ISO-NE Answer, Docket No. ER18-619-000, at 31 (filed Feb. 13, 2018) (ISO-NE Answer).

²⁷⁰ *See supra* PP 94-95, 97.

²⁷¹ CASPR Order, 162 FERC ¶ 61,205 at P 78.

²⁷² ISO-NE Answer at 31 & n.96 (“Existing resources that would require large side payments are unlikely to transfer their capacity in the substitution auction because doing so will tend to reduce social surplus.”) (citing Geissler Testimony at 141-147 and Figure VIII.9); *see also id.* at 146-147 (acknowledging that side payment could be higher than example in testimony but explaining how the substitution auction clearing mechanism limits side payments in a general way).

4. Renewables Exemption

a. Background

102. As noted above, in a series of prior orders, the Commission accepted ISO-NE's proposal to allow a limited exemption from the MOPR for certain renewable resources (renewables exemption).²⁷³ In any FCA, up to 200 MW of renewable resources could qualify for the renewables exemption and enter the FCA without being subject to the MOPR.²⁷⁴ Any unused portion of that 200 MW could carry forward for up to three years (two additional FCAs) for a possible maximum of 600 MW of exempt renewable resource capacity in any given FCA.²⁷⁵

103. In the CASPR filing, ISO-NE stated that, in contrast to when the limited renewables exemption was originally proposed in 2014 and accepted in 2015, the renewables exemption now has greater risk of causing price suppression because certain market expectations (e.g., load increase) have not materialized and ISO-NE currently has significant excess capacity.²⁷⁶ ISO-NE proposed to phase-out the exemption rather than eliminating it immediately in order "to minimize adverse impacts on investments that are already underway."²⁷⁷ Observing that some states sought to preserve the renewables exemption because they want to guarantee that, annually, some Sponsored Policy Resources will obtain a capacity supply obligation, ISO-NE criticized such guarantees as

²⁷³ See *supra* P 5 & note 14 (citing First Renewables Exemption Order, 147 FERC ¶ 61,073 at P 81); see also *NextEra*, 898 F.3d at 21. The exemption is for new resources that qualify under state renewable or alternative energy portfolio standards or, in states without a portfolio standard, qualify under that state's renewable energy goals as a renewable resource. They must also "receive an out-of-market revenue source supported by a state-or federally-regulated rate, charge or other regulated cost recovery mechanism." ISO-NE Tariff § III.13.1.1.1.7(a).

²⁷⁴ Renewables Exemption Remand Rehearing Order, 158 FERC ¶ 61,138 at P 2 & n.5 (citing ISO-NE Tariff § III.13.1.1.12.10(b)).

²⁷⁵ *Id.* P 2 & n.7 (citing ISO-NE Tariff § III.13.1.1.12.10(c)). ISO-NE stated that, at the time of the CASPR filing, there were 514 accrued exempt MW to be used through FCA 15, conducted in 2021. ISO-NE Transmittal at 13.

²⁷⁶ CASPR Order, 162 FERC ¶ 61,205 at P 87 & n.139 (citing ISO-NE Transmittal at 11); *id.* P 97 & n.176 (citing ISO-NE Answer at 8 and 11).

²⁷⁷ ISO-NE Transmittal at 11-13.

“antithetical to competitive markets.”²⁷⁸ In response to ISO-NE’s proposal, the Massachusetts Attorney General advocated for the implementation of a backstop provision after phase-out of the renewables exemption, which would allow up to 200 MW of Sponsored Policy Resources to participate in the FCM regardless of whether there were corresponding retirements in that year to offset such entry.²⁷⁹ Through a proxy supply offer, megawatts that enter the FCM through this backstop could be matched with eventual retirements over time.²⁸⁰

b. CASPR Order

104. The Commission accepted ISO-NE’s proposal to phase-out the renewables exemption over a three-year period.²⁸¹ During the transition period, the remaining accrued exemption megawatts that have not yet cleared the FCA, that is, up to 514 MW of renewable capacity to be used through FCA 15 (to be conducted in 2021), may enter the primary auction without being subject to the MOPR. Among other reasons, the Commission accepted the proposal to phase-out the renewables exemption because “ISO-NE’s transition proposal [was] a balanced approach for implementing CASPR’s alternative means of accommodating state policies, while attenuating any potential adverse impacts on pending investments that could result from an immediate change to the market rules.”²⁸²

105. Responding to parties seeking to eliminate the renewables exemption, the Commission explained that:

to ensure that the FCM remains just and reasonable, CASPR seeks to maintain a stable investment environment. Since investors may have made decisions based on the continuation of the [renewables] exemption, the transition period will mitigate some of the negative impacts that could have resulted from an abrupt termination. Furthermore, it is consistent with

²⁷⁸ *Id.* at 12.

²⁷⁹ CASPR Order, 162 FERC ¶ 61,205 at P 93 & n.61.

²⁸⁰ *Id.* P 93.

²⁸¹ *Id.* P 99 (allowing remaining accrued exempt MW to be used through FCA 15).

²⁸² *Id.*

Commission precedent to permit a transition mechanism to a new regulatory construct.²⁸³

106. In addressing arguments seeking to retain the renewables exemption in tandem with CASPR, among other things, the Commission found that ISO-NE had provided a reasonable justification to phase-out the renewables exemption “as CASPR is a market-based rather than an administrative solution.”²⁸⁴ The Commission explained that CASPR obviated the need for the renewables exemption, which, the Commission noted, in its current form would not be able to accommodate certain resources, such as the Massachusetts hydro resource procurement.²⁸⁵ The Commission agreed with ISO-NE that “the long-term continuation of the [renewables] exemption could limit participation in the substitution auction, undermining the purpose of CASPR.”²⁸⁶

107. The Commission also declined to impose a 200 MW backstop replacement for the renewables exemption, finding that “CASPR provides a reasonable opportunity to accommodate state-sponsored resources in the FCM over time, and the lack of a backstop to provide a guarantee of that accommodation does not render the proposal unjust and unreasonable.”²⁸⁷

c. Rehearing Requests

108. NextEra-NRG continue to seek immediate elimination of the renewables exemption.²⁸⁸ Conversely, Clean Energy Advocates seek continuation of the renewables exemption, preferably in lieu of CASPR, or alternatively, a backstop 200 MW exemption.²⁸⁹

²⁸³ *Id.* P 100 & n.183 (citing *ISO New England Inc.*, 155 FERC ¶ 61,319, at P 62 (2016) (accepting use of transition mechanism to implement zonal demand curves in ISO-NE); *ISO New England Inc.*, 147 FERC ¶ 61,172, at P 73 (2013) (accepting transition plan to phase in ISO-NE’s pay for performance provisions).

²⁸⁴ CASPR Order, 162 FERC ¶ 61,205 at P 101 & n.185.

²⁸⁵ *Id.* P 101.

²⁸⁶ *Id.* P 101 & n.186 (citing ISO-NE Answer at 10).

²⁸⁷ *Id.* P 102.

²⁸⁸ *See* NextEra-NRG Rehearing Request at 1-10.

²⁸⁹ *See* Clean Energy Advocates Rehearing Request at 19-20.

i. **Eliminate Exemption**(a) **Rehearing Request**

109. NextEra-NRG assert that, by accepting a three-year phase-out of the renewables exemption, the Commission violated the FPA; failed to engage in reasoned decisionmaking regarding its own precedent, record evidence, and legitimate objections; and improperly disregarded substantial evidence.²⁹⁰ Specifically, NextEra-NRG argue that the Commission contradicted its own precedent without explanation by justifying the three-year phase-out of the renewables exemption as a means to maintain a stable investment environment.²⁹¹

110. NextEra-NRG contend that it is arbitrary and capricious for the Commission to justify the renewables exemption by finding that investments in renewable resources will occur even without an exemption, while nevertheless also “finding that with the adoption of CASPR, the immediate elimination of the renewables exemption will somehow disrupt those very investments.”²⁹² Noting that the Commission recently affirmed this rationale on rehearing, NextEra-NRG contend that the Commission provides no basis for shifting its policy justification in a single year from: (1) renewable investments will occur with or without the renewables exemption to; (2) renewable investments will be negatively impacted without a renewables exemption transition period.²⁹³ NextEra-NRG posit that the only plausible bases for reversing the position taken in the prior orders are (a) the Commission is relying on statements made by ISO-NE that were not accompanied by any evidence;²⁹⁴ or (b) the Commission

²⁹⁰ See NextEra-NRG Rehearing Request at 1-2.

²⁹¹ See *id.* at 2-3.

²⁹² See *id.* at 1-2.

²⁹³ See *id.* at 6.

²⁹⁴ *Id.* at 6 & n.12 (citing ISO New England Inc., Demand Curve Changes, Docket No. ER14-1639 (filed Apr. 1, 2014), Testimony of Dr. Robert G. Ethier at 41:3-1). NextEra-NRG fault the Commission because it “never states that it is relying on Dr. Ethier’s now disclaimed prior testimony or associated statements in ISO-NE’s transmittal letter.” *Id.*

developed a new guiding principle of investor confidence without any explanation or citation to precedent.²⁹⁵

111. NextEra-NRG assert that the Commission's concern for investor confidence is undermined by the fact that market participants and the New England States Committee on Electricity began meetings in late 2016 to find a market solution to substitute for the renewables exemption. NextEra-NRG contend that the IMAPP stakeholder process put investors on notice that the rules may change more than two years before FCA 13 (and four years before FCA 15). NextEra-NRG argue that there is no record evidence that such time was insufficient for investors to modify their positions.²⁹⁶ NextEra-NRG emphasize that the Commission has often reminded market participants that any tariff rule they may rely upon is subject to change. Therefore, NextEra-NRG insist that the Commission has failed to provide a reasoned justification for its policy change underlying its acceptance of the renewables exemption phase-out.

(b) Commission Determination

112. Contrary to NextEra-NRG's contention, the prior orders accepting the renewables exemption do not conflict with allowing a three-year phase-out of the renewables exemption to facilitate the transition to CASPR by protecting investors' expectations. The Commission's finding that state policies will result in construction of renewables with or without the exemption recognized that the renewables exemption does not drive construction of renewables; state policies do.²⁹⁷ ISO-NE's limited renewables exemption reflects the balancing of not paying twice for capacity²⁹⁸ with the alternative interest in reducing the potential for price suppression. As the Commission declared and we reiterate in this order, CASPR is a shift to a new market mechanism to enable Sponsored Policy Resources to obtain a capacity supply obligation, while maintaining a market design capable of attracting competitive entry when such entry is needed.²⁹⁹

²⁹⁵ See *id.*; see also *id.* at 5 n.9 (discussing Commissioner Glick's dissent and arguing that the renewables exemption is not settled law because, at the time the rehearing request was filed, the D.C. Circuit had not yet acted on the pending appeal).

²⁹⁶ See *id.* at 6.

²⁹⁷ See, e.g., Renewables Exemption Remand Order, 155 FERC ¶ 61,023 at P 62 (acknowledging that renewables "resources will be constructed with or without a renewables exemption"); see also *NextEra*, 898 F.3d at 20.

²⁹⁸ See ISO-NE Transmittal at 10 & n.30 (quoting Renewables Exemption Remand Rehearing Order, 158 FERC ¶ 61,138 at P 9).

²⁹⁹ See CASPR Order, 162 FERC ¶ 61,205 at PP 20-24.

Contrary to NextEra-NRG's assertion, we find no conflict in, on the one hand, acknowledging that, as a general matter, renewables will be built regardless of the exemption and, on the other hand, recognizing that, once a limited exemption is in effect and developers have invested in particular resources, it is reasonable to provide a three-year transition period to ensure a smooth transition to the new market-based approach. While the renewables exemption did not drive or induce renewables construction, particular individual investment choices may have been made in reliance on the possibility of securing the exemption. Accordingly, we continue to find that allowing gradual phase-out of the administratively-set renewables exemption (a three-year transition period commensurate with the three-year period for allowing up to 600 MW of renewable resources to participate in the capacity auction without being subject to the MOPR) is reasonable. While market participants participated in the IMAPP stakeholder process, until ISO-NE filed and the Commission accepted CASPR, they could not be certain how the ISO-NE Tariff and FCM rules might change prospectively. During this period of uncertainty, investments reasonably would have been made based on the ISO-NE Tariff rules in effect pre-CASPR. Moreover, as the Commission noted in the CASPR Order, it is not unusual for the Commission to allow a gradual transition to a new market mechanism.³⁰⁰

ii. **Price Suppression**

(a) **Rehearing Request**

113. NextEra-NRG contend that the Commission erred by finding that the three-year phase-out of the renewables exemption is just and reasonable. NextEra-NRG argue that the FCM will continue to clear well below the Net Cost of New Entry, given the current state of the market, ongoing state initiatives for the entry of clean resources, and ISO-NE's determination since issuance of the CASPR Order that it will seek to retain a retiring resource for reliability and fuel security.³⁰¹ NextEra-NRG argue that the continuation of the renewables exemption will result in unjust and unreasonable price suppression and undue discrimination and the Commission's failure to consider price suppression in its balancing analysis is capricious.³⁰²

114. NextEra-NRG claim that the Commission erred by finding that the inclusion of the phase-out of the renewables exemption in CASPR constitutes a "balanced approach"

³⁰⁰ See *id.* P 100 n.183 (citing *ISO New England Inc.*, 155 FERC ¶ 61,319 at P 62; *ISO New England Inc.*, 147 FERC ¶ 61,172 at P 73).

³⁰¹ See NextEra-NRG Rehearing Request at 2-3.

³⁰² See *id.* at 3.

without considering the price suppressive effects of the renewables exemption.³⁰³ NextEra-NRG assert that the Commission's failure to tackle the effect of price suppression on market outcomes is not just and reasonable ratemaking.³⁰⁴

115. Specifically, NextEra-NRG contend that the Commission never balanced any particular quantity of price suppression against any particular value (monetary or otherwise) achieved by permitting uneconomic new entry through the transitional renewables exemption.³⁰⁵ NextEra-NRG assert that, even after the Commission acknowledged ISO-NE's conclusion that the assumptions upon which the Commission ultimately approved the original renewables exemption did not bear out – and therefore price suppression is more likely – the Commission nevertheless solely balanced investor confidence and the states' policies for adding more renewables.³⁰⁶ NextEra-NRG argue that the Commission acted capriciously for failing to analyze price suppression, given the “now known facts almost four years after ISO-NE's original [renewables exemption] filing.”³⁰⁷

116. NextEra-NRG insist that the Commission erred by failing to set for hearing the need for, or price suppression associated with, the three-year phase-out of the renewables exemption from the MOPR mechanisms, thus undermining the intent of the CASPR proposal to reduce FCA price suppression.³⁰⁸ NextEra-NRG assert that, by not quantifying price suppression, the Commission violated the FPA and the APA, ignored record evidence, and failed to respond meaningfully to legitimate objections.³⁰⁹

117. NextEra-NRG point out that they had raised a concern in their CASPR protest that the underlying justification for the renewables exemption – that the exemption had “limited” potential to suppress prices – was no longer valid given that the three-year phase-out will allow up to 514 MW of capacity to enter the market through

³⁰³ *Id.* at 9.

³⁰⁴ *See id.*

³⁰⁵ *See id.* at 7.

³⁰⁶ *See id.*

³⁰⁷ *Id.* at 7-8.

³⁰⁸ *See id.*

³⁰⁹ *See id.*

a MOPR exemption.³¹⁰ NextEra-NRG claim that the concern is further heightened by ISO-NE's announcement on April 3, 2018 that it intends to reject Exelon Generation's FCA 13 retirement bids for Mystic Units 7, 8, 9 and the Jet unit, which total approximately 2,000 MW, on the grounds of reliability or new fuel security concerns.³¹¹ NextEra-NRG argue that, assuming these units do not retire, any new entry by renewables in FCA 13 will come through the renewables exemption in a system that is already substantially long in capacity.³¹²

118. NextEra-NRG state that the Supreme Court has repeatedly reaffirmed the *Hope*³¹³ "end result" standard for determining whether a rate is just and reasonable.³¹⁴ NextEra-NRG add that, while the Commission is not required to forecast rates with "exacting precision,"³¹⁵ it is required to provide some "rough" approximation of what the effects of its orders will be.³¹⁶ NextEra-NRG assert that, if the Commission does not provide a quantitative estimate of the effects its orders will have, then it must explain "specifically why it could not have done so."³¹⁷ NextEra-NRG contend that, given that there will be no retirements in FCA 13, such an estimate can be performed because prices are set by resources at the margin.

119. NextEra-NRG assert that ISO-NE's own analysis shows that the Commission needs to consider price suppression forecasts in its determination. NextEra-NRG state that Dr. Ethier, on behalf of ISO-NE, previously conceded in the renewables exemption proceeding that there will be "systematic downward pressure on prices" if "exempted

³¹⁰ *Id.* at 7.

³¹¹ *See id.* at 7 & n.13.

³¹² *See id.* at 7 & n.14.

³¹³ 320 U.S. 591 (1944).

³¹⁴ NextEra-NRG Rehearing Request at 8 & n.16 (citing *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987) (en banc) (collecting cases)).

³¹⁵ *Id.* at 8 & n.17 (citing *Midwest ISO Trans. Owners v. FERC*, 373 F.3d at 1369).

³¹⁶ *Id.* at 8 & n.18 (citing *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009); *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 898 (D.C. Cir. 2009)).

³¹⁷ *Id.* at 8 & n.19 (citing *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017)).

renewable entry does not exceed average annual load growth.”³¹⁸ NextEra-NRG add that Dr. Ethier went on to state that, ““when the market is long’ (that is, available supply exceeds peak demand),” then “renewable entry would be expected to slow the market’s return to equilibrium’ (i.e., reduce prices).”³¹⁹ NextEra-NRG contend that these very concerns have arisen, pointing to ISO-NE’s explanation in its transmittal letter in this proceeding:

[T]he region now has significant excess capacity; in FCA 11, FCM procured excess resources amounting to 1,760 MW over the net Installed Capacity Requirement (NICR). As a result, FCM cleared well below the Net Cost of New Entry (“CONE”) in FCA 11. Exacerbating this situation, Massachusetts is expected to contract for approximately 2,800 MW (nameplate value) of sponsored *new* supply resources to meet legislative mandates, and the region has not experienced the expected load growth. On the latter point, for FCA 12, NICR declined to 33,725 MW from 34,075 in FCA 11. There were small declines in FCAs 9 and 10 as well. Under

³¹⁸ *Id.* at 8 & n.20 (citing ISO New England Inc. Demand Curve Changes, Docket No. ER14-1639 (filed Apr. 1, 2014), Testimony of Dr. Ethier at 41:3-5). NextEra-NRG fault the Commission for “never stating that it is relying on Dr. Ethier’s now disclaimed prior testimony or associated statements in ISO-NE’s transmittal letter.”) *Id.* n.12. NextEra-NRG argue that the Commission should have acknowledged in the CASPR Order that it was relying on Dr. Ethier’s testimony in the renewables exemption docket. *See id.* at n.20. To be clear, in the background section of the CASPR Order, the Commission cited to its prior orders in the renewables exemption proceeding, and, in those orders, the Commission acknowledged that it was relying on Dr. Ethier’s testimony. *See* CASPR Order, 162 FERC ¶ 61,205 at P 3 & n.4 (citations omitted). Moreover, NextEra-NRG’s argument misses the point because the Commission need not re-affirm the renewables exemption ab initio in this proceeding, but rather must ensure that CASPR, in tandem with the renewables exemption phase-out, is just and reasonable. *See id.* P 99. NextEra-NRG has not shown how continuation of the previously-accepted renewables exemption for a three-year period renders CASPR unjust and unreasonable. *Id.* But, we further note that, in sustaining the three-year phase out of the renewables exemption, we rely on the renewables exemption orders, ISO-NE’s filing, *see, e.g.*, ISO-NE Transmittal at 10-13; Geissler Testimony at 17-29, and relevant pleadings.

³¹⁹ NextEra-NRG Rehearing Request at 8-9 & n.21 (citing Dr. Ethier Testimony at 42:4-6).

these conditions, the market may continue to clear well below Net CONE for the foreseeable future.³²⁰

(b) Commission Determination

120. The Commission has previously found that the renewables exemption would not result in unjust and unreasonable FCM clearing prices.³²¹ The D.C. Circuit has affirmed that finding, stating that “the Commission reasonably balanced the potential for limited price suppression against competing interests in concluding that the renewable exemption to the minimum offer price rule is consistent with the purpose of the forward capacity market.”³²² The court explicitly stated that it was reasonable for the Commission to undertake such balancing.³²³ ISO-NE proposed a reasonable three-year phase-out of the renewables exemption under CASPR to preserve investor confidence and stability of the market.³²⁴ We continue to find that providing such a transition period benefits customers by ensuring stability so that investors will be more willing to risk financing resources, which in turn supports resource adequacy at reasonable rates.³²⁵

³²⁰ *Id.* at 9 & n.22 (citing ISO-NE Transmittal at 10-11) (internal citations omitted).

³²¹ *See* Renewables Exemption Order, 147 FERC ¶ 61,073 at P 81.

³²² *NextEra*, 898 F.3d at 21.

³²³ *Id.*; *accord, e.g.*, Renewables Exemption Remand Rehearing Order, 158 FERC ¶ 61,138 at P 43 (“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.”).

³²⁴ *See* ISO-NE Transmittal at 11. We note that this three-year period mirrors both the fact that the FCA is run three years in advance of performance and the fact that the renewables exemption was designed to allowed up to 200 MW to be exempt annually from the FCA, with a cap of 600 MW, which is the sum of three years of maximum exempt MW amounts.

³²⁵ *See* CASPR Order, 162 FERC ¶ 61,205 at PP 99-101.

121. NextEra-NRG acknowledge that the Commission is not required to forecast rates with “exacting precision”³²⁶ but nonetheless fault it for not providing some “rough” approximation of what the effects of its orders will be.³²⁷ NextEra-NRG are mistaken: in originally accepting the renewables exemption, the Commission anticipated that any price suppressive effects would be balanced by a load increase.³²⁸ In the Renewables Exemption Remand Rehearing Order, the Commission recognized that this load increase had not materialized, but also relied on Dr. Ethier’s testimony regarding the substantial amount of anticipated retirements to determine that retirements would offset the renewable exemption’s price suppressive effects.³²⁹ The *NextEra* court affirmed this analysis.³³⁰ Subsequently, in accepting CASPR, including the phase-out of the renewables exemption, the Commission determined that, based on CASPR design choices and record evidence, “CASPR will allow the FCM to continue to meet its objective of providing resource adequacy at just and reasonable rates.”³³¹ We continue to support the reasonableness of this finding.

122. NextEra-NRG misunderstand the nature of the Commission’s balancing role under *Hope* and *Duquesne*. *Hope* and *Duquesne* speak of balancing the customer and utility (i.e., supplier or generator) interests, which the Commission found that CASPR achieves. In the CASPR Order, the Commission explained that CASPR “seeks to maintain a stable investment environment.”³³² Gradually phasing out the administratively-based renewables exemption while implementing CASPR’s market-based solution supports that stability. As the Commission explained, it is reasonable to allow a transition so that those who had expectations based on the renewables exemption could shift their investment strategy based on the new CASPR

³²⁶ NextEra-NRG Rehearing Request at 8 & n.17 (citing *Midwest ISO Trans. Owners v. FERC*, 373 F.3d at 1369).

³²⁷ See *id.* at 8 & n.18 (citing *Ill. Commerce Comm’n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009); *La. Pub. Serv. Comm’n v. FERC*, 184 F.3d 892, 898 (D.C. Cir. 2009)).

³²⁸ See Renewables Exemption Remand Order, 155 FERC ¶ 61,023 at P 43 & n.20 (quoting Dr. Ethier’s Testimony at 41).

³²⁹ See Renewables Exemption Remand Rehearing Order, 158 FERC ¶ 61,138 at P 20.

³³⁰ See *NextEra*, 898 F.3d at 25.

³³¹ CASPR Order, 162 FERC ¶ 61,205 at P 25.

³³² CASPR Order, 162 FERC ¶ 61,205 at P 100.

system.³³³ While everyone benefits from resource adequacy, CASPR supports supplier interests primarily by ensuring just and reasonable rates in the primary auction. CASPR supports customer interests primarily by sustaining long-term resource adequacy at just and reasonable rates and allowing Sponsored Policy Resources to enter the FCA via the substitution auction, which reduces the possibility of payments for duplicative capacity.

123. We further disagree with NextEra-NRG's contention that allowing up to 514 MW of capacity to enter the market through a MOPR exemption would have more than a limited effect on price suppression. In upholding the renewables exemption after a voluntary remand, the Commission pointed out that ISO-NE had predicted 6,500 MW of retirements by 2020, which is a substantial portion of the 35,000 MW market.³³⁴ ISO-NE subsequently estimated that, by 2020, 30% of the regional capacity will have committed to cease operation or will be at risk of retirement.³³⁵ The Commission observed that the predicted retirements far exceeded the 600 MW carryforward cap and concluded that the exempted renewable energy would only make a small impact in replacing retiring resources.³³⁶ Although the Commission acknowledged that limited price suppression could occur, even with such substantial retirements,³³⁷ the court found that "the Commission is not required to protect against all price suppression. The Commission acted reasonably in concluding that retirements would help mitigate any price suppression."³³⁸ NextEra-NRG offer no basis to question the continuing validity of this analysis. Moreover, we note that the renewables exemption would only continue to be in effect for a limited period of time and, as previously noted, the Commission has accepted reasonable transition mechanisms in the past.³³⁹

³³³ *See id.* PP 99-100.

³³⁴ *See* Renewables Exemption Remand Order, 155 FERC ¶ 61,023 at P 53; Renewables Exemption Remand Rehearing Order, 158 FERC ¶ 61,138 at P 73.

³³⁵ *See* Renewables Exemption Remand Order, 155 FERC ¶ 61,023 at P 53.

³³⁶ *See* Renewables Exemption Remand Rehearing Order, 158 FERC ¶ 61,138 at P 36.

³³⁷ *See, e.g., id.* P 8 (agreeing with generators that renewables exemption shifts the supply curve to the right and reduces FCM capacity prices, but finding it does not unreasonably suppress capacity prices).

³³⁸ *NextEra*, 898 F.3d at 25.

³³⁹ *See supra* note 285.

124. NextEra-NRG's argument that ISO-NE's rejection of the Mystic units' retirement bids will exacerbate the alleged price suppression caused by the CASPR program is beyond the scope of this proceeding. While further changes to the FCM have been proposed and in some cases accepted since the issuance of the CASPR order, which may result in greater or lesser revenues for capacity resources, the Commission's acceptance of the CASPR program was based on the conditions of the capacity market at that time, and NextEra-NRG have failed to demonstrate that those conditions have changed so significantly as to render the Commission's prior conclusion as to price suppression no longer accurate.³⁴⁰ Thus, to the extent that NextEra-NRG have concerns regarding the impact on the capacity market resulting from the treatment of the Mystic units, they may raise those concerns in the ongoing proceedings related to those units.³⁴¹

125. We disagree with NextEra-NRG's assertion that, if the Commission does not provide a quantitative estimate of the effects its orders will have, then it must explain "specifically why it could not have done so,"³⁴² claiming that, given that there will be no

³⁴⁰ While we do not rely on the results of post-filing auctions to support the Commission's acceptance of CASPR, the fact that ISO-NE has continued to procure sufficient capacity to meet reliability needs indicates that capacity prices have not been suppressed sufficiently to prevent the FCM from fulfilling its function. *See* Transmittal, ISO New England, Inc., Docket No. ER19-295-000 at 4-5 (Nov. 6, 2018) (ISO-NE reported that it was seeking to procure a net Installed Capacity Requirement of 33,750 MW, and 34,925 MW of existing capacity and 8,716 MW of new capacity had qualified to participate in the FCA); *see also* Transmittal, ISO New England, Inc., Docket No. ER21-372-000 at 4-5 (Nov. 10, 2020) (ISO-NE reported that it was seeking to procure a net Installed Capacity Requirement of 33,270 MW, and 33,662 MW of existing capacity and 7,030 MW of new capacity had qualified to participate in the FCA).

³⁴¹ NextEra is, in fact, raising its concerns regarding price suppression in the Commission's proceeding on the retention of the Mystic units. *See* NextEra Request for Rehearing, Constellation Mystic Power, LLC, Docket No. ER18-1639-002, at 11-15 (filed Jan. 22, 2019).

³⁴² NextEra-NRG Rehearing Request at 8 & n.19 (citing *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017)). We note, in particular, that the D.C. Circuit's holding in *Sierra Club* concerns quantification, where possible, of potential environmental impacts under standards, not applicable here, set by the National Environmental Policy Act. 867 F.3d at 1374. The same court's later decision in *NextEra*, applying the Federal Power Act standard applicable here, explains, as discussed above, that "[p]rice suppression is not a scientific determination, but rather an economic construct," and holds that the Commission may base its market predictions on

retirements in FCA 13, such an estimate can be readily performed because prices are set by resources at the margin. There are other factors besides retirements that affect these estimates. For example, the Commission does not know which import resources will participate, or the magnitude of non-retirement de-list bids. Given these uncertainties, any such estimates are likely to be speculative and unreliable. Accordingly, the Commission instead appropriately relies on its findings, grounded in economic theory, that phasing out the renewables exemption will support maintaining a stable investment environment, while allowing the FCM, with CASPR, to continue to balance the two objectives of: (1) ensuring necessary capacity at just and reasonable rates; and (2) accommodating the entry of Sponsored Policy Resources into the FCM over time.

iii. **Continue Exemption Indefinitely**

(a) **Rehearing Request**

126. Clean Energy Advocates argue that the Commission failed to assess the degree to which phasing out the renewables exemption and replacing it with the substitution auction would prevent Sponsored Policy Resources from participating in the market and thereby failed to consider the costs the CASPR proposal would place on customers.³⁴³

127. Clean Energy Advocates contend that CASPR was premised on the notion that ISO-NE Tariff revisions were necessary because states have increased their renewable energy procurement targets beyond the amount for which the renewables exemption would facilitate capacity market entry.³⁴⁴ But Clean Energy Advocates assert that phasing out the renewables exemption and replacing it with the CASPR method, which they claim renders market access more difficult to achieve, revises the ISO-NE Tariff in the opposite direction from what is necessary to ensure just and reasonable rates.³⁴⁵

128. Clean Energy Advocates argue that, with states increasing their renewables targets and procurement amounts, ISO-NE should have updated the renewables exemption to continue to facilitate state environmental goals while maintaining

“basic economic theory,” if reasonably explained and applied. *NextEra*, 898 F.3d at 24 (citing *Sacramento Mun. Util. Dist.*, 616 F.3d at 531; *South Carolina*, 762 F.3d at 65).

³⁴³ See Clean Energy Advocates Rehearing Request at 4.

³⁴⁴ See *id.* at 19.

³⁴⁵ See *id.*

reliability in the region at least cost.³⁴⁶ Clean Energy Advocates assert that the simplest way to achieve this goal would have been to update the renewables exemption to ensure eligibility. Clean Energy Advocates contend that an alternative solution would be to update the MOPR's definition of "out-of-market" revenues to exclude revenues from these Sponsored Policy Resource procurements, reflecting the fact that the revenues are earned through a competitive process and taking into account benefits that are not factored into the Commission's markets.³⁴⁷

(b) Commission Determination

129. The Commission has considered CASPR's effect on Sponsored Policy Resources' participation in the FCM. The Commission acknowledged that CASPR will phase Sponsored Policy Resources into the FCM over time, rather than allow them in all at once.³⁴⁸ We continue to find this gradual approach, in which the quantity of Sponsored Policy Resources is linked to retirements, is appropriate to preserve a competitive FCM price, which should, in turn, continue to attract investment.³⁴⁹ As discussed above, the Commission also explained why CASPR has the potential to allow more Sponsored Policy Resources into the FCM than the limited renewables exemption.³⁵⁰ Also, the Commission considered the impact of CASPR on customers.³⁵¹ The Commission agreed with ISO-NE's recommendation to prioritize the preservation of a competitive FCA price to ensure investor confidence, which in turn helps sustain resource adequacy, after weighing the cost of excess capacity against the resource adequacy issues that could ensue from eliminating application of the MOPR to

³⁴⁶ See *id.* at 19-20; *id.* at 8 (defining social costs as meeting reliability needs at least cost).

³⁴⁷ See *id.* at 20.

³⁴⁸ See CASPR Order, 162 FERC ¶ 62,205 at P 25 (discussing the careful coordination of the entry of Sponsored Policy Resources into the FCM with the exit of from the FCM of an equal amount of retiring capacity); *id.* P 102 (same); *id.* P 72 (accepting ISO-NE's prioritization of maintaining competitive prices in the FCM over the entry of Sponsored Policy Resources into the FCM over time).

³⁴⁹ See *id.* PP 25, 102.

³⁵⁰ See *id.* P 101.

³⁵¹ See, e.g., *id.* P 24 (explaining how out-of-market state support can cause customers to pay twice for capacity, which CASPR was designed to ameliorate).

Sponsored Policy Resources.³⁵² The court has acknowledged that the Commission does not need to quantify the impact of a market design on customers' bottom line, particularly when there a number of uncertain variables, impossible to calculate in the present, which could affect the analysis.³⁵³ Here, these uncertain variables include the quantity of imports and associated offer prices, the volume of retirements and retirement offers and future market conditions.³⁵⁴ We continue to find the economic principles underlying CASPR to be sound.

130. Next, we reiterate that ISO-NE did not propose to eliminate the MOPR as applied to Sponsored Policy Resources. As a section 205 proceeding, we find that ISO-NE justified its CASPR proposal and thus we do not need to consider alternative proposals.³⁵⁵

131. Moreover, we disagree with Clean Energy Advocates' contention that, in lieu of CASPR, ISO-NE should refine and continue the renewables exemption. As the Commission explained, CASPR replaced the renewables exemption with a market-based mechanism designed to ensure transparent, competitively-based capacity prices while addressing overbuild concerns. As ISO-NE's expert witness Geissler testified, the renewables exemption is unlikely to accommodate Sponsored Policy Resources into the FCM effectively in the future as procurements increase and new types of capacity supply are contracted.³⁵⁶ The renewables exemption also fails to maintain competitively-based capacity prices because new capacity that qualifies under the renewables exemption may price its capacity below its competitive value in the primary auction by incorporating its state subsidy into its offer, which can lower FCA clearing prices below competitive values.³⁵⁷ The renewables exemption alone fails to prevent overbuilding capacity because some technology types, such as the hydropower Massachusetts has opted to

³⁵² *See id.* P 72.

³⁵³ *See, e.g., NextEra*, 898 F.2d at 24 (“The Commission is not required to rely only on quantitative predictions.”).

³⁵⁴ *See, e.g., ISO-NE Tariff* § III.13.1.3.1-III.13.1.3.5.8 (tariff provisions involving import capacity).

³⁵⁵ *See Cal. Indep. Sys. Operator Corp.*, 120 FERC ¶ 61,023, at P 45 & n.34 (2007) (“For a proposal to be acceptable, it need not be perfect nor even the most desirable; it need only be reasonable.”), *reh'g denied*, 124 FERC ¶ 61,094 (2008), *aff'd*, *Sacramento Mun. Util. Dist.*, 616 F.3d 520).

³⁵⁶ *See* Geissler Testimony at 17:4-18:6.

³⁵⁷ *See id.* at 18:10-14.

procure, do not qualify for the exemption because they do not meet the specifications under state standards or goals in effect on January 1, 2014.³⁵⁸ And, even if ISO-NE were to change the qualification parameters for the renewables exemption, as Clean Energy Advocates suggest, the renewables exemption administratively caps the quantity of new capacity that can bypass the MOPR.³⁵⁹ Because the cap is not related to market conditions but rather is set administratively, the renewables exemption does not have the potential to allow as many megawatts of Sponsored Policy Resources to enter the FCM as CASPR does.³⁶⁰ It could also suppress prices relative to CASPR, which is designed to maintain competitive prices in the FCA. For these reasons, we continue to find that the Commission's acceptance of CASPR was a just and reasonable and market-based approach that better addresses the interplay between state and Commission policies than the renewables exemption, its administratively-based predecessor.

132. Finally, we sustain the Commission's determination not to require ISO-NE to modify CASPR by adding an annual 200 MW backstop renewables exemption.³⁶¹ We continue to find that ISO-NE's proposal is just and reasonable without such a backstop mechanism. ISO-NE has justified phasing out the renewables exemption because this administratively-based mechanism conflicts with and potentially undermines CASPR's market-based approach.³⁶² Implementing a perpetual, annual 200 MW "backstop" would exacerbate this situation, as renewable resources would tend to favor the exemption approach to entering the FCM, potentially diminishing a well-functioning and robust substitution auction.

³⁵⁸ *See id.* at 17:10-19.

³⁵⁹ *See id.* at 19.

³⁶⁰ *See id.*

³⁶¹ *See* CASPR Order, 162 FERC ¶ 61,205 at PP 99-102.

³⁶² *See* ISO-NE Answer, Docket No. ER18-619-000 at 10 (filed Feb. 13, 2018) ("The continuation of the [renewables] exemption (or a backstop) would undermine CASPR because no sponsored policy resource would elect to sell capacity at a low price in the substitution auction when it could instead receive the higher primary auction price through the exemption.").

The Commission orders:

In response to the rehearing requests filed by Clean Energy Advocates, Consumer-Owned Systems, NextEra-NRG, and Public Citizen, the CASPR Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.

Docket No. ER18-619-001

(Issued November 19, 2020)

GLICK, Commissioner, *dissenting*:

1. I dissent from today's order because I do not believe that ISO New England Inc.'s Competitive Auctions with Sponsored Policy Resources (CASPR) construct is a just and reasonable means of accommodating state public policies in its Forward Capacity Market (FCM). Although CASPR had some theoretical appeal, the nearly three years since the Commission accepted the filing have made clear that, in practice, CASPR simply is not up to the task of accommodating the New England states' efforts to decarbonize their electricity sector and address the threat of climate change. It is time to go back to the drawing board.

2. CASPR is, at its core, another effort to make a minimum offer price rule (MOPR) an effective way to mediate the interaction between state public policies and the FCM. That is a fool's errand. Electricity markets are, and always have been, the product of public policy. Pretending otherwise or trying to mitigate our way to a market free from the effects of certain public policies will only harm customers, create needless federal-state tensions, and undermine faith in the regional markets whose development has been this Commission's crowning achievement. We must move beyond the MOPR.

3. I recognize that the question of how to reform electricity markets to manage the ongoing transition to a clean energy future is a complex one and that the right answer will likely vary among the different RTOs. But that is all the more reason to begin putting those structures in place now, rather than searching for ways to keep MOPR-based approaches on life support.

* * *

4. My theory of the case begins with a basic proposition: Under the Federal Power Act (FPA), the states, not the Commission, are responsible for shaping the mix of resources used to generate electricity. Although the FPA vests the Commission with jurisdiction over wholesale sales of electricity, as well as practices affecting those wholesale sales,¹ Congress expressly precluded the Commission from regulating

¹ Specifically, the FPA applies to "any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission" and "any rule, regulation, practice, or contract

“facilities used for the generation of electric energy.”² The FPA preserves that responsibility for exclusive state jurisdiction.³

5. But while those jurisdictional lines are clearly drawn, the respective spheres of jurisdiction themselves are not “hermetically sealed.”⁴ One sovereign’s exercise of its authority will inevitably affect matters subject to the other sovereign’s exclusive jurisdiction.⁵ For example, any state regulation that increases or decreases the number of generation facilities will, through the law of supply and demand, inevitably affect

affecting such rate, charge, or classification.” 16 U.S.C. § 824e(a); *see also id.* § 824d(a) (similar).

² *See id.* § 824(b)(1); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016) (describing the jurisdictional divide set forth in the FPA); *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 767 (2016) (*EPSA*) (explaining that “the [FPA] also limits FERC’s regulatory reach, and thereby maintains a zone of exclusive state jurisdiction”); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm’n of Ind.*, 332 U.S. 507, 517-18 (1947) (recognizing that the analogous provisions of the Natural Gas Act (NGA) were “drawn with meticulous regard for the continued exercise of state power”). Although these cases deal with the question of preemption, which is, of course, different from the question of whether a rate is just and reasonable, the Supreme Court’s discussion of the respective roles of the Commission and the states remains instructive when it comes to evaluating how the application of a MOPR squares with the Commission’s role under the FPA.

³ 16 U.S.C. § 824(b)(1); *Hughes*, 136 S. Ct. at 1292; *see also Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 205 (1983) (recognizing that issues including the “[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States”).

⁴ *EPSA*, 136 S. Ct. at 776; *see Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1601 (2015) (explaining that the natural gas sector does not adhere to a “Platonic ideal” of the “clear division between areas of state and federal authority” that undergirds both the FPA and the NGA).

⁵ *See EPSA*, 136 S. Ct. at 776; *Oneok*, 135 S. Ct. at 1601; *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 57 (2d Cir. 2018) (explaining that the Commission “uses auctions to set wholesale prices and to promote efficiency with the background assumption that the FPA establishes a dual regulatory system between the states and federal government and that the states engage in public policies that affect the wholesale markets”).

wholesale rates.⁶ Nevertheless, the existence of such cross-jurisdictional effects is not necessarily a “problem” for the purposes of the FPA. Rather, those effects are the product of the “congressionally designed interplay between state and federal regulation”⁷ and the natural result of a system in which regulatory authority over a single industry is divided between federal and state government.⁸ Maintaining that interplay and permitting each sovereign to carry out its designated role is essential to the federalist regime that Congress made the foundation of the FPA.

6. When the Commission tries to prevent state public policies from having their inevitable, but indirect effect on a capacity market, it takes on the role that Congress reserved for the states. That is true even where the Commission claims that its only “policy” is to block the *effects* of state public policies, not the policies themselves. After all, a federal policy of eliminating the effects of state resource decisionmaking policies is itself a form of public policy—just not one that Congress gave the Commission authority to pursue.

7. In any case, as former Chairman Norman Bay correctly observed, an “idealized vision of markets free from the influence of public policies . . . does not exist, and it is impossible to mitigate our way to its creation.”⁹ Instead, public policy and energy

⁶ *Zibelman*, 906 F.3d at 57 (explaining how a state’s regulation of generation facilities can have an “incidental effect” on the wholesale rate through the basic principles of supply and demand); *id.* at 53 (“[I]t would be ‘strange indeed’ to hold that Congress intended to allow the states to regulate production, but only if doing so did not affect interstate rates.” (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kan.*, 489 U.S. 493, 512-13 (1989) (*Northwest Central*))); *Elec. Power Supply Ass’n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) (explaining that the subsidy at issue in that proceeding “can influence the auction price only indirectly, by keeping active a generation facility that otherwise might close A larger supply of electricity means a lower market-clearing price, holding demand constant. But because states retain authority over power generation, a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law.”).

⁷ *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (quoting *Northwest Central*, 489 U.S. at 518); *id.* (“recogniz[ing] the importance of protecting the States’ ability to contribute, within their regulatory domain, to the [FPA]’s goal of ensuring a sustainable supply of efficient and price-effective energy”).

⁸ *Cf. Star*, 904 F.3d at 523 (“For decades the Supreme Court has attempted to confine both the Commission and the states to their proper roles, while acknowledging that each use of authorized power necessarily affects tasks that have been assigned elsewhere.”).

⁹ *N.Y. State Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC

markets are inextricably intertwined.¹⁰ Nearly every aspect of the electricity market is affected by at least one—and more often many—federal, state, or local policies.¹¹ Even if the Commission were to succeed in ferreting out the effects of state efforts to shape the generation mix, the result would not be a “competitive”¹² market as the Commission defines the term. Instead, the market would continue to reflect the long history of federal and state public policy, ignoring only the contemporary effects of the very policy decisions that Congress expressly reserved for the states.

8. The futility of trying to simulate a market free of public policy is particularly evident in New England, where the states are actively exercising their authority over generation facilities to decarbonize their electricity sectors and confront the urgent threat posed by climate change.¹³ The Commission’s efforts to block the effects of those policies will not lead the states to abandon them. If anything, we are more likely to watch the states ramp up their policies as the consequences of climate change become ever more apparent than we are to watch them acquiesce in the Commission’s efforts to “nullify” those policies.¹⁴ Turning RTO market rules into one of the principal barriers to

¶ 61,137 (2017) (Bay, Chairman, concurring at 2).

¹⁰ As the FPA itself recognizes, “the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest.” 16 U.S.C. § 824.

¹¹ See *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019) (Glick, Comm’r, dissenting at PP 27-28) (discussing the scope of federal and state subsidies affecting the PJM capacity market); *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (Glick, Comm’r, dissenting at 6-9) (explaining how “[g]overnment subsidies pervade the energy markets and have for more than a century”); *ISO New England Inc.*, 162 FERC ¶ 61,205 (2018) (CASPR Order) (Glick, Comm’r, dissenting in part and concurring in part at 3) (“Our federal, state, and local governments have long played a pivotal role in shaping all aspects of the energy sector, including electricity generation.”).

¹² See *ISO New England, Inc.*, 173 FERC ¶ 61,162, at P 38 (2020) (CASPR Rehearing Order) (explaining that ensuring “competitive participation in the FCM” involves “screening out revenues that are only available to a subset of suppliers”).

¹³ See, e.g., New England’s Regional Wholesale Electricity Markets and Organizational Structures Must Evolve For 21st Century Clean Energy Future, http://nescoe.com/wp-content/uploads/2020/10/Electricity_System_Reform_GovStatement_14Oct2020.pdf.

¹⁴ *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 at PP 10, 89 (recognizing, in a moment of rather refreshing candor, that applying the MOPR to

the realization of state policies will, sooner or later, fragment RTO markets and undermine the regionalization of the grid.

9. We must avoid that result. RTOs, and regional markets more generally,¹⁵ should be one of the principal building blocks for the transition to the electricity grid of the future. Regional markets can more effectively utilize resources of all types—both the clean resources promoted by state public policies, as well as other resources that currently help balance the system. That dynamic is critical to making the transition to a clean energy future as efficient as possible.¹⁶ To realize those efficiencies, RTOs—and this Commission—need to once and for all stop trying to fight the effects of state public policies and make accommodating those policies a foundational principle of RTO markets.

10. I recognize that CASPR, when it was proposed, was supposed to provide a way for State Sponsored Resources that were blocked by the MOPR to secure a capacity

federal policies would “disregard or nullify” those policies in a way that the Commission is prohibited from doing); *see id.* (Glick, Comm’r, dissenting at n.26) (“The Commission justifies its refusal to extend the MOPR to federal subsidies because to do so would ‘disregard or nullify the effect of federal legislation.’ But that can only mean that the Commission is fully aware that this is what it is doing to state policies, notwithstanding its repeated assurances that it respects state jurisdiction over generation facilities.”) (internal citations omitted); *see Calpine Corp. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,035 (2020) (Glick, Comm’r, dissenting at P 10) (similar).

¹⁵ Not all regionalization takes the form of an RTO. CAISO’s Energy Imbalance Market (EIM), for example, has similarly had great success in integrating renewable resources cost-effectively. *See* California Indep. Sys. Operator, Western EIM Benefits Report: Third Quarter 2020 at 17 (Oct. 29, 2020), <https://www.westerneim.com/Documents/ISO-EIM-Benefits-Report-Q3-2020.pdf> (calculating the benefits associated with avoided curtailment of renewables).

¹⁶ As I have previously explained, mitigating state-sponsored resources will cause RTOs to procure unneeded capacity at needlessly high prices. *See* CASPR Order, 162 FERC ¶ 61,205 (Glick, Comm’r, dissenting in part and concurring in part at 5) (“[T]he MOPR will force LSEs to procure more capacity than is needed to maintain resource adequacy, all of which consumers will be required to pay for. In addition, by increasing the market-clearing price in the capacity market, the MOPR increases the cost of *every* unit of capacity that clears the capacity auction.”). The result is to greatly increase the cost of maintaining resource adequacy as the state drives a transition to a clean energy future.

commitment through the so-called substitution auction.¹⁷ As I explained in my separate statement accompanying the underlying order, that approach had a theoretical appeal insofar as it could recognize the capacity contribution from certain State Sponsored Resources, which would help to accommodate state public policies while reducing costs to consumers.¹⁸ But, even so, CASPR was at root an attempt to work within the MOPR—a point best illustrated by ISO New England’s explanation that, at every turn, it prioritized preventing “price suppression” over accommodating state public policies.¹⁹ Accordingly, I concluded that while CASPR’s theoretical appeal was sufficient on that record to carry ISO New England’s burden under FPA section 205, whether it would ultimately remain just and reasonable would depend on how successful it proved in accommodating state public policies.²⁰

11. On that score, CASPR deserves a failing grade.²¹ Only a few dozen megawatts of state-sponsored capacity have cleared through the substitution auction in the first two Forward Capacity Auctions (FCA) featuring CASPR.²² Moreover, ISO New England

¹⁷ Transmittal at 5.

¹⁸ CASPR Order, 162 FERC ¶ 61,205 (Glick, Comm’r, dissenting in part and concurring in part at 6-7).

¹⁹ Transmittal at 1 (stating that “whenever possible,” ISO New England elected to preserve what it describes as “competitive prices” over the accommodation of state public policies); *see* CASPR Order, 162 FERC ¶ 61,205 at P 6 (reciting ISO New England’s description of CASPR’s goals).

²⁰ CASPR Order, 162 FERC ¶ 61,205 (Glick, Comm’r, dissenting in part and concurring in part at 6-7).

²¹ *Vineyard Wind LLC*, 173 FERC ¶ 61,058 (2020) (Glick, Comm’r, concurring at P 2).

²² *See id.* (Glick, Comm’r, concurring at P 2 & nn.5-6). Today’s order does not address the paucity of new capacity that has cleared through the substitution auction, presumably because it was not raised in the rehearing requests, which, as required by law, *see* 16 U.S.C. § 825l(a), were filed within thirty days of the underlying order. But those rehearing requests have languished before the Commission for almost three years, in which time ISO New England has run a pair of FCAs using CASPR. Given that the Commission elsewhere in today’s order relies on data about those auctions, it is arbitrary and capricious not to consider the ways in which that data from subsequent auctions undermines its conclusions in today’s order, particularly because the rehearing requests questioned whether CASPR would, in fact, accommodate those State Sponsored Resources. *E.g.*, Clean Energy Advocates Rehearing Request at 31-35 (“Had the Commission considered the issue, it would have found that there is insufficient evidence

has, in my view, failed to demonstrate the commitment to accommodating state public policies that is necessary to make a construct like CASPR successful.²³ Simply put, CASPR is not an adequate substitute for the Renewable Technology Exemption, which ISO New England phased out as part of the CASPR proposal.²⁴ That alone is sufficient for me to conclude that CASPR has not been shown to be just and reasonable.

12. In addition, the New England states have significantly increased their decarbonization ambitions since the Commission accepted CASPR. For example, Maine has adopted a 100% clean energy standard,²⁵ while other states in the region have dramatically increased their clean energy procurement goals.²⁶ The record in this

to conclude that the substitution auction will work to allow state-sponsored resources to enter the ISO-NE capacity market, thereby avoiding the procurement of thousands of megawatts of unneeded capacity.”); see *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) (“[A]n agency cannot ignore evidence that undercuts its judgment; and it may not minimize such evidence without adequate explanation.”); *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 962 (D.C. Cir. 2003) (explaining that a court “may not find substantial evidence ‘merely on the basis of evidence which in and of itself justified [the agency’s conclusion], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn’” (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951))); see also *Am. Gas Ass’n v. FERC*, 593 F.3d 14, 21 (D.C. Cir. 2010) (explaining that it is arbitrary and capricious for the Commission not to consider and adequately respond to arguments raised by dissenting Commissioners).

²³ *Vineyard Wind LLC*, 173 FERC ¶ 61,058 (Glick, Comm’r, concurring at PP 1-2); *ISO New England Inc.*, 166 FERC ¶ 61,061 (2019) (Glick, Comm’r, dissenting in part at 2).

²⁴ See CASPR Order, 162 FERC ¶ 61,205 at P 87. Whether a MOPR along with the Renewable Technology Exemption is itself just and reasonable is another question, but one that is not implicated by this filing.

²⁵ See An Act To Reform Maine's Renewable Portfolio Standard, Maine LD 1494 (2019).

²⁶ See, e.g., Adam Wilson, *New England Renewable Policies to Drive 12,500 MW of Renewable Capacity By 2030* (June 15, 2020), <https://www.spglobal.com/marketintelligence/en/news-insights/research/new-england-renewable-policies-to-drive-12500-mw-of-renewable-capacity-by-2030>; Nat’l Renewable Energy Lab., *Comparing Offshore Wind Energy Procurement and Project Revenue Sources Across U.S. States at 17-18* (2020), <https://www.nrel.gov/docs/fy20osti/76079.pdf> (detailing the New England states offshore wind procurement goals).

proceeding and the experience of the first two FCAs featuring CASPR do not provide any reason to believe that it will prove an effective means of accommodating those state policies.

13. No doubt that is partly because CASPR was never intended as a way of accommodating evolving state efforts decarbonize the resource mix. For example, CASPR established a cut-off date that made only resources sponsored by pre-existing state policies eligible for the substitution auction²⁷—surefire evidence that the construct was not designed with an eye toward the subsequent expansion of state efforts to address climate change.²⁸ A construct that is *designed not* to adapt to evolving state policies for addressing climate change is, almost *a fortiori*, destined to fail to accommodate those policies.

14. The Commission itself also bears considerable responsibility for my conclusion that CASPR is unjust and unreasonable. In the nearly three years since it issued the original CASPR Order, the Commission has thoroughly weaponized MOPRs into a tool for stymying state public policies and propping up prices.²⁹ Although the roots of that antagonistic approach to the states were evident in the CASPR Order,³⁰ both the

²⁷ CASPR Order, 162 FERC ¶ 61,205 at P 28.

²⁸ Today's order does not address how that cut-off date applies to the New England states' post-CASPR actions, again no doubt because most of that state activity took place in the nearly three years since the rehearing requests were filed, *see supra* note 22. Nevertheless, the failure to consider that question only underscores to extent to which the Commission has not seriously wrestled with the question of whether CASPR is an adequate means of accommodating state policies in the FCM.

²⁹ *See, e.g., Calpine Corp. v. PJM Interconnection, L.L.C.*, 173 FERC ¶ 61,061 (2020) (Glick, Comm'r, dissenting at P 8) (“The majority has taken MOPRs, already a controversial topic, and thoroughly weaponized them as a tool for increasing prices and stifling state efforts to promote clean energy.”); *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,060 (2020) (Glick, Comm'r, dissenting at P 4) (“Buyer-side market power rules—often referred to as minimum offer price rules or MOPRs—that were once intended only as a means of preventing the exercise of market power have evolved into a scheme for propping up prices, freezing in place the current resource mix, and blocking states' exercise of their authority over resource decisionmaking.”).

³⁰ CASPR Order, 162 FERC ¶ 61,205 at P 22 (stating that the Commission “intend[ed] to use the MOPR to address the impacts of state policies on the wholesale capacity markets”); *see id.* (Glick, Comm'r, dissenting in part and concurring in part at 1) (“The suggestion in today's order that the Commission will rely on MOPRs—or something similar—to mitigate the impacts of state public policies will eventually come

statements that accompanied that order³¹ and subsequent testimony before Congress,³² suggested that the original order's most antagonistic aspects lacked the support of a majority of the Commission.³³ Nevertheless, the approach foreshadowed in Paragraph 22 of the CASPR Order has come to perfectly capture the Commission's approach to state public policies.³⁴ In going down that misguided path, the Commission eliminated any chance that a MOPR-based approach to managing the effects of state public policies on wholesale markets could prove durable.³⁵ And, in so doing, the Commission's use of the MOPR against the states has convinced me that a MOPR-based approach to accommodating state public policies cannot be just and reasonable. The irony, of course, is that it has been this Commission's embrace of the MOPR that has done more than anything to hasten its ultimate demise.

15. Finally, the Commission's responses to various rehearing requests in today's order underscore why its acceptance of CASPR was arbitrary and capricious. First and

to rank as a historically serious misstep.”).

³¹ See *id.* (Glick, Comm'r, dissenting in part and concurring in part at n.1) (“My colleagues’ separate statements indicate that paragraph[] 22 of today’s order did not receive the votes of a majority of the Commission.”).

³² Gavin Bade, *Chatterjee Opposes MOPR as ‘Standard Solution’ For State Policies* (Apr. 19, 2018), <https://www.utilitydive.com/news/chatterjee-opposes-mopr-as-standard-solution-for-state-policies/521731/>.

³³ CASPR Order, 162 FERC ¶ 61,205 (Glick, Comm'r, dissenting in part and concurring in part at n.1).

³⁴ See *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,060 (Glick, Comm'r, at PP 28-29) (“[W]e are witnessing a federal agency attempt to stamp out the effects of a state’s efforts to promote a clean energy future.”); *Calpine Corp. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,035 (Glick, Comm'r, dissenting at PP 3-4) (criticizing the Commission for “establish[ing] a sweeping definition of state subsidy that will subject much, if not most, of the resources in PJM’s capacity market to a minimum offer price rule.”)

³⁵ At least as a means for managing the effects of state public policies. As I have previously explained, I believe MOPRs may have a legitimate role in managing the effects of actual buyer-side market power. *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,060 (Glick, Comm'r, dissenting at PP 1, 20). But, it should go without saying, buyer-side market power mitigation should be limited only to buyers with market power. *Id.*

foremost is the Commission's continued reliance on the term "investor confidence."³⁶ That concept, which the Commission pulled out for the first time in the CASPR Order, and its role in this proceeding have never been adequately explained.³⁷ Although today's order argues that the Commission provided a definition of the term in the CASPR Order,³⁸ it does not explain why "investor confidence" should be the lodestar by which the Commission evaluates whether a proposal to accommodate state public policies is just and reasonable. Instead, today's order directs us to the CASPR Order's statement that the "purpose of the FCM is to ensure that sufficient investors will be both available and willing to invest in capacity in New England."³⁹ But if one reads the cited language and accompanying authority carefully, it is clear that, prior to this proceeding, the Commission recognized that the purpose of the FCM was to produce the price signals needed to ensure resource adequacy at just and reasonable rates, which is not necessarily the same thing as maintaining investor confidence.⁴⁰ After all, price signals that encourage resource exit and discourage new entry might well undermine certain investors' confidence in the FCM while nevertheless being the result of a well-functioning market. As a result, nothing in the underlying order or today's order on rehearing explains the Commission's decision to shift its focus to ensuring "investor confidence" or how that shift could be construed as consistent with the Commission's previous orders or its obligation to ensure that wholesale rates and practices are just and reasonable and not unduly discriminatory or preferential.⁴¹

³⁶ CASPR Rehearing Order, 173 FERC ¶ 61,162 at PP 33-39.

³⁷ CASPR Order, 162 FERC ¶ 61,205 (Glick, Comm'r, dissenting in part and concurring in part at 4-5).

³⁸ CASPR Rehearing Order, 173 FERC ¶ 61,162 at P 33 ("[T]he meaning of the term "investor confidence" is readily gleaned from the CASPR Order. As the Commission explained, in the context of the FCM, investor confidence is the willingness to 'bear resource investment risk in exchange for an *opportunity* to earn a market return commensurate with that risk.'") (citing CASPR Order, 162 FERC ¶ 61,205 at P 23).

³⁹ CASPR Rehearing Order, 173 FERC ¶ 61,162 at P 35 (citing CASPR Order, 162 FERC ¶ 61,205 at P 21).

⁴⁰ See *ISO New England Inc.*, 155 FERC ¶ 61,023, at P 35 (2016) (describing "the purpose of the FCM" as "ensuring that price signals are sufficient to incent existing resources to stay in the capacity market, and new resources to enter, so that ISO-NE meets its reliability requirements at least cost"); see also *ISO New England Inc.*, 158 FERC ¶ 61,138, at P 9 (2017) ("One purpose of capacity markets is to send appropriate price signals regarding where and when new resources are needed.").

⁴¹ See *ABM Onsite Servs.-W., Inc. v. NLRB*, 849 F.3d 1137, 1142 (D.C. Cir. 2017)

16. In addition, the Commission has abandoned “investor confidence” in similar proceedings as it has flip-flopped between different justifications for its use of the MOPR in the different RTOs. In its various PJM MOPR orders, for example, the Commission justified its intervention using the equally inscrutable concepts of “market integrity” and the “premise of capacity markets” instead of relying on “investor confidence.”⁴² Although the different RTOs can pursue different market designs, the Commission has never, including in today’s order, coherently explained its practice of relying on different, seemingly unrelated buzz words to justify its actions in the different RTOs. That is arbitrary and capricious.

17. The Commission’s baffling assertion that allowing State Sponsored Resources to enter the capacity auction “*over time* will reduce the potential for New England to develop more resources than ISO-NE needs to maintain resource adequacy” is similarly arbitrary and capricious.⁴³ For every State Sponsored Resource that does not receive a capacity supply obligation, either through the main FCM mechanism or CASPR’s substitution auction, an additional resource will receive a corresponding capacity supply obligation and, presumably, participate in the market when it might not otherwise. That is, after all, the purpose of a capacity auction intended to guide resource entry and exit.⁴⁴ But that does not mean that State Sponsored Resources that are precluded from receiving a capacity supply obligation will not be built. Those resources are required to be developed under state law, even when their contribution to resource adequacy is ignored in the FCM. Neither economic theory nor the record before us supports the suggestion that limiting the capacity contribution from State Sponsored Resources, or allowing such resource entry only “*over time*,” will significantly reduce the potential for overbuilding. Rather, overbuilding—and the attendant harm⁴⁵—is the obvious and inevitable

(“[A]n agency’s unexplained departure from precedent is arbitrary and capricious.”).

⁴² See *Calpine Corp. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,035 (Glick, Comm’r, dissenting at P 18) see also *N.Y. Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,060 (Glick, Comm’r, dissenting at P 28) (criticizing the Commission for using different “buzz words” to justify its actions).

⁴³ CASPR Rehearing Order, 173 FERC ¶ 61,162 at P 57.

⁴⁴ See *supra* note 40 and accompanying text.

⁴⁵ *ISO New England Inc.*, 158 FERC ¶ 61,138 at P 9 (“If renewable resources are being built, but are not reflected in the FCM, then the FCM 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

consequence of a MOPR-based approach to state policies. There is no reason to believe that CASPR's phased approach to allowing State Sponsored Resources into the market will vitiate those harms.⁴⁶

18. For the foregoing reasons, I would grant rehearing and reject CASPR. I would not, however, send ISO New England back to the drawing board alone. As noted above, this Commission has for years mistakenly relied on MOPRs to "mitigate" the impacts of state public policies in the eastern RTOs.⁴⁷ The Commission, as much as any other entity, bears responsibility for the unsustainable place in which we find ourselves today. Moreover, the experience in multiple RTOs over recent years is that when the Commission sends an RTO off to implement a vague directive, especially when cut off from communication with the Commission by our *ex parte* regulations, we unnecessarily complicate the process of identifying a new just and reasonable rate. Accordingly, I believe that it is incumbent on the Commission to work cooperatively with the ISO, its stakeholders, and the New England states to settle upon a durable framework that accommodates state public policies while also ensuring that the wholesale market procures the resources and services needed to operate the grid reliably.

19. I do not believe that the current FCM is up to that task. In New England, as in the other eastern RTOs, it has become clear that the principles and assumptions that underlay the creation of the current capacity market constructs no longer hold. In particular, the days when the procurement of a single, undifferentiated "capacity" product could serve as an effective guide for efficient resource entry and exit are over. Especially in New England, concerns about the consequences that resource entry and exit decisions have for climate change, among other things, are likely to play a more important role in resource entry and exit than the FCM clearing price. It is past time for the resource adequacy paradigms to evolve accordingly. Rather than clinging to MOPRs as a way of blocking the effects of state public policies, we should be accelerating efforts to more efficiently procure the resources and services needed to reliably operate a clean energy grid.

capacity is needed.").

⁴⁶ Once again, I recognize that the CASPR proposal is an attempt to provide a way around the MOPR and that ISO New England's general application of the MOPR is not at issue in this proceeding. Nevertheless, insofar as the Commission is suggesting that the CASPR will avoid some or all of those harms, they become relevant to determining whether the Commission's decisionmaking is arbitrary and capricious.

⁴⁷ See *supra* P 14; see also *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,060 (Glick, Comm'r, dissenting at PP 3-19) (criticizing the Commission's bases for applying MOPRs to mitigate the effects of state public policies).

20. I do not mean to suggest that this task will be easy, seamless, or completed in one fell swoop. It will eventually require that all the relevant elements of an RTO—including not just the resource adequacy construct, but also the procurement of energy and ancillary services, as well as the planning and development of new transmission facilities—work in concert to accommodate the changing electricity sector. That will be no mean feat. But the longer the Commission waits to take those inevitable steps, the more harm it will do to RTO markets and the customers we are supposed to protect.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner