

DISCUSSION DRAFT (10/27/16)**Integrating Markets and Public Policy in New England Wholesale Electricity Markets:
Legal Analysis**Executive Summary

Participants in the New England wholesale electricity market seek to integrate renewable energy and environmental policies into FERC-regulated ISO New England markets. Proposals under discussion in the NEPOOL stakeholder process known as Integrating Markets and Public Policy (IMAPP) include the addition of a carbon price to the energy market and procurement mechanisms for zero-emission energy or capacity.

This memo explores FERC's authority under the Federal Power Act (FPA) to approve an ISO-NE tariff that includes these market mechanisms. Decades of FERC orders and federal court decisions emphasize that FERC's authority under the FPA is adaptable to industry changes. While legal precedent is not definitive, FERC approval of IMAPP proposals is legally justifiable and defensible. Nonetheless, IMAPP proposals present a few legal questions that have not been addressed by FERC or courts and that are potentially fatal to FERC's approval.

The industry's transition from cost-based rates to market-based rates for electricity sales illustrates the extraordinary flexibility of FERC's authority under the FPA. For decades, FERC had ensured that wholesale rates for electricity were "just and reasonable" and not "unduly discriminatory" by employing cost-of-service regulation. When a market-based approach gained support in the late twentieth century, FERC capitalized on the ambiguity of its statutory charge and proactively responded to industry changes. Concluding that *market-based* rates were just and reasonable and long-standing industry practices were unduly discriminatory, FERC mandated open-access transmission in order to facilitate competition. It then enabled the creation of regional wholesale markets and approved market rules, all with statutory authority initially implemented to regulate a very different industry.

Integrating renewable energy and carbon policies into those wholesale markets is similarly responsive to industry trends. Absent an unambiguous prohibition in the FPA preventing FERC from doing so, approving IMAPP is consistent with the generous construction of the FPA afforded by courts. The FPA's just and reasonable standard is now tied to enhancing competition, which provides a plausible connection to IMAPP. The FPA's core purposes of consumer protection and industry development provide additional connections between IMAPP and FERC's authority.

This memo addresses two threshold jurisdictional questions: 1) does IMAPP amount to impermissible regulation of state-regulated generation facilities, and 2) may FERC approve tariff provisions that are premised in part on state policies? Concluding that neither issue prevents FERC from approving an IMAPP proposal as just and reasonable, the memo then discusses proposed capacity market reforms, a carbon adder in the energy market, and a clean energy procurement mechanism. Capacity market reforms appear to be the least legally controversial, in part because courts have consistently upheld FERC orders on capacity market design. Discrimination claims are easy to allege against each proposal, but little precedent speaks directly to whether an IMAPP proposal is "unduly" discriminatory. Ultimately, if FERC concludes that IMAPP will result in just and reasonable rates, courts will be deferential to FERC's policy and technical judgments that support its determination.

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DISCUSSION DRAFT (10/27/16)**I. Introduction to IMAPP**

The New England Power Pool's (NEPOOL) Integrating Markets and Public Policy (IMAPP) stakeholder process aims to propose changes to the ISO-New England (ISO-NE) wholesale markets intended to advance state public policy objectives in New England.¹ A "problem statement" released in May 2016 by the New England States Committee on Electricity (NESCOE), which represents the New England Governors, summarizes the issue:

Competitive wholesale electricity markets are designed to meet New England's need to maintain reliability by selecting the lowest-cost resources. They do not include states' legal obligation to execute state energy and environmental laws. However, as the markets move the region to increasing reliance on one fuel source for power generation, questions about reliability become more acute. The challenge is finding a means to execute states' policy-related requirements at the lowest reasonable cost without unduly diminishing the benefits of competitive organized markets or amplifying the cost to consumers of implementing those state policies in order to maintain markets.²

Three proposals have emerged from the stakeholder process:

1. Include a carbon price in the ISO-NE energy market;
2. Modify the capacity market construct either a) to include a mechanism for procuring zero-emission resources or b) to protect the market from state mandates and subsidies;
3. Create a Forward Clean Energy Market (FCEM) that allows utilities to procure long-term commitments (1 to 10 years) for energy from zero-emission generators.

A September 30 NESCOE memo states that it "does not anticipate arriving at collective state support for a proposal that includes pricing carbon into the locational marginal price."³ As a legal matter, NESCOE's position does not prevent FERC's approval of a carbon adder, but state support will be helpful for building a supportive record. Regardless, this memo discusses a carbon adder.

In order to implement any (or all) of these proposals, ISO-NE must amend its FERC-jurisdictional tariff.⁴ To do so, ISO-NE or NE-POOL^a must submit proposed tariff amendments to FERC. Interested parties, including market participants, state regulators, consumer groups, and advocacy organizations, could file comments at FERC in opposition or in support of the proposed amendments. As discussed in more detail below, if FERC concludes that the tariff amendments will result in "just and reasonable" rates, FERC would then issue an order approving those proposed amendments pursuant to section 205 of the Federal Power Act.⁵ Presumably, various parties would challenge FERC's order in federal court.^b

^a The "jump ball" provision of the ISO-NE Participants Agreement provides NEPOOL with the right to submit proposed tariff amendments to FERC if NEPOOL members do not approve ISO-NE's proposed tariff change. In a jump ball scenario, ISO-NE must include in its FERC filing a description of NEPOOL's alternative proposal. FERC may then adopt either proposal. 147 FERC ¶ 61,172 at n. 2 (2014).

^b A challenge could be filed in the D.C. Circuit or the First Circuit. 16 U.S.C. § 825l.

This process of amending a FERC-jurisdictional tariff and defending FERC's approval in court plays out as a matter of course. The six FERC-jurisdictional regional market operators regularly amend their rules in response to market conditions or other factors. Because market rules advantage some market participants over others, may raise consumer costs, and can have environmental effects, FERC proceedings about major rule changes are hotly contested, and FERC's orders are routinely challenged in federal court.

These three IMAPP proposals raise threshold legal questions about the FPA that have not been answered definitively by FERC or courts. The purposes of this memo are to examine the legal framework for FERC approval, raise those questions, and provide preliminary assessments in order to explore the legal risks of various proposals.

II. The Source and Flexibility of FERC's Legal Authority

A. Introduction to the Federal Power Act (FPA)

Under § 201 of the Federal Power Act (FPA), FERC has exclusive jurisdiction over “the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce.”⁶ The FPA reserves to the states jurisdiction “over facilities used for the generation of electric energy.”

FERC's primary task under the FPA is to ensure that all jurisdictional rates are “just and reasonable.” Section 205 requires that “[a]ll rates and charges made . . . for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable.” It declares that any rate that is not just and reasonable is “unlawful.” Section 205 also prohibits regulated utilities from granting “any undue preference or advantage to any person or subject[ing] any person to any undue prejudice or disadvantage.”

Under § 205, jurisdictional sellers of energy or providers of transmission service must file any changes to their rate schedules or tariffs with FERC. FERC may then reject the filing, order a hearing about the filing, or accept the filing. *Cities of Anaheim* (D.C. Cir. 1984).⁷ A party unsatisfied with a rate may file a complaint under § 206. If FERC finds that the rate or a “rule, regulation, practice, or contract affecting such rate” is “unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate . . . rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.”

To summarize, § 205 requires that all jurisdictional rates be just and reasonable and not unduly preferential. Section 206 provides the Commission with remedial authority to fix any rates or rules that it finds are unjust, unreasonable, or unduly discriminatory.

B. The Extraordinary Flexibility of FERC's FPA Authority

Sections 201, 205, and 206 are virtually unchanged since Congress passed Title II of the FPA in 1935. Yet FERC has applied the FPA in novel ways; its current market-based regulatory regime bears little resemblance to the cost-of-service ratemaking it has always administered. Section 201's

capacious jurisdictional language and the flexible standards in sections 205 and 206 have enabled FERC to respond to industry shifts and to initiate, encourage, and mandate structural changes.

From 1935 until the 1980s, FERC regulated wholesale sales of electricity exclusively on a cost-of-service basis. Pursuant to § 205, wholesale sellers of energy submitted to FERC rates that provided for cost recovery plus a rate of return sufficient to attract necessary capital. Parties could also negotiate contracts, and FERC would review them based on cost-of-service principles. That is no longer the case.

Beginning in the late 1980s, FERC shifted from cost-of-service to market-based regulation of wholesale electricity sales.⁸ Rather than filing specific rate schedules or contracts based on costs, sellers request from FERC authority to sell energy at market-based rates. FERC approves a seller's market-based rate authority so long as it concludes that the seller cannot exercise market power.^c Market-based rate authority frees a seller from review under cost-of-service regulation and allows it to sell energy into wholesale auction markets and through bilateral contracts at negotiated rates. Although Congress did not provide FERC any specific authorization in the FPA to allow for market-based rates, FERC concluded that rates that are freely negotiated by sophisticated market participants would meet § 205's just and reasonable standard. As the D.C. Circuit explained, "[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable." *Tejas Power* (D.C. Cir. 1990).⁹

Once it established market-based rates,¹⁰ FERC then sought additional means to encourage and facilitate the growth of competitive wholesale markets for electricity.¹¹ In 1996, it concluded that transmission owners' unduly discriminatory practices motivated by their incentives to stifle competition presented a "persistent barrier" to the development of competitive markets. Pursuant to its authority under sections 205 and 206, FERC ordered all jurisdictional transmission owners to file open-access tariffs that provide competitors with the same transmission services as the owners provide for themselves. *Transmission Policy Access Group* (D.C. Cir. 2000).¹² In reviewing FERC's order, the D.C. Circuit concluded that the FPA's "ambiguous antidiscrimination provisions . . . giv[e FERC] broad authority to remedy unduly discriminatory behavior." *Id.*

With "the foundation necessary for competitive wholesale markets" in place, FERC concluded that the "traditional management of the transmission grid by vertically integrated electric utilities was inadequate to support the . . . development of competitive electricity markets." *FERC Order No. 2000*.¹³ Therefore, pursuant to its authorities under § 205 and § 202(a) to promote and encourage regional interconnection and coordination of transmission facilities, FERC established minimum standards for Regional Transmission Operators (RTOs) that would operate the transmission grid in support of competitive regional markets. Meanwhile, FERC approved agreements among utilities filed under § 205 that established RTOs and rules for energy and capacity auction markets.¹⁴

^c FERC initially defined market power as a seller's ability to "significantly influence price in the market by withholding service and excluding competitors for a significant period of time." *Citizens Power & Light Corp.*, 48 FERC ¶ 61,210 at 61,777 (1989).

FERC regulates RTOs under the FPA as jurisdictional public utilities. Under § 205, FERC approves or disapproves of tariff amendments proposed by RTOs, *NStar Elec. & Gas Corp.* (D.C. Cir. 2007),¹⁵ while under §206 FERC reforms of market rules or otherwise modifies tariff rates, terms and conditions on its own motion or in response to complaints. One of FERC's core functions is to oversee wholesale auction markets organized by the RTOs. FERC facilitated this industry restructuring without any explicit authorization from Congress. It allowed for market-based rates, mandated open-access transmission, approved utility-created RTOs, and reviewed rules for spot-market auctions, all pursuant to a statute that was written for a different regulatory regime. Given that FERC facilitated the creation of these markets without specific Congressional authorization, it stands to reason that FERC may approve modifications to those market rules, provided that those modifications result in just and reasonable rates that are not unduly discriminatory.

A limiting principle to that authority is that FERC is likely prohibited from approving a tariff provision that covers non-jurisdictional activity. *Detroit Edison* (D.C. Cir. 2003).¹⁶ In *Detroit Edison*, the D.C. Circuit held that FERC approval of an RTO tariff that allowed unbundled retail customers to take distribution service under the tariff exceeded FERC's authority because FERC did not have jurisdiction over unbundled retail transmission. The decision concluded that FERC was unable to "harmonize its orders with the statutory limits on its jurisdiction." Under *Detroit Edison*, IMAPP proposals may not be included in the ISO-NE tariff if they are beyond FERC's jurisdiction.

The Supreme Court's recent demand response case is a useful starting point for assessing the scope of FERC's jurisdiction. In 2016, the Supreme Court affirmed FERC's assertion of jurisdiction over compensation for demand response resources in wholesale markets. The Court explained that demand response "pays consumers for commitments to curtail their use of power, so as to curb wholesale rates and prevent grid breakdowns." *EPSA*.¹⁷ The FPA, written in 1935, does not explicitly contemplate wholesale auction markets, let alone demand response programs in those markets, which have proliferated due to advances in computing and communications technologies. Challengers claimed that FERC was reaching beyond its jurisdiction, which is limited to wholesale energy sales and transmission, into an area of state authority by effectively regulating sales of energy to end users. FERC defended its assertion of jurisdiction on the grounds that demand response programs effectuated through wholesale market rules balanced supply and demand and therefore "affected" FERC-jurisdictional rates pursuant to sections 205 and 206. In its order under review by the Court, FERC conceded that demand response compensation is a "complex matter that lies at the confluence of state and federal jurisdiction." *FERC Order No. 745*.¹⁸

The Court upheld FERC's jurisdiction, finding that demand response indeed "directly affects" wholesale rates. Moreover, the Court concluded that it "will not read the FPA, against its clear terms, to halt a practice that so evidently enables the Commission to fulfill its statutory duties of holding down prices and enhancing reliability in the wholesale energy market."¹⁹ This statement suggests that absent specific language in the FPA prohibiting FERC from regulating a particular practice, that practice is within the Commission's jurisdiction if it "directly affects" wholesale rates.

As the Court explained decades earlier in a case about FERC’s authority under the Natural Gas Act,^d “[w]e are, in the absence of compelling evidence that such was Congress’ intention, unwilling to prohibit administrative action imperative for the achievement of an agency’s ultimate purposes.” *In re Permian Basin Area Rate Cases* (U.S. 1968).²⁰ FERC’s “broad responsibilities therefore demand a generous construction of its statutory authority”. *Id.*²¹ FERC “must be permitted, consistently with obligations of due process, to adapt rules and policies to demands of changing circumstances.”²²

C. FERC’s Standard of Review of Tariff Filings under § 205

FERC plays “an essentially passive and reactive” role under § 205. *Atlantic City Elec.* (D.C. Cir. 2002).²³ Under traditional cost-of-service regulation, sellers could file changes to rates at any time. FERC would reject those changes only if it found that they were not just and reasonable.

Today, when a FERC-jurisdictional market operator, such as ISO-NE, files proposed tariff revisions, FERC issues formal notice of the filing and provides approximately thirty days for comments. Following an initial round of comments, many participants choose to file responses. In some cases, FERC will request additional information from the filing party, which may trigger further comments from participants. All of these submittals constitute the official record of the proceeding. The filing party has the burden of showing that the rates are just and reasonable based on the record.²⁴ FERC will issue an order that accepts, rejects, or accepts in part and rejects in part the tariff.²⁵ FERC “must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record.” *Sithe/Independence Power Partners* (D.C. Cir. 1999).²⁶

When FERC reviews proposed market rules filed by an RTO under § 205, FERC’s “overall task, of course, [is] to ensure, based on record evidence, that the rates and practices set forth in the [] Tariff [are] just, reasonable, and not unduly discriminatory.” *Wisconsin Public Power* (D.C. Cir. 2007).²⁷ To approve the proposed tariff, FERC need not conclude that the tariff is optimal or best, or that there is any deficiency with the current tariff. “Section 205, unlike § 206, allows the Commission to approve rate increases without a showing that current rates are unjust and unreasonable; it need only find the *proposed* rates to be just and reasonable.” *City of Winfield*, (D.C. Cir. 1984).²⁸ Moreover, any party opposing FERC’s approval has “the burden . . . to show that the Commission’s choices are unreasonable and its chosen line of demarcation is not within a zone of reasonableness as distinct from the question of whether the line drawn by the Commission is precisely right.” *Wisconsin Public Power*.²⁹

III. The ‘Just and Reasonable’ Standard

As discussed, FERC’s conclusion that a tariff amendment results in ‘just and reasonable’ rates is a prerequisite for its approval. This section first explains how courts have understood the just and reasonable standard and then illustrates how FERC might conclude that an IMAPP proposal is just and reasonable and consistent with the FPA’s “ultimate purposes.” As noted repeatedly in this

^d Because the core provisions of the FPA and Natural Gas Act “are in all material respects substantially identical,” *FPC v. Sierra Pacific Power Co.*, 350 U. S. 348, 353 (1956), the Supreme Court has “an established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes.” *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 576 n. 7 (1981).

memo, FERC's determination that an ISO-NE tariff that incorporates an IMAPP proposal will result in just and reasonable rates must be based on technical evidence in the record. The memo provides examples of factual conclusions and economic theory that would be legally relevant to FERC's determination, but it does not intend to identify any specific facts which are necessary for FERC's approval or to limit the types of evidence that may support FERC's determinations. This memo is focused on FERC's legal authority and not on the evidence and economic arguments that IMAPP proponents will provide to FERC that will enable it to make its just and reasonable determination. In other words, this memo provides the legal foundation on which economic and other technical evidence must be added.

A. What Does Just and Reasonable Mean?

"There is only one statutory standard for assessing wholesale-electricity rates, whether set by contract or tariff—the just-and-reasonable standard." *Morgan Stanley* (U.S. 2008).³⁰ The Supreme Court has repeatedly reiterated that "'just and reasonable' is obviously incapable of precise judicial definition." *Id.*³¹ FERC therefore has discretion; in making determinations about just and reasonable rates "the Commission [is] not bound to the use of any single formula or combination of formulae." *Hope* (U.S. 1944).³² The just and reasonable standard focuses the Commission's review on the "result reached, not the method employed" to set the rate. *Id.*

The core Constitutional requirement is that determining whether a rate is just and reasonable must "involve[] a balancing of the investor and the consumer interests." *Id.*³³ More generally, FERC "must be free, within limitations imposed by constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *In re Permian Area Rate Cases* (U.S. 1968).³⁴ This understanding of ratemaking as a balancing of interests was articulated when rates were set based on cost-of-service principles, but the Court has never rejected it. To the contrary, the Court reaffirmed its relevance in 2008, stating that FERC must choose a ratemaking "method that entails an appropriate 'balancing of the investor and consumer interests.'" *Morgan Stanley*.³⁵

As FERC has transitioned to a market-based rate regime, the Supreme Court's understanding of 'just and reasonable' has evolved. In 2016, the Court observed that FERC "undertakes to ensure 'just and reasonable' wholesale rates by enhancing competition— attempting, as we recently explained, 'to break down regulatory and economic barriers that hinder a free market in wholesale electricity.'" *EPSA*, citing *Morgan Stanley*.³⁶ As FERC explained in the demand response order that the Supreme Court was reviewing, "[e]ffective wholesale competition" furthers the Commission's core mission of consumer protection³⁷ by "among other things, providing more supply options, encouraging new entry and innovation, and spurring deployment of new technologies." *FERC Order No. 745*.³⁸

Courts "afford great deference to the Commission in its rate decisions," *Morgan Stanley*, and their "limited role is to ensure that the Commission engaged in reasoned decisionmaking—that it weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice." *EPSA*.³⁹ "[T]hose who would overturn [FERC's] judgment undertake 'the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.'" *In re Permian Area Rate Cases*.⁴⁰

That deference is rooted in the nature of just and reasonable determinations. According to the D.C. Circuit, “issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of [FERC’s] regulatory mission.” *Elec. Consumers Res. Council* (D.C. Cir. 2005).⁴¹ The Supreme Court recently echoed that sentiment, explaining that with regard to the appropriate compensation for demand response resources, the “disputed question here involves both technical understanding and policy judgment.” FERC has concluded that when it makes such policy judgments it “is not limited to textbook economic analysis of the markets subject to [its] jurisdiction, but also may account for the practical realities of how those markets operate.” *FERC Order No. 745*.⁴² The Supreme likewise stated the Commission’s determination about just and reasonable rates may include “pragmatic adjustments.” *Hope*.⁴³

B. *Approving an IMAPP Proposal as Just and Reasonable and Consistent with the FPA’s Ultimate Purposes*

In its recent decision upholding FERC jurisdiction to regulate compensation for demand response resources, the Supreme Court observed that FERC’s “justifications for regulating demand response are all about, and only about, improving the wholesale market.” *EPSA*.⁴⁴ So too, FERC’s justifications for approving an IMAPP proposal should be “all about, and only about, improving the wholesale market.” FERC’s tool box is not limited to a particular “formula” or by “textbook economic analysis.” It may account for “practical realities” and make “pragmatic adjustments.” The plasticity of the just and reasonable standard and the nature of FERC’s review under § 205 (see above), combined with the “great deference” that courts afford FERC’s technical and policy judgments provide FERC with multiple pathways for approving an IMAPP proposal. The evidence in the record must ultimately drive FERC’s analysis and rationale.

For example, the Supreme Court has recognized in recent cases that “enhancing competition” is now FERC’s primary tool for ensuring that rates are just and reasonable.⁴⁵ Thus, if FERC can conclude that there is adequate support in the record that an IMAPP proposal furthers that goal, it can approve the proposal as just and reasonable. FERC’s authority to approve IMAPP could be supported by FERC’s conclusion, assuming support in the record, that IMAPP furthers the FPA’s “major” or “principal purpose,” its “overriding policy” goal, or a “cornerstone of Commission policy.”

The Supreme Court has said that:

- a “major purpose of the [FPA] is to protect power consumers against excessive prices.” *Pa. Water & Power Co.* (U.S. 1952);⁴⁶
- a “principal purpose of [the FPA] was to encourage the orderly development of plentiful supplies of electricity . . . at reasonable prices.” *NAACP* (U.S. 1976);⁴⁷
- the FPA has “an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.” *Otter Tail Power Co.* (U.S. 1973).⁴⁸

Evidence demonstrating that an IMAPP proposal will: 1) benefit consumers by harmonizing fragmented implementation of state renewable energy or CO₂ mandates, or 2) encourage development of resources that diversify supply and meet market participants’ legal requirements or 3) further competition in FERC-regulated markets would all align FERC’s approval with its core

duties. FERC “[a]dministrative action imperative for achievement of [its] ultimate purpose” will not be prohibited by a court “in the absence of compelling evidence that such was intention of Congress.” *In re Permian Area Rate Cases*.⁴⁹ Once FERC has determined that IMAPP will result in just and reasonable rates, a court will be reluctant to cut off FERC’s jurisdiction over the ISO-NE markets, unless the court concludes that the FPA unambiguously prohibits FERC’s approval.

The FPA’s “public interest” mandate further reinforces these rationales for IMAPP approval. Section 201(a) declares that the electricity business is “affected with a public interest” and that federal regulation is therefore “necessary in the public interest.” The Supreme Court has clarified the public interest mandate is tied to FERC’s duty to maintain just and reasonable rates. In *NAACP*, the Supreme Court held that FERC “is authorized to consider the consequences of discriminatory employment practices . . . only insofar as such consequences are directly related to the Commission’s establishment of just and reasonable rates.”⁵⁰ The Court explained that

“the use of the words ‘public interest’ in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation. In order to give content and meaning to the words ‘public interest’ as used in the Power and Gas Acts, it is necessary to look to the purposes for which the Acts were adopted. In the case of the Power and Gas Acts it is clear that the principal purpose of those Acts was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices.” *Id.*

IMAPP proponents would presumably demonstrate that New England renewable energy and carbon policies have “consequences [] directly related to the Commission’s establishment of just and reasonable rates.” Once the link between those policies and wholesale rates is established, the public interest mandate in § 201 requires FERC to account for those policies. In that sense, the § 201 public interest mandate buttresses FERC’s authority to account for a broad array of factors that “directly affect” or are “directly related” to whether rates are just and reasonable.

The Court’s conclusion in *NAACP* speaks to the breadth of utility practices that may “directly relate to” rates. “Nothing in *NAACP v. FPC* forecloses agency discretion to consider in given situations pervasive public policies that it is not required to evaluate in every decision it makes.” *Richmond Power and Light* (D.C. Cir. 1978).⁵¹ If utility employment practices can be relevant to the establishment of just and reasonable rates, then surely FERC may also account for utility practices in response to state and federal energy and environmental policies. But the Supreme Court cautioned in *NAACP* that the public interest mandate is limited; it must be tied to the FPA’s “purposes” and is not a “broad license to promote the general public welfare.” Thus, the § 201 public interest mandate should not be read as an independent grant of authority to consider factors that do not directly affect jurisdictional rates.⁵²

Approval of an IMAPP proposal that would allow for coordinated implementation of disparate state programs would also be consistent with FPA § 202. Section 202(a) states:

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper

utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts.

Nearly forty years ago, FERC explained that “[t]he importance of encouraging coordinated planning and operation of bulk power supply systems has been a cornerstone of Commission policy for many years.”⁵³ Section 202(a) supported FERC’s guidance on RTOs (*FERC Order No. 2000*) and FERC’s landmark rule issued in 2010 about regional transmission planning (*FERC Order No. 1000*). FERC’s approval of an IMAPP proposal would be consistent with its “duty” to “promote and encourage . . . coordination” “for the purpose of assuring an abundant supply of electric energy . . . with regard to conservation of natural resources.”⁵⁴

According to the D.C. Circuit, “one might reason [that § 202(a) and the § 201 public interest mandate] empower[s FERC] to consider overall fuel-supply economics and the social consequences of energy shortages, but that it need not invariably do so if the rates are just and reasonable in the traditional regulatory sense.” *Richmond Power and Light*.⁵⁵ The issue in that case was whether wholesale electric rates designed to address the 1973 oil embargo were necessarily unreasonable if they did not lead to decreased use of imported oil. The court concluded that FERC “may rationally decline to affirmatively foster other policies [such as energy independence] in weighing the specific interests that it is required by statute to consider.” *Id.*⁵⁶

With regard to IMAPP, FERC may not be *required* under the FPA to proactively consider environmental or renewable energy policies. In approving ISO-NE’s § 205 IMAPP filing, FERC would not have to justify its decision to “affirmatively foster” environmental goals because it would be deferring to the ISO’s decision to account for “the social consequences of energy” supply. Once the record establishes a nexus between those issues and jurisdictional rates, and FERC concludes that a proposed tariff incorporating those issues will result in just and reasonable rates, its “essentially passive and reactive” role under § 205 compels approval. A reviewing court will defer to FERC’s just and reasonable determination and will uphold FERC’s approval unless it can conclude that it is unambiguously prohibited by the FPA.

IV. Threshold Objections to FERC Approval

This section addresses two threshold objections that opponents at FERC and in federal court are likely to raise. These questions are relevant to any of the IMAPP proposals under consideration.

A. Are IMAPP proposals unambiguously prohibited by FPA § 201 because they amount to regulation of generation facilities?

FPA § 201 reserves regulation of generation facilities to the states. So long as FERC’s regulation of wholesale rates does not directly regulate generation facilities, it does not run afoul of this jurisdictional limit.

Under FPA § 201, “states regulate [generation] facilities, while FERC regulates sale and transmission.” *New England Electric Power Generators Ass’n*. (D.C. Cir. 2014).⁵⁷ IMAPP opponents may argue that a FERC-jurisdictional tariff may not include mechanisms that facilitate procurement of specific types of resources or that account for emissions because such mechanisms would impermissibly regulate generation facilities. The key question is whether FERC approval of any IMAPP proposals oversteps the Commission’s jurisdiction under § 201.

Opponents of FERC-regulated capacity markets have repeatedly argued that FERC’s regulation of capacity procurement mechanisms transgresses the Commission’s jurisdictional limits. Federal appeals courts have rejected those arguments in each case.⁵⁸ The first example is in 1978; FERC approved an NEPOOL agreement that charged utilities for failing to hold sufficient capacity. The D.C. Circuit concluded that although the charge may “motivate [utilities] to develop sufficient [generation] capacity,” it was within FERC’s jurisdiction because the agreement provision “affects the fee that a participant pays for [FERC-jurisdictional] power and reserve service.” *Municipalities of Groton* (D.C. Cir. 1978).⁵⁹

Twenty-one years later, the D.C. Circuit similarly held that FERC may regulate ISO-NE’s installed capacity requirement (ICR), a key input into the capacity market that represents the estimated amount of capacity the system requires for reliability. The D.C. Circuit panel concluded that FERC’s review of the ICR was not “direct regulation” of generation facilities in violation of § 201, reasoning that “[d]etermination of the ICR affects rates within the Commission’s jurisdiction and, in evaluating whether that determination is just and reasonable, the Commission neither regulates generation facilities in violation of section 201 nor runs afoul of any other provision of the Federal Power Act.” *Conn. Dep’t of Pub. Util. Control* (D.C. Cir. 2009).⁶⁰

In 2014, the D.C. Circuit again upheld FERC’s regulation of the ISO-NE capacity market. At issue was a rule intended to mitigate buyer-side market power. The court “stress[ed] that FERC’s mitigation measures here do not entail direct regulation of facilities” and rejected arguments to the contrary. *New England Electric Power Generators Ass’n*. (D.C. Cir. 2014).⁶¹ Rather, “states remain free to subsidize the construction of new generators, and load serving entities to build or contract for any self-supply they believe is necessary; FERC’s orders simply regulate” wholesale rates.⁶²

The Third Circuit recently upheld FERC’s approval of PJM’s capacity market construct. The challenged order allowed PJM to remove tariff provisions that explicitly accounted and allowed for generation resources subsidized through New Jersey and Maryland laws. The two states protested, claiming that the tariff provisions were necessary for development of resources that meet the states’ reliability needs and furthered their environmental and economic goals.⁶³ The Third Circuit upheld FERC’s order, in part because it found that the states “were actually structuring contracts for the development of new resources in a way that would substantially suppress [PJM] prices.” *New Jersey Bd. of Pub. Utils.* (3rd Cir. 2014).⁶⁴ Again, FERC had jurisdiction because the tariff directly affected wholesale prices, and did not directly regulate generators. The court added that “what FERC has actually done here is permit states to develop whatever capacity resources they wish, and to use those resources to any extent that they wish, while approving rules that prevent

the state’s choices from adversely affecting wholesale capacity rates. Such action falls squarely within FERC’s jurisdiction.”⁶⁵

Although this line of cases is about FERC’s regulation of capacity markets, it can be read as broadly relevant to IMAPP. The cases draw a distinction between a state’s direct regulation of generation facilities and FERC’s direct regulation of wholesale sales from those facilities. As the industry has shifted to increasingly rely on FERC-regulated wholesale sales, the jurisdictional lines between state and federal authority have blurred. Generation procurement is an area of shared authority; states retain jurisdiction over siting, environmental standards, and fuel choices, while FERC has jurisdiction over matters that directly affect wholesale rates. There may not be a “bright line” demarcating where FERC jurisdiction ends and state authority begins, as the Supreme Court concluded fifty years ago.⁶⁶ FERC approval of an IMAPP proposal would be consistent with recent Supreme Court decisions that recognize “a federal-state relationship marked by interdependence,” *Hughes*, Sotomayor concurrence,⁶⁷ as well as more expansive FERC authority, exemplified by the demand response case. *Joel Eisen*, U.C. DAVIS L. REV. 2016.⁶⁸ These cases recognize that FERC and the states may “coordinate regulatory approaches or operate adjacent programs that touch on the same regulatory topics.” *Jim Rossi*, TX. L. REV. 2016.⁶⁹

In one of its first decisions about the FPA, the Supreme Court quoted with approval a House Committee report on the bill declaring that the FPA was written so “as to be a complement to and in no sense a usurpation of State regulatory authority.” *Conn. Light & Power Co.* (U.S. 1945).⁷⁰ While it is clear that FERC may not directly regulate generation facilities, it is plausible that FERC could approve programs intended to preempt state procurement or carbon reduction laws. Rather than structuring an IMAPP proposal to “usurp” state authority, NEPOOL should design mechanisms that “complement” state programs by “provid[ing] a carrot that states won’t be able to resist eating.” *Illinois Commerce Comm’n.* (7th Cir. 2013).⁷¹

Complementary programs would allow states to continue to make decisions about particular resources and, if they choose, to design procurement mechanisms that are independent of the ISO-NE market. A well-designed ISO-NE mechanism might induce states (through their regulated utilities) to participate, rather than mandate participation. While a program that preempts state policies might be within FERC’s jurisdiction, a complementary program would likely engender less controversy. Preemption is discussed in more detail in section VIII.

B. May FERC approve ISO-NE tariff provisions that are premised in part on public policy?

FERC has approved tariffs premised on state renewable mandates. An IMAPP proposal need not be strictly limited to market participants’ existing legal requirements but may also reflect broad market trends. As an expert agency, FERC may base its decisions on reasonable predictions about the markets it regulates.

FERC has repeatedly recognized that utilities have requirements under state and federal law, and that jurisdictional tariffs may account for those public policies. Assuming that this precedent applies to IMAPP proposals, the next question is whether IMAPP must be strictly limited to existing legal requirements. In other words, may FERC approve an IMAPP proposal that only achieves

renewable energy or CO₂ emission requirements that regulated entities already face under current law? Or may FERC premise its approval on its understanding that the overall direction of public policy is pushing New England market participants to a lower carbon grid and approve an IMAPP proposal that facilitates that transformation?

At the outset, it is worth highlighting that incorporating state policy into a tariff does not excuse FERC from determining whether or not the tariff will result in just and reasonable and not unduly discriminatory rates. FERC may not approve a tariff solely because it is premised on public policy. That said, FERC's determination that the rates will be just and reasonable is likely to be premised in part on its recognition that market participants must meet obligations under state and federal law. IMAPP opponents may raise a threshold objection, arguing that FERC is prohibited from accounting for such policies in a jurisdictional tariff.

Two examples, one from the Midcontinent ISO (MISO) and another from ISO-NE, illustrate that FERC has approved RTO tariffs that are premised on state policies. In 2010, the MISO and its member transmission-owning utilities submitted transmission tariff amendments that allocated costs among market participants of so-called Multi-Value Projects (MVP). The § 205 tariff filing explained that MVPs “enable the reliable and economic delivery of energy in support of *documented energy policy mandates*.”⁷² FERC approved the tariff filing, noting that the tariff “allows MISO and stakeholders to identify transmission projects that will have positive benefits for the grid, and that may also *satisfy legal and public policy goals* in addition to providing just and reasonable pricing on a non-discriminatory basis.”⁷³ The Seventh Circuit subsequently upheld FERC's approval, observing that the tariff is “mainly intended to finance the construction of transmission lines for electricity generated by remote wind farms. Every state in MISO's region except Kentucky (which is barely in the region) encourages or even requires utilities to obtain a specified percentage of their electricity supply from renewable sources, mainly wind farms.” *Illinois Commerce Comm'n.* (7th Cir. 2013).⁷⁴

FERC has also recognized state renewable policies in its approval of capacity market rules. In 2014, ISO-NE and NEPOOL submitted revisions to capacity market rules that included an exemption from buyer-side market power mitigation rules for certain renewable energy resources that qualify under any New England state's renewable portfolio standard. The exemption was designed to “permit[] market participants to satisfy their renewable portfolio standard obligations without imposing additional costs on consumers.”⁷⁵ In approving the exemption under § 205, FERC stated that the exemption “recognizes all New England state policies, rather than favoring a particular approach,” and “is limited to complementing state programs promoting renewable resources.”⁷⁶

FERC's landmark Order 1000 requires transmission owners to develop regional plans that consider transmission needs driven by public policy, including states' renewable mandates. FERC explained that the requirement to consider public policy in transmission tariffs is necessary because such policies “can directly affect the need for interstate transmission facilities, which are squarely within the Commission's jurisdiction.”⁷⁷ FERC cautioned that its directive “cannot be construed as pursuing broad general welfare goals that extend beyond matters subject to our authority under the FPA.” In upholding FERC's order, which was promulgated under FPA § 206, the D.C. Circuit cabined FERC's authority, writing that the order merely establishes a planning process that

requires jurisdictional utilities to consider relevant public policies. According to the court, utilities, and not FERC, will identify the “state and federal policies [that] might affect the transmission market.” *S.C. Pub Serv. Authority* (D.C. Cir. 2014).⁷⁸

These three examples highlight that FERC has both approved tariffs that are premised on specific state renewable policies and has mandated that utilities consider state and federal policies that directly affect a FERC-jurisdictional market. However, both *Illinois Commerce Comm’n* and *S.C. Pub Serv. Authority* are about FERC’s authority over transmission, and there is not yet a court decision affirming similar FERC authority over RTO market rules. The D.C. Circuit has stated that FERC “possesses greater authority over electricity transmission than it does over sales . . . [and] the FPA preserves for the States relatively more sales authority than transmission authority.”⁷⁹ It is certainly possible for a court to read this statement as a limiting principle that would implicate FERC authority over IMAPP. Perhaps FERC may only support the delivery of energy mandated by state policy but may not directly advance those state policies. However, a more straightforward reading of this limit is the uncontroversial point that FERC may not regulate retail sales while it may assert jurisdiction over retail transmission. *New York* (U.S. 2002).⁸⁰

It is not clear why the limitation on FERC’s jurisdiction over sales to wholesale sales would prevent FERC from incorporating state renewable energy and CO₂ policies into RTO market rules. A recent order establishes FERC’s understanding that accommodating state policies is a legitimate objective of an RTO market tariff. In rejecting a NESCOE complaint that requested that FERC mandate an exemption for state-mandated renewable resources from capacity market bidding rules, FERC stated that it “must balance two considerations. The first is its responsibility to promote economically efficient markets and efficient prices, and the second is its interest in accommodating the ability of states to pursue other legitimate state policy objectives.”⁸¹

This example highlights that FERC-regulated RTO markets have limited their responses to state policies with rules intended to prevent price suppression due to out-of-market payments to state-supported resources. Such market rules are implicitly premised on the conclusion that utility practices in response to state policies directly affects rates. As a practical matter, as the magnitude of the policies and utility responses grows, FERC ought to be able to respond accordingly. The FPA “makes federal and state powers ‘complementary,’” *EPSA*,⁸² and “like all collaborative federalism statutes, envisions a federal-state relationship marked by interdependence.” *Hughes*, Sotomayor concurrence.⁸³ “Recognition of concurrent [or shared] jurisdiction opens up new institutional arrangements where state and federal regulators can coordinate regulatory approaches or operate adjacent programs that touch on the same regulatory topics.” *Jim Rossi*, *Tx. L. REV.* 2016.⁸⁴ The FPA does not suggest that in fulfilling its duty to maintain just and reasonable rates FERC may only deploy limited responses to state policies. “These are pragmatic choices about the best institutional balance for regulating modern energy markets— decisions that Congress has delegated to the FERC in recognition of its expertise.” *Rossi*.

A more general objection to FERC’s authority to incorporate public policy is that IMAPP proposals do not merely accommodate policies, as the ISO-NE example illustrates, but effectuate them in FERC-regulated markets more intrusively than these examples.⁸⁵ A key limit that FERC placed on

itself was that it did not “favor” any particular policy or resource, and merely allowed or required utilities to implement or account for state policies in a FERC-jurisdictional tariff at their discretion. Assuming that ISO-NE identifies relevant policies or resources in its § 205 IMAPP filing, FERC’s approval would be consistent with this precedent. As discussed in section VIII.C, the role that states may then play in implementing a FERC-jurisdictional tariff is a subject of ongoing controversy.

A final objection to incorporating state renewable energy policies is that such laws are typically aimed at utilities, which are purchasers in the ISO-NE market. “The entire thrust of Part II [of the FPA] is toward the seller at wholesale, not the buyer.” *California Electric Power Co.* (9th Cir. 1952).⁸⁶ FERC has not made this distinction with regard to state policies. In Order No. 1000, FERC did not limit the public policy mandate to policies that placed legal obligations on transmission providers. The order allows, and may even require, consideration of policies relevant to transmission *customers*, such as utilities.⁸⁷ The D.C. Circuit explained that the public policy “mandate simply recognizes that state and federal policies might affect the *transmission market*.” *S.C. Pub Serv. Authority*.⁸⁸

A related issue is whether a FERC-jurisdictional tariff premised on state or federal policies must be strictly limited to identifiable laws and regulations. Or, may FERC recognize that public policy generally favors renewable energy and CO₂ reductions from the power sector and approve a tariff that is premised on exceeding existing legal requirements? For instance, the Conservation Law Foundation (CLF), an IMAPP participant, has proposed capacity and energy market reforms that would facilitate long-term region-wide CO₂ reductions.⁸⁹ While the reductions are premised on some states’ laws, state regulators have not defined the power sector’s obligations or placed specific legal obligations on market participants to achieve those reductions.⁹⁰

Cases generally suggest that a FERC order may be premised on the Commission’s reasonable predictions about wholesale markets. If FERC concludes, based on states’ long term goals, market and technology trends, or other factors, that there is a broad trend toward a low-carbon grid, it may approve an IMAPP proposal that accomplish more than merely facilitating the achievement of identifiable legal obligations.

The Supreme Court upheld a FERC order that was based in part on the Commission’s forecast of market developments. According to the Court, such “a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.” *Transcontinental Gas Pipe Line Corp.* (U.S. 1961).⁹¹ It is worth noting that in that case the Natural Gas Act specifically required FERC to determine whether issuing a certificate is in the “present or future public convenience and necessity.” The FPA has no such language, but courts have since upheld FERC predictions in FPA cases.

For instance, in a case about a utility merger, the D.C. Circuit rejected arguments that FERC’s merger conditions should be vacated because they were premised on speculative market developments. According to the court, “it is within the scope of the agency’s expertise to make such a prediction about the market it regulates, and a reasonable prediction deserves our deference notwithstanding that there might also be another reasonable view.” *Environmental Action* (D.C. Cir. 1991).⁹² The

D.C. Circuit echoed this opinion one year later in its review of a FERC transaction approval, summarizing that “[a]dministrative agencies are afforded wide deference in predicting the likelihood of future events.” *Michigan Public Power Agency* (D.C. Cir. 1992).⁹³ In a natural gas ratemaking proceeding, the D.C. Circuit similarly stated with regard to FERC’s prediction about the competitive effects of a rate structure that “[m]aking such predictions is clearly within the Commission’s expertise, and we find that its prediction here is rationally based on record evidence.” *East Tennessee* (D.C. Cir. 1988).⁹⁴ More generally, the D.C. Circuit upheld an FCC rule in 2006, concluding that “an agency’s *predictive judgments* about areas that are within the agency’s field of discretion and expertise are entitled to particularly deferential review, as long as they are reasonable.”⁹⁵ This standard should easily apply to FERC’s regulation of wholesale markets, and specifically to its predictions about the direction of the ISO-NE markets.

IMAPP opponents may argue that predicting future public policies is not “within the Commission’s expertise,” demarcating a plausible limit on this authority that would prevent FERC from accounting for the direction of public policy. However, outcomes in the energy markets that FERC regulates have always been intimately connected to public policies, including environmental policies. Deference to FERC’s “predictive judgments” is rooted not only in the Commission’s technical ratemaking expertise, but also in its understanding of supply and demand, technological capabilities and development, project finance and development, and industry trends. Public policies influence several (if not all) of these factors. FERC’s prediction that public policies will continue to favor zero-emission generation would not be made in vacuum but would be premised on forty years of state and federal policies, including PURPA of 1978, tax credits for renewable resources enacted in 1992 and renewed several times through 2015, state renewable portfolio standards passed beginning in the late 1990s, the Regional Greenhouse Gas Initiative (RGGI) developed by ten states in the 2000s, and the EPA’s Clean Power Plan that was finalized in 2015.

FERC’s predictive judgments must be supported by the record, but FERC may also rely on economic theory. The D.C. Circuit stated that no case law “prevents the Commission from making findings based on ‘generic factual predictions’ derived from economic research and theory.” *Sacramento Mun. Utility Dist.* (D.C. Cir. 2010).⁹⁶ Elsewhere, the D.C. Circuit said that FERC “do[es] not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall; nor need they do so for predictions that competition will normally lead to lower prices.” *Associated Gas Distributors* (D.C. Cir. 1987).⁹⁷ The D.C. Circuit will similarly “defer to [FERC’s] reasonable and cogent explanations of predictable economic outcomes.” *Black Oak Energy* (D.C. Cir. 2013).⁹⁸

There is no precedent that draws a clear line between a “reasonable prediction [that] deserves [a court’s] deference” and an unsupported assertion that renders FERC’s decision arbitrary and capricious. The cases do not clarify what type of evidence may support FERC’s determination, but it is reasonable to expect courts to be more deferential to FERC’s predictions if they are rooted in its expertise as a market and reliability regulator rather than its understanding of state politics. What is also clear is that any prediction about the direction of public policy and the ISO-NE wholesale markets must be based on facts. In addition to discussing decades of public policies, the submittals in the docket could note that power sector CO₂ emissions in New England are at their lowest levels in decades,⁹⁹ and renewable energy continues to expand.¹⁰⁰ These trends are likely to persist over

the next several years due to existing legal requirements on market participants. How far beyond that time frame FERC may reasonably predict depends at least in part on the facts before it.

V. IMAPP Proposals to Reform the Forward Capacity Market (FCM)

NEPOOL participants have explained that IMAPP proposals to reform the FCM can be broadly categorized as intended either to protect the current market from state-mandated renewables or to facilitate the integration of zero-emission resources into the ISO-NE markets.¹⁰¹

NRG’s “Two-Tier FCM Pricing” proposal is an example of the former. Its purpose is to “enable states to pursue public policy objectives” while also “protecting price formation / competitive signals in the FCM.”¹⁰² FERC approval would appear consistent with FERC’s recent approval of an ISO-NE capacity market construct that exempted certain state-mandated renewable resources as well as other FERC approvals of minimum-offer price rules. Although the proposal raises questions about undue discrimination, it appears legally less controversial than the latter type of proposal because the facts appear more similar to previous FERC approvals of capacity market rules.

CLF’s “Carbon Integrated Forward Capacity Market” (FCM-C) proposal is an example of the latter. The FCM-C adds to the capacity market construct a procurement mechanism for zero-emission credits (ZEC). A ZEC could represent the environmental benefits of one MWh generated by a non-emitting resource, or it could denote a commitment to sell a specific quantity of zero-emission energy in the ISO-NE energy markets. Like the Two-Tier market, the FCM-C must be defended against claims that it is unduly discriminatory. The addition of the ZEC procurement mechanism raises additional questions about FERC jurisdiction. These two issues are discussed in subsections A) and B) below.

In general, reforming the capacity market so that it accounts for renewable energy or CO₂ emission goals appears to have less legal risk than creating an FCEM (although ZECs present a specific legal risk; see next sub-section). As discussed above in section IV.A, “[w]here capacity decisions about an interconnected bulk power system affect FERC-jurisdictional transmission rates for that system without directly implicating generation facilities, they come within the Commission’s authority.” *Conn. Dep’t of Pub. Util. Control*.¹⁰³

Over the past decade, FERC has approved multiple capacity market designs in PJM, ISO-NE, and NYISO. Evaluating under § 205’s ‘just and reasonable and not unduly preferential’ standard, FERC is typically deferential to RTO capacity market proposals, and challengers to an IMAPP capacity market proposal have a particularly tall task. FERC has a nearly perfect record defending its orders on capacity market design in federal court.¹⁰⁴ FERC recently approved two capacity market designs that connect compensation to a generator’s performance in the energy market. This novel connection between RTO capacity and energy markets is currently being reviewed by the D.C. Circuit, but petitioners have not directly challenged FERC’s authority to approve the pay-for-performance construct as just and reasonable.¹⁰⁵

While a capacity market construct that values zero-emission resources is certainly another new wrinkle, and would undoubtedly face legal objections (as discussed below), FERC has twice invited

such proposals from RTOs. In 2011, FERC approved new rules for PJM's RPM capacity auction, which removed tariff provisions that enabled the participation of generators that were supported by New Jersey and Maryland law. FERC stated that the tariff "does not interfere with states or localities that, for policy reasons, seek to provide assistance for new capacity entry if they believe such expenditures are appropriate for their state." FERC further explained that

RPM itself, however, has no feature to explicitly recognize, for example, environmental or technological goals, nor does it contemplate reliability concerns beyond a three-year forecast. **If PJM market participants agree that RPM should account for resource attributes that reflect broader objectives than three-year forward reliability, then PJM and its stakeholders should begin a process to consider how to incorporate these features into RPM's market design.** In this way, all capacity resource suppliers will be able to receive a non-discriminatory market clearing price that reflects these values in addition to reliability.¹⁰⁶

Two months later, FERC invited ISO-NE stakeholders to do the same:

As the Commission similarly noted in the PJM MOPR Rehearing Order, the FCM has no feature to explicitly recognize, for example, environmental or technological goals, nor does it contemplate reliability concerns beyond a three-year forecast. Parties are free to introduce and develop categorical exemptions or other measures in the stakeholder process. We decline State Commissions and Associated Parties' request that we clarify beforehand that such an exemption would be just and reasonable. We are not convinced by the argument that such a finding is necessary to 'clear[] the way for stakeholders to develop such an approach.' We are furthermore not convinced that we must do so simply because the Commission recently allowed an exemption for renewable resources in PJM. That exemption, unlike the request here, was proposed under § 205 of the FPA. State Commissions and Associated Parties essentially seek a declaratory ruling based on an undeveloped record for an exemption that has not yet been introduced in the stakeholder process.¹⁰⁷

These non-binding statements suggest that the FERC Commissioners in 2011/12 did not see a threshold legal issue with creating a capacity market mechanism for resources that meet state "environmental or technological goals." However, the key issue, as FERC highlighted in the ISO-NE order, is that any proposal must be judged based on the record before the Commission and not in the abstract.

A. *May FERC regulate a market for ZECs or other environmental or non-power attributes of wholesale capacity?*

The proposal is more defensible as consistent with FERC precedent if ZECs are sold with the capacity.

FERC has asserted jurisdiction over sales of renewable energy credits (REC) when they are “bundled” with wholesale energy. A plausibly relevant distinction here, as discussed below, is that ZECs would be bundled with capacity, not energy.

In a 2012 order approving the addition of a REC annex to a standard-form agreement for the purchase of wholesale power, FERC concluded that “where a wholesale energy sale and a REC sale take place as part of the same transaction, RECs are charges in connection with a jurisdictional service that affect the rates for wholesale energy. Thus, the Commission has jurisdiction over the wholesale energy portion of the transaction as well as the RECs portion of a bundled REC transaction under FPA sections 205 and 206 (regardless of whether the contract price is allocated separately between the energy and RECs).”¹⁰⁸

FERC noted that while there are an “infinite of practices that affect” jurisdictional rates, REC sales “directly affect the rate,” which brings them under FERC jurisdiction. The Supreme Court recently upheld this “directly affecting” test in connection with FERC’s jurisdiction over demand response. *EPSA*. FERC’s REC determination is therefore on solid legal ground. Moreover, it is consistent with FERC’s own precedent. In 1994, FERC determined that if a wholesale sale “requires the use of an emissions allowance, that sale, and the cost of the allowances in connection with it, is subject to review under section 205.”¹⁰⁹ FERC’s assertions of jurisdiction were unrelated to the environmental aspects of these instruments but were instead rooted in its role as market regulator.

In its 2012 REC order, and in its 1994 order about emission allowances, FERC disclaimed jurisdiction over RECs and allowances when those instruments are sold independently of FERC-jurisdictional energy sales. According to FERC, an “unbundled REC transaction does not affect wholesale electricity rates, and the charge for the unbundled RECs is not a charge in connection with a wholesale sale of electricity.”¹¹⁰

No court has reviewed FERC’s determinations about RECs and allowances.

That the ZEC is bundled with capacity and not energy may be legally relevant. As discussed above, FERC has asserted jurisdiction over inputs into RTO capacity markets when they directly affect jurisdictional *energy* or *transmission* rates. FERC’s jurisdiction over ZECs, an input into a reformed capacity market, may rest on the argument that ZEC sales directly affect capacity sales, which in turn directly affect wholesale energy sales. One could argue that ZEC sales therefore indirectly affect energy sales, which would fail the direct effects test that the Supreme Court recently approved in *EPSA*.¹¹¹

On the other hand, there is little doubt that FERC has broad jurisdiction over capacity markets, *Hughes*, and despite the absence of any specific authorization to FERC in the FPA to regulate capacity sales, capacity has been a FERC-jurisdictional product for decades. The direct connection

between ZECs and FERC-jurisdictional capacity rates may be sufficient to establish FERC's jurisdiction without tracing that jurisdiction back to its statutory source. Alternatively, this issue can be avoided if FERC concludes that ZECs sold through a capacity market directly affect jurisdictional energy sales.

The jurisdictional question is different if ZECs are characterized as commitments to produce zero-emission energy rather than as environmental attributes. In that case, the legal analysis would be similar to the pay-for-performance capacity market construct that FERC approved for PJM and ISO-NE. These FERC orders are currently being challenged in the D.C. Circuit, but the petitioners do not directly oppose FERC's authority under § 205 to approve the pay-for-performance construct.¹¹² That ZECs are only available for certain resources is then a question about undue discrimination, which is addressed in the next section.

B. Does a “two-tier” market or a procurement mechanism for zero-emission capacity or ZECs unduly discriminate against ineligible resources?

There is little precedent that directly addresses this question. FERC generally has flexibility to determine when a tariff unduly discriminates.

Claims of “undue prejudice” or “undue discrimination” are easy to allege but difficult to prove.^e In recent capacity market reform proceedings before FERC, participants casually claim undue discrimination when proposed market rules disadvantage their preferred resources. These assertions are often unsupported by FERC precedent, let alone federal court decisions. Opponents of IMAPP proposals will surely allege that they are discriminatory, while proponents will argue that any discrimination is justifiable and therefore not “undue.” Neither side will have a strong legal foundation for its claims.

Under §205(b), a FERC-jurisdictional rate may not “make or grant any undue preference or advantage,” or “subject any person to any undue prejudice or disadvantage, or maintain any unreasonable difference in rates.” Relatedly, on its own accord or in response to a complaint filed by a market participant, FERC has a duty under § 206 to remedy a rate that it finds to be “unduly discriminatory or preferential.”

The prohibition against unduly discriminatory rates is historically rooted in concerns about a utility's anticompetitive practices, such as reduced rates to its preferred customers. *Joel Eisen*, U.C. DAVIS L. REV. 2016.¹¹³ Traditionally, rates were considered unduly discriminatory if they did not reflect the costs of serving those ratepayers.¹¹⁴ The inquiry has historically been customer-specific; a utility is prohibited from charging a price to one ratepayer and a materially different price for the same service to a different ratepayer.

The D.C. Circuit explained in 1984 in a case about cost-of-service regulation that

^e Few court decisions differentiate between § 205's undue preference standard and § 206's undue discrimination standard. This memo treats them equivalently. One exception is *Public Service Co. of Indiana* (7th Cir. 1978), which states that “[t]he purpose behind section 205(b) is the protection of the consumer's interest, and the purpose behind section 206 is the protection of the public interest.”^e

[i]f a rate design has different effects on charges for similar services to similar customers, the utility bears the burden of justifying these different effects. It can satisfy this burden by ‘offering a valid reason for the disparity or by demonstrating that the gap is as small as practicable under the circumstances.’ Not all discrimination is necessarily unlawful. Section 205(b) proscribes any ‘unreasonable difference in rates’ and any ‘undue preference or advantage.’ *Electricity Consumers Resource Council* (D.C. Cir. 1984).¹¹⁵

In that case, the court concluded that the rate design under review resulted in unlawful cross subsidization. Neither the utility nor FERC (which had approved the rate) provided any “legally sufficient reason for charging [some] customers a rate that does not accurately reflect the cost of serving them” or “any evidence showing factual differences to justify the [rate] or to show that it is de minimis.” Courts accept disparate treatment between ratepayers “only if FERC offers a valid reason for the disparity.” *Black Oak Energy* (D.C. Cir. 2013).¹¹⁶

In the mid-1990s, FERC broadened the scope of its undue discrimination analysis at the wholesale level to industry-wide anticompetitive practices. FERC explained that due to

changing conditions in the electric utility industry, *e.g.*, the emergence of non-traditional suppliers and greater competition in bulk power markets, the focal point of claims of undue discrimination has changed from discrimination in the treatment of different customers to discrimination in the rates and services the utility offers third parties when compared to its own use of the transmission system.¹¹⁷

Using its authority to remedy undue discrimination, FERC required transmission-owning utilities to provide third parties with access to transmission on the same or comparable basis as the utility’s uses of its system. Reviewing FERC’s order, the D.C. Circuit concluded that the FPA’s “ambiguous antidiscrimination provisions . . . giv[e FERC] broad authority to remedy unduly discriminatory behavior.” *Transmission Policy Access Group* (D.C. Cir. 2000).¹¹⁸ Many reforms instituted by FERC since that open-access order are aimed at remedying undue discrimination, including practices that discriminated specifically against renewable energy generators.¹¹⁹

The D.C. Circuit has said that its general approach to evaluating undue discrimination claims “[i]n the context of a market” (as opposed to cost-based rates) is to “scrutin[ize] the operator’s method of fixing a market price, coupled with its system for disbursing any surpluses accumulated because of the LMP [locational marginal price] method.” *Black Oak Energy* (D.C. Cir. 2013).¹²⁰ Recent undue discrimination claims about RTO tariffs are often about cost allocation.¹²¹ In these cases, petitioners allege that the tariff allocates costs to or distributes surpluses among market participants in an unduly discriminatory fashion that fails to reflect the cost causation principle. In one recent case, the court’s review consisted of recounting FERC’s highly technical explanations for the approved methodology and then concluding that the “petitioners fail to show that the Commission did not examine the relevant data or articulate a rational connection between the facts found and the choice made, bearing in mind that the court’s review is highly deferential.” *Transmission Agency of Northern California* (D.C. Cir. 2010).¹²²

Opponents of an IMAPP capacity market reform proposal may argue that the rule unduly discriminates based on environmental attributes or generation technology.^f FERC has recently addressed similar arguments. In approving PJM capacity market rules, FERC first summarized the general principle that “according different treatment to different classes of entities subject to our jurisdiction does not amount to undue discrimination under the FPA when the classes are not similarly situated.” It then explained why treating renewable energy resources differently by exempting them from the minimum-offer price rule was not unduly discriminatory:

Here, wind and solar resources have different characteristics than CTs [combustion turbines] and CCs [combined cycles] and thus cannot always be regarded as interchangeable, and we continue to find PJM’s proposal to exempt certain resource types from MOPR to be a pragmatic and reasonable approach. While capacity can generally be regarded as an undifferentiated product, different resource types used to provide this product are not the same and do not necessarily have the same characteristics. . . .

In addition, capacity values also differ by resource. Specifically, wind and solar resources produce variable energy output. Therefore, the dependable amount of capacity that can be counted on for capacity market purposes, and thus, the amount of capacity that can be sold into the capacity market, is typically much lower than the maximum potential output of the wind or solar resource. As a result, these resources are a poor choice for any entity attempting to suppress capacity prices.¹²³

Reviewing FERC’s order, the Third Circuit concluded that “FERC fully explained its reasons for approving PJM’s proposal to subject gas-fired resources to the MOPR while exempting other types of generation.” *New Jersey Bd. of Pub. Utils.* (3rd Cir. 2014).¹²⁴ The court added that “what FERC has actually done here is permit states to develop whatever capacity resources they wish, and to use those resources to any extent that they wish, while approving rules that prevent the state’s choices from adversely affecting wholesale capacity rates. Such action falls squarely within FERC’s jurisdiction.”¹²⁵ This case, although factually different from IMAPP, suggests that FERC is not strictly prohibited from discriminating against or in favor of renewable resources.

In a case currently pending before the D.C. Circuit, petitioning environmental organizations argue that PJM’s capacity market rules unduly discriminate against renewable energy and demand response resources. Their claim is that PJM’s rules (which were approved by FERC) “unduly discriminate against an entire class of clean energy resources by conditioning participation in the capacity market on an arbitrary and unnecessary annual performance requirement that will largely exclude them.” The petitioners explain that the availability of renewable resources and demand response varies over the course of the year. While PJM’s rules once accounted for these “seasonal” resources, the new rules “arbitrarily require[e] every resource in the capacity market to act as a twelve-month resource.”¹²⁶ If the court reaches the merits on this issue, it will further inform the

^f Opponents may also make undue discrimination arguments about any proposed cost allocation methodology, but that issue is not addressed in this memo.

legal analysis of IMAPP proposals. There is no federal court precedent about RTO market rules unduly discriminating against particular resources in this way.

That said, there is no clear legal reason why FERC must conclude that a capacity market mechanism that procures ZECs or zero-emission generation is unduly discriminatory. FERC has stated that it “has recognized that market design rules need not be identical among the regions and may instead reflect the unique characteristics of markets as necessary.”¹²⁷ Although FERC has historically viewed capacity as an undifferentiated commodity that assures reliability, FERC has specifically invited RTOs to submit capacity market rules that “explicitly recognize . . . environmental or technological goals.” In determining whether a specific tariff unduly discriminates, FERC has examined costs, technical characteristics of various resources, and the effects on competition. Given this array of factors, and others it might consider, FERC has discretion to conclude that an IMAPP proposal is not unduly discriminatory. At the same time, FERC’s own precedent suggests that it should be careful not to prefer particular resources or state policies. Consistent with its standard of review under § 205, FERC should defer to the tariff filer on the choice of state policies and resources to include.

VI. FERC’s Authority to Approve a Carbon Adder in the Energy Market

It is relatively uncontroversial that FERC may approve a CO₂ price tied to allowance or credit requirements, such as those imposed by RGGI and EPA’s Clean Power. FERC has recognized that just and reasonable rates may include allowance costs since Congress enacted the sulfur dioxide cap-and-trade program in 1990.¹²⁸ More recently, FERC has approved a California ISO tariff that incorporates the costs of allowances for that state’s economy-wide CO₂ cap-and-trade program.¹²⁹ The more difficult legal issue is whether a price may include a CO₂ adder that does not relate to a cost actually incurred by market participants.

The dominant pricing scheme in RTO energy markets relies on locational marginal prices (LMP). LMPs “are designed to reflect the least-cost of meeting an incremental megawatt-hour of demand at each location on the grid, and thus prices vary based on location and time. Each LMP consists of three components: (i) the cost of generation; (ii) the cost of congestion; and (iii) the cost of transmission losses.” *Sacramento Mun. Utility Dist.* (D.C. Cir. 2010).¹³⁰ FERC has concluded that LMPs send “accurate price signals” that “encourage more efficient supply and demand decisions in both the short and long run.”¹³¹

Proponents of a carbon price could argue that given current public policy requirements and the likely direction of future emission regulations, LMPs that do not include a carbon price cannot send “accurate” long-run price signals. By motivating investment in resources that make the region’s fuel mix more diverse, a carbon adder produces an energy price that more “accurately” reflects the region’s long-term needs. The inaccuracy may be particularly acute where states have adopted significant long-term carbon reduction mandates, yet current prices continue to motivate investment in emitting resources.

Absent a carbon price, FERC might conclude that market participants will continue to invest in natural-gas fired capacity, which, regardless of public policy requirements, will exacerbate the

region's reliance on that fuel. Today, natural gas powers 50 percent of power generated in New England, and nearly eighty percent of new capacity added last year is powered by natural gas.¹³² This recent data exemplifies a long-term trend: ninety percent of new electric generating capacity added to the New England grid since 1999, the year that the ISO-NE wholesale markets began operation, is fossil-fuel fired (nearly all of which is powered by natural gas).¹³³ ISO-NE and the New England governors have expressed concern about the region's reliance on natural gas.¹³⁴

As discussed in Section III, “[t]here is only one statutory standard for assessing wholesale-electricity rates, whether set by contract or tariff—the just-and-reasonable standard.” *Morgan Stanley* (U.S. 2008).¹³⁵ It is the “result reached, not the method employed” to generate a rate that controls whether it is just and reasonable. *Hope* (U.S. 1944).¹³⁶ FERC does not have to find that the value of the adder is itself just and reasonable, but rather must conclude that the entire rate (LMP + adder) is just reasonable.¹³⁷ The Supreme Court recently stated that FERC “undertakes to ensure ‘just and reasonable’ wholesale rates by enhancing competition— attempting, as we recently explained, ‘to break down regulatory and economic barriers that hinder a free market in wholesale electricity.’” *EPSA*, citing *Morgan Stanley*.¹³⁸ If supported by the facts in the record, FERC could find that the LMP rate plus a carbon adder sends more “accurate” price signals by harmonizing state and federal regulatory requirements, diversifying the fuel mix, leveling the playing field for emission-free resources, or otherwise improving wholesale markets.

A. *May FERC approve a carbon adder that is not based on costs actually incurred by market participants?*

FERC has a path forward for approving an adder that is not based on cost, but there are legal risks.

Historically, FERC approved rates as just and reasonable based on cost-of-service principles. “Simply put, it has been traditionally required that all approved rates reflect to some degree the costs actually caused by the customer who must pay them.” *KN Energy* (D.C. Cir. 1984).¹³⁹ The D.C. Circuit recently explained that “we scrutinize a utility's rates to ensure a match between cost-causation and cost-responsibility. In the context of a market, we do the same, and our object of scrutiny is the operator's method of fixing a market price, coupled with its system for disbursing any surpluses accumulated because of the LMP method.”[§] *Black Oak Energy* (D.C. Cir. 2013).¹⁴⁰

FERC has included non-cost factors in rates. In a case about rates for oil pipelines, the D.C. Circuit explained that “when FERC chooses to refer to non-cost factors in ratesetting, it must specify the nature of the relevant non-cost factor and offer a reasoned explanation of how the factor justifies the resulting rates.” *Farmers Union Cent. Exchange* (D.C. Cir. 1984).¹⁴¹ “Reliance on non-cost factors has been endorsed by the courts primarily in recognition of the need to stimulate new supplies.” *Consumers Union* (D.C. Cir. 1974).¹⁴²

A 1992 FERC policy statement about ratemaking for pipelines and electric utilities asserts that FERC “is free to set rates [above cost-based rates] to provide incentives so long as there is a

[§] As mentioned in a previous footnote, this memo does not address cost allocation or surplus disbursement.

correlation between the incentive and the result to be induced.”¹⁴³ Although FERC then stated that its policy was “not intended for competitive markets,” the Commission is not precluded from reevaluating that determination or concluding that because zero-emission resources are procured outside of RTO markets, there is no competitive RTO market for the purpose of incentivizing zero-emission resources.

Approval of a carbon adder as an incentive for the development of a more diverse fuel mix is consistent with the FPA’s “principal purpose of [] encourag[ing] the orderly development of plentiful supplies of electricity . . . at reasonable prices.” *NAACP v. FPC* (U.S. 1976).¹⁴⁴ The presence of state RPS laws and other renewable policies is evidence that policymakers, and by extension consumers, perceive a scarcity of zero-emission resources. If FERC finds that a carbon adder will address that scarcity, it may be able to conclude that a carbon adder balances consumers’ interests in zero-emissions energy with investors’ interest in a market-based solution. *Hope*.¹⁴⁵

However, because the carbon adder is not based on actual costs, it may result in “profits too huge to be reconcilable with the legislative command” that rates be just and reasonable. *Public Service Comm’n of N.Y* (D.C. Cir. 1978).¹⁴⁶ But the D.C. Circuit has recognized that “market rates are expected and permitted to be higher than marginal costs during times of scarce supply” because “high rates [] serve a critical signaling function: encouraging new development that will increase supply.” *Blumenthal* (D.C. Cir. 2009).¹⁴⁷ In another case, the D.C. Circuit rejected FERC’s denial of a complaint about a NYISO price-mitigation rule because FERC “gave no reason to suppose that [removing scarcity pricing] does not also wreak substantial harm in curtailing price increments attributable to genuine scarcity that could be cured only by attracting new sources of supply.” *Edison Mission Energy* (D.C. Cir. 2005).¹⁴⁸ To emulate the effects of scarcity pricing, a carbon adder could be evaluated a periodic basis and modified to reflect demand for zero-emission energy.

While the FPA’s fluid mandate provides FERC with opportunities to argue that a carbon adder will result in just and reasonable rates, there is no clear legal precedent on two issues: a) whether FERC may approve an adder that is not based on costs actually incurred as an incentive for development of diverse resources, and 2) whether cases about scarcity pricing are analogous to a persistently higher price intended to motivate investment in diverse resources.

A related claim is that because the adder will benefit some sellers at the expense of others, it is unduly discriminatory. Opponents of a carbon adder may have a stronger undue discrimination claim than ZEC opponents. While a well-designed ZEC program certainly benefits ZEC-creating resources, other resources may not be directly affected, at least in the short term. A carbon adder, however, is essentially a payment from owners of emitting resources to owners of emission-free resources. By definition, such a fee discriminates. Whether that discrimination is “undue” is a separate matter. Undue discrimination is discussed in more detail in section V.B.

In addition, opponents of carbon adder may argue that an adder would be contrary to FERC’s longstanding policy of not favoring particular types of electric generation.¹⁴⁹ This argument collapses into the threshold question of whether an IMAPP proposal amounts to impermissible regulation of generation facilities (see section IV.A). Proponents would argue that a carbon adder

directly regulates wholesale rates and not generation facilities because it would “permit states to develop whatever capacity resources they wish, and to use those resources to any extent that they wish, while . . . prevent[ing] the state’s choices from adversely affecting wholesale” reliability or fuel diversity. “Such action falls squarely within FERC’s jurisdiction.” *New Jersey Bd. of Pub. Utils.*¹⁵⁰

If the carbon adder is nonetheless viewed as a change of FERC’s fuel neutrality policy, FERC “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.” *FCC v. Fox Television Stations* (U.S. 2009).¹⁵¹ As discussed, FERC should be able to meet that standard.

B. May FERC approve a rate that includes a carbon adder premised on requiring market participants to internalize the externalities of carbon emissions?

FERC aims to fulfill its statutory duties (see section III.B) through rate regulation. While FERC has extraordinary flexibility in choosing the means to achieve the FPA’s goals (see section II.B), the FPA provides no explicit mandate to regulate rates for their environmental effects.

In 2000, the D.C. Circuit concluded that the “Supreme Court has never indicated that the discretion of an agency setting ‘just and reasonable’ rates for sale of a simple, fungible product or service should, or even could, encompass considerations of environmental impact (except, of course, as the need to meet environmental requirements may affect the firm’s costs).” *Grand Council of Crees* (D.C. Cir. 2000).¹⁵² In that case, the D.C. Circuit held that the environmental concerns of a non-profit representing the Crees people in Quebec did not provide the organization with standing to challenge FERC’s grant of market-based rate authority to Quebec Hydro. But the court based its holding on FERC orders that disclaimed authority to consider environmental issues, and did not hold that the FPA itself precludes FERC from concluding otherwise.

The *Crees* decision observes that the FPA is silent on whether FERC may account for environmental effects, but “[f]ollowing the judicial lead, the Commission has affirmatively forsworn environmental considerations.” Because FERC had consistently refused to consider environmental issues in ratemaking, the court held that petitioners lacked standing. According to the court, the Crees people were “outside the relevant zone of interests if [] FERC’s refusal to consider environmental issues under § 205(a) is valid.”

The decision explicitly leaves the door open for FERC to change its position. The FPA’s ambiguity provides FERC with discretion, and court’s holding is premised on the court’s application of *Chevron* deference to FERC’s reasonable interpretation of an ambiguous statute. But the court applied that deferential standard of review with approval of FERC’s choice, stating that “it seems pointless to weave such [environmental] issues into setting ‘just and reasonable’ rates for electric power. The environmental issues posed by construction and operation of energy facilities will invariably be reviewed under other provisions; if those reviews (or other forces such as liability risks or firm commitment to environmental quality) cause the utility to incur costs, such costs would feed into the Commission’s normal rate calculation.”

If FERC wishes to change its policy it must conclude that accounting for environmental effects is “permissible under the statute.” *FCC v. Fox Television Stations* (U.S. 2009).¹⁵³ As discussed in section III.B, the Supreme Court has tied the FPA’s “public interest” mandate to FERC’s duty to set just and reasonable rates that “encourage the orderly development of plentiful supplies of electricity.” *NAACP v. FPC* (U.S. 1976).¹⁵⁴ This public interest mandate may reinforce FERC’s authority to consider CO₂ emissions as part of its just and reasonable determination, but whether it provides FERC with an independent basis for regulating environmental effects is another matter.

FERC’s legal justification is tied to the rate that it approves. As discussed above, FERC’s justifications for approving an IMAPP proposal should be “all about, and only about, improving the wholesale market.” *EPSA*. FERC might conclude that a carbon adder enhances competition in the wholesale markets, aligns public policy with markets, or is necessary to send accurate price signals. The approved price should be premised on achieving such goals, which are independent of the environmental harm caused by CO₂ emissions. A carbon adder that is set to the social cost of carbon, which estimates the damages associated with emitting one ton of CO₂, would be aimed at achieving environmental goals. Rather than valuing CO₂ emissions based on their environmental harm, FERC may be on more solid legal ground if a carbon adder is designed to “break down regulatory and economic barriers that hinder a free market in wholesale electricity,” *EPSA*, by achieving some specific outcomes for the ISO-NE markets.

VII. Forward Clean Energy Market (FCEM)

An FCEM is a centralized procurement mechanism for emission-free energy. Like the current ISO-NE auction mechanisms, an FCEM would match utility bids to buy quantities of emission-free energy with generators’ offers to sell such energy. NEPOOL participants’ proposals vary in how they implement an FCEM.¹⁵⁵

If FERC can conclude that the FCEM will result in just and reasonable rates, there does not appear to be any threshold legal barrier that prevents FERC from so concluding. As discussed in Part III, in evaluating whether a rate is just and reasonable, “the Commission [is] not bound to the use of any single formula or combination of formulae.” *Hope* (U.S. 1944). While FERC has consistently approved auction designs premised on LMPs, it may approve other methodologies, so long as they are supportable based on the evidence. The just and reasonable standard focuses the FERC’s review on the “result reached, not the method employed” to set the rate. *Id.*¹⁵⁶

FERC must also conclude that an FCEM is not unduly discriminatory. As discussed in section V.B, there is scant FERC precedent or case law about how to understand the undue discrimination standard in this context. The standard has historically been applied on a contract-specific basis, and courts have analyzed whether two customers that pay different rates to the utility are “similarly situated” and therefore entitled to the same rate. Under the FPA’s “ambiguous antidiscrimination provisions,” *Transmission Policy Access Group* (D.C. Circ. 2000),¹⁵⁷ FERC could conclude that zero-emission resources that are allowed to participate in the FCEM are not “similarly situated” to other resources, whether because they are required by state policy, diversify the grid’s fuel mix, or other factors. A case currently before the D.C. Circuit may shed light on this issue.¹⁵⁸

As of October 1, 2016, stakeholders were discussing various FCEM design options. Distinctions include whether an FCEM award includes the energy and all environmental attributes, or whether it might be a procurement mechanism only for environmental attributes.¹⁵⁹

A. *Is there a legal distinction between an FCEM for energy sold with environmental attributes and an FCEM for environmental attributes only?*

Yes. FERC has asserted jurisdiction over environmental attributes when they are sold with jurisdictional power and disclaimed jurisdiction when they are not.

This issue is discussed in section V.A. Although no court has explicitly addressed FERC's jurisdiction over environmental attributes, FERC has held that it has jurisdiction over sales of emissions allowances and renewable energy credits (REC) when those instruments are sold with wholesale power. FERC's rationale, recently endorsed by the Supreme Court in its demand response decision, is that when the instrument is sold with its associated energy, the sale of the instrument "directly affects" the FERC-jurisdictional rate.

An environmental attributes-only market presents greater legal risk than a market for energy bundled with environmental attributes.

VIII. Interaction with State CO₂ and Renewable Energy Laws

The FPA provides FERC with "exclusive jurisdiction over wholesale sales of electricity in the interstate market." *Hughes* (U.S. 2016).¹⁶⁰ A court must preempt state laws that "intrude on FERC's authority over interstate wholesale rates." *Id.* Courts also preempt state laws that *conflict* with FERC regulation by "stand[ing] as an obstacle to the accomplishment and execution of the [Congress'] full purposes and objectives." *Nazarian* (4th Cir. 2014).¹⁶¹ Under the FPA's system of "interlocking" federal and state jurisdiction, "conflict-pre-emption analysis must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Nazarian* (4th Cir. 2014).¹⁶² More generally, because the FPA is a "collaborative federalism statute," all preemption inquiries must be "particularly delicate." (*Hughes*, Sotomayor concurrence).

In *Hughes*, the Supreme Court affirmed the Fourth Circuit's holding in *Nazarian* that a Maryland Public Service Commission order is preempted by the FPA. The order required state-regulated utilities to pay a generator selling to PJM the difference between PJM auction prices and prices set by state regulators. The Court "reject[ed] Maryland's program only because it disregards an interstate wholesale rate required by FERC." In a concurring opinion, Justice Sotomayor explains that FERC approved the PJM auction as the "proper mechanism" to determine just and reasonable rates for wholesale sales to PJM. Maryland's order set a different rate than FERC's just and reasonable rate and "thus contravened the goals of the FPA."¹⁶³ "States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates." *Mississippi Power & Light* (U.S. 1988).¹⁶⁴ The *Hughes* court did not express an opinion about whether Maryland's order conflicts with the FPA.

A. *Would an FCEM or capacity market procurement mechanism preempt state renewable portfolio standards or other state renewable procurement mandates?*

Probably not, but it is impossible to draw a definitive conclusion in the abstract without a specific ISO-NE tariff. In addition, current state procurement programs may be incompatible with IMAPP.

All six New England states have enacted renewable portfolio standards that require electricity distribution companies to procure a certain percentage of the energy they sell from renewable sources.¹⁶⁵ Some states have also passed separate renewable energy procurement laws. For example, Massachusetts law requires distribution companies to “jointly and competitively solicit proposals for offshore wind energy generation; and, provided that reasonable proposals have been received, [] enter into cost-effective long-term contracts.” The law specifies roles for the state energy agency and stipulates that any contracts are subject to approval by the Department of Public Utilities.¹⁶⁶ Rhode Island law similarly requires the state’s distribution company to annually solicit proposals from renewable energy developers and, if it receives “commercially reasonable” proposals, to enter into long-term contracts that are subject to regulatory approval.¹⁶⁷

In general, utilities may purchase energy or capacity through ISO-NE’s markets or by negotiating bilateral contracts. *Morgan Stanley* (U.S. 2008).¹⁶⁸ State procurement requirements and FERC-regulated markets have existed side-by-side for decades, and no court has preempted such a state policy under the FPA.¹⁶⁹ It seems possible and preferable, as well as consistent with IMAPP’s guiding principles, that any IMAPP program be designed to co-exist with state laws.

That said, as *Hughes* demonstrates, FERC regulation can preempt a state procurement program. While the IMAPP procurement proposals do not appear to raise preemption concerns, it is not possible to reach a definitive conclusion without knowing the details of the ISO-NE procurement mechanism and the state law at issue. It is also worth noting that state procurement laws may be incompatible with an ISO-NE mechanism. Massachusetts’ offshore wind law, for example, requires state regulators to approve an RFP and subsequent contracts. As discussed below, while FERC may account for state regulators’ views in its administration of a tariff, FERC may not abrogate its statutory duty to maintain just and reasonable rates by acceding to state authority.

B. *Would an ISO-NE carbon adder preempt RGGI or other state CO₂ policies?*

To reduce preemption risk, an ISO-NE carbon price should be designed to account for RGGI prices. An ISO-NE carbon price would not preempt CO₂ emission limits.

It is well-established that FERC has exclusive jurisdiction to determine whether wholesale rates are just and reasonable.¹⁷⁰ If just and reasonable wholesale rates include a carbon adder, an additional carbon adder under state law might “interfere with FERC’s authority by disregarding interstate wholesale rates FERC has deemed just and reasonable.” *Hughes*.¹⁷¹ “States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC’s authority over interstate wholesale rates.” *Id.*

There is an important practical distinction between RGGI and the Maryland program in *Hughes* that may be legally relevant. The state-mandated payments in *Hughes* were based explicitly on the PJM price, and had the effect of “adjusting an interstate wholesale rate.” RGGI requires generators emitting CO₂ to retire an allowance for each ton of emitted CO₂. A New England generator includes the allowance cost in the offer it submits to ISO-NE. The just and reasonable price generated by a competitive ISO-NE auction market thus includes the RGGI allowance price; RGGI does not “adjust” a FERC-approved rate.

Even if RGGI is not preempted under *Hughes*, the Supreme Court’s preemption test in *OneOK* provides another avenue for preemption. At issue in *OneOK* was whether litigants’ claims about natural gas sales under state antitrust law were preempted by the Natural Gas Act. The Court concluded that the “*target at which the state law aims*” determines whether state law is pre-empted and distinguished “between measures *aimed directly at* interstate purchasers and wholesales for resale, and those aimed at subjects left to the States to regulate.” *OneOK* (U.S. 2015).¹⁷²

The *OneOK* preemption inquiry then turns on whether RGGI is aimed at FERC-regulated wholesale rates or state-regulated CO₂ emissions. Each of the six New England states enacted RGGI by passing legislation in the late 2000s.¹⁷³ Those laws typically empower state regulators to auction emission allowances and direct how the proceeds must be spent. The laws do not specifically mention ISO-NE markets. As a practical matter, RGGI aims to reduce CO₂ emissions by raising wholesale power generators’ costs in proportion to their CO₂ emission rates.

Proponents of both an ISO-NE carbon price and RGGI’s continued existence will have to walk a fine line. On the one hand, they will need to argue that RGGI is aimed at reducing emissions, and the fact that it uses a market-based mechanism that “directly affects” wholesale power prices is not relevant to the jurisdictional question. On the other hand, as discussed above, they will also have to argue that the FERC-approved carbon adder is consistent with the FPA’s core purposes and serves a purpose other than pollution control to fend off the argument that “[i]t is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.” *Mississippi Power* (U.S. 1988, Scalia concurrence).¹⁷⁴ As previously discussed, more recent Supreme Court decisions about the FPA conclude that “federal and state powers ‘complementary,’” *EPSA*.¹⁷⁵ The FPA, “like all collaborative federalism statutes, envisions a federal-state relationship marked by interdependence.” *Hughes*, Sotomayor concurrence.¹⁷⁶ It is legally plausible that an ISO-NE carbon adder and RGGI may coexist.

RGGI advocates may also argue that a court should “start with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.” *Hillsborough County* (U.S. 1985).¹⁷⁷ Pollution control is typically considered an “historic police power,” and courts may be hesitant to preempt such laws.

IMAPP advocates might mitigate this quandary by designing an ISO-NE carbon adder to account for RGGI. For example, the RGGI allowance price could be subtracted from the FERC-jurisdictional carbon adder to avoid any conflict (assuming the ISO-NE adder is larger than the RGGI price). This mechanism does not completely eliminate the jurisdictional overlap. But the distinction allows

proponents of both pricing mechanisms to argue that the RGGI allowance requirement aims at emission reductions while the ISO-NE carbon adder is aimed at achieving outcomes in the wholesale market.

C. May states “retain full control” over the implementation of an ISO-NE tariff provision?

This question reflects ongoing disputes before FERC and courts.

A September 30 NESCOE document summarizes three IMAPP proposals that are supported by at least one state. One proposal describes “a wholesale ISO-NE administered market auction or procurement mechanism that one or more states could use, at states’ specific direction, as an alternative to individual or joint state procurements and contracts.” NESCOE specifies that “*states must maintain full control*, as contemplated in state laws, over the definition and implementation of their own state statutory requirements (neither FERC nor ISO-NE may define, interpret, impose or attempt to create or confer authority about the requirements or implementation of state laws).”¹⁷⁸

While a FERC-jurisdictional tariff may carve out a role for state regulators,¹⁷⁹ the tariff could not eliminate the possibility that FERC would assert jurisdiction over that provision and overrule the state. As discussed in sections II, III, and IV, FERC has jurisdiction to approve an ISO-NE tariff that implements an IMAPP proposal if it finds that the matters at issue “directly affect” FERC-jurisdictional rates. Once FERC has asserted jurisdiction, it has a statutory duty to ensure that rates are just, reasonable, and not unduly discriminatory. FERC may not disclaim this responsibility by delegating oversight of the tariff to state regulators.¹⁸⁰

The precise role state regulators may play in the administration of a FERC-jurisdictional tariff is a matter of ongoing dispute. FERC recently rejected a NYISO tariff proposal that would have allowed state regulators to select projects that address reliability. FERC found that “NYISO’s proposal inappropriately delegates evaluation and selection of [reliability-must-run] alternatives” to state regulators, and concluded that NYISO must be the entity that addresses reliability needs.¹⁸¹ FERC similarly rejected an ISO-NE tariff that would have delegated to NESCOE the responsibility of evaluating and selecting public policy-driven transmission upgrades.¹⁸² According to FERC, while NESCOE may identify transmission needs driven by public policy, the FERC-jurisdictional RTO must have the obligation “to evaluate and determine whether to select” transmission solutions in regional planning for cost allocation purposes.¹⁸³ The ISO-NE order is currently on review before the D.C. Circuit.¹⁸⁴

IX. FERC’s Plan B: Section 206

FPA § 206 allows the Commission to initiate changes to existing utility tariffs. In order to demand any change to an existing tariff, FERC must make two findings: 1) that the existing tariff results in unjust, unreasonable, or unduly discriminatory rates; and 2) that its proposed changes are just and reasonable. *Atlantic City Elec.* (D.C. Cir. 2002).¹⁸⁵ The statutory just and reasonable standard is the same under sections 205 and 206. *FirstEnergy Service Co.* (D.C. Cir. 2014).¹⁸⁶

To implement an IMAPP proposal under § 206, FERC would have to meet this “dual burden” by concluding that the existing ISO-NE IMAPP tariff results in unjust and unreasonable rates and prove

that its preferred IMAPP proposal will result in just and reasonable rates. *FirstEnergy*. Courts will uphold FERC's factual findings if supported by substantial evidence,” *Sacramento Mun. Utility Dist.* (D.C. Cir. 2010),¹⁸⁷ and will typically “afford great deference to the Commission in its rate decisions.” *Morgan Stanley* (U.S. 2008).¹⁸⁸ In choosing a just and reasonable rate, FERC must exercise “reasoned judgment.” *EPSA* (U.S. 2016).¹⁸⁹

FERC could convene a technical conference to elicit information that might otherwise be submitted in a proceeding about an ISO-NE tariff filing under § 205. FERC could then use that information to support its own § 206 order. To meet its “dual burden,” FERC must prove that existing rates are unjust and unreasonable, a showing that is not required for its approval of an ISO-NE tariff filing under § 205. By proceeding under § 206, FERC must also justify its choices of which renewable energy and environmental policies to integrate into the ISO-NE markets and how to integrate them. By proceeding under § 205, FERC may defer to ISO-NE’s choices, and reviewing courts are likely to defer to FERC. This “dual deference” provides a glidepath for IMAPP approval. FERC relied on this deference in previous orders that incorporate state policy (see section IV.B).

Moreover, it is possible that ISO-NE itself and New England states would oppose FERC’s § 206 order. While not legally fatal, those protests would highlight to a court that FERC is imposing a tariff designed to incorporate state policies against the wishes of market participants and those states. Without support from these parties, it may be more difficult for FERC to meet its evidentiary burdens.

ENDNOTES

¹ See <http://nepool.com/IMAPP.php>.

² Policies and Markets Problem Statement, May 17, 2016, http://www.nepool.com/uploads/IMAP_20160517_Problem_Statement.pdf.

³ State IMAPP Objectives Memo, http://nepool.com/uploads/IMAPP_20161006_IMAPP_Objectives_to_NEPOOL_9_30_16.pdf.

⁴ The Tariff is available at: <https://www.iso-ne.com/participate/rules-procedures/tariff>. It is organized as follows: Section I: General Terms and Conditions; Section II: Open Access Transmission Tariff (details the rights and responsibilities of transmission owners and customers); Section III: Market Rule 1 (governs market operations); Section IV: ISO Funding Mechanisms; and Attachments A–G.

⁵ 16 U.S.C. § 824d.

⁶ 16 U.S.C. § 824(b); *Hughes v. Talen*, 136 S.Ct. 1288, 1291 (2016); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).

⁷ *Cities of Anaheim, Riverside, Banning, Colton, and Asuza v. FERC*, 723 F.2d 656, 659 (D.C. Cir. 1984).

⁸ *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012 (9th Cir. 2004) (“However, approximately a decade ago, companies began to file market-based tariffs that did not specify the precise rate to be charged. As a result, FERC then departed from its historical policy of basing rates upon the cost of providing service plus a fair return on invested capital, and began approving market-based tariffs.”).

⁹ *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990).

¹⁰ The Supreme Court has never ruled on whether market-based rates are legal under the FPA. In *Morgan Stanley*, the Court “reiterate[d] that we do not address the lawfulness of FERC’s market-based-rates scheme, which assuredly has its critics,” and invited challengers to address that issue in a separate case. In 2011, the

Ninth Circuit rejected a broad challenge to FERC’s market-based regulatory scheme. *Montana Consumer Counsel, et al. v. FERC*, 659 F.3d 910 (9th Cir. 2011). The Supreme Court denied certiorari. The Court’s most recent cases about the Federal Power Act do not address challenges to market-based rates.

¹¹ See Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice of Proposed Rulemaking, 59 FR 35274 (July 11, 1994) (“Our goal is to facilitate the development of competitively priced generation supply options, and to ensure that wholesale purchasers of electric energy can reach alternative power suppliers and vice versa.”).

¹² *Transmission Policy Access Group v. FERC*, 225 F.3d 667, 684 (D.C. Cir. 2000), *aff’d* *New York v. FERC*, 535 U.S. 1 (2002); *see also* Federal Energy Regulatory Commission, Order No. 888, 61 Fed.Reg. 21,540 (1996) (“Non-discriminatory open access to transmission services is critical to the full development of competitive wholesale generation markets and the lower consumer prices achievable through such competition.”).

¹³ FERC Order No. 2000, 89 FERC ¶ 61,285 (1999); *see also* *Midwest Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004) (“In FERC’s view, inefficiencies in the transmission grid and lingering opportunities for transmission owners to discriminate in their own favor remained obstacles to robust competition in the wholesale electricity market.”).

¹⁴ *See, e.g.*, *PJM Interconnection*, 81 FERC ¶ 61,257 (1997) (concluding that “proposed locational marginal pricing (LMP) model, in conjunction with the use of FTRs, is just and reasonable”).

¹⁵ *NStar Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 796 (D.C. Cir. 2007).

¹⁶ *Detroit Edison v. FERC*, 334 F.3d 48 (D.C. Cir. 2003).

¹⁷ *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 770 (2016).

¹⁸ FERC Order No. 745, 134 FERC ¶ 61,187 at P 115 (2011).

¹⁹ *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 782 (2016).

²⁰ *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968).

²¹ *Id.* at 776; *see also id.* at 790 (“[T]he breadth and complexity of the Commission’s responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.”).

²² *Id.* at 784.

²³ *Atlantic City Elec.*, 295 F.3d 1, 9 (D.C. Cir. 2002) (citing *Cities of Campbell*, 770 F.2d 1180, 1184–85 (D.C. Cir. 1985)).

²⁴ *Transmission Agency of Northern California v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010) (citing *Sacramento Mun. Utility Dist. v. FERC*, 616 F.3d 520, 537–38 (D.C. Cir. 2010)).

²⁵ *See, e.g.*, FERC Docket No. ER15-623-000 about reforms to PJM’s capacity market construct.

²⁶ *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999).

²⁷ *Wisconsin Public Power*, 493 F.3d 239, 260 (D.C. Cir. 2007).

²⁸ *City of Winfield*, 744 F.2d 871, 875 (D.C. Cir. 1984).

²⁹ *Wisconsin Public Power*, 493 F.3d 239, 260 (D.C. Cir. 2007) (quoting *ExxonMobil Gas Mktg. Co.*, 297 F.3d 1071, 1084 (D.C. Cir. 2002)).

³⁰ *Morgan Stanley Capital Group v. Public Utility Dist. No. 1 of Snohomish Cnty., WA*, 554 U.S. 527, 545 (2008).

³¹ *Id.*, at 532 (citing *FPC v. Texaco Inc.*, 417 U.S. 380, 389, (1974); *Permian Basin Area Rate Cases*, 390 U.S. 747, 767, (1968)).

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³³ *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944).

³⁴ *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968).

³⁵ *Morgan Stanley Capital Group v. Public Utility Dist. No. 1 of Snohomish Cnty., WA*, 554 U.S. 527, 532 (2008).

³⁶ *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 768 (2016) (quoting *Morgan Stanley Capital Group v. Public Utility Dist. No. 1 of Snohomish Cnty., WA*, 554 U.S. 527, 538 (2008)).

³⁷ “A major purpose of the [FPA] is to protect power consumers against excessive prices.” *Pa. Water & Power Co. v. Fed. Power Comm’n*, 343 U.S. 414, 418 (1952).

³⁸ FERC Order No. 745, 134 FERC ¶ 61,187 at P 48 (2011).

³⁹ *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 782–83 (2016).

⁴⁰ *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767(1968) (quoting *FPC v. Hope*, 320 U.S. 591, 602 (1944)).

⁴¹ *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1236 (D.C. Cir. 2005) (quoting *Pub. Util. Comm’n of the State of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001)); see also *Town of Norwood v. FERC*, 962 F.2d 20, 22 (D.C. Cir. 1992).

⁴² FERC Order No. 745, 134 FERC ¶ 61,187 at P 46 (2011) (citing *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 872 (D.C. Cir. 1993); *Vermont Dep’t of Pub. Serv. v. FERC*, 817 F.2d 127, 135 (D.C. Cir. 1987); *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984).

⁴³ *Hope*, 320 U.S. 591, 602 (1944).

⁴⁴ *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 776 (2016).

⁴⁵ *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 768 (2016) (quoting *Morgan Stanley Capital Group v. Public Utility Dist. No. 1 of Snohomish Cnty., WA*, 554 U.S. 527, 538 (2008)); *Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288, 1292 (2016) (citing *EPSA*); *Oneok, Inc. v. Learjet*, 135 S.Ct. 1591, 1597 (2015) (recognizing that “FERC adopted an approach that relied on the competitive marketplace, rather than classical regulatory rate-setting, as the main mechanism for keeping *wholesale* natural-gas rates at a reasonable level”).

⁴⁶ *Pa. Water & Power Co. v. Fed. Power Comm’n*, 343 U.S. 414, 418 (1952); *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 781 (2016).

⁴⁷ *National Ass’n for Advancement of Colored People v. FPC*, 425 U.S. 662, 671 (1976).

⁴⁸ *Otter Tail Power Co. v. U.S.* 410 U.S. 366, 374 (1973); *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758 (1973) (“The Act had two primary and related purposes: to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce. . . . This power clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations.”).

⁴⁹ *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968).

⁵⁰ *National Ass’n for Advancement of Colored People v. FPC*, 425 U.S. 662, 671 (1976).

⁵¹ *Richmond Power and Light of City of Richmond, Ind. v. FERC*, 574 F.2d 610, 616 n. 22 (D.C. Cir. 1978).

⁵² Title II of the FPA is littered with references to the “public interest.” FERC must consider the public interest when it evaluates major utility transactions (§ 203), security issuances (§ 204), and interconnection and wheeling requests (§§ 210, 211), and must account for the public interest in its reliability standards (§ 215), market price transparency rules (§ 220), market manipulation rules (§ 222), orders to require unregulated utilities to provide open-access transmission (§ 211A), and when it wields its limited transmission line siting authority (§ 216). These numerous references to the public interest require that FERC consider the statute’s core purposes when it makes decisions.

⁵³ 50 FPC 1351, 1355 (1977).

⁵⁴ FERC has rarely, if ever, invoked this aspect of § 202(a). In 1973, the FPC issued Order No. 496, which was designed to achieve, among other goals, “all possible savings by electric utilities in their consumption of petroleum and natural gas for the generation of electric power.” The order cites to § 202, and is consistent with the FPA’s charge to consider conservation.

⁵⁵ *Richmond Power and Light of City of Richmond, Ind. v. FERC*, 574 F.2d 610, 616 n. 22 (D.C. Cir. 1978).

⁵⁶ *Id.* at 617.

⁵⁷ *New England Power Generators Ass’n v. FERC*, 757 F.3d 283, 290 (D.C. Circuit 2014).

⁵⁸ *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 95–98 (3rd Cir. 2014) (rejecting argument that changes to PJM’s Minimum Offer Price Rule “amounts to direct regulation of generating facilities”); *New England Electric Power Generators Ass’n v. FERC*, 757 F.3d 283, 290 (D.C. Circuit 2014) (upholding buyer side mitigation measures despite arguments that they “serve to dictate which resources a utility must use to satisfy its capacity obligations” and “impermissibly determine the makeup of a state’s resource portfolio”); *Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 481–83 (D.C. Cir. 2009) (holding that FERC may regulate Installed Capacity Requirement as it affects FERC jurisdictional rates, even if the requirement could result in the construction of facilities, a matter under state jurisdiction); *Municipalities of Groton v. FERC*, 587 F.2d 1296, 1300–03 (D.C. Cir. 1978) (concluding that FERC approval of a capacity deficiency charge does not encroach on

state jurisdiction, even though it may “motivate [utilities] to develop sufficient capacity to meet their load requirements”).

⁵⁹ *Municipalities of Groton v. FERC*, 587 F.2d 1296, 1302 (D.C. Cir. 1978) (emphasis added).

⁶⁰ *Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 485 (D.C. Cir. 2009) (emphasis added).

⁶¹ *New England Electric Power Generators Ass’n v. FERC*, 757 F.3d 283, 291 (D.C. Cir. 2014).

⁶² *Id.*

⁶³ *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 99 (3rd Cir. 2014).

⁶⁴ *Id.*

⁶⁵ *Id.* at 98.

⁶⁶ See *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215 (1964) (“Congress meant to draw a bright line, easily ascertained, between state and federal jurisdiction”).

⁶⁷ *Hughes v. Talen*, 136 S.Ct. 1288, 1300 (2016) (J. Sotomayor, concurring); see also *OneOK v. Learjet*, 135 S.Ct. 1591, 1601 (2015) (“Petitioners and the dissent argue that there is, or should be, a clear division between areas of state and federal authority in natural-gas regulation. But that Platonic ideal does not describe the natural gas regulatory world.”).

⁶⁸ See Joel Eisen, FERC’s Expansive Authority to Transform the Electric Grid, 49 U.C. DAVIS L. REV. 1783.

⁶⁹ Jim Rossi, The Brave New Path of Energy Federalism, 95 Tex. L. Rev (2016).

⁷⁰ *Conn. Light & Power Co. v. Fed. Power Comm’n*, 324 U.S. 515, 525 (1945) (quoting Hearings on H.R. 5423 Before H. Comm. on Interstate and Foreign Commerce, 74th Cong. 384 (1935)).

⁷¹ *Illinois Commerce Comm’n v. FERC*, 721 F.3d 764, 773 (7th Cir. 2013).

⁷² Midwest ISO et al Filing, FERC Docket No. ER10-1791, at p. 2 (Jul. 15, 2010) (emphasis added).

⁷³ 133 FERC ¶ 61,221 at P 194 (2010) (emphasis added).

⁷⁴ *Illinois Commerce Comm’n v. FERC*, 721 F.3d 764, 771 (7th Cir. 2013).

⁷⁵ 147 FERC ¶ 61,173 at P 64 (2014), *reh’g denied*, 150 FERC ¶ 61,065 (2015).

⁷⁶ *Id.* at 82.

⁷⁷ FERC Order No. 1000, 136 FERC ¶ 61,051 at P111 (2011).

⁷⁸ *S.C. Pub Serv. Authority v. FERC*, 762 F.3d 41, 89 (D.C. Cir. 2014).

⁷⁹ *Id.* at 62 (citing *New York v. FERC*, 535 U.S. 1, 17 (2002)).

⁸⁰ *New York v. FERC*, 535 U.S. 1 (2002).

⁸¹ 142 FERC ¶ 61,108 at P 35 (2013).

⁸² *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 780 (2016) (quoting *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972)).

⁸³ *Hughes v. Talen*, 136 S.Ct. 1288, 1300 (2016) (J. Sotomayor, concurring).

⁸⁴ Jim Rossi, The Brave New Path of Energy Federalism, 95 TEX. L. REV. (2016).

⁸⁵ See, e.g., IMAPP Presentation of NRG, Oct. 21, 2016,

http://nepool.com/uploads/IMAPP_20161021_NRG.pdf (differentiating between IMAPP proposals that “accommodate” and those that “achieve” state policy objectives); Donald J. Sipe, Four Possible Functionalities of IMAPP Reforms, http://nepool.com/uploads/IMAPP_20161006_Position_Sipe_Functionalities.pdf (distinguishing between IMAPP proposals that “advance” state policies and those that are “purely defensive reforms designed to protect price formation”).

⁸⁶ *California Electric Power Co. v. FPC*, 199 F.2d 206, 209 (9th Cir. 1952).

⁸⁷ FERC Order No. 1000, 136 FERC ¶ 61,051 P at 209 (2011).

⁸⁸ *S.C. Pub Serv. Authority v. FERC*, 762 F.3d 41, 89 (D.C. Cir. 2014).

⁸⁹ Conservation Law Foundation presentation,

http://nepool.com/uploads/IMAPP_20160914_Presentation_FCM-C.pdf.

⁹⁰ See *Kain v. Dept. of Environmental Protection*, 474 Mass. 278 (2016) (concluding that the Global Warming Solutions Act, which requires economy-wide 80 percent CO₂ reductions by 2050, requires state regulators to set actual limits on emissions rather than aspirational goals and requires regulators to do so).

⁹¹ *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).

⁹² *Environmental Action v. FERC*, 939 F.2d 1057, 1064 (D.C. Cir. 1991).

⁹³ *Michigan Public Power Agency v. FERC*, 963 F.2d 1574, 1580 (D.C. Cir. 1992) (citing *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813–14 (1978)).

⁹⁴ *East Tennessee v. FERC*, 863 F.2d 932, 939 (D.C. Cir. 1988).

⁹⁵ *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006) (emphasis added) (citing *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) (upholding FCC rule premised on “predictions about the development of new broadband technologies and about the incentives for increased deployment (and, in turn, increased competition) flowing from an absence of unbundling”)).

⁹⁶ *Sacramento Mun. Utility Dist. v. FERC*, 616 F.3d 520, 530 (D.C. Cir. 2010) (citing *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 688 (D.C. Cir. 2000)). There, the D.C. Circuit clarified that “this Court’s rationale for vacating the FERC order at issue in our 1984 decision in *Electric Consumers* was not that the Commission had relied on economic theory, but that it had “distorted the economic theory it claimed to apply.”)

⁹⁷ *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1008 (D.C. Cir. 1987).

⁹⁸ *Black Oak Energy v. FERC*, 725 F.3d 230, 240 (D.C. Cir. 2013).

⁹⁹ 2014 ISO New England Electric Generator Air Emissions Report, Jan. 2016, p. 31 https://www.iso-ne.com/static-assets/documents/2016/01/2014_emissions_report.pdf (showing total emissions each year from 2001 and 2014 and stating that there was a 26 percent total reduction).

¹⁰⁰ See ISO-NE Presentation, Sep. 28, 2016, https://www.iso-ne.com/static-assets/documents/2016/09/gvw_nec_9_28_2016.pdf (showing expected growth of wind and solar).

¹⁰¹ See, e.g., IMAPP Presentation of NRG, Oct. 21, 2016, http://nepool.com/uploads/IMAPP_20161021_NRG.pdf (differentiating between IMAPP proposals that “accommodate” and those that “achieve” state policy objectives); Donald J. Sipe, Four Possible Functionalities of IMAPP Reforms, http://nepool.com/uploads/IMAPP_20161006_Position_Sipe_Functionalities.pdf (distinguishing between IMAPP proposals that “advance” state policies and those that are “purely defensive reforms designed to protect price formation”).

¹⁰² Framework Document: Two-Tier FCM Pricing, Sep. 12, 2016, http://nepool.com/uploads/IMAPP_20160914_Framework_NRG_rev.pdf.

¹⁰³ *Conn. Dep’t of Pub. Util. Control*, 569 F.3d 477, 484 (D.C. Cir. 2009).

¹⁰⁴ In *Keyspan-Ravenswood LLC v. FERC*, 348 F.3d 1053 (D.C. Cir. 2003), the court vacated a FERC order approving a NYISO tariff because FERC did not adequately address objections about the tariff’s methodology for calculating a capacity market price cap. Courts have approved FERC capacity market design orders in every other case: *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232 (D.C. Cir. 2005); *Public Service Gas & Electric Co. et al. v. FERC*, 324 Fed.Appx. 1 (D.C. Cir. 2009); *Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009); *TC Ravenswood v. FERC*, 705 F.3d 474 (D.C. Cir. 2013); *TC Ravenswood v. FERC*, 741 F.3d 112 (D.C. Cir. 2013); *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3rd Cir. 2014); *New England Power Generators Ass’n v. FERC*, 757 F.3d 283 (D.C. Circuit 2014).

¹⁰⁵ See Joint Opening Brief of Petitioners, *Advanced Energy Management Alliance et al. v. FERC*, D.C. Cir. Docket No. 16-1234, pg. 68–69 (Sep. 23, 2016); Brief of Petitioner New England Power Generators Association, Inc., *New England Power Generators Association, Inc. v. FERC*, D.C. Cir. Docket No. 16-1023 (Jul. 18, 2016).

¹⁰⁶ 137 FERC ¶ 61,145 at P 90 (2011).

¹⁰⁷ 138 FERC ¶ 61,027 at P 91 (2012).

¹⁰⁸ 139 FERC ¶ 61,061 at P 24 (2012).

¹⁰⁹ 69 FERC ¶ 61,344 at 62,289 (1994).

¹¹⁰ 139 FERC ¶ 61,061 at P 25 (2012).

¹¹¹ *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 774 (2016) (explaining that “a common-sense construction of the FPA’s language, limit[s] FERC’s ‘affecting’ jurisdiction to rules or practices that ‘directly affect the [wholesale] rate.’”).

¹¹² See Joint Opening Brief of Petitioners, *Advanced Energy Management Alliance et al. v. FERC*, D.C. Cir. Docket No. 16-1234, pg. 68–69 (Sep. 23, 2016); Brief of Petitioner New England Power Generators Association, Inc., *New England Power Generators Association, Inc. v. FERC*, D.C. Cir. Docket No. 16-1023 (Jul. 18, 2016).

¹¹³ See Joel Eisen, FERC’s Expansive Authority to Transform the Electric Grid. 49 U.C. DAVIS L. REV. 1783, 1799-1802 (2016) (tracing the prohibition against undue discrimination to turn-of-the-century railroad regulation and summarizing that early cases understood discrimination to refer to unlawful practices or advantages).

¹¹⁴ ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS, VOL. 1, 63 (1970) (“The rule that individual rates not be unduly discriminatory similarly has been defined in terms of the respective costs of various services.”).

¹¹⁵ *Electricity Consumers Resource Council v. FERC*, 747 F.2d 1511, 1515 (D.C. Cir. 1984) (citing *Alabama Elec. Co-op., Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982)).

¹¹⁶ *Black Oak Energy v. FERC*, 725 F.3d 230, 240 (D.C. Cir. 2013) (quoting *Electricity Consumers Resource Council v. FERC*, 747 F.2d 1511, 1515 (D.C. Cir. 1984)); see also *Ark. Elec. Energy Consumers v. FERC*, 290 F.3d 362, 367 (D.C. Cir. 2002) (“A rate is not unduly preferential or unreasonably discriminatory if the utility can justify the disparate effect.”).

¹¹⁷ *Am. Electric Power Serv. Corp.*, 67 FERC ¶ 61,168, 61,490 (1994) (citing *New England Power Pool*, 67 FERC ¶ 61,042 (1994)).

¹¹⁸ *Transmission Policy Access Group v. FERC*, 225 F.3d 667, 684 (D.C. Cir. 2000), *aff’d* *New York v. FERC*, 535 U.S. 1 (2002); see also Federal Energy Regulatory Commission, Order No. 888, 61 Fed. Reg. 21,540 (1996) (“Non-discriminatory open access to transmission services is critical to the full development of competitive wholesale generation markets and the lower consumer prices achievable through such competition.”).

¹¹⁹ See FERC Order No. 764, 139 FERC ¶ 61,246 at PP 6–9 (2012); FERC Order No. 792, 145 FERC ¶ 61,159 at PP 15, 21–23 (2013).

¹²⁰ *Black Oak Energy v. FERC*, 725 F.3d 230, 237 (D.C. Cir. 2013).

¹²¹ See, e.g., *Transmission Agency of Northern California v. FERC*, 628 F.3d 538, 549–52 (D.C. Cir. 2010); *Black Oak Energy v. FERC*, 725 F.3d 230, 239–41 (D.C. Cir. 2013).

¹²² *Transmission Agency of Northern California v. FERC*, 628 F.3d 538, 549–52 (D.C. Cir. 2010) (citing *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009)).

¹²³ 137 FERC ¶ 61,145 at PP 109, 110 (2011).

¹²⁴ *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 107 (3rd Cir. 2014).

¹²⁵ *Id.* at 98.

¹²⁶ Joint Opening Brief of Petitioners, *Advanced Energy Management Alliance et al., v. FERC*, D.C. Cir. Docket No. 16-1234, pg. 68–69 (Sep. 23, 2016).

¹²⁷ 150 FERC ¶ 61,065 at P 19 (2015) (citing several FERC orders including 119 FERC ¶ 61,063 at P 39 (2007) (“[T]he 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.”).

¹²⁸ 69 FERC ¶ 61,344 at 62,289 (1994); FERC Policy Statement and Interim Rule Regarding Ratemaking Treatment of the Cost of Emissions Allowances in Coordination Rates, 59 Fed. Reg. 65,930 (Dec. 22, 1994).

¹²⁹ 141 FERC ¶ 61,237 at P 29 (2013) (“As a general matter, we find that it is reasonable to incorporate the emissions costs of the greenhouse gas allowances into the calculation of generating units’ variable costs as calculated in CAISO’s tariff. Such a revision is required in order to provide generators a reasonable opportunity to recover their variable energy costs incurred as a result of the California Program.”).

¹³⁰ *Sacramento Mun. Utility Dist. v. FERC*, 616 F.3d 520, 524 (D.C. Cir. 2010).

¹³¹ 101 FERC ¶ 61,344 (2002).

¹³² ISO New England’s Internal Market Monitor, 2015 Annual Markets Report, Tbl. 1-1, p. 15 https://www.iso-ne.com/static-assets/documents/2016/05/2015_imm_amr_final_5_25_2016.pdf.

¹³³ Data derived from U.S. Energy Information Administration, Form 860.

¹³⁴ *Id.* at p. 66 (“One of the most pressing challenges identified in the ISO’s Strategic Planning Initiative was the region’s reliance on generators fueled by natural gas.”); NESCOE Problem Statement, *supra* note 2.

¹³⁵ *Morgan Stanley Capital Group v. Public Utility Dist. No. 1 of Snohomish Cnty., WA*, 554 U.S. 527, 545 (2008).

¹³⁶ *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944).

¹³⁷ But see *City of Charlottesville, VA v. FERC*, 661 F.2d 945, 950 (“Experience has taught that a determination of whether the result reached is just and reasonable requires an examination of the method employed in

reaching that result. In examining Commission methodology, “(w)hat is basic is the requirement that there be support in the public record for what was done.”) (citing *In re Permian Area Rate Cases*, 390 U.S. 747, 791 (1968), *American Public Gas Ass’n. v. FPC*, 567 F.2d 1016, 1029 (D.C. Cir. 1977)).

¹³⁸ *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 768 (2016) (quoting *Morgan Stanley Capital Group v. Public Utility Dist. No. 1 of Snohomish Cnty., WA*, 554 U.S. 527, 538 (2008)).

¹³⁹ *K N Energy v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1984).

¹⁴⁰ *Black Oak Energy v. FERC*, 725 F.3d 230, 237 (D.C. Cir. 2013).

¹⁴¹ *Farmers Union Cent. Exchange*, 734 F.2d 1486, 1502 (D.C. Cir. 1984) (citations omitted).

¹⁴² *Consumers Union v. FPC*, 510 F.2d 656, 660 (D.C.Cir.1974) (citing *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 314–321 (1974). Opponents may argue that incentive rates are subject to a heightened standard of review, above and beyond the just and reasonable standard, that requires FERC to demonstrate that the incentive is “in fact needed, and is no more than is needed, for the purpose.” *City of Detroit v. FPC*, 230 F.2d 810, 817 (D.C. Cir. 1955); see also *Electricity Consumers Resource Council v. FERC*, 407 F.3d 1232, 1236–39 (D.C. Cir. 2005) (citing to cases that petitioner claimed supported a heightened standard of review but rejecting that the tariff at issue provided an “incentive” rate). Judicial precedent is unclear on this issue. This standard has never been applied to a court’s review of RTO market rules. In 2005, opponents of an administratively determined demand curve (ICAP) that was an important input to New York’s capacity market construct argued for this heightened standard of review. The court concluded that the ICAP was not an incentive rate, as petitioners urged. The court did not definitely determine whether an incentive rate formula for an RTO market is subject to heightened review. *Electricity Consumers Resource Council v. FERC*, 407 F.3d 1232 (D.C. Cir. 2005).

¹⁴³ *Incentive Ratemaking for Interstate Natural Gas Pipelines, Oil Pipelines, and Electric Utilities*, 61 F.E.R.C. ¶ 61,168, 61,594 (1992).

¹⁴⁴ *National Ass’n for Advancement of Colored People v. FPC*, 425 U.S. 662, 671 (1976).

¹⁴⁵ *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (determining whether a rate is just and reasonable must “involve[] a balancing of the investor and the consumer interests”).

¹⁴⁶ *Public Service Comm’n of N.Y. v. FERC*, 589 F.2d 542, 550 (D.C. Cir. 1978).

¹⁴⁷ *Blumenthal v. FERC*, 552 F.3d 875, 883 (D.C. Cir. 2009).

¹⁴⁸ *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964 (D.C. Cir. 2005).

¹⁴⁹ See, e.g., *Integration of Variable Energy Resources*, Notice of Inquiry, 130 FERC ¶ 61,053 at P 10 (2010) (“Our goal is not to adopt rules that favor one type of supply source over another.”).

¹⁵⁰ *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 98 (3rd Cir. 2014).

¹⁵¹ *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

¹⁵² *Grand Council of Crees*, 198 F.3d 950, 956 (D.C. Cir. 2000).

¹⁵³ *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

¹⁵⁴ *National Ass’n for Advancement of Colored People v. FPC*, 425 U.S. 662, 671 (1976).

¹⁵⁵ See Forward Clean Energy Market Framework Document, Sep. 12, 2016, http://nepool.com/uploads/IMAPP_20160914_Framework_FCEM.pdf.

¹⁵⁶ But see, *supra* note 137.

¹⁵⁷ *Transmission Policy Access Group v. FERC*, 225 F.3d 667, 684 (D.C. Cir. 2000), *aff’d New York v. FERC*, 535 U.S. 1 (2002); see also Federal Energy Regulatory Commission, Order No. 888, 61 Fed.Reg. 21,540 (1996) (“Non-discriminatory open access to transmission services is critical to the full development of competitive wholesale generation markets and the lower consumer prices achievable through such competition.”).

¹⁵⁸ *Advanced Energy Management Alliance et al., v. FERC*, D.C. Cir. Docket No. 16-1234.

¹⁵⁹ See Forward Clean Energy Market Framework Document, Sep. 12, 2016, http://nepool.com/uploads/IMAPP_20160914_Framework_FCEM.pdf.

¹⁶⁰ *Hughes v. Talen*, 136 S.Ct. 1288, 1291 (2016); see also *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (recognizing that Congress “vested” in FERC “exclusive jurisdiction” and “plenary authority over interstate wholesale rates”).

¹⁶¹ *PPL EnergyPlus v. Nazarian*, 753 F.3d 467, 478 (4th Cir. 2014) (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000)).

¹⁶² *Id.* (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n*, 489 U.S. 493, 515 (1989)).

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- ¹⁶³ *Hughes v. Talen*, 136 S.Ct. 1288, 1300 (2016) (J. Sotomayor, concurring).
- ¹⁶⁴ *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 374 (1988).
- ¹⁶⁵ IMAPP Goal Posts, http://nepool.com/uploads/IMAP_20160621_Goal_Posts_States.pdf.
- ¹⁶⁶ Massachusetts HB 4568 (2016), Section 12C.
- ¹⁶⁷ R.I. GEN. LAWS § 39-26.1-3.
- ¹⁶⁸ *Morgan Stanley Capital Group v. Public Utility Dist. No. 1 of Snohomish Cnty., WA*, 554 U.S. 527, 546–48 (2008); see also FERC Notice of Proposed Rulemaking, 122 F.E.R.C. ¶ 61,167 at P 130 (2008) (“Long-term power contracts are an important element in a functioning electric power market.”).
- ¹⁶⁹ *But see North Carolina v. Heydinger*, 825 F.3d 912 (8th Cir. 2016) (J. Murphy concurring) (finding that Minnesota’s ban on power from new, out-of-state coal-fired power plants regulates wholesale sales and is therefore preempted by the FPA).
- ¹⁷⁰ See *supra* note 164.
- ¹⁷¹ *Hughes v. Talen*, 136 S.Ct. 1288, 1299 (2016).
- ¹⁷² *OneOK v. Learjet*, 135 S.Ct. 1591, 1600 (quoting *Northern Natural Gas Co. v. State Corporation Comm’n of Kan.*, 372 U.S. 84 (1963)).
- ¹⁷³ For cites to the state laws and regulations, see <http://rggi.org/design/regulations>. Legislation in New England includes CONN. GEN. STAT. § 22a-200c(b); ME. REV. STAT. tit. 38 § 580-B(4); MASS. GEN. L. c. 21A, § 22(c)(1); N.H. REV. STAT. ANN. § 125-O:8, 21; R.I. GEN. LAWS § 23-82-5(c); VT STAT. ANN. Ch. 30 § 255(c).
- ¹⁷⁴ *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 377 (1988) (citing *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962–967 (1986)).
- ¹⁷⁵ *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 780 (2016) (quoting *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972)).
- ¹⁷⁶ *Hughes v. Talen*, 136 S.Ct. 1288, 1300 (2016) (J. Sotomayor, concurring).
- ¹⁷⁷ *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).
- ¹⁷⁸ State IMAPP Objectives Memo, http://nepool.com/uploads/IMAPP_20161006_IMAPP_Objectives_to_NEPOOL_9_30_16.pdf.
- ¹⁷⁹ FERC Order No. 890 at P 574 (2007) (“As with any other interested stakeholder, we emphasize that planning must be coordinated with relevant state regulators . . . that wish to participate in the transmission provider’s planning process. . . . We stress that state determinations with respect to retail load will not be second-guessed, but that once those determinations are incorporated into the transmission plan, the transmission planning principles will apply.”).
- ¹⁸⁰ See *Northwest Central Pipeline Corp. v. State Corporation Comm’n of Kan.*, 489 U.S. 493, 518 (1989) (“The NGA does not require FERC to regulate around a state rule the only purpose of which is to influence purchasing decisions of interstate pipelines, however that rule is labeled.”); *Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007) (“As FERC’s authority generally rests on the public interest in constraining exercises of market power . . . it is hard to see how the statute could leave FERC weaponless against conduct that might encourage or cloak the running up of unreasonable costs.”).
- ¹⁸¹ 155 FERC ¶ 61,076 at PP 31–41 (2016).
- ¹⁸² 143 FERC ¶ 61,150 (2013) *reh’g denied*, 150 FERC ¶ 61,209 (2015).
- ¹⁸³ Brief of Respondent FERC, *Emera Maine, et al. v. FERC*, D.C. Cir. Docket No. 15-1139, at pp 55–59 (May 20, 2016).
- ¹⁸⁴ *Emera Maine, et al. v. FERC*, D.C. Cir. Docket No. 15-1139.
- ¹⁸⁵ *Atlantic City Elec.*, 295 F.3d 1, 10 (D.C. Cir. 2002).
- ¹⁸⁶ *FirstEnergy Services Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014) (citing *Boston Edison Co. v. FERC*, 233 F.3d 60, 64 (1st Cir. 2000); *Kan. Gas & Elec. Co. v. FERC*, 758 F.2d 713, 716 (D.C. Cir. 1985)).
- ¹⁸⁷ *Sacramento Mun. Utility Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010).
- ¹⁸⁸ *Morgan Stanley Capital Group v. Public Utility Dist. No. 1 of Snohomish Cnty., WA*, 554 U.S. 527, 532 (2008).
- ¹⁸⁹ *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 782 (2016).