

ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1224
(consolidated with Nos. 19-1247, 19-1252 & 19-1253)

In the
United States Court of Appeals
for the
District of Columbia Circuit

BELMONT MUNICIPAL LIGHT DEPARTMENT, et al.,
Petitioners,

– v. –

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

NEW ENGLAND POWER GENERATORS ASSOCIATION, et al.,
Intervenors for Respondent.

On petition for review of orders of the
Federal Energy Regulatory Commission

**BRIEF OF THE NEW ENGLAND POWER GENERATORS
ASSOCIATION AS INTERVENOR FOR RESPONDENT**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties to the underlying agency proceeding and who have appeared before the Court are listed in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Respondent.

C. Related Cases

This case has not previously been before this Court or any other court. There are no related cases.

/s/ Paul W. Hughes

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Rules of this Court, the New England Power Generators Association, Inc. (NEPGA), states as follows:

NEPGA, a not-for-profit entity duly organized under the laws of the Commonwealth of Massachusetts, is a trade association that advocates for the business interests of non-utility competitive electric power generators in New England. NEPGA's member companies represent approximately 26,000 megawatts of installed capacity throughout the New England region. NEPGA's member companies are responsible for generating and supplying electric power for sale within the New England bulk power system, and are active participants in the ISO-NE capacity and wholesale electricity markets.

NEPGA has no corporate parents and does not issue stock; there is therefore no entity that owns 10% or more of its stock. NEPGA is a trade association for purposes of Circuit Rule 26.1(b).

/s/ Paul W. Hughes

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GLOSSARY

FERC	Federal Energy Regulatory Commission
ISO-NE	ISO New England, Inc.
MW	Megawatts
MWh	Megawatt-hours
Program	Inventoried Energy Program

INTRODUCTION

Cold snaps are a fact of life in New England, and—because they greatly increase the region’s demand for natural gas—they can pose a serious problem for the reliability of the region’s electricity grid. Forecasts indicate that, barring action by the region’s system operator, ISO New England, Inc. (ISO-NE), New England will suffer from repeated blackouts during the coldest winter days. Widespread power outages during freezing weather pose enormous risks to the welfare of millions of New England residents; prior outages have been directly linked to death and significant economic loss.

Ensuring the resilience and reliability of electric generation to meet consumer demands during these critical periods is thus of paramount importance. At issue here, ISO-NE created an interim program to incentivize power generators to maintain on-site, stored fuel—that is, “inventoried energy”—to reduce the risk of a grid-wide inability to meet the demand for power on extremely cold days. This “Inventoried Energy Program” (the Program) provides cash incentives for power plants to maintain on-site fuel reserves, ensuring that they can generate power even when the region faces cold-induced fuel shortages. FERC approved the Program as a temporary, stopgap measure to fill an identified market need during the winters of 2023-2024 and 2024-2025.

Because FERC's approval of the Program as an interim measure was neither arbitrary, capricious, nor an abuse of discretion, the petitions for review should be denied.

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the addenda to petitioners' respective opening briefs.

ISSUE PRESENTED FOR REVIEW

Did the Federal Energy Regulatory Commission act arbitrarily or capriciously by approving a short-term, interim program to address New England's pressing winter fuel security problems, while a permanent solution is developed?

STATEMENT

A. Winter fuel security in New England.

FERC and ISO-NE have both identified a serious problem confronting New England's power grid—fuel security during cold winter weather. There has been a trend in recent decades toward natural gas-fired power plant development; other generation technologies, like oil, that permit large quantities of fuel to be stored on site, are either being retired or running much less frequently. At the same time, the region “has not seen commensurate investment in natural gas infrastructure,” with the result that “the New England region has unique challenges with respect to the

availability of fuel.” *ISO New England Inc.*, 164 FERC ¶ 61,003 (2018) (LaFleur, Commissioner, concurring).

Natural gas-fired power plants generally rely on just-in-time delivery of gas through pipelines. *See* ISO New England, *Natural Gas Infrastructure Constraints*, perma.cc/7TJN-SZST. Gas utilities, which supply natural gas to homes and businesses for heating and other purposes, may in certain circumstances have priority access to the finite amount of gas pipeline capacity. *Id.*; *see also* ISO New England, *Operational Fuel-Security Analysis* 16, 25 fig. 3 (Jan. 17, 2018) (*Fuel-Security Analysis*), perma.cc/3G2F-BH83 (JA __, __).¹ The result is that, “during the coldest weeks of the year, th[e] natural gas delivery infrastructure can’t meet all the demand for natural gas for both home heating and power generation,” and “natural-gas-fired power plants ... may not be able to access natural gas.” *Fuel-Security Analysis* at 16 (JA __).

This potential, cold-triggered shortfall in gas-fired electricity generation must be made up by other types of generation resources. Absent generation with sufficient fuel stores, *i.e.*, “inventoried energy,” the grid

¹ This document was cited in ISO-NE’s filings before the Commission, and FERC relied upon it substantively in its order. *See* Order PP 45 & n.82, 58 (JA __, __). It is therefore part of the administrative record. *See James Madison Ltd. ex rel. Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996).

operator will be forced to implement emergency measures—including load shedding, “also known as rolling blackouts or controlled outages that disconnect blocks of customers sequentially ... as a last resort to protect the grid.” *Fuel-Security Analysis* at 8 (JA ___). And it is noncontroversial that, “during the winter months in New England[,] ... the loss of electricity can have dire consequences.” *ISO New England*, 164 FERC ¶ 61,003 (Glick, Commissioner, dissenting in part).

B. ISO-NE’s forward capacity market.

As New England’s independent system operator, ISO-NE administers a forward capacity market in which electric “capacity” is bought and sold. As this Court has explained: “In this market, electricity providers purchase from generators options to buy quantities of energy three years in advance.” *PSEG Energy Resources & Trade LLC v. FERC*, 665 F.3d 203, 205 (D.C. Cir. 2011).

If a generation resource that has previously participated in the forward capacity market wishes to exit the market, it “must submit a Retirement De-List Bid 11 months before the associated auction,” which determines whether the resource may retire. *ISO New England*, 164 FERC ¶ 61,003 at P 7. If the resource’s de-list bid is lower than the eventual clearing price of the auction, the resource permanently exits the market beginning with the associated delivery period, three years later. Thus,

generators' retirement decisions must be made three to four years in advance.

C. ISO-NE's proposal.

ISO-NE developed the Program as an interim mechanism to ameliorate fuel security risks for the winters of 2023-2024 and 2024-2025, while a longer-term solution is developed. ISO-NE Filing 4, R.2 (JA __), Order P 57, R.110 (JA __).

1. In January of 2018, ISO-NE published its *Fuel-Security Analysis*, which reflected a year-long study of New England's winter fuel security issues and calculated the impacts, in projected days of rolling blackouts and other metrics, of twenty-three scenarios for the 2024-2025 winter. *See generally Fuel-Security Analysis* (JA __-__); *see also ISO New England*, 164 FERC ¶ 61,003 at PP 4-5 (summarizing same). The study's conclusions were dire: "In almost all future resource combinations, the power system was unable to meet electricity demand and maintain reliability without some degree of emergency actions." *Fuel-Security Analysis* at 8 (JA __). Indeed, "all but the most optimistic case resulted in load shedding, also known as rolling blackouts or controlled outages." *Id.* "Taken together, the study results suggest that New England could be headed for significant levels of emergency actions, particularly during major fuel or resource outages." *Id.* at 9 (JA __).

Shortly thereafter, ISO-NE learned that two resources, known as Mystic 8 and 9, had submitted retirement de-list bids for the winter of 2022-2023. After conducting targeted studies and concluding “that the loss of Mystic 8 and 9 presented ‘unacceptable fuel security risks,’” ISO-NE petitioned FERC for a waiver of certain provisions of its tariff so it could delay the retirement. *ISO New England*, 164 FERC ¶ 61,003 at P 10.

In a July 2, 2018 order, although denying ISO-NE’s request on a technical basis (*id.* P 47), FERC recognized the severity of the winter fuel security problem facing the region. FERC expressly “f[ou]nd ISO-NE’s methodology and assumptions in the [*Fuel-Security Analysis*] and Mystic Retirement Studies reasonable and accept[ed] ISO-NE’s conclusions that the retirement of Mystic 8 and 9 ... could cause ISO-NE to violate mandatory reliability standards as soon as 2022.” *Id.* P 49.² FERC sua sponte initiated a proceeding under Section 206 of the Federal Power Act and preliminarily found ISO-NE’s tariff unjust and unreasonable because of

² See also *ISO New England*, 164 FERC ¶ 61,003 (LaFleur, Commissioner, concurring) (“Today’s order ... concludes that the New England region is facing serious fuel security challenges that must be addressed.”); *id.* (Chatterjee, Commissioner, concurring) (“[F]uel security risks beyond the control of market participants may demand near-term, out-of-market support until any long-term, market-based solutions that are identified as necessary can be implemented.”).

the “specific regional fuel security concerns identified in the record.” *Id.* FERC ordered ISO-NE to submit both (1) “interim Tariff revisions that provide for the filing of a short-term, cost-of-service agreement to address” the Mystic 8 and 9 situation, and (2) “permanent Tariff revisions reflecting improvements to [the] market design to better address regional fuel security concerns.” *Id.* P 55.

After submitting initial tariff revisions addressing Mystic 8 and 9 (*see ISO New England Inc.*, 165 FERC ¶ 61,202 at P 49 (2018)), ISO-NE sought to satisfy the second half of FERC’s directive by proposing a permanent solution to winter fuel security. FERC recently rejected those permanent revisions. *See ISO New England Inc.* 173 FERC ¶ 61,106 at PP 1, 22 (2020).

2. While it was developing its long-term solution, ISO-NE proposed the Program on March 25, 2019, as an interim measure for the winters of 2023-2024 and 2024-2025. Order PP 1, 5 (JA __, __).

The Program addresses winter fuel security by procuring “inventoried energy”—or, in layman’s terms, by paying resources to maintain fuel inventories needed to generate during periods when fuel is scarce. “For example, if an oil resource has an on-site tank containing enough oil to operate the resource for two days, that resource has two days of invento-

ried energy.” ISO-NE Filing 8 (JA __). The program is also open to renewable resources with the equivalent of on-site fuel, including certain hydroelectric facilities with water stored in reservoirs, and wind and solar facilities with batteries that store energy for later use. Order P 14 (JA __).

Under the Program, an eligible resource can choose to participate in a forward market, in which the resource is paid in advance for a commitment to maintain inventoried energy, or in a spot market, in which the resource is paid for the amount of inventoried energy it has on hand during an “Inventoried Energy Day”—a day on which the average of the high and low temperatures (at Bradley International Airport) is 17 degrees Fahrenheit or lower. Order PP 6-9 (JA __-__).

The price for inventoried energy in the forward market is set at \$82.49 per megawatt-hour (MWh), a rate that was developed as “an estimate of the minimum rate that a natural gas-only resource would require in order to sign a winter peaking supply contract for vaporized liquefied natural gas.” Order P 7 (JA __); *see also* ISO-NE Filing at 148-165 (JA __-__) (technical analysis and calculations deriving this rate), 148 (JA __) (explaining that this measure was chosen because “a forward [liquefied natural gas] contract is the most viable, least-cost approach for gas-only resources to procure incremental inventoried energy”). The price in the

spot market is \$8.25/MWh, calculated by dividing the forward price by the expected ten Inventoried Energy Days per winter, such that “a resource is indifferent between selling stored energy for forward settlement or spot settlement.” Order P 8 (JA __). In either case, no individual resource will be compensated for more than 72 hours of inventoried energy. This cap “reflect[s] the decrease in the incremental reliability benefit of an additional MWh of inventoried energy as the resource’s quantity of inventoried energy increases.” *Id.* P 10 (JA __).

ISO-NE estimates that the Program will incent generation resources to sell forward and maintain between 1.2 million and 1.8 million MWh of inventoried energy for each Inventoried Energy Day, resulting in an estimated program cost of \$102 million to \$148 million per year. Order P 17 (JA __).

D. FERC’s decision.

FERC approved the Program on June 18, 2020, finding that it “is a reasonable short-term solution to compensating, in a technology-neutral manner, resources that provide fuel security.” Order PP 32, 57 (JA __, __). FERC found it “a reasonable short-term measure, which will likely provide reliability benefits, such as incenting up to 1.8 million MWh of inventoried energy to be available during stressed winter conditions, in

light of the fuel security concerns presented in the [*Fuel-Security Analysis*] and noted by [FERC] in the July 2 Order.” *Id.* P 58 (JA ___).

In particular, FERC found that ISO-NE’s “current market design contains a ‘misaligned incentives’ problem, such that fuel secure resources may not be sufficiently incented to make additional investments in energy supply arrangements, which may have adverse efficiency and reliability consequences under the existing market rules.” Order P 33 (JA ___). As FERC explained, “misaligned incentives result from the different values that generators and society place on investments in energy supply arrangements”: “[S]ociety places the value of such investments on the high energy price avoided, while generators value such investments based on the lower energy price they receive in the energy market as a result of the investment.” *Id.* FERC therefore found that, “by providing additional compensation to fuel secure resources,” the Program “helps address the misaligned incentives problem that currently exists in the Tariff.” *Id.*

Moreover, FERC continued, the Program may promote winter fuel security by allowing certain fuel-secure resources to lower the prices in their retirement de-list bids, thereby decreasing the likelihood that they retire. As FERC explained, “a resource that participates in the Invento-

ried Energy Program can lower its capacity offer to reflect program revenues,” which will help ISO-NE “retain an additional fuel secure resource that would have otherwise retired.” Order P 95 (JA __). Additionally, the Program “compensat[es] resources for a specific reliability attribute for which they are not currently compensated.” *Id.* P 62 (JA __).

In approving the Program, FERC stressed the need “that the program be in place in time for participants considering retirement decisions for” the forward capacity auctions for the 2023-2024 and 2024-2025 winters. Order P 96 (JA __).³

In sum, FERC found the Program just and reasonable because it “will help ISO-NE address winter energy security in light of the misaligned incentives in the market, while ISO-NE finishes developing a long-term market solution.” Order P 34 (JA __).

³ Because retirement de-list bids were due on March 15, 2019, when stakeholders were aware of the Program’s “final design components,” resources were “encouraged ... to submit two retirement de-list bids on that deadline, one assuming the [P]rogram is in place and one assuming it is not.” Order P 96 (JA __). This timing “allowed [resources] to reflect the [Program’s] impact on their bids,” even though it had not yet been approved. *Id.*

SUMMARY OF THE ARGUMENT

FERC's decision to approve the Program was reasoned and based on substantial evidence in the record, and therefore must survive arbitrary-and-capricious review.

1. FERC reasonably found that New England faces an unaddressed winter fuel security problem, and that the Program is a just and reasonable interim measure to address it while a long-term fix is developed. Substantial evidence indicates that New England is likely to face multiple days of reliability shortfalls during freezing winter weather absent action from ISO-NE. In light of this unacceptable risk, and the long lead time required to create a permanent solution, FERC reasonably approved the Program to ameliorate the pressing reliability issues, for two winters only, pending the development of longer-term measures. Given the "great deference" due to FERC's ratemaking decisions (*FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016)), and the even greater deference afforded to interim, exigent regulatory measures (*see AT&T, Inc. v. FCC*, 886 F.3d 1236, 1246 (D.C. Cir. 2018)), FERC's approval of the Program easily survives APA review.

2. Petitioners' specific objections to FERC's analysis lack merit. First, the Program does not deliver an inappropriate "windfall" by paying generators that already maintain inventoried energy. To the contrary,

there is nothing unjust and unreasonable about paying generators for service that is demonstrably needed to maintain system reliability. Moreover, the record evidence demonstrates that, by disincenting retirement of these needed resources and incenting them to procure fuel, the Program will have the unsurprising effect of increasing the amount of this needed service available to ISO-NE, relative to what would have been provided without compensation.

Second, the quantitative underpinnings of the Program are appropriately developed for an interim measure—indeed, Petitioners do not suggest how the additional quantitative analysis they call for could have been performed in the constrained timeframe available. Again, whether the Program is the best approach (especially when the alternative may be no solution at all) is a policy choice properly committed to ISO-NE, as the public utility filing under Section 205 of the Federal Power Act, and to FERC, as the expert agency reviewing that filing.

Nor does FERC's approval of the Program depart from precedent without explanation, fail to consider existing market structures, or discriminate against renewable energy sources.

Because FERC's approval of the Program was reasonable and supported by record evidence, the Court should deny the petitions for review.

ARGUMENT

I. FERC REASONABLY DETERMINED THAT THE PROGRAM IS A JUST AND REASONABLE INTERIM SOLUTION.

The Inventoried Energy Program at issue in this case—set to be in place for only two winters while a long-term solution is developed—is a rational and reasonable interim response to the fuel security issues faced by New England’s electrical grid during the cold winter months.

The Federal Power Act requires that rates and tariffs approved by FERC be “just and reasonable.” 16 U.S.C. § 824d(a). Under this flexible standard, “there is not a single ‘just and reasonable rate’ but rather a zone of rates that are just and reasonable,” and “a just and reasonable rate is [any] one that falls within that zone.” *Maine Pub. Utils. Comm’n v. FERC*, 520 F.3d 464, 471 (D.C. Cir. 2008); *see also Montana-Dakota Utils. Co. v. N.W. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (“Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint.”). In short, ratemaking under the Federal Power Act is “much less a science than an art.” *Ala. Elec. Co-op., Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982).

This Court “review[s] FERC’s decisions under the familiar arbitrary-and-capricious standard of the Administrative Procedure Act.”

Verso Corp. v. FERC, 898 F.3d 1, 7 (D.C. Cir. 2018). That review is “narrow” and deferential, and “the court must uphold [agency action] if the agency has ‘examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.’” *Elec. Power Supply Ass’n*, 136 S. Ct. at 782 (alterations incorporated). “And nowhere is that more true than in a technical area like electricity rate design: ‘[Courts] afford great deference to [FERC] in its rate decisions.’” *Id.*

Indeed, “in rate-related matters, the court’s review of [FERC]’s determinations is *particularly* deferential because such matters are either fairly technical or ‘involve policy judgments that lie at the core of the regulatory mission.’” *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54-55 (D.C. Cir. 2014) (emphasis added). “The court owes [FERC] ‘great deference’ in this realm because ‘[t]he statutory requirement that rates be just and reasonable is obviously incapable of precise judicial definition,’ and ‘[FERC] must have considerable latitude in developing a methodology responsive to its regulatory challenge.’” *Id.* at 55; *see also Blumenthal v. FERC*, 552 F.3d 875, 884-885 (D.C. Cir. 2009) (“A presumption of validity therefore attaches to each exercise of [FERC]’s expertise.”).

A. New England faces a real winter fuel security problem.

The Program addresses a serious problem identified by FERC in its order: Risks to fuel security due to increased reliance on just-in-time delivery of natural gas that may be diverted to heating applications during especially cold periods. *See* Order P. 58 (JA __).

1. As described above, ISO-NE published a thorough, year-long analysis of potential scenarios for the winter of 2024-2025, demonstrating that the risks were unacceptable: “In almost all future resource combinations, the power system was unable to meet electricity demand and maintain reliability without some degree of emergency actions.” *Fuel-Security Analysis* at 8 (JA __); *see also id.* (“[A]ll but the most optimistic case resulted in load shedding, also known as rolling blackouts or controlled outages.”). FERC relied on this painstaking analysis in the order below, incorporating both the *Fuel-Security Analysis*’s findings and FERC’s own earlier analysis of New England’s fuel security problems. Order P 58 (JA __) (“[W]e find that ISO-NE’s proposal to compensate fuel-secure resources is a reasonable short-term measure ... in light of the fuel security concerns presented in the [*Fuel-Security Analysis*] and noted ... in the July 2 Order.”).

FERC thus reasonably found, based on substantial evidence in the record, that a fuel security problem exists in New England given the current generation fuel mix. *See S.C. Pub. Serv. Auth.*, 762 F.3d at 54 (“Substantial evidence ‘is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,’ and requires ‘more than a scintilla’ but ‘less than a preponderance’ of evidence.”).

2. Alone among the petitioners, the Sierra Club and the Union of Concerned Scientists dispute FERC’s finding that a winter fuel-security problem exists. *See Sierra Club Br. 23-28*. But these objections fall flat.

These petitioners first assert that FERC’s July 2, 2018, order cannot provide support for its current finding of fuel security risks, because “[t]he Commission never found [in the July 2 order] that ISO-NE faces a fuel security problem beyond the specific generators targeted in the short-term Tariff revisions.” *Sierra Club Br. 25*. True enough, the July 2, 2018, order discussed fuel security risks in the context of the proposed retirement of the Mystic 8 and 9 generators—because that was the proposal before FERC at the time. But critically, FERC’s 2018 order also validated the methodology and assumptions underlying the *Fuel-Security Analysis*, which in turn revealed a problem much broader than just Mystic 8 and 9. *See ISO New England*, 164 FERC ¶ 61,003 at P 51 (“We find that ISO-NE has used a reasonable methodology to analyze the

available data under a rational set of assumptions to arrive at its conclusions in the [*Fuel-Security Analysis*].”).⁴

Indeed, the “reference case” studied in the *Fuel-Security Analysis*—that is, the “baseline scenario” expected to occur in 2024-2025 “if the power system’s evolution continues on its current path”—resulted in six days requiring rolling blackouts; in addition, “[l]ess severe emergency actions ... would be required for more than 75 hours.” *Fuel-Security Analysis* at 33-35 (JA __-__). Were any of the five studied resource-mix variables to turn out less favorably than in the reference case, those already-concerning outcomes would become substantially worse, up to a worst-case scenario involving *thirty-one days* of rolling blackouts in a single winter. *Id.* at 56 (JA __) (table showing results of all 23 studied cases).

FERC’s explanation of its reasoning must be upheld against challenge “if the agency’s path may reasonably be discerned.” *Transcontinental Gas Pipe Line Corp. v. FERC*, 518 F.3d 916, 922 (D.C. Cir. 2008). That standard is satisfied here, as FERC incorporated by reference “the fuel

⁴ See also *id.* PP 49 (“We find ISO-NE’s methodology and assumptions in the [*Fuel-Security Analysis*] and Mystic Retirement Studies reasonable.”), 50 (“We find that the studies are reasonable and support our preliminary findings in this order.”).

security concerns presented in the [*Fuel-Security Analysis*]”—whose top-line result is that an unacceptable level of risk will exist in 2024-2025 if industry conditions continue along their current path—along with FERC’s own earlier order that validated the *Fuel-Security Analysis*’s methodology and assumptions. Order P 58 (JA __); see *S. Cal. Edison Co. v. FERC*, 686 F.2d 43, 45-46 (D.C. Cir. 1982) (upholding FERC order that “incorporated by reference the policy analysis” set out in prior orders); *Hollister Ranch Owners’ Ass’n v. FERC*, 759 F.2d 898, 903 (D.C. Cir. 1985) (“In any future proceedings ... FERC may incorporate by reference any or all of the record developed in these proceedings.”).⁵

FERC’s conclusion that a winter fuel-security issue exists in New England is therefore supported by substantial evidence. See *S.C. Pub. Serv. Auth.*, 762 F.3d at 54.

⁵ These petitioners also appear to suggest that the *Fuel-Security Analysis*’s findings should be discounted because it employed a deterministic, rather than probabilistic, analysis. See *Sierra Club Br. 6*, 26. But as FERC explicitly explained, “ISO-NE’s deterministic approach is specifically tailored to consider resource unavailability caused by fuel shortages, whereas a traditional probabilistic resource adequacy analysis would be unlikely to address such events due to the unpredictability of fuel shortages.” *ISO New England*, 164 FERC ¶ 61,003 at P 50 n.143 (quoting *ISO New England Inc.*, 144 FERC ¶ 61,204 at P30 (2013)); see also *id.* P 50 (explicitly rejecting objections to the *Fuel-Security Analysis*’s deterministic methodology).

B. FERC reasonably determined that the Program is a beneficial interim measure to temporarily ameliorate these issues.

Having established that unaddressed winter fuel-security risk exists in New England's power-generation system, FERC went on to reasonably conclude that "ISO-NE's proposal to compensate fuel-secure resources is a reasonable short-term measure, which will likely provide reliability benefits, such as incenting up to 1.8 million MWh of inventoried energy to be available during stressed winter conditions, in light of [those] fuel security concerns." Order P 58 (JA __). This reasoning is neither arbitrary nor capricious, and is supported by substantial evidence. *Elec. Power Supply Ass'n*, 136 S. Ct. at 782.

1. The Program's interim nature bears on the deference due FERC.

Before engaging with FERC's reasoning for approving the Program, it is important to underscore its interim nature. The Program is a short-term, stopgap measure, intended to reduce the risk of a catastrophic energy shortage during two winter seasons only, while a permanent, more fully market-based solution is developed.⁶ Moreover, the Program was

⁶ ISO-NE's first attempt at a long-term, market-based solution for New England winter fuel security was submitted to FERC in April 2020, about a year after it proposed the Program. *See* page 7, *supra*. However, FERC has now rejected that proposal as unjust and unreasonable, and provided

necessarily developed quickly: Because forward capacity auctions take place three years in advance of the delivery period to which they correspond—and retirement de-list bids are due almost an additional year prior to the auction—the Program had to be announced and understood by March of 2019 in order to serve its purpose of deterring the retirement of fuel-secure resources for the winter of 2023-2024. Order P 96 (JA __); *see* pages 34-38, *infra* (discussing retirement-deterrence).

While FERC correctly noted that “[t]he interim nature of the program does not relieve ISO-NE of the need to demonstrate that the [Program] is just and reasonable” (Order P 57 (JA __)), this Court has repeatedly held that such interim regulatory programs, conceived in exigent circumstances, are entitled to significant deference, over and above the already “great deference” (*Elec. Power Supply Ass’n*, 136 S. Ct. at 782) due to FERC’s ratemaking decisions more generally.

As the Court recently put it, “[w]e owe *particular* deference to interim regulatory programs involving some exigency, like the one at issue here. That added deference reflects the reality that, during a transition

guidance on the development of a replacement solution. *See ISO New England Inc.*, 173 FERC ¶ 61,106 at P 57. If anything, FERC’s rejection of ISO-NE’s first long-term proposal, and the iterative nature of this process more generally, only underscores the critical importance of a simple interim solution that can be implemented in the meantime.

period, an agency must make ‘predictive judgments’ and ‘certainty is impossible.’” *AT&T, Inc. v. FCC*, 886 F.3d 1236, 1246 (D.C. Cir. 2018) (emphasis added); *see also Blumenthal*, 552 F.3d at 884-885 (approving interim programs even though “FERC acknowledges the imperfections of these interim solutions,” because “[t]he Connecticut electricity market presents intensely practical difficulties demanding a solution from FERC, and [FERC] must be given the latitude to balance the competing considerations and decide on the best resolution”) (citation and quotation marks omitted).

In other words, “problems which greatly complicate the Commission’s work may properly be deferred if prompt interim action is necessary.” *Am. Smelting & Ref. Co. v. Fed. Power Comm’n*, 494 F.2d 925, 943 (D.C. Cir. 1974);⁷ *see also id.* at 942 (approving interim agency program with gaps in reasoning that “would almost certainly have been fatal” in a permanent program, because “the court must take into account the temporary nature of the Commission’s action as well as the exigencies which prompted the Commission to grant interim relief”); *accord Cent. Maine Power Co. v. FERC*, 252 F.3d 34, 44 (1st Cir. 2001) (“[I]f prompt action is

⁷ This case involved FERC’s predecessor, the Federal Power Commission.

necessary and delay would be harmful, agencies sometimes do need to take interim action, deferring to further proceedings other facets of the problem or alternative solutions that may take more time to develop.”).

The Program is exactly such an interim program based on an exigent need, and “the temporary nature of [FERC]’s action as well as the exigencies which prompted [FERC] to grant interim relief” must therefore color all of the discussion below. *Am. Smelting*, 494 F.2d at 942.

2. *FERC reasonably determined that the Program may address the fuel security risk confronting New England.*

As FERC explained, the Program has the potential to ameliorate New England’s winter fuel-security concerns through several mechanisms.

First, “the current market design contains a ‘misaligned incentives’ problem, such that fuel secure resources may not be sufficiently incented to make additional investments in energy supply arrangements,” with the potential for “adverse efficiency and reliability consequences” as a result. Order P 33 (JA __). In short, as ISO-NE put it in a report relied upon by FERC for this point (*see id.* P 33 & n.48 (JA __)), “investing in more robust energy supply (*e.g.*, fuel) arrangements may often be beneficial and cost-effective for the system, but not financially viable for individual

generators in a today's energy market construct." ISO New England, *ISO Discussion Paper: Energy Security Improvements 3* (Apr. 2019) (Discussion Paper), perma.cc/DS2Q-TPYP (JA __).⁸

In slightly more detail, the misaligned incentives problem is as follows:

[I]nvesting in a costly supplemental fuel arrangement that meaningfully reduces the risk of supply shortages (and therefore the risk of high prices) entails up-front costs to the generator, yet reduces the energy market price the generator receives [because available supply is greater]. The value that society places on making the supplemental fuel arrangement is based on the high price it *avoids* with the investment. However, the value the generator places on the same arrangement is based on the lower price it *receives* in the energy market with the investment. This value difference, in turn, results in a divergence between the social and private benefit of the investment.

Discussion Paper at 11 (JA __); *accord* Order P 33 & n.48 (JA __) (citing Discussion Paper at 11 (JA __)); *see also* Discussion Paper 11-22 (JA __-__) (illustrating the problem with extensive quantitative analysis). In short, investments in fuel security benefit society but may be affirmatively detrimental to the generator making the investment—with the

⁸ As with the *Fuel-Security Analysis* discussed above (*see* note 1, *supra*), this discussion paper was relied upon by FERC in its decision, and was therefore undoubtedly “before the agency at the time the decision was made,” and properly included in the administrative record. *James Madison Ltd.*, 82 F.3d at 1095.

predictable result that the level of investment will be sub-optimal from society's perspective. And as FERC concluded, the Program "helps address [this] misaligned incentives problem" by "providing additional compensation to fuel secure resources, which may allow them to secure such energy supply arrangements." Order P 33 (JA __).

Petitioners challenge this misaligned-incentives reasoning as without support in the record, and one group derides it as a "slogan" that is "simply vacuous." NECOS Pet'rs Br. 10-11, 24; *see also* State Pet'rs Br. 23-28; Sierra Club Br. 31-32. But this is precisely the sort of economic incentive-based reasoning that agencies employ every day regarding the markets they regulate, and that courts uniformly uphold: "We permit [FERC] to base its market predictions on basic economic theory," provided "it explain[s] and applie[s] the relevant economic principles in a reasonable manner." *NextEra Energy Res., LLC v. FERC*, 898 F.3d 14, 23 (D.C. Cir. 2018); *see also Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 531 (D.C. Cir. 2010) ("[No] case law prevents [FERC] from making findings based on 'generic factual predictions' derived from economic research and theory.").

Indeed, "[p]redictions regarding the actions of regulated entities are precisely the type of policy judgments that courts routinely and quite correctly leave to administrative agencies." *Mozilla Corp. v. FCC*, 940 F.3d

1, 50 (D.C. Cir. 2019); *see also Pub. Utils. Comm'n of Cal. v. FERC*, 24 F.3d 275, 281 (D.C. Cir. 1994) (“When it comes to forecasting behavior of the pipelines in an increasingly competitive market for natural gas, we are quite unwilling to challenge FERC’s considered judgment.”). FERC’s identification of the misaligned incentives issue, and its conclusion that the Program would help correct that misalignment, is just such a considered judgment, and this Court should not disturb it.

Moreover, while FERC’s discussion of the incentives issue may be terse, its decision cites to a comprehensive report that lays out the reasoning in great detail, including through extensive quantitative illustrations. *See* Order PP 33 & n.48, 62 n.122 (JA __, __) (citing Discussion Paper at 11 (JA __)). That is certainly an explanation of sufficient clarity that “the agency’s path may reasonably be discerned”; it thus survives arbitrary-and-capricious review. *Transcontinental Gas*, 518 F.3d at 922.

Second, FERC also found that the Program would likely improve New England’s fuel security by deterring fuel-secure resources from retiring, or permanently exiting the market. As FERC explained, “a resource that participates in the [Program] can lower its capacity offer to reflect program revenues and potentially clear the [forward capacity market], potentially helping to retain an additional fuel secure resource that

would have otherwise retired.” Order P 95 (JA __); *see also id.* (“Therefore, we disagree with arguments that ISO-NE’s proposal is unjust and unreasonable because ISO-NE has failed to provide credible evidence to support the view that the [Program] would deter fuel-secure resources from pursuing retirement.”).

In other words, given that “ISO-NE has highlighted that up to 5,000 MW” of resources with stored energy are “at risk of retirement” (Order P 61 (JA __); *see also id.* P 92 (JA __)),⁹ FERC’s conclusion on this point is that, in the aggregate, the Program should incent fuel-secure resources to remain in the market for the winters of 2023-2024 and 2024-2025, thereby preventing further degradation to winter fuel security.¹⁰ That is exactly the kind of “[p]rediction[] regarding the actions of regulated entities ... that courts routinely and quite correctly leave to administrative agencies.” *Mozilla*, 940 F.3d at 50; *see also Sorenson Commc’ns, LLC v.*

⁹ By contrast, the *Fuel-Security Analysis*’s reference case—which produced significant amounts of load shedding—assumed only 1,500 MW of retirements by the 2024-2025 winter. *Fuel-Security Analysis* at 34 (JA __).

¹⁰ Once more, this is designed to be an *interim* program to address short-term needs. It does not provide a long-term solution, nor does it address long-term resource mix. And, as described more fully below (*see* pages 41-43 *infra*), *all* resources are eligible for participation in the Program—including all renewables—so long as they are associated with storage and can, therefore, inventory energy.

FCC, 897 F.3d 214, 230 (D.C. Cir. 2018) (“Arbitrary-and-capricious review is generally deferential, but it is ‘particularly deferential’ in cases such as this, which ‘implicate competing policy choices, technical expertise, and predictive market judgments.’ When reviewing an agency’s predictive judgment under these circumstances, we ‘require only that the agency acknowledge factual uncertainties and identify the considerations it found persuasive.’”).

And while Petitioners object that FERC has not provided more specificity with respect to retirement forecasting, such specificity is not required to support an interim program responding to an urgent unmet need. *See AT&T*, 886 F.3d at 1246; *Am. Smelting*, 494 F.2d at 942-943; *Cent. Maine Power*, 252 F.3d at 44. Rather, FERC has made a policy choice to approve a temporary program that, while not as meticulously justified as would be expected of a permanent program, is at least “a step in the right direction” toward addressing an exigent problem (Order P 34 (JA __))—and given the tight timeline imposed by the delist bid schedule, the alternative is no program at all. *See id.* P 96 (JA __) (“[W]e agree with ISO-NE that it is important that the program be in place in time for participants considering retirement decisions for [the auctions covering 2023-2024 and 2024-2025].”).

That is FERC's policy decision to make, and this Court should not disturb it. *See Blumenthal*, 552 F.3d at 884-885 (“[T]he Commission must be given the latitude to balance the competing considerations and decide on the best resolution,” even if the result is a necessarily “imperfect[] ... interim solution.”). Because FERC has “examined the relevant considerations and articulated a satisfactory explanation” (*Elec. Power Supply Ass’n*, 136 S. Ct. at 782) for its conclusion that the interim Program falls within “a zone of rates that are just and reasonable” (*Maine Pub. Utils. Comm’n*, 520 F.3d at 471), that determination must stand.

II. PETITIONERS’ SPECIFIC CHALLENGES FAIL.

Apart from their arguments, discussed above, that FERC’s affirmative case for approving the Program was arbitrary and capricious, Petitioners level several specific objections against the approval decision. None has merit.

A. The Program is not a “windfall.”

A common theme throughout Petitioners’ briefs is the assertion that the benefits of the Program are not worth the costs—particularly because, they say, a significant amount of payments will be made to resources that are unlikely to change their behavior in response.

1. To begin, Petitioners’ argument on this score relies on a misreading of this Court’s case law. For their contention that FERC is required

to offer an in-depth quantitative justification to “see to it that the increase [in cost from the Program] ... is no more than is needed[] for the purpose” (e.g., NECOS Pet’rs Br. 24; see also State Pet’rs Br. 18-20, 30-32), Petitioners rely on a line of so-called incentive-ratemaking cases stemming from *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1983), and *City of Detroit v. FPC*, 230 F.2d 810 (D.C. Cir. 1955).

As this Court has explained, that line of cases applies “a heightened standard of review” to FERC’s “approval of incremental rate increases above cost-based rates to encourage increases in energy supply.” *Elec. Cons. Res. Council v. FERC*, 407 F.3d 1232, 1236 (D.C. Cir. 2005) (*ELCON*). Importantly, though, the Court recognized that this “heightened standard” does not automatically apply to any rate merely because FERC intends it to convey socially efficient incentives to market participants—indeed, much, if not all, ratemaking is concerned with incenting certain behavior. Rather, the cases cited by Petitioners come into play only where FERC “impose[s] an incremental rate increase above traditional cost-based rates” for energy in order to incent greater energy production, resulting in “higher rates across the board.” *Id.* at 1237-1238 (rejecting application of heightened standard because these criteria were not met).

Here, the Program does not meet the preconditions for applying the “heightened standard” for incentive rates. First, the Program does not

function by taking the existing “cost-based rate[]” for a good—here, sold-forward energy capacity—and tacking on “an incremental rate increase” to incent additional supply of that good. *ELCON*, 407 F.3d at 1237. To the contrary, the Program seeks to compensate resources, for the first time, for providing a *separate* good—inventoried energy—that is socially valuable but for which resources currently receive *no* compensation. Order P 62 (JA __) (Program “is aimed at compensating resources for a specific reliability attribute for which they are not currently compensated”). Because the Program is not an effort to tweak an existing, cost-based rate for capacity, but is instead an initial attempt (on an interim, exigent basis) to establish a previously nonexistent market for socially-valuable inventoried energy, the incentive-rate cases are simply inapplicable. *ELCON*, 407 F.3d at 1237.

Moreover, as to the good actually bought and sold through the Program—inventoried energy—the Program is explicitly *not* designed to provide excess returns above cost to generators. Instead, ISO-NE used a hybrid cost- and market-based approach to estimate the *minimum* price that would incent participation—or, in other words, the economically efficient price. See Order P 63 (JA __) (“By setting a fixed forward rate based on a winter peaking supply contract for [liquefied natural gas],

ISO-NE estimated the minimum value that would incent program participation from a natural gas-only resource, thereby approximating the price that would occur if inventoried energy was competitively procured through a market-based mechanism where a natural gas-only resource was the marginal resource that established the price paid to all resources providing the service.”); *see also* ISO-NE Filing at 148-165 (JA __) (technical analysis and calculations deriving this rate). This is a far cry from the “creamy returns” at issue in *Farmers Union*, 734 F.2d at 1503. Thus, not only are the incentive-ratemaking cases wholly inapt, they would be satisfied even if they did apply.

This observation also addresses the NECOS Petitioners’ assertion that the Program is per se unjust and unreasonable because it is (they say) neither cost- nor market-based. *See* NECOS Pet’rs Br. 20-23. First, while “an inquiry into costs” is a “useful and reliable starting point” (*Farmers Union*, 734 F.2d at 1502), NECOS Petitioners point to *no* authority suggesting that a rate must be entirely cost-based or entirely market-based in order to be just and reasonable. In any event, ISO-NE has, as just described, constructed the price for inventoried energy by estimating the cost to a gas-fired resource of participating by acquiring firm supplies of liquefied natural gas, thereby approximating the likely output of a market-based solution. Order P 63 (JA __); *see also* ISO-NE Filing at

148-165 (JA __). Such a hybrid approach based on ISO-NE's and FERC's market expertise is amply justifiable for an interim program, particularly given that a more fully market-based approach was simply not feasible within the timeframe required. *See* pages 20-23, *supra*.

Finally, as FERC recognized, the Program does not necessarily result in “higher rates across the board,” as required for application of the incentive-ratemaking cases. *ELCON*, 407 F.3d at 1237. While the Program payments themselves represent an increase, that increase may be offset by “[l]ower relative capacity prices [that] could occur as a result of the program,” as capacity market participants take their Program revenues into account in making their bids. Order P 110 (JA __). This distinction takes the Program even further outside the incentive-ratemaking case law on which Petitioners rely. In short, the Program is not a tack-on to the capacity rate intended to increase supply of capacity, but an additional revenue stream intended to “compensate[e] resources for a specific reliability attribute for which they are not currently compensated” (Order P 62), while potentially *reducing* the clearing prices in both the forward capacity market and the energy market.¹¹

¹¹ The likelihood that investing in energy security will lower energy prices lies at the heart of the “misaligned incentives” problem that prompted the Program. *See* Order P 33 (JA __).

2. As to the specific objection that the Program compensates some generators that already keep inventoried energy on hand, that is a policy choice within the discretion of FERC in “balanc[ing] the competing considerations and decid[ing] on the best [interim] resolution” to the “intensely practical difficulties” presented by New England’s urgent fuel security issues. *Blumenthal*, 552 F.3d at 884-885 (affirming FERC’s approval of an admittedly “imperfect[] ... interim solution[]”).

As an initial matter, FERC cannot validly be accused of abusing its discretion by finding it just and reasonable to “compensat[e] resources for a specific reliability attribute for which they are not currently compensated,” Order P 62 (JA __), particularly where, as here, FERC has determined that this attribute is needed to ensure reliability.

Petitioners’ characterization of payments to these resources as “an utter waste of consumers’ money” (State Pet’rs Br. 22 (quoting Dissent P 7 (JA ___))) relies on a misunderstanding of the goals of the program. To start with, what certain resources do today with respect to stored fuel is no guarantee of their inventory decisions years from now—what the Program is designed to address. The Program provides consumers assurance that those stores of inventoried energy will still be there when needed into the future.

Further, Petitioners disregard FERC's finding that the Program may deter the retirement of fuel-secure resources. *See* pages 10-11, *supra*. As to resources that already maintain on-site fuel, even if the Program does not incent additional fuel storage, it hedges against *decreases* in the aggregate fuel storage that would otherwise occur through retirements and other, more mundane alterations to these generators' business practices. *See* Order P 62 (JA __) (rejecting Petitioner's argument on this score, in part because the Program "includes a forward component that will allow resources to account for the program's revenue in making retirement and other de-list bid decisions," and therefore "find[ing] it just and reasonable for the program to allow broader eligibility"). And the program will meanwhile *increase* inventoried energy stores among the majority of projected Program participants that do not fall into this category.

Indeed, the feature alleged to doom the Program—that some resources would take the desired action even without the payments—is an inherent property of capacity and other products based on a resource's capability, rather than energy output itself. In capacity markets, generation resources are compensated for committing to be available to generate electricity when called upon in the future, as distinct from actually generating electricity. Critically, these capacity payments are *in addition*

to the payments generators receive when they ultimately sell the energy into the grid. Thus, some number of capacity market participants would be available to run even in the absence of the capacity market, because the revenues from the energy markets themselves would provide sufficient incentives for them to be available. But that does not mean that resources assuming capacity commitments, including those that would have been available anyway, are not providing a needed and valuable service or that there is anything unjust and unreasonable about compensating them for this product. *Cf. ELCON*, 407 F.3d at 1237 (rejecting argument that “the new rate design” for New York’s capacity market “grants a windfall to existing capacity suppliers” because “it offers increased revenues to all capacity suppliers, regardless of whether they invest in new generation facilities.”).

The capability payments provided by the Program are especially important because, while an acute winter fuel shortage leading to rolling blackouts may be a low-incidence event, its potential consequences are extremely weighty. Power shortages—particularly when they lead to load shedding—are incredibly costly, both in economic terms and in terms of human life. *See* Pippa Stevens, *PG&E Power Outage Could Cost the California Economy More Than \$2 Billion*, CNBC (Oct. 10, 2019),

perma.cc/59VQ-WB8P (economic losses from brief planned outage estimated at \$2.5 billion); *Spike in Deaths Blamed on 2003 New York Black-out*, Reuters (Jan. 26, 2012), perma.cc/96EQ-FREA (epidemiological study tied “nearly 100” deaths to 2003 outage).

Balancing the essentially non-cost consideration of preventing such catastrophic failures against the known costs of the Program is exactly the sort of “policy judgment[] that lie[s] at the core of the regulatory mission,” and is therefore committed to FERC’s expert judgment. *S.C. Pub. Serv. Auth.*, 762 F.3d at 55; *see also Adv. Energy Mgmt. All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017) (“[FERC] explained the important non-cost reasons for approving PJM’s proposal. It does not have to find net savings. We defer to [FERC]’s weighing of the various considerations and ultimate ‘policy judgment.’”).

Finally, it bears repeating that the Program is an interim measure developed on a necessarily short timeframe to respond to an exigent threat. *See* Order P 58 (JA __). Even if a full market-based regime that compensates only for incremental inventoried energy is preferable in theory, such a solution was likely impossible to implement in the limited time available. *See id.* P 11 (JA __) (“ISO-NE ... prioritized simplicity to ensure that the program was designed and filed quickly.”). Indeed, as

noted above, FERC recently rejected ISO-NE's first attempt at permanent, market-based tariff revisions to address winter fuel security, underscoring the complexity of reaching a permanent solution.

As FERC put it, “[a]lthough ISO-NE acknowledges that the [Program] may not constitute a fully market-based solution, we agree with ISO-NE that the proposal is a step in the right direction,” and that the Program “will help ISO-NE address winter energy security ... while ISO-NE finishes developing a long-term market solution.” Order P 34 (JA __). Once again, it was within FERC's discretion to approve an “interim solution[,]” even if “imperfect[,]” over no solution at all. *Blumenthal*, 552 F.3d at 884-885.

B. The Program is appropriately quantified for an interim measure.

Petitioners also assert that FERC was required to more fully quantify the benefits of the Program—in terms of the region's precise inventoried energy needs and the quantities that the program is likely to produce—so that they could be measured against the program's projected costs. *See* State Pet'rs Br. 30-37; NECOS Pet'rs Br. 15-16.

Again, however, the simplicity of the Program—including the decision not to conduct time-consuming quantification analysis—was a delib-

erate design choice based on the exigent timeframe: “ISO-NE ... prioritized simplicity and expedience in the program’s development and [states] that it was appropriate to forgo the complex and time-consuming development of a robust methodology to estimate the program’s expected reliability benefits.” Order P 44 (JA __). FERC approved that choice. *See id.* P 58 (JA __) (rejecting argument “that ISO-NE has not demonstrated a need for the [Program],” finding that “a detailed cost-benefit analysis is not required” under the circumstances, and concluding that the Program “is a reasonable short-term measure[] which will likely provide reliability benefits”).

Tellingly, Petitioners fail to explain how the more detailed analysis they request could have been conducted in time to implement the Program for the winter of 2023-2024. Indeed, the development of ISO-NE’s first permanent proposal took another full year beyond the submission of the Program—and even that proposal was rejected by FERC and sent back to the drawing board. *See* note 6, *supra*. Whether it is preferable to have an (arguably) undertheorized but “directionally correct” interim solution to New England’s winter fuel security problems (ISO-NE Filing at 7 (JA __)), or no solution at all until a permanent solution is developed (whenever that may be), is surely a “policy decision” to be made by FERC.

Blumenthal, 552 F.3d at 884-885; *Adv. Energy*, 860 F.3d at 662; see pages 20-29, *supra*.

To be clear, NEPGA is not suggesting that there is an “exception[]” to the just-and-reasonable standard “for ‘directionally correct’ interim steps.” Sierra Club Br. 29. Rather, the point is that the inherently flexible just-and-reasonable standard is itself capable of taking into account the realities of the ticking clock—particularly given that the ultimate beneficiaries of winter fuel security measures are the consumers who are thereby protected against being left without power in arctic temperatures—and that “a step in the right direction [toward] ... winter energy security” may be just and reasonable when the alternative is no additional protection at all. Order P 34 (JA __); *cf. Am. Smelting*, 494 F.2d at 942; *S.C. Pub. Serv. Auth.*, 762 F.3d at 55.

C. There is no unexplained departure from precedent.

Petitioners further argue that FERC’s approval of the Program constitutes an arbitrary and capricious departure from the agency’s earlier precedent—specifically, the agency’s 2015 order approving a different winter energy security program for the 2015-2018 winters. State Pet’s Br. 38-39; Sierra Club Br. 29-31; see *New England Power Generators Ass’n Inc. v. FERC*, 879 F.3d 1192, 1201 (D.C. Cir. 2018). They assert that because an earlier order rejected a proposal to compensate nuclear,

hydroelectric, biomass, and coal-fired resources for their on-site fuel, FERC must reach the same result here or explain how circumstances have changed. *Id.*

A proper understanding of FERC's 2015 order, however, reveals that there is no departure from prior precedent at all. The 2015 order arose from competing filings under New England's unusual "jump ball" mechanism, in which FERC was presented with two proposals, one from ISO-NE and another put forward by the New England Power Pool, under Section 205 of the Federal Power Act and could only select one to implement. *See generally ISO New England Inc.*, 152 FERC ¶ 61,190 (2015). Thus, in concluding that the Pool's alternative proposal was "just and reasonable, and preferable to" the proposal that would have compensated a wider variety of resources, FERC did *not* determine that ISO-NE's proposal was *unjust* and *unreasonable*—merely that the Pool's alternative was preferable. *See id.* PP 46-47. In this proceeding, which, like most Section 205 proceedings, contained no alternative proposal, FERC was only required to determine whether ISO-NE's proposal, the Program, was just and reasonable, not whether it was "more or less reasonable than alternative rate designs." *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984).

Nor has FERC “deviated from its prior finding” that various types of generators “will provide no incremental reliability in response to incremental payments for energy storage.” State Pet’rs Br. 38. First, FERC made no such “finding” in the 2015 proceeding; what it actually found was that “the record does not reflect that including the additional resource types ... will incent any additional *fuel procurement*.” *ISO New England*, 152 FERC ¶ 61,190 at P 47 (emphasis added). And as to that finding, FERC has not changed course; rather, it has explained why the Program is just and reasonable notwithstanding that objection: “Unlike the [prior] winter reliability programs, the [Program] includes a forward component that will allow resources to account for the program’s revenue in making retirement and other de-list bid decisions. Accordingly, we find it just and reasonable for the program to allow broader eligibility.” Order P 62 (JA __). In other words, even if the Program does not incent incremental fuel storage from these generators, it does provide incentives for them not to retire from the market, thus preventing further depletions of the region’s aggregate inventoried energy. *See* pages 34-38, *supra*.

D. FERC did not fail to consider existing programs.

Contrary to the NECOS Petitioners’ assertion (at 27-30), FERC also has not failed to consider the interplay between the Program and other market mechanisms, primarily the Pay-for-Performance program. To the

contrary, FERC extensively canvassed the arguments of numerous parties on this very point; “disagree[d] with arguments that ... Pay-for-Performance negates the need for the [Program]”; and “agree[d] with ISO-NE that the [Program] should complement the incentives produced by Pay-for-Performance by providing additional incentives for resource owners to make additional investments in energy supply arrangements.” Order PP 117-118 (JA __-__); *see also* ISO-NE Deficiency Filing at 11-12, R.71 (JA __-__) (reviewing those complementary incentives in greater depth); *ISO New England*, 164 FERC ¶ 61,003 at PP 53-54 (explaining in detail why Pay-for-Performance “might not provide a full solution to the fuel security problems identified in the [*Fuel-Security Analysis*].”).

That is more than enough to satisfy FERC’s obligations under the APA. Indeed, the NECOS Petitioners’ argument (at 29-30) on this point largely restates its contentions that the misaligned incentives addressed by the Program do not actually exist, or that the program is otherwise unreasonable. As explained above, those complaints lack merit, and this argument therefore fails as well.

E. The Program does not discriminate against renewables.

Finally, certain petitioners assert that the Program violates the Federal Power Act’s prohibition on discriminatory rates (*see* 16 U.S.C.

§ 824d(b)), by failing to include certain renewable energy resources. *See* Sierra Club Br. 34-39. That argument fails on multiple scores.

First, the program is expressly open to renewables that can inventory energy. Specifically, the program is open to hydroelectric generators with reservoirs to store water, and to wind and solar resources paired with battery storage. Order P 14. Thus, to the extent that renewables can inventory energy, these resources *are* eligible for participation in the Program.

Second, renewable resources that *lack* storage capacity simply cannot supply the product at issue—inventoried energy. As a result, there cannot be any undue discrimination.

The standard is well-established: “The court will not find a Commission determination to be unduly discriminatory if the entity claiming discrimination is not similarly situated to others.” *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010)); *see Env'tl. Action, Inc. v. FERC*, 939 F.2d 1057, 1062 (D.C. Cir. 1991) (“If there are rational reasons for treating [market participants] differently, then the discrimination is not ‘undue’ within the meaning of ... the [Federal Power Act].”).

Here, FERC reasonably concluded that “it is not unduly discriminatory that suppliers incapable of providing inventoried energy are not

directly compensated under the [Program], as such an approach would undermine the intent of the program.” Order P 78 (JA __). Just-in-time energy from wind and solar without battery storage may face the same “fuel” availability issues as excluded conventional generation. It is thus a different product from inventoried energy—and it is therefore not “similarly situated” to the resources within the Program. *Id.*

FERC’s decision makes perfect sense for a program designed to prevent an outcome, like winter blackouts, with low incidence but potentially catastrophic consequences. As the ISO-NE discussion paper stresses, just-in-time generation of “[s]olar- and wind-based power inherently var[ies] with the weather” (Discussion Paper at 1 (JA __)), and therefore cannot be counted on to make up the shortfall when necessary: Maybe the crisis will happen on a sunny, windy day—but maybe it will not.¹²

Petitioners’ preference for a different kind of energy program is no basis to overturn FERC’s action, so long as it was reasonable. *Elec. Power Supply Ass’n*, 136 S. Ct. at 782 (“We may not substitute our own judgment for that of [FERC].”). Because FERC’s approval of the Program as

¹² In addition, ISO-NE found that “[s]olar energy can’t help directly with the winter peak ... because demand peaks after the sun has set.” *Fuel-Security Analysis* at 15 (JA __).

a short-term, interim response to pressing fuel-security concerns was eminently reasonable, it must be upheld.

CONCLUSION

The petitions for review should be denied.

Dated: February 16, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for intervenor certifies that this brief:

(i) complies with this Court's order of February 8, 2021 because it contains 9,597 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in New Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: February 16, 2021

/s/ Paul W. Hughes

CERTIFICATE OF SERVICE

I hereby certify that that on February 16, 2021, I filed the foregoing brief via the Court's CM/ECF system, which effected service on all registered parties to this case.

Dated: February 16, 2021

/s/ Paul W. Hughes