

February 17, 2023

Re: Forward Clean Energy Market Design Proposal

We commend the Massachusetts Department of Energy Resources for pursuing a regional clean energy market. The New England power sector has a long history of collaborative efforts.¹ Creating a new regional institution to facilitate clean energy procurement can reduce consumer costs and accelerate the clean energy transition.

This comment addresses governance of the proposed Forward Clean Energy Market (FCEM) and in particular whether the Administrator (FCEM-NE) should file the market rules at FERC for the Commission's approval. We argue that the FCEM should be regulated by states because: 1) sales of FCEM products are not FERC-jurisdictional, 2) the non-profit administrator (FCEM-NE) would not be a public utility under the Federal Power Act (FPA), and 3) the FCEM-NE would not be eligible to file FCEM auction rules under section 205 of the FPA. We suggest that the New England states pursue a non-FERC-jurisdictional FCEM.

The FCEM proposal envisions auction markets for various products representing environmental attributes of wholesale energy or capacity. FERC has repeatedly stated that it does not have jurisdiction over the sale of environmental attributes when they are sold separately, or unbundled, from wholesale power.² Federal courts have endorsed this conclusion.³

¹ See *NEPOOL Power Pool Agreement*, 48 FPC 538 (1972).

² FERC explained its jurisdiction over renewable energy credits in *WSPP Inc.*, 139 FERC ¶ 61,061 (2012) (citing *Edison Electric Institute*, 69 FERC ¶ 61,344 (1994) (finding no jurisdiction over cap-and-trade allowances)). In various contexts, FERC has said that it does not have jurisdiction over REC sales. See, e.g., *American Ref-Fuel Company*, 105 FERC ¶ 61,004 at P 24 (2003), *Morgantown Energy*, 139 FERC ¶ 61,066 at PP 46–47 (2012), *Windham Solar*, 156 FERC ¶ 61,042 at P 4 (2016), *Calpine, et al.*, 171 FERC ¶ 61,034 at P 67, n. 192 (2020).

³ *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41 (2nd Cir. 2018), *Electric Power Supply Association v. Star*, 904 F.3d 518 (7th Cir. 2018), *Wheelabrator Lisbon, Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183 (2nd Cir. 2008).

Although FCEM products may be distinguishable from existing renewable energy credits, those features should not bring FCEM product sales under FERC's jurisdiction. For instance, the price of certain FCEM attributes, such as GHG abatement certificates, may be contingent on wholesale market outcomes. But neither FERC nor federal courts have distinguished among unbundled environmental attributes based on their pricing mechanisms.⁴ Instead, FERC has rested its jurisdictional finding on whether the attributes are sold with wholesale power in the same transaction.⁵ The sale of other FCEM attributes, such as clean capacity certificates, would allow selling resources to automatically clear the FERC-jurisdictional ISO-NE capacity auction. This connection between the attribute sale and participation in the FERC-regulated auction should not trigger FERC jurisdiction over the attribute sale. Even where unbundled attributes are closely tied to wholesale market participation, FERC has not suggested that it has jurisdiction over attribute sales.⁶

Moreover, state regulation of clean capacity certificates should not be preempted. A state may not create clean energy subsidies that "condition payment of funds on capacity clearing the auction."⁷ The FCEM does not propose such a condition. Instead, FERC will have the final say as to whether an attribute sale would allow a resource to automatically clear the ISO-NE capacity auction. Rules about which resources clear the auction are enshrined in ISO-NE's capacity auction rules, which must be approved by FERC. FERC can authorize automatic clearance of clean capacity certificate sellers in the ISO-NE capacity auction without asserting jurisdiction over the attribute sale.

⁴ *Coalition for Competitive Electricity v. Zibelman*, 906 F. 3d 41 (2nd Cir. 2018) (finding that although the prices of New York's zero-emission credits vary based on wholesale market projections, the state's program is not preempted), *Electric Power Supply Association v. Star*, 904 F.3d 518 (7th Cir. 2018) (same).

⁵ *WSPP Inc.*, 139 FERC ¶ 61,061 (2012).

⁶ FERC has approved California ISO rules that allow energy sellers to include costs of cap-and-trade allowances in their market offers and thereby signal whether they intend to deliver energy into California and be subject to California's cap-and-trade rules. Including an allowance price in the offer to the FERC-jurisdictional market is a pre-condition to delivering energy into California via the CAISO auction. See *CAISO*, 141 FERC ¶ 61,237 (2014); *CAISO*, 153 FERC ¶ 61,087 (2015).

⁷ *Hughes v. Talen*, 578 U.S. 150, 166 (2016).

Because FCEM product sales are under state jurisdiction, FCEM-NE would not be a public utility under the FPA. Under section 201 of the FPA, a public utility is any person that “owns or operates” FERC-jurisdictional “facilities,”⁸ a “widely inclusive term” that includes contracts “utilized in connection with” FERC-jurisdictional sales.⁹ Since FCEM-NE auction rules would govern non-FERC-jurisdictional sales of unbundled attributes, its contracts would not be jurisdictional facilities. Put differently, FCEM-NE would not be operating under a FERC-jurisdictional tariff.

FCEM-NE would therefore not be eligible to file FCEM auction rules under section 205 of the FPA.¹⁰ Section 205 sets procedures that allow public utilities to change their FERC-jurisdictional rates. As FCEM-NE would not be a public utility, would not be engaged in any FERC-jurisdictional sales, and would not administer a FERC-jurisdictional tariff, it could not file its rules under section 205.

However, a public utility could voluntarily share its own section 205 filing rights with FCEM-NE. Transmission operators, such as ISO-NE, share filing rights pursuant to agreements approved by FERC.¹¹ While FCEM-NE and ISO-NE could pursue such an approach, the filed rates could include only FERC-jurisdictional sales. As discussed, sales of unbundled attributes through FCEM-NE auctions would not be FERC-jurisdictional.

FCEM-NE might nonetheless argue that sales of its products “directly affect” FERC-jurisdictional rates, bringing them under FERC’s authority.¹² We see two risks to this approach. First, asking FERC to revisit its jurisdictional determinations about unbundled attributes could have far-reaching and unpredictable consequences. FERC’s

⁸ 16 USC 824(e).

⁹ *Hartford Electric Power & Light Co. v. Federal Power Commission*, 131 F.2d 953, 961 (2nd Cir. 1942).

¹⁰ *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 11 (D.C. Cir. 2002) (“As FERC believes an ISO to be a public utility within the scope of the Federal Power Act, and thus entitled to make section 205 filings . . .”).

¹¹ *See, e.g., ISO New England, et al.*, 106 FERC ¶ 61,280 at P 55 (2004) (approving ISO-NE governance rules that provide limited filing rights to NEPOOL); *MISO, et al.*, 143 FERC ¶ 61,165 at P 30 (2013) (approving MISO proposal to provide limited filing rights to a committee of state regulators).

¹² *FERC v. Electric Power Supply Association*, 577 U.S. 260 (2016).

finding that FCEM attribute sales “directly affect” wholesale energy or capacity rates might lead to FERC jurisdiction over all unbundled attributes. Second, giving FERC authority to approve and rewrite FCEM rules may harm states’ interests. Ongoing controversies about capacity auction minimum offer price rules (MOPRs) illustrate that FERC can interfere with state clean energy policies. The FCEM proposal does not outline any countervailing benefits of FERC jurisdiction.

We urge the New England states to consider a state-regulated approach. ISO-NE could still play a prominent administrative role. Public utilities may engage in non-FERC-jurisdictional activities. For instance, a PJM subsidiary issues renewable energy credits, facilitates trading of those credits, and tracks generators’ emissions. ISO-NE could follow this approach and create a non-FERC-jurisdictional subsidiary to administer FCEM auctions.

Sincerely,

/s
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