<u>The Compatibility of the Forward Clean Energy Market with FERC-Regulated Markets</u>
May 5, 2020

By creating a market for clean energy attribute credits ("CEACs"), the Forward Clean Energy Market (the "FCEM") would allow, but not require, individual States to pursue their carbon emissions reduction targets through a competitive, least-cost process open to carbon-free resources. Integrating the FCEM into the existing regional transmission organization ("RTO")/independent system operator ("ISO") market structures would have the further benefit of addressing concerns about FCEM payments being "out-of-market" subsidies and would thereby ensure that the participating carbon-free resources are not subject to the Minimum Offer Price Rule (the "MOPR") or similar offer-floor mitigation.

States across the country have been pursuing emissions reductions through mandates that load-serving utilities procure renewable energy credits and zero-emissions credits and other direct and indirect subsidies for carbon-free resources. Concerned about the potential impact on the organized capacity market administered by PJM Interconnection, L.LC. ("PJM"), the Federal Energy Regulatory Commission ("FERC") recently ordered PJM to expand its MOPR such that it would apply broadly to new and existing resources receiving State subsidies. In so doing, FERC exercised its broad authority under the Federal Power Act (the "FPA") to "regulate the interstate wholesale market for electricity—both wholesale rates and the panoply of rules and practices affecting them." *FERC v. Electric Power Supply Ass'n*, 136 S.Ct. 760, 773 (2016) ("*EPSA*"). That same broad authority would fully justify FERC regulation of RTO/ISO rules governing FCEM auctions as a practice directly affecting wholesale rates. And accommodating State carbon emissions reduction efforts in this manner would also advance the goals of "cooperative federalism" embraced by the Supreme Court in *EPSA*. Simply put, if FERC has the authority to mitigate the effects of State subsidies on the wholesale markets, it should also have the authority to mitigate the effects of its own mitigation through an accommodation mechanism, like the FCEM.

Importantly, while FERC would have jurisdiction over the rules for the RTO-/ISO-administered FCEM auctions and other buyers could voluntarily choose to bid into FCEM auctions, each State would retain exclusive authority to decide whether to mandate participation by its regulated utilities and the extent of such participation. FERC would have no say in a State's decision about how many, if any, CEACs a State requires its regulated utilities to procure, and nothing about the FERC role in overseeing the RTO's/ISO's conduct of FCEM auctions would call into question State jurisdiction to pursue carbon reduction goals, any more than FERC's authority over centralized capacity auctions undermines State jurisdiction over generation and retail matters.

Like the wholesale demand response opt-out hailed by the Supreme Court as an example of "cooperative federalism" in *EPSA*, the FCEM would leave States free to make their own decisions about participation (or non-participation). Similarly, it would respect the jurisdictional boundaries recognized in FERC's MOPR orders, where FERC acknowledged that its jurisdiction under the FPA does not preempt State efforts with respect to promoting certain types of generation. As was the case in *EPSA*, FERC would not be infringing on the rights of the States, but would only be fulfilling "its regulatory mission to improve the competitiveness, efficiency, and reliability of the wholesale market." *Id.* at 777.

NRG and the plus signs are registered servicemarks of NRG Energy, Inc. NRG is a registered trademark of NRG Energy, Inc. © 2020 NRG Energy, Inc. All rights
reserved. 407692124