

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NTE Connecticut, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 22-1027
	)	
Federal Energy Regulatory Commission,	)	
	)	
Respondent.	)	

**MOTION OF  
INTERVENOR ISO NEW ENGLAND INC.  
TO DISMISS PETITION FOR REVIEW**

Intervenor ISO New England Inc. (“ISO”), pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27(f), submits this Motion to Dismiss the Petition for Review in this matter, filed by Petitioner NTE Connecticut, LLC (“NTE”) on February 23, 2022 (“Petition”). The Petition seeks review of three orders issued by the Federal Energy Regulatory Commission (“FERC” or the “Commission”), in FERC Docket No. ER22-355-000, in which FERC accepted the ISO’s termination of the Capacity Supply Obligations of NTE’s Killingly Energy Center (“Killingly”) pursuant to the ISO’s Transmission, Markets and Services Tariff (“Tariff”).<sup>1</sup>

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<sup>1</sup> See *ISO New England Inc.*, 178 FERC ¶ 61,001 (2022) (“Termination Order”); *ISO New England Inc.*, 178 FERC ¶ 62,082 (2022) (“Notice of Denial of Rehearing by Operation of Law”); *ISO New England Inc.*, 178 FERC ¶ 61,130 (2022) (“Rehearing Order”).

The subject matter of the Petition was recently before this Court on emergency motions in No. 22-1011.

As the Court found in its recent order lifting its stay of FERC's Termination Order, "it is undisputed that NTE has defaulted on its financial assurance obligations under the ISO-NE Tariff, which default provides an independent ground for terminating the Killingly plant's capacity supply obligation." *In re NTE Connecticut, LLC*, No. 22-1011 (D.C. Cir. Mar. 2, 2022) (order granting emergency motion to lift stay) (Attachment 1). Killingly's Capacity Supply Obligations have been terminated independently of the FERC's orders for which the Petition seeks this Court's review. NTE therefore lacks standing in this case because the injury it allegedly has suffered cannot be redressed by this Court. In short, even if the Court granted the Petition and vacated FERC's orders, that would not alter NTE's loss of Killingly's Capacity Supply Obligations due to NTE's financial assurance default under the Tariff.

Alternatively, even if NTE could establish standing, its claim of error in FERC's orders is now moot because of the intervening, Tariff-prescribed termination of Killingly's Capacity Supply Obligations following NTE's financial assurance default. For each of these independent reasons, the Court should dismiss the Petition with prejudice.

## **I. BACKGROUND**

### **A. *FERC Granted ISO's Request to Terminate NTE's Capacity Supply Obligation***

On November 4, 2021, the ISO submitted a filing to the Commission seeking to terminate the Capacity Supply Obligations that Killingly previously acquired in Forward Capacity Auctions conducted by the ISO pursuant to the Tariff. Section III.13.3.4A of the Tariff provides that, after consultation with the Project Sponsor, the ISO has the right to terminate a resource's Capacity Supply Obligation through a filing with the Commission if certain triggers are met. One of the triggers for which the ISO may submit such a filing is if, as a result of revisions to a resource's critical path schedule milestones, the resource will not have achieved commercial operation within two years after the beginning of the Capacity Commitment Period for which the resource first received a Capacity Supply Obligation. In Killingly's case, it was evident to the ISO that Killingly would not be able to achieve commercial operation by June 1, 2024 (i.e., two years from the beginning of the Capacity Commitment Period for which Killingly first acquired a Capacity Supply Obligation). For that reason, the ISO made a filing with the Commission to terminate Killingly's Capacity Supply Obligations pursuant to Section III.13.3.4A of the Tariff.

Effective January 4, 2022, FERC's Termination Order accepted the ISO's request to terminate Killingly's Capacity Supply Obligations, beginning with the

2022-2023 Capacity Commitment Period<sup>2</sup> and including future Capacity Commitment Periods.<sup>3</sup> On January 10, 2022, NTE filed a motion for stay and a request for rehearing with the Commission. The Commission denied NTE's motion for stay on January 28, 2022.<sup>4</sup> The Commission denied NTE's request for rehearing on February 23, 2022.<sup>5</sup>

***B. This Court's Orders Granting and Lifting a Stay of the Termination Order***

On January 20, 2022, NTE submitted a petition to this Court under the All Writs Act, docketed as No. 22-1011, seeking a stay of the Termination Order to facilitate Killingly's participation in the ISO's Forward Capacity Auction 16. By order issued on February 4, 2022, the Court stayed the Termination Order until thirty days after the Commission resolved NTE's then-pending request for rehearing of the Termination Order ("Stay Order"). Pursuant to the Stay Order, the ISO included Killingly in Forward Capacity Auction 16 on February 7, 2022. However, given the uncertainty regarding Killingly, the ISO calculated results for Forward Capacity

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<sup>2</sup> Termination Order at P 23.

<sup>3</sup> That is, the 2022-2023, 2023-2024, and 2024-2025 Capacity Commitment Periods, in accordance with Section III.13.3.4A of the Tariff.

<sup>4</sup> *ISO New England Inc.*, 178 FERC ¶ 61,063 (2022).

<sup>5</sup> Consistent with its usual practice since this Court's decision in *Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc), the Commission issued a Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration on February 11, 2022. *ISO New England Inc.*, 178 FERC ¶ 62,082 (2022).

Auction 16 with and without Killingly and, as described below, did not publish the results until Killingly's status was determined.

On February 18, 2022, after NTE defaulted on its obligations under the Tariff's Financial Assurance Policy, the ISO filed an emergency motion in No. 22-1011 to lift the stay of the Termination Order.<sup>6</sup> On March 2, 2022, the Court granted that motion, holding that "it is undisputed that NTE has defaulted on its financial assurance obligations under the ISO-NE Tariff, which default provides an independent ground for terminating the Killingly plant's capacity supply obligation." *In re NTE Connecticut, LLC*, No. 22-1011 (D.C. Cir. Mar. 2, 2022) (order granting emergency motion to lift stay).

***C. FERC's Rehearing Order Affirming that Killingly's Capacity Supply Obligations Were Properly Terminated***

While the emergency motions practice in No. 22-1011 continued, on February 23, 2022, FERC issued its Rehearing Order. The Commission rejected NTE's claims that the Termination Order was arbitrary and capricious and was not supported by substantial evidence in the record. Explaining its reasoning in detail, FERC re-affirmed its finding that the ISO had sufficiently demonstrated that NTE would not meet Killingly's May 31, 2024 commercial operation critical path

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<sup>6</sup> Emergency Motion of ISO New England Inc. for Dissolution of Stay Order, *In re NTE Connecticut, LLC*, No. 22-1011 (D.C. Cir. Feb. 18, 2022) ("Emergency Motion").

schedule milestone that NTE had set for Killingly, as required by the Tariff.<sup>7</sup> Thereafter, NTE filed the instant Petition on February 23, 2022, one week after all of its Capacity Supply Obligations were terminated by operation of the Tariff due to NTE's financial assurance default (independent of the termination for failure to meet the critical path schedule milestone). As noted, on March 2, 2022, the Court lifted the stay of the Termination Order.

## **II. ARGUMENT**

### ***A. NTE Lacks Standing Because Its Alleged Injury Is Not Redressible by This Court***

The ISO respectfully requests that the Court dismiss NTE's Petition because NTE lacks standing. NTE cannot establish standing because it alleges no injury that the Court can remedy in this proceeding.

On February 16, 2022, NTE defaulted under the Tariff's Financial Assurance Policy. That default, by operation of the terms of the FERC-approved Tariff, resulted in termination of all of Killingly's Capacity Supply Obligations, independent of any action by FERC. NTE's default thus removes the foundation of the injury it alleges was caused by the Termination Order, since NTE's uncontested financial default means that, even if NTE prevailed on its Petition, the relief it seeks

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<sup>7</sup> Rehearing Order at PP 13, 32-33.

could not and would not restore those Capacity Supply Obligations. Because the Court cannot redress NTE's claimed injury, NTE lacks standing.

The third prong of the irreducible constitutional minimum criteria for standing requires that an injury in fact must be likely, as opposed to merely speculative, and that the injury can be redressed by a favorable judicial decision. In the words of this Court, to establish Article III standing, "[Petitioner] must demonstrate that it has suffered an injury-in-fact, that FERC's action caused its injury, and that a favorable order would likely redress its harm." *B&J Oil & Gas v. FERC*, 353 F.3d 71, 75 (D.C. Cir. 2004). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Idaho Power Co. v. FERC*, 312 F.3d 454, 459-60 (D.C. Cir. 2002).

In *Advanced Management Technology, Inc. v. FAA*, 211 F.3d 633 (D.C. Cir. 2000), the Court decided that where the petitioner filed its challenge to the agency's termination of a contract after the agency had re-awarded the contract to petitioner, "The claim may sound like one of mootness – a justiciable controversy existed but no longer remains – but the timing makes [Petitioner's] problem one of standing. . . . Standing is assessed 'at the time the action commences,' i.e., in this case, at the time [Petitioner] sought relief from an Article III court . . . ." *Id.* at 636 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 191 (2000)) (internal citation omitted).

At the time NTE filed its Petition, it had no standing because it had lost its Capacity Supply Obligations by operation of the Tariff's Financial Assurance Policy, which establishes collateral requirements as a requirement to participate in and remain in the New England markets. While NTE knew of these requirements and the consequences of failing to fulfill them, subsequent to this Court's Stay Order and Killingly's inclusion in Forward Capacity Auction 16 on February 7, 2022, NTE failed to meet those collateral requirements. Such failure resulted in automatic and immediate termination of Killingly's Capacity Supply Obligations pursuant to Section VII.D of the Financial Assurance Policy.<sup>8</sup> Once NTE's Capacity Supply Obligations were terminated by operation of the Tariff, NTE ceased to have standing to seek review of FERC's orders because any injury NTE allegedly suffered from FERC's orders could no longer be redressed by a favorable order upon review—either by this Court or by FERC after a remand.

Since Killingly's Capacity Supply Obligations are terminated regardless of whether the Commission's Termination Order is upheld, NTE lacks a redressible injury. That, in turn, precludes NTE's standing to seek review of FERC's orders. The Court therefore should dismiss the Petition with prejudice.

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<sup>8</sup> Emergency Motion at Declaration of Robert C. Ludlow ¶ 16 (Attachment 2).



***B. NTE's Petition Should Be Dismissed Because Even if NTE Had Standing, NTE's Claim Is Moot Because of Irreversible Third-Party Action***

NTE's default under the Tariff's Financial Assurance Policy resulted in the termination of all of Killingly's Capacity Supply Obligations. Therefore, in the alternative, even if NTE could establish that it has standing, the Court should dismiss NTE's Petition because independent third-party action has rendered moot NTE's challenge of FERC's orders.

A federal court must satisfy itself that the party invoking federal jurisdiction has presented a justiciable case or controversy and the mootness doctrine ensures that judicial relief can still redress the asserted injury. *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 263 (D.C. Cir. 2007). *See also Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

The question of mootness is a "threshold jurisdictional issue."<sup>9</sup> This Court considered this question in *Southern Co. Services v. FERC*, 416 F.3d 39, 41, 43 (D.C. Cir. 2005), where it concluded that "Southern's petition regarding the Williams orders is moot because the Williams agreement has since expired." Similarly, in *Entergy Services v. FERC*, 391 F.3d 1240, 1245 (D.C. Cir. 2004), this Court held that a challenge to a specific Commission order regarding an interconnection agreement is moot when the contract is terminated. In *Northwest Pipeline Corp. v. FERC*, 863 F.2d 73, 76-77 (D.C. Cir. 1988), the court held that, "Obviously, the

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<sup>9</sup> *Coal. of Airline Pilots Ass'ns v. FAA*, 370 F.3d 1184, 1189 (D.C. Cir. 2004).

challenged rate terms disappeared into the regulatory netherworld when the certificates themselves entered the archives. . . . Thus, to the extent it seeks review [of Orders affecting the certificates], Petitioner's claim is, beyond reasonable dispute, moot."

Here, NTE seeks review of orders concerning Capacity Supply Obligations which are now in the regulatory netherworld because NTE defaulted on its financial assurance obligations under the ISO Tariff, which default terminated Killingly's Capacity Supply Obligations independent of the FERC orders NTE would have the Court review in this case. Thus, there is no longer a justiciable case or controversy for NTE to pursue, as NTE's contentions ceased to be justiciable the moment NTE's Capacity Supply Obligations were terminated by operation of the Tariff as a result of NTE's financial assurance default. Accordingly, the ISO respectfully requests that this Court dismiss NTE's Petition.

### **III. CONCLUSION**

WHEREFORE, for the reasons explained above, the ISO respectfully requests that the Court issue an order dismissing with prejudice NTE's Petition in this case.

Respectfully submitted,

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***Attorneys for ISO New England Inc.***

Dated: April 5, 2022

**IN THE  
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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NTE Connecticut, LLC,	)	
	)	
Petitioner,	)	
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	)	
Federal Energy Regulatory Commission,	)	
	)	
Respondent.	)	

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT**

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(g)(1), the undersigned certifies that the foregoing motion complies with the applicable type-volume limitations. The motion was prepared using a proportionally spaced type (Times New Roman, 14 point) and contains 2,119 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word Standard 2016) used to prepare the motion.

Respectfully submitted,

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***Attorney for ISO New England Inc.***

**IN THE  
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	)	
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 5th day of April 2022, I have served the foregoing motion via the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted,

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***Attorney for ISO New England Inc.***

## **Attachment 1**

***In re NTE Connecticut, LLC*, No. 22-1011  
(D.C. Cir. Mar. 2, 2022)**

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 22-1011****September Term, 2021****FERC-ER22-355-000****Filed On: March 2, 2022**

In re: NTE Connecticut, LLC,

Petitioner

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ISO New England Inc. and New England  
Power Generators Association, Inc.,  
Intervenors

**BEFORE:** Tatel, Wilkins, and Rao, Circuit Judges

**ORDER**

Upon consideration of the emergency motion to lift stay, the responses thereto, and the reply, it is

**ORDERED** that the temporary stay entered by the court on February 4, 2022, be lifted. ISO New England has demonstrated that, due to changed circumstances, the stay is no longer equitable. Cf. Franklin Twp. Sewerage Auth. v. Middlesex Cnty. Utils. Auth., 787 F.2d 117, 121 (3d Cir. 1986). Since our stay order, the Federal Energy Regulatory Commission (“FERC”) has issued an order on rehearing, addressing some of the deficiencies in its earlier termination order. See In re NTE Conn., LLC, No. 22-1011, 2022 WL 552060, at \*4–6 (D.C. Cir. Feb. 24, 2022); ISO New England Inc., 178 FERC ¶ 61,130 (2022). Moreover, it is undisputed that NTE has defaulted on its financial assurance obligations under the ISO-NE Tariff, which default provides an independent ground for terminating the Killingly plant’s capacity supply obligation. In light of these developments, our stay of FERC’s termination order is no longer equitable.

**Per Curiam**

**FOR THE COURT:**

Mark J. Langer, Clerk

BY: /s/

Manuel J. Castro  
Deputy Clerk

## **Attachment 2**

**Declaration of Robert C. Ludlow,  
*In re NTE Connecticut, LLC*, No.  
22-1011 (D.C. Cir. Feb. 18, 2022)**



**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**In Re: NTE Connecticut, LLC**

)  
) No. 22-1011  
)  
)

**DECLARATION OF  
ROBERT C. LUDLOW**

1. My name is Robert C. Ludlow. I am a Vice President and the Chief Financial and Compliance Officer of ISO New England Inc. (the “ISO”). My business address is One Sullivan Road, Holyoke, MA 01040.

2. I served in the role of Vice President and Chief Financial Officer from the time the ISO commenced its operations on July 1, 1997 until September 2000. At that time, I began working as an outside consultant for the ISO until August 2002, when I rejoined the ISO as Vice President and Chief Financial Officer. In July 2008, my title changed to reflect my expanded responsibility for compliance. The compliance organization is responsible for developing and maintaining the ISO’s compliance management system. This system captures the company’s compliance obligations, including regulatory requirements of the Federal Energy Regulatory Commission (“FERC” or “Commission”) and the company’s

Transmission, Markets, and Services Tariff (“Tariff”) on file with FERC and subject to its jurisdiction. I hold a B.B.A. in Accounting from St. Bonaventure University. Prior to joining the ISO, I was a Partner at the accounting firm of Marden, Harrison & Kreuter, CPAs. I also served as the Chief Financial Officer of Western Beef, Inc. I am a Certified Public Accountant.

3. I am providing this declaration in support of the ISO’s Motion for Expedited Dissolution of Stay, filed with the Court in the proceeding captioned above.

4. All participants in the markets the ISO administers must comply with the ISO New England Financial Assurance Policy (“Financial Assurance Policy”). The Financial Assurance Policy is Exhibit 1A to Section I of the Tariff. A copy of the Financial Assurance Policy is Attachment 1 to the ISO’s Motion for Expedited Dissolution of Stay.

5. The Financial Assurance Policy’s requirements apply to any market activities of NTE Connecticut, LLC (“NTE”), including with respect to obtaining and maintaining Capacity Supply Obligations for NTE’s Killingly Energy Center (“Killingly”).

6. It is my understanding that, after the Court’s order issued on February 4, 2022, in this case, Killingly participated as an existing resource in Forward Capacity Auction 16 on February 7, 2022. However, after Forward

Capacity Auction 16 closed, NTE defaulted on its financial assurance obligations under the Financial Assurance Policy. I will explain below the applicable terms of the Financial Assurance Policy and their consequences in NTE's case.

7. Section II.A.4.a of the Financial Assurance Policy prescribes minimum capitalization criteria for participants in the New England markets administered by the ISO. A market participant that does not meet the minimum capitalization criteria of Section II.A.4.a is required to provide the ISO with financial assurance equal to 25 percent of the participant's financial assurance requirement. This requirement is found in Financial Assurance Policy, Section II.A.4.c.

8. NTE has not met the Financial Assurance Policy's minimum capitalization criteria, and therefore has been and is subject to the financial assurance requirement of Section II.A.4.c. When FERC issued its order of January 4, 2022 ("Termination Order"), approving termination of Killingly's CSOs, NTE was in compliance with the requirement to provide the ISO with financial assurance equal to 25 percent of its financial assurance requirement. NTE met that requirement through a letter of credit it provided to the ISO.

9. When Killingly's CSOs were terminated per the Termination Order, in accordance with Section III.13.3.4A of the Tariff, NTE forfeited the

financial assurance it had provided with respect to the terminated Capacity Supply Obligations. Accordingly, the ISO then drew down a portion of the letter of credit that NTE had provided as financial assurance. The ISO continued to hold the remainder of the letter of credit as financial assurance.

10. After learning that the Court stayed the Termination Order on February 4, the ISO promptly took actions to restore NTE's previously forfeited financial assurance. The ISO accomplished this by depositing into an account held by NTE the funds the ISO previously drew from NTE's letter of credit. When the ISO restored NTE's previously terminated Capacity Supply Obligations in the ISO's systems, NTE's financial assurance obligations were recalculated to reflect the restored Capacity Supply Obligations, the financial assurance provided in lieu of the capitalization requirements (*i.e.*, 25 percent of the participant's financial assurance requirement), and all other financial assurance requirements.

11. Section X.B. of the Financial Assurance Policy provides that a letter of credit "shall be valued at \$0 at the end of the Business Day that is 30 days prior to the termination of such letter of credit." NTE's letter of credit expires by its terms on February 28, 2022. Therefore, as of January 31, 2022 (the first business day within 30 days of the letter of credit's expiration date), the remainder of NTE's letter of credit (the balance left after the ISO's draw

following the Termination Order) was then valued at zero for purposes of the Financial Assurance Policy.

12. Thus, when the Court stayed the Termination Order on February 4, 2022, because of the zero value then assigned to NTE's letter of credit, NTE did not have sufficient financial assurance on deposit with the ISO to meet the requirements of the Financial Assurance Policy. It is my understanding that representatives of the ISO explained this to NTE during several conversations with NTE representatives during the weekend of February 5-6, 2022. Section III.B.2.c of the Financial Assurance Policy provides that, when a market participant fails to meet its financial assurance requirement "solely because a letter of credit is valued at \$0 prior to the termination of that letter of credit, as described in Section X.B, then the ISO, in its sole discretion, may determine that: ... for five Business Days after such change in the valuation of the letter of credit, such valuation shall not by itself cause" the participant to be out of compliance with the Financial Assurance Policy.

13. It is my further understanding that the ISO advised NTE on February 6 that the ISO would exercise its limited Financial Assurance Policy discretion (regarding valuation of the letter of credit) which had the effect of allowing Killingly to participate in FCA 16. Accordingly, for five Business Days from January 31, NTE would not be out of compliance with the

Financial Assurance Policy because of the zero valuation of the letter of credit. This meant, assuming no other defaults, that the ISO would treat NTE as being in good standing under the Financial Assurance Policy until the close of business on February 7, 2022. The ISO explained that NTE would have to extend or replace its letter of credit or provide other qualified financial assurance to the ISO by close of business on February 7 to remain in compliance with the Financial Assurance Policy.

14. NTE did not provide an extension of its letter of credit or replacement financial assurance on February 7. Therefore, as of February 8, 2022, the Financial Assurance Policy dictated a zero valuation for the portion of the letter of credit on which NTE continued to rely for financial assurance. This caused NTE to be in default of its financial assurance requirement under the Financial Assurance Policy. Pursuant to Section III.B.2.c of the Financial Assurance Policy, on February 8, 2022, the ISO provided NTE with notice that NTE did not then meet its financial assurance requirements.

15. Pursuant to Section III.B.2.c of the Financial Assurance Policy, on February 9, 2022, the ISO provided to certain New England stakeholder committees a confidential notice that NTE was in financial assurance default and was therefore suspended from the New England markets. The suspension,

in turn, triggered an opportunity for NTE to cure its default within five business days thereafter, or by close of business on February 16, 2022.

16. NTE did not provide the ISO with additional financial assurance within the five business day cure period. In such circumstances, Section VII.D of the Financial Assurance Policy provides that “all Capacity Supply Obligations associated with Non-Commercial Capacity that were awarded to the defaulting Designated FCM Participant in previous Forward Capacity Auctions ... shall be terminated.” Thus, effective at the close of business on February 16, 2022, the Capacity Supply Obligations Killingly obtained in Forward Capacity Auction 16 and prior auctions were terminated.

17. This concludes my declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 17, 2022.



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Robert C. Ludlow