UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13-4330, 4394, 4501

PPL ENERGY PLUS LLC, et al.
V.
LEE A. SOLOMON, in his official capacity as
President of the New Jersey Board of Public Utilities, et al.

CPV POWER DEVELOPMENT, INC.,
Appellant in 13-4330,
HESS, NEWARK LLC,
Appellant in 13-4394, Intervenor in 13-4330,
ROBERT M. HANNA., etc., et al.
Appellants in 13-4501.

Appeal from Judge of the United States District Court for the District of New Jersey, No. 2:11-cv-00745-PGS, Hon. Peter G. Sheridan, U.S.D.J.

BRIEF OF NEW JERSEY DIVISION OF RATE COUNSEL AMICUS IN 13-4501

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STATEMENT OF INTEREST

Amicus, the New Jersey Division of Rate Counsel ("NJ Rate Counsel") is the administrative agent charged under New Jersey law with the general protection of the interests of utility ratepayers. N.J.S.A. 52:27E-50 et seq. While the plaintiffs and interveners in this matter represent the interests of those who pay or are paid for generation initially, the courts have recognized that it is the ratepayers who ultimately shoulder the cost of electricity. See Conn. Dept. of Public Utility Control, 569 F.3d 477, 479 (D.D.C. 2009). Cost is an important concern to ratepayers, however, that is not the true issue at stake in this matter. Rather, the provision of reliable electric service is the issue at stake here—one with which the ratepayers clearly have an interest. Electricity is an essential need, and without reliable service, ratepayers will be irreparably harmed. For this reason, NJ Rate Counsel has a heightened interest in the outcome of this matter. Moreover, because of the interest in this matter, NJ Rate Counsel participated in the proceedings below as amicus and seeks to do so at this appellate level.

SUMMARY OF ARGUMENT

Preliminarily, NJ Rate Counsel endorses the arguments and legal positions set forth by the New Jersey Board of Public Utilities ("NJ BPU"). It

also adopts the statements set forth in the NJ BPU's brief. In the interest of not being repetitive, NJ Rate Counsel's points will supplement the NJ BPU's argument. Specifically, NJ Rate Counsel believes that Judge Sheridan erred in finding that the Long Term Capacity Pilot Program Act, N.J.S.A. 48:3-51, 48:3-98.2-4 ("LCAPP") is preempted by the Federal Power Act ("FPA"), 16 §824, et seq. The FPA provides for a division of jurisdiction between FERC and the states over the regulation of electricity, specifically reserving some rights to the states. 16 §§ 824o, 824(a) and (b). PJM, the entity responsible for operating the regional transmission grid that encompasses all of New Jersey, recognized this division in its original Minimum Offer Price Rule ("MOPR")[1], providing for an exemption for state-sponsored generation developed to resolve a projected capacity shortfall. PJM Interconnection, L.L.C., 117 FERC ¶61,331 at P 5 (2006). The LCAPP was enacted specifically in reaction to a capacity shortfall projected by PJM and PSEG.

The Standard Offer Capacity Agreements ("SOCAs"), the underlying contracts in this matter, are not preempted. They are either, as defendants argued below, non-jurisdictional financing arrangements (not preempted by the

[1] The MOPR is a screen used by PJM to determine if a new entrant into PJM's capacity market is bidding an economic amount—that is, the generator is not bidding an artificially low number below the generator's actual costs in an attempt be selected and drive down the overall market construct's price.

FPA) or FERC jurisdictional rates under the exclusive jurisdiction of FERC. Significantly, FERC is well aware of the LCAPP and the SOCAs signed pursuant to that Act. Indeed, upon the petition of Plaintiffs challenging the LCAPP, FERC modified the MOPR. In doing so, FERC created a new rule that would allow the SOCA generators to proceed in PJM's BRA without being able to cause undue harm to that market construct. JA 387 & 465. Thus, FERC knew of the LCAPP and the SOCAs, but allowed the SOCA generators to proceed (under new rules) with no fear of interference with its jurisdictional market.

The LCAPP was an exercise of New Jersey's police power to provide for the health and welfare of its citizens. Judge Sheridan has severely limited that power, taking away the State's ability to protect its citizens from dangerous electric outages. If affirmed, the decision could be used to impede state efforts to promote the development of new and needed generation, as well as the ability to foster cleaner, more environmentally friendly generation. Indeed, as explained in the NJ BPU's brief, many states already exercise similar powers to provide for renewables, demand-side and energy efficient resources. See NJ BPU Brief at 26-29. The Court's ruling interferes with the State's longstanding right to regulate in this arena.

ARGUMENT

POINT I

THE LCAPP STATUTE IS NOT PREEMPTED BY THE FEDERAL POWER ACT.

In 2011, New Jersey enacted the Long Term Capacity Pilot Program Act, N.J.S.A. 48:3-51, 48:3-98.2-4 ("LCAPP") to provide incentives to develop new electric generation facilities in response to a capacity shortage in the eastern PJM area. N.J.S.A. 48:3-98.2. The existing shortage, caused by transmission delays and a lack of new capacity, led to high capacity prices in the PJM market and caused PJM and Plaintiff PSEG to warn of even more severe capacity shortages due to the anticipated retirement of over 11,000 MWs of capacity. See: N.J.S.A. 48:3-98.2 (g) and (h); NJ BPU Brief at 14-15. The LCAPP required the NJ BPU to design a program to promote construction of up to 2,000 MW of qualified electric generation facilities. N.J.S.A. 48:3-98.3.

The NJ BPU initiated the LCAPP program on February 10, 2011. On March 29, 2011, the NJ BPU approved the Standard Offer Capacity Agreements which required eligible generators to submit bids in the PJM Capacity Market Auction at the lowest commercially reasonable price under PJM's Market Rules. SOCA Section 2.3.3 (c) and (d).

In his decision, Judge Sheridan frames the issue as whether the "LCAPP intrude(s) upon and interfere(s) with the authority delegated to the ["FERC"] by the Federal Power Act." JA 25-26.

In deciding that it does, the court presents its preemption analysis, rejecting New Jersey's argument that the SOCAs are "financial contracts" that do not involve physical sales, finding that the SOCAs occupy the same field of regulation as the Commission, and concluding that they intrude upon the Commission's authority to set wholesale energy price through its preferred RPM Auction process. JA 78. The basis for this finding is that the SOCAs "make substantial use of RPM terminology" and impose RPM-related obligations. JA 78-79. Moreover, the LCAPP defines the SOCA as a "capacity price . . . to be received by eligible generators under a Board-approved SOCA." JA 79. In addition, as performance under the SOCA is contingent on clearing the RPM auction, the "SOCA are not separate from, and to the contrary, occupy the same field as the RPM Auction." Id.

The Judge first finds field preemption, concluding that "LCAPP" supplants the federal statute, and intrudes upon the exclusive jurisdiction of the Commission, by establishing the price that LCAPP generators will receive for their sales of capacity." JA 84. While New Jersey has authority to take "a wide range of actions to ensure" reliability, and to "encourage . . . new electric

generation facilities," it "chose to advance those goals through a mechanism that intrudes upon the authority of the Commission and violates federal law." Id. at 84-85.[2]

Field preemption arises when state law attempts to occupy "a field reserved for federal regulation." United States v. Locke, 529 U.S. 89, 111 (2000); Bruesewitz v. Wyeth Inc., 561 F.3d 233, 240 (2009). This occurs when "Congress has left no room for state regulation of these matters." Locke, 529 U.S. at 111. This may arise where the federal law expressly preempts state law, where the laws conflict or where the federal regulatory scheme is so pervasive that it "occupies the field" and warrants an inference that Congress did not intend the states to supplement it. Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

The Judge next considers conflict preemption, and finds that "it is clear that the LCAPP Act poses as an obstacle to the Commission's implementation of the RPM." JA 86. The Judge concludes that the LCAPP's "imposition of a

[2] While Judge Sheridan suggests other mechanisms the NJ BPU could use to support and encourage development of generation projects (JA 74), the NJ BPU could not take any of those actions. Rather, additional legislation would be required. The Legislature had these options before it when enacting the LCAPP, but chose to utilize the LCAPP—a mechanism specifically permitted by FERC at the time of its enactment.

government imposed price creates an obstacle to the Commission's preferred method . . . ." Id.

The FPA created exclusive federal jurisdiction, now vested in FERC, over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b); Stipulated Facts ¶ 5. The FPA also grants FERC, through its "Electric Reliability Organizations," authority to ensure the reliability of the bulk power system that transmits wholesale power in interstate commerce. 16 U.S.C. § 824o Yet, with respect to reliability, the FPA specifically provides:

> Nothing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any reliability standard…
>
> [16 U.S.C. § 824o(i)(3)].

The FPA reserved to the States certain historic regulatory powers, expressly recognizing State authority over "facilities used for the generation of electric energy." 16 U.S.C. § 824(a), (b). The FPA is clear that FERC has no authority to order the construction of new electric generation facilities. 16 U.S.C. § 824(b)(1). Thus, the FPA contemplates state action to direct or otherwise incentivize construction of new electric generation facilities to ensure safe, adequate, and reliable electric service within each state.

When the allocation of state and federal jurisdiction is unclear, FERC usually determines the scope of its jurisdiction. See, e.g., New York v. FERC, 535 U.S. 1 (2002); California v. FERC, 495 U.S. 490 (1990). Here, FERC-approved tariffs in effect at the time the LCAPP Act was enacted permitted states to undertake regulatory and legislative initiatives to ensure adequate capacity to meet demand.

PJM's design of the Reliability Pricing Model ("RPM")[3] acknowledged the division of power between the states and federal regulators. The RPM included a MOPR that applied to new market entrants and was aimed at promoting competition within the PJM market. This provision of the MOPR was contested by several parties, including Plaintiffs in this case, leading to a negotiated settlement through a FERC proceeding. That settlement included a specific exemption to the MOPR for state programs designed to address reliability. PJM Interconnection, L.L.C., 117 FERC ¶ 61,331, at P 5 (2006). The exemption permitted a bid into RPM at a price of "zero" for:

> [A]ny Planned Generation Capacity Resource being developed in response to a state regulatory or legislative mandate to resolve a projected capacity shortfall in the Delivery Year affecting that state, as determined pursuant to a state evidentiary proceeding

[3] RPM is a FERC approved market construct used for the sale of capacity within the PJM region.

> that includes due notice, PJM participation, and an opportunity to be heard.
>
> [PJM Tariff, Attachment DD § 5.14(h)(1) (JA 1090].

FERC expressly approved this exemption before enactment of the LCAPP Act. FERC found that the negotiated MOPR was "a reasonable method of assuring that net buyers do not exercise monopsony power by seeking to lower prices through self supply." 117 F.E.R.C. ¶ 61,331, at P 104. FERC further held that "[t]he exception to which PPL/PSEG primarily objects - namely, reliability projects built under state mandate - is reasonable because it enables states to meet their responsibilities to ensure local reliability." Id. Thus, the LCAPP Act did not impede FERC's authority under the FPA, but worked within it. Nevertheless, once New Jersey relied upon FERC's ruling, Plaintiffs asserted that its action relying on that ruling is unconstitutional.

In the face of PJM and PSEG's predictions of capacity shortages, New Jersey needed to act quickly and decisively to keep the lights on in New Jersey and to protect its citizens and businesses from rolling blackouts. The State could not sit by passively to see if these service interruptions would occur. Consistent with the FERC-approved MOPR, the State conducted proceedings, in which PJM and other interested parties participated, regarding the lack of new capacity available to New Jersey under the RPM.

The Legislature then passed the LCAPP statute in an attempt to ease the capacity shortfalls anticipated by PJM. Those shortfalls resulted from a delay in the Susquehanna to Roseland Transmission Line, anticipated retirements of existing capacity, and a failure of RPM to provide sufficient incentives for new generation in congested areas of PJM. NJ BPU Brief at 14-15. Since FERC does not have jurisdiction under the FPA to order new generation, and the transmission lines planned by PJM were delayed, New Jersey invoked its authority to address local reliability, economic and environmental needs.

Judge Sheridan's ruling incorrectly classifies the SOCAs as contracts preempted by the FPA. The SOCA contracts are either non-jurisdictional financing arrangements, or FERC jurisdictional rates. Either category precludes a finding that LCAPP, which directed the State's utilities to enter into the SOCAs, is preempted. If New Jersey is correct that the SOCAs are non-jurisdictional agreements, then the court has no basis on which to find them preempted. Alternatively, even if the court is correct that SOCA/LCAPP sets a wholesale rate, all this means is that the SOCAs are contracts that are subject to FERC's jurisdiction. That jurisdiction allows FERC to decide whether the SOCAs are just and reasonable and, if not, to modify them. FERC'S authority over wholesales rates does not preempt states from directing distribution companies to enter into FERC-jurisdictional contracts. Moreover, if the

SOCAs are FERC-jurisdictional contracts, then only FERC—and not the court—may modify them.

Under the LCAPP Act, the State of New Jersey does not regulate wholesale electricity markets or generators' interactions with FERC or impede the federal regulation of either. Instead, the LCAPP Act conformed with all then-current FERC-approved market rules, requiring participation in the PJM capacity markets and compliance with their rules. The LCAPP Act requires that "the selected eligible generators with executed [Standard Offer Capacity Agreements] SOCAs shall offer the capacity, electricity, and ancillary services into the PJM wholesale markets as required by the market rules," N.J.S.A. 48:3-98.3(c)(11). Those generators must participate in and clear the annual Base Residual Auction ("BRA") conducted by PJM under the RPM for each delivery year for the entire term of the SOCA. N.J.S.A. 48:3-98.3(c)(12).

FERC is well aware of the LCAPP and the SOCAs, which were the impetus for major capacity-market reforms and subsequent litigation (what the Judge calls "MOPR II"). While FERC rewrote the MOPR to limit the state contracts' effects on wholesale prices, FERC never found (and has not contended in this court) that the contracts were illegal or unenforceable. Instead, FERC, based upon Plaintiffs' petition before that agency, adopted MOPR revisions, including a unit-specific review process, and told the states

they could do as they pleased, but would be subject to the new MOPR if any state-sponsored units sought PJM capacity credit. The CPV and Hess units were selected, SOCAs were signed, and each participated in the RPM auction, subject to the MOPR, and cleared on that basis. In other words, FERC reviewed the LCAPP, changed the rules and then found that New Jersey (and the SOCA generators) could proceed without undue impact on the RPM. There should be no basis under these facts on which to find that LCAPP or related SOCAs conflict with the FPA or FERC's authority under it. For the same reason, Generator claims that the SOCAs ruined their ability to plan are off base. FERC MOPR revisions addressed and protected Generator interests from all but legitimate competition.

The judge acknowledges these arguments, but dismisses them, incorrectly finding that the court is "in the best position to determine whether the LCAPP and the related polices implemented by the Board violate the Supremacy Clause." JA 74.[4] It is not clear from the opinion whether the court was aware that FERC approved a project-specific application by CPV for market-based authority. Contracts subject to that authority are FERC-

[4] This part of the judge's decision is particularly confusing. The judge asserts that under MOPR III, "issues between the Board and the Commission concerning participation of new generators in the RPM Auction are resolved . . ." and there is no remaining controversy for the Court. JA 74. This was never Defendants or NJ Rate Counsel's position. Indeed, MOPR II remains under review by this Court, and MOPR III was rejected by FERC. JA 612.

jurisdictional agreements, and only FERC has authority to modify them. There is no mention in the opinion of the FERC-status of the SOCAs.

In reviewing the Act, Judge Sheridan failed to recognize that the Legislature complied with the requirements set forth in the PJM tariff and approved by FERC. His Honor's analysis of the history of MOPR misses the mark entirely. The MOPR in place at the time the Act was passed provided an exemption for state-sponsored generation bidding into the BRA. The State relied upon that exemption in enacting the Act. After the Act was passed, Respondents in this matter, along with others, filed a complaint at FERC and ultimately had the MOPR changed to not exempt state-sponsored generation. Significantly, in approving the new MOPR, FERC stated that it had moved to protect its jurisdictional BRA from "uneconomic entry." It then permitted the SOCA generators to participate in the BRA under these new rules.

POINT II

STATES NEED THE AUTHORITY TO RESPOND TO ELECTRICITY RELIABLITY CONCERNS

Enactment of the LCAPP Act was an exercise of the State's police power to ensure reliability and resource planning. Police power is the State's constitutionally-recognized power to govern, and to make, adopt, and enforce laws to protect public health, justice, morals, order, safety and welfare. Sligh v. Kirkwood, 237 U.S. 52, 59 (1915).

FERC has consistently recognized that the states have police power to ensure the reliability of electric service and resource planning. FERC Order 888 deregulated vertically-integrated power utilities nationwide in 1996, unbundling electric generation from transmission, see Sacramento Mun. Util. Dist. v. FERC, 428 F.3d 294, 295-96 (D.C. Cir. 2005), and adopting a pro forma tariff that every transmission-owning public utility must file with FERC and follow. Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 727 (D.C. Cir. 2000). Order 888 states that it:

> will not affect or encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions [or] authority over utility generation and resource portfolios …
>
> [FERC Order 888, 61 F.R. 21540, at p. 21626 n. 544 (May 10, 1996)].

Courts presume against field preemption when it would encroach on an existing state police power. Where the field that Congress is said to have preempted has been traditionally occupied by the States, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Jones v. Rath Packing Co., 430 U.S 519, 525 (1977). The FPA

does not manifest that purpose. In fact, it specifically reserves this authority to the States. 16 U.S.C. §§ 824o, 824(a) and (b).

It is undisputed that the electric service is essential to the health and welfare of New Jersey's citizens[5] and that the State has a legitimate interest in protecting that service. The Act was New Jersey's attempt to protect its citizens. It is true that the increase in supply will ultimately drive down the price of electricity to New Jersey's ratepayers. Cost, however, is a symptom of the larger problem: safe and reliable service to New Jersey's ratepayers. The reason costs go up in New Jersey is due to congestion and the difficulty in bringing sufficient capacity to the State. The farther capacity is from load, the greater the chances of interruption and the greater the threat to reliable service. Indeed, the court cited the testimony of PJM's Vice President of Planning, who stated that a reliability problem can be resolved in one of two ways: transmission or generation near the area with a reliability issue. See NJ BPU Brief at pp. 12-15 (explaining the high cost and uncertainty of new transmission projects, and the need for the State to address reliability issues with the only

[5] Indeed, this was the entire point of NJ BPU witness James Giuliano, Director of Reliability and Security at the NJ BPU, who testified to the severe consequences of an electric outage. Judge Sheridan misconstrued this testimony, somehow interpreting it as an admission that sufficient generation exists. JA 61. Mr. Giuliano explained the hardships of an outage, but specifically explained that the reason for the outage was not his concern, and never testified that there was sufficient capacity in New Jersey.

tool at its disposal: generation). PJM, however, cannot order generation; the states can. Thus, NJ Rate Counsel supported this Act not solely because it lowered prices but because it gave a chance for the ratepayers to receive reliable service—something PJM had told the State it could no longer guarantee.

If Judge Sheridan's decision is affirmed on appeal or followed by the other courts, the decision may well be used to impede state efforts to promote the development of new and needed generation. Assuming that the PJM's capacity market continues to fail to induce the development of new resources—or the right types of resources—states may continue to see a need to engage in such efforts. Indeed, as the NJ BPU explains in its brief, many states already rely upon these powers to provide for renewables, energy efficiency and demand-side programs. NJ Rate Counsel is particularly concerned with energy efficiency and demand-side programs, which not only drive down demand providing for greater reliability, but provide real cost savings to ratepayers. Ratepayers, however, pay for these costs. They so to achieve diversity, environmental, reliability benefits or some combination of all three for the ratepayers. These programs are legitimate and necessary exercises of state powers and are not preempted. See also BPU Brief at 29-30. The LCAPP is no different, and likewise is not preempted by the FPA.

CONCLUSION

For all the foregoing reasons, this Court should overrule Judge Sheridan's decision that the LCAPP Act was preempted by the FPA and find that the Act was a legitimate exercise of the State's powers, as explicitly permitted by the FPA.

Respectfully submitted,

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January 27, 2014

CERTIFICATION OF ADMISSION TO BAR

I, Stefanie A. Brand, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

STEFANIE A. BRAND
DIRECTOR, DIVISION OF RATE COUNSEL

By: /s/ *Stefanie A. Brand*
Stefanie A. Brand, Esq.
Director, Division of Rate Counsel

Dated: January 27, 2014

CERTIFICATION OF COMPLIANCE WITH RULE 32(a)(7)(b)

I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). The number of words in the brief is 3,463, excluding parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

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Dated: January 27, 2014

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 31.1(C)

I certify that this brief complies with L.A.R. 31.1(c) in that prior to it being e-mailed to the Court today it was scanned by the following virus detection software and found to be free from computer viruses:

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Dated: January 27, 2014

CERTIFICATION OF COMPLIANCE WITH RULE 32(a)(7)(b)

I certify that the text of the paper copies of this brief and the text of the PDF version of this brief filed electronically with the court today are identical.

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CERTIFICATION OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the typeface requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this Brief has been prepared in a proportionally spaced typeface using 2003 Microsoft Word in 14 point Times Roman font.

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Dated: January 27, 2014

CERTIFICATION OF SERVICE

Pursuant to FED.R.APP.P. 25, 3rd CIR. L.A.R., and 3rd CIR MISC. R. 113.4, I hereby certify that, on January 27, 2014, served a copy of the foregoing brief on all counsel in these consolidated cases that are "Filing Users" of this Court's electronic filing system, and such counsel were served, pursuant to 3rd CIR. MISC. R. 113.4, when this brief was filed through the Court's electronic filing system, by the Notice of Docket Activity generated by the Court's electronic filing system.

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