Nos. 13-4330, 13-4394, & 13-4501 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PPL ENERGYPLUS, LLC, *et al.*,

v.

LEE A. SOLOMON, in his official capacity as
President of the New Jersey Board of Public Utilities, *et al.*,

v.

CPV POWER DEVELOPMENT, INC.; HESS NEWARK, LLC

CPV POWER DEVELOPMENT, INC.,
Appellant in No. 13-4330

HESS NEWARK, LLC,
Appellant in No. 13-4394

LEE A. SOLOMON, *et al.*,
Appellants in No. 13-4501

On Appeal from the United States District Court of the District of New Jersey,
No. 3:11-cv-007-PGS (Hon. Peter G. Sheridan)

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CORPORATE DISCLOSURE STATEMENT
& STATEMENT OF FINANCIAL INTEREST

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Plaintiffs/Appellees state:

***The PPL Parties*:** PPL EnergyPlus LLC; PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; Lower Mount Bethel Energy, LLC; PPL New Jersey Solar, LLC; PPL New Jersey Biogas, LLC; and PPL Renewable Energy, LLC ("PPL Parties") are each wholly owned, indirect subsidiaries of PPL Corporation, whose shares are publicly traded on the New York Stock Exchange under the symbol "PPL." No other publicly held company has a 10% or greater ownership interest in the PPL Parties or PPL Corporation.

***The Calpine Parties*:** Calpine Energy Services L.P.; Calpine Mid-Atlantic Generation, LLC; Calpine New Jersey Generation, LLC; Calpine Bethlehem, LLC; Calpine Mid-Merit, LLC; Calpine Vineland Solar, LLC; Calpine Mid-Atlantic Marketing, LLC; and Calpine Newark, LLC ("Calpine Parties") are each wholly owned subsidiaries of Calpine Corporation. Calpine Corporation ("Calpine"), is a Delaware corporation with its principal place of business in Houston, Texas. Calpine's common stock is traded on the New York Stock Exchange under the symbol "CPN." No other publicly held company has a 10% or greater ownership interest in the Calpine Parties or Calpine Corporation.

***Exelon Generation Company, LLC*:** Exelon Generation Co., LLC is a Pennsylvania limited liability company and a wholly owned subsidiary of Exelon Ventures Company, LLC, which in turn is a wholly owned subsidiary of Exelon Corporation. Exelon Corporation's common stock is traded on the New York Stock Exchange under the symbol "EXC." No other publicly held company has a 10% or greater ownership interest in the Exelon Generation Company, LLC, Exelon Ventures Company, LLC or Exelon Corporation.

***Atlantic City Electric Company*:** Atlantic City Electric Company is a wholly owned subsidiary of Conectiv, LLC ("Conectiv"). Conectiv is solely a holding company with no business operations. Conectiv is a wholly owned subsidiary of Pepco Holdings, Inc., a publicly held corporation. Pepco Holdings, Inc.'s common stock is traded on the New York Stock Exchange under the symbol "POM." No other publicly held company has a 10% or greater ownership interest in Atlantic City Electric Company, Conectiv or Pepco Holdings, Inc.

***Public Service Electric and Gas Company*:** Public Service Electric and Gas Company ("PSE&G") is a wholly-owned subsidiary of the Public Service Enterprise Group Incorporated, which itself is publicly traded on the New York Stock Exchange under the symbol "PEG." There are no other publicly held corporations that own 10% or greater ownership interest in Public Service Electric and Gas Company or Public Service Enterprise Group Incorporated.

***Essential Power, LLC*:** Essential Power, LLC, formerly known as North American Energy Alliance, LLC, is a Delaware limited liability company. No publicly held corporation holds an interest in Essential Power, LLC.

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INTRODUCTION

This case involves an avowed effort by New Jersey to override federal regulatory judgments with which it disagrees. In New Jersey's view, the rates and terms FERC has established for transactions in the interstate wholesale market for electric capacity do too little to encourage the development of new generating facilities in New Jersey. After failing in its effort to persuade FERC to modify its approach, the state decided to take matters into its own hands and simply replace FERC's rates and terms with ones more to its liking. As the District Court correctly concluded, that flagrant incursion on federal authority is preempted by federal law. FERC alone has authority to regulate all "rates and charges made, demanded, or received … for or in connection with the transmission or sale" of electricity in the wholesale market. 16 U.S.C. § 824d(a). New Jersey's disagreement with how FERC has exercised that exclusive authority does not empower it to invade a field concededly reserved to FERC—let alone to do so through means that squarely conflict with FERC's regulatory regime.

New Jersey's unabashed interference with the interstate wholesale market also violates the dormant Commerce Clause by discriminating in favor of in-state participants in that market. New Jersey deliberately crafted its regulatory scheme to render a generating facility *located in New Jersey* better-positioned to take advantage of the wholesale rates and terms that the state has mandated in lieu of those approved by FERC. That blatant discrimination in favor of in-state commerce triggers a virtually *per se* rule of invalidity, and New Jersey has not come close to overcoming its demanding burden under that test. In short, the Long Term Capacity Pilot Program is both preempted and unconstitutional. This Court should affirm the District Court's judgment invalidating it.

STATEMENT OF ISSUES

1. Whether the District Court correctly concluded that the LCAPP is preempted because it intrudes upon FERC's exclusive jurisdiction by setting prices for capacity transactions on the interstate wholesale market.

2. Whether the District Court correctly concluded that the LCAPP is preempted because it conflicts with FERC's regulation of the interstate wholesale market.

3. Whether the LCAPP violates the dormant Commerce Clause by favoring in-state over out-of-state participants in interstate commerce.

STATEMENT OF THE CASE

A. The Federal Regulatory Regime

Federal regulation of the wholesale electricity market dates back nearly a century. Historically, state electricity markets were "vertically integrated," meaning utilities were responsible not only for *delivering* electricity to customers, but also for *generating* the electricity they delivered. *See New York v. FERC*, 535 U.S. 1, 5 (2002). Each vertically integrated utility typically operated on a monopoly and common carrier basis within its designated geographic region. Because their operations were almost exclusively intrastate, these vertically integrated markets were heavily regulated by states, which set the rates that a utility could charge retail customers based on costs it incurred in generating, transmitting, and delivering electricity. JA37-39.

Because electricity demand fluctuates at different times of year, an electricity supplier must be equipped to serve not just relatively static demand, but also significantly increased demand during peak periods. Traditionally, vertically integrated utilities did this by building generating plants intended to operate only when demand was at its highest—even if that meant they operated as little as 20 or 30 hours a year. JA40. The obvious inefficiencies of numerous companies with underutilized back-up generating facilities soon led utilities to look for ways to sell excess electricity to each other, in hopes of diminishing costs attributable to too many plants spending most of the year idle. To facilitate this "wholesale" market, utilities began building high voltage transmission lines across which electricity could be transferred from utility to utility, for ultimate retail sale. JA40.

As these wholesale transactions began to cross state lines, the question arose whether states had authority to regulate them, or whether the dormant Commerce Clause reserved this burgeoning interstate market to the federal government. The Supreme Court answered that question in *Public Utilities Commission of Rhode*

Island v. Attleboro Steam & Electric Co., 273 U.S. 83, 89 (1927). Reasoning that these wholesale transactions are "fundamentally interstate from beginning to end," the Court concluded that the dormant Commerce Clause prohibited states from regulating them, and held that such regulation could come only from "exercise of the power vested in Congress." *Id.* at 89-90.

Congress responded in short order. In 1935, it enacted the Federal Power Act ("FPA"), which established a new federal agency (then the Federal Power Commission, now the Federal Energy Regulatory Commission ("FERC")) charged with providing "effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758 (1973). Section 201(b) of the FPA grants the Commission broad and exclusive jurisdiction over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce," including the power to determine what "rates and charges made, demanded, or received … for or in connection with the transmission or sale" of electricity at wholesale are "just and reasonable." 16 U.S.C. §§ 824(b), 824d(a), 824e.

Section 201(b) further provides that the Commission has jurisdiction over "all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, *except as specifically provided in this subchapter and subchapter III of* *this chapter*, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." *Id.* § 824(b)(1) (emphasis added). That careful wording underscores the breadth of authority Congress established: Even as it preserved traditional state authority over generation and intrastate transmission, Congress subordinated that authority to the federal authority the FPA granted. Congress thus made clear that if state regulation in these areas intrudes upon federal regulation of the interstate wholesale market, that state regulation must give way.

B. The Rapid Expansion of the Federal Wholesale Market

Although the wholesale market continued to expand modestly, it remained largely ancillary to the traditional vertically integrated regime; while vertically integrated utilities continued to engage in wholesale transactions to sell excess capacity, separate generating facilities that produced energy solely for wholesale sale generally did not exist. That began to change, however, with several federal initiatives in recent decades. First, in 1978, Congress enacted the Public Utility Regulatory Policies Act, 16 U.S.C § 2601, *et seq.*, which required vertically integrated utilities to begin purchasing some of their power from independent generating companies, rather than producing it all themselves. Nonetheless, because "the owners of transmission lines" often denied generating entities "access to their transmission lines on competitive terms and conditions," *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 682 (D.C. Cir. 2000), the wholesale market still accounted for only about 10-15% of power sales. *See* James J. McGrew, *FERC: Federal Energy Regulatory Commission* 151-52 (2d ed. 2009).

Congress addressed this problem through the Energy Policy Act 1992, Pub. L. No. 102-486, 106 Stat. 2776, which authorized FERC to ease restrictions on access to interstate transmission lines so that wholesale generators could obtain access to transmission lines owned by vertically integrated utilities. FERC followed that up with Order Number 888, which required owners of transmission lines to offer access on a non-discriminatory basis. 61 Fed. Reg. 21,540 (May 10, 1996). These and other regulatory measures paved the way for explosive growth in wholesale transactions over the past two decades. *New York*, 535 U.S. at 7.

As this expanded wholesale marketplace took shape, states began to question whether vertical integration still made sense. Many (but by no means all) states ultimately opted to restructure their electricity industries by disentangling their utilities' generation, transmission, and distribution functions and ordering utilities to open their distribution networks to competitors. JA43. By allowing generators to sell the bulk of their electricity into, and retail suppliers to purchase the bulk of their electricity out of, the interstate wholesale market, these states reaped the benefits of lower prices resulting from a more competitive market. At the same time, by rendering their electricity markets largely dependent on the federally regulated wholesale market, states necessarily ceded much of their traditional regulatory authority over generation.

In 1999, New Jersey embraced this new model. Through the Electric Discount and Energy Competition Act ("EDECA"), it restructured its market so that electricity sold to New Jersey consumers would be purchased from the interstate wholesale market, rather than generated by utilities. Consumers, in turn, would have an array of retail suppliers, known as load serving entities ("LSEs"), from which to purchase electricity, rather than receiving it from the local monopoly. JA43. Although these LSEs procure the electricity and sell it to consumers, a common carrier known as an electric distribution company ("EDC") delivers that electricity to consumers over local distribution networks. JA43. Thus, in a typical post-EDECA situation, a generating company sells electricity to the wholesale market, an LSE purchases electricity from the wholesale market for resale to retail customers, and the local EDC delivers that electricity to those customers.

The significance of its decision to do away with vertical integration was not lost on New Jersey. The EDECA expressly acknowledged that the Act "would effectively end the system of government regulation of the electricity generation industry, which has existed in New Jersey since the years when Woodrow Wilson served as Governor." P.L. 1999, c.23, Advance Law A.16, at 109 (N.J. 1999). By "[p]lac[ing] greater reliance on competitive markets … to deliver energy services to consumers," the Act recognized, the state was knowingly opening itself up to "the benefits as well as the risks of participation" in a federal market that the state could not regulate. *Id.* at 1, 110. In its 2008 Energy Master Plan, the state candidly acknowledged that, as a consequence of its voluntary dependence on the wholesale market, New Jersey "has much less authority over the supply and price of electricity than it used to." PX-045-0009. In effect, New Jersey "no longer regulates the generation of power." PX-045-0009-10.

C. PJM and the Reliability Pricing Model

As the interstate wholesale market expanded, FERC encouraged participants to organize regional transmission organizations ("RTOs") to facilitate wholesale market operations in large portions of the country. PJM Interconnection, LLC, ("PJM") is the RTO that operates the wholesale market for a region comprising all or part of 13 states, including New Jersey. PJM is the largest centrally dispatched power market in the world. JA31. It encompasses more than 1,300 power plants and approximately 56,000 miles of transmission lines. *Id.* Subject to FERC's oversight and approval, PJM ensures that its wholesale market will supply all LSEs within PJM enough electricity to meet consumer demand.

PJM does so by operating markets for both electricity and "capacity"—that is, the ability to produce electricity when called upon. JA36. To ensure that sufficient capacity will be available, PJM employs a mechanism known as the reliability pricing model ("RPM"), through which it determines both how much capacity is needed throughout the region and the price at which it will be sold. RPM's central feature is a competitive auction that PJM holds annually for a year three years in the future. PJM determines how much capacity the region will need for the relevant year, then holds an auction at which sellers commit to sell, and PJM commits to purchase, the targeted amount from all types of capacity resources for subsequent resale to retail suppliers.

To participate in the auction, a capacity resource decides how much capacity it wants to sell, and bids that capacity at a megawatt-per-day price. Once all bids are received, PJM accepts bids from lowest to highest until it has the requisite capacity. The highest bid PJM must accept to obtain enough capacity becomes the "market clearing price." Each capacity resource that bid into the auction at or below that price must sell PJM all the capacity it bid; in return, each gets paid the market clearing price for its capacity, even if its bid was lower. JA48. As FERC has explained, this single clearing price "creates incentives for sellers to minimize their costs, because cost-reductions increase a seller's profits. And when many sellers work to minimize their costs, competition among them keeps prices as low as possible." *PJM Interconnection, L.L.C.*, 117 FERC ¶61,331, at ¶141 (2006).

Several factors—some voluntary, some FERC-mandated—affect the price at which resources bid into the auction. For instance, many existing facilities already have recovered their entry costs and have low marginal costs. These facilities therefore may bid at a price of zero, with the view that any market clearing price is better than nothing. JA51. Conversely, when a large buyer in the PJM market invests in new generation, thus becoming both a buyer and a seller, it has a very different incentive to bid into the market at a low price—to depress the clearing price at which it will later *buy* capacity, thereby recouping any losses on its sales. To prevent such anti-competitive behavior, FERC has established the minimum offer price rule ("MOPR"), which requires new generating resources to bid at or above a minimum that reflects what it would cost the generator to recover its entry costs if it relied on PJM market revenues alone.

One basic goal of PJM's forward market is to provide price signals that encourage new generation three years in advance (roughly how long it takes to construct a generating facility). Relying on these signals, "generation companies and their financiers make decisions about how much generating capacity will be built, what types of power plants will provide that new capacity, and where the new plants will be located." PX-045-0027. One means by which PJM provides such signals is by subdividing the region into "locational delivery areas" ("LDAs"), and permitting different capacity prices in LDAs where transmission constraints increase the cost of delivering electricity. When this price "separation" occurs, it helps signal when and where new generation may be valuable.

Occasionally, these price signals alone are insufficient to incentivize new generation in certain areas. Accordingly, PJM has established the new entry price adjustment ("NEPA"), which provides a special three-year revenue guarantee to new resources that satisfy certain size and locational conditions, in an effort to "provide support to the new entrant until sufficient load growth would be expected to" do so. *PJM Interconnection, L.L.C.*, 128 FERC ¶61,157, at ¶101 (2009). The NEPA is the one exception to PJM's general policy of non-discrimination—*i.e.*, of seeking to obtain the most cost-effective electricity, whether it comes from new resources or existing ones. *See id.* ¶102 ("Both new entry and retention of existing efficient capacity are necessary to ensure reliability").

D. New Jersey's Long Term Capacity Pilot Program

Although New Jersey voluntarily abandoned vertical integration to reap the efficiencies of the interstate wholesale market, New Jersey took issue with PJM's reliability pricing model from the outset. In New Jersey's view, the RPM does too little to encourage development of new generation in New Jersey. JA50. Because New Jersey believed that "new generators should be given assurances to overcome fears regarding the risk of long term financing packages of potential financiers," it encouraged PJM not to adopt the RPM. JA50. When that failed, New Jersey recommended, *inter alia*, that the NEPA be revised to guarantee new generators a fixed revenue stream for *ten* years, arguing that this longer guarantee "could provide the certainty required to encourage new generation projects" in New Jersey. JA1834; *see also* JA1764.

FERC considered and rejected those arguments. Although FERC "recognize[d] that a longer commitment period may aid the developer in financing a project," it concluded that "giving new suppliers longer payments and assurances unavailable to existing suppliers providing the same service" would upset the RPM's "balance" between new and existing generation. *PJM Interconnection, L.L.C.*, 126 FERC ¶61,275, at ¶¶149-50 (2009). In FERC's view, the "RPM was designed to provide long-term forward price signals and not necessarily long-term revenue assurance." *Id*. ¶150. On rehearing, FERC reiterated that the wholesale "market should be designed correctly so that the contribution to reliability from both new entrants and existing suppliers is compensated comparably." 128 FERC ¶61,157, at ¶103. As a matter of federal policy, it explained, "[b]oth new entry and retention of existing efficient capacity are necessary to ensure reliability and both should receive the same price so that price signals are not skewed in favor of new entry." *Id.* ¶102; *see also id.* ¶103 n.61 ("in the long run, extending NEPA could lead to higher overall costs if existing capacity exits and has to be replaced by new entry").

When its efforts to reform FERC's approach to regulating the wholesale market failed, New Jersey decided to take matters into its own hands. In January 2011, it enacted the Long Term Capacity Agreement Pilot Program Act ("LCAPP" or "Act"), P.L. 2011, c.9 (N.J. 2011), which gave certain New Jersey generators the long-term pricing guarantee FERC refused to provide. The Act's findings candidly acknowledge that it is designed to achieve through "State policy" the kinds of "structural changes" in the federal wholesale market that were "previously denied by FERC." N.J.S.A. § 48:3-98.2(c)-(d); *see also id*. § 48:3-98(d) (purporting "[t]o address the lack of incentives under the reliability pricing model" for "construction of new, efficient generation").

The LCAPP operates by mandating that private parties enter into contracts guaranteeing "eligible" new generators a 15-year fixed revenue stream for their wholesale capacity sales. JA57. These contracts, known as "standard offer capacity agreements" ("SOCAs"), are not contracts for any kind of transactions solely within the state. Rather, they are contracts for a generator's capacity sales *into the PJM market*. Indeed, to be eligible for LCAPP participation, a generator must agree to "participate in and clear the annual base residual action conducted by the PJM" each year. N.J.S.A. § 48:3-98.3(c)(12). The SOCAs then guarantee each LCAPP generator a "standard offer capacity price" ("SOCP") for its capacity sales into the PJM market, regardless of what the PJM market clearing price is. JA58.

Payments under the SOCAs do not come from the state. The LCAPP instead orders New Jersey's four EDCs (private companies who deliver electricity from LSEs to consumers) to enter into SOCAs that require them to pay LCAPP generators the difference between the capacity price established by New Jersey and the capacity price established by the PJM auction. JA57. These payments are "for a defined amount of electric capacity"—they guarantee a specific price for each unit of capacity that the LCAPP generator actually sells to PJM. *Id.* § 48:3-51. If an LCAPP generator fails to clear the PJM market, the EDC is not required to pay it anything. If the generator clears the market, it is guaranteed a per-unit price for its capacity sales that differs from the PJM clearing price. EDCs may then pass along to ratepayers whatever costs or credits the SOCAs produce. *Id.* § 48:3-98.3(d).

As originally drafted, the LCAPP defined an "eligible" generator to include only "a developer of a new … generating facility … that is physically located within the State of New Jersey." JA1859-60. After this overt in-state preference elicited dormant Commerce Clause objections, it was replaced with a requirement to evaluate each application's "showing of environmental, economic, and community benefits." N.J.S.A. § 48:3-98.3(b)(6). But that "technical" change, PX-104-0002, did not alter the legislature's discriminatory intent. As New Jersey's witnesses testified, applications were evaluated based on whether they would "creat[e] economic and environmental benefits *for New Jersey*." Tr. 1290:17-1291:2

(Levitan); *see also* JA1922, 1996-98 (evaluation process focused "on the maximization of economic, environmental, and community benefits from the standpoint of ratepayers *in New Jersey*"); PX-141-0002; Tr. 503:13-15 (Dominguez); JA2136.

The state ultimately selected three proposals—Newark Energy Company ("Hess"), Old Bridge Energy Center ("NRG"), and Woodbridge Energy Center ("CPV")—to participate in the LCAPP and build new generating facilities in New Jersey. JA62-63. The state then ordered the EDCs to execute 15-year SOCAs with each of these generators, which the EDCs did under protest. JA12. These 15-year contracts grant LCAPP generators exactly the kind of long-term pricing guarantee for wholesale capacity sales that FERC has declared contrary to federal policy.

E. The Proceedings Below

Plaintiffs are generating companies that sell capacity in the PJM auction and EDCs in New Jersey. The generating companies rely on the PJM auction's long-term price signals to make determinations about investments in both existing and new generating facilities. The EDCs, meanwhile, have been forced to enter into SOCAs with LCAPP generators. Because the LCAPP fundamentally disrupts the markets in which they participate, plaintiffs brought this suit challenging its constitutionality under the Supremacy Clause and the dormant Commerce Clause. After a trial that spanned 13 days and included extensive presentation of evidence, testimony of multiple witnesses, and exhaustive arguments from all parties, the District Court issued a 65-page opinion holding the LCAPP preempted by federal law.[1] In doing so, the court followed in the footsteps of the District of Maryland, which held a materially analogous Maryland regulatory scheme preempted for largely the same reasons. *See PPL Energyplus, LLC v. Nazarian*, No. 12-1286, 2013 WL 5432346 (D. Md. Sept. 30, 2013).

The District Court began by cataloguing the large body of case law confirming that the FPA grants FERC "exclusive authority to regulate wholesale electricity sales and the transmission of energy in interstate commerce." JA82. It concluded that the LCAPP "intrudes upon" this federal field "by establishing the price that LCAPP generators will receive for their sales of capacity" into the wholesale market. JA84. In so holding, the court specifically rejected defendants' attempt to characterize the SOCAs as "purely financial contracts" that require no actual capacity sales; as the court found, "payment of the SOCA price is made *only if* the LCAPP generators successfully sell and deliver wholesale capacity to PJM." JA79, 84 (emphasis added). Although the court acknowledged states' traditional "responsibility for the

[1] Although Hess Newark LLC did not participate below, this Court granted its motion to intervene on appeal. For the reasons stated in appellants' Brief in Response to Motion to Intervene and in Support of Cross-Motion to Dismiss Appeal, appellants continue to believe that Hess, as a non-party below, lacks standing to intervene in these proceedings.

siting and construction of power plants," it explained that states must "exercise this responsibility without interfering with the Commission's exclusive authority to regulate wholesale sales of electricity in interstate commerce." JA84. "While New Jersey retained the authority to take a wide range of actions to … encourage the construction of new generation facilities," it could not do so "through a mechanism that intrudes upon the authority of the Commission." JA84-85.

The court also concluded that the LCAPP is preempted because it conflicts with aspects of FERC's regulation of the interstate wholesale market. JA85-86. New Jersey's efforts to impose on the federal market long-term pricing policies that FERC explicitly rejected, combined with "the SOCA's imposition of a government imposed price" that differs from the price approved by FERC, "creates an obstacle to the Commission's preferred method for the wholesale sale of electricity in interstate commerce." JA86.

The court also found that the LCAPP's preferences for in-state generators "place[] a direct burden on interstate commerce." JA84. Nonetheless, it concluded that plaintiffs did "not me[e]t [their] burden of proof" on their claim that the LCAPP violates the dormant Commerce Clause. JA89.

SUMMARY OF ARGUMENT

The LCAPP is squarely preempted twice over. Not only does it seek to impose state policy preferences on a field that Congress reserved exclusively to the federal government, but it also conflicts with federal law by seeking to impose policy preferences that FERC considered *and rejected*. As the District Court correctly concluded, New Jersey simply does not have the power to override FERC's regulation of an exclusively federal market.

The LCAPP is preempted, first, because it intrudes upon FERC's exclusive authority over "rates and charges made, demanded, or received … for or in connection with the transmission or sale" of capacity in the wholesale market. 16 U.S.C. § 824d(a). Indeed, the LCAPP is rival rate-setting at its most stark. The whole point of the Act is to ensure that certain generators receive a price different from the price that FERC has approved for their sales of capacity into the wholesale market. Appellants struggle mightily to prove otherwise, but their efforts fall short. The contracts mandated by the LCAPP are not contracts for the mere construction of generating facilities, or hedge agreements, or any of the other types of agreements into which appellants attempt to convert them. The SOCAs mandate payment for LCAPP generators' *actual sales* of capacity into the PJM market. And they do so at prices selected by New Jersey, not FERC. Because Congress has reserved wholesale rates to exclusive federal regulation, that is not something the FPA allows states to do.

The LCAPP also is preempted because it directly conflicts with FERC's regulations and objectives. FERC has carefully constructed its regulatory regime to establish price signals that achieve its desired balance between new and existing capacity generation. In doing so, FERC has concluded that new and existing resources should receive the same rate for their capacity, subject only to a limited exception under which certain new resources in specific areas, and under limited circumstances, may lock in prices for three years instead of one. FERC steadfastly has resisted calls—including from New Jersey—to extend this period, and repeatedly has explained that doing so would disrupt its efforts to avoid skewing the market too far in the direction of favoring new resources over existing facilities, or favoring price stability over efficiency.

The LCAPP is a deliberate effort to override that considered judgment. By providing LCAPP generators with a *15-year* revenue guarantee, New Jersey seeks to impose on the federal capacity market precisely the kind of long-term, new-entry preference that FERC considered and rejected. Once again, that is not something the FPA permits. States do not have the power to regulate the federal wholesale market in the first place—let alone to do so by imposing conditions on market participants that FERC has *expressly* declared contrary to federal policy. New Jersey's unambiguous attempt to do so threatens to upend FERC's careful efforts to structure its wholesale market to achieve regional reliability at least cost. Contrary to appellants' contentions, FERC has neither sanctioned nor resolved this clear conflict with federal law. If anything, FERC's efforts to blunt one distortive aspect of state legislation on the PJM auction through repeated revisions to its MOPR polices only underscores the presence, not absence, of a conflict.

Finally, the LCAPP violates the dormant Commerce Clause. By both design and effect, the LCAPP ensured that its preferential treatment would favor *local* participants in interstate commerce, selected based on their "showing of environmental, economic, and community benefits" to *New Jersey*. State laws that openly discriminate against out-of-state interests are virtually *per se* invalid, and can survive only if the *state* "'demonstrate[s], under rigorous scrutiny, that it has no other means to advance [its] local interest.'" *Tri-M Grp. v. Sharp*, 638 F.3d 406, 427 (3d Cir. 2011). New Jersey did not even attempt such a showing. Nor could it have successfully done so, as a wealth of trial evidence revealed non-discriminatory means through which New Jersey could have advanced whatever local interest it might have invoked.

None of this means that New Jersey lacks options for incentivizing the construction of generating facilities within its borders. But New Jersey's conscious decision to integrate its energy market with FERC's wholesale market has consequences. One of those consequences is that the state may not impose its policy preference for a longer investment horizon—a preference that FERC considered and rejected, no less—by providing certain New Jersey generators with a 15-year guarantee of a price that differs from the PJM market clearing price. As New Jersey acknowledged when it dispensed with vertical integration, doing so meant accepting both the benefits and risks of participation in a federally regulated market, including the risk that FERC would not elevate New Jersey's interests above those of other PJM market participants. FERC's refusal to do so in no way empowers New Jersey to impose its own policy preferences on a market that Congress has reserved exclusively to FERC. Because the LCAPP is an open and unapologetic effort to do so, the District Court correctly invalidated it.

STANDARD OF REVIEW

This Court reviews constitutional questions de novo, deferring to factual findings unless they are clearly erroneous. *United States v. Voigt*, 89 F.3d 1050, 1064 (3d Cir. 1996).

ARGUMENT

I. The LCAPP Is Preempted Because It Intrudes Upon A Field Exclusively Reserved To The Federal Government.

The LCAPP is a blatant attempt to interfere with FERC's exclusive authority under the FPA. FERC undeniably possesses the exclusive power to authorize "rates and charges made, demanded, or received … for or in connection with" wholesale capacity sales. 16 U.S.C. § 824d(a). And it is bedrock law that a state may not regulate in a field exclusively reserved to the federal government. Yet that is precisely what the LCAPP does: It seeks to supplant FERC's approved rates with rates more to New Jersey's liking. Because New Jersey does not have the power to displace federal regulation of an exclusively federal field, the LCAPP is plainly preempted by federal law.

A. FERC Occupies the Field of Wholesale Sales of Electric Energy.

There can be no serious dispute that the federal government has occupied the field of regulation of the interstate wholesale market for electricity. For decades, courts—including both the Supreme Court and this Court—repeatedly have concluded that the FPA left "no power in the states to regulate … sales for resale in interstate commerce." *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964); *see also New York v. FERC*, 535 U.S. 1, 21 (2002) ("The FPA authorized federal regulation not only of wholesale sales that had been beyond the reach of state power, but also the regulation of wholesale sales that had been *previously subject* to state regulation."); *Utilimax.com, Inc. v. PPL Energy Plus LLC*, 378 F.3d 303, 305 (3d Cir. 2004) (same). Any other conclusion is impossible to reconcile with the FPA; the statute unambiguously grants FERC exclusive jurisdiction over "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1); *see also id.* § 824(d) (defining "wholesale" sale as "a sale … for resale").

Wholesale rates are at the epicenter of this preempted field. The FPA grants FERC authority to determine what "rates and charges made, demanded, or received … for or in connection with the transmission or sale subject to the jurisdiction of the

Commission" are "just and reasonable." *Id.* §§ 824d(a)-(b), 824e(a). Accordingly, courts routinely have recognized that the FPA's "clear grant of power," *S. Cal. Edison*, 376 U.S. at 215, to FERC over the interstate wholesale market encompasses the exclusive authority to establish and approve wholesale rates for electricity and electric capacity sales. *See Pa. Water & Power Co. v. FPC*, 193 F.2d 230, 239 (D.C. Cir. 1951) (FERC has "occupied the field with regard to interstate wholesale rates of electric companies"); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956 (1986) (same); *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) (recognizing FERC's exclusive authority over capacity rates); *Utilimax.com*, 378 F.3d at 305 (same).

All of appellants' talk about the presumption against preemption is therefore beside the point. This is not an area in which Congress has left some ambiguity as to the respective roles of the federal and state governments. And the wholesale electricity market is far removed from an area of traditional state authority where the presumption would have force. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347–48 (2001) (presumption against preemption not warranted unless field is "'a field which the States have traditionally occupied'"); *United States v. Locke*, 529 U.S. 89, 94 (2000) (presumption against preemption "is not triggered when the State regulates in an area where there has been a history of significant federal presence"). Indeed, the Supreme Court found states without any authority in 1927, and federal involvement has been the norm ever since Congress enacted the FPA. In short, Congress has decided, in no uncertain terms, that the federal government *alone* may determine what prices may be charged and received "for"—or even "in connection with"—sales of electricity and capacity on the interstate wholesale market. Indeed, even appellants readily concede that the FPA "establish[es] exclusive federal jurisdiction over the interstate sale of electricity," NJ Br. 21, including "exclusive authority over wholesale power sales and rates," CPV Br. 23.

Appellants nonetheless insist that the FPA preserves some "complementary" role for states in determining how generators should be compensated for their wholesale capacity sales, and that FERC must "accommodate" any state interference with its authority over rates that is "'plausibly' directed at" furthering state interests. CPV Br. 31-32. Appellants fundamentally misunderstand both field preemption and the FPA. It is black-letter law that "*any* state law falling within [an exclusively federal] field is preempted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). That is so even if the state law is intended to be "parallel" or "complementary" to federal regulation. *Arizona v. United States*, 132 S. Ct. 2492, 2501-02 (2012). Indeed, it is so even if the federal government has decided not to regulate at all. *See Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 383-84 (1983). Here, the FPA grants FERC exclusive authority to regulate "rates and charges made, demanded, or received … for or in connection with" interstate wholesale transactions. 16 U.S.C. § 824d(a). That broad grant of authority necessarily forecloses states from attempting to do so themselves.[2]

To be sure, the FPA also acknowledges and largely preserves states' traditional authority over generation and local distribution facilities. *See* 16 U.S.C. § 824(b)(2). But that in no way narrows the scope of FERC's exclusive authority over *interstate* transactions—even when those transactions implicate generating issues otherwise subject to state regulation. Congress made that much clear when it subordinated states' traditional authority over generation to any grant of federal authority "specifically provided in this subchapter and subchapter III of this chapter"—which necessarily includes FERC's exclusive power to regulate the rates and terms of interstate wholesale transactions. 16 U.S.C. § 824(b)(1); *see Miss. Indus. v. FERC*, 808 F.2d 1525, 1545 n.74 (D.C. Cir. 1987) ("under the clear terms of the statute, [FERC] has been awarded jurisdiction over generation facilities 'to the extent provided in other sections,' including jurisdiction necessary to effectuate regulation of interstate wholesale rates").

That readily distinguishes this case from *Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*, 489 U.S. 493 (1989), the primary case from

[2] In arguing otherwise, appellants wrench out of context a footnote of dicta in *NE Hub Partners, L.P. v. CNG Transmission Corp*., 239 F.3d 333, 346 n.13 (3d Cir. 2001). That footnote merely noted that FERC itself may shape federal regulation around state policy—not that states are free to intrude on a federally regulated field.

which CPV attempts to derive its "complementary authority" argument. CPV Br. 31. *Northwest Central* did not involve the FPA; it involved section 1(b) of the Natural Gas Act. While certain provisions of the NGA and the FPA are "'substantially identical,'" *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981), section 1(b) of the NGA and section 201(b) of the FPA are decidedly not. Section 1(b) not only lacks the FPA's language subordinating states' traditional authority to federal authority granted therein, but also states unambiguously that the federal authority it grants "*shall not apply* to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 15 U.S.C. § 717(b) (emphasis added). In other words, section 1(b) contains exactly the kind of preservation of *exclusive* state authority that section 201(b) of the FPA disclaims; "Congress went so far in § 1(b) … as to prescribe not only the intended reach of the federal power, but also to specify the areas into which this power was not to extend.'" *Nw. Cent.*, 489 U.S. at 510 (brackets omitted).

Whatever "federal accommodation" of state interests may be appropriate in a statute that explicitly preserves *exclusive* state authority, *id.* at 518, the FPA does not contemplate any such "accommodation" when it comes to FERC's exclusive authority to regulate the "rates and charges made, demanded, or received … for or in connection with" wholesale capacity sales. 16 U.S.C. § 824d(a). Indeed, *Northwest Central* made perfectly clear that its recognition that section 1(b) expressly preserves a complementary role for states in no way suggested that states have the same kind of complementary role when it comes to FERC's regulation of fields that Congress has declared *exclusively* federal. *See* 489 U.S. at 513-14.

Of course, in a vertically integrated world, FERC's exclusive authority over wholesale transactions may have had little practical effect on the scope of state regulatory power, as the bulk of electricity distributed in a state was produced by its local utilities. But once a state consciously dispenses with vertical integration and renders its electricity market dependent upon the interstate wholesale market, it necessarily follows that its regulatory options are more limited, as states simply do not have the power to regulate that interstate market. New Jersey itself recognized as much—in the EDECA, when it acknowledged that dispensing with vertical integration "would effectively end the system of government regulation of the electricity generation industry," P.L. 1999, c.23, Advance Law A.16, at 109; and again in its 2008 Energy Master Plan, when it acknowledged that New Jersey effectively "no longer regulates the generation of power." PX-045-0009-10.

In short, although states retain significant authority under the FPA over "the siting and construction of power plants, they are required to exercise this responsibility without interfering with the Commission's exclusive authority to regulate wholesale sales of electricity in interstate commerce." JA84. Congress has established a "bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates." *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 374 (1988). Any state regulation that crosses that bright line is preempted. *Id.*

B. The District Court Correctly Concluded That the LCAPP Intrudes Upon FERC's Exclusive Authority to Regulate Wholesale Capacity Rates.

The LCAPP clearly intrudes upon FERC's exclusive authority under the FPA. The Act is a direct effort by New Jersey to displace FERC's authority over what rates may be "made, demanded, or received … for or in connection with" interstate wholesale capacity sales. 16 U.S.C. § 824d(a). By its terms, the Act requires LCAPP generators to sell capacity into the PJM market, and then requires local distribution companies to compensate them for each unit of capacity they sell at a price that differs from the PJM market clearing price. That price differential is no accident—the whole point of the LCAPP is to incentivize new generation by guaranteeing a more stable capacity price than the wholesale market provides. New Jersey may do many things to promote new generation, but it may not do that.

The theory behind the LCAPP is straightforward. New Jersey wanted to encourage the construction of new, in-state generating facilities. New Jersey did not want to build these facilities itself; nor did it want to reestablish a vertically integrated *intrastate* market in which they could sell electricity at state-set rates, without relying on the interstate market at all. Instead, New Jersey wanted to incentivize *private* companies to build new generating facilities and sell their capacity into *the interstate wholesale market*, which, in New Jersey's view, might inure to the benefit of its residents. Thus, an LCAPP generator had to agree not just to build a new generating facility, but also to bid its capacity into the PJM market—and to do so at a price that would clear the market each year. In return, LCAPP generators are granted state-mandated contracts (the SOCAs) that guarantee them a "standard offer capacity price," which, as its name suggests, is a price at which they will be compensated for whatever capacity they sell into the PJM market. *See* N.J.S.A. § 48:3-51 (defining SOCP as "the capacity price that is … to be received by eligible generators").

Of course, any generator that clears the PJM market already is entitled to the PJM market clearing price, so the SOCAs work only if they guarantee something different from what the interstate market has to offer. That something is a price *different from and more stable than* the PJM clearing price: The SOCAs guarantee LCAPP generators receipt of a dollar-per-megawatt-day rate, determined by the state, for each unit of capacity that a generator sells into the PJM market for 15 years—regardless of whether the PJM market price is higher or lower than that state-set rate each year. *See id.* § 48:3-98.3(c)(4) (describing SOCA payments as "the difference between the SOCP" and the PJM clearing price).

As the District Court readily concluded, this is rate-setting at its most blatant. New Jersey has determined that new generators would be better off with fixed rates for a 15-year period, and has established a regulatory scheme that will guarantee the new generators those rates. The only problem is, New Jersey has guaranteed rates for sales into an avowedly *federal* market, in which FERC concededly possesses the *exclusive* power to determine how sales will be compensated. New Jersey's attempt to "supplant" FERC's authority "by establishing the price that LCAPP generators will receive for their sales of capacity" is plainly preempted by federal law. JA84; *see also Nazarian*, 2013 WL 5432346, at *42 (concluding that materially analogous Maryland regime impermissibly "set[] or establish[ed] the wholesale energy and capacity prices to be received by CPV for its sales into the PJM Markets"); *cf. Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308-09 (1988) (invaliding "state law whose central purpose [wa]s to regulate matters that Congress intended FERC to regulate").

Contrary to appellants' contentions, CPV Br. 38, that conclusion is not undermined in the slightest by the fact that SOCA payments will be made by the EDCs, rather than by PJM or the LSEs that purchase capacity from PJM. FERC has jurisdiction over "[a]ll rates and charges made, demanded, or *received* … *for or in connection with* the … sale" of capacity at wholesale. 16 U.S.C. § 824d(a) (emphasis added). That statutory text focuses on what the seller gets in returns for its wholesale sales, and a payment received by a generator from a third party for its capacity sales is every bit as much a payment "received for" those sales as a payment received from PJM. Moreover, it undoubtedly is a payment received "in connection with" those sales. Indeed, the whole point of the LCAPP is to ensure that new generators "receive" payments "in connection with" interstate capacity sales that differ from the prices set by the PJM auction. As this Court has recognized, "in connection with" is a term of breadth that must be construed "to capture a very wide variety of different relationships." *United States v. Loney*, 219 F.3d 281, 284 (3d Cir. 2000). Nothing about the scope of FERC's broad authority under the FPA's purposefully expansive language turns on the precise mechanics by which a participant in the interstate market receives the non-federal rate.

The Supreme Court already has concluded that a state may not bypass FERC's exclusive authority by setting retail rates that do not allow for recovery of the FERC-approved rate paid to purchase the electricity at wholesale. *Miss. Power & Light*, 487 U.S. at 373. There is absolutely no reason to reach a different conclusion when a state seeks to interfere with the federal rate through a different one-step-removed-from-wholesale transaction. The LCAPP is not meaningfully different from a law that simply declared that each in-state generator would receive a specific wholesale rate for its capacity sales, and ordered LSEs to refund generators the difference between the market clearing price and the state-set rate. Both are equally preempted by federal law.

In any event, the District Court considered and rejected appellants' attempt to characterize the SOCA payments as separate from PJM's auction, and that factual finding is entitled to deference. *See* JA79 (finding that "the SOCAs are not separate from … the RPM Auction"). As the District Court correctly understood, it would make no sense to treat the two as distinct—payments under the SOCAs are wholly conditioned on, and directly proportionate to, actual sales of capacity into the PJM auction. Because those payments are deliberately designed to ensure that a generator receives a rate different from and more stable than the rate that FERC has approved "for or in connection with" wholesale capacity sales, 16 U.S.C. § 824d(a), they clearly intrude upon FERC's exclusive power under the FPA.

C. Appellants' Efforts to Avoid that Commonsense Conclusion Ignore How the LCAPP and the SOCAs Actually Operate.

Rather than dispute the premise that New Jersey may not establish its own wholesale rates, appellants spend the bulk of their briefs attempting to convert the SOCAs into something they are not. For instance, appellants strain mightily to recast the SOCAs as agreements to provide payment for construction of a generating facility, rather than for sales of capacity into the wholesale market. *See* CPV Br. 37. But even their own witnesses conceded that this argument blinks reality. *See* JA831, 837 (LCAPP operates by guaranteeing a "price *for the offered capacity*," "regardless of the prices in the [auction]"); JA778 ("SOCA prices, are the price that [CPV] receive[s] per megawatt day of capacity sold to PJM"); *accord* JA836-37, 1905, 2436-42, 2445, 2449; Tr. 2061:22-24 (Roach). Both the LCAPP and the SOCAs explicitly acknowledge that the SOCAs provide "payments … *for a defined amount of electric capacity*," not for the mere agreement to build a generating facility. N.J.S.A. § 48:3-51 (emphasis added); *see also* JA2179. That is clear from the fact that SOCA payments are made *only if* the generator actually delivers capacity to PJM; a generator that constructed a plant but failed to clear the PJM market would receive no SOCA payments whatsoever. *See* JA778-79, 836-39, 955, 958-73, 980-81, 989-93, 2174-75, 2179.[3]

For largely the same reasons, appellants' efforts to characterize the SOCAs as "purely financial" or "hedge" agreements also fail. CPV Br. 39-40; NJ Br. 32; Hess Br. 25-27. As Plaintiffs' financial expert explained to the District Court in detail, the type of agreement loosely known as "purely financial" is a contract that requires no performance other than ultimate payment. For instance, two parties might "bet" on whether the price of energy on a given day will be above or below a certain number, with the agreement that whoever is correct will be entitled to a multiple of the

[3] Hess's related attempt to characterize the SOCAs as requiring generators only to "abide by the rules of the federally-regulated PJM market" is equally flawed. Hess Br. 29. LCAPP generators are not paid for abiding by PJM's rules; they are paid if—*and only if*—they actually sell capacity into the PJM market.

difference between the parties' agreed-upon price and whatever the actual price turns out to be. Such an agreement is "purely financial" because it does not require the actual sale or delivery of energy *by either party*; it simply involves their passive observation of market performance. JA83-84.

Clearly, that is not how the SOCAs work. The SOCAs are not indifferent to whether LCAPP generators actually sell or deliver capacity. To the contrary, they guarantee payment "only if the LCAPP generators successfully sell and deliver wholesale capacity to PJM." JA79. Indeed, even New Jersey concedes that the amount of payment under the SOCAs "is based on *the amount of capacity sold by SOCA generators* and the RPM auction clearing price." NJ Br. 33 (emphasis added). An agreement that "expressly condition[s] payment on physical performance," JA60, cannot plausibly be characterized as "purely financial," but rather is plainly "for or in connection with" that physical performance, 16 U.S.C. § 824d(a); *see also Nazarian*, 2013 WL 5432346, at *37 (because state-mandated contract "determine[d] the amount of settlement based on CPV's physical energy and capacity sales into the PJM Markets," it "d[id] not constitute a pure financial contract").[4]

[4] Appellants repeatedly seize upon the District Court's reference to the SOCAs' condition that an eligible generator actually build a plant, CPV Br. 40; Hess Br. 28, but the court was not suggesting that this condition alone establishes preemption. Instead, the court simply recognized that the requirement to build a plant is further evidence that the SOCAs are not "purely financial" contracts. As the court

Nor can the SOCAs be characterized as "bilateral agreements" subject to FERC jurisdiction. CPV Br. 19. The SOCAs are not bilateral contracts freely negotiated among willing counterparties; to the contrary, they are state-mandated contracts, entered into under protest, that dictate the price of a wholesale transaction in the PJM market. JA12. That is nothing at all like any mechanism FERC contemplates. A decision affirming the District Court's conclusion that the LCAPP is preempted would have no effect on *freely negotiated* bilateral contracts for capacity.

Appellants alternatively attempt to save the LCAPP by changing the subject, and suggesting that a whole host of state subsidy programs will fall if the LCAPP is preempted. NJ Br. 26-29; CPV Br. 41 n.18. But their efforts are doomed by a fatally flawed premise. Plaintiffs have never suggested that federal law preempts every state initiative that "indirectly impacts rates within FERC's jurisdiction." CPV Br. 28. There is a fundamental difference between a state program that merely *impacts* federal rates, and a state program that openly and unapologetically displaces them. The LCAPP is preempted because it does the latter, not just the former.

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proceeded to explain, what makes the SOCAs an intrusion upon FERC's exclusive authority is the requirement than an EDC compensate the generator for each unit of capacity that it *actually sells* into the PJM market—and at a price that differs from the PJM market clearing price. *See* JA84 (LCAPP "intrudes upon the exclusive jurisdiction of the Commission[] *by establishing the price that LCAPP generators will receive for their sales of capacity*" (emphasis added)).

In any event, for the most part, the programs appellants invoke are readily distinguishable.[5] For instance, although "renewable portfolio standards" take a variety of forms, a typical renewables program does not establish a price at which wholesale sales will be compensated, but rather simply requires that *retail* sales include a certain percentage of renewable energy. *E.g.*, N.J.A.C. § 14:8-2, *et seq*. Others, such as New Jersey's "Solar 4 All" Program, differ from the LCAPP in that they are targeted at construction of a facility by a *retail* utility, not construction of a facility by a generating company with no retail customers. JA903-04.

Whether each of these very different programs—none of which has been tested in this case or any other—could survive a preemption challenge may be debatable,[6] but it is ultimately beside the point. Whatever else a state may do to further its energy policies, it may not displace FERC's exclusive authority over rates "received … for or in connection with" wholesale capacity sales. 16 U.S.C. § 824d(a); *accord Nazarian*, 2013 WL 5432346, at *32 ("[w]hile Maryland may

[5] Of course, the LCAPP is not meaningfully different from the Maryland scheme that has been declared preempted for largely the same reasons. *See Nazarian*, 2013 WL 5432346. Whether the LCAPP can be distinguished from the Connecticut program upon which it was based is also a difficult question, but one not presented here.

[6] For example, FERC has concluded that renewable energy certificates ("RECs") implicate its jurisdiction when they are bundled with wholesale electricity sales. *See WSPP Inc.*, 139 FERC ¶61,061, at ¶24 (2012) (charge for a REC sold in conjunction with a wholesale electricity sale is a rate received "in connection with" that wholesale sale).

retain traditional state authority to regulate the development, location, and type of power plants within its borders, the scope of Maryland's power is necessarily limited by FERC's exclusive authority to set wholesale energy and capacity prices"). Appellants' repeated efforts to make this case about anything other than the LCAPP cannot change the fact that the LCAPP does exactly that.

Contrary to appellants' contentions, CPV Br. 45-46, FERC has not concluded otherwise. FERC has never considered, let alone endorsed as consistent with federal law, a state program that guarantees participants in the PJM market a wholesale capacity price different from the one the PJM auction sets. To the contrary, FERC repeatedly has confirmed that a state may not set a wholesale price for electricity.[7] Nor could FERC endorse state incursion on its exclusive authority over wholesale rates, as it is *Congress*, not FERC, that has declared regulation of the wholesale market off limit to the states. *See Kurns v. A.W. Chesterton Inc.*, 132 S. Ct. 1261, 1270 (2012) (holding state requirements field preempted notwithstanding federal government's contrary argument). The very MOPR proceedings upon which CPV

[7] *See Cal. Pub. Utils. Comm'n*, 132 FERC ¶61,047, at ¶64 (2010) (describing as "impermissible wholesale rate-setting" state requirement that its utilities offer to buy wholesale electricity from certain facilities at no less than state-determined price); *Entergy Servs., Inc.*, 120 FERC ¶61,020, at ¶28 (2007) (FERC's "ratemaking obligations under the FPA cannot be delegated to a state"); *Midwest Power Sys., Inc.*, 78 FERC ¶61,067 (1997) (noting that states have tools such as tax incentives and direct subsidies to encourage renewable resources without setting wholesale prices).

relies reflect FERC's recognition of this reality: FERC explicitly disclaimed any "intent … to pass judgment on state and local policies" such as the LCAPP. *PJM Interconnection, L.L.C.*, 137 FERC ¶61,145, at ¶3 (2011); *see also infra* Part II.C.

CPV also misses the mark with its argument that FERC's exclusive jurisdiction over wholesale rates somehow deprives this Court of jurisdiction over this case. CPV Br. 47. Appellants' claim is not about whether the rates New Jersey has guaranteed through the LCAPP are "just and reasonable"; it is about whether New Jersey has the power to establish wholesale rates in the first place. FERC has no "'right of first refusal to decide such questions'" of preemption. *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 349 n.19 (3d Cir. 2001). Indeed, federal courts routinely decide preemption cases involving FERC's exclusive jurisdiction without requiring the parties to first litigate the preemption issue before FERC. *E.g.*, *Schneidewind*, 485 U.S. 293; *Pub. Utils. Comm'n v. United Fuel Gas Co.*, 317 U.S. 456 (1943).

In the end, there is no escaping the conclusion that the LCAPP is preempted. But that does not mean that states are powerless to encourage construction of new generating facilities or pursue other energy initiatives. To the contrary, "New Jersey retain[s] the authority to take a wide range of actions to ensure reliable electric service for its citizens and encourage the construction of new electric generation facilities." JA84-85. For instance, New Jersey could have pursued FERC's fixed resource requirement option, which allows distributors to procure capacity *outside* of the PJM auction, through bilateral contracts or by constructing their own generation facilities. JA2428. It could have established an agency to build state-owned power plants and sell directly to retail consumers. JA2425-27. It could have bypassed the wholesale market altogether and returned to a vertically integrated regime, which many states still retain.

But when it comes to state actions that implicate a federally preempted field, means as well as ends matter. It is not enough for New Jersey to announce that its ultimate objective is to encourage new generation, point to unpreempted means of achieving that end, and then claim immunity for an open and obvious effort to dictate wholesale rates simply because it furthers the same end. States cannot dictate the rates received by participants in the wholesale market for the best of reasons, for the worst of reasons, or any reason in between. "[B]y establishing the price that LCAPP generators will receive for their sales of capacity" for 15 years, JA84, New Jersey plainly intruded upon the exclusive authority of FERC.

II. The LCAPP Is Preempted Because It Conflicts With Federal Law.

The LCAPP not only intrudes upon a field reserved exclusively to FERC; it also squarely conflicts with FERC's regulations in that field. Indeed, the LCAPP is a transparent attempt to impose upon participants in the PJM market policies that

FERC has considered and rejected. Accordingly, the Act is preempted as a matter of both field and conflict preemption.

A. FERC Has Carefully Calibrated Its Capacity Market to Achieve Its Desired Balance of New and Existing Resources.

As PJM has explained, the reliability pricing model underlying its capacity auction is designed to "commit the least-cost set of capacity resources to ensure that [FERC]-established resource adequacy targets are met in the PJM footprint on a three-year forward basis." JA48; *see also* Tr. 80:6-8 (Massey) (auction is designed to procure "the least expensive mix of resources that are necessary to keep the lights on for that one year period, three years hence"). One of the core components of this model is the considered judgment of PJM and FERC that "[b]oth new entry and retention of existing efficient capacity are necessary to ensure reliability." *PJM*, 128 FERC ¶61,157, at ¶102. Accordingly, the PJM capacity auction is carefully calibrated to achieve the most cost-effective balance of both new *and existing* generating resources.

The auction does so by ensuring that new and existing generators "receive the same price so that price signals are not skewed in favor of new entry." *Id*. This single market price harnesses "competition between existing resources … and competitive new entry" by incentivizing *all* generators to decrease their costs. *PJM Interconnection, L.L.C.*, 135 FERC ¶61,022, at ¶193 (2011). Because generators who cannot produce capacity as efficiently as their competitors will be forced to improve or to exit the market, the market clearing price ultimately results in "more efficient sellers and lower prices." *PJM*, 117 FERC ¶61,331, at ¶141. And by operating this market on a forward basis, PJM seeks to provide "long-term price signals" that will "attract needed investment" in capacity generation. *PJM Interconnection, L.L.C.*, 132 FERC ¶61,173, at ¶61,870 (2010). Not only do higher market clearing prices signal room for new (or more efficient existing) generation, but when price separation among delivery areas occurs, it helps signal where investment is most needed.

The new entry price adjustment, or NEPA, is FERC's single, tailored exception to this even-handed treatment. Under the NEPA, a new capacity resource located in certain areas with congested transmission may lock in a "new entry price" for three years. The NEPA reflects FERC's recognition of the potential difficulties of incentivizing new generation in certain areas, and its considered judgment as to how best to respond to that potential problem while retaining the general benefits of fully competitive prices: with a three-year price lock-in "to provide support to the new entrant until sufficient load growth would be expected to support the new entry." *PJM*, 128 FERC ¶61,157, at ¶101.

Over the years, FERC has considered requests—including requests from New Jersey—to extend the NEPA and lock in prices for longer. *E.g.*, JA1764, 1834. And FERC repeatedly has declined to do so. *E.g.*, *PJM*, 126 FERC ¶61,275, at ¶149

(2009); *PJM*, 128 FERC ¶61,157*,* at ¶95. Although FERC recognized that a longer period could "aid the developer in financing a project," it explained that any such extension would conflict with its policy of seeking to ensure a "superior balance" between new and existing generation. *PJM*, 128 FERC ¶61,157*,* at ¶94.

Specifically, "by giving new suppliers longer payments and assurances unavailable to existing suppliers providing the same service," an extended NEPA period would result in "further price discrimination between existing resources … and new generation suppliers"—something FERC was not willing to tolerate. *PJM*, 126 FERC ¶61,275, at ¶149. In FERC's view, the reliability pricing model "was designed to provide long-term forward price signals and not necessarily long-term revenue assurance for developers." *Id.* In short, FERC deemed any further skewing of price signals toward new entry incompatible with its overarching objective of using a balance of new and existing capacity to achieve reliability at least cost.

B. The District Court Correctly Concluded that the LCAPP's Guaranteed Pricing for New Generators Squarely Conflicts with FERC's Regulatory Regime.

The LCAPP is a direct assault on this carefully constructed federal regime. Not only does the Act guarantee certain new generators in New Jersey a price different from the one established by the FERC-approved PJM market, but it guarantees them fixed capacity prices for *15 years*. Worse still, it does so for the *express purpose* of overriding federal policy judgments with which New Jersey disagrees. New Jersey has made no secret of that. The LCAPP openly acknowledges that it is a response to FERC's refusal to implement "similar structural changes" like "the expansion of the 'New Entry Price Adjustment'" to longer than three years, and insists that these changes therefore must be pursued "by State policy" instead. N.J.S.A. § 48:3-98.2(c).

Once again, that is simply not something the state has the power to do. State laws are preempted not only when they intrude upon federal fields, but also when they conflict with federal law, including when they pose an "'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000); *see also Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) ("even state regulation designed to protect vital state interests must give way" when it directly conflicts with federal policy). Here, the conflict with federal law could not be clearer: New Jersey identified a federal policy with which it disagreed, asked FERC to change that policy, and when FERC refused to do so, enacted its own law to override FERC's decision. Even the president of New Jersey's Board of Public Utilities has openly acknowledged the "head-on collision" with FERC's policies that the LCAPP creates. JA2229.

Contrary to appellants' suggestion, this square conflict with federal law has far more than an "indirect[]" effect on FERC's regulatory scheme. CPV Br. 28. A principal aim of the PJM auction is to achieve what FERC has declared a "superior balance" between new and existing generation, which it maintains through both non-discriminatory prices and a limited NEPA exception. *PJM*, 126 FERC ¶61,275, at ¶150; *see also* JA996-97. And yet the "very heart of LCAPP" is "discrimination against sources of capacity that do not involve brand new generation." JA1007-08. The LCAPP is designed to skew pricing dramatically in favor of new resources, which is precisely what FERC has sought to prevent. *See PJM*, 126 FERC ¶61,275, at ¶149 ("giving new suppliers longer payments and assurances unavailable to existing suppliers providing the same service" would conflict with federal policy against "discrimination between existing resources … and new generation suppliers").

Moreover, as FERC underscored in rejecting New Jersey's requests to change its policies, "in the long run, extending NEPA could lead to higher overall costs if existing capacity exits and has to be replaced by new entry." *PJM*, 128 FERC ¶61,157, at ¶103 n.61; *see also* Tr. 741:14-25 (Willig) (a "less efficient set of capacity resources … is bound to lead to higher costs and therefore higher prices"). Staff on New Jersey's own Board also emphasized more subtle problems that the LCAPP could create. For instance, the LCAPP could provoke other market participants to "demand identical premiums before deploying capital." JA1849*; see also* JA975 ("we'll have … more seeming need for more subsidized programs that replace the market"). And uncertainties created by the possibility of analogous schemes in other states could discourage market participants from investing in the first place. *See* JA1849 ("commercial entities may not subject capital to market forces if they perceive that the government will offer future, risk-free alternatives.").

Indeed, those adverse effects have already been felt: As plaintiffs' witnesses detailed, as a result of the LCAPP, Calpine decided to retire a New Jersey-based plant that could have provided capacity at a price lower than the price guaranteed to CPV under the SOCAs, JA859; Exelon placed a multi-million dollar project to expand the capacity of existing nuclear facilities on hold, JA742-43; and PSEG passed on several potential new projects, JA689, 695, 697. *See also* JA862, 867-68, 872 (Calpine has suspended plans to develop one new plant, reduced another project by half, and generally avoided "putting too much money into PJM right now, pending … this uncertainty"). In short, by replacing FERC's considered judgment with its own policy preferences, New Jersey has created both a conflict with federal law and a significant obstacle to the accomplishment of federal regulatory objectives. *See Geier*, 529 U.S. 861 (striking down state law that interfered with federal policy carefully crafted to achieve an appropriate balance of different passive restraint devices).

Again, that does not mean that New Jersey is powerless to encourage new generation or pursue energy policy objectives. *See supra* pp. 39-40. New Jersey has multiple options for doing so—including retreating from the federal wholesale market entirely. What New Jersey may not do is adopt regulations that are consciously designed to render the wholesale market more to New Jersey's liking. FERC has considered and rejected New Jersey's arguments in favor of using long-term pricing guarantees to incentivize new generation. New Jersey does not have the power to do so in FERC's stead.

C. FERC's Minimum Offer Price Rule Orders Do Not Address, Let Alone Resolve, the Conflict Between the LCAPP and FERC's Regulatory Regime.

Rather than deny the clear conflict between the LCAPP and FERC's policies, appellants insist that FERC has somehow resolved it. *E.g.*, NJ Br. 34-39; CPV Br. 52-53. FERC has done no such thing. (Nor could it, given the LCAPP's incursion on exclusive authority granted by Congress. *See supra* pp. 28-32.) Appellants' contrary argument conflates two distinct issues—the prices at which generators may bid *into* the PJM market, and the prices they may "*receive*[] … for or in connection with" their capacity sales. 16 U.S.C. § 824d(a) (emphasis added). The FERC orders appellants invoke address only the former, and explicitly eschew any position on New Jersey's efforts to manipulate the latter.

The minimum offer price rule addresses a specific issue: "the exercise of buyer market power" through below-cost bidding behavior—that is, when large *buyers* of capacity who also *sell* capacity seek to lower the market clearing price by bidding their capacity into the PJM market at a loss, with the intention of using savings on the buy side to offset their losses on the sale side. *PJM*, 137 FERC ¶61,145, at ¶2; JA52-53. The MOPR seeks to prevent this anti-competitive behavior "by setting a price floor … and requiring all new, non-exempted resources to bid at that floor, or higher, unless the resource can demonstrate, through a unit-specific review process, that a lower bid is justified based on the economics of that unit." *PJM Interconnection, L.L.C.*, 143 FERC ¶61,090, at ¶22 (2013). In other words, it establishes a minimum price at which a new generator may bid *into* the capacity market to reduce the risk of non-competitive bids distorting the clearing price.

As the District Court recognized, JA74, that issue has no bearing on the resolution of this case. To be sure, appellants have encouraged FERC to revise its MOPR policies to mitigate the potential for LCAPP generators to bid into the PJM auction at non-competitive prices. But whether LCAPP generators bid *into* the auction at competitive prices is an entirely different question from the question presented here—namely, whether New Jersey has authority to ensure that LCAPP generators receive rates more stable than FERC is willing to offer "for or in connection with" their wholesale capacity sales. 16 U.S.C. § 824d(a). In other words, the MOPR proceedings were about the integrity of the PJM auction; this case is about the legality of New Jersey's efforts to displace it.

That distinction was not lost on FERC. In determining whether and how the MOPR should apply to LCAPP generators, FERC explicitly disclaimed any "intent … to pass judgment on state and local policies and objectives with regard to the development of new capacity resources." *PJM*, 137 FERC ¶61,145, at ¶3; *see also* *PJM*, 143 FERC ¶61,090, at ¶54. Likewise, FERC disclaimed any consideration of NEPA, even though CPV insisted that "the MOPR and the NEPA were inextricably linked." *PJM*, 137 FERC ¶61,145, at ¶141. In declaring such issues "beyond the scope of this proceeding," *id.* ¶143; *see also* 143 FERC ¶61,090, at ¶232, FERC recognized the fundamental difference between issues relating to *bids* that new entrants may make, and issues relating to *revenues* that new entrants may receive. The MOPR proceedings concerned only the former. In short, the MOPR orders are about the MOPR, not the LCAPP.

If anything, the MOPR orders only underscore the field and conflict preemption problems with the LCAPP. If New Jersey's regulatory actions really affected FERC's scheme only "indirectly," CPV Br. 28, then FERC would not need to devise ways to counteract them. In reality, FERC has had no choice but to repeatedly revise its regulatory regime to attempt to mitigate the LCAPP's distorting effects on FERC's carefully constructed market design. While those revisions have done nothing to resolve the fundamental conflict between the LCAPP and FERC's policies, the very fact that FERC has felt the need to make them is proof enough of the incursion on its regulatory power. *See Arizona v. United States*, 132 S. Ct. 2492, 2503 (2012) (noting that "specific conflicts between state and federal law simply underscore the reason for field preemption").

III. The LCAPP Violates The Dormant Commerce Clause By Discriminating Against Interstate Commerce.

The LCAPP also is invalid for the independent reason that it violates the dormant Commerce Clause. Both on its face and in its effect and design, the law discriminates in favor of in-state interests, and therefore is subject to a "virtually *per se* rule of invalidity." *City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978). The state did not come close to satisfying its burden of "'demonstrat[ing], under rigorous scrutiny, that it has no other means'" than discrimination against interstate commerce to advance its "'local interest[s].'" *Tri-M*, 638 F.3d at 427. The District Court's contrary conclusion rests on a misunderstanding of the governing legal principles.

A. State Laws that Discriminate Against Interstate Commerce Are Virtually *Per Se* Invalid.

The Commerce Clause gives Congress the power "to regulate Commerce ... among the several States." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has long recognized that the clause concomitantly "limits the power of the States to erect barriers against interstate trade." *Lewis v. B.T. Inv. Managers*, 447 U.S. 27, 35 (1980). This "dormant" aspect of the clause prohibits states from using their regulatory power to "benefit in-state economic interests at out-of-state interests' expense." *Cloverland-Green Spring Dairies v. Pa. Milk Mktg. Bd*., 298 F.3d 201, 210 (3d Cir. 2002) (citing *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994)); *see also United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (clause prohibits "'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter'"); *Am. Trucking Ass'ns v. Whitman*, 437 F.3d 313, 318 (3d Cir. 2006) (clause "prohibits a state from impeding free market forces to shield in-state businesses from out-of-state competition").

To violate the dormant Commerce Clause, discrimination need not take the form of a "total prohibition" on interstate commerce. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 578 (1997); *see also Atl. Coast Demolition & Recycling v. Bd. of Chosen Freeholders of Atl. Cty.*, 48 F.3d 701 (3d Cir. 1995) (same). Even indirect tilting of the economic playing field against interstate commerce is impermissible. *E.g.*, *Granholm v. Heald*, 544 U.S. 460, 473-74 (2005) (deeming discrimination "obvious" where "differential treatment" created a "cost differential" for out-of-state wines). Distinctions "between direct and indirect burdens" likewise are "irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states." *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 522 (1935).

Precisely because the wholesale electricity market traditionally has been an interstate one, efforts by states to regulate wholesale transactions have long been viewed with suspicion under the dormant Commerce Clause. Indeed, when the Supreme Court first considered the question, it deemed wholesale transactions so inherently interstate that it declared their regulation off-limits to states. *See Attleboro*, 273 U.S. at 88-89. Although the Court later backed away from the notion that the line between wholesale and retail transactions will always delineate the line between interstate and intrastate regulation, *see Ark. Elec.*, 461 U.S. at 393, it has not retreated from the principle that state interference with an *interstate* market is inherently suspect under the dormant Commerce Clause.[8] Nor has the Court retreated from the "virtually *per se* rule of invalidity" applicable to state laws that discriminate against interstate commerce. *City of Phila.*, 437 U.S. at 624. Unless the state can "'demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest,'" such a discriminatory law cannot survive. *Tri-M*, 638 F.3d at 427.

B. The LCAPP Discriminates Against Out-of-State Projects.

The LCAPP discriminates against interstate commerce both on its face and by practical effect and design. The LCAPP is designed to incentivize the construction

[8] Of course, courts rarely have occasion to consider the dormant Commerce Clause implications of such regulation since the FPA explicitly reserves the field of interstate wholesale market regulation to FERC. *Supra* Part I.A.

of new generating plants by guaranteeing preferential long-term rates for the capacity that new generators sell into the federally regulated wholesale market. Yet the Act renders eligibility for this preferential treatment contingent on an applicant's "showing of environmental, economic, and community benefits." N.J.S.A. § 48:3-98.3(b)(2). As New Jersey's own agents and witnesses confirmed, the point of this provision was to "identify those projects best positioned to confer economic, environmental, and community benefits *in New Jersey*." JA1922; *see also* JA802, 843, 845 (describing advantage given to applicants who demonstrated potential economic benefits to New Jersey). That is, it tilted the playing field for eligibility to receive the LCAPP's preferential treatment decidedly in favor of *in-state* generators.

That much is clear from the history behind the LCAPP and the community benefits provision. As initially introduced in the legislature, the LCAPP characterized itself as "AN ACT establishing a long-term capacity agreement pilot program to promote construction of qualified, *in-State* electric generation facilities." JA1854 (emphasis added). Early drafts limited "eligible generators" to "developer[s] of a new, natural gas fired, combined-cycle electric power generating facility … *physically located within the State of New Jersey*." JA1859-60 (emphasis added); *see also* JA1876-77, 1894 (same); PX-95-0001 (e-mail from Board president's aide attesting that LCAPP would "us[e] RPM to incentivize new *in-state* generation") (emphasis added); PX-84-0003 (memo from Board president to governor's office proposing "multi-year pricing supplement and guarantee to RPM that would provide new, *in State* generation a premium payment for … at least seven years") (emphasis added).

To be sure, dormant Commerce Clause objections produced what was described as a "technical" change of replacing the "in-state" requirement with a softer requirement that applicants make a "showing of environmental, economic, and community benefits." N.J.S.A. § 48:3-98.3(b)(2); PX-104-0002. But the import of the provision remained clear. *See* JA1926, 1951, 1996-98, 2136 (interpreting "economic and community benefits" to include benefits to New Jersey only); Tr. 1290:17-1291:2 (Levitan) (any SOCA recipient should "creat[e] economic and environmental benefits for New Jersey"); JA845-47 (testimony from Board agent agreeing that "increases in New Jersey employment and personal income and business revenues … would be an advantage," and that a project creating jobs in New Jersey, as opposed to Pennsylvania, would be weighted more favorably). Indeed, New Jersey's 2011 Energy Master Plan continued to describe the LCAPP as an effort to "Expand *In-State* Electricity Resources" because "[*o*]*ut-of-state* resources do not bring economic development, jobs, and property taxes to New Jersey." JA2248, 2322 (emphasis added).

That the LCAPP did not "place[] an absolute bar on the utilization of out-of-state facilities … does not transform a fundamentally discriminatory scheme into a non-discriminatory one." *Atl. Coast*, 48 F.3d at 713. It is the Act's practical operation that counts. The theoretical possibility of a Pennsylvania-based facility that will create more New Jersey jobs than a New Jersey facility is not enough. This Court's *Atlantic Coast* decision is illustrative. Although the statute there did not explicitly render out-of-state facilities ineligible for preferential treatment, the Court readily concluded that it was still discriminatory because New Jersey would "approve[] district plans only if they are consistent with the 'core' goal of having all of New Jersey's solid waste processed and disposed of in New Jersey." *Id.* Here, too, "out-of-state facilities do not compete on anything approaching a level playing field." *Id.* Even the Board's own agent conceded that a New Jersey-based generator "would have an advantage" over an otherwise-identical generator whose economic and community benefits would flow to another state. JA846-47.

Of course, there is nothing necessarily problematic about a state seeking to bring economic and community benefits within its own borders. For instance, in a vertically integrated market, where the bulk of energy is both generated and distributed in-state, it makes sense for a state to favor in-state projects. *Cf. Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 297 (1997) (vertically integrated utilities have obligation "to serve all members of the public"). Likewise, when a state acts as a market participant, and buys and sells energy *itself*, it may favor in-state interests without implicating the dormant Commerce Clause. *See Wis. Dep't of Indus., Labor*

& Human Relations v. Gould Inc., 475 U.S. 282, 289 (1986). But when a state uses its law to benefit local interests by discriminating between *private* in-state and out-of-state participants in an *interstate* market, that is another matter entirely. *See Atl. Coast*, 48 F.3d at 706-07 (market participant exception inapplicable because disposal site designation criteria controlled conduct of private parties).

That is exactly what the LCAPP does. The Act directs *private* parties (the EDCs) to enter into contracts that provide long-term pricing guarantees to select *private* generators. By definition, that is not market participation by the state.[9] Nor are these private generators engaged in wholly *intrastate* commerce. To the contrary, an explicit condition for participation in the LCAPP and receipt of payments under a SOCA is sale of capacity into the *interstate* wholesale market. The Act thus is designed to subsidize participation in an avowedly interstate market—yet to do so only for *local* participants. And although appellees need not identify specific harm to out-of-state projects since the Act is facially discriminatory, the harm caused by this discrimination against out-of-state interests is not hypothetical: One witness testified that PPL was discouraged by the LCAPP's in-state preference from proposing Pennsylvania-based projects because it concluded that those projects were

[9] Nor is this a situation where a state is merely funding public utility infrastructure projects through taxes on its citizens. *Cf. W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994). The subsidies here are not funded out of general revenue, and the projects are not traditional public utilities.

unlikely to be selected. JA723. That kind of discrimination against out-of-state interests is precisely what the dormant Commerce Clause is intended to prevent.[10]

C. The State Failed to Satisfy Its Rigorous Burden of Proving that It Has No Non-Discriminatory Means for Achieving Its Ends.

For all these reasons, the District Court correctly found that the LCAPP "places a direct burden upon interstate commerce." JA84. But the court then failed to follow that finding to its logical conclusion. A state law that directly burdens interstate commerce by facially discriminating in favor of in-state interests is subject to a "virtually *per se* rule of invalidity." *City of Phila.*, 437 U.S. at 624. Only if *the state* can "'demonstrate, under rigorous scrutiny, that it has *no other means* to advance a legitimate local interest,'" can that kind of discriminatory law survive. *Tri-M*, 638 F.3d at 427 (emphasis added).

Although the District Court acknowledged these legal standards, it promptly misapplied—indeed, *inverted*—them. Rather than subject the state's purported justifications for the LCAPP to "rigorous scrutiny," the court relieved the state of its burden entirely. After noting only that the state's arguments "appear[] reasonable," the court concluded that "*Plaintiff*[*s*] ha[ve] not met [their] burden of proof." JA89 (emphasis added). In other words, rather than require the state to demonstrate that

[10] The Supreme Court has twice rejected the contention, raised by appellants below, that the FPA authorizes states to take actions that otherwise would violate the dormant Commerce Clause. *See New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982); *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992).

it has no non-discriminatory means to advance its purported interests, the court committed clear legal error by faulting *plaintiffs* for failing to meet a burden of proof that they did not possess.[11]

Under a proper application of the correct legal standard, the state did not come close to making the requisite showing, "under rigorous scrutiny, "'that it ha[d] no other means to advance a legitimate local interest.'" *Tri-M*, 638 F.3d at 427. Indeed, the state never even attempted to do so. Nor could it, as undisputed record evidence confirms that New Jersey had non-discriminatory alternatives for advancing whatever local interests it might have invoked.

For instance, to the extent New Jersey sought to improve in-state reliability, it did not need to discriminate against interstate commerce to do so. New Jersey's witnesses conceded that a new plant across the border in Pennsylvania could have addressed any reliability concerns as well as a plant in New Jersey. *See* JA2434. Yet the state rejected just such a proposal, and has yet to identify any basis beyond discrimination in favor of in-state proposals for doing so. Tr. 499:17-501:23 (Dominguez). Nor can New Jersey justify its discriminatory treatment as an effort to respond to concerns about delay in completion of the Susquehanna-Roseland

[11] The District Court appears to have confused the test for discriminatory and nondiscriminatory laws. Only when a law is *non*discriminatory should the analysis focus on whether its burden on interstate commerce is "clearly excessive" in relation to its local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

transmission line, *see* NJ Br. 13-14, as no LCAPP generator was projected to come online until *after* the line was complete. JA737-38.

At bottom, New Jersey's motive for designing the LCAPP to discriminate against out-of-state interests is clear: It sought to bring "economic development, jobs, and property taxes to New Jersey." JA2322. Indeed, the Act states explicitly that it is intended to "assist the State's economic development and create opportunities for employment in the energy sector." N.J.R.S. § 48:3-98.2(i). If a state's mere desire to benefit its own economy at the expense of other states were enough to justify discriminatory laws, the dormant Commerce Clause would be rendered a nullity. Indeed, the whole point of this constitutional restraint is to *prevent* states from elevating such parochial interests above the national interest in a unified interstate economy. Because the LCAPP runs afoul of that principle, it violates the dormant Commerce Clause.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

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I hereby certify that, pursuant to L.A.R. 46.1, I am admitted to and a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

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Dated: February 18, 2014

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