

Case No. 13-2424

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PPL ENERGYPLUS, LLC; PPL BRUNNER ISLAND, LLC; PPL HOLTWOOD, LLC; PPL MARTINS CREEK, LLC; PPL MONTOUR, LLC; PPL SUSQUEHANNA, LLC; LOWER MOUNT BETHEL ENERGY, LLC; PPL NEW JERSEY SOLAR, LLC; PPL NEW JERSEY BIOGAS, LLC; PPL RENEWABLE ENERGY, LLC; PSEG POWER, LLC; ESSENTIAL POWER, LLC

Plaintiff-Appellees

v.

DOUGLAS R.M. NAZARIAN; HAROLD WILLIAMS; LAWRENCE BRENNER; KELLY SPEAKES-BACKMAN; KEVIN HUGHES; CPV MARYLAND, LLC

Defendant-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT BALTIMORE

**BRIEF OF AMICUS CURAIE AMERICAN WIND ENERGY
ASSOCIATION AND THE MID-ATLANTIC RENEWABLE
ENERGY COALITION IN SUPPORT OF APPELLANTS
AND URGING REVERSAL**

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CORPORATE DISCLOSURE STATEMENT (Fed. R. App. P. 26.1)

I certify that *amicus curiae*, the American Wind Energy Association (“AWEA”) and the Mid-Atlantic Renewable Energy Coalition (“MAREC”) do not have a parent corporation and that no publicly held corporation owns 10 percent or more of any stake or stock in AWEA or MAREC.

None of the parties’ counsel authored this brief in whole or in part. None of the parties or their counsel contributed money that was intended to fund preparing or submitting the brief. No person other than AWEA and MAREC contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(c)(5).

Dated: February 11, 2014

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I. STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The American Wind Energy Association (“AWEA”) is a national trade association representing a broad range of entities with a common purpose of encouraging the expansion and facilitation of wind energy resources in the United States. The Mid-Atlantic Renewable Energy Coalition (“MAREC”) is a coalition of wind energy companies, wind turbine manufacturers, public interest organizations, law firms and service companies dedicated to promoting the growth and development of renewable energy in the Mid-Atlantic region. AWEA and MAREC seek to promote wind energy as a clean source of electricity for consumers.

AWEA and MAREC have filed a motion for leave to file this *amicus curiae* brief and move to file this brief to ensure that the Court’s decision clarifies that the Federal Power Act (“FPA”), 16 U.S.C. § 791 et seq., preserves state jurisdiction to promote state-mandated solicitations and long-term power contracts as long as the Federal Energy Regulatory Commission’s (“FERC”) exclusive federal jurisdiction over wholesale rates is not disturbed. If the Court fails to do so, its decision could be misconstrued to expand improperly the scope of FERC wholesale rate authority under the FPA and, in turn, erroneously narrow the scope of state authority to promote preferred generating resources. In particular, as discussed further below,

we urge the Court to provide clear guidance in its opinion so that it does not unnecessarily call into question state competitive electricity procurements that are lawful exercises of state authority (*i.e.*, requirements that utilities purchase capacity and energy at wholesale under specific state mandates) as long as they do not run afoul of the Supremacy Clause by intruding on FERC's exclusive right to set wholesale power rates.

Courts grant leave to file *amicus curiae* briefs when they will "assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003). Courts are most likely to allow briefs from *amici curiae* who have "a unique perspective or specific information that can assist the court beyond what the parties can provide." *Id.* As a representative of entities promoting the expansion and facilitation of wind energy resources in the United States, AWEA and MAREC bring a unique perspective to the potential implications of the district court's ruling and presents ideas not found in the parties' briefs.

II. ARGUMENT

A. AWEA and MAREC submit this brief in support of Appellants urging the Court to reverse the district court's ruling in favor of Plaintiff-Appellees.

AWEA and MAREC urge the court to reverse the district court's ruling against Appellants by adopting their arguments that the Maryland Public Service

Commission's ("PSC") Generation Order No. 84815 ("Generation Order") does not violate the Supremacy Clause, U.S. Const. art. VI, para. 2. AWEA and MAREC hereby incorporate by reference the arguments set forth in the Briefs filed by Appellants, CPV Maryland, LLC and Maryland Public Service Commission, asserting that the Generation Order does not invade FERC's jurisdiction over wholesale sales of electricity in interstate commerce because, among other reasons, it seeks to ensure Maryland's electric resource adequacy—an action that falls well within the state's authority. *See* CPV Appellant Br. at 20–24; Md. Pub. Serv. Comm'n Appellant Br. at 15–19.

B. If the Court affirms the district court's decision in favor of Appellees, the Court should provide clear guidance in its opinion so that it does not unnecessarily call into question other state competitive electricity procurements that are lawful exercises of state authority.

The FPA vests FERC with the responsibility to set the "rates and charges" of wholesale electric energy and to ensure that those rates are "just and reasonable." 16 U.S.C. § 824d(a); *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47–48 (2003). Thus, by enacting the FPA, Congress created a division between federal and state authority within the broad field of setting rates for electric energy regulation. In line with this division, wholesale price setting is generally within FERC's exclusive jurisdiction pursuant to the FPA. *Cf. Pub. Utils. Comm'n of R. I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) (asserting that the dormant

Commerce Clause prohibits states from regulating rates for wholesale power sales between utilities in different states).

In the case at hand, the district court found that the PSC's Generation Order set an out-of-market price for wholesale electricity that CPV would receive under the Contract for Differences ("CfD") because it directed market participants to enter into the CfD and the CfD in effect set a wholesale rate for the contract. Mem. Decision at 102, 109. Consequently, the court held that the Generation Order could not stand because it encroached on FERC's exclusive jurisdiction of wholesale price setting.

The district court, however, noted that "states hold the authority to . . . limit the type or amount of generation facilities constructed in the state [and] promote certain environmentally desired types of generation facilities." Mem. Decision at 84. In other words, the district court highlighted that a state action to promote the development of certain power plants contemplated to participate in the wholesale energy market is not preempted merely because the action—increasing the supply of energy resources—affects wholesale energy prices.

FERC has also drawn a distinction between a state action that directly establishes a wholesale rate and a state action either to hold a solicitation or direct a regulated utility to hold a solicitation that in turn leads to a wholesale price under a long-term contract. For example, when FERC reviewed California's feed-in

tariff, in which the state legislature directed the California Public Utilities Commission (“CPUC”) to establish prices for small cogeneration facilities, FERC found that “the [CPUC’s decisions under the state statute] are not preempted by the [FPA] only to the extent that the [CPUC] is ordering the utilities to purchase capacity and energy from certain resources, but are preempted to the extent that the CPUC is setting wholesale rates for such transactions.” *California Pub. Utils. Comm’n, et al.*, 132 FERC ¶ 61,047 at ¶ 69 (2010), *aff’d* 254 F.3d 250, 253-54 (D.C. Cir. 2001). We also note that the court stated: “Any [combined heat and power (“CHP”)] generator that is not a QF but is a public utility must, pursuant to section 205 of the FPA, file with the Commission the rates it proposes to charge under the CPUC’s AB 1613 tariff, and, consistent with section 205 of the FPA, the CHP generator must demonstrate that such rates are just, reasonable and not unduly discriminatory or preferential.” *Id.* In other words, even if a state determines a wholesale rate in the first instance, that rate is permissible so long as FERC ultimately approves the rate as just and reasonable under section 205 of the FPA. 16 U.S.C. § 824d(a).

In short, if this Court affirms the district court decision, it is critical to draw a distinction between a state directing the establishment of wholesale rates and a state ordering the utilities to purchase energy from certain resources to prevent unintended consequences for lawful state-mandated solicitations and long-term

power contracts, including state efforts to promote preferred generating resources to achieve environmental objectives—none of which disturb FERC’s exclusive federal jurisdiction over wholesale rates.

III. CONCLUSION

Amicus curiae, AWEA and MAREC, respectfully request that the Court reverse the district court’s ruling in favor of Plaintiff-Appellees. If the Court affirms the district court’s decision, AWEA and MAREC ask that the Court provide clear guidance in its opinion so that it does not unnecessarily call into question state competitive electricity procurements that are lawful exercises of state authority.

Dated: February 11, 2014

Respectfully submitted,

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Defendant-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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**MOTION OF AMICUS CURIAE AMERICAN WIND
ENERGY ASSOCIATION AND THE MID-ATLANTIC RENEWABLE
ENERGY COALITION FOR LEAVE TO FILE BRIEF IN
SUPPORT OF APPELLANTS**

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the American Wind Energy Association (“AWEA”) and the Mid-Atlantic Renewable Energy Coalition (“MAREC”) respectfully move this Court for leave to file an *amicus curiae* brief in support of Appellants’ position in the above-captioned case, and in support of this motion, state as follows:

1. AWEA is a national trade association representing a broad range of entities with a common purpose to encourage the expansion and facilitation of wind energy resources in the United States.

2. AWEA is a non-profit 501(c)(6) corporation organized under the laws of the state of Michigan.

3. The Mid-Atlantic Renewable Energy Coalition (“MAREC”) is a coalition of wind energy companies, wind turbine manufacturers, public interest organizations, law firms and service companies dedicated to promoting the growth and development of renewable energy in the Mid-Atlantic region.

4. MAREC is a non-profit 501(c)(3) organization incorporated in the state of Pennsylvania.

3. This case raises issues that could have a profound and direct impact on AWEA’s and MAERC’s purpose and goals.

4. The *amicus curiae* brief attached with this motion is intended to apprise this Court of issues in which AWEA and MAREC have an interest apart from the immediate interests of the parties to this litigation.

5. AWEA and MAREC believe that the arguments within the attached *amicus curiae* brief provide a broader perspective regarding the issues raised by this appeal that should serve as a useful supplement to the submissions presented by the parties.

6. Counsel for AWEA and MAREC conferred with Counsel for Appellants and Appellees regarding the filing of this motion and the accompanying brief, and they consent to their submission.

For the foregoing reasons and based on the documents submitted herewith, AWEA and MAREC respectfully request that the Court grant its motion for leave to file the accompanying *amicus curiae* brief and that the Court consider the accompanying brief as it reviews the Appellants and Appellees arguments.

Dated: February 11, 2014

Respectfully submitted,

/s/ Gene Grace

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Counsel for AWEA and MAREC

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25, I hereby certify that I have electronically filed the foregoing Motion of the American Wind Energy Association and the Mid-Atlantic Renewable Energy Coalition for Leave to File Amicus Brief as *Amicus Curiae* in Support of Appellants with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the Fourth Circuit's CM/ECF system, that all counsel in these consolidated cases are "Filing Users" of this Court's electronic system, and that they were served when this motion was filed through the Court's electronic filing system, by the Notice of Docket Activity generated by the Court's electronic filing system.

Dated: February 11, 2014

/s/ Gene Grace
Gene Grace

Counsel for *Amicus Curiae*
AWEA and MAREC

