Nos. 13-2419 (L) & 13-2424

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PPL ENERGYPLUS, LLC, *et al.*,

Plaintiffs-Appellees,

v.

DOUGLAS R.M. NAZARIAN, in his official capacity as Chairman of the Maryland Public Service Commission, *et al.*,

Defendants-Appellants.

Appeal from Judgment of the U.S. District Court for the District of Maryland, No. 12-cv-01286 (Hon. Marvin J. Garbis)

BRIEF FOR THE CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY; THE CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION; GEORGE JEPSEN, ATTORNEY GENERAL FOR THE STATE OF CONNECTICUT; CONNECTICUT OFFICE OF CONSUMER COUNSEL; THE NEW ENGLAND CONFERENCE OF PUBLIC UTILITIES COMMISSIONERS, INC.; THE MAINE PUBLIC UTILITIES COMMISSION; THE RHODE ISLAND PUBLIC UTILITIES COMMISSION; THE VERMONT PUBLIC SERVICE BOARD; THE VERMONT DEPARTMENT OF PUBLIC SERVICE; THE CALIFORNIA PUBLIC UTILITIES COMMISSION; THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; THE PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA; THE DELAWARE PUBLIC SERVICE COMMISSION; THE NEW JERSEY BOARD OF PUBLIC UTILITIES; AND THE NEW JERSEY DIVISION OF RATE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

[Caption continued on next page]

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1, the *Amici Curiae* declare that they do not have parent corporations or publicly held stock.

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INTEREST OF THE *AMICI CURIAE*

This case implicates issues of critical importance to the *Amici*. In particular, the *Amici* are concerned that a decision affirming the District Court's unduly expansive view of federal jurisdiction under the Federal Power Act ("FPA") could spark a firestorm of litigation challenging long-standing procurement practices that enable the States to ensure that their citizens are safely provided with reliable, clean, and affordable supplies of electric power.[1]

For more than a century, the States have determined whether new power plants are required to meet their citizens' needs, and whether to promote the development of such power plants with ratepayer funds. The States also have the responsibility and authority to regulate their public utilities, and to implement important State policy objectives such as the development of renewable energy sources and innovative technologies to reduce emissions of carbon dioxide and other pollutants.

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[1] As the Court is aware, a New Jersey procurement program similar to the Maryland program at issue here is the subject of an appeal pending in the Third Circuit. *PPL EnergyPlus, LLC, et al. v. Lee A. Solomon, et al.*, No. 13-4330 *et al*. Also, in December 2013, an unsuccessful bidder initiated litigation seeking to invalidate a Connecticut procurement designed to support the development of new wind, solar, and other energy sources as allegedly preempted by the FPA. *Allco v. Esty*, No. 13-1874 (D. Conn.). Moreover, a complaint was filed in January alleging that a Massachusetts offshore wind turbine project is preempted by the FPA and invalid under the dormant Commerce Clause. *Barnstable v. Berwick*, No. 14-10148 (D. Mass.).

It is common practice among the States to conduct — or authorize their regulated utilities to conduct — procurements to develop new power plants. Such procurements typically result in long-term power purchase agreements or other arrangements between new generation resources and State public utilities, with some or all costs recovered from retail ratepayers through their utility bills.

Although procurement programs in the *Amici* States differ from the Maryland program under review, the *Amici* are nevertheless troubled by the District Court's fundamentally flawed reasoning in finding the Maryland program preempted by the FPA. Accordingly, the *Amici* respectfully submit this brief as of right pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure in support of Appellants' position that the District Court's judgment should be reversed.[2] In particular, the *Amici* urge the Court of Appeals to make clear that a State's exercise of its traditional authority to initiate or authorize a competitive procurement to develop new generation resources — along with any resulting long-term contract between generators and a State's public utilities — is not categorically preempted by the FPA.

The *Amici Curiae* are as follows:

[2] Out of an abundance of caution, the *Amici* also obtained consent from all parties, through their counsel, for the filing of this brief.

The Connecticut Public Utilities Regulatory Authority

The Public Utilities Regulatory Authority ("PURA") is the Connecticut State commission charged with regulating public utility companies and is authorized by State statute to participate in proceedings before federal agencies and courts on matters affecting utility services rendered or to be rendered in Connecticut. Conn. Gen. Stat. § 16-6a. The PURA oversees State procurements of electricity and capacity, and is responsible for the State's interest in obtaining reliable energy. The District Court's decision on appeal could directly impact the State of Connecticut's and PURA's ability to ensure sufficient, reliable and affordable supplies of electric power and could undermine the State's ability to advance State policy objectives such as the development of renewable energy and innovative technologies.

The Connecticut Department of Energy and Environmental Protection

The Connecticut Department of Energy and Environmental Protection ("DEEP") is the State agency authorized by statute to oversee and direct the State's energy and environmental policies and as such has a direct interest in this litigation. Conn. Gen. Stat. § 22a-1, *et seq.*, *id.* §§ 16-1, 16-245a. At the direction of its legislature, Connecticut DEEP has prepared a Comprehensive Energy Strategy that has set clear and achievable goals in terms of procuring renewable energy resources to meet the needs of its mandatory Renewable Portfolio

Standards as well as directing the steps needed to obtain new, low-carbon resources to meet its obligations under the Regional Greenhouse Gas Initiative. *Id.* § 16a-3d. The legislature has further enacted specific statutes authorizing the Commissioner of DEEP to coordinate with the State's electric distribution utilities to obtain new generation to meet these important State environmental policies. *Id.* § 16-245a. As a consequence, the Department has a direct and substantial interest in any litigation that would potentially affect the ability of State officials to direct and satisfy the State's environmental policies particularly related to new generation.

George Jepsen, the Attorney General for the State of Connecticut

The Attorney General is an elected constitutional official and the chief legal officer of the State of Connecticut. Among the Attorney General's responsibilities are interventions in various types of proceedings to protect the State, the public interest and the people of the State of Connecticut, and assuring the enforcement of a variety of laws of the State of Connecticut, including Connecticut laws concerning the competitive procurement of electric generation capacity for reliability and renewable energy policy, to promote the benefits of competition and to assure the protection of Connecticut's electricity consumers from anti-competitive abuses.

Connecticut Office of Consumer Counsel,
by and through Elin Swanson Katz, Consumer Counsel

The Connecticut Office of Consumer Counsel ("OCC") is the State's statutory advocate for utility customers, including electricity customers, pursuant to Conn. Gen. Stat. § 16-2a. OCC therefore has a statutory responsibility to advocate for the interests of Connecticut electric customers, including to ensure that their rates remain just and reasonable and that electricity be highly reliable. OCC also has an interest in promoting renewable and clean sources of electricity for its customers. The outcome of the appeal could directly impact the reliability or sustainable nature of electricity in Connecticut by impeding the State of Connecticut's ability to develop new power generation resources. The outcome of the appeal could also impact rates due to the potential scarcity of electricity supply.

The New England Conference of Public Utilities Commissioners, Inc.

The New England Conference of Public Utilities Commissioners, Inc. ("NECPUC") is a non-profit corporation comprising the utility regulatory bodies of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.[3] NECPUC was established in 1947 and provides regional regulatory

[3] The States of Connecticut, Maine, Rhode Island, and Vermont voted in support of NECPUC's participation in this *amicus* brief. The States of New Hampshire and Massachusetts abstained from the vote.

assistance on matters of common concern to the six New England States in the electricity, gas, telecommunications and water industries.

The Maine Public Utilities Commission

Under Maine law, the Maine Public Utilities Commission is the State commission designated by statute with jurisdiction over rates and service of electric utilities in the State. Me. Rev. Stat. tit. 35-A, § 101 *et seq.*

The Rhode Island Public Utilities Commission

The Rhode Island Public Utilities Commission implements the State's legislative policies establishing, *inter alia*, the fair regulation of public utilities and ensuring rates charged by public utilities are reasonable and just. R.I. Gen. Laws §§ 39-1-1, 39-1-3 and 39-2-1. The Commission has further authority to implement the State's Long-Term Contracting Standard for Renewable Energy and Renewable Energy Standard established pursuant to Chapters 26 and 26.1, Title 39 of the R.I. General Laws.

The Vermont Public Service Board

The Vermont Public Service Board ("VPSB") is the "state commission" as defined by FERC regulations and designated by Vermont statute, with jurisdiction over rates and service of electric utilities in the State. The VPSB also reviews the environmental and economic impacts of proposals to purchase energy supply or build new energy facilities. The VPSB's mission is to ensure high quality electric service at minimum reasonable costs that best serve the long-term interest of

Vermont and its residents, as defined in Vermont statute. The District Court decision on appeal, if upheld, could impair the ability of the VPSB to ensure high quality electric service in conformance with Vermont statute.

The Vermont Department of Public Service

The Vermont Department of Public Service ("VDPS") is charged with representing the interests of the public in utility matters and is also responsible, by statute, for regulated utility planning. Vt. Stat. Ann. tit. 30, § 2. As the State of Vermont's public advocate, VDPS has an affirmative duty to protect the interests of Vermont consumers in securing reliable, safe, reasonably priced power consistent with applicable State and federal statutes. The decision of the District Court has the potential to negatively impact the rates paid by Vermont ratepayers and the planning process for addressing legitimate State policies surrounding resource selection and resource adequacy.

The California Public Utilities Commission

The California Public Utilities Commission ("CPUC") is a constitutionally established State agency charged with the responsibility for regulating electric corporations within the State of California. The CPUC ensures the provision of safe, reliable utility service and infrastructure at reasonable rates while fulfilling California's commitments to environmental enhancement and a healthy California

economy. The CPUC has a statutory mandate to represent the interest of California's electric consumers in legal proceedings before FERC and the courts.

CPUC-jurisdictional public utilities operate within the California Independent System Operator Corporation ("CAISO"). Unlike the regional transmission organizations and independent system operator in which the *Amici* States and Maryland participate, the CAISO has not instituted an organized, FERC-jurisdictional capacity market.[4] Accordingly, the District Court's finding of field preemption could not legitimately threaten CPUC-regulated generation planning or procurement processes. But the CPUC is considering, as a policy matter, whether to support development of a limited, backstop capacity auction process in California subject to FERC oversight. The District Court's decision, if upheld on appeal, has the potential to negatively impact California's support for such a market. The CPUC's interest is to ensure that the Court appropriately recognizes (as FERC does) the States' historic and ongoing traditional role in ensuring resource adequacy regardless of the presence or absence of a FERC-regulated capacity market.

[4] Load serving entities in California secure capacity contracts necessary to demonstrate compliance with the State's resource adequacy requirements entirely through bilateral transactions or with utility-owned generation.

The Public Service Commission of the State of New York

The New York Public Service Commission ("NYPSC") is a state administrative commission created under the New York Public Service Law. The commission has general regulatory jurisdiction over electric utilities and the provision of retail electric service within the State of New York, including, without limitation, the licensing of electric generation facilities. The commission is responsible, *inter alia*, for ensuring that every electric corporation furnishes and provides "such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." N.Y. Pub. Serv. L. § 65(1) (McKinney 2000). It is the duty of counsel to the commission to represent and appear for the people of the State of New York and the commission in all actions and proceedings involving any question under the Public Service Law or within the jurisdiction of the commission. N.Y. Pub. Serv. L. §11 (McKinney 2000).

Additionally, the State of New York is within a single electricity wholesale market managed by the New York Independent System Operator ("NYISO"). The NYPSC is the only state public utilities commission within the NYISO footprint. Therefore, within the NYISO, NYPSC is uniquely positioned to undertake the responsibilities and perform the duties statutorily assigned and noted above for the interest of the State and the people of New York.

The Public Service Commission of the District of Columbia

The Public Service Commission of the District of Columbia ("DCPSC") was originally established by Congress in 1913 and was reaffirmed by Congress as an independent agency of the District of Columbia Government in the District of Columbia Home Rule Charter in 1973. The DCPSC functions as a quasi-judicial agency to ensure that the natural gas, electricity and telecommunications utilities doing business in the District provide safe and reasonably adequate service and facilities at just and reasonable rates. D.C. Code §§ 1-204.93 and 34-301 (2001). As a jurisdiction without any significant local generation, the DCPSC has an interest in reducing RPM capacity costs to District ratepayers in SWMAAC and/or the Pepco zone. The decision of the District Court has the potential to negatively impact the rates paid by District of Columbia ratepayers by denying them a source of generation in the neighboring state of Maryland that could lower RPM capacity costs.

The Delaware Public Service Commission

The Delaware Public Service Commission (the "Delaware PSC") is an agency in the State of Delaware, organized and existing by virtue of the statutes enacted by the Delaware General Assembly, presently codified as the Delaware Public Utility Act. The Delaware PSC has the responsibility to supervise and regulate all Delaware public utilities (including electric companies) to ensure their

operation in the interest of the public and to promote adequate, economical and efficient delivery of utility services in the State. This includes electric utility delivery service in connection with electric transmission. By State statute, Delaware has the right to secure new generation as part of a utility's integrated resource plan and this proceeding may have significant affect with respect to that right. The entire state of Delaware is contained in the footprint of PJM and, therefore, Delaware PSC ratepayers may be directly affected by the outcome of this proceeding.

The New Jersey Board of Public Utilities

The New Jersey Board of Public Utilities ("NJBPU") has general regulatory supervision over all New Jersey public utilities, requiring them to furnish safe, adequate, proper, and reliable service at just and reasonable rates. N.J.S.A. 48:2-1 *et seq*. On January 28, 2011, Governor Chris Christie signed into law P.L. 2011, c. 9, which established a Long-Term Capacity Agreement Pilot Program ("LCAPP") to promote the construction of base load and mid-merit electric generation facilities to address New Jersey's electric reliability concerns, and directed NJBPU to implement the LCAPP. Pursuant to the LCAPP law, NJBPU approved standard offer capacity agreements ("SOCAs") between three generators and New Jersey's four electric distribution companies. Currently pending in the United States Court of Appeals for the Third Circuit is NJPBU's appeal of the District Court's

determination that the LCAPP is preempted under federal law (*PPL EnergyPlus, LLC, et al. v. Lee A. Solomon, et al.*, Nos. 13-4330, *et al.*). The Maryland PSC's contract for differences ("CfD") mechanism on appeal here is the counterpart to New Jersey's SOCAs. Thus, New Jersey has a direct and substantial interest in litigation that potentially affects the ability of State officials to implement mechanisms, such as the SOCAs, that address electric reliability concerns. New Jersey, like the other *Amici*, has a vital interest in ensuring that its police powers can continue to be used to protect the health, welfare, and safety of its citizens, including electric consumers. The district court's decision improperly strips the States, such as New Jersey, of their ability to safeguard the interest of their citizens, including ratepayers.

The New Jersey Division of Rate Counsel

The New Jersey Division of Rate Counsel ("NJ Rate Counsel") is the administrative agent charged under New Jersey law with the general protection of the interests of utility ratepayers. N.J.S.A. 52:27E-50 *et seq*. The courts have recognized that it is the ratepayers who ultimately shoulder the cost of electricity. *See Conn. Dep't of Pub. Util. Control v. Fed. Energy Regulatory Comm'n*, 569 F.3d 477, 479 (D.C. Cir. 2009). Cost is an important concern to ratepayers; however, that is not the true issue at stake in this matter. Rather, the provision of reliable electric service is the issue at stake here — one in which the ratepayers

clearly have an interest. Electricity is an essential need, and without reliable service, ratepayers will be irreparably harmed. For this reason, NJ Rate Counsel has a heightened interest in the outcome of this matter. Moreover, because of this interest, NJ Rate Counsel filed an *amicus* brief in a similar matter in the Third Circuit. *See supra* n.1.

SUMMARY OF ARGUMENT

In conducting a competitive procurement for a new power plant and requiring Maryland's public utilities to enter into long-term contracts with the winning developer, the Maryland Public Service Commission ("Maryland PSC") properly exercised the police power and traditional authority committed to it by the State of Maryland to avert a looming capacity shortage that threatened to jeopardize the reliability of the State's electricity supply.

As explained in Part I below, the District Court erroneously held that Congress's grant of authority to the Federal Energy Regulatory Commission ("FERC") with respect to wholesale power transactions constitutes a federal regulatory scheme that is so pervasive that it extends to preempt the Generation Order and Contract for Differences ("CfD") mechanism implemented by the Maryland PSC. Such State actions (in Maryland and elsewhere) do not interfere with, and indeed are entirely compatible with federally regulated markets, as FERC has expressly recognized.

Moreover, as explained in Part II below, the District Court incorrectly ruled that the Generation Order and CfD establish the price that the winning developer, CPV Maryland LLC ("CPV"), will receive for sales of capacity. However, it is not necessary for the Court to reach this issue to resolve the appeal. Even if the bid submitted by CPV, as incorporated into the CfD, constitutes a price for capacity sales into the FERC-regulated regional market operated by PJM Interconnection, LLC ("PJM"), at most, the CfD would be subject to FERC's review to determine whether the price is "just and reasonable" within the meaning of the FPA. In short, even if the Generation Order or the CfD contain a wholesale rate, neither would run afoul of the FPA.

ARGUMENT

I. THE DISTRICT COURT'S CONCLUSION THAT THE MARYLAND PROGRAM IS PREEMPTED BY THE FPA IS INCONSISTENT WITH THE TEXT AND PURPOSE OF THE FPA AND INTRUDES ON TRADITIONAL STATE POWERS

It is axiomatic that "[d]ual sovereignty is a defining feature of our Nation's constitutional blueprint." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) (citation omitted). Thus, "[a]lthough the States surrendered many of their powers to the new federal government, they retained a residuary and inviolable sovereignty that is reflected throughout the Constitution's text." *Printz v. United States*, 521 U.S. 898, 899 (1997). This core tenet of our federalism is enshrined in the Tenth Amendment: "The powers not delegated to the United

States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

As James Madison explained in an essay in support of the Constitution's adoption:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 303 (Sesquicentennial ed., 1937).

Electricity is the lifeblood of modern society. It is vital to the "internal order, improvement, and prosperity" of every State, and to the safety, health, and welfare of all Americans. For more than a century, the States have had the responsibility and authority to ensure that the energy needs of their citizens are met. Since the enactment of the FPA in 1935, State regulatory agencies and FERC have concurrently regulated various aspects of the generation, transmission, and distribution of electric energy to citizens across the United States to ensure access to this essential commodity.

The District Court erred in misinterpreting the scope of authority granted to FERC by the FPA and further erred in disregarding the States' historic authority and power to regulate generation resources and public utilities.

A. The District Court's Field Preemption Decision Is Not Supported by the Text or Purpose of the FPA, Which Recognizes the Historic Authority of the States to Regulate Generation Facilities and Public Utilities

In the early twentieth century, local public utilities were generally vertically integrated monopolies that built, owned, and operated power plants and distributed electricity to their customers subject to regulation by the States. *See* JA-208-210. As the Supreme Court has recognized, the regulation of utilities is "one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (citing *Munn v. Illinois,* 94 U.S. 113 (1877)).[5]

In 1927, after some electric utilities began contracting bilaterally with each other for wholesale power or standby capacity, the Supreme Court found that the States lacked authority to regulate wholesale power sales between utilities in different States in light of the dormant Commerce Clause. *See Pub. Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). In 1935, Congress enacted the FPA, which vested in FERC (formerly the Federal Power Commission) the authority to regulate "the transmission of electric energy in interstate

[5] In Maryland as in many other States, this power has been committed to a State regulatory commission, here, the Maryland PSC. *See Yeatman v. Towers*, 126 Md. 513, 95 A. 158, 159-60 (1915).

commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. §§ 824(a), (b)(1).

In enacting the FPA, Congress made clear that the grant of authority to FERC extended "*only to those matters which are not subject to regulation by the States*." *Id.* § 824(a) (emphasis added). In addition, the FPA identified specific areas of State authority on which federal jurisdiction was not to encroach. For example, section 201(b) provided that FERC "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 . . . . " *Id.* § 824(b)(1).

Nothing in the FPA purports to establish the outer limit of State authority with respect to the regulation of generation resources or the financing of such generation resources through public utilities and ratepayers. The FPA contains no preemption provision and no evidence of Congressional intent to displace State authority with respect to generation resources. Indeed, the FPA's explicit reservation of authority to the States with respect to generation facilities, *id.* § 824(b)(1), suggests the contrary. *See also Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States"). Subsequent to the passage of the FPA, the States continued to make decisions regarding whether to finance

the construction of new generation resources, and the optimal mix of generation resources to serve their citizens.

Indeed, the District Court's conclusion that the Generation Order and CfD invade a field occupied by Congress has it exactly backwards. The plain text of the FPA demonstrates that the statute does not establish a comprehensive federal regulatory scheme that extends to displace traditional State authority to develop new generation resources through procurements and long-term contracts that contemplate the participation of new generation resources in federal wholesale markets. Rather, Congress expressly provided that FERC lacks jurisdiction to intrude on traditional State authority to regulate generation resources. *See* 16 U.S.C. § 824(b)(1). The District Court's interpretation of the FPA would render such express provisions reserving authority to the States meaningless.

Moreover, the District Court's expansive interpretation of FERC's jurisdiction with respect to wholesale power rates defies logic and common sense. The District Court's ruling, taken to its logical conclusion, suggests that any State action that affects "the ultimate price received," *see* JA-310, by a power plant for energy and capacity sales into a FERC-regulated market would be preempted by the FPA. So hypothetically, if a State chose to directly subsidize the development of a new power plant through grants on the condition that the new power plant participate in a FERC-regulated market, such a direct subsidy would be preempted

under the logic of the District Court opinion. The District Court's unduly expansive interpretation of FERC's jurisdiction under the FPA is insupportable and impermissibly intrudes on the States' traditional authority to develop new generation resources and the States' police power to regulate public utilities by requiring them to enter into long-term contracts with such generation resources.[6]

B. FERC's Recognition of State Authority to Develop New Generation and Adoption of Market Rules Acknowledging "State-Subsidized" Entry Demonstrate that State Procurement Programs Are Compatible with Federally Regulated Markets

The advent of federally regulated regional markets for electricity and deregulation[7] in multiple States did not alter the States' independent obligation to "keep the lights on" or diminish State authority to determine whether to develop —

[6] The District Court further erred in failing to apply the presumption against preemption, JA-309-10 n.60, which applies with special force in this case because the FPA constitutes legislation in a field which the States have traditionally occupied. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("In all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"). *Cf. New York v. FERC*, 535 U.S. 1, 17-18 (2002) (recognizing that "[t]he Court has most often stated a 'presumption against pre-emption' when a controversy concerned not the scope of the Federal Government's authority to displace state action, but rather whether a given state authority conflicts with, and thus has been displaced by, the existence of [f]ederal [g]overnment authority").

[7] Beginning in the 1990s, many States restructured their electric industries by separating generation functions from the transmission and distribution functions of public utilities. *See* JA-245-46.

through long-term contracts, tax relief, or other subsidies — new generation resources to serve their citizens' needs. *See Conn. Dep't of Pub. Util. Control v. Fed. Energy Regulatory Comm'n*, 569 F.3d 477, 481 (D.C. Cir. 2009), *cert. denied*, 558 U.S. 1110 (2010) ("State and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from [FERC]").

Long-term contracts, typically for 15- or 20-year terms, provide a stable source of revenue that assist developers of new power plants to obtain financing for construction. By contrast, the capacity auctions in PJM provide only single-year price commitments. In Maryland, the PJM capacity auctions failed to bring needed new generation investment despite the State's demonstrated reliability needs. *See* JA-252. Maryland's experience demonstrates that long-term contracts — whether resulting from a State procurement or otherwise — serve an important purpose in the marketplace.

As discussed in Appellants' briefs and herein, FERC has acknowledged on multiple occasions that States have the authority to promote the development of new generation resources through long-term contracts. Significantly, in a rulemaking clarifying the requirements for sellers of wholesale electricity to obtain

market-based rate authorization — *i.e.*, blanket approval from FERC to enter into freely negotiated contracts with purchasers for energy, capacity, and ancillary services[8] — FERC expressly recognized the continuing authority of State commissions to "establish . . . [c]ompetitive procedures for the acquisition of electric energy . . . purchased at wholesale . . . . " Order 697, Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services By Public Utilities, 119 FERC ¶ 61,295 (2007) at PP 1078-79. The regulation provides:

> Nothing in this part--
>
> (a) Shall be construed as preempting or affecting any jurisdiction a State commission or other State authority may have under applicable State and Federal law, or
>
> (b) Limits the authority of a State commission in accordance with State and Federal law to establish
>
> > (1) Competitive procedures for the acquisition of electric energy, including demand-side management, purchased at wholesale . . . .

18 C.F.R. § 35.27 ("Authority of State Commissions").[9] *See also New York*, 535 U.S. at 24 ("FERC has recognized that the States retain significant control" in

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[8] *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 537 (2008). CPV has such "market-based rate authority." JA-304-306.

[9] As described in part I, *supra*, the text of the FPA itself plainly indicates that Congress did not intend FERC's jurisdiction over wholesale power transactions to supersede traditional State authority over, among other things, generation facilities and public utilities. FERC is not empowered to determine the scope of the States' traditional powers to regulate generation, public utilities, or

(continued...)

"traditional areas," including generation and transmission siting and "local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions . . . ; authority over utility generation and resource portfolios; and authority to impose non-bypassable distribution . . . charges"[10]) (citing Order 888, 75 FERC ¶ 61,080 nn.543, 544 (1996)).

Consistent with its acknowledgment of State authority to "establish . . . competitive procedures for the acquisition of electric energy . . . purchased at wholesale," 18 C.F.R. § 35.27, FERC has developed market rules in the PJM and New England regional markets in furtherance of "just and reasonable" market prices, without ever suggesting that such State programs are unlawful or that FERC has the ability to interfere with State processes. The ongoing participation of new generation resources with long-term contracts in federally regulated markets demonstrates that State programs to promote the development of new generation resources are compatible with federal regulation of interstate wholesale markets.

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otherwise, but to the extent there is any ambiguity regarding the limits of FERC's jurisdiction, FERC's implicit acknowledgment of such limitations in section 35.27 may be entitled to deference. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1874-75 (2013).

[10] It should be noted that, under the CfD mechanism, payments to or from CPV are recovered or credited through non-bypassable charges on retail ratepayers' utility bills. *See* JA-265.

1. State Procurement Programs

Although individual procurement programs are structured differently to meet the specific needs of each State, the scope and diversity of State efforts in this area demonstrate the potentially grave consequences of the District Court's unduly broad interpretation of federal jurisdiction under the FPA, if affirmed. In particular, if the States lack authority to direct procurements and approve resulting contracts that finance the construction of new generation resources, the States would be stripped of meaningful tools to ensure reliable electric service and to promote other public policy goals for the health, safety, and welfare of their citizens. *Amici* provide examples of procurement programs to assist the Court to understand the scope of State initiatives and the compatibility of such initiatives with federally regulated markets.

For as long as the States have regulated electricity, Integrated Resource Planning has been an important tool for State regulators to ensure that there are sufficient resources to meet the forecasted energy needs of its citizens, and to determine the optimal mix of resources to supply energy to the State. Most States, including deregulated States, use some form of Integrated Resource Planning. In Connecticut, for example, DEEP is charged with

> develop[ing] an integrated resources plan for the procurement of energy resources, including, but not limited to, conventional and renewable generating facilities, energy efficiency, load management, demand response, combined heat and power facilities, distributed

> generation and other emerging energy technologies to meet the projected requirements of their customers in a manner that minimizes the cost of such resources to customers over time and maximize consumer benefits consistent with the state's environmental goals and standards.

Conn. Gen. Stat. § 16a-3a.[11]

Ten years ago, after deregulation, Connecticut faced a reliability crisis in relation to aging power plants, transmission congestion, and an acute shortage of investment in new generation capacity.[12] Acting pursuant to its traditional authority, the Connecticut General Assembly passed the Connecticut Energy Independence Act in 2005, directing the Connecticut Department of Public Utility

[11] Among other policy objectives, Connecticut is currently on track to meet a target of having 27 percent of all energy used in the State of Connecticut come from clean and renewable resources by 2020. *See* Conn. Gen. Stat. §§ 16-245a, 16-243q.

[12] At the time, the FERC-regulated grid operator in New England identified "acute" reliability concerns in Connecticut relating to aging power plants and transmission congestion, and urgently warned State regulators that, without immediate investment in new generation and transmission infrastructure, Connecticut faced serious threats to reliable electric service. *See, e.g.*, *ISO New England Inc., Connecticut Energy Plan Framework — Recommended Solutions and Actions for the State of Connecticut* (2005) ("[B]ecause of continued growth in electricity use, generating unit retirements, continued transmission bottlenecks, and inadequate development of resources, Connecticut, and Southwest Connecticut specifically face particular and immediate threats to the reliable and efficient provision of electric service"). Moreover, FERC echoed these reliability concerns. *See, e.g., Devon Power LLC*, 113 FERC ¶ 61,075 (2005) at P 5 ("The Commission remains concerned about the resource adequacy situation in New England, especially in the congested areas of Southwest Connecticut and Northeastern Massachusetts, and the resulting impact on wholesale power prices").

Control ("CT DPUC")[13] to implement measures to develop new power plants. Conn. Gen. Stat. § 16-243m. Pursuant to the legislation, the CT DPUC conducted a competitive bidding process that spanned twelve months and resulted in the award of long-term contracts to power plant developers, including developers of a gas-fired power plant in Middletown, Connecticut, that averted the pending shortage of generation capacity.

In 2007, the General Assembly passed the Act Concerning Electricity and Energy Efficiency, which further directed the CT DPUC to consider plans to build new peaking generation plants to ensure customers had access to sufficient electric supplies when electricity needs were highest. *See* Section 50, An Act Concerning Electricity and Energy Efficiency, Public Act 07-242 (codified at Conn. Gen. Stat. § 16-243u). Pursuant to the 2007 Act, the CT DPUC again conducted an open, competitive procurement that resulted in a portfolio of long-term contracts with new peaking generators for gas-fired peaking capacity. *DPUC Review of Peaking Generation Projects*, Docket No. 08-01-01, Decision (Conn. Dep't of Pub. Util. Control, June 25, 2008) at 21.[14]

[13] The CT DPUC is now the PURA.

[14] PSEG Power Connecticut, an affiliate of the PSEG entities that are parties to this litigation, was awarded a long-term contract and constructed a peaking facility in New Haven, Connecticut pursuant to this procurement.

In addition, in May 2013, the Connecticut General Assembly passed a law permitting DEEP to coordinate with other New England States to solicit proposals for renewable energy sources and direct the State's utilities to enter into power purchase agreements with the renewable resources for terms of up to 20 years. S.B. 1138, An Act Concerning Connecticut's Clean Energy Goals, §§ 6-8 (May 30, 2013). As a result, DEEP issued requests for proposals from regional renewable generators to enter into long-term contracts to meet the State's environmental objectives. The result of this major effort was that generators across the region submitted robust, competitive bids for a wide variety of renewable generation including wind power, solar power, tidal power, and biomass. Many of these proposals were cutting-edge projects of a scale and type not seen before in New England. Without the possibility of long-term procurement contracts, directed and overseen by the State, the scope and scale of these projects would not have been possible.

2. FERC's Response to State Procurements for New Generation

Consistent with 18 C.F.R. § 35.27, which recognizes the authority of the States to "establish . . . competitive procedures for the acquisition of electric energy . . . purchased at wholesale," FERC has expressly acknowledged specific exercises of State authority designed to promote the construction of power plants through long-term contracts. Indeed, FERC has accommodated the participation of

such new generation resources subject to market rules designed to satisfy its FPA mandate to ensure that market prices are "just and reasonable."

Addressing the participation of Connecticut power plants holding long-term contracts in the regional New England market, FERC recognized that "states and state agencies may conclude that the procurement of new capacity, even at times when the market-clearing price indicates entry of new capacity is not needed, will further specific legitimate policy goals . . . . " *ISO New England, Inc.*, 135 FERC ¶ 61,029 (2011) at P 20. *See also id.* at P 170 ("The Commission acknowledges the rights of states to pursue policy interests within their jurisdiction").[15]

Moreover, FERC recently implemented certain market rules requiring all new capacity resources, including "state-subsidized"[16] power plants, to make "competitive" offers (as defined by the rules) to satisfy its concerns about the alleged impact of such power plants on the market clearing price. *ISO New*

[15] *See also ISO New England, Inc.*, 126 FERC ¶ 61,080 (2009) at P 38 ("The Commission has accepted the use of long-term bilateral contracts, such as the Connecticut state-sponsored requests for proposals . . . to meet installed capacity and local sourcing requirements"); *ISO New England, Inc.*, 122 FERC ¶ 61,016 (2008) at P 26 ("The Commission's long-standing policy, consistent with a substantial body of judicial precedent, has been to protect the stability of long-term contracts. Contracts, especially long-term contracts like the ones at issue here, provide certainty and stability in energy markets").

[16] FERC's orders often describe new power plants holding long-term contracts with a State's utilities pursuant to a State procurement as "state-subsidized" resources. For purposes of this brief, the *Amici* do not adopt this term but use it solely for the purpose of avoiding unnecessary confusion.

England, Inc., 142 FERC ¶ 61,107 (2013), *reh'g pending*. At no point in its orders addressing the New England regional market has FERC suggested that Connecticut procurement initiatives are unlawful or pose an obstacle to the administration of the market.[17]

FERC's recognition of State prerogatives and authority to develop new generation demonstrates that State procurement programs and FERC-regulated markets coexist harmoniously. Moreover, the ongoing participation of new power plants with long-term contracts in the FERC-regulated New England regional market and, as described in Appellants' briefs, PJM, demonstrates that the participation of "state-subsidized" generation resources in FERC-regulated markets is entirely consistent with the administration of such markets.

[17] Indeed, the D.C. Circuit has acknowledged the authority of the States to take a wide range of actions "in their role as regulators of generation facilities without direct interference" from FERC, despite the fact that State decisions regarding generation resources necessarily "affect the pool of bidders in the Forward Market, which in turn affects the market clearing price for capacity." *Conn. Dep't of Pub. Util. Control*, 569 F.3d at 481.

II. ALTHOUGH THE DISTRICT COURT ERRONEOUSLY DETERMINED THAT THE GENERATION ORDER AND CFD ESTABLISH A WHOLESALE RATE, IT IS NOT NECESSARY FOR THE COURT TO REACH THIS ISSUE BECAUSE THE MARYLAND PROCUREMENT DOES NOT RUN AFOUL OF THE FPA EVEN IF THE CFD ARGUABLY INCLUDES A WHOLESALE RATE

As discussed in Appellants' briefs, the District Court erred in holding that the Generation Order and CfD set prices for the wholesale purchase or sale of capacity. However, it is not necessary for this Court to reach this issue.

The District Court correctly recognized that bilateral contracting outside of FERC-regulated markets is common. JA-221 ("Transactions on the PJM Markets are not the only permissible FERC-regulated wholesale transactions. Private parties can buy and sell wholesale energy, capacity, and ancillary services outside the PJM Markets and thus outside the prices set by PJM in such markets"). *See also* JA-250 (only 15 percent of all wholesale electricity sales in the PJM region occur through PJM spot energy markets). In short, it is well recognized that parties may enter into wholesale power transactions and set prices for such transactions, subject to FERC's subsequent review of such prices to determine whether they are "just and reasonable" pursuant to section 205 of the FPA. *See* 16 U.S.C. § 824d(a).

According to the District Court, the CfD incorporates a "contract price" that was proposed by CPV as part of its proposal. JA-289.[18] Even if the District Court correctly determined that the CfD incorporated a wholesale rate for the sale of energy and capacity, however, it was error to conclude that the CfD and Generation Order are necessarily preempted by the FPA. Nothing in the FPA indicates that FERC's jurisdiction with respect to wholesale power transactions requires FERC to set wholesale energy and capacity rates in the first instance. And actual contracting practices under the current regulatory regime suggest the contrary.

In short, even assuming that the CfD establishes a wholesale rate for the sale of energy and capacity, the only implication would be that the rate would be subject to review by FERC pursuant to section 205. (Of course, FERC would not have jurisdiction to supervise or dictate the terms of the State procurement process.) The plain text of the FPA, the traditional authority of the States to regulate generation resources and public utilities, and well-established bilateral contracting practices in the marketplace compel the conclusion that the District

[18] It is significant that Maryland did not itself determine the payment terms to be incorporated into the CfD between local utilities and CPV. FERC has never found a long-term contract resulting from a State competitive procurement to run afoul of federal jurisdiction where the payment terms are based on generators' competitive bids.

Court erred in holding that the Maryland PSC's actions were field preempted by the FPA.

CONCLUSION

The District Court erred in ruling that the Generation Order and CfD are preempted by the FPA. The Court of Appeals should reverse the District Court's decision below, but at a minimum should make clear that the FPA does not displace the States' traditional authority to promote the development of new generation resources through procurements and long-term contracts between new generation resources and State public utilities.

Dated: February 11, 2014

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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