Nos. 13-2419, 13-2424

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PPL ENERGYPLUS, LLC, *et al.*,

Plaintiffs-Appellees,

v.

DOUGLAS R.M. NAZARIAN, *et al.*,

Defendants-Appellants.

and

CPV MARYLAND, LLC,

Intervenor-Appellant.

On Appeal from the United States District Court Maryland,
No. 1:12-cv-01286-MJG, Hon. Marvin J. Garbis, U.S.D.J.

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 13-2419 Caption: PPL EnergyPlus, LLC v. Nazarian

Pursuant to FRAP 26.1 and Local Rule 26.1,

Please see attached
(name of party/amicus)

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Signature: s/Paul D. Clement Date: 12/9/2013

Counsel for: Appellees

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Nos. 13-2419

PPL EnergyPlus, LLC vs. Nazarian

Corporate Disclosure Statement & Statement of Financial Interest

The PPL Parties:

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; and PPL Renewable Energy, LLC ("PPL Parties") state that each of the PPL Parties is a wholly-owned, indirect subsidiary 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.

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No. 13-2424 Caption: PPL EnergyPlus, LLC v. CPV Maryland, LLC

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INTRODUCTION

This case involves an avowed effort by Maryland to override federal regulatory judgments with which it disagrees. In Maryland's view, the rates and terms FERC has established for transactions in the interstate wholesale market for electricity do too little to encourage the development of new generating facilities in Maryland. After failing in its efforts 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). Maryland'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.

Maryland's unabashed interference with the interstate wholesale market also violates the dormant Commerce Clause by discriminating against participants outside central Maryland (and, in theory, the District of Columbia). Maryland declared out-of-state generating facilities ineligible for the preferential pricing terms it mandated in lieu of those approved by FERC. That blatant discrimination in favor of local commerce triggers a virtually *per se* rule of invalidity, and Maryland has not come close to overcoming its demanding burden under that test. In short, the Generation Order 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 Maryland's Generation Order is preempted because it intrudes upon FERC's exclusive jurisdiction by setting prices for energy and capacity transactions on the interstate wholesale market.

2. Whether the Generation Order is preempted because it conflicts with FERC's regulation of the interstate wholesale market.

3. Whether the Generation Order violates the dormant Commerce Clause by favoring in-state participants and disfavoring 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. JA209.

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. 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. JA209-10.

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. JA212. 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. 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. 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, Maryland embraced this new model. Through the Electric Customer Choice and Competition Act, it restructured its market so that electricity sold in Maryland would be purchased from the interstate wholesale market, rather than generated by vertically integrated utilities. Consumers, in turn, would "benefit more from a competitive market for their electricity rather than being captive to a single utility that had a monopoly on their electricity service." P.606 at 36. Regulated utilities known as electric distribution companies ("EDCs") now purchase electricity at wholesale and re-sell and deliver it to consumers over local distribution networks. JA248. Thus, in a typical post-1999 situation, a generating company sells electricity to the wholesale market, and the local EDC purchases electricity from the wholesale market for resale and delivery to retail customers.

The significance of its decision to do away with vertical integration was not lost on Maryland. By spinning off Maryland "utilities' generating assets," the Act ensured that "electricity previously subject to traditional rate-of-return regulation (in which the PSC set the utility's profit through a *state regulatory proceeding*) would now be purchased … in the *federally regulated* wholesale electricity market." P.391 at 10 (emphases added). Maryland consciously opened itself up to the "benefit [of] a competitive market," P.606 at 36, as well as the risks of participation in a federal market that the state could not regulate. By relying on the wholesale market, the state anticipated that it would no longer "evaluate the need for new generation stations in Maryland"; "that need is determined by the marketplace" instead. JA248. Thus, as Maryland itself acknowledged, because of its voluntary dependence on the federally regulated wholesale market, Maryland ceded much of its pre-existing authority over regulation of the electricity market.

C. PJM and the Reliability Pricing Model

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

Among other things, PJM operates a wholesale electricity market in which generation resources sell electricity to PJM. PJM then sells that electricity to load serving entities ("LSEs"), which resell it to consumers to meet energy demands. To participate in this market, generation resources bid their electricity into a market for delivery in the next hour or 24 hours. PJM then accepts bids from lowest to highest until it has enough electricity. The highest bid PJM accepts to satisfy the region's needs becomes the "market clearing price." JA233. Each resource that bid at or below that price will be paid the clearing price for all of its electricity, even if its bid was lower. JA223-28.

PJM designed this "locational marginal pricing" model to "reflect[] the value of the energy at the specific location and time it is delivered" and "the effect of actual operating conditions." P.516 at 11. The clearing price may be higher, for instance, in a zone where transmission lines are congested, so generating facilities will receive higher revenues for servicing those areas. These zone-by-zone prices are designed to establish "price signals that encourage new generation sources to locate in areas where they will receive higher prices," thereby reducing the impact of congestion on prices. *Id*.

PJM also operates a market for "capacity"—*the option* to buy electricity to satisfy future demand. JA227. To ensure that sufficient capacity will be available throughout the region, PJM employs a mechanism known as the reliability pricing model ("RPM"), through which it determines both how much capacity is needed 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 year, then holds an auction at which sellers commit to sell, and PJM commits to purchase, the targeted amount from all types of generation resources for resale to retail suppliers.

The capacity auction operates much like the hourly and daily electricity markets. To participate, a generation resource decides how much capacity it wants to sell and bids that capacity at a megawatt-per-day price. JA234. PJM accepts these bids from lowest to highest until it has the requisite capacity, and the highest bid accepted becomes the market clearing price. JA233. Each capacity resource that clears the market must sell PJM all the capacity it bid, and, in return, receives the clearing price for that capacity. As FERC has explained, this single 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).

This forward market is designed to provide price signals that encourage new generation three years in advance (roughly how long it takes to construct a generating facility). JA243-45. As with the hourly and daily markets, the capacity auction has a geographic dimension. PJM subdivides the region into "locational deliverability areas" ("LDAs") for purposes of the auction, permitting different clearing prices in areas where potential transmission constraints limit the amount of capacity that can be imported from other parts of the region.[1] When this "price separation" occurs, it helps signal when new generation in a particular sub-region may be valued more highly than elsewhere. JA242; 3/4/13p.m. Tr. 113:23-115:15, 119:8-122:15; 3/8/13a.m. Tr. 95:9-24, 99:5-20. Relying on these signals, generation companies and financiers make decisions about how much capacity development or transmission planning is needed, what sources will provide that energy, and where new power plants will be located.

Occasionally, PJM's 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, to "support … 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 ("[b]oth new entry and retention of existing efficient capacity are necessary to ensure reliability").

[1] The Southwest Mid-Atlantic Area Council ("SWMAAC")—98% within Maryland, and 2% in D.C.—is part of the Mid-Atlantic Area Council LDA.

D. Maryland's Generation Order

Although Maryland voluntarily abandoned vertical integration to reap the efficiencies of the interstate wholesale market, within a few years, it began to "voice concerns" that "deregulation had not worked well" for Maryland. JA250; 3/5/13a.m. Tr. 55:10-21, 59:6-10. Unhappy with the rates the PJM market produced, Maryland's legislature passed a law requiring the state's public service commission ("PSC") to "consider changes"—including a possible return to vertical integration—designed to provide consumers reliable electricity "at the best possible price." 2007 Md. Laws, SB 400, http://mgaleg.maryland.gov/2007RS/bills/sb/sb0400e.pdf. In response, the PSC submitted two reports contending that PJM's price signals were doing too little to encourage "new generation and transmission resources" in Maryland, and as a result were leading Maryland consumers to "pay much higher than average prices." P.391 at 1; *see also* P.582 at 26-28.

Rather than advocate a return to vertical integration, however, the PSC recommended attempting to incentivize new in-state generation by directing utilities to enter into contracts that would guarantee new generators fixed revenues for a period much longer than the PJM market does. P.391 at 41; 3/5/13a.m. Tr. 61:11-63:7. In its final report, the PSC reiterated its interest in ensuring that new plants were built in Maryland "for economic reasons." P.582 at 2, 7. To that end, the PSC informed the legislature that it would "undertake a new investigation in 2009 to determine whether[,] and on what term[s], to direct or solicit the construction of one or more new power plants in Maryland." P.582 at 1-2.

In the meantime, Maryland sought to convince FERC to revise its regulation of the PJM market to provide a longer-term investment horizon that the state believed would better incentivize construction of new plants in Maryland. Maryland specifically proposed expanding the NEPA's three-year price guarantee to a *ten-year* guarantee. FERC considered and rejected those arguments. *PJM Interconnection, L.L.C.*, 126 FERC ¶61,275, at ¶146 (2009). 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. *Id.* ¶¶149-50. 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 the 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").

After its efforts to persuade FERC to alter its approach to regulating the wholesale market failed, the PSC took matters into its own hands. In December 2011, the PSC proceeded to implement its plan to direct utilities to enter long-term contracts with new generators and thus "mitigate" a purported "risk that RPM will not attract enough new capacity." P.2 at 2-3. The PSC issued a request for proposals ("RFP") to build a new gas-fired generating facility that would be obligated to sell all of its electricity and capacity into the PJM market. Although an earlier version "permitted bids from existing facilities that would uprate, or expand, their existing generation capacity," JA257, and used a broader locational requirement under which a Pennsylvania facility would have been eligible, 3/5/13a.m. Tr. 99:6-100:6; 3/11/13a.m. Tr. 109:22-110:13, the final RFP permitted proposals only for a new generator "located inside the SWMAAC of the PJM region," which is an area comprising part of Maryland and all of D.C. JA262.

In return, the RFP guaranteed the winning bidder(s) something it called a "Fixed/Indexed Pricing Contract for Differences." This Pricing Contract is not a contract with the state itself. Rather, it is a contract that the PSC orders Maryland's EDCs (the private companies who deliver electricity to consumers) to enter into guaranteeing the new generator a fixed, 20-year revenue stream for its wholesale electricity and capacity sales. Under the Pricing Contract, the EDCs are obligated to ensure that the new generator receives a state-set "contract price" "for each unit of energy and capacity [that it] sells to PJM in the PJM Markets"—regardless of what the PJM market clearing price paid to other sellers in that market may be. JA289; Pricing Contract § 3.2(a)-(b), P.215 at BP00036609, BP00036613. Thus, if the state-set "contract price" is higher than the PJM price, the EDCs must pay the new generator the difference for each unit of electricity and capacity that the generator actually sells into the PJM market. If the new generator fails to clear the PJM market and sells nothing to PJM, the EDC is not required to pay anything. The EDCs may pass along any costs or credits achieved to ratepayers.

The PSC received three proposals in response to its request and ultimately selected one, made by CPV. Through the Generation Order, Maryland ordered the EDCs to execute a 20-year Pricing Contact with CPV, which they did under protest. 3/5/13a.m. Tr. 9:7-13. This 20-year contract grants CPV exactly the kind of long-term pricing guarantee for wholesale capacity sales that FERC has rejected. Without that state-provided guarantee, CPV would not have developed the proposed facility at all, much less bid into and cleared the PJM auction. P.2, Attachment 8 § 3.2(a)-(b); 3/7/13p.m. Tr. 93:21-94:1 (agreeing that CPV would not go forward with the new plant without the Pricing Contract at this point).

E. Proceedings Below

Plaintiffs are generating companies that sell capacity and energy into Maryland through the PJM market and that rely on PJM's long-term price signals to make determinations about their investments in both existing and new generating facilities. The Maryland PSC's Order has caused plaintiffs "financial and pecuniary harm," not only by suppressing PJM prices and reducing their revenues for sales in the PJM markets, but also by forcing plaintiffs "to forgo certain investments" in new generating assets. JA65-66. Plaintiffs thus brought this suit challenging the Order's constitutionality under the Supremacy Clause and the dormant Commerce Clause. After a trial that spanned six days and included extensive presentation of evidence, testimony of multiple witnesses, and exhaustive arguments from all parties, the District Court issued a 149-page opinion holding the Order preempted by federal law. That decision was reinforced weeks later by the District of New Jersey, which held a similar New Jersey regulatory scheme preempted for largely the same reasons. *See PPL EnergyPlus, LLC v. Hanna*, 2013 WL 5603896 (D.N.J. Oct. 11, 2013).

The court began by cataloguing the large body of precedent confirming that the FPA grants FERC "exclusive authority to regulate wholesale electricity sales and the transmission of energy in interstate commerce." JA271-75. It concluded that the "Order, through the [Pricing Contract], establishes the price ultimately received by CPV for its actual physical energy and capacity sales to PJM in the PJM Markets" and thus intrudes upon an exclusively federal field. JA292. The court specifically rejected defendants' attempt to characterize the Pricing Contract as a "purely financial contract, financial hedging agreement, or swap agreement" that requires no energy or capacity sales. Rather, the court found that the "evidence establishes that the contract price represents a fixed revenue stream for *actual energy and capacity sales* into the PJM Markets" and that "CPV only obtains the contract price for wholesale energy and capacity sales into the PJM Markets if the CPV bid clears." JA294, 300.

Although the court acknowledged that Congress preserved states' traditional authority over "the siting and construction of physical facilities used for the generation of electric energy," it explained that "the scope of Maryland's power is necessarily limited by FERC's exclusive authority to set wholesale energy and capacity prices." JA281-86. At bottom, the court concluded, "Maryland's stated purpose to use the Generation Order to secure the existence of sufficient and reliable electric energy for Maryland residents does not permit invasion into a federally occupied field." JA285.

Given its holding that the Order is preempted under field preemption principles, the court declined to opine on whether it also conflicts with FERC's regulation of the interstate wholesale market. JA311-12. The court did conclude, however, that the Order does not violate the dormant Commerce Clause. The court rejected defendants' "plethora of contentions" that the Order's express preference for in-state generators is insulated from scrutiny under the dormant Commerce Clause, and also rejected defendants' claims that the mere fact that the SWMAAC region includes D.C. and only part of Maryland precludes a finding that it discriminates against interstate commerce. Nonetheless, the court concluded that the Order did not discriminate in favor of in-state commerce, even though it expressly rendered out-of-state applicants ineligible for its preferential pricing terms. JA338.

SUMMARY OF ARGUMENT

Maryland's Generation Order 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, Maryland simply does not have the power to override FERC's regulation of an exclusively federal market.

The Order 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 and energy in the wholesale market. 16 U.S.C. § 824d(a). Indeed, the Order is rival rate-setting at its most stark. The whole point of the Pricing Contract is to ensure that CPV receives a price different from the price that FERC has approved for its sales into the wholesale market. Appellants struggle mightily to prove otherwise, but their efforts fall short. The Pricing Contract is not a contract for the mere construction of generating facilities, a hedge, a swap agreement, or any of the other types of agreements into which appellants attempt to convert it. The contract mandates payment for CPV's *actual sales* of capacity and energy into the PJM market. And it does so at prices selected by Maryland, not sanctioned by FERC. Because Congress has reserved wholesale rates to exclusive federal regulation, that is not something the FPA allows states to do.

Contrary to Maryland's contentions, no jurisdictional bar precludes this Court from reaching that commonsense conclusion. Appellees clearly possess Article III standing to challenge state action designed to create a new competitor in ways appellees believe to be unlawful. That FERC could ultimately determine that the prevailing rates in the market with a new competitor are "just and reasonable" hardly prevents appellees from challenging the state action that would create the new competitor in the first place. It is well-settled that a party who suffered competitive injury as a result of a state regulation has Article III standing to challenge that regulation as preempted by federal law—even if the injury relates to a price approved by a federal regulator. And it is equally well-settled that the federal courts, not FERC, are the proper bodies to resolve such preemption questions.

The Order 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, under limited circumstances, certain new resources may lock in prices for three years. FERC steadfastly has resisted calls—including from Maryland—to extend this period, explaining that doing so would skew the market too far in the direction of favoring new resources over existing facilities, or favoring price stability over efficiency.

The Order is a deliberate effort to override that considered judgment. By providing CPV with a *20-year* revenue guarantee, Maryland seeks to impose on the federal capacity market precisely the kind of long-term, new-entry preference that FERC 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. Maryland'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.

Finally, the Order violates the dormant Commerce Clause. Maryland expressly discriminated against out-of-state participants in interstate commerce by refusing to offer its preferential pricing to out-of-state proposals. State laws that discriminate against out-of-state interests are virtually *per se* invalid, and can survive only if the state proves it has no nondiscriminatory means of advancing a legitimate local interest unrelated to economic protectionism. Maryland plainly failed to carry that burden: Though Maryland attempted to invoke a reliability interest, the trial evidence demonstrated that any reliability concerns had largely subsided by the time the state issued the Order, and that Maryland had nondiscriminatory alternatives to alleviating any such concerns anyway. In reality, Maryland's interest was straightforward: It sought to achieve economic benefits *for Maryland*, at the expense of interstate commerce. That is exactly the kind of discrimination the dormant Commerce Clause prohibits.

None of this means that Maryland lacks options for incentivizing the construction of generating facilities within its borders. But Maryland's conscious decision to integrate its energy market with FERC's wholesale market has consequences. One consequence 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 CPV with a 20-year guarantee of a price that differs from the PJM market clearing price. Dispensing with vertical integration meant accepting both the benefits and risks of participation in a federally regulated market, including the risk that FERC would not elevate Maryland's interests above those of other market participants. Because the Order is a transparent attempt to impose Maryland's own preferences on a federal market it has long criticized, 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. Grimmond*, 137 F.3d 823, 827-31 (4th Cir. 1998).

ARGUMENT

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

The Order is a blatant effort 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 a state may not regulate in a field exclusively reserved to the federal government. Yet that is precisely what the Order does: It seeks to supplant FERC's approved rates and terms with ones more to Maryland's liking. Because Maryland does not have the power to displace federal regulation in an exclusively federal field, the Order 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*, 535 U.S. at 21 ("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."); *Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 812 F.2d 898, 902 (4th Cir. 1987) (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"); *Appalachian Power*, 812 F.2d at 902 (same); *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). Indeed, even appellants readily concede that FERC has "'exclusive authority to regulate … the sale at wholesale of electric energy in interstate commerce,'" Md. Br. 14, including "exclusive authority over wholesale ratemaking," CPV Br. 30.

All of appellants' talk about the presumption against preemption is therefore beside the point. As the District Court correctly held, this is not an area in which Congress has left some ambiguity as to the respective roles of the federal and state governments. "Regulating in the field of wholesale price-setting is occupied by FERC." JA309 n.60; *see also 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, 108 (2000) (presumption against preemption "is not triggered when the State regulates in an area where there has been a history of significant federal presence"). The Supreme Court found states without any authority in 1927, and federal control has been the norm ever since Congress enacted the FPA. In short, it is "well-accepted" 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. JA281.

Appellants nonetheless insist that the FPA preserves some complementary role for states in determining how generators should be compensated for wholesale sales, and that FERC must "accommodate" any state interference with its exclusive authority so long as "the State's asserted objectives" have something to do with generation. CPV Br. 18, 22-23. 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) (emphasis added). That is so even if the state law purports to be "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.

To be sure, the FPA also acknowledges and largely preserves "traditional state authority to regulate the development, location, and type of power plants." JA284; *see also* 16 U.S.C. § 824(b)(2). But as the District Court explained, "Maryland cannot secure the development of a new power plant by regulating in such a manner as to intrude into the federal field of wholesale electric energy and capacity price-setting." JA284. 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); *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 which CPV attempts to derive its "federal accommodation" argument. CPV Br.

20-23. *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). That is, 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.

Whatever "federal accommodation" of state interests may be appropriate when a statute explicitly preserves *exclusive state* authority, *id.* at 518, the FPA contemplates no 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 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. Maryland itself recognized as much in its 2007 report to the legislature, which acknowledged that dispensing with vertical integration meant that "electricity previously subject to traditional rate-of-return regulation … would now be purchased … in the *federally regulated* wholesale electricity market." P.391 at 10 (emphasis added).

In short, although states retain significant authority under the FPA over the siting and construction of power plants, "the scope of Maryland's power is necessarily limited by FERC's exclusive authority to set wholesale energy and capacity prices." JA248. 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. Miss. 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 Generation Order Intrudes Upon FERC's Exclusive Authority to Regulate Wholesale Capacity Rates.

The Order clearly intrudes upon FERC's exclusive authority under the FPA. It is a direct attempt by Maryland to displace FERC's authority over what rates may be "made, demanded, or received … for or in connection with" interstate wholesale sales. 16 U.S.C. § 824d(a). By its terms, the Pricing Contract requires CPV to sell energy and capacity into the PJM market, and then requires local distribution companies to compensate CPV for each unit of energy and capacity it sells at a price that, as Maryland concedes, "differ[s] from the PJM market price[]." Md. Br. 22. That price differential is no accident—the whole point of the Order is to incentivize new generation by guaranteeing a more stable price than the wholesale market provides. *See* 3/7/13p.m. Tr. 21:5-21 (CPV did not even look at PJM market clearing price in making bid). Maryland may do many things to promote new generation, but it may not do that.

The theory behind the Order is straightforward. Maryland wanted to encourage the construction of new, in-state generating facilities. Maryland did not want to build these facilities itself, and it specifically rejected the alternative of reestablishing a vertically integrated *intrastate* market in which new generators could sell electricity at state-set rates, without relying on the interstate market at all. Instead, Maryland wanted to incentivize *private* companies to build new generating facilities and sell their electricity into *the interstate wholesale market*, which, in Maryland's view, might inure to the benefit of its residents. Thus, to be selected, CPV had to agree not just to build a new generating facility, but also to bid its energy and capacity into the PJM market—and to do so at a price that would clear the auction each year. In return, CPV would receive a state-mandated Pricing Contract that guarantees it a fixed price for whatever energy and capacity it sells into the PJM market.

Of course, any generator that clears the PJM market already is entitled to the market clearing price, so the Pricing Contract works only if it guarantees 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 Pricing Contract guarantees CPV receipt of a dollar-per-megawatt-hour or dollar-per-megawatt-day rate, determined by the state's own regulatory process, for each unit of electricity or capacity that CPV sells into the PJM market for 20 years—regardless of whether the PJM market price is higher or lower than that state-set rate. *See* P.2, Attachment 8 at 18, 19, 32, 33 (establishing compensation scheme based on difference between contract price and PJM clearing price).

As the District Court readily concluded, this is rate-setting at its most blatant. Maryland has determined that new generators would be better off with rates fixed for a 20-year period, and has established a regulatory scheme that will guarantee CPV those rates. The problem is that Maryland 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. *See* 3/7/13p.m. Tr. 4:16-5:3 (CPV's sales into PJM are "FERC jurisdictional sales at wholesale"); 3/5/13a.m. Tr. 54:10-55:9. Maryland's attempt to "fix[] the monetary value of the energy and capacity generated by CPV's facility and actually sold by CPV into the PJM Markets" is plainly preempted by federal law. JA292; *see also Hanna*, 2013 WL 5603896, at *35 (concluding that similar New Jersey regime impermissibly "supplants" FERC's exclusive power over wholesale rates "by establishing the price that LCAPP generators will receive for their sales of capacity"); *cf. Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308-09 (1988) (invalidating "state law whose central purpose [wa]s to regulate matters that Congress intended FERC to regulate").

Contrary to appellants' contentions, that conclusion is not undermined in the slightest by the fact that payments will be made by the EDCs instead of by 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 receives for its wholesale sales, and a payment received by a generator from a third party for its wholesale sales is every bit as much a payment "received for" those sales as a payment received from PJM. Indeed, the whole point of the Pricing Contract is to ensure that CPV "receives" payments that differ from the prices set by PJM "in connection with" its interstate wholesale sales. At a minimum, the payments provided by the contract undoubtedly are received by CPV "in connection with" its wholesale sales. *See United States v. Loney*, 219 F.3d 281, 284 (3d Cir. 2000) ("in connection with" is a term of breadth that must be construed "to capture a very wide variety of different relationships"). Nothing about the scope of FERC's broad authority under the FPA's 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 no reason to reach a different conclusion when a state seeks to interfere with the federal rate through a different one-step-removed transaction. The Order is not meaningfully distinct from a state law that simply declared that each in-state generator would receive a specific wholesale rate for its capacity sales and ordered EDCs to pay 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 rejected appellants' attempt to characterize payments under the Pricing Contract as "separate" from PJM's auction, CPV Br. 30, and that factual finding is entitled to deference. JA292-94. As the District Court correctly understood, it would make no sense to treat the two as distinct—payments under the Pricing Contract are "directly contingent on" and proportional to "CPV's clearing capacity in the [auction]" and "the quantity of energy and capacity sold" in that auction. JA299-300. 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 sales, 16 U.S.C. § 824d(a), they clearly intrude upon FERC's exclusive power under the FPA.

C. Appellants' Efforts to Avoid Field Preemption Ignore How the Pricing Contract Actually Operates.

Rather than deny that Maryland cannot establish its own wholesale rates, appellants attempt to convert the Pricing Contract into something it is not. For instance, appellants strain mightily to recast payments under the contract as payments for the construction of new power plants, rather than payments for CPV's actual wholesale sales. That argument blinks reality. Payments under the Pricing Contract are made *only if* CPV physically delivers capacity and energy to

PJM; if CPV constructed a plant but failed to clear the PJM market, it would get nothing. *See* P.2, Attachment 8 § 6.1(a) ("No Monthly Payment shall be provided during any period in which [CPV] has not been selected to provide capacity in PJM's BRA"); *id.* § 6.2(b) (EDCs "shall not pay for Capacity and Energy that PJM deems was not made available up to the performance standards required by PJM Agreements and PJM Tariff"). Indeed, Maryland made clear in its request for proposals that the Pricing Contract was designed to "provid[e] compensation to Supplier *for Capacity and Energy*." P.2 at 5 (emphasis added). Moreover, as CPV's own witness agreed, "the financial considerations taken into account" when determining the contract price went well "beyond recouping the costs for physically constructing a generation facility"; they were "the same types of financial concerns or factors … taken into account by an existing generation resource when formulating the price at which it is willing to bid into the [auction]." JA293-94; *see* Knight Dep. 262:11-17 (State was not "purchas[ing] a generating facility" as part of contract); 3/7/13a.m. Tr. 122:15-123:19, 129:5-130:7.

For largely the same reasons, appellants' efforts to characterize the Pricing Contract as a "financial," "hedge," or "swap" agreement and therefore beyond FERC's jurisdiction also fail. CPV Br. 32-33. The District Court found "credible and reliable" testimony from appellees' witness explaining that the type of agreement in the energy industry loosely known as "purely financial" is a contract that requires no performance other than ultimate payment. JA294-95. 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 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. JA295-97.

Clearly, that is not how the Order works. As Chairman Nazarian himself testified, "physical delivery of electricity was … the raison d'etre of going down this path"; "[h]aving some new fancy financial transaction would not have helped" Maryland at all. 3/5/13a.m. Tr. 17:15-22. Accordingly, "CPV only obtains the contract price for wholesale energy and capacity sales into the PJM Markets if the CPV bid clears." JA300; *see also* 3/7/13p.m. Tr. 11:11-13:3, 16:20-17:7 (pricing terms linked directly to quantity of energy sold and capacity sold into PJM); 3/4/13p.m. Tr. 98:4-8 ("If they're going to get payment under the contract, they must clear megawatts in the energy market"). And payments under the Pricing Contract are directly tied to how much electricity and capacity CPV *actually sells*. An agreement that "renders payment directly contingent upon CPV's clearing capacity," JA299, 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); *Hanna*, 2013 WL 5603896, at *35.

In the end, there is no escaping the conclusion that the Order intrudes upon FERC's exclusive jurisdiction over wholesale rates and therefore 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, there are plenty of "legitimate ways in which states may secure the development of energy generation facilities." JA310. For instance, Maryland 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. *But see* P.228; Mossburg Dep. 100:20-101:21 (state told consultants early on not to "waste a lot of time on FRR"). It could have established an agency to build state-owned power plants and sell directly to retail consumers. It could have bypassed the wholesale market altogether and returned—as Virginia did in 2007—to the vertically integrated regime many states still retain. Indeed, the PSC specifically recognized that a "return to full re-regulation" would enable Maryland to regain control over electricity rates, P.391 at 32, yet nonetheless declined to pursue that option.

But when it comes to state actions that implicate a federally preempted field, the means matter, as well as the ends. JA286 ("It is the means by which the [state] sought to secure a new generation facility that [are] field preempted, not the securing of the facility itself or the purpose for taking action to do so.”). It is not enough for Maryland 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 obvious effort to set 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, the worst of reasons, or any reason in between. *Cf. Retail Indus. Leaders Ass’n v. Fielder*, 475 F.3d 180, 198 (4th Cir. 2007) (Maryland enactment’s “noble purpose” cannot avoid its preemption). By “establish[ing] the price ultimately received by CPV for its actual physical energy and capacity sales to PJM,” JA292, Maryland plainly intruded upon the exclusive authority of FERC.

D. Appellants’ Belated Standing and Jurisdictional Arguments Are Meritless.

Maryland alternatively attempts to convince this Court that it lacks jurisdiction over this case. Maryland is mistaken. Neither its eleventh-hour standing argument nor its reprise of the “filed rate” doctrine argument rejected below can be reconciled with settled precedent or the actual claims appellees have raised.[2]

[2] Maryland suggests that it raised this standing argument below, but cites only its list of affirmative defenses in its answer. Maryland never developed the

It is well-established that a market participant has "standing to challenge the legality of the entrance of a newcomer into the business." *Assoc. of Data Processing Serv. Orgs. v. Camp,* 397 U.S. 150, 154 (1970); *see also Leaf Tobacco Exporters Ass'n v. Block*, 749 F.2d 1106, 1112 (4th Cir. 1984) ("The plaintiffs, complaining that they will face increased competition from the direct entry of the Cooperative into international tobacco markets, have alleged an injury in fact."); *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998) ("parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition"); *U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1331 (D.C. Cir. 2002) (competitors have standing to challenge "regulatory decisions that permit subsidization of some participants in a market"). CPV itself has conceded that, but for the Order and Pricing Contract, it would not have entered its new Maryland facility into the market at all, and thus would have had no effect on its would-be competitors or PJM prices. P.2, Attachment 8 § 3.2(a)-(b); 3/7/13p.m. Tr. 93:21-94:1. Appellees thus clearly have Article III standing to challenge the Order and Pricing Contract.

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argument, which explains why the District Court did not address it. Maryland's decision below was well-advised, as its "standing" argument lacks merit. And although Maryland couches its argument in Article III terms, its assertion that the Order causes "no justiciable injury" appears to be less an Article III standing argument than a prudential one. That alone is reason to reject it, as "[u]nlike constitutional standing, prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417 (5th Cir. 2012).

Maryland does not dispute that, but for the Order, CPV's new facility would not be in the PJM market. It instead insists that appellees have suffered "no justiciable injury" because FERC has declared (or will declare) the prices established by the PJM market "just and reasonable" despite CPV's entry. Md. Br. 7-8. Maryland misunderstands the import of FERC's imprimatur on a PJM price. The mere fact that FERC declares that a price charged in a market that includes CPV is "just and reasonable" does not mean that the price would have been the same if Maryland had complied with the Constitution and CPV were not in the market at all; nor does it mean that FERC would not have declared that different price "just and reasonable." Indeed, the PJM market is deliberately structured to ensure that prices will be dictated by how much electricity or capacity each entrant bids, and at what price. A new entrant thus obviously will affect those prices. *E.g.*, 3/8/13a.m. Tr. 72:5-9 ("[T]he additional capacity in this market that is brought about through the CPV deal under the Pricing Contract will slide over the supply curve in that very same year but also in subsequent years. And so the price will tend to be lower.").

Maryland nonetheless insists that FERC has taken measures through its proceedings relating to the "minimum offer price rule," or MOPR, to ensure that CPV's entry will have no effect on the PJM market. Again, Maryland is mistaken. The MOPR is designed to address *anti-competitive* behavior through "the exercise of buyer market power." *PJM Interconnection, L.L.C.*, 137 FERC ¶61,145, at ¶2 (2011). In other words, it targets large *buyers* of capacity who also *sell* capacity and seek to lower the market clearing price by bidding their capacity at a loss, using savings on the buy side to offset losses on the sale side. The MOPR seeks to prevent this anti-competitive behavior by "setting a price floor" at which a new generator may bid into the capacity market to reduce the risk of non-competitive bids suppressing the clearing price. *PJM Interconnection, L.L.C.*, 143 FERC ¶61,090, at ¶22 (2013).

Although FERC made adjustments to that rule to try to prevent CPV from making *anti-competitive* bids, its MOPR adjustments did not—and could not—ensure that CPV's entry would have no impact whatsoever on PJM prices, or would not be lower than the bids of others whose resources would have cleared had CPV not participated at all. The MOPR adjustments merely established that, for a limited time, CPV could not bid into the market at a price below a certain level. That does not change the fact that, but for the Order, CPV would not be participating in the market *at all*, and would not be displacing competitors that might have bid at higher prices, or thwarting the entry of more economic new generation resources. Indeed, the limited effect of the MOPR proceedings is underscored by Maryland's representation that CPV ultimately will be free to bid its capacity in at a zero price. It strains credulity to suggest that competitors would not be injured by such a new entrant, or that the injury is not traceable to the state action necessary to bring that new entrant into existence, or that invalidating that state action would not redress that injury. *See U.S. Telecom*, 295 F.3d at 1331; *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 605 (D.C. Cir. 2002); *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 43 (D.C. Cir. 1999); *Liquid Carbonic Indus. Corp. v. FERC*, 29 F.3d 697, 701 (D.C. Cir. 1994).

Maryland fares no better with its alternative argument that this Court lacks jurisdiction under the "filed rate" doctrine. As the District Court correctly understood in rejecting the same argument below, appellees "are not asking that this Court determine a price or rate for CPV's energy and capacity sales that would be fair." JA308. They are asking this Court to affirm the District Court's judgment that Maryland has no power to set wholesale rates in the first place. Whether the rates Maryland has set through the Pricing Contract are, in FERC's estimation, "just and reasonable" has no bearing whatsoever on whether this Court has "*jurisdiction* to decide the constitutionality of the PSC's regulatory actions and to enjoin enforcement of an unconstitutional state action." *Id.* (emphasis added).

As to that question, FERC has no "right of first refusal"; to the contrary, preemption questions routinely are decided by federal courts in the first instance. *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 349 n.19 (3d Cir. 2001); *see, e.g.*, *Schneidewind*, 485 U.S. 293; *Pub. Utils. Comm'n v. United Fuel*

Gas Co., 317 U.S. 456 (1943); *cf. Aluminum Co. of Am. v. Utils. Comm'n of State of N.C.*, 713 F.2d 1024, 1030 (4th Cir. 1983) ("abstention is inappropriate where the federal government has preempted the field" or "there is a direct, facial conflict between state and federal statutes").

In any event, the Pricing Contract is not the kind of "bilateral contract" subject to FERC approval Maryland seems to contemplate anyway. Md Br. 23; CPV Br. 34. The Pricing Contract was not a "freely negotiated contact[]" among willing counterparties. *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 537 (2008). Rather, it is a *state-mandated* contract, entered into under protest, that dictates the price of wholesale transactions. That is nothing like any mechanism FERC approves. Nor is it a mechanism that FERC has the ability to endorse, as it is *Congress*, not FERC, that has declared regulation of the wholesale market off-limits to the states. *See Kurns v. A.W. Chesterton Inc.*, 132 S. Ct. 1261, 1270 (2012) (holding state requirements field preempted notwithstanding federal regulators' contrary argument). In fact, FERC repeatedly has confirmed that a state may *not* set wholesale electricity prices.[3] Because that is precisely what the Generation Order does, it is preempted.

[3] *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*

II. The Generation Order Is Preempted Because It Conflicts With Federal Law.

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

The reliability pricing model underlying PJM's capacity auction is designed to "provide[] long-term price signals to attract needed investment in the PJM region through a competitive auction process" on a three-year forward basis. *PJM Interconnection, LLC*, 132 FERC ¶61,173, at ¶61,870 (2010). 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.

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).

The auction does so by ensuring that new and existing generators "receive the same price so that the 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 results in "more efficient sellers and lower prices." *PJM*, 117 FERC ¶61,331, at ¶141. By operating this market on a forward basis, moreover, PJM seeks to provide "long-term price signals" that will "attract needed investment" in capacity generation. *PJM*, 132 FERC ¶61,173, at ¶61,870. Higher market clearing prices signal room for new (or more efficient existing) generation. And when "price separation" among delivery areas occurs—*i.e.*, when prices are higher in more congested areas, due to constraints on the amount of capacity that can be imported from outside the area—it signals 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 Maryland—to extend the NEPA and lock in prices for longer. And FERC repeatedly has declined to do so. *E.g.*, *PJM*, 126 FERC ¶61,275, at ¶149; *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.* ¶150. 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 Generation Order's Guaranteed Pricing for New Generators Squarely Conflicts with FERC's Regulatory Regime.

The Order is a direct assault on this carefully constructed federal regime. Not only does the Order guarantee CPV a price different from the one established by the FERC-approved PJM market, but it guarantees CPV fixed capacity prices for *20 years*. Worse still, it does so for the *express purpose* of overriding federal policy judgments with which Maryland disagrees. Maryland has made no secret of that. In its view, "there are a million things that are wrong with the RPM," including PJM's refusal to expand the NEPA to encourage new generation. 3/5/13a.m. Tr. 110:24-111:22, 112:24-113:7; *see also id.* 12:11-15 ("market structures within PJM will never provide the signals or the financial support to build power plants in Maryland"). Indeed, the Chairman of the PSC declared the PJM market's price signals "useless." *Id.* 116:25-117:15. The state's solution was not to retreat from PJM, but rather to attempt to impose its own preference—for a 20-year investment horizon, and for a new SWMAAC plant in 2015 rather than at some future point—on FERC's regulatory regime.

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: Maryland identified a federal policy with which it disagreed, asked FERC to change that policy, and when FERC refused to do so, adopted its own regulatory order to override FERC's decision.

Maryland's decision to do so does not "merely impact or border FERC-regulated matters," CPV Br. 21; it unapologetically displaces FERC's preferred rates and terms. 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. And yet the express purpose of the Order was to use a 20-year price guarantee to skew the market dramatically in favor of new resources—precisely what FERC has sought to prevent. *See id.* ¶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 Maryland'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* 3/8/13a.m. Tr. 79:5-25. For instance, the Order deters other market participants from investing in new resources without similar state guarantees. CPV's incentive to bid low in the PJM market, regardless of its costs, produces "diminished expectations to other potential developers for what [revenues] they would get from the capacity market"; this in turn thwarts investment in plants that "would have been more efficient" and consistent with "the non-discriminatory criteria … [and] policy goals of FERC." 3/8/13a.m. Tr. 72:20-22, 75:1-7. Those adverse effects are not theoretical: Maryland's Long Term Electricity Report and witnesses attested that CPV's entry—made possible only by the Order—displaced other economic entry into the market. *See* 3/11/13p.m. Tr. 151:1-152:3; D.224 at L-2-3; 3/8/13a.m. Tr. 74:10-75:7.

By directly displacing FERC's market-driven price signals with state choices and criteria about new generation, moreover, the Order "creates uncertainty in the marketplace, in the market structure, and regulatory risk that [other participants] have to consider for any future investment." 3/4/13a.m. Tr. 47:3-17. That uncertainty will extend to "other states," where the possibility of similar programs will produce still-lower prices and discourage construction without state contracts.

3/8/13a.m. Tr. 77:22-78:17. In short, by replacing FERC's considered judgment with its own policy preferences, Maryland 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).

Contrary to appellants' suggestions, FERC has neither reconciled this conflict nor approved of Maryland's incursion on its exclusive authority. FERC has never considered, let alone endorsed as consistent with federal law, a state program that guarantees participants in the PJM market pricing terms different from those set by PJM and approved by FERC. And as the District Court correctly concluded, "FERC has not passed judgment, one way or another, on the reasonableness or fairness of the terms of [the Pricing Contract]," or on "whether the [Pricing Contract] is a 'FERC-jurisdictional' contract." JA306. The MOPR proceedings upon which Maryland relies in contending otherwise involve entirely distinct questions about the price at which a new generator may bid *into* PJM, not the price that a new generator may "*receive* … for or in connection with" its wholesale sales, 16 U.S.C. § 824d(a) (emphasis added). *See supra* pp. 29-33. Those orders explicitly disclaim 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. Likewise, they explicitly disclaim any consideration of NEPA-related issues, even though CPV insisted that "the MOPR and the NEPA were inextricably linked." *Id.* ¶141.

Indeed, if anything, the MOPR orders only underscore the Generation Order's field and conflict preemption problems. If Maryland's regulatory actions really affected FERC's regulatory scheme only at the "border," CPV Br. 21, 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 Order's distorting effects on FERC's carefully constructed market design. While those revisions have done nothing to resolve the fundamental conflict between the Order and FERC's policies, the very fact that FERC has felt the need to make them is proof enough of the Order's incursion on FERC's regulatory power.

Again, this does not mean that Maryland is powerless to encourage new generation or pursue energy policy objectives. *See supra* pp.36-37. What Maryland may not do is adopt regulations consciously designed to render the wholesale market more to Maryland's liking. FERC has considered and rejected Maryland's arguments in favor of using long-term pricing guarantees to incentivize new generation. Maryland does not have the power to do so in FERC's stead.

III. The Generation Order Violates The Dormant Commerce Clause By Discriminating Against Interstate Commerce.

The Order 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 Order 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 District Court correctly sided with appellees on virtually every component of their dormant Commerce Clause argument, yet erred in its ultimate finding that the Order is non-discriminatory.[4]

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 "'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550

[4] Because appellees sought the same relief on their dormant Commerce Clause argument as their preemption arguments, this Court may consider the dormant Commerce Clause issue as an alternative ground for affirmance. *See Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143, 155-56 (4th Cir. 2012) (dismissing cross-appeal as "not properly taken" and "unnecessary, as it merely seeks affirmance of the district court's judgment on an alternate ground").

U.S. 330, 338 (2007); *accord McBurney v. Young*, 667 F.3d 454, 468 (4th Cir. 2012). Requirements that economic activity take place in-state, while excluding out-of-state sources of the same activity, are routinely invalidated under the dormant Commerce Clause. *E.g.*, *Toomer v. Witsell*, 334 U.S. 385 (1948) (striking down locational restriction in South Carolina statute requiring shrimp fishermen to unload, pack, and stamp shrimp before export); *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. City*, 48 F.3d 701 (3d Cir. 1995).

Precisely because the wholesale electricity market traditionally has been an interstate one, efforts by states to regulate wholesale transactions have long been viewed with particular suspicion under the dormant Commerce Clause. Indeed, when the Supreme Court first considered the question, it found 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.[5]

[5] 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 course, there is nothing necessarily problematic about a state seeking to favor in-state projects. It makes sense, for instance, in a vertically integrated market, where the bulk of energy is both generated and distributed in-state. *Cf. Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 297 (1997) (vertically integrated utilities have obligation "to serve all members of the public"). It likewise does not implicate the dormant Commerce Clause when a state acts as a market participant, and buys and sells energy *itself*. *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 private-party conduct).

B. The Generation Order Discriminates Against Out-of-State Projects.

The District Court correctly concluded that Maryland is not acting as a market participant here; to the contrary, the Order directs *private parties* (the EDCs) to enter into a contract that provides long-term pricing guarantees to CPV. JA328-29. And the court correctly recognized that CPV is engaged in wholly *interstate* commerce—indeed, receipt of payments under the Pricing Contract is explicitly conditioned on actual sales of capacity and energy into the interstate wholesale market. JA320. The court also correctly recognized that this is not a situation where a state is merely funding public utility infrastructure projects through taxes on its citizens; the subsidies here are not funded out of general revenue, and the projects are not traditional public utilities. *Cf. W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994). Nonetheless, the court held that the Order does not violate the dormant Commerce Clause because it does not discriminate against interstate commerce at all.

That puzzling conclusion is impossible to reconcile with the PSC's actions. By its terms, the PSC's request for proposals imposed an express locational requirement on eligibility for a Pricing Contract: the new generator must be "located inside the Southwest MAAC Locational Deliverability Area," which consists solely of central Maryland and D.C. P.2 at ¶2.1. In other words, it plainly rendered almost all out-of-state market participants in the interstate wholesale market ineligible for the preferential pricing terms Maryland was forcing the EDCs to offer.

As the District Court acknowledged, that the SWMACC region includes D.C. makes no difference. A regulation is no less violative of the dormant Commerce Clause if it discriminates against all but one—as opposed to all—of the other states. *See New Energy Co. v. Limbach*, 486 U.S. 269, 274, 280 (1988) (making tax credit available to some out-of-state manufacturers does not make credit nondiscriminatory). Moreover, the court correctly found that D.C. was an unrealistic, if not impossible, location for a qualifying facility—a factual finding entitled to deference. *See* JA333-34; 3/7/13a.m. Tr. 95:6-18; Nazarian Dep. 288:19-289:5. In fact, as the court noted, bidders were asked to identify "benefits *to the State of Maryland*," which were factored into the overall score of proposals. P.2, at ¶¶6.1-6.5.3 (emphasis added). Likewise, the District Court correctly recognized that the SWMAAC's exclusion of other parts of Maryland had no bearing on the analysis. *See Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 n.4 (1951) (striking down Madison pasteurization ordinance and finding it "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce").

Nonetheless, the court seemed to think that this blatant discrimination against out-of-state participants was not enough to violate the dormant Commerce Clause because it "does not erect any *barriers* to the sale or transmission of electric energy at wholesale." JA337 (emphasis added). But it is well-settled that a state measure need not erect total "barriers" to out-of-state commerce in order to discriminate against interstate commerce. *E.g.*, *Camps Newfound/Owatonna v. Town of Harrison, Me.*, 520 U.S. 564, 578 (1997) (discrimination need not take the form of a "total prohibition" of interstate commerce). To the contrary, even indirect tilting of the economic playing field against interstate commerce is impermissibly discriminatory. *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). Here, Maryland rendered out-of-state interests wholly ineligible for "a competitive advantage" in the interstate market. JA337. That is discrimination, pure and simple.

Since the Order is facially discriminatory, appellees need not identify specific harm to out-of-state projects caused by this discrimination. Nonetheless, there is nothing hypothetical about that harm: Out-of-state producers in Pennsylvania, Delaware, and New Jersey were ineligible for a Pricing Contract, whether or not they could meet the state's purported needs. 3/5/13a.m. Tr. 30:10-14; 3/14/13a.m. Tr. 71:8-20 (PPL unable to participate in RFP because PPL's "readily available sites were in Pennsylvania" and PPL "did not have generation assets facility or location that was in SWMAAC"). Moreover, as the trial evidence showed, the Order did not merely "add additional supply" to the PJM market, but rather did so at the expense of *displacing* out-of-state supply that otherwise likely would have cleared the PJM market. 3/11/13p.m. Tr. 151:1-152:3; D.224 at L-2-3; 3/8/13a.m. Tr. 74:10-75:7. That is precisely the kind of discrimination against out-of-state interests that the dormant Commerce Clause is intended to prevent.[6]

[6] 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).

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

Because the Order directly burdens interstate commerce by discriminating against out-of-state interests, it triggers a "virtually *per se* rule of invalidity." *City of Phila.*, 437 U.S. at 624. Indeed, the Supreme Court has described the standard as so "heavy" that "'facial discrimination itself may be a fatal defect.'" *Or. Waste Sys., v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 100-01 (1994). Only if Maryland can prove that the discriminatory law "is demonstrably justified by a valid factor unrelated to economic protectionism … and that there are no 'nondiscriminatory alternatives adequate to preserve the local interests'" can it be upheld. *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996).

Maryland did not come close to making that showing. Although it asserted as its "valid" interest "looming" reliability problems that threatened power outages, P.44 at 1, the evidence at trial did not substantiate these purported problems. Whatever reliability concerns may have existed in 2007 and 2008, when the state first began considering re-regulation options, they had dramatically diminished by 2011, when the actions at issue here took place. By then, a major new transmission project had been completed ahead of schedule, and SWMAAC had experienced a substantial reduction in its forecasted electricity demand. And uncontested record evidence showed that, for the last several years, SWMAAC has had a capacity *surplus* and *excess* ability to import power. Even the PSC's staff and consultants affirmed that any earlier reliability concerns no longer remained. *E.g.,* P.42.

Nor did the potential that PJM auction prices in SWMAAC could differ from those in other LDAs justify Maryland's locational restriction. Such "price separation" had not occurred since 2008. 3/6/13p.m. Tr. 111:22-113:13. The evidence showed, moreover, that SWMAAC has ample ability to increase the capacity imported from outside SWMAAC. 3/6/13p.m. Tr. 108:25-111:17; 3/7/13a.m. Tr. 58:21-59:7. Appellants thus readily acknowledged that a new plant in Pennsylvania could have been "as helpful or nearly as helpful" as a plant inside SWMAAC. 3/5/13a.m. Tr. 39:22-25.

In any event, price separation merely indicates that meeting SWMAAC's reliability needs would require, in addition to lower-cost capacity imports, higher-cost capacity resources inside the region, thus yielding a higher market clearing price. This reflection of the relative value of distantly sourced resources is at most an economic issue already reflected in the price differentials generated by the interstate wholesale market—not a justification for discrimination against interstate commerce. Accordingly, even if Maryland did have legitimate reliability concerns, it did not show that it lacked non-discriminatory alternatives for addressing those concerns.

In the end, Maryland's motive for discriminating against out-of-state interests is clear: Maryland sought to bring economic benefits to Maryland. The PSC acknowledged as much in its reports, which confirmed that it evaluated re-regulation options based on their expected "economic value added" to Maryland ratepayers, and that obtaining "the best prices for Maryland ratepayers" was "no less important" than ensuring reliability. P.391 at 29; *see also* P.582 at 2 (vowing to investigate "whether and on what terms to build additional generation *for economic reasons*"); JA334 (proposals had "to include a '[d]escription of the … direct economic *benefits to Maryland ratepayers*"; "2.5% of the non-price score consisted of the '*benefits to the State of Maryland*'"). The consultant who drafted the PSC's request for proposals likewise acknowledged the absence of imminent reliability concerns, yet recommended soliciting new plants anyway because of the potential economic benefits to Maryland. P.203 at BP0004815; 3/11/13a.m. Tr. 70:22-73:10. (These comments were conspicuously removed from the PSC's final request.)

Of course, 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. 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 Order 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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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a), I certify that this brief complies with the length limitations set forth in Fed. Rule App. Proc. 32(a)(7) because it contains 13,900 words, as counted by Microsoft Word, excluding the items that may be excluded under Federal Rule 32(a)(7)(B)(iii).

Dated: March 10, 2014

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Candice Chiu
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