

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT  
Nos. 13-4330 & 13-4501 (consolidated)**

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**PPL ENERGYPLUS, LLC, *et al.*,**

**v.**

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

**v.**

**CPV POWER DEVELOPMENT, INC.; HESS NEWARK, LLC  
CPV POWER DEVELOPMENT, INC.,  
Appellant in No. 13-4330  
LEE A. SOLOMON, *et al.*,  
Appellants in No. 13-4501  
HESS NEWARK, LLC,  
Intervenor in No. 13-4330**

**CERTIFICATION OF ACCURACY**

On behalf of all parties to the proceedings in Case Nos. 13-4330 and 13-4501, undersigned Liaison Counsel hereby certifies that the attached is a true and accurate transcript of the oral argument held before this Court on March 27, 2014. Three copies of the transcript have also been sent to the Court via overnight delivery service.

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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT  
NO. 13-4330/13-4501

PPL ENERGYPLUS, LLC; PPL BRUNNER ISLAND, LLC;  
PPL HOLTWOOD, LLC; PPL MARTINS CREEK, LLC; et al.

v.

LEE A. SOLOMON, in his official capacity as  
President of the New Jersey Board of Public  
Utilities; JEANNE M. FOX, in her official  
capacity as Commissioner of the New Jersey  
Board of Public Utilities; etc.

CPV POWER DEVELOPMENT, INC.  
Appellant in 13-4330

\*HESS NEWARK, LLC, Intervenor in USCA  
\*(Pursuant to Courts order entered  
November 14, 2013)

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United States District Court.

BEFORE:

THE HONORABLE JULIO M. FUENTES

THE HONORABLE PATTY SHWARTZ

THE HONORABLE LEE H. ROSENTHAL

THIRD CIRCUIT, 3/27/14

1 (Caption continues:)

2 PPL ENERGYPLUS, LLC; PPL BRUNNER ISLAND, LLC;  
3 PPL HOLTWOOD, LLC; PPL MARTINS CREEK, LLC; et al.

4 v.

5 LEE A. SOLOMON, in his official capacity as  
6 President of the New Jersey Board of Public  
Utilities; JEANNE M. FOX., etc., et al.

7 CPV POWER DEVELOPMENT, INC.; HESS NEWARK, LLC.

8 LEE A. SOLOMON,  
9 JEANNE M. FOX,  
10 JOSEPH FIORDALISO,  
NICHOLAS ASSELTA,  
Appellants in 13-4501

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1 THE COURT: PPL Energy versus Solomon.  
2 Mr. Engel.

3 MR. ENGEL: Thank you, your Honor. My  
4 name is Richard Engel. May it please the Court, I  
5 am a Deputy New Jersey Attorney General  
6 representing the president and the members of the  
7 New Jersey Board of Public Utilities.

8 Your Honors, we believe this case,  
9 while it has a complex set of facts, is actually  
10 simple in the way it could be legally resolved.  
11 What New Jersey did here was to encourage the  
12 building of new power plants and it did so by  
13 setting up a financial mechanism that would allow  
14 those plants to be built within the mechanism of  
15 the Federal Power Act, within the context of the  
16 Federal Power Act. And thus it's our belief that  
17 this law is not preempted by the supremacy clause  
18 and therefore the district court decision should be  
19 reversed and the injunction lifted.

20 My colleagues will discuss in more  
21 detail the preemption arguments and Ms. Kindall  
22 will discuss the point of view of the other states,  
23 and I would like to reserve three minutes, your  
24 Honor, two for me and one for Mr. Elgarten at the

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1 end of the argument beyond the five minutes I have  
2 and three the others have.

3           But what I would like to do is discuss  
4 for you I believe what's important and that's the  
5 context that the law was enacted under. New  
6 Jersey's law was enacted to solve a very important  
7 problem, and that was that the -- and one that this  
8 court has long recognized is within the province of  
9 the states, and that is to provide safe, reliable  
10 and more recently environmentally friendly power to  
11 the citizens of New Jersey.

12           And so what New Jersey did was get  
13 together, the legislature in 2010, and was being  
14 told, the legislature and the Board of Public  
15 Utilities were being told that there was an  
16 imminent concern that there was going to be a lack  
17 of power in New Jersey that needed to be somehow  
18 resolved, and this is by the actual plaintiffs in  
19 this case, came to the Board of Public Utilities  
20 and said we need to do something to resolve this  
21 imminent power problem that's coming up.

22           And so one of the ways that they were  
23 going to do this was to build a new transmission  
24 line, for example, that they thought would resolve

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1 the problem which, by the way, was going to be  
2 fully guaranteed, funded by the rate payers of New  
3 Jersey and a profit for the utility. So this  
4 mechanism of giving people a profit and funding by  
5 the rate payers is not unusual and in fact is often  
6 used.

7           So New Jersey is sitting there, the  
8 legislature is saying we've got a big problem, we  
9 might be faced with rolling blackouts or brownouts,  
10 et cetera, what do we do to solve this problem?  
11 And they came up with a mechanism that sincerely  
12 was believed to be within the context of what FERC  
13 allows, and that is they adopted this financial  
14 mechanism called the SOCA, S-O-C-A, also sometimes  
15 known as a contract for differences, that would  
16 allow the most efficient method of getting new  
17 power plants that were useful to be built as  
18 quickly as possible.

19           And so what New Jersey's legislature  
20 realized -- that this could only be done as part of  
21 this method -- was with a stable source of revenue  
22 for these people. No New Jersey power plants were  
23 being built. Clearly the mechanism that had been  
24 set up by the FERC context was not working.

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1 THE COURT: How does this SOCA help  
2 the generators or the power plants? How does it  
3 help New Jersey build new plants? Maybe you can  
4 tell me how that works.

5 MR. ENGEL: Sure, your Honor. What  
6 happens is in addition to the rate that they will  
7 receive by selling into the PJM market they will  
8 get a subsidy from the utilities ultimately paid  
9 for by the rate payers.

10 THE COURT: But that was contingent on  
11 the auction price, wasn't it?

12 MR. ENGEL: Correct. I mean they have  
13 to bid into the auction, just as every other new  
14 generator.

15 THE COURT: Right.

16 MR. ENGEL: Clear the auction, and  
17 then if that auction price wasn't sufficient to  
18 guarantee them enough revenue to build their power  
19 plant then they would get a separate subsidy from  
20 the utilities, ultimately from the rate payers.

21 THE COURT: You said that you're not  
22 going to address preemption but it seems like this  
23 goes to the heart of preemption.

24 MR. ENGEL: Well, it does, your Honor.

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1 I'm trying to set it in context because my  
2 colleagues will go into it in a little more detail.

3 THE COURT: Okay.

4 MR. ENGEL: But yes, it does.

5 THE COURT: Fair enough.

6 MR. ENGEL: And I'll get to that in a  
7 second, your Honor.

8 THE COURT: Your time goes very  
9 quickly here.

10 MR. ENGEL: No, I understand, your  
11 Honor. I understand. So again, if you want me to  
12 sit down I will, but I just wanted to follow up on  
13 one more point, and that is that the generators  
14 that were selected under the rules here followed  
15 the rules. They did everything that the FERC  
16 allowed them to do. And therefore we don't  
17 understand why all of a sudden in their amicus  
18 brief FERC is changing its position when their own  
19 MOPR orders have allowed the exact mechanism that's  
20 being used here.

21 THE COURT: Okay. Mr. Engel, thank  
22 you. Can I ask you one thing, that problem that  
23 you were alluding to, the reason for which this  
24 whole thing was set up, that has abated

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1 considerably, hasn't it? In other words, the fears  
2 that New Jersey had about brownouts and blackouts  
3 and so forth, that doesn't really exist any more,  
4 does it?

5 MR. ENGEL: I wouldn't say it doesn't  
6 exist, your Honor. I would say -- I guess we were  
7 -- I don't know if we can use the term lucky that  
8 the economy had problems and therefore that there  
9 wasn't as much demand for power as they originally  
10 thought, but I believe that there still is a very  
11 great concern out there in the Board of Public  
12 Utilities that if we don't do something there will  
13 still be problems.

14 THE COURT: Okay. Thank you.

15 MR. ENGEL: Thank you, your Honor.

16 THE COURT: Mr. Elgarten.

17 MR. ELGARTEN: Good morning. I  
18 represent CPV Power.

19 THE COURT: Mr. Elgarten, can I ask  
20 you to begin by addressing the response to, what I  
21 understand to be part of the response to your  
22 argument, or the argument that was just  
23 foreshadowed about the FERC 2011 change to the MOPR  
24 rules. The response is in part, as I understand

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1 it, that that addressed the, not the price that the  
2 -- it addressed one, one end of the equation. It  
3 did not deal with the -- it dealt with revenues, it  
4 didn't deal with the price that was offered.

5 MR. ELGARTEN: No. It dealt with the  
6 price that was offered in the capacity auction, so  
7 it --

8 THE COURT: No, I understand that.  
9 But that, the argument that the subsidy that the  
10 New Jersey statute provides deals with the price  
11 that comes out, the revenues. What was received.

12 MR. ELGARTEN: Yes.

13 THE COURT: The change to the MOPR  
14 rules dealt with the --

15 MR. ELGARTEN: Price that goes in.

16 THE COURT: -- amounts bid and the  
17 different ends.

18 MR. ELGARTEN: Yes. So --

19 THE COURT: And the argument is that,  
20 as I understand it, that by changing the price  
21 received, by adding to the price received you've  
22 done something very different from what FERC  
23 approved in 2001.

24 MR. ELGARTEN: Well, that's not

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1 actually the argument that we understand is being  
2 made. The argument that's being made or was  
3 suggested by the district judge, but I note that  
4 appellees actually withdrew this at the trial court  
5 level, was that there's some effect, yes, they did,  
6 and we cited the provisions and they've receded  
7 from it in their briefs, that the effect of this,  
8 this subsidy, this payment in addition to what is  
9 bid into the auction somehow has a negative effect  
10 on the auction itself.

11           If that is the conflict, well that is  
12 the conflict that was certainly resolved by FERC's  
13 rule changes, if they felt there was a conflict, by  
14 FERC's rule changes that determined that the  
15 participation of the SOCA supported generators in  
16 the process was not disruptive.

17           FERC clearly held, clearly and  
18 explicitly held that it is not disruptive. The  
19 original rules, frankly, had given a blanket  
20 exemption for all such support. They've changed  
21 the rules. The NJ BPU decision covers this in  
22 great detail. But the conclusion of FERC in that  
23 circumstance was that there was no negative effect.

24           Indeed, it's to the contrary, that the

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1 participation of a SOCA supported generator is a  
2 competitive resource and it's a competitive  
3 resource that we bid properly into the auction and  
4 cleared the auction and then went forward to start  
5 the construction on the power plant.

6 THE COURT: But there's no question  
7 that the SOCA, the payments paid through SOCA to  
8 the generators are contingent on the auction. I  
9 mean isn't that accurate?

10 MR. ELGARTEN: It is absolutely  
11 contingent because it would be darn foolish, excuse  
12 me, darn foolish for the state to give a subsidy  
13 that was beyond what the -- if they were able to  
14 recover the resources in the market. But the  
15 requirement to bid in the auction was always to bid  
16 in the auction at whatever rules that FERC makes  
17 for control of that auction.

18 THE COURT: Well, whether the  
19 generators bid at a minimum, minimum, or they bid  
20 competitively, it doesn't matter because they're  
21 going to be guaranteed the difference through SOCA  
22 anyway.

23 MR. ELGARTEN: They are. So --

24 THE COURT: But my point is doesn't

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1 that manipulate the auction?

2 MR. ELGARTEN: It doesn't manipulate

3 --

4 THE COURT: Doesn't that have a  
5 negative effect on the auction? I mean it's  
6 supposed to be a level playing field, but when one  
7 player is incentivized to bid the minimum because  
8 it has nothing to lose, doesn't that affect the  
9 auction?

10 MR. ELGARTEN: No, because FERC  
11 determined that it didn't.

12 THE COURT: I didn't think you'd agree  
13 with me but I thought I would ask you any way.

14 MR. ELGARTEN: No.

15 THE COURT: What about the fact that  
16 it's the rate received though? I mean it's still  
17 the rate received, whether it impacts the auction  
18 or not.

19 THE COURT: Right. And that was my  
20 point.

21 THE COURT: How does it not? That's  
22 what I thought your question was. Why was the  
23 district court wrong in saying it was a rate  
24 received?

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1 MR. ELGARTEN: It is not a rate  
2 received, and that goes to the field preemption.  
3 It's not a rate received because FERC's exclusive  
4 jurisdiction over rates and charges, and this is a  
5 fine point but it's an important point, FERC's  
6 exclusive jurisdiction over rates and charges is  
7 limited by Section 201 of the FPA. That is  
8 literally for the payment of the exchange of the  
9 sale of capacity. This is not for that. This is  
10 an additional supplemental payment above and beyond  
11 the actual sale and capacity.

12 It is covered by the FPA, but it is  
13 not covered by the exclusive jurisdiction  
14 provisions of the FPA. 205 and 206 give FERC  
15 nonexclusive jurisdiction over everything in the  
16 universe that affects rates, but that's not  
17 exclusive.

18 THE COURT: How is it limited?

19 MR. ELGARTEN: How is which limited?

20 THE COURT: The jurisdiction over the  
21 wholesale rates in auction format.

22 MR. ELGARTEN: Because 201 defines the  
23 exclusive jurisdiction of FERC and it is a finely  
24 defined jurisdiction that relates to the period of

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1 Attleboro. Yes.

2 THE COURT: So is the result of  
3 following your argument that we might find conflict  
4 preemption but we could not find field preemption?

5 MR. ELGARTEN: Well, my first argument  
6 is you can't find either preemption. So the first  
7 one you can't find because the "in connection with"  
8 idea or the "affecting rates" is not part of the  
9 exclusive jurisdiction of FERC until FERC takes  
10 that jurisdiction in hand and exercises that  
11 jurisdiction and then you have a review proceeding.  
12 So that's one reason you can't find field  
13 preemption.

14 You can't find conflict preemption  
15 because, two reasons, the standards the Supreme  
16 Court has set for finding it is when the  
17 accommodation of a state action, in its proper  
18 sphere, building a power plant, and they've been  
19 subsidizing and building power plants for years,  
20 when it affects FERC jurisdiction, you have to find  
21 that the effect is so, and the words are  
22 "disruptive and extensive" then it can't be  
23 accommodated.

24 Here we know that could not have

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1 happened because FERC readily accommodated it and  
2 determined that there is no conflict with the  
3 auction. Now of course it affects -- this is Judge  
4 Fuentes' question, it of course affects the market.  
5 That's the whole reason you build power plants, is  
6 so you have more capacity. And as they said in the  
7 CPUC case, the Connecticut case, everything you do  
8 to either build or not build is going to affect the  
9 market.

10 But does it affect it in a bad way  
11 that is disruptive of the auction? And FERC ruled  
12 on that and this court affirmed in NJ BPU.

13 THE COURT: Is it then your position  
14 that FERC's authority over interstate wholesale  
15 capacity rates is limited?

16 MR. ELGARTEN: No. FERC's authority  
17 is different from its exclusive jurisdiction. The  
18 exclusive jurisdiction is the field in which it  
19 preempts states from action.

20 THE COURT: All right. But its  
21 authority then is not limited.

22 MR. ELGARTEN: Their authority is very  
23 -- well, it is limited but it is a broad authority  
24 to take actions to protect its market under

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1 Sections 205 and 206, the in connection with and  
2 the effects.

3 THE COURT: Maybe I misunderstood you.  
4 Just to clarify, so you're saying it's jurisdiction  
5 over interstate wholesale rates --

6 MR. ELGARTEN: Absolutely.

7 THE COURT: -- is limited.

8 MR. ELGARTEN: That is a complete  
9 plenary authority over those rates which are  
10 preemptive of state authority and that is the  
11 Attleboro decision. You can't regulate, you can't  
12 dictate a rate.

13 THE COURT: That seems to cut against  
14 what the Federal Power Act says about FERC's  
15 jurisdiction.

16 MR. ELGARTEN: It is actually not, and  
17 this is why I thought it was important to clarify  
18 the point. The Federal Power Act in Section 201 is  
19 the jurisdictional provision, A and B of 201, it's  
20 824. And that is exclusive. And we know that  
21 because it is Attleboro. That's an old Supreme  
22 Court case. Says you can't regulate directly that  
23 sale.

24 And if the state dictates the rates it

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1 is clearly violating Attleboro and the law and  
2 invading FERC jurisdiction. But Congress in its  
3 wisdom, and in its great wisdom, gave FERC a  
4 broader remedial authority and regulatory authority  
5 than just that exclusive jurisdiction. So their  
6 remedial authority extends to everything that  
7 affects, affects rates, if it is urgent and  
8 important.

9 But when it exercises that authority  
10 it doesn't preempt the universe. It has to engage  
11 in a regulatory action with notice and a hearing  
12 and people appear, and then those rulings which are  
13 in the form of a tariff, an exercise of remedial  
14 authority which is discretionary, have to appear in  
15 a rule, then we take it up to the court of appeals.  
16 And within that sphere --

17 THE COURT: We're going to have to  
18 finish up, Mr. Elgarten.

19 MR. ELGARTEN: -- it's regulated.  
20 Okay.

21 THE COURT: Your time ran quite a bit  
22 ago. So we'll have to go on to the next counsel.  
23 Mr. Zuckerman.

24 MR. ELGARTEN: Yes.

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1 THE COURT: Thank you, Mr. Elgarten.

2 MR. ZUCKERMAN: May it please the  
3 Court, I'm Richard Zuckerman. I represent Hess  
4 Newark, which is building a 625 megawatt power  
5 plant in Newark, New Jersey and has entered into  
6 SOCAs with each of the four electric distribution  
7 companies in New Jersey.

8 The LCAPP Act was drafted with the  
9 field between, the boundary between the state field  
10 and the federal field precisely in mind. What the  
11 LCAPP Act does is it uses the state's authority  
12 over the local distribution of energy to  
13 incentivize power generation. Both the local  
14 distribution of energy and power generation are  
15 firmly within the state field as defined by the  
16 Federal Power Act.

17 THE COURT: May I ask a question here?

18 MR. ZUCKERMAN: Yes, your Honor.

19 THE COURT: One of the arguments made  
20 is that there are, an important part of this market  
21 is bilateral agreements.

22 MR. ZUCKERMAN: That's correct.

23 THE COURT: That operate independently  
24 of the auction.

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1 MR. ZUCKERMAN: That's right.

2 THE COURT: And that do provide,  
3 through these voluntary arrangements, additional or  
4 supplemental or separate revenue or rate  
5 parameters. But they don't go through the auction.  
6 Was there consideration in the process that you've  
7 described that gave rise to the New Jersey statute  
8 of a mechanism that didn't go through the auction,  
9 that wasn't tied to and triggered by the  
10 requirement of complying with the auction clearing  
11 prices in order to achieve the end that you've just  
12 described?

13 MR. ZUCKERMAN: I'm not certain what  
14 consideration of that was done, your Honor, but  
15 this is a perfectly permissible way to do it and is  
16 in fact extraordinarily respectful of the federal  
17 field.

18 THE COURT: The problem is that it's  
19 contingent on the auction. I thought the question  
20 was a good question. Can't this be done without  
21 having to implicate the auction and having the SOCA  
22 agreements contingent on the auction?

23 MR. ZUCKERMAN: It could have been  
24 done that way.

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1 THE COURT: In other words private  
2 agreements.

3 MR. ZUCKERMAN: It could have been  
4 done that way, but the issue before this court is  
5 whether the method that was chosen by the State of  
6 New Jersey is permissible and whether it respects  
7 the boundary between the state field of regulation  
8 and the federal field of regulation.

9 THE COURT: Yes, that's the rub, yes.

10 MR. ZUCKERMAN: And if one looks at  
11 how the SOCAs actually operate, it's clear that it  
12 does respect that. The SOCA payments are payments  
13 that are made by the electric distribution  
14 companies which operate exclusively in the state  
15 field and they're made to power generators which in  
16 their role as power generators operate exclusively  
17 in the state field.

18 THE COURT: But there's no doubt in  
19 the district court, and I was fairly careful about  
20 this, but it did make a specific finding saying  
21 that the performance of the SOCAs is contingent  
22 upon clearing the RPM auction.

23 MR. ZUCKERMAN: That's correct.

24 THE COURT: So they're joined at the

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1 hip it seems like.

2 MR. ZUCKERMAN: The contingent, the  
3 SOCAs are contingent on clearing the RPM auction.  
4 But let's look at whether it would have been more  
5 respectful of the federal field not to have that  
6 requirement in place. What happened here is that  
7 there were three generators chosen and approved  
8 under the LCAPP Act, CPV, Hess and NRG.

9 They all bid into the auction. CPV  
10 and Hess cleared the auction. NRG did not. If the  
11 problem --

12 THE COURT: At the time you did that  
13 were you subject to the 2011 MOPR rules?

14 MR. ZUCKERMAN: All of them were under  
15 the 2011 MOPR II in the 2012 auction. So if the  
16 objection is that it was contingent on clearing the  
17 auction, then the argument on the other side has to  
18 be that the LCAPP Act would have been just fine had  
19 the SOCAs for all three generators, CPV, Hess and  
20 NRG come into effect.

21 Now that makes no sense because NRG,  
22 having not cleared the auction, in accordance with  
23 the FERC-promulgated rules, was found under those  
24 FERC-promulgated rules not to be an economic entry.

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1           So it would have been a far greater  
2 intrusion into the federal field to say well, we're  
3 going to give you subsidies whether or not you  
4 clear the auction. And there's no intrusion  
5 whatsoever into the federal field, where it works  
6 the way that it does, which is that it says clear  
7 the auction, follow the federal rules, the FERC  
8 rules in that auction, and then you will receive an  
9 out-of-market payment, not from the purchaser in  
10 the auction but from the electric distribution  
11 company, keeping in mind that the electric  
12 distribution company doesn't purchase capacity --

13           THE COURT: But the payment that's  
14 made depends on what happens at the auction.

15           MR. ZUCKERMAN: The size of the  
16 payment that's made is --

17           THE COURT: The clearing price.

18           MR. ZUCKERMAN: -- is determined by  
19 the clearing price. But that doesn't cause it to  
20 invade the federal field because the principle is  
21 that this is an out-of-market payment.

22           Whether that out-of-market payment is,  
23 whether the size of that out-of-market payment is  
24 judged according to the auction price or is

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1 determined separately such as a fixed-rate payment,  
2 the net result is that the power generator receives  
3 two payments, one for selling capacity and -- which  
4 it receives from the purchaser of capacity, PJM,  
5 and the other as an out-of-market payment from a  
6 different counterparty.

7 THE COURT: But it's for the same  
8 thing, for that provision of the capacity.

9 MR. ZUCKERMAN: It's not for the same  
10 thing. It's a requirement that the capacity have  
11 been sold in order to receive the out-of-market  
12 payment. The same way under renewable energy  
13 certificates. In order to get the payment under  
14 the renewable energy certificate the electricity  
15 has to be sold.

16 THE COURT: But it really doesn't  
17 matter what the generator bids in this sense  
18 because the generator is going to be made whole no  
19 matter what. So it seems like it makes the bidding  
20 process academic. I mean it's not going to affect  
21 what the other players are going to bid. They can  
22 just go in there and bid -- can they bid zero?

23 MR. ZUCKERMAN: They cannot.

24 THE COURT: Not any more.

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1 MR. ZUCKERMAN: The LCAPP generators  
2 can't bid zero, and the reason they can't bid zero  
3 is that in MOPR II FERC held the LCAPP generators  
4 can't bid zero.

5 They have to bid under the FERC  
6 regulated rules applying the unit-specific review  
7 process which means that these generators, the  
8 LCAPP generators will be reviewed based upon their  
9 costs, and if it's determined that they're an  
10 economic entry and that the market therefore will  
11 benefit from their participation, they should be  
12 allowed to bid.

13 THE COURT: But isn't that only for  
14 one year? Or do you get that for more than one  
15 year when you bid?

16 MR. ZUCKERMAN: They're required to  
17 bid for one year. That's correct. They have to  
18 clear that one year.

19 THE COURT: Just the one year. So  
20 thereafter the SOCA goes on for 15 years.

21 MR. ZUCKERMAN: That is correct, your  
22 Honor.

23 THE COURT: So to Judge Fuentes' point  
24 then, after year one could one bid zero?

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1 MR. ZUCKERMAN: If FERC so provides,  
2 yes. If FERC does not provide, no.

3 THE COURT: Is there anything that  
4 FERC has said that would forbid that? That is, the  
5 2011 rule changes don't speak to that, correct?

6 MR. ZUCKERMAN: The 2011 rule changes  
7 would allow that. And since FERC --

8 THE COURT: Can you address -- I'm  
9 sorry, I don't mean to interrupt but actually I do.  
10 Can you address the question that Judge Shwartz  
11 just raised then which is the effect of the much  
12 longer guarantee than is provided by FERC and the  
13 argument that the, I think the acronym is NEPA,  
14 that the NEPA adjustment is, that that could be  
15 longer than one year, only goes to three years and  
16 that New Jersey tried to get FERC to go for a  
17 longer period, FERC said no. New Jersey is doing  
18 it this way and FERC has already rejected that as  
19 an option to help subsidize and therefore  
20 facilitate new construction.

21 MR. ZUCKERMAN: FERC, in setting rates  
22 for the sale of capacity, rejected a longer term  
23 position. FERC doesn't have jurisdiction over  
24 out-of-market payments that are done separately by

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1 a different counterparty, even if they relate to or  
2 are contingent upon clearing in the capacity  
3 market.

4 So the fact that FERC has chosen in  
5 rate setting not to provide for a longer time frame  
6 does not mean that New Jersey, in arranging for an  
7 out-of-market payment, which it's entitled to do  
8 under the Federal Power Act, made by the electric  
9 distribution companies in the state field under the  
10 Federal Power Act, will be entirely permissible.

11 THE COURT: I take it your point would  
12 be that the SOCA agreements and the -- well, let's  
13 just say the SOCA agreements have no effect on the  
14 wholesale energy rates at auction.

15 MR. ZUCKERMAN: Any construction of  
16 capacity is going to have an effect on the energy  
17 rates. If New Jersey decided to subsidize the  
18 construction of power plants just for intrastate  
19 distribution of electricity, where all of the  
20 electricity would be consumed within the state,  
21 clearly outside of FERC's jurisdiction, that would  
22 have an indirect effect on the PJM market.

23 And the reason it would have an  
24 indirect effect on the PJM market is it would

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1 remove the customers who are now served by  
2 intrastate power plants from part of the load that  
3 was being serviced by the PJM market.

4           So any construction of capacity will  
5 have an indirect effect. That's intrinsic in the  
6 structure of the Federal Power Act, and that does  
7 not cause an invasion of FERC jurisdiction.

8           THE COURT: Okay. Mr. Zuckerman,  
9 thank you very much. You were very helpful.

10           MR. ZUCKERMAN: Thank you very much,  
11 your Honor.

12           THE COURT: Ms. Kindall.

13           MS. KINDALL: Good morning, may it  
14 please the Court. I'm Assistant Attorney General  
15 Clare Kindall, I represent the amici states who are  
16 listed on the brief.

17           To save time I'll simply say that  
18 we've submitted the same brief before the Fourth  
19 Circuit, and in addition to the parties in this  
20 matter, because we had more time to gather support,  
21 we also included the New York, New Jersey, Delaware  
22 and D.C. state agencies as part of joining the same  
23 arguments. And --

24           THE COURT: Now that Fourth Circuit

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1 case, that's probably the Nazarian case; is that  
2 correct?

3 MS. KINDALL: Yes, sir.

4 THE COURT: And looking at that case  
5 it seems like it's on all fours with the  
6 circumstances of this case. Can you distinguish  
7 the case or is it that you simply disagree with its  
8 conclusion?

9 MS. KINDALL: We disagree. The amici  
10 states disagree with the district court's decisions  
11 in both this case and the Nazarian case because of  
12 their impact, and I think unintended impact of the  
13 broad jurisdictional sweep in both decisions but  
14 particularly, and for the case before this court,  
15 finding both field and conflict preemption of what  
16 has been traditionally a cooperative effective  
17 workable split of jurisdictions between the states.

18 And I think the split between the  
19 states and the federal realms actually answers the  
20 questions that have been proceeding here, in that  
21 you've asked why does the SOCA help New Jersey  
22 build power plants and why doesn't the fact that  
23 the payments have to clear in the auction, why  
24 doesn't that sort of intrude on FERC's

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1 jurisdiction. And I think let me just set a little  
2 context for this.

3 THE COURT: Is the issue of  
4 jurisdiction that FERC does not have jurisdiction  
5 over the wholesale rates at the auction, at the RPM  
6 auction?

7 MS. KINDALL: FERC has the right --  
8 FERC doesn't set rates first off, so let's clear  
9 that.

10 THE COURT: It's either the question  
11 --

12 MS. KINDALL: But they absolutely have  
13 jurisdiction.

14 THE COURT: I'm wondering is it a  
15 question of jurisdiction or authority or is it the  
16 question that the SOCA agreements or state  
17 agreements have no impact on the auction itself?  
18 Either jurisdiction or --

19 MS. KINDALL: It's a little more  
20 nuanced, your Honor. If I may, typical -- this is  
21 a case of first impression, and which is why the  
22 states are so concerned about it.

23 Typically a challenge from the Federal  
24 Power Act is a challenge to FERC's rules applying

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1 to FERC's market to how they may affect states and  
2 other stakeholders. This is the first time we have  
3 a state law to address state long-term energy needs  
4 under a state procurement paid for by state rate  
5 payers, is nonetheless deemed to be field preempted  
6 under the Federal Power Act as well as conflict  
7 preempted because it might have an effect on the  
8 market when anything a state does for generation  
9 will have a, quote/unquote, effect.

10 THE COURT: May I ask a question of,  
11 trying to drill down, no pun intended.

12 MS. KINDALL: Go right ahead.

13 THE COURT: On the effect notion.  
14 Part of the issue here is trying to understand the  
15 effect that the SOCA's will have on the auction  
16 price, on the clearing price, given the 2011 change  
17 and given the 15-year guarantee that the SOCA's  
18 provide.

19 MS. KINDALL: The SOCA price, SOCA's  
20 ranges will have no effect and let me tell you why.  
21 In the oral argument before this court under the  
22 MOPR decision that was just affirmed a month ago,  
23 the government represented to the court that 97  
24 percent of the bidders into the auction are price

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1 takers. And the reason for that is because power  
2 plants are heavily capital intensive. You need a  
3 15-year stream of income in order to support it,  
4 which is why it is a state issue, long-term issue  
5 on the local level.

6 The federal government is dealing with  
7 short-term capacity markets and what happens --  
8 needs to happen on the interstate levels and on the  
9 regional levels and on a uniform level, whereas the  
10 state is dealing with their own unique  
11 circumstances.

12 Some states are resource constrained,  
13 other states are resource rich. Some states need  
14 transmission lines, other states need more power  
15 plants. And that is why the Federal Power Act has  
16 this dual jurisdiction and this is why the states  
17 are so concerned, because the district court's  
18 decision below is sweeping in fact scenarios that  
19 were not before the district court that nonetheless  
20 could be applied to our states and a variety of  
21 state amici situations and completely eliminate  
22 valid essential state programs that have been  
23 traditionally, routinely decades-long  
24 interpretations into this dual jurisdiction.

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1           So we're not saying that we have  
2 jurisdiction over wholesale rates, and we're not  
3 saying that FERC has jurisdiction over generation.  
4 What we're saying is that the scheme, set up by  
5 Congress in the Federal Power Act, long standing,  
6 allows both realms to work together. And I would  
7 say the MOPR rules prove that when FERC -- I mean  
8 FERC has addressed this exact same state law, has  
9 managed to come to an accommodation to deal with  
10 its own markets, and there's no need for a conflict  
11 because the two can work side by side.

12           So the fact that the state is ensuring  
13 there is a financial wherewithal over a 15-year  
14 period in order to finance steel in the ground, and  
15 that's what it's about, can you finance steel in  
16 the ground power plants. And you can't finance  
17 steel in the ground power plants with a one-year  
18 financial commitment.

19           THE COURT: I don't have the cite with  
20 me, I wish I did, but the Third Circuit has issued  
21 a ruling not too long ago, New Jersey Board of  
22 Public Utilities vs. FERC.

23           MS. KINDALL: Yes.

24           THE COURT: As I recall there was a

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1 statement in there that specifically said that FERC  
2 has exclusive authority over PJM market rules and  
3 wholesale rates.

4 MS. KINDALL: Absolutely, your Honor.

5 THE COURT: I hope I didn't  
6 mischaracterize it.

7 MS. KINDALL: No, you didn't. But  
8 your Honor, if I may for a moment let me just grab  
9 my own copy.

10 THE COURT: And my question is isn't  
11 that binding on our review?

12 MS. KINDALL: Equally binding, your  
13 Honor, on page 55 of the decision is the fact that  
14 "what FERC has done is permit the states to develop  
15 whatever capacity resource they wish and to use  
16 those resources to the extent they wish, while  
17 approving rules that prevent the choices from  
18 adversely affecting their markets." In other  
19 words, dual jurisdiction, dual sovereignty, dual  
20 efforts.

21 So FERC has said through its MOPR  
22 rules we can accommodate what the states are doing,  
23 because -- anything the states do, and let me --  
24 this is why it's so important to the states.

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1 Energy conservation rules, energy efficient rules,  
2 all procurements, any sort of new generation, 29  
3 states plus the District of Columbia have RPS  
4 standards, Resource Portfolio Standards. All of  
5 that stuff we typically use bilateral contracts  
6 for. There is nothing unusual about this case and  
7 the circumstances of this case.

8 THE COURT: Okay. Ms. Kindall, thank  
9 you very much.

10 MS. KINDALL: I appreciate it. And we  
11 ask that you reverse below and restore what is the  
12 typical jurisdiction and certainly do not let it  
13 extend beyond the fact circumstances of this case  
14 because it really does have a major impact outside  
15 this case.

16 THE COURT: Thank you, Ms. Kindall.  
17 Mr. Clement.

18 MR. CLEMENT: Thank you, your Honors.  
19 And may it please the Court, Paul Clement for the  
20 appellees.

21 Let me start with a point of agreement  
22 with the State of New Jersey which is that I do  
23 think this is a simple case, or perhaps  
24 straightforward is the better way to describe it.

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1 Because this is a case where the state law  
2 essentially, by its own terms, criticizes the  
3 federal regime and then makes the payments  
4 contingent on the federal regime.

5 And so if you go look at the first  
6 five findings of the LCAPP legislation, there are a  
7 total of nine, but the first five are all about the  
8 federal regime, the federal wholesale market and  
9 why New Jersey is dissatisfied with the results  
10 that it's provided. And they specifically talk  
11 about NEPA and its three-year time frame. And they  
12 say -- I've never seen anything quite like this in  
13 a state legislative finding -- they say, you know,  
14 FERC could have fixed this, they could have worked  
15 with us, but they declined to do it, so we have to  
16 act.

17 And then it's not just the purpose but  
18 I think the purpose informs the preemption  
19 analysis, then it's the terms of the act. And as  
20 Judge Fuentes quite I think correctly focused on,  
21 what is very distinct about this law and the  
22 Maryland order and it's very different from all of  
23 the other things that you've heard about that  
24 states can do, is that it's contingent on not just

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1 bidding but then clearing the federal auction.

2 And what that means is that you're  
3 essentially guaranteeing that if these companies  
4 are allowed to enter pursuant to the terms of this  
5 statute, you're going to get 14 years of zeros.

6 The first year they're subject to the  
7 MOPR and I'll talk about why we don't think the  
8 MOPR is sufficient. But once the first year is  
9 cleared, that's 14 years of zeros. And if you  
10 don't think that's going to have an effect on those  
11 markets, I don't think you can do math.

12 THE COURT: So the real vice is the  
13 combination of the 15-year guarantee and the  
14 absence of any constraint on the amount that's bid  
15 after the first year?

16 MR. CLEMENT: I think in a combination  
17 of those two things, but I think there's even a  
18 problem in the first year which I will try to get  
19 to.

20 THE COURT: Okay. Good.

21 MR. CLEMENT: Because I think the MOPR  
22 is an effort by the federal agency to try to make a  
23 countermeasure to limit the distorting effect of  
24 this, but I don't think it accomplishes its full

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1 goals. But if I could say one more point before I  
2 get to that point.

3 I think that this fact that it's  
4 contingent on the bidding and clearing in the  
5 federal market and, as a number of your questions  
6 pointed out, there are ways for states to subsidize  
7 new construction in ways that don't have that  
8 requirement.

9 And you could actually do something  
10 fairly similar. You could provide -- you could  
11 figure out what it costs to build a new plant, you  
12 could say you're bound and determined to build a  
13 new plant, and then you could essentially hit the  
14 EDCs, ultimately the rate payers, with what it  
15 would take to do that.

16 And actually I think the 15-year SOCA  
17 payment schedule, if I understand it, is a rough  
18 approximation of what they'd have to pay. And you  
19 can do it without messing with the federal market  
20 at all.

21 So to me that prompts the question why  
22 are they doing this? And unfortunately there is a  
23 very good answer, which is they I think understand  
24 that if they can guarantee these products bid into

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1 the market and clear into the market, that will  
2 have the effect of lowering the price in that  
3 market.

4           And since these aren't the only power  
5 plants in the world and there are plenty of other  
6 New Jersey power plants that are buying from the  
7 wholesale market, if they can use these plants to  
8 lower that price they can essentially get some of  
9 the financing for this on the backs of a lower and  
10 artificially lower wholesale price. And that I  
11 think in a nutshell is the vice here.

12           THE COURT: Something like that seemed  
13 to have happened before where the bidding was such  
14 that the actual price, the clearing price was being  
15 depressed. So in response, if I remember  
16 correctly, the minimum offer price rule was put  
17 into effect. So that it does appear that these  
18 rules can be tweaked over time to accommodate  
19 problems with regard to the bidding.

20           Why could not PJM do something like  
21 that in this case in response to the SOCA  
22 agreements?

23           MR. CLEMENT: Here, and I think this  
24 brings in Judge Rosenthal's 15-year issue as well.

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1 Because you can try to deal in the confines of  
2 what, I think is affectionately called the MOPR,  
3 the Minimum Offer Price Rule.

4           You can try to deal with the auction,  
5 but all of that auction is based on a three-year  
6 forward market, and it's all based on the federal  
7 assumption that three years is the right time  
8 horizon for drawing in new investment because  
9 that's an appropriate period of time to get cost  
10 recovery.

11           Now New Jersey and Maryland very much  
12 disagree. They think they need 10, they think they  
13 need 15 years. But here's the thing. I don't  
14 think there's any effective way, and the government  
15 may disagree with me on this, but I don't think  
16 there's any effective way within the confines of  
17 that three-year MOPR rule to deal with a 15-year  
18 subsidy.

19           And here's the way I think about it,  
20 which is it's their own view that but for this  
21 15-year subsidy these plants won't exist.

22           So it may be that for purposes of the  
23 one-year MOPR screen they can show that their costs  
24 of new entry are low enough to justify this. But

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1 that's in the confines of thinking about what's the  
2 cost of new entry and all these plants with three-  
3 year horizons.

4 Their own view is that but for this  
5 subsidy we don't exist. Well, if they don't exist  
6 the price in that wholesale market is a whole lot  
7 lower.

8 THE COURT: Can you respond to the  
9 argument that if FERC felt its jurisdiction  
10 offended or intruded upon then FERC had ample  
11 opportunity to weigh in and still does have an  
12 opportunity to regulate if it finds the results  
13 distortive, unfair or unreasonable?

14 MR. CLEMENT: Well, your Honor, I'm  
15 happy to do that. I think one thing we've learned  
16 about the federal government's position here is  
17 that they weren't eager to volunteer it. But when  
18 asked they viewed these state laws as being  
19 preempted.

20 THE COURT: Limited preemptive.

21 MR. CLEMENT: Preempted. Should be  
22 preempted, however you want to say it. So I think  
23 what I would take from that is a couple of things.  
24 One is FERC's views are, certainly now that we see

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1 them we certainly think they're very important and  
2 we're happy for you to take those into account.

3 But that said, at bottom this is an  
4 argument that a state statute, not a particular  
5 rate proposal, not a particular voluntary contract  
6 that might be FERC jurisdictional but a state  
7 statute, is unconstitutional because it both  
8 intrudes on a federal field and is conflicted and  
9 we also think has a dormant commerce clause  
10 problem.

11 THE COURT: If this statute was  
12 written to have the payment not based upon the  
13 present market but say their language said the SOCA  
14 will be dictated based on the three-year average of  
15 the three years in the past and you use an average,  
16 would that be preempted?

17 MR. CLEMENT: I think it still would  
18 be, your Honor. I think there are two things that  
19 are absolutely critical here for preemption  
20 purposes. I actually think that either one would  
21 be sufficient. But one is the bid-and-clear  
22 requirement.

23 So I took your hypothetical to be you  
24 still have the bid-and-clear requirement but

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1 instead of it being, instead of the SOCA being just  
2 a function of the clearing price it ends up being a  
3 function of something that's still based on the  
4 federal auction but it's an average.

5 THE COURT: But historically.

6 MR. CLEMENT: Yes.

7 THE COURT: So it's not affecting the  
8 real time market activity.

9 MR. CLEMENT: Well --

10 THE COURT: I wanted to know whether  
11 that would be a problem if that's the SOCA payment  
12 was calculated, rather than the bid today, three  
13 years ago on an average, something like that.

14 MR. CLEMENT: Yes, and I would still  
15 take the position that that is preempted because of  
16 two things. One is, I think just the bid-and-clear  
17 requirement I think is enough because that's -- a  
18 state law I don't think really has any business in  
19 this realm to say you must clear a federal auction.

20 THE COURT: Why not? Where else are  
21 they going to get the power? Unless they do the  
22 bilateral contracts. That's the game in town in  
23 PJM.

24 MR. CLEMENT: No, they can do

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1 bilateral contracts or they could -- you know, if  
2 you wanted to just do subsidies for generation  
3 there's no reason to make it contingent on clearing  
4 the federal auction. If you want to have a pure  
5 subsidy presumably you would say we want more of  
6 this.

7           And this is how some things work for  
8 like solar and things like that. It's not a  
9 bid-and-clear requirement. It's we want more solar  
10 so go bid it. And one way or another, we're state  
11 regulators, we'll figure out, you know, if you bid  
12 it and clear it, that's great, if you don't maybe  
13 you'll do a bilateral contract, if not we'll make  
14 the rate payers pay for it, and it will all work  
15 out one way or another. There are multiple  
16 options.

17           So I do think it's very suspicious  
18 when you have this bid-and-clear requirement. The  
19 other point though is, I think the premise of your  
20 question is if you did that average you still  
21 wouldn't have that distorting effect. I still  
22 think you would have the distorting effect. And to  
23 me it's --

24           THE COURT: Tell me how. How would

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1 you have it since you're not distorting it on  
2 realtime activity, you're using a snapshot  
3 backwards. So explain how it would disrupt the  
4 market.

5 MR. CLEMENT: Because you're still  
6 providing essentially a subsidy to something that  
7 might not other -- by their own hypothesis wouldn't  
8 be in the market. And so these plants wouldn't be  
9 built but for the subsidy.

10 So you could tie the subsidy to almost  
11 anything. And if you have the bid-and-clear  
12 requirement -- suppose they just said look, we're  
13 going to make it, we're going to pay you \$200 more  
14 than the market clearing price. I think that would  
15 be the same case ultimately.

16 It would be a different mechanism to  
17 provide ultimately that the provider for the  
18 capacity market is going to receive something  
19 that's different from the federal rate, so we think  
20 it would be field preempted for that reason. And  
21 we also think it would be conflict preempted  
22 because it would distort that market.

23 There's a lot of different ways to  
24 think about the distortion of the market. The way

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1 I think about it though, the simplest way I've  
2 thought of thinking about it is to say their own  
3 view is they wouldn't exist.

4 And that has hugely distorting  
5 impacts, because if they exist by virtue of the  
6 state law that is preempted, now they're going to  
7 come up here and they'll remind you that, well,  
8 they could exist by a state subsidy that doesn't  
9 impact this issue. But they're using the federal  
10 market to exist, essentially. They're pivoting off  
11 of it to exist. They're going to distort that.

12 The effect of that is that some plant  
13 that has a much better economic profile in  
14 Pennsylvania or in Delaware, and still would help  
15 New Jersey rate payers, isn't going to get built.  
16 So there's still that distorting effect.

17 THE COURT: So do you agree that  
18 subsidies are okay as long as you don't have to  
19 also bid and clear?

20 MR. CLEMENT: I think that's -- I  
21 don't want to say that definitively in the sense  
22 that I can imagine a subsidy that doesn't have a  
23 bid-and-clear requirement that's still preempted  
24 for some other reason. But I do think that the

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1 bid-and-clear requirement is, in a sense, a very  
2 narrow way but a very important way to decide this  
3 case.

4           Because if you think about it what we  
5 have here is we have the states are saying  
6 correctly that when it comes to generation that's  
7 generally our field. And we are saying correctly  
8 and I think without objection, that wholesale rates  
9 are our field.

10           And so the bid-and-clear requirement  
11 is really where they take their field and say we're  
12 going to sort of link ourselves and we're going to  
13 go into your territory.

14           THE COURT: What about bid and clear  
15 not being part of the mechanism but a 15-year  
16 guarantee still being part of it? Would that raise  
17 preemption issues?

18           MR. CLEMENT: I think it would. I  
19 think certainly we've briefed it, in the way we've  
20 thought about it, as that's more of a conflict  
21 preemption concern.

22           And again I think it's a very stark  
23 conflict because, like I said, I was very struck by  
24 the legislative findings because this is not

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1 something where the federal government hasn't  
2 thought about this or that this is all based on a  
3 very traditional state authority.

4           They sort of recognize that since they  
5 have decided to go away from the vertical  
6 integration model they're largely dependent on the  
7 interstate market for significant generation, and  
8 they understand that FERC has made a judgment that  
9 a three-year time horizon is about right.

10           And remember, all of that's not just  
11 because they like three. You know, they have this  
12 very important concern that they don't want to  
13 discriminate between existing sources and new  
14 sources. And it's very important, sort of key  
15 policy judgment they've made. And so they've said  
16 three years strikes the right balance.

17           THE COURT: Could you talk about  
18 whether this is a matter of jurisdiction or  
19 authority over the RPM auction market?

20           MR. CLEMENT: Well, I want to make  
21 sure I'm responsive to the question. The way we  
22 think about this is --

23           THE COURT: I'm hearing this is a  
24 matter of jurisdiction from the other side, not

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1 necessarily a matter of complete authority over the  
2 RPM auctions.

3 MR. CLEMENT: Yes, if I understand the  
4 argument, the argument is that 201 is preemptive,  
5 205 and 206 are about sort of, some sort of  
6 jurisdiction. And we have two basic problems with  
7 that way of looking at the world.

8 First of all, we think this still  
9 comes within the preempted field of 201. 201 talks  
10 about rates and charges. The other related point,  
11 though I don't really understand why you would sort  
12 of artificially sort of say well 201 is about the  
13 preemptive scope and 205 and 206 are just about  
14 FERC's jurisdiction.

15 I think if you're reading the statute  
16 you read those various provisions in pari materia  
17 and they tell you we didn't just give the field  
18 over here to FERC just for kicks. We did it so  
19 they could exercise jurisdiction. Their  
20 jurisdiction is defined here.

21 So I would say you read 201 and 205  
22 together and there's no question that -- and this  
23 is where I think the field preemption argument  
24 becomes actually a narrow way to decide this case

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1 because it combines, if you combine the bid and  
2 clear and the reality of everybody who's looked at  
3 the SOCA contracts, everybody who's looked at this,  
4 the district court here and the district court in  
5 Maryland, they've heard a lot of sophisticated  
6 arguments to the effect that these are not what  
7 they obviously seem to be.

8           And they've heard all that evidence  
9 and they've all decided, both judges have decided,  
10 no. It doesn't matter that you're telling these  
11 other people that they're going to pay you. You're  
12 getting two streams of payment and it's contingent  
13 on bidding in and clearing the federal auction. So  
14 if you don't have any capacity sales you don't get  
15 any money from anybody. But if you do then we  
16 calculate how much you're going to get by what you  
17 got plus what you get under the SOCA.

18           I mean everybody who has looked at  
19 that says good grief, that is a wholesale rate.  
20 It's complicated. It's more complicated than my  
21 hypo, and just say the state says and add 200. But  
22 it is a wholesale rate. And so I think that --

23           THE COURT: The idea is to sell as  
24 much capacity as you can and to get as much as you

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1 can for it.

2 MR. CLEMENT: Well, it is and it  
3 isn't, because again this gets back to the  
4 incentives that the states have. Because this  
5 whole thing is starting because they think the  
6 rates are too high. And so they figured out what  
7 it takes to get new generation.

8 But then the reason they want to make  
9 sure they bid and clear is because if they bid and  
10 clear into the market the price is going to go  
11 down, and that's going to benefit the states not  
12 just -- it's not going to benefit the generation  
13 project itself, it will actually hurt them, except  
14 it won't hurt them because the SOCA comes in and  
15 makes them whole, and then they get the benefit on  
16 the back end of the rates being depressed.

17 So it's really a twofer from the  
18 standpoint of the states, but it's not an innocuous  
19 twofer, it's a twofer with all of these distorted  
20 impacts on the market.

21 I have just a few seconds left. I  
22 wanted to say a word about the dormant commerce  
23 clause argument. It's an alternative ground, you  
24 don't need to reach it, but I think it's telling

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1 for one important reason.

2           So we look at the statute, we look at  
3 the way it was first drafted. It says in New  
4 Jersey, seems like a glaring dormant commerce  
5 clause problem, somebody notices that and says no,  
6 no, community benefits. Well, I think we know what  
7 that means.

8           But still, they come back and they say  
9 no, no, you know, in theory this plant could be  
10 built in Pennsylvania or we even got one bid from  
11 Illinois. But in a weird way that just shows you  
12 the huge preemption problem here, because when  
13 Congress, a 1935 Congress with a 1935 sense of what  
14 states could do, they didn't think the generation  
15 authority of the states was for New Jersey to  
16 decide, to have a generation plant in Pennsylvania  
17 that affected the wholesale market.

18           I mean the very fact that in theory  
19 their effect on wholesale prices, which is what is  
20 the motivating factor behind the statute, can be  
21 achieved by siting new generation in Pennsylvania  
22 is actually a bad fact for them because it shows  
23 this is all about the wholesale market, this is not  
24 about the traditional siting decisions that

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1 Congress had in mind in 1935.

2 THE COURT: Mr. Clement, thank you  
3 very much.

4 MR. CLEMENT: Thank you, your Honors.

5 THE COURT: Two minutes rebuttal --  
6 oh, I'm sorry.

7 THE COURT: One more.

8 THE COURT: I forgot one of the  
9 troublemakers in the case.

10 MR. SOLOMON: We're in this case  
11 because the court directed us to file a brief, but  
12 now that we've gone through this effort we do agree  
13 with the appellees that the New Jersey mechanism is  
14 preempted.

15 I am Robert Solomon, I'm the solicitor  
16 of the Federal Energy Regulatory Commission, but I  
17 appear today on behalf of both the FERC and the  
18 United States of America, and I very much  
19 appreciate this time granting my participation in  
20 oral argument.

21 THE COURT: Can you address the issue  
22 or the accusation, I think it's the proper term,  
23 that you are taking different positions, wearing a  
24 regulatory hat than you are wearing your hat as

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1 amicus?

2 MR. SOLOMON: We are not taking a  
3 different position. In fact just about every  
4 sentence in our brief is followed by a citation to  
5 an FERC or to a court decision. The FERC is a  
6 collegial body that prefers to speak through its  
7 orders. I was reluctant to prepare an amicus brief  
8 because we don't want the lawyers speaking for the  
9 agency.

10 Having said that, we're very fortunate  
11 here because the commission in the 2011 orders that  
12 were the focus of last month's decision, actually  
13 discussed the New Jersey program in light of the  
14 revisions that were necessitated in the aftermath  
15 of the New Jersey program.

16 I've heard much about the Federal  
17 Power Act and the commission's jurisdiction over  
18 effects and whether the commission's exclusive  
19 jurisdiction is different depending upon whether it  
20 acts under Section 201 or whether it acts under  
21 Section 205 and 206.

22 And I want to clarify that while the  
23 statute is phrased very broadly, the agency has  
24 jurisdiction over all rates and charges for or in

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1 connection with FERC jurisdictional transmission or  
2 wholesale sales, and we also have jurisdiction over  
3 contracts and practices affecting those rates and  
4 charges, there is a --

5 THE COURT: Does that include the  
6 construction of new power plants, let's say in New  
7 Jersey? When you say you have -- I mean it sounds  
8 like a very broad, expansive jurisdiction.

9 MR. SOLOMON: Well, it's broad but  
10 there's a limiting principle. First with respect  
11 to the state authority over generation facilities  
12 in Section 201(b) there is the caveat, except as  
13 specifically provided elsewhere in the statute.

14 The federal government is relying upon  
15 the direct effect of the New Jersey program on the  
16 resulting wholesale rate.

17 And our argument is based on the  
18 direct effect that the New Jersey program has.  
19 It's not in the statute but there are decades of  
20 cases saying that the agency's authority over  
21 practices affecting doesn't cover, as appellants  
22 argued, all practices in the universe, there has to  
23 be a direct connection to the wholesale rate.

24 It's the wholesale rate that the

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1 agency cares about. Sometimes the rate is a  
2 particular number, sometimes it's a formula,  
3 sometimes it's a process like we have here with the  
4 PJM auction.

5 THE COURT: But how do you get around  
6 Northwest Central Pipeline.

7 MR. SOLOMON: Northwest Central  
8 Pipeline, the 1989 decision, had only an indirect  
9 effect on FERC jurisdiction. Here, as counsel have  
10 been arguing, it is the bidding and clearing  
11 requirement of the New Jersey statute that is  
12 particularly offensive.

13 And as this court found just last  
14 month on direct review of the FERC orders, this  
15 court said that there is in fact a direct effect  
16 that is both squarely and exclusively within the  
17 FERC's jurisdiction.

18 THE COURT: But you addressed it by  
19 entering that order that was upheld.

20 MR. SOLOMON: Yes. We found that the  
21 replacement mechanism removing the exemption for  
22 state mandated resources is just and reasonable.  
23 The suppliers might believe that it's not just and  
24 reasonable enough and that there's still some

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1 lingering concern, and that might have something to  
2 do with conflict preemption.

3 I should point out that last month's  
4 decision is still subject to rehearing and Supreme  
5 Court review.

6 As far as I know the appellants  
7 believe that the agency still has acted unlawfully  
8 under the Federal Power Act and the Administrative  
9 Procedure Act.

10 But we hope, and we're not too far  
11 from what I heard from Connecticut counsel, that  
12 this court try to stay as close to the facts of  
13 this case as possible and focus on the direct  
14 effect as opposed to focusing on the aggregate  
15 price or the guaranteed price offered by the New  
16 Jersey program.

17 When you have the bidding and clearing  
18 you have the direct effect that squarely implicates  
19 the FERC's jurisdiction under 201, 205 and 206 of  
20 the Federal Power Act.

21 If you're simply talking about the  
22 price, the aggregation of the market clearing price  
23 and the contract for differences, then you start  
24 getting closer and closer to an indirect effect.

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1 We don't know where the line is --

2 THE COURT: Isn't that what the  
3 district court in Maryland and New Jersey though  
4 viewed it as? They only focused on the rate  
5 received, the money received, not the effect. No  
6 one talked about this bid-and-clear problem, if I  
7 recall.

8 MR. SOLOMON: That is true. The basis  
9 for the field preemption was primarily on the  
10 aggregate price. There are some references in the  
11 district court decision to the intrusive or  
12 encroaching effect. So I do not believe the  
13 district court judge would disagree with what we  
14 are arguing now.

15 The district court did not have the  
16 advantage, as we do now, of the Third Circuit's  
17 February 20th intervening decision, which I think  
18 better focuses the debate on the direct effect.

19 THE COURT: Mr. Solomon, I thank you  
20 very much for your argument.

21 MR. SOLOMON: Thank you.

22 THE COURT: Rebuttal. Mr. Engel.

23 MR. ENGEL: Thank you, your Honor,  
24 I'll be brief because I know Mr. Elgarten has a

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1 little bit to say also. But I still just can't get  
2 over, I'm citing from page 41 of the opinion of  
3 this court last month which was quoting FERC's MOPR  
4 order in 2011, and it said "even if discriminatory  
5 subsidies are being received, if the resource is  
6 needed at the MOPR bid, then it is a competitive  
7 resource and should be permitted to participate in  
8 the auction regardless of whether it also receives  
9 a subsidy."

10 I just don't understand how that can  
11 be reconciled with the position that Mr. Solomon is  
12 taking today. And I also don't understand how  
13 Mr. Clement, with all due respect, can get up here  
14 and try to point as if it looks like New Jersey is  
15 doing something wrong with regard to the only one  
16 year needing to clear when one, FERC said that was  
17 okay, and two, I'll again reiterate what was said  
18 earlier, 97 percent, this is in the record in the  
19 decision or in the record in the case last month,  
20 97 percent of the utilities that bid into the  
21 market after the first year do so as zero bids.

22 So the fact that we might be able to  
23 have zero bids really is not a problem here and in  
24 fact MOPR talked about the issue of whether the

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1 subsidy, et cetera, and the price mitigation should  
2 go on for more than one year. And FERC said they  
3 were okay with only having to show that you could  
4 meet the one year requirement.

5 So we think that we were being more  
6 than respectful. In fact, as we said earlier, it  
7 would have been wrong not to get involved with the  
8 normal FERC market process, and therefore we  
9 believe that this is an absolutely acceptable realm  
10 of regulation and law that New Jersey enacted and  
11 should be upheld.

12 THE COURT: Mr. Engel, thank you very  
13 much. Mr. Elgarten.

14 MR. ELGARTEN: We all agree that you  
15 should read NJ BPU to see what FERC actually ruled  
16 as an order in its official capacity as the  
17 regulator of the market under 205.

18 I want to respond to the 15-year point  
19 and I would like to respond to the NEPA because  
20 they didn't come up earlier.

21 The 15-year point was specifically  
22 addressed by FERC in connection with NJ BPU. The  
23 request had been made either to exclude these  
24 participants entirely, or to at least make them bid

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1 a cost-based bid for three years in a row. FERC  
2 issued a ruling and it's, and the results of that  
3 ruling are it rejected that. It rejected that  
4 because, and the cite would be to 137 FERC, that's  
5 the 137 FERC opinion, and it's paragraph 132. It  
6 is summarized in the ruling of NJ BPU.

7           They explained that after the first  
8 year, once you've shown yourself to be a  
9 competitive resource, all of the costs for future  
10 bidding are sunk. That's why 97 percent of  
11 participants in the market, participants in the  
12 market, bid zero. It's normal. And that FERC  
13 understands. It is only the new entrants who have  
14 to show a cost-based bid. And indeed that's what  
15 CPV and Hess did, complying with those rules.

16           So let me turn back to the NEPA. In  
17 other words, they could control the 15 years --

18           THE COURT: Mr. Elgarten, your red  
19 light is on.

20           MR. ELGARTEN: Would you like to hear  
21 about the NEPA or not?

22           THE COURT: Thirty seconds.

23           MR. ELGARTEN: The NEPA was an  
24 internal rule. It would lock in the price for

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1 three years or ten years internally to the market  
2 so that market participants would pay the subsidy,  
3 the additional payments. It was a very special  
4 rule.

5           So in their capacity of regulating  
6 their market they could well and properly determine  
7 that within that market I don't want my market  
8 participants to pay a subsidy. It's very different  
9 from having someone outside the market pay  
10 subsidies and it really says nothing about that  
11 rule.

12           THE COURT: Thank you, Mr. Elgarten.

13           MR. ELGARTEN: Thank you.

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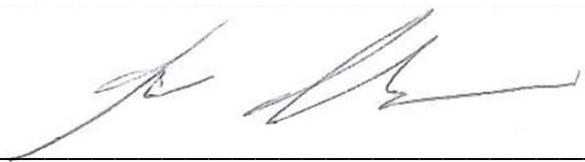
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CERTIFICATION

I, JAMES DeCRESCENZO, a Registered Diplomate Reporter, Certified Realtime Reporter, Certified Shorthand Reporter of New Jersey, License Number XI 00807, and Notary Public, hereby certify that the foregoing is a true and accurate transcript.

I further certify that I am neither attorney nor counsel for, not related to nor employed by any of the parties to this action; and further, that I am not a relative or employee of any attorney or counsel employed in this action, nor am I financially interested in this case.



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James DeCrescenzo  
Registered Diplomate Reporter  
Certified Shorthand Reporter Notary Public