



No. 14-694

In the
Supreme Court of the United States

JOSEPH L. FIORDALISO, ET AL.,
Petitioners,

v.

PPL ENERGYPLUS, LLC, ET AL.,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

**BRIEF *AMICUS CURIAE* OF
THE AMERICAN WIND ENERGY ASSOCIATION IN
SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICUS CURIAE*¹

The American Wind Energy Association (AWEA) is the national trade association representing a broad range of entities with a common interest in encouraging the deployment and expansion of wind energy resources in the United States. The interests of the members of the *Amicus Curiae* are threatened by the Third Circuit's decision in *PPL EnergyPlus, LLC v. Lee A. Solomon*, 766 F.3d 241 (3rd Cir. 2014), which impermissibly constrains crucial State functions that are necessary to ensure the long-term procurement of renewable energy production and carry out other aspects of electric resource planning.²

The *Amicus Curiae* have an interest in this case because State-conducted resource procurement efforts could ultimately be preempted on the same basis as New Jersey's efforts, or by an extension of

¹ AWEA counsel authored this brief, no counsel for a party to the decision below, or other entity, authored this brief in whole or in part, and no person or entity other than AWEA made a financial contribution to the preparation or submission of this brief. In accordance with U.S. Sup. Ct. Rule 37.2(a), 28 U.S.C.A., timely notice of an intent to file this brief was provided to counsel for the parties, and all parties have consented to the filing of this brief.

² The long-term contract mechanism to support infrastructure development at issue here is also used in other States in similar forms. For instance, Maryland used a nearly identical approach to support the construction of a power plant needed by that State, which is the subject of the Petition for Writ of Certiorari, *Nazarian v. PPL EnergyPlus, LLC*, No. 14-614, 2014 WL 6706153 (U.S. docketed Nov. 26, 2014). AWEA supports that petition as well but was unable to file an *amicus curiae* brief in support thereof before the December 29, 2014, submission deadline.

the Third Circuit's rationale to other State procurement efforts. Thus, the States' ability to ensure their electricity supply portfolios could be severely diminished, impacting renewable energy programs and other State environmental programs.³

By effectively holding that long-term contracts for new generation exceed State authority by setting wholesale prices, the Third Circuit decision encourages challenges over similar State-directed mechanisms to assure adequate generation capacity. If the Third Circuit decision stands, it will invariably serve to significantly undermine State authority to decide the resource type, quantity and timing of new or existing generation facilities that will be constructed or maintained within the States.

States must maintain diverse generation resource options through, among other things, directing long-term integrated resource planning. Through such planning, States commonly seek to meet policies to encourage the deployment of new technologies that are able to deliver cleaner, more reliable electric supplies, including increased renewable energy deployment. Recent and forthcoming federal environmental regulations have only served to increase the need for States to have the ability to adjust generation resources. The Third Circuit decision puts in jeopardy the States' ability to meet such legitimate policy goals.

³ Numerous other environmentally-friendly mandated programs are threatened by the decision of the Third Circuit. See *Petition for a Writ of Certiorari, Nazarian v. PPL EnergyPlus, LLC*, No. 14-614, 2014 WL 6706153 (U.S. docketed Nov. 26, 2014) at pp. 22-25.

SUMMARY OF THE ARGUMENT

The Third Circuit decision threatens the States' well-established resource adequacy powers that are explicitly recognized as part of State jurisdiction under the Federal Power Act ("FPA"). 16 U.S.C. § 791, et. seq. The court below incorrectly found that authority to be field preempted, thereby calling into question the States' police powers to engage in the long-term planning required to ensure their desired electric resource portfolios and impeding legitimate State actions dependent thereon.

ARGUMENT

I. The Third Circuit's Decision Improperly Precludes States From Carrying Out Resource Planning.

States have long held exclusive regulatory responsibility for assuring generation resource adequacy.⁴ In this case, the State of New Jersey exercised deep-rooted resource adequacy powers retained by States under the FPA. The Third Circuit erroneously concluded its actions to be preempted, divesting the State of its rights under the FPA to determine its electric resource portfolio.

⁴ See *New York v. FERC*, 535 U.S. 1, 24 (2002) (enumerating areas of State authority to include, among others, administration of integrated resource planning and resource portfolio decisions).

A. The Third Circuit’s Decision Holding That the FPA Preempts New Jersey’s Procurement Decisions for Power Plants Misconstrues the Separation Of State and Federal Responsibility Under the FPA.

Enactment of the FPA created affirmative federal jurisdiction over the interstate aspects of electric energy.⁵ Under the statute, States retain exclusive jurisdiction over facilities used for the generation of electric energy.⁶ States even have the right to limit new construction to more environmentally–friendly units. *Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009).

The FPA expressly excludes FERC from matters traditionally regulated by the States and specifically preserves State authority over generation, by including a “specific grant of power to the States to regulate production.” 16 U.S.C. § 824(a) & (b)(1). This Court has clearly recognized that States retain “authority over . . . reliability of local service[,] administration of integrated resource planning . . . and resource portfolios. . . .” *New York v. FERC*, 535 U.S. 1, 24 (2002).

New Jersey’s actions, ensuring adequate electric generating capacity to meet its needs, fall

⁵ The FPA vests FERC with authority over the “transmission of electric energy in interstate commerce” and the “sale of electric energy at wholesale in interstate commerce.” 16 U.S.C. § 824(b)(1).

⁶ FERC “shall not have jurisdiction . . . over facilities used for the generation of electric energy. . . .” 16 U.S.C. § 824(b)(2).

unmistakably under the categories of reliability, integrated resource planning and the determination of resource portfolios that are designated for State jurisdiction under the FPA. In preserving State authority over such actions in the FPA, these are precisely the roles Congress expected States to play and is exactly what New Jersey did: acted in a field traditionally occupied by the States.⁷ Preemption is simply inapplicable in this case as a clear showing of congressional intent to preempt is absent.

B. The Third Circuit's Decision Impedes the States' Ability to Support Electric Infrastructure Development Needs Through Their Traditional Powers.

To date, many States have met their directives to ensure cleaner energy portfolios through State-mandated long-term contracts. A cornerstone to new renewable energy development is the stable financing that comes from such contracts and the dedicated income stream they provide.

Because the Third Circuit held that the New Jersey procurements are field preempted, related efforts by States to provide incentives for new power plant construction, as well as for renewable energy initiatives, all previously unquestionably reserved to

⁷ "Where . . . the field in which Congress is said to have preempted has been traditionally occupied by the States . . . 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

the States by Congress, are now subject to challenge on Constitutional grounds.⁸

The Third Circuit decision arguably calls into question the States' Congressionally-sanctioned ability to ensure their electric generation portfolios by preventing utilities from entering into competitively procured long-term power plant construction contracts. This inhibits the development of new renewable generation and threatens the public policy objectives dependent on such development.

CONCLUSION

This Court should review the Third Circuit's decision because it imperils the States' ability to ensure an adequate supply of electricity and to achieve renewable energy goals. For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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⁸ Indeed, several important State initiatives have already been challenged based on the Third Circuit decision. See Petition for a Writ of Certiorari, *Nazarian v. PPL EnergyPlus, LLC*, No. 14-614, 2014 WL 6706153 (U.S. docketed Nov. 26, 2014) at pp. 20-21.