No. 14-694

IN THE

Supreme Court of the United States

JOSEPH L. FIORDALISO, MARY-ANNA HOLDEN, AND DIANNE SOLOMON, IN THEIR OFFICIAL CAPACITY AS COMMISSIONERS OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES,

Petitioners,

v.

PPL ENERGYPLUS, LLC, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Federal Power Act, 16 U.S.C. §§ 824 *et seq.*, Congress divided responsibilities over energy between the states and the federal government. The Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction to regulate sales of energy at wholesale in interstate commerce while the states retain authority over electric generation facilities and electric purchases by local utilities. Relying on the authority allocated to states under the Federal Power Act, New Jersey enacted the Long-Term Capacity Agreement Pilot Program Act, N.J.S.A. §§ 48:3-51, 48:3-98.2-.4 ("LCAPP"), in an effort to stimulate construction of new power plants to ensure sufficient and reliable generation.

Under LCAPP, New Jersey conducted a competitive procurement and directed its four local utilities to enter into long-term contracts with successful bidders to provide a stable revenue source to support construction of the plants. Under these long-term contracts, if the developer's accepted bid price exceeds what the developer obtains by selling the plant's capacity in the FERC-supervised electricity auction, the utility pays the difference to the developer; if auction revenue exceeds the bid price, the developer refunds the difference to the utility. The payment or refund is then passed through to ratepayers who have purchased the electricity. The question presented is:

Where, as part of a State-directed procurement, the resulting contract provides for a payment to the power plant developer based on the differential between the developer's competitive bid to build a new power plant,

and the amount the developer receives from capacity sales in the FERC-supervised auction, and where the contract does not involve any actual sale of capacity, is the contract "field preempted" as an attempt by the State to set interstate electric rates?

PARTIES TO THE PROCEEDING

Petitioners are Joseph L. Fiordaliso, Mary-Anna Holden, and Dianne Solomon, in their official capacities as Commissioners of the New Jersey Board of Public Utilities. CPV Power Development, Inc. ("CPV") was an Appellant below and a Defendant-Intervenor in the district court proceeding. Hess Newark, LLC, was an Appellant-Intervenor below. Lee A. Solomon, named in his official capacity below, was the President of the NJPBU at the time this litigation commenced but no longer holds that position.

Respondents, Plaintiffs-Appellees in the court below, are: PPL EnergyPlus, LLC; PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; Lower Mount Bethel Energy, LLC; PPL New Jersey Solar, LLC; PPL New Jersey Biogas, LLC; PPL Renewable Energy, LLC; Calpine Energy Services L.P.; Calpine Mid–Atlantic Generation, LLC; Calpine New Jersey Generation, LLC; Calpine Bethlehem, LLC; Calpine Mid–Merit, LLC; Calpine Vineland Solar, LLC; Calpine Mid–Atlantic Marketing, LLC; Calpine Newark, LLC; Exelon Generation Company, LLC; Genon Energy, Inc.; NAEA Ocean Peaking Power, LLC; PSEG Power, LLC; Atlantic City Electric Company; and Public Service Electric & Gas Company.

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PETITION FOR A WRIT OF CERTIORARI

Joseph L. Fiordaliso, Mary-Anna Holden, and Dianne Solomon, in their official capacity as Commissioners of the New Jersey Board of Public Utilities ("NJBPU"), respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 766 F.3d 241 (3d Cir. 2014) and reproduced at App.1a. The October 11, 2013, opinion of the United States District Court for the District of New Jersey is reported at 977 F. Supp. 2d 372 (D.N.J. 2013) and reproduced at App.32a.

JURISDICTION

This case was originally filed in the United District Court for the District of New Jersey under 28 U.S.C. §1331. Pursuant to 28 U.S.C. §§ 2201, 2202, and FED.R.CIV.P. 57, 65, the Complaint sought declaratory and injunctive relief raising Supremacy and Commerce Clause challenges to the Long-Term Capacity Agreement Pilot Program ("LCAPP"), a New Jersey statute, enacted to encourage the construction of new, efficient electric generation. The district court issued a final judgment on October 11, 2013, and the judgment was appealed to the Third Circuit, 28 U.S.C. §1291. The Third Circuit issued its opinion affirming the district court's judgment on September 11, 2014. This Petition is filed within the time allowed under this Court's Rule No. 13. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution of the United States is reproduced in Appendix E at App.132a; relevant provisions of the Federal Power Act are reproduced beginning at App.133a; and, relevant provisions of the Long-Term Capacity Agreement Pilot Program Act are reproduced at App.123a.

STATEMENT OF THE CASE

A. Both the Federal Government and the States Regulate Aspects of the Electric Energy Industry

Electric energy generation and transmission occur in a complex regulatory environment populated with multiple private and public actors operating under the supervision of both state and federal agencies. App.5a. When the Federal Power Act was enacted in 1935, most electricity in the United States was sold by "utilities that had constructed their own power plants, transmission lines, and local delivery systems." *New York v. FERC*, 535 U.S. 1, 5 (2002). While there was some interconnection among utilities, "most operated as separate, local monopolies subject to state or local regulation." *Id.* States had broad authority to regulate utilities, but this Court limited that power in *Public Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 86 (1927). The Court there held that a state could not regulate rates for electricity sold to purchasers in other states because that is a "direct burden on interstate commerce." *Id.*

As a "direct result" of the Court's decision in *Attleboro*, Congress passed the Federal Power Act to "fill the gap" and establish exclusive federal jurisdiction over the interstate sale of electricity. *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). Congress placed "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce" under federal control. 16 U.S.C. § 824(a). App.133a. The Federal Power Act also embodies Congress's attempt "to reconcile the claims of federal and of local authorities and to apportion federal and state jurisdiction over the industry." *Conn. Light & Power Co. v. Fed. Power Comm'n,* 324 U.S. 515, 531 (1945).

The Federal Power Act charged FERC with "provid[ing] effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *New York*, 535 U.S. at 6 (citation omitted); *see also* 16 U.S.C. § 824(a) (granting FERC responsibility for regulating "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce"). FERC "regulates the sale of electricity at wholesale in interstate commerce." *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 41 (2003), and "ensure[s] that wholesale rates are just and reasonable." *Entergy La., Inc.*, 539 U.S. at 41 (quotation marks omitted); 16 U.S.C. § 824d(a). App.135a.

The Federal Power Act left undisturbed the States' primary authority over power plant construction, capacity and electricity purchasing decisions by local utilities, and charges to the ratepayers to support those activities. In finding preemption based on a State's exercise of its traditional power to support needed power plant

construction through long-term, ratepayer supported competitive contracts with the State's local utilities, the decision below contradicts the very premise upon which FERC initiated its regulation of future capacity auctions, and disregards the Federal Power Act's allocation of authority between FERC and the States.

While FERC once directly considered whether the wholesale rates submitted to it were "just and reasonable," the agency has since moved away from this role and now favors using market mechanisms to produce competitive rates for interstate sales and transmissions of energy. As part of this approach, FERC oversees regional transmission organizations that facilitate market operations. App.7a-8a.

PJM Interconnection, LLC ("PJM"), a federally-regulated regional transmission organization that takes its name from "Pennsylvania," "Jersey," and "Maryland," the home states of the first utilities to pool their excess power and capacity in 1927, is the regional transmission organization for all or part of 13 states and the District of Columbia, including the entirety of New Jersey. PJM operates the largest centrally-dispatched power market in the world. App.8a.

> As a regional transmission organization, PJM has two responsibilities of significance to this case. First, PJM manages the flow of electric energy throughout the regional power grid, "dispatching" energy in real time to where it is needed. App'x 32. Second, PJM facilitates the interstate sales of electricity products, including energy and capacity, by managing

> marketplaces where those products may be exchanged. Electric energy is "the actual electricity that electric generators produce and which residential and business customers ultimately use." App'x 35 (quotation marks omitted). By contrast, electric capacity is "the ability to produce [energy] when called upon."
>
> [App.8a.]

B. Well-Settled Tenets of Dual Sovereignty Allow for Legislation Like LCAPP Which Operates Compatibly With the Federal Framework.

The United States Constitution establishes a system of dual sovereignty between the states and the Federal Government. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Under this system, the states' power is "concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). The Supremacy Clause provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. App.132a. Under the Supremacy Clause, federal law may sometimes preempt an otherwise permissible state law, rendering the state law without effect. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008).

In determining whether preemption exists, the court must "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." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotation marks omitted). "This assumption provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (internal citation and quotation marks omitted). "[O]ur task is to ascertain Congress' intent in enacting the federal statute at issue." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). As this Court has observed, "the purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cippollone v. Liggett Group., Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks omitted). The Court must "give full effect to evidence that Congress considered, and sought to preserve, the States' co-ordinate regulatory role in our federal scheme." *California v. FERC*, 495 U.S. 490, 497 (1990).

The Federal Power Act draws the line between the federal government's and the states' authority to regulate the power industry. It restricts federal regulation to oversight of interstate transmission of electricity and the wholesale markets for electricity and electric capacity. 16 U.S.C. § 824(b)(1). App.133a-134a. It reserves to a state the authority to regulate power generation (including regulating, and providing incentives for, the construction of power plants) and local distribution of electricity. Acting within the area reserved to the states, New Jersey enacted LCAPP to incentivize the construction of new, efficient power plants that in turn would ensure that sufficient generation is available to the region and to "assist the State's economic development and create opportunities for employment in the energy sector while helping to reduce the cost and volatility of electricity prices in New Jersey." N.J. Stat. Ann. § 48:3-98.2. App.128a.

LCAPP established a competitive selection process to foster the development of up to 2,000 megawatts of new baseload and mid-merit electric power generation facilities. The Act authorized the designated independent agent of the NJBPU to assess power project proposals offered in response to a Request for Proposals. N.J. Stat. Ann. § 48:3-98.3(b). App.129a. The Act also authorized the NJBPU to order New Jersey's local electric distribution companies to execute Standard Offer Capacity Agreements with the winning bidders to support the construction of these power plants. Under the LCAPP, this Agreement functions as a financially-settled transaction arrangement that provides for eligible generators to receive payments from the electric distribution companies for a fixed term not to exceed 15 years. App129a. Consistent with LCAPP's terms, and after a thorough evaluation process conducted by the NJBPU's independent agent, the NJBPU directed that Agreements be executed between three LCAPP Generators—CPV, Hess Newark, and NRG Energy, Inc. ("NRG")—and New Jersey's four electric distribution companies, which the electric distribution companies executed under protest. App.11a.

The Standard Offer Capacity Agreements are a form of "contracts for differences" that work as follows: First, the LCAPP Generator agrees to build a power plant and to use all commercially reasonable efforts so that its plant will qualify to sell electric capacity in PJM's Base Residual Auction. All terms for the sale of capacity, including price, are determined by PJM market rules, not by LCAPP or the Agreement. The Agreement comes into effect, in any given year, only if the LCAPP Generator's offer to sell capacity "clears" the Base Residual Auction, that is, if the offer price is equal to or lower than the price of the last accepted bid by PJM. App.129a-131a.

The Standard Offer Capacity Agreement compensates the LCAPP Generator, through a Standard Offer Capacity Price for building a new power plant. If the PJM Market clearing price for capacity is less than the Standard Offer Capacity Price, the electric distribution companies must pay the LCAPP Generator the difference. If the market clearing price for capacity is more than the Standard Offer Capacity Price, the LCAPP Generator must pay the electric distribution company the difference. N.J. Stat. Ann. 48:3-98.3(c)(4), App.130a. The payments the electric distribution companies either make or receive under the Agreements are passed through to ratepayers—the electric distribution company's retail distribution customers. N.J. Stat. Ann. 48:3-98.3(c)(4), App.131a. No sale of electricity or electric capacity takes place under the Standard Offer Capacity Agreements. App136a.

C. The Decision Below

Respondents include several incumbent electrical energy generators who claimed that additional generation would adversely affect the prices they receive in the PJM capacity auction. Respondents also include two electrical local distribution companies that signed the Standard Offer Capacity Agreement under protest. They brought this case in the United States District Court for the District of New Jersey against individual members of NJBPU. Some of the respondents also brought a parallel case challenging Maryland's similar subsidy program for one power plant owned by CPV. See *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014). Petitioner CPV intervened.

Respondents asserted that LCAPP was both "field preempted" and "conflict preempted." App.12a. They also alleged a Commerce Clause violation. The district court held for Respondents on "field preemption" and "conflict preemption," App.12a, declaring LCAPP invalid. But it rejected Respondents' Commerce Clause challenge. CPV and the New Jersey defendants appealed from the district court's determination invalidating the LCAPP, and Hess Newark subsequently intervened in CPV's appeal. App.13a.

At the request of the Third Circuit, FERC filed an *amicus* brief. App.13a. In that brief, FERC *did not* endorse the field preemption theory ultimately adopted by the Third Circuit, namely, that the Standard Offer Capacity Agreements "essentially set[]" a wholesale rate. FERC theorized instead that preemption should be found because the new power plants that New Jersey had spurred by using the Standard Offer Capacity Agreements would "affect" rates subject to FERC jurisdiction.

The Third Circuit rejected FERC's "affecting" theory as overbroad and inconsistent with this Court's decisions. App.25a. It nevertheless affirmed the district court ruling on "field preemption" grounds. App.25a. The Third Circuit found that FERC has approved PJM's reliability pricing model as the means to set the interstate wholesale price for electric capacity in the PJM region. App.16a. Because the LCAPP generators will receive both the PJM market price for interstate capacity sales and also potentially receive an additional amount fixed by the Standard Offer Capacity Agreements, the Third Circuit concluded that the LCAPP effectively raised the auction capacity price and that the NJBPU "'essentially sets a price for wholesale

energy sales' for LCAPP generators." App.20a-21a. The Third Circuit thus concluded that that "LCAPP effectively sets capacity prices and therefore regulates the same field occupied by FERC." App.15a.

REASONS FOR GRANTING THE PETITION

This petition concerns New Jersey's—indeed all states'—ability to ensure safe, adequate, reasonably-priced and reliable electricity to its citizens within the federal framework that gives FERC exclusive jurisdiction over wholesale sales of electric capacity in interstate commerce while also preserving the states' authority over development of electric generation within their borders. Petitioners urge this Court to review the Third Circuit's decision because that Court decided that a state transaction has set rates for a wholesale sale even though no actual sale occurs between the parties to the transaction. App.136a. This outcome disregards both the Federal Power Act and the case law establishing dual federal-state jurisdiction over the generation and sale of electric energy.

I. The Third Circuit Wrongly Determined that LCAPP Regulates Within the Field Reserved for FERC and Is Therefore Preempted

The Third Circuit began its analysis in the right place. It recognized "the basic assumption that Congress did not intend to displace state law" and that "[o]nly a clear and manifest conflict with federal law, or clear and manifest Congressional intent to override state choices, will overcome the presumption against preemption." App.14a-15a, citing *Farina v. Nokia Inc.*, 625 F.3d 97,

116-177 (3d Cir. 2010). The court also honed in on the core issue—"whether LCAPP has strayed into the exclusive federal area of interstate wholesale rates." App.15a.

However, the court went off course by misconstruing LCAPP's strategy for incentivizing the construction of new electric generation as establishing interstate wholesale rates even though the PJM capacity auction establishes the price or rate for the electric capacity that LCAPP Generators bid and clear through the Base Residual Auction. Regardless of the Third Circuit's logic for determining that "New Jersey cannot excuse LCAPP's interference with capacity prices as incidental to its scheme because the statute's explicit objective is to supplement capacity prices," App.23a, the Court failed to explain how the Standard Offer Capacity Agreement unlawfully traverses a field reserved for FERC in setting rates for wholesale sale of electric capacity when the Standard Offer Capacity Agreement itself does not involve a wholesale sale.

The Third Circuit thus voided LCAPP under field preemption where none exists in law or in fact. In doing so, it deviated from the presumption against preemption and failed to recognize the assumption that the historic powers of the states are not to be superseded by the Federal Power Act unless that was the clear and manifest purpose of Congress. See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). On whether LCAPP is field preempted under the Federal Power Act, Section 201 of that Act instructs: "Sale of electric energy at wholesale. The term 'sale of electric energy at wholesale' . . . means a sale of electric energy to any person for resale." 16 U.S.C. § 824(d).

App.134a. The Standard Offer Capacity Agreement does not fit within the confines of this definition.

New Jersey ensured that LCAPP would not involve a State-sponsored transaction between a purchaser and a seller for electric capacity. The Standard Offer Capacity Agreement does not involve a sale of electric capacity or any other product or service. Indeed, the Agreement provides: "4.2. Structure of Transaction. Nothing in this Agreement shall entitle or obligate Utility to purchase, or take title to or delivery of, capacity, electric energy, or ancillary services from the Capacity Facility." App.136a.

The sale of electricity capacity is between LCAPP Generators and PJM, and the Standard Offer Capacity Agreement is a mechanism designed to encourage the development of new, efficient generation. *N.J.S.A.* § 48:3-98.2. App.127a. Therefore, the Agreement is a contract for differences, not a wholesale sale of electric capacity subject to FERC's jurisdiction. See, e.g., *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 830 (D.C. Cir. 2006) ("But FERC reasonably regards that hourly charge as an accounting entry rather than an actual sale of power").

II. Because LCAPP Regulates Within the Field Reserved for the States, It Is Not Preempted.

Under the Federal Power Act, the federal government and states are accorded different rights and responsibilities. The Act contains no express preemption clause. Indeed, this Court has recognized that under the Federal Power Act, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction." *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215

(1964). Under the Act, the federal government regulates the transmission and sale of electric energy at wholesale in interstate commerce, but such federal regulation "extend[s] only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). App.133a. More specifically, the Act provides that FERC has no jurisdiction "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." 16 U.S.C. §824(b)(1). App.134a.

States thus retain certain authority to regulate electric energy under the Act. In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, for example, this Court stated that "[s]tates retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." 461 U.S. 190, 205 (1983). A state also retains authority to determine which generation resources are used within its borders. *Id.* FERC's authority does "not affect or encroach upon state authority in such traditional areas as . . . administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM [demand side management]; [and] authority over utility generation and resource portfolios . . . ." FERC Order 888, 75 FERC ¶ 61,080 (April 24, 1996), at 434 n. 544.

In striking down LCAPP on a theory of field preemption, the Third Circuit moved the bright line drawn between federal and state authority established by the Federal Power Act. LCAPP offends no principle

of preemption because it does not invade the areas that the Act reserves for federal regulation and instead falls within the bounds of authority reserved to the states. The Standard Offer Capacity Agreement is a unique mechanism for encouraging electric generation in New Jersey by granting eligible electric generators a financial incentive; it neither involves a sale of capacity nor sets a price for purchased capacity. App.136a. In contrast, the PJM capacity auction is the federal mechanism by which capacity is offered to PJM and a price is established for that offered capacity. App.17a. LCAPP simply provides for the creation of a financially-settled agreement linked to capacity offered and cleared in the Base Residual Auction.

The federal system for the wholesale sale of electric capacity in interstate commerce does not include any financially-settled agreements, such as New Jersey's Standard Offer Capacity Agreement or a similar mechanism. That is left to the states. If FERC does not regulate in the field of financially-settled agreements, then LCAPP cannot be deemed field preempted. Whether LCAPP contravenes the Federal Power Act should be established by provisions of the Act itself, not general FERC practices regarding energy markets; there can be no violation of the Supremacy Clause under the latter. This Court should determine that LCAPP and other mechanisms like it fall outside of the field occupied by FERC under the Federal Power Act.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be granted.

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