No. 14-694

In The
Supreme Court of the United States

JOSEPH L. FIORDALISO, MARY-ANNA HOLDEN, and DIANNE SOLOMON, in their official capacities 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 Third Circuit Court Of Appeals

BRIEF OF THE STATES OF CONNECTICUT, IOWA, MAINE, MARYLAND, NEW MEXICO, VERMONT AND WASHINGTON, THE NEW ENGLAND CONFERENCE OF PUBLIC UTILITY COMMISSIONERS, THE CALIFORNIA PUBLIC UTILITIES COMMISSION, THE PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, THE VERMONT DEPARTMENT OF PUBLIC SERVICE, THE VERMONT PUBLIC SERVICE BOARD, THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, THE MARYLAND OFFICE OF PEOPLE'S COUNSEL, AND THE NEW JERSEY DIVISION OF RATE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*[1]

The *amici curiae* are states with a vital interest in the ability to ensure an adequate supply of electricity and to achieve state renewable energy goals; state public utility commissions that regulate public utilities, including the New England Conference of Public Utility Commissioners; and state utility consumer advocates who represent the interests of electric customers, including the National Association of State Utility Consumer Advocates. The *amici* are listed in the Addendum to this brief (the "Amici States"). The interests of the Amici States are threatened by the Third Circuit's decision, which incorrectly found a New Jersey state statute and the resource procurement efforts of the State of New Jersey Board of Public Utilities ("New Jersey") to be field preempted.

Because electricity is and has been a fundamentally necessary service for more than one hundred years, each state is obligated through its police powers to ensure an adequate supply of electricity to its citizens. The Third Circuit held that when New Jersey procured resources to ensure an adequate supply of electricity to its citizens, it entered a field occupied by the federal government.

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[1] No other person than the named *amici curiae* or their counsel authored this brief or provided financial support for it. Pursuant to Supreme Court Rule 37.2(a), timely notice of an intent to file this brief was provided counsel for the parties, and all parties have consented to the filing of this brief.

Thus, despite New Jersey's historic role with respect to generating facilities in that state, and despite the explicit recognition of the states' duties in the Federal Power Act of 1935 with respect to generating facilities, New Jersey's statute and resource procurement efforts were erroneously determined to be field preempted. The Amici States have an interest in this case because state statutes and state-conducted resource procurement efforts could ultimately be preempted by an extension of the Third Circuit's rationale. Thus, their ability to ensure an adequate supply of electricity to their citizens could be severely diminished, impacting not only renewable energy programs or other state environmental programs, but also electric reliability.

REASONS FOR GRANTING THE WRIT

The State of New Jersey exercised long-standing, well-established resource adequacy powers that pre-existed the Federal Power Act, and are explicitly recognized as part of state jurisdiction under the Act. The Third Circuit incorrectly found those powers to be field preempted, thereby depriving states of their police powers and their rights under the Federal Power Act.

I. The Third Circuit's Decision Improperly Precludes States From Ensuring Adequate Electric Generation.

In procuring resources to meet local needs, New Jersey acted in an area of longstanding state jurisdiction and responsibility that was not interrupted by either enactment of the Federal Power Act in 1935 or New Jersey's decision to restructure its electric industry in 1999.[2] *See PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 247-248 (3d Cir. 2014). Prior to enactment of the Federal Power Act, states possessed extensive regulatory powers over the siting, generation, transmission, distribution and sale of electric energy, though limited by the dormant Commerce Clause. *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 471-472 (4th Cir. 2014). The Federal Power Act created a dual sovereignty paradigm, with affirmative federal jurisdiction over the interstate aspects of electric energy, and state jurisdiction over facilities used for the generation of electric energy.[3]

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[2] The typical form of electric restructuring is when a state separates the function of generating electricity from transmission and distribution, and allows competitive supply of retail electric service to customers.

[3] The Federal Power Act vests the Federal Energy Regulatory Commission ("FERC") with authority over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce," but states expressly retained jurisdiction over "facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1).

Consistent with this balancing of jurisdiction, New Jersey's legislature passed the Long Term Capacity Pilot Program Act ("LCAPP"), N.J. Stat. § 48:3-98.2(f). The New Jersey legislature found that the region needed more electric energy generators and passed LCAPP to encourage power generation companies to construct new power plants in the region. *PPL EnergyPlus v. Solomon*, 766 F.3d at 248-249. Pursuant to LCAPP, the New Jersey Board of Public Utilities solicited bids from power generation companies willing to build power plants in the region. *Id.*, 766 F.3d at 249. The solicitation resulted in contracts under which the winning bidders were obligated to construct electric generating facilities in the region, paid for by New Jersey ratepayers, to meet New Jersey reliability needs and other electricity obligations. *Id.*, 766 F.3d at 248-249. As argued before the Third Circuit, LCAPP is

> a state law to address state long-term energy needs under a state procurement paid for by state rate payers, [that] is nonetheless deemed to be field preempted under the Federal Power Act . . . because it might have an effect on the market when anything a state does for generation will have [an] effect.

PPL EnergyPlus v. Solomon, 766 F.3d at 254. In its decision, the Third Circuit took pains to limit its holding to interstate rates and capacity prices. *Id.*, 766 F.3d at 254-255. The Third Circuit expressly

rejected FERC's contention that LCAPP was preempted because any increase in supply would have an effect on the wholesale market price, notably holding that "the law of supply-and-demand is not the law of preemption." *Id*., 766 F.3d at 255.

Nonetheless, the Third Circuit erred by treating a state action that *builds upon* regional capacity prices as though it *established* regional capacity prices. *See PPL EnergyPlus v. Solomon*, 766 F.3d at 252. The LCAPP contracts required the winning bidders to sell capacity and energy into regional electricity markets, accepting the market price for selling into the regional market, and then receiving or paying an additional amount pursuant to a bilateral contract. *Id.* New Jersey did not, however, attempt to regulate the rates at which electric energy or electric capacity are sold in interstate commerce. Rather, the successful LCAPP bidders were obligated to accept the capacity prices offered by the regional wholesale market. *Id*. The bidders' contractual financial terms were pegged to the wholesale capacity prices but did not establish those prices.

The fact that New Jersey could have used other, much less effective means to accomplish its policy goals fails to render LCAPP preempted. *Cf. PPL EnergyPlus v. Solomon*, 766 F.3d at 253 n.4 (proposing other options for states, such as tax relief and permit approvals). There is no practical difference between an electric generating plant receiving an amount above and beyond the capacity auction price from a bilateral contract and a

subsidy—both provide financial compensation outside the wholesale market. Neither the LCAPP contract nor a subsidy establishes the wholesale market price. Rather, they provide financial incentives to build power plants.

New Jersey is responsible to ensure an adequate supply of electric generating capacity. It passed legislation and conducted the competitive solicitation in order to ensure power plants would be built in the region to satisfy New Jersey's energy and capacity needs. The contracts that resulted from New Jersey's competitive solicitation directly accomplished this purpose by obligating the winning bidders to construct electric generating facilities, and to sell capacity and energy into regional electricity markets operated pursuant to administrative orders approved by FERC. New Jersey expressly and explicitly acted to ensure an adequate supply of electric generating capacity to benefit its citizens.

In doing so, it acted in accordance with the jurisdiction retained by states under the Federal Power Act. This Court has expressly recognized that states retain "authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM [demand-side management]; authority over utility generation and resource portfolios; and authority to impose nonbypassable distribution or retail stranded cost charges." *New York v. FERC*, 535 U.S. 1, 24 (2002),

citing Order No. 888, FERC Stats. & Regs. ¶ 31,036, 31,782, n.544.[4] New Jersey's actions ensured adequate electric generating capacity to meet New Jersey's energy and capacity needs. New Jersey's actions fall clearly under the categories of reliability, integrated resource planning[5] and buy-side decision-making designated for state jurisdiction under the Federal Power Act.

New Jersey's actions occur within a field traditionally occupied by the States. "Where . . . the field in which Congress is said to have pre-empted 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

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[4] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540, 21,626 n.544 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, 31,782 n.544 (1996), *clarified*, 76 FERC ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *clarified*, 79 FERC ¶ 61,182 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[5] Integrated resource planning generally examines expected demands and resources over a long term period and seeks to ensure an adequate supply of resources (including a reserve margin) to serve customers, and may incorporate state objectives such as diversification of resources and development of renewable energy.

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). *See also Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Consequently, having acted within its traditional sphere, New Jersey is entitled under this Court's rulings to a presumption of non-preemption.

Although the Third Circuit acknowledged that New Jersey was entitled to a presumption of non-preemption, it failed to apply such a presumption. *See PPL EnergyPlus v. Solomon*, 766 F.3d at 250. The Third Circuit also failed to find, as it must, that the Federal Power Act shows a clear and manifest purpose for federal entry into integrated resource planning, reliability of local service, or buy-side and demand-side decisions. *See Jones v. Rath Packing Co.*, *supra*, 430 U.S. at 525. Although it acknowledged that New Jersey passed LCAPP specifically to address resource adequacy and electric generation, the Third Circuit nonetheless erroneously redefined New Jersey's actions as supplanting a federally-administered auction by purportedly setting the rates of wholesale capacity sales. *PPL EnergyPlus v. Solomon*, 766 F.3d at 248, 250-252.

Contrary to the Third Circuit's ruling, New Jersey did not set the rates of wholesale services. It brought buyers and sellers together for the purpose of reaching a bilateral agreement. New Jersey did not set a price for capacity based upon a bidder's internal costs; rather, the bidders set the price at which they

were willing to meet the entirety of the obligations set forth in the contract, specifically to construct and operate an electric generating facility to benefit the region, and to be counted, for capacity purposes, in the capacity market run by the regional transmission organization.

Further, the price was determined by competitive market forces, not by New Jersey. This process is entirely consistent with the market-based tariff regime established by FERC, and recounted by this Court in *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Wash.*, 554 U.S. 527, 535-538 (2008). Under FERC's market-based tariff regime, so long as a seller lacks market power, freely negotiated contracts result in just and reasonable rates. *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004). When a state commission exercises its resource adequacy powers under the Federal Power Act by soliciting bids, its action is consistent with the Act's jurisdictional divide and with FERC's market-based tariff regime because it is merely bringing together buyers and sellers. Here, New Jersey, through its competitive solicitation, brought buyers and sellers together to negotiate a contract. Sellers freely formulated and submitted offers, which were ranked and compared, and the winning bidder was chosen. At no point did New Jersey determine a just and reasonable rate based upon the revenues and expenses of any bidder.

In fact, states bring buyers and sellers together in many contexts, but in none of those contexts has

FERC or any court determined that the state set wholesale rates. For example, states bring buyers and sellers together to ensure an adequate supply of retail standard service is properly procured.[6] *See, e.g., Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082, PP 18, 36-39 (2004); Conn. Gen. Stat. § 16-244c. Moreover, states ensure that renewable energy goals are met by setting targets and conducting resource procurements at market-based prices. *See, e.g., Otter Creek Solar LLC*, 143 FERC ¶ 61,282, P 4 (2013); 30 Vermont Statutes Annotated §§ 8005a and 8006a; Conn. Gen. Stat. §§ 16-244v, 16a-3f, 16a-3g and 16a-3h.[7]

Beyond the states' role in establishing renewable energy policy, many, if not all, states conduct some form of either integrated resource planning or

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[6] Standard service is retail electricity service provided to customers who do not choose competitive supply.

[7] Pursuant to Conn. Gen. Stat. § 16a-3f, Connecticut has procured renewable energy resources by the solicitation of proposals. Although Connecticut procured physical energy and capacity, and did not procure using contracts for differences, its procurement nonetheless has been judicially challenged as purportedly field preempted, relying in significant part on the decisions below. *See*, First Amended Complaint for Declaratory and Injunctive Relief for Violations of the Supremacy Clause of the United States Constitution and the Federal Power Act, ¶ 89 n.8, *Allco Fin. Ltd. v. Klee*, No. 3:13cv01874 (JBA) (D. Conn., Feb. 26, 2014). The complaint was dismissed, but an appeal is pending**.** *See Allco Fin. Ltd. v. Klee*, No. 3:13cv1874 (JBA), 2014 WL 7004024 (D. Conn., Dec. 10, 2014), *appeal docketed*, No. 15-20 (2d Cir. Jan. 5, 2015).

long-term procurement planning to meet energy needs, regardless of whether they have restructured their electric industry. For example, the State of Connecticut's integrated resource plan requirement is set forth in statute, and specifies the actions to be taken if the plan identifies an anticipated shortfall in resources. Conn. Gen. Stat. § 16a-3a. Another restructured state, Delaware, also requires its electric utility to conduct integrated resource planning. Del. Code Ann. Title 26, § 1007(c).

Throughout its experience as a partially restructured state (no more than ten percent of an electric utility's load can be served by a competitive supplier), the State of Michigan conducts annual investigations into the adequacy and reliability of electric generation capacity. Indeed, Michigan's latest such inquiry takes note that the Midwest Independent System Operator now anticipates a 3,000 megawatt shortfall in electric generation capacity in 2016. December 4, 2014 Order in Case No. U-17751, *In the Matter of the Investigation, on the Commission's Own Motion, Into the Electric Supply Reliability Plans of Michigan's Electric Utilities for the Years 2015 Through 2019*, p. 4.[8] The California Public Utilities Commission conducts long-term procurement planning and authorizes the state's investor-owned utilities to enter into contracts to

[8] http://efile.mpsc.state.mi.us/efile/docs/17751/0001.pdf.

construct new generation resources when necessary for reliability. *See* Cal. Pub. Utils. Code § 454.5.

States whose integrated resource planning forecasts a future shortfall in generation will seek to bring buyers and sellers together to help ensure reliability by encouraging the production of electricity. *See*, *e.g.*, Conn. Gen. Stat. § 16a-3b(b). The Third Circuit's holding threatens the states' ability to respond to identified shortfalls, and can render their integrated resource planning a fruitless exercise. Worse, if the mere act of bringing together buyers and sellers for the purpose of ensuring reliability or furthering renewable energy goals is field preempted, all states face an increased risk of an erroneous preemption determination as a result of the Third Circuit's holding.

The Third Circuit's decision thus wrongly creates distinctions between states that do not exist in the Federal Power Act itself. The decision could be interpreted as holding that the New Jersey LCAPP is field preempted because New Jersey restructured its electric market and now participates in a federally-administered capacity market. *See, e.g.*, *PPL EnergyPlus v. Solomon, supra*, 766 F.3d at 247-248, 254. Under such a reading, resource adequacy decisions made by non-restructured states are presumably not field preempted, while those made by states which restructured and now participate in federally-administered capacity markets are field preempted.

However, field preemption analysis focuses on Congressional intent. When considering preemption, no matter which type, "[t]he purpose of Congress is the ultimate touchstone." *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003), citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Nothing in the dual-sovereignty paradigm embodied in the Federal Power Act distinguishes between states based upon whether they restructured or participate in federally-administered capacity markets. The Federal Power Act provides all states exclusive state authority over electric generation and resource adequacy planning regardless of these distinctions. *See* 16 U.S.C. § 824(b)(1). Consequently, the Third Circuit decision improperly creates a jurisdictional divide under which some states possess their full electric generation and resource adequacy powers under the Federal Power Act, and other states do not.

II. The Federal Power Act Does Not Require States to Rely Solely Upon Federal Wholesale Market Mechanisms to Ensure Reliable Electric Power.

All states face resource adequacy issues. The existing fleet of generating facilities will age and require replacement, and states will experience load growth. Indeed, the New Jersey legislature passed LCAPP after specifically finding that the regional wholesale market had "not resulted in large additions to peaking facilities or any additions of intermediate

or base load resources available to the region and the State." *PPL EnergyPlus v. Solomon*, 766 F.3d at 248, citing N.J. Stat. § 48:3-98.2(b). Under the Third Circuit's holding, however, states that have restructured and participate in federally-administered capacity markets are now deprived of an essential tool to address resource adequacy.

There is no basis to conclude that states abdicated all responsibility to ensure resource adequacy when restructuring. No provision of the Federal Power Act provides that when a state restructures, its resource adequacy powers and responsibilities shift to the federal government. Federal interstate markets only attempt to create the conditions under which investors generally may build electric generating facilities—if those markets fail, neither FERC nor any regional transmission organization can order the construction of a new generating facility. Nothing in the Federal Power Act requires that a state gamble upon whether those markets succeed, and suffer the consequences, potentially including actual outages and significant financial penalties, if they do not.

Indeed, an ongoing case from the State of New York illustrates the manner in which electric reliability is threatened by this case. The State of New York is anticipating potential reliability concerns as a result of generating facility retirements, and is acting to prevent shortages. January 18, 2013 Order Instituting Proceeding and Requiring Evaluation of Generation Repowerings, New York Public Service

Commission Case No. 12-E-0577, *Proceeding on Motion of the Commission to Examine Repowering Alternatives to Utility Transmission Reinforcements*.[9] Specifically, the New York Public Service Commission directed utilities under its regulatory authority to evaluate repowering of existing generating facilities as an option to address reliability needs. *Id*., p. 3. That proceeding is ongoing at the administrative agency level, but opponents already cite the District Court's decision in this matter to raise field preemption and thwart these important reliability efforts. *See* May 27, 2014 Comments of Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear, Indian Point 3, LLC and Entergy Nuclear Operations, Inc. in Case No. 12-E-0577, *supra*, p. 6.[10]

While the Third Circuit attempted to contain the impact of its decision, its decision is nonetheless being used to attack a wide variety of state efforts to ensure reliability and to achieve state renewable energy goals. Participation in a federal wholesale market does not negate a state's obligation or ability to ensure reliable energy for its citizens. Moreover, a federal wholesale market does not, and cannot, serve as a substitute for state action. The Third Circuit's decision should be reviewed.

[9] http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={6D9D8176-BF93-4842-9FE3-FB933427D179}.

[10] http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={508E316D-F1B7-4E84-9C7B-D664965AF05B}.

CONCLUSION

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

Respectfully submitted,

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