No. 14-634, 14-694

IN THE
Supreme Court of the United States

CPV POWER DEVELOPMENT, INC., EIF NEWARK, LLC,
Petitioners,
v.
PPL ENERGYPLUS, LLC, ET AL.,
Respondents.

JOSEPH L. FIORDALISO, ET AL.,
Petitioners,
v.
PPL ENERGYPLUS, LLC, ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* AMERICAN PUBLIC POWER ASSOCIATION AND NATIONAL RURAL ELECTRIC COOPERATION ASSOCIATION IN SUPPORT OF PETITIONERS

DELIA D. PATTERSON
RANDOLPH LEE ELLIOTT
AMERICAN PUBLIC POWER ASSOCIATION
2451 Crystal Drive
Suite 1000
Arlington, Virginia 22202

JAY A. MORRISON
PAMELA M. SILBERSTEIN
PAUL M. BREAKMAN
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
4301 Wilson Boulevard
Arlington, Virginia 22203

JOHN P. COYLE
Counsel of Record
DUNCAN & ALLEN
1730 Rhode Island Avenue, NW
Suite 700
Washington, D.C. 20036-3115
(202) 289-8400
jpc@duncanallen.com

Counsel for Amici Curiae American Public Power Association and National Rural Electric Cooperative Association

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF THE *AMICI CURIAE*

The American Public Power Association and the National Rural Electric Cooperative Association write in support of the Petition of Petitioners CPV Power Development, Inc. and EIF Newark, LLC for writ of *certiorari* in No. 14-634 and Petitioners Joseph Fiordaliso, *et al.*, for writ of *certiorari* in No. 14-694.[1] The Associations appeared below as *amici* supporting Appellants and reversal of the district court.

The American Public Power Association (APPA) represents the Nation's more than 2,000 not-for-profit, publicly owned electric utilities, which serve over 47 million customers, in every state except Hawaii, and provide over 15 percent of all kilowatt-hour sales of electricity to ultimate customers. APPA's utility members are load-serving entities, with the primary goal of providing customers in the communities they serve with reliable electric power and energy at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of APPA's members with the long-term interests of the residents and businesses in their communities.

The National Rural Electric Cooperative Association (NRECA) represents the Nation's more than 900 not-for-profit, member-owned rural electric utilities, which provide electricity to approximately 42 million consumers in 47 states, or 13 percent of the Nation's population. Rural electric cooperatives

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[1] All parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity other than the *amici* has made a monetary contribution to the preparation or submission of this brief.

account for approximately 11 percent of all kilowatt-hour sales of electricity in the Nation. NRECA's members also include approximately 65 generation and transmission (G&T) cooperatives, which supply wholesale power to their distribution cooperative owner-members. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost.

Both Associations' utility members participate in wholesale power markets in regions of the Nation where "Regional Transmission Organizations" (RTOs), including the RTO discussed in this case, PJM Interconnection, L.L.C. (PJM), operate the electric transmission grid. Since the advent of RTOs almost fifteen years ago, the Associations' members in RTO regions have continued to exercise their business judgment to obtain electric generation capacity and electric energy from various sources, including (a) generation facilities they purchase or build; (b) purchases under long-term and short-term bilateral wholesale contracts; and (c) purchases from RTOs. The Associations' interest in this case is to ensure that their members continue to be able to obtain the mix of generating capacity resources that, in their judgment, best enables them to meet their environmental and other regulatory obligations and provide safe, adequate and reliable electric service at the lowest reasonable cost.

The Court of Appeals' decision determines an important federal question, holding that the Federal Power Act (16 U.S.C. §§ 791a – 828c (the "FPA")) preempts New Jersey's Long-Term Capacity Pilot

Program Act (the "LCAPP"),[2] which directs New Jersey utilities engaged in providing Basic Generation Service to New Jersey retail electricity customers to enter into Standard Offer Capacity Agreements to establish a fixed revenue stream for new generating capacity[3] for a fifteen-year term.[4] The

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[2] The LCAPP is codified at N.J.S.A. §§ 48:3-51, 48:3-98.2 through 48:3-98.4. "Basic Generation Service" is defined by N.J.S.A. § 48:3-51 as "electric generation service that is provided, to any customer that has not chosen an alternative electric power supplier, whether or not the customer has received offers for competitive supply options, including, but not limited to, any customer that cannot obtain such service from an electric power supplier for any reason, including non-payment for services. Basic generation service is not a competitive service and shall be fully regulated by the board." Basic Generation Service is provided by electric utilities engaged in the distribution of electricity at retail within the State of New Jersey. The specific utility obligations associated with Basic Generation Service are set forth in N.J.S.A. § 48:3-57.

[3] "'Capacity' is defined as 'the ability to produce electricity when called upon.'" *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp.2d 372, 381 (D. N.J. 2013) (14-634 Pet. App. 47a). "In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases from a generator an option to buy a quantity of energy, rather than purchasing the energy itself." *NRG Power Mktg., LLC v. Me. PUC*, 558 U.S. 165, 168 (2010).

[4] The Court of Appeals (Pet. App. 23a) described the operative financial terms of the Standard Offer Capacity Agreement as seeking to create a contract for differences "between the price of capacity received by a generator from the PJM auction and a price fixed by the Agreement itself. If the Agreement price exceeded the auction price, the Agreement required the electricity distribution companies to pay the difference in price, multiplied by the amount of capacity, to the LCAPP generators. If the auction price exceeded the Agreement price, the Agreement obliged the LCAPP generators to pay the difference in price, multiplied by the amount of capacity, to the electricity distribution companies."

decision below conflicts with decisions of this Court concerning both field and conflict preemption in federal regulatory regimes, such as the FPA, that explicitly reserve roles for state regulatory authority, holding that while "state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, . . . it is also true that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (internal citation omitted). *See also Nw. Cent. Pipeline Co. v. Kan. Corp. Comm'n*, 489 U.S. 493, 512 (1989) (courts should "avoid encroachment on the powers Congress intended to reserve to the States . . . 'by an extravagant mode of interpretation . . . .'"). The decision below also conflicts with prior decisions of this Court explaining the operation of the regulatory authority granted by FPA Sections 205 and 206 as to who "sets" wholesale electric power rates under the FPA. *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 352-353 (1956); *United Gas Pipeline Co. v. Mobile Gas Service Co.*, 350 U.S. 332, 341 (1956).

The decision below misapplies field preemption principles based on a mistaken view of the function and purpose of RTO centralized capacity auctions, and an equally mistaken premise that the Federal Energy Regulatory Commission, rather the process of contracting between participants in wholesale markets, "sets" wholesale power rates. The Court should grant the petitions because the decision below, if allowed to stand, will substantially disrupt the sound functioning of the Nation's wholesale electric power markets, at least in those parts of the eastern United States served by RTOs, and is likely to impede

the orderly development of needed electric infrastructure at reasonable cost.

SUMMARY OF ARGUMENT

The decision below rests on a simplistic and inaccurate view of how centralized capacity auctions, like the PJM Reliability Pricing Model at issue in this case, actually operate. The Court of Appeals' conclusion that New Jersey's LCAPP is field preempted because "through the Standard Offer Capacity Agreements, [it] attempts to regulate the same subject matter that FERC has regulated through PJM's Reliability Pricing Model" (Pet. App. 24a) misunderstands the relationship between bilateral contracts and the functioning of RTO-operated centralized capacity auctions. The FERC itself has long held that centralized capacity auctions are intended to operate in tandem with robust bilateral markets, precisely because it is the bilateral markets that actually support the addition of needed energy infrastructure with long-term and predictable contract revenues. The preemption finding below is wrong because the centralized capacity auction price on which the Court of Appeals concentrated its attention, and the bilateral contract capacity price set by Petitioners CPV Power Development, Inc. and EIF Newark, LLC for the sale of capacity from their proposed new generating units under the LCAPP, are intended by the FERC to coexist and fulfill distinct roles in promoting generation adequacy and reliability within the PJM RTO.

Contrary to the conclusions of the Court of Appeals, long-term contracting by load-serving entities concerning generating capacity, like that directed by the LCAPP, is intended by FERC to

operate as a component of a broader wholesale market of which PJM's centralized capacity auction is also a part. The LCAPP simply created a way for New Jersey's retail electric utilities to respond to "price signals" provided by PJM's centralized capacity auction and the long-term bilateral markets to which the retail utilities were otherwise indifferent because PJM capacity charges are simply passed-through to retail customers. In holding that the LCAPP was preempted by FERC's approval of the auction mechanisms in PJM's centralized capacity market, the Court of Appeals conflated two distinct rate-setting processes, each of which has a distinct and well-recognized role in the relevant wholesale electric power market. In short, the Court of Appeals' conclusion that the New Jersey LCAPP is field preempted because "through the Standard Offer Capacity Agreements, attempts to regulate the same subject matter that FERC has regulated through PJM's Reliability Pricing Model" (Pet. App. 24a) rests ultimately on the mistaken notion that there is only a single price permitted by the FPA for the sale of generating capacity in PJM.

As part of this premise, the decision below also supposes that the FERC sets wholesale rates (*id.*). This element of the decision parts company with a long line of settled decisions of this Court holding that the power conferred on the FERC by the Federal Power Act "is simply the power to review rates and contracts made in the first instance by. . . [utility] companies and, if they are determined to be unlawful, to remedy them."[5] Prior to the decision below, it had long been understood that:

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[5] *United Gas Pipeline Co. v. Mobile Gas Service Co.*, 350 U.S. 332, 341 (1956), cited in *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 352-353 (1956) (". . . we construed the Natural Gas Act as

> Sections 205 and 206(a) 'are simply parts of a single statutory scheme under which all rates are established initially by the (utilities), by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on (utilities) as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of (electric utilities).'[6]

Under these and other authorities discussed *infra*, the Court of Appeals conclusion that "[b]ecause FERC has exercised control over the field of interstate capacity prices, and because FERC's control is exclusive, New Jersey's efforts to regulate the same subject matter cannot stand" (Pet. App. 25a) – simply misunderstands the FERC's regulatory role. This is a second, but equally important, reason for granting the petitions. In the 58 years since it decided *Sierra*

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not authorizing unilateral contract changes, and that interpretation is equally applicable to the Federal Power Act. Accordingly, for the reasons there given, we conclude that neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra").

[6] *Papago Tribal Utilities Authority v. FERC*, 610 F.2d 914, 924 (D.C. Cir. 1980), *quoting United Gas Pipeline Co. v. Mobile Gas Service Co.*, *supra*, 350 U.S. at 341.

Pacific Power Co., this Court's explanation of the paramount importance of contracts in the Nation's electric power industry has become increasingly critical to the functioning of that industry. The decision below departs from this settled understanding of the operation of the FPA. Unless corrected by the grant of *certiorari* here, that departure threatens the stability of a bedrock principle on which the operation of the electric power industry depends.

ARGUMENT

"PJM Interconnection ('PJM') is the RTO that manages the regional transmission system spanning from New Jersey west to Chicago and south to North Carolina." *N. J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 82 (3d Cir. 2014). It is a regulated public utility under the FPA. *Pennsylvania-New Jersey-Maryland Interconnection*, 103 FERC ¶ 61,170, PP 16-21 (2003).

The FERC regulates two parallel markets for generating capacity within the PJM region. One of those markets is the centralized capacity operated by PJM, the Reliability Pricing Model. Like the regional resource adequacy arrangements from which they evolved,[7] centralized capacity auctions set a price for generating capacity supplied to load-serving participants that have not otherwise supplied their

[7] As the FERC summarized PJM's earlier resource adequacy arrangement, "each [load-serving entity] must procure capacity resources equal to a fixed percentage above its peak load to ensure a sufficient amount of capacity to meet the forecasted load plus reserves adequate to provide for the unavailability of capacity resources, load forecasting uncertainty, and planned and maintenance outages." *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 at P 9 (2006).

allocated share of applicable regional capacity requirements.

The second of these two parallel wholesale markets is bilateral contracting between load-serving utilities and generation owners for the purchase and sale of entitlements in generating capacity, and related transactions. It is this second, bilateral market that actually generates the overwhelming majority of the capitalization required to support the construction of new generating resources. *Amicus* APPA has observed and reported on generating facility construction trends for the past several years, publishing an annual review entitled *Power Plants Are Not Built on Spec.*[8] Continuing trends observed in publicly reported data on power plant construction, APPA observed that, for new generating capacity entering service during 2013:

- Two-thirds of the capacity was built with purchased power agreements (PPAs) for the sale of the power (64 percent of PPAs were with a utility and 2 percent with an end-use customer or non-utility retail supplier).

- Another 31.6 percent was constructed under ownership by the utility (29.6 percent) or customer (2 percent).

[8] APPA's 2014 *Power Plants Are Not Built on Spec* report can be found on-line at http://appanet.files.cms-plus.com/PDFs/94_2014_Power_Plant_Study.pdf (last viewed December 22, 2014).

> - Just 2.4 percent was built solely for sales into RTO markets (at most—plants for which no information was available were assumed to be built for market sales). The vast majority of the 2.4 percent of capacity built only for market sales received some type of external funding, such as grants from the American Reinvestment and Recovery Act (ARRA) or a state or foundation.

In concluding that activity in the bilateral contractual market for generating capacity is somehow subordinate to the outcome of FERC-supervised centralized capacity auctions, the Court of Appeals decision sows seeds of doubt that will likely impede the development of needed infrastructure for a considerable period – even if the decision itself is quickly overturned on *certiorari.* Investors are obviously diffident about committing the hundreds of millions, or even billions, of dollars needed to build a new power plant, and developers are unlikely to devote the years of necessary effort to planning and permitting, for the payoff of a one-year contract at an uncertain price three years in the future.

It was the capital-intensive of nature generation development, and the long time frames associated with planning, permitting, development and capital recovery for generating plants that led the FERC to observe, in announcing its Reliability Compensation Policy early in its supervision of the PJM capacity auction (*PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112 at P 20 (2004)):

> . . . [W]e are mindful of the comments made to us by representatives of the financial community, that dependence on price volatility for investment is an inadequate foundation for cost-effective financing of new infrastructure. A clear preference for long-term contracts and/or reliable revenue streams was stated. Ideally, the market should encourage [load-serving entities] to engage in long-term bilateral contracting to support needed investment. . . .

In its initial order accepting elements of the RPM proposal, FERC "conclude[d] that, after [load-serving entities] have had an opportunity to procure capacity on their own, it is reasonable for PJM to procure capacity in an open auction …," but "[t]his, however, should be a last resort." *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079, P 71 (2006). As FERC described it, PJM's proposal was that load-serving entities "may either (a) build their own needed capacity or create an incentive for the construction of new capacity by entering into long-term bilateral agreements, (b) refrain from entering into bilaterals and pay the (presumably higher) prices set by the [proposed RPM auction] demand curve, or (c) develop transmission or demand response solutions to capacity problems." *Id.*, P 172. Soon thereafter, FERC approved a settlement that "preserve[d] provisions of [PJM's proposal] that support self-supply and bilateral contracts …." *PJM Interconnection*, 117 FERC ¶ 61,331, P 29. In 2011, FERC approved amendments to the PJM capacity

auction rules, but those rules continued to provide for participation in the auction by capacity resources that load-serving entities own or acquire by bilateral contract. *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, PP 191–197, *order on reh'g*, 137 FERC ¶ 61,145 (2011), *rev. denied sub nom. N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3rd Cir.). The currently effective RPM structure contains provisions to accommodate self-supplied capacity that load-serving entities own or acquire in the bilateral market. *N.J. Bd. of Pub. Utils, supra*, 744 F.3d at 83 n. 4. *See PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, PP 107–115 (2013), *reh'g pending*.

I. The Decision Below Conflates Two Distinct Capacity Markets, Misapplying Field Preemption Principles

The decision below found the New Jersey LCAPP is field preempted because "through the Standard Offer Capacity Agreements, [it] attempts to regulate the same subject matter that FERC has regulated through PJM's Reliability Pricing Model" (Pet. App. 24a). The Court of Appeals own description of how the LCAPP Standard Offer Capacity Agreements were intended to operate is instructive. The Court of Appeals described the operative financial terms of the Standard Offer Capacity Agreement (Pet. App. 23a) as seeking to create a contract for differences "between the price of capacity received by a generator from the PJM auction and a price fixed by the Agreement itself." Under the Standard Offer Capacity Agreement, the Court stated (*id.*):

> If the Agreement price exceeded the auction price, the Agreement required the electricity distribution companies to pay the difference in price, multiplied by the amount of capacity, to the LCAPP generators. If the auction price exceeded the Agreement price, the Agreement obliged the LCAPP generators to pay the difference in price, multiplied by the amount of capacity, to the electricity distribution companies.

What the Court of Appeals described is a hedge, for a fifteen-year term, against price volatility in fifteen annual RPM Base Residual Auctions that establish a single year's auction price, three years in advance of the effective date of the capacity option sold in the Base Residual Auction. That hedge operates bilaterally, between the New Jersey utilities engaged in providing Basic Generation Service to New Jersey retail customers (on one hand) and Petitioners CPV and EIF Newark (on the other hand), to provide the kind of "incentive for the construction of new capacity by entering into long-term bilateral agreements" that was precisely contemplated by FERC as operating in parallel to the PJM Reliability Pricing Model auctions (115 FERC ¶ 61,079 at P 172). Neither the LCAPP nor its Standard Offer Capacity Agreement involves any review of wholesale electric power rates by the State of New Jersey, nor do the LCAPP and the Standard Offer Capacity Agreement purport to empower the State of New Jersey to prescribe or to modify any rates or charges resulting from the PJM Base Residual Auction. Instead, the LCAPP Standard Offer Capacity Agreement is an

exchange, between the New Jersey Basic Generation Service utilities and Petitioners CPV and EIF, of the risk of particular outcomes of the Base Residual Auction in the FERC-regulated PJM centralized capacity market. The LCAPP Standard Offer Capacity Agreement does not determine those outcomes and, for the reasons explained immediately below, it cannot influence those outcomes. The operation of the Standard Offer Capacity Agreement is thus entirely consistent with FERC's early recognition in its Reliability Compensation Policy Order that "dependence on price volatility for investment is an inadequate foundation for cost-effective financing of new infrastructure" and that "the market should encourage [load-serving entities] to engage in long-term bilateral contracting to support needed investment" (107 FERC ¶ 61,112 at P 20).

In addition, by the time it became operative, a Standard Offer Capacity Agreement could not have had any impact on the price that Petitioners CPV and EIF received in the Base Residual Auction. Under market rule revisions adopted by PJM and accepted by FERC, that price was a function of a bid set by PJM itself under its Minimum Offer Price Rule ("MOPR"), based on PJM's determination of permissible bids by Petitioners CPV and EIF, based on the costs of its proposed generating facility, calculated *without* the benefit of the Standard Offer Capacity Agreement.[9]

[9] PJM's Minimum Offer Price Rule ("MOPR") requires individualized scrutiny of proposed bids in the Base Residual Auction that fall below specified thresholds, in order to prevent "out-of-market" compensation not generally available to bidders from influencing the clearing price in the Auction. *PJM Interconnection, L.L.C.,* 137 FERC ¶ 61,145 at PP 242-253 (2011), *review den. sub nom. N.J. Bd. of Pub. Utils. v. FERC*, *supra*, 744 F.3d at 107-108.

In order to receive any payment under the Standard Offer Capacity Agreement, the PJM-established bid for capacity offers by Petitioners CPV and EIF would have to have been below the maximum price set by the Base Residual Auction, so that it would clear the relevant Base Residual Auction at a price level that both PJM and FERC had concluded satisfied the statutory "just and reasonable" standard of FPA Sections 205 and 206 without unfairly impacting the results of the Auction. *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at P 143 (2013).

The New Jersey Legislature's directive, to utilities subject to its supervision, to promote the construction of new generation within New Jersey by entering into a hedging arrangement with the developer of that new generation does not implicate any recognized variety of preemption. *La. Pub. Serv. Comm'n v. FCC*, *supra*, 476 U.S. at 368-369 (identifying and summarizing six "varieties" of preemption and the circumstances in which they arise). The Court of Appeals agreed below (Pet. App. 27a) with the United States Court of Appeals for the Fourth Circuit's characterization in *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 477 (4th Cir. 2014), *petitions for cert. pending*, Nos. 14-614 & 14-623 (docketed Nov. 28, 2014), that, for purposes of field preemption, "'[t]he fact that [these sorts of payments] do[] not formally upset the terms of a federal transaction is no defense, since the functional results are precisely the same' . . . . The generators receive a different price for the capacity they clear through PJM than what FERC intended." This characterization overlooks the fact that the Standard Offer Capacity Agreement, like the Contract for Differences in *Nazarian*, involves a different product than that which is traded in the PJM Base Residual

Auction. The fifteen-year hedge that is the substance of the Standard Offer Capacity Agreement affects neither the determination of prices nor the resulting obligations that are "set" by the PJM Reliability Pricing Model and its Base Residual Auction for a single year's capacity supply undertaking. In short, the Standard Offer Capacity Agreement wraps around the outcome of the Base Residual Auction to provide revenue certainty to a new generating resource. It does not fix, set or determine the price established by the Base Residual Auction, which operates entirely independently from its influence.

The Federal Power Act "is premised on contractual agreements voluntarily devised by the regulated companies" (*Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968)). In the Act, Congress "departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting." *Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 479 (2002). In the context of FERC's current reliance on market forces to restrain wholesale rates to just and reasonable levels, it is axiomatic that "[m]arkets are not perfect, and one of the reasons that parties enter into wholesale-power contracts is precisely to hedge against the volatility that market imperfections produce." *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 547 (2008). The New Jersey Legislature's LCAPP directive that New Jersey's electric utilities providing Basic Generation Service enter into the hedging arrangement in this case that the Court of Appeals concluded was preempted by the Federal Power Act may more appropriately be viewed as an exercise of

authority properly reserved to the states[10] by Section 201(b)(1) of the FPA.[11] *See New York v. FERC*, 535 U.S. 1, 24 (2002) (explaining concurrent spheres of FERC and state regulation under FPA Section 201(b)(1)). Ultimately, without the need to establish specific metes and bounds of the respective regulatory regimes of the FERC and state regulation in this context, the New Jersey Legislature's directive to the utilities providing Basic Generation Service represents a response, in the form of bilateral contracting to reduce price volatility and encourage the development of new energy infrastructure that FERC had long encouraged in connection with its oversight of centralized capacity auctions, including specifically PJM's Reliability Pricing Model.[12] In this

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[10] The requirements for Basic Generation Service are set forth in N.J.S.A. § 48:3-57. As this Court has held, "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the states," *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

[11] 16 U.S.C. § 824(b)(1), which provides in relevant part that "[t]he Commission . . . shall not have jurisdiction, except as specifically provided. . . over facilities used for the generation of electric energy. . ."

[12] *ISO New England, Inc.*, 138 FERC ¶ 61,027 at P 74 (2012) ("The establishment of such an offer floor does not prohibit parties from self-supplying. Parties may self-supply with existing capacity, which is not subject to the economic benchmarks established by the April 13 Order. Parties may also self-supply with new capacity, provided these new resources clear the auction"); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 208 (2011) ("the purpose and function of the MOPR is not to unreasonably impede the efforts of resources choosing to procure or build capacity under long-standing business models"); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, P 29 (2006) ("The Settlement preserves provisions . . . that support self-supply and bilateral contracts through various means,

regard, FERC's repeated acknowledgement of the importance of bilateral contracting to fulfill the PJM region's infrastructure needs strongly counsels against the Court of Appeals' preemption conclusion here. *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 721 (1985) (". . . since the agency has not suggested that the county ordinances interfere with federal goals, we are reluctant in the absence of strong evidence to find a threat to the federal goal").

The danger posed by the Court of Appeals' decision to the Nation's ability to fulfill its current and future energy infrastructure needs through stable, long-term, bilateral contractual arrangements that provide a secure revenue stream for financing is manifest. The need for such arrangements has been acknowledged repeatedly by the federal agency whose jurisdiction the Court of Appeals sought to protect with its preemption ruling. There is no plausible suggestion that the State regulatory initiative here poses any genuine prospect of interference with the operation of federal regulation.

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including capacity pricing hubs and electronic forums for bilateral transactions"); *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112 at P 20 (2004) (". . . dependence on price volatility for investment is an inadequate foundation for cost-effective financing of new infrastructure. . . . Ideally, the market should encourage [load-serving entities] to engage in long-term bilateral contracting to support needed investment. . . .").

II. The Decision Below Mistakenly Concluded That the LCAPP Would "Set" Rates

The Court of Appeals concluded (Pet. App. 25a) that "[b]ecause FERC has exercised control over the field of interstate capacity prices, and because FERC's control is exclusive, New Jersey's efforts to regulate the same subject matter cannot stand." The New Jersey Legislature set no rate in this case. Nor could its directive in the LCAPP to the New Jersey utilities providing Basic Generation Service have displaced any action undertaken by the FERC. This is because utilities – not the FERC – set rates under the Federal Power Act. Petitioners CPV and EIF set the rates at which they were willing to enter into the fifteen-year Standard Offer Capacity Agreements with the New Jersey Basic Generation Service utilities. PJM (another public utility) would set the price at which CPV and EIF were permitted to bid in the 2012 Base Residual Auction, which in turn determined a one-year level of payments to CPV and EIF for their assumption of capacity supply obligations under the PJM Reliability Pricing Model. The Court of Appeals' preemption conclusions in this case both rest on that Court's misplacement of the locus of rate setting authority under the Federal Power Act.

Prior to the decision below, it had long been understood that:

> Sections 205 and 206(a) 'are simply parts of a single statutory scheme under which all rates are established initially by the (utilities), by contract or otherwise, and all rates are

> subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on (utilities) as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of (electric utilities).'[13]

In the Federal Power Act, Congress "departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting." *Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 479 (2002). The result of Congress's decision to rely on contractual rate setting means that the Act "is premised on contractual agreements voluntarily devised by the regulated companies" (*Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968)). Concomitantly, the FERC has no authority to require a public utility "to cede rights expressly given to them in section 205 of the Federal Power Act . . . . the very statutory rights given to them by Congress." *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9-10 (D.C. Cir. 2002). Simply put, "the FPA reserves to the utility, and not to FERC, the power to establish rates, by contract or otherwise." *Town of Barnstable v. Berwick*, 17 F. Supp.3d 113, 124 n. 26 (D. Mass. 2014), *appeal pending*, No. 14-1597 (1st Cir. filed June 2, 2014).

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[13] *Papago Tribal Utilities Authority v. FERC*, 610 F.2d 914, 924 (D.C. Cir. 1980), *quoting United Gas Pipeline Co. v. Mobile Gas Service Co.*, *supra*, 350 U.S. at 341.

Here, as stated above, Petitioners CPV and EIF set the "rate" in the Standard Offer Capacity Agreement. To the extent that rate was subject to Section 205 or 206 of the FPA, it was incumbent upon Petitioners CPV and EIF to make the appropriate filing with FERC and to demonstrate that its rate was just, reasonable and not unduly discriminatory. *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 at P 69 (2010). The New Jersey Legislature did not "set" any rate in connection with the LCAPP or the Standard Offer Capacity Agreements under its aegis. The Court of Appeals' contrary holding in the case below impedes the ability of load-serving utilities and developers of generation to enter into long-term contracts required for the financing of energy infrastructure.

CONCLUSION

For the foregoing reasons, the petitions for writ of *certiorari* of Petitioners Fiordalosi, *et al.*, and of CPV Power Development, Inc. and EIF Newark, LLC should be granted.

Respectfully submitted,

John P. Coyle
Counsel of Record
Duncan & Allen
1730 Rhode Island Avenue, N.W.
Suite 700
Washington, D.C. 20036-3115
(202) 289-8400
jpc@duncanallen.com

Delia D. Patterson
Randolph Lee Elliott
American Public Power Association
2451 Crystal Drive, Suite 1000
Arlington, Virginia 22202

Jay A. Morrison
Pamela M. Silberstein
Paul M. Breakman
National Rural Electric
Cooperative Association
4301 Wilson Boulevard
Arlington, Virginia 22203

Counsel for Amici Curiae American Public Power Association and National Rural Electric Cooperative Association