Nos. 13-4330, 13-4394 & 13-4501 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PPL ENERGYPLUS, LLC, et al.,

v.

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

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

CPV POWER DEVELOPMENT, INC.,
Appellant in No. 13-4330

HESS NEWARK, LLC,
Appellant in No. 13-4394

LEE A. SOLOMON et al.,
Appellants in No. 13-4501

Appeal from Judgment of the United States District Court
for the District of New Jersey, No. 3:11-cv-00745-PGS

Brief of Amici Curiae American Public Power Association and National Rural Electric Cooperative Association Supporting Appellants and Reversal

Randolph Lee Elliott
Denise C. Goulet
Miller, Balis & O'Neil, P.C.
1015 Fifteenth Street, N.W., Suite 1200
Washington, DC 20005
(202) 296-2960

Attorneys for American Public Power Association and National Rural Electric Cooperative Association

January 24, 2014

(additional counsel listed on next page)

Susan N. Kelly
Senior Vice President of Policy Analysis and General Counsel
Delia D. Patterson
Assistant General Counsel
American Public Power Association
1875 Connecticut Avenue, N.W.
Washington, DC 20009
202-467-2900

Jay A. Morrison
Vice President, Regulatory Issues
Pamela M. Silberstein
Associate Director, Power Supply Issues
National Rural Electric Cooperative Association
4301 Wilson Boulevard
Arlington, VA 22203
703-907-5811

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INTEREST OF AMICI CURIAE[1]

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. The association'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 the association'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 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

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

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 over a decade 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- 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 capacity resources that, in their judgment, best enables them to meet their environmental and other regulatory obligations and provide reliable service at the lowest reasonable cost.

SUMMARY OF ARGUMENT

The decision below gets this case backwards. It is the district court—not the State of New Jersey—that has infringed on the exclusive authority of the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA), 16 U.S.C. §§ 824–824u, to regulate rates for interstate wholesale electricity sales.

The decision below upsets Congress' careful delineation of authority between FERC and the states. The FPA preserves state jurisdiction over retail rates and facilities for the generation of electricity and local distribution. These are the only matters regulated by the New Jersey Long-Term Capacity Agreement Pilot Program Act (LCAPP Act), N.J. Stat. Ann. §§ 48:3-98.2– .4. The FPA does not prohibit a state from overseeing the wholesale power purchases by utilities subject to its jurisdiction if those utilities may choose among alternative, FERC-regulated, wholesale power purchases or may forgo such purchases by building their own generation. . The LCAPP Act reaches no more broadly than that, and it does not establish any wholesale rate in violation of any FERC-regulated tariff.

But the FPA *does* prohibit federal courts from determining in the first instance whether a wholesale electricity price established under one FERC tariff is unlawful because some other FERC tariff should govern the transaction. The "filed rate" doctrine holds that courts, except when reviewing a FERC order, must give binding effect to interstate wholesale electric rates established or accepted by FERC. By deciding for itself which wholesale price is "preferred," and by declaring any other wholesale price "void," the district court clearly overstepped the mark, and for that reason alone its judgment should be set aside.

The district court's decision is also contrary to public policy. The court essentially consigns developers of new power plants in New Jersey to selling their

capacity in a yearly auction run by PJM with substantial price volatility. But building a new power plant requires long-term financial arrangements, which often take the form of long-term wholesale contracts with distribution utilities, public power systems, or electric cooperatives—"load-serving entities"—that purchase the plant's output to serve their customers. Congress and FERC have consistently recognized that fact and supported such long-term arrangements. Unless the district court's decision is reversed, national energy policy may be frustrated by federal-court litigation in other states making similar baseless claims—which has already happened.

This case does not involve public power systems or electric cooperatives. Unlike the investor-owned utilities in this case, they are generally not regulated by FERC or, in many cases, the states. But many public power and cooperative utilities participate in the interstate wholesale electricity markets that FERC regulates, and they rely on long-term power contracts to develop new power plants to serve their customers. Amici curiae do not concede that such arrangements would be held to be preempted by the FPA if the district court's decision is affirmed. But the district court's decision potentially threatens to undermine their continued ability to acquire long-term wholesale power supplies and to develop their own needed generation facilities.

ARGUMENT

I. FERC allows sales of capacity in the PJM region under long-term bilateral contracts as well as in PJM's capacity auctions.

The decision below rests on an erroneous understanding of the FPA and of FERC's orders and policy. As a result, the district court barred the State of New Jersey from exercising legitimate authority reserved to it in the FPA, *see infra* Section II, and compounded that error by deciding matters entrusted to FERC's exclusive determination, *see infra* Section III. These errors both spring from the district court's failure to appreciate that there are two, parallel FERC-authorized and FERC-regulated mechanisms for the sale of capacity in the PJM region—a bilateral market, in which buyers and sellers enter into capacity sales transactions directly with one another, and PJM's centralized capacity auction.

A. FERC has accepted market-based rate tariffs of public utilities authorizing capacity sales under bilateral contracts in RTO regions.

Congress amended the FPA in 1935 in order "to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758 (1973). The FPA gives FERC exclusive jurisdiction over "the transmission of electric energy in interstate commerce" and "the sale of electric

energy at wholesale in interstate commerce"; over "all facilities" used for such transmission and sale; and over "public utilities" that own or operate such facilities. 16 U.S.C. §§ 824(b)(1), 824(e). *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (interstate wholesale rates).[2]

The FPA provides that "[a]ll rates and charges made, demanded, or received by any public utility" for the transmission or sale of electric energy subject to FERC's jurisdiction "shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." 16 U.S.C. § 824d(a). To enable FERC to enforce this standard, the FPA requires every public utility to file with FERC "schedules showing all [jurisdictional] rates and charges… together with all contracts which in any manner affect or relate to such rates [or] charges." 16 U.S.C. § 824d(c). A public utility cannot change its rate schedules without giving prior notice by filing the change with FERC. 16 U.S.C. § 824d(d). If FERC finds that such a rate is "unjust, unreasonable, unduly discriminatory or preferential," the FPA provides that FERC "shall determine the just and reasonable rate … to be thereafter observed and in force, and shall fix the same by order." 16 U.S.C. § 824e(a).

[2] Public power systems and most electric cooperatives are not "public utilities" under the FPA. 16 U.S.C. § 824(f).

Although the FPA does not prescribe a particular method for establishing just and reasonable rates, FERC traditionally has reviewed rates based on the cost of service. *See* 18 C.F.R. §§ 35.12, 35.13 (2013). In recent years, however, FERC has waived the cost-of-service filing requirements and allowed electricity sales at market-based rates—i.e., by negotiation with each individual purchaser. FERC grants blanket market-based rate authority to a public utility upon a showing that it lacks, or has adequately mitigated, any market power. *See* 18 C.F.R. §§ 35.36–35.42 (2013). This blanket authority allows the public utility to make sales at changing market rates without the prior notice and filing of each contract and new rate; instead, FERC requires the public utility to file periodic reports on its market-based rate transactions after the fact. *See* 18 C.F.R. § 35.10b (2013). While the lawfulness of FERC's scheme of market-based rates is not without its critics, it is not at issue in this litigation and need not be addressed to decide this appeal. *See Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1*, 554 U.S. 527, 548 (2008).

What is important for present purposes is that FERC authorizes public utilities to sell capacity at market-based rates in the PJM region by a bilateral contract negotiated with the purchaser as well as in PJM's centralized capacity auction. Indeed, FERC has already granted blanket authority to make sales of "capacity" at market-based rates to one of the generators whose agreements were

voided by the district court. *See CPV Shore, LLC*, 142 FERC ¶ 61,081, P 1 (2013). This blanket authority extends to sales made under bilateral agreements as well as in capacity auctions operated by an RTO.

B. PJM's tariff allows capacity sales under long-term bilateral contracts.

To ensure open-access, non-discriminatory transmission service and to separate the operation of the transmission grid from the economic interests of electricity generators, FERC has encouraged the creation of RTOs. *See Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004). These entities, which do not own or operate any generation facilities, operate the transmission facilities of transmission-owning utilities and "provide open access to the regional transmission system to all electricity generators at rates established in a single, unbundled, grid-wide tariff that applies to all eligible users in a non-discriminatory manner." *Id.* at 1364 (internal quotation omitted). While FERC specifies the minimum functions that all RTOs must perform, these functions do not include the administration of capacity markets. 18 C.F.R. § 35.34 (2013).

PJM is an RTO that operates the transmission grid in New Jersey and several other states. *PJM Interconnection, L.L.C.*, 101 FERC ¶ 61,345 (2002) (granting RTO status). As such, PJM is a public utility subject to FERC regulation under the

FPA. *Pennsylvania-New Jersey-Maryland Interconnection*, 103 FERC ¶ 61,170, PP 16-21 (2003).

In 2006, FERC accepted PJM tariff amendments providing for PJM to administer annual auctions to procure capacity for the purpose of ensuring grid reliability—what PJM calls the Reliability Pricing Model or RPM. *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006), *order on reh'g*, 119 FERC ¶ 61,318 (2007). Under its tariff, PJM annually conducts a "Base Residual Auction" for capacity to be supplied for a one-year term, three years in the future. *Id. See generally* PJM, *Manual 18: PJM Capacity Market* 88-90 (rev. 20, Nov. 20, 2013) (available at www.pjm.com/~/media/documents/manuals/m18.ashx) ("*PJM Capacity Market Manual*"). Amici curiae emphasize three points about the RPM structure.

1. The Base Residual Auction accommodates the use of self-supplied capacity and long-term, bilateral capacity agreements by load-serving entities. PJM describes the "RPM structure" to include both the "Base Residual Auction" and the "Bilateral Market." *Id.* at 5. The Base Residual Auction is "residual" because self-supply and the bilateral market operate *first*. 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 at a time when further delay in procurement

could jeopardize reliability. This, however, should be a last resort." *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079, P 71 (2006). As described by FERC, the RPM proposal provided 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. Subsequently FERC approved a negotiated settlement that "preserve[d] provisions of [PJM's proposal] that support self-supply and bilateral contracts …." *PJM Interconnection*, 117 FERC ¶ 61,331, P 13. In 2011, FERC approved amendments to the Base Residual Auction rules, but the amended rules continued to provide for participation in the auction by capacity resources that load-serving entities own or acquire by bilateral contract and designate as their "self-supply." *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, PP 191–197, *order on reh'g*, 137 FERC ¶ 61,145 (2011), *pet. for review pending sub nom. N.J. Bd. of Pub. Utils. v. FERC*, Nos. 11-4245 *et al.* (3rd Cir.). The currently effective RPM structure contains provisions to accommodate self-supply capacity that load-serving entities own or acquire in the bilateral market. *See PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, PP 107–115 (2013), *reh'g pending.*

2. PJM's tariff effectively requires load-serving entities in the PJM region to offer and clear their generating capacity resources in the Base Residual Auction. This includes (a) the capacity from generating facilities in PJM owned by load-serving entities themselves and (b) the capacity from generating facilities in PJM purchased by load-serving entities in the bilateral market. *See PJM Capacity Market Manual* 4–6, 39–45, 57–63. PJM assigns a capacity responsibility to each load-serving entity (based on its load and a reserve margin), *see id.* at 4, 7–14, and charges it for its proportionate share of the capacity purchased in the RPM auction, *see id.* at 140. But if a load-serving entity also sells its self-supplied (owned or purchased) generation capacity in the Base Residual Auction, then it also receives revenue from PJM—the auction price times the quantity of its capacity that clears the auction, *see id.* at 14—that offsets PJM's charges to the load-serving entity for that quantity of capacity. This enables a load-serving entity to hedge the auction price with owned or purchased capacity resources.[3] As long as the load-serving

[3] The *PJM Capacity Market Manual* explains this hedging function as follows:

> Under RPM, each LSE [load-serving entity] that serves load in a PJM Zone during the Delivery Year shall be responsible for paying a Locational Reliability Charge equal to their Daily Unforced Capacity Obligation in the Zone multiplied by the Final Zonal Capacity Price applicable to that Zone. LSEs may choose to hedge their Locational Reliability Charge obligations by directly offering and clearing resources in the Base Residual Auction and Incremental Auctions or by designating self-supplied resources (resources directly owned or resources contracted for through unit-specific bilateral purchases) as

entity's capacity clears the RPM auction, it avoids paying twice for capacity—once to PJM and once to a third-party capacity seller or to finance its generating facility.

3. At various times, PJM or FERC has changed the rules for the Base Residual Auction, including the maximum and minimum prices that may be offered by suppliers in the auction and how capacity resources clear the auction, and these rules have been and remain highly controversial.[4] While the auction rules affect the ability of load-serving entities to finance and build new generating facilities, and to purchase long-term capacity resources, these rules are not at issue in this case. The relevant point is that throughout its existence, the RPM structure has permitted long-term, bilateral contracting for capacity in the PJM region—at prices and terms determined outside of the Base Residual Auction and regulated by FERC through its oversight of public utility sellers' market-based rate tariffs.

> self-scheduled to cover their obligation in the Base Residual Auction. Such action may wholly or partially offset an LSE's Locational Reliability Charges during the Delivery Year depending upon how the clearing prices of the resources compare to the Final Zonal Capacity Prices that apply to their unforced capacity obligations.

PJM Capacity Market Manual at 4. *See also id.* at 6 ("The bilateral market … provides LSEs the opportunity to hedge against the Locational Reliability Charge.").

[4] Petitions for review of FERC's 2011 orders amending the auction rules are before this Court in *N.J. Bd. of Pub. Utils. v. FERC*, Nos. 11-4245 *et al.* (3rd Cir.) (argued Sept. 10, 2013).

C. The FPA and FERC policy support long-term power contracting.

Apart from FERC's orders concerning PJM's RPM auction, FERC's policies encourage and facilitate long-term power-supply agreements in RTO regions. Congress amended the FPA in 2005 by adding a new section 217, 16 U.S.C. § 824q , which requires in relevant part that "[t]he Commission shall exercise the authority of the Commission under this chapter [of the FPA] in a manner that … enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs." 16 U.S.C. § 824q(b)(4).[5] To implement this directive, FERC adopted regulations requiring RTOs with organized electricity markets, like PJM, to make available long-term firm (i.e., generally uninterruptible) transmission rights. 18 C.F.R. § 42.1 (2013).[6] These regulations require that RTOs make available firm transmission rights with terms long enough "to meet the needs of load serving entities to hedge long-term power supply arrangements made or planned to satisfy a service obligation" and they

[5] Load-serving entities are defined as utilities, including public power systems and electric cooperatives, obligated by state law or contract to provide electric service to end-users. 16 U.S.C. § 824q(a). *See* Jay Morrison, *EPACT '05 Implementation: Is FERC in Full Compliance?* 28 Energy L.J. 631 (2007).

[6] *See* Long-Term Firm Transmission Rights in Organized Electricity Markets, Order No. 681, 71 Fed. Reg. 43,564 (Aug. 1, 2006), *order on reh'g*, Order No. 681-A, 71 Fed. Reg. 68,440 (Nov. 16, 2006), *order on reh'g*, Order No. 681-B, 74 Fed. Reg. 13,103 (Mar. 26, 2009).

"must be able to offer firm coverage for at least a 10 year period." 18 C.F.R. § 42.1(d)(4) (2013).

In 2008, FERC amended its regulations governing RTOs to require them to dedicate a portion of their web sites for market participants to post offers to buy or sell power on a long-term basis (one year or more), with the goal of promoting greater use of long-term contracts by improving market transparency. 18 C.F.R. § 35.28(g)(2) (2013).[7] The Commission explained the importance of long-term contracts in these terms:

> Long-term power contracts are an important element of a functioning electric power market. Forward power contracting allows buyers and sellers to hedge against the risk that prices may fluctuate in the future. Both buyers and sellers should be able to create portfolios of short-, intermediate-, and long-term power supplies to manage risk and meet customer demand. Long-term contracts can also improve price stability, mitigate the risk of market power abuse, and provide a platform for investment in new generation and transmission.[8]

It would be an exceedingly incongruous result if PJM's capacity-auction process were construed in the teeth of these Congressional and FERC policies to preclude load-serving entities from entering into long-term capacity arrangements to hedge the price volatility of PJM's annual capacity auctions. Yet that is the

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[7] *See* Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 73 Fed. Reg. 64,100, PP 4, 277-309 (Oct. 28, 2008), *order on reh'g*, Order No. 719-A, 74 Fed. Reg. 37,776 (July 29, 2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

[8] *Id.*, P 278.

implication of the district court's decision finding that the LCAPP Act is preempted because the RPM auction is FERC's "preferred" method for establishing capacity prices in the PJM region. JA 78, 86.

II. New Jersey was not preempted from directing utilities to enter into long-term capacity agreements.

As explained above, the FPA applies to "the sale of electric energy at wholesale in interstate commerce" and gives FERC jurisdiction over all facilities used for such sales. But the FPA further states that, absent a specific provision, it "shall not apply to any other sale of electric energy," and FERC "shall not have jurisdiction ... over facilities used for the generation of electric energy or over facilities used in local distribution …." 16 U.S.C. § 824(b)(1). This "shall not" language "was employed without subtlety or contortion and in its usual sense." *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 529 (1945). "Congress by these terms plainly was trying to reconcile the claims of federal and of local authorities and to apportion federal and state jurisdiction over the industry." *Id.* at 531. To be sure, the FPA occupies a field. But Congress was careful to delineate the limits of that field. "Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Pac.*

Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n, 461 U.S. 190, 205 (1983).[9]

The district court acknowledged that New Jersey "retained the responsibility for siting and construction of power plants." JA 84. But it reasoned that the State must "exercise this responsibility without interfering with the Commission's exclusive authority to regulate wholesale sales of electricity in interstate commerce." JA 84. In this instance, it held the LCAPP Act had interfered with FERC's authority "by establishing the price that LCAPP generators will receive for their sales of capacity." JA 84.

Appellants argue that New Jersey is regulating the generation of electric energy as permitted by the FPA. State Br. at 19-30; CPV Br. at 22-33; Hess Br. at 14-33. The district court found, however, that the challenged Standard Offer Capacity Agreements (SOCAs) establish interstate wholesale rates and therefore are subject to FERC's jurisdiction. JA 83-84. Appellants challenge that jurisdictional finding. State Br. at 31-33; CPV Br. at 36-41; Hess Br. at 18-28. Amici curiae take no position on this jurisdictional issue, since their members are

[9] *See New York v. FERC*, 535 U.S. 1, 24 (2002) (noting traditional subjects of state authority over retail utilities identified by FERC, "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").

generally non-jurisdictional entities. *See supra* n.2. But even if New Jersey is regulating matters beyond generation, and even if the SOCAs are wholesale contracts within FERC's jurisdiction, New Jersey still has acted well within the authority reserved to it by the FPA. In particular, it did not establish any wholesale prices contrary to any FERC tariff.

A. The FPA allows New Jersey to direct utility companies under its jurisdiction to execute the SOCAs.

The jurisdiction of state and local regulators over retail rates preserved by the FPA is broad enough to encompass New Jersey's actions in this case. When FERC regulates the rates for interstate wholesale electric energy under the FPA, it regulates the sales and the selling public utilities; in most instances, it does not directly regulate the wholesale purchases or the purchasers.[10] Thus, in reviewing a cost-based wholesale rate, FERC might examine the reasonableness of the seller's costs used to determine the rate; but it would not examine the reasonableness of the wholesale purchaser's decision to purchase energy at that wholesale rate rather than some other wholesale rate.

Indeed, it is well established that the FPA allows state and local regulators, in exercising their jurisdiction over retail rates, to examine the question whether it

[10] An exception is when FERC sets, approves a tariff that sets, both the price and the quantity of the wholesale transaction. *See Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47–51 (2003). This case does not present that issue.

was prudent for a wholesale buyer to purchase at a FERC-regulated rate given the available alternatives, and if not, how much of the purchase price should be disallowed from the retail rates charged by the buyer. *See Ky. W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 837 F.2d 600, 606–09 (3rd Cir. 1988); *Pike County Light & Power Co. v. Pa. Pub. Util. Comm'n*, 465 A.2d 735, 738 (Pa. Commw. 1983); *Narragansett Elec. Co. v. Burke*, 381 A.2d 1358 (R.I. 1977); *Cent. Vt. Pub. Serv. Corp.*, 84 FERC ¶ 61,194 at 61,974 (1998). While a state cannot review the reasonableness of the *rate* set by FERC, it may determine whether it is in the public interest for the wholesale purchaser whose retail rates it regulates to pay a particular FERC-set wholesale rate in light of its purchase alternatives. "[I]t might well be unreasonable for a utility to purchase unnecessary quantities of high-cost power, even at FERC-approved rates, if it had the legal right to refuse to buy that power." *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 374–75 (1988) (dicta).

More generally, the FPA preserves the authority of state regulators to oversee their regulated retail utilities' purchasing decisions in FERC-regulated wholesale markets. Thus, without running afoul of the FPA, a state can require a utility whose rates it regulates to enter into a long-term bilateral wholesale purchase agreement rather than purchase in the wholesale markets operated by an RTO.

That is what New Jersey has done here. As noted, there are two, parallel FERC-regulated mechanisms for the sale of capacity in the PJM region—the bilateral market and the RPM auction. New Jersey had the authority under the FPA to determine that long-term bilateral contracts voluntarily executed by the generation developers provided a more stable and reasonable mechanism over the long term for New Jersey retail ratepayers to pay for needed capacity resources than exclusively relying on PJM to purchase capacity, at more volatile prices, in the annual RPM auctions and then charge the costs to New Jersey's utilities.[11]

B. New Jersey has not established wholesale prices in violation of the FPA.

Contrary to the district court's finding, JA 84, New Jersey did not establish or impose the SOCA prices that LCAPP generators would receive. The SOCA generators proposed their prices in the LCAPP procurement process, and state authorities chose from among these proposals. The state did not compel any SOCA generator to offer or accept any particular price. Under the LCAPP process, the SOCA generator could propose any price it wanted and, until it executed an

[11] That the SOCAs are executed by distribution utilities, and the SOCA payments (or rebates) are reflected in local distribution charges, rather than in retail energy charges or in a separate capacity charge, does not change the analysis, because that choice is a rate-setting matter within New Jersey's authority over "all other sales" and "local distribution" reserved in the FPA.

agreement, could walk away if dissatisfied with the price or terms state authorities requested.

Moreover, the LCAPP process and the SOCAs did not interfere with the RPM auction process or RPM prices. Generators executing SOCAs would participate in the RPM auction in the ordinary fashion, in accordance with PJM's tariff and FERC's orders.

By requiring the generators to offer their capacity in the RPM auction and clear the auction, the SOCAs did not operate outside the PJM tariff—they operated in accordance with it. If the SOCA generator's capacity cleared the RPM auction, the generator would receive the RPM clearing price for the sale of its capacity, and PJM would charge New Jersey load-serving entities their share of the cost of that capacity along with other capacity clearing the auction. If the SOCA generator did *not* participate in and clear the RPM auction, however, PJM would have to acquire other capacity instead, and it would pass through those costs to PJM load-serving entities, including those in New Jersey. Thus, the requirement that the SOCA generator participate in and clear the RPM auction avoided having New Jersey ratepayers pay for capacity that did not benefit them under the PJM tariff.

By providing a long-term price hedge against the volatility of RPM auction prices, both for the SOCA generator and for New Jersey ratepayers, the SOCA payments (or rebates) functioned like any long-term wholesale power contract with

a fixed rate. *See Morgan Stanley*, 554 U.S. at 551. The RPM structure accommodates that result. *See supra* Section I.B.

III. The theory of the district court's decision is inconsistent with the FPA and violates the filed rate doctrine.

FERC's exclusive authority over rates for interstate wholesale sales of electric energy has several consequences, which together have come to be known as the "filed rate" doctrine. First, the parties to a transaction are bound by the rate filed with or fixed by FERC. Thus, the doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (*Arkla*).[12] Second, FERC itself has "no power to alter a rate retroactively." *Id.* at 578. Third, the filed rate is binding on state and federal courts. *Miss. Power*, 487 U.S. at 371. Fourth, under principles of federal preemption, the filed rate is binding on state utility regulators. *Id.* at 372; *Nantahala*, 476 U.S. at 963–66. "The considerations underlying the doctrine … are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." *Arkla*, 453 U.S. at 577-78 (internal quotation omitted). This Court, and all other

[12] *Arkla* concerned the Natural Gas Act, 15 U.S.C. §§ 717–717z . But as the Court noted there, the relevant provisions of that act and the FPA are substantially identical. 453 U.S. 577 n.7.

courts of appeals that have addressed the question, have applied the filed rate doctrine to FERC market-based wholesale electric tariffs and rates.[13]

This case involves the third prong of the filed rate doctrine—not the fourth. As shown above, New Jersey's actions were not preempted by the FPA. *See supra* Section II. But the district court also failed to recognize that the FPA, by granting exclusive authority to FERC to determine the reasonableness of interstate wholesale rates, prohibits a district court from voiding the rates in interstate wholesale electricity contracts on the ground that the court finds them unreasonable.

The district court properly concluded, JA 83, and no party to this case disputes, that FERC has exclusive jurisdiction over the capacity prices set by PJM's auction. But the district court also found that the challenged SOCAs establish interstate wholesale rates and are subject to FERC's jurisdiction. JA 83–84. Appellants challenge that jurisdictional finding. State Br. at 31–33; CPV Br. at

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[13] *See Utilimax.com, Inc. v. PPL EnergyPlus, LLC*, 378 F.3d 303, 307–08 (3d Cir. 2004); *Simon v. Keyspan Corp.*, 694 F.3d 196, 204–08 (2d Cir. 2012); *Pub. Util. Dist. No. 1 of Grays Harbor County v. IDACORP Inc.*, 379 F.3d 641, 650–52 (9th Cir. 2004); *Town of Norwood v. New Eng. Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000). *See also Tex. Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 509–10 (5th Cir. 2005) (applying filed rate doctrine to state-regulated wholesale market-based rate). Amici curiae do not contend that the filed rate doctrine should bar an antitrust claim for damages or injunctive relief concerning FERC market-based rates. *See Simon v. Keyspan*, 694 F.3d at 204–08 (noting issue but holding antitrust claim to be barred). This case does not present that issue, however, since the plaintiffs assert claims arising under traditional administrative and utility law.

36–41; Hess Br. at 18–28. As noted, amici curiae take no position on that issue. But even assuming *arguendo* that the SOCAs are FERC-jurisdictional contracts establishing FERC-jurisdictional rates, the district court's judgment still should be set aside. That judgment declared the SOCAs "void *ab initio*, invalid, and unenforceable …." JA 93. The filed rate doctrine, however, plainly prohibits the district court from invalidating a FERC-jurisdictional rate.

In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), the Supreme Court held that because Congress in the FPA gave FERC's predecessor, the Federal Power Commission, the authority to determine the reasonableness of wholesale electric rates, a litigant "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Id.* at 251. Accordingly, "the right to a reasonable rate is the right to the rate which the Commission files or fixes, and … except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one." *Id.* at 251-52. Yet that is precisely what the district court did here.[14]

[14] FERC's orders under the FPA are subject to exclusive judicial review in the courts of appeals. 16 U.S.C. § 825*l* (2012). Such orders cannot be collaterally attacked in other litigation. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-37 (1958).

The district court's sole basis for finding federal preemption was its own determination of whether a generator that clears the RPM auction may also receive payment under the SOCA. The court determined that the only lawful rates for capacity sales are the RPM auction prices: "The clearing prices for capacity sold in the RPM are the Commission approved rates for capacity sales made in PJM territory." JA 48. The court's basis for finding field preemption was its determination that the SOCAs "intrude upon the Commission's authority to set wholesale energy prices through its preferred RPM Auction process," JA 78, and that "the LCAPP supplants the federal statute, and intrudes upon the exclusive jurisdiction of the Commission, by establishing the price that LCAPP generators will receive for their sales of capacity," JA 84. Similarly, the court's conflict-preemption finding was based on its own determination "[f]rom reviewing the entire scheme of the RPM process … that the LCAPP Act poses an obstacle to the Commission's implementation of the RPM." JA 86. And by crediting the generator-plaintiffs' testimony that they "rely on the competitive price signals of the RPM Auction" and "the SOCA prices undermine their … ability to use those RPM price signals," the district court determined that "the SOCA's imposition of a government imposed price creates an obstacle to the Commission's preferred method for the wholesale sale of electricity in interstate commerce." JA 86.

Thus, the theory the district court employed to find federal preemption is itself inconsistent with the federal statute. If the SOCAs established prices subject to FERC's exclusive jurisdiction, as the district court found here, then the court cannot declare them void on the ground that they depart from FERC's "preferred" rates for capacity sales, because such a declaration would infringe on "the exclusive powers of the Commission to determine what those rates are to be." *Montana-Dakota Utils.*, 341 U.S. at 250. While the FPA requires that all wholesale rates be just and reasonable, "the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce." *Id.* at 251. The district court could not pick and choose which wholesale rates to make lawful.

Rather than voiding the SOCAs based on its own determination of what capacity prices are reasonable, or what price signals are efficient, the district court should have dismissed the complaint below for failure to state a claim upon which relief could be granted.[15]

[15] Any relief for Appellees lies at FERC, whose orders are reviewable in a court of appeals. *See supra* n.14. There is no basis for the district court to stay this action while it refers the FPA questions to FERC.

IV. The district court's decision potentially threatens legitimate wholesale contracting practices of public power utilities and electric cooperatives.

New Jersey's policy concerns, which led it to seek long-term agreements with generator developers to facilitate the development of clean, efficient new generation capacity in the state, are hardly unique to New Jersey. If they have not done so already, other states can be expected to consider adopting similar kinds of programs.

A 2012 study by APPA shows the importance of stable, long-term financial arrangements to the construction of new power plants. *See* American Public Power Association, *Power Plants Are Not Built On Spec* (Mar. 2012) (available at www.publicpower.org/files/PDFs/PowerPlantsArenotBuiltonSpecMarch2012%5F1331649529309%5F2.pdf). This study found that the great bulk of new generation capacity completed in the Nation in 2011 was built by developers who had long-term financial arrangements in place—either (1) the developer had a long-term contract with a utility that was purchasing the power to serve its customers, or (2) the developer was a vertically integrated utility building capacity to supply power to its customers. *Id.* at 1. Only two percent of the new generation project capacity completed in 2011 was built for shorter-term, market sales such as in centralized RTO capacity auctions. *Id.* The most recent results of the Base Residual Auction

(for delivery in 2016/2017) do not appear to be that stark, but they still show that load-serving entities continue to use self-supplied capacity resources in PJM.[16]

Given the importance of long-term financial arrangements to the financing of new generation—and the fact that Congress and FERC policy have supported long-term power contracting by load-serving entities, *see supra* Section I.C—the district court's decision is especially troubling. Unless it is reversed, national energy policy may be frustrated.

If other states in PJM or in the other RTOs with similar capacity auctions adopt policies resembling New Jersey's, they will likely face similar lawsuits.[17] An appeal is pending in the Fourth Circuit involving issues similar to this case arising from a complaint by generators in PJM against Maryland's state utility commission.[18] Moreover, a complaint recently filed in the District of Connecticut cites the district court's decision here and the decision on appeal in the Fourth

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[16] Of the generation capacity that requested and was granted exemption from PJM's "minimum offer price rule" and then cleared the market, 71% received a "Competitive Entry Exemption" and 29% a "Self-Supply Exemption." *See* PJM, *2016/2017 RPM Base Residual Auction Results* 4 (available at http://pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2016-2017-base-residual-auction-report.ashx). It is unclear whether this is a shift or an anomaly.

[17] ISO New England Inc. and the New York Independent System Operator, Inc., conduct similar capacity auctions. *See* FERC, *Centralized Capacity Market Design Elements*, Commission Staff Report AD13-7-000 (Aug. 23, 2013) (available at www.ferc.gov/CalendarFiles/20130826142258-Staff%20Paper.pdf).

[18] *See PPL EnergyPlus, LLC v. Nazarian*, No. 13-2419 (4th Cir. appeal docketed Nov. 25, 2013).

Circuit.[19] And a complaint has been filed in the District of Massachusetts against that state's utility commissioners alleging that their approval of a utility's procurement of capacity from a planned wind-power project was preempted by the FPA.[20]

These cases do not involve public power systems or electric cooperatives. Most states do not regulate the rates of public power systems or cooperatives. The law in those states leaves the public power or cooperative utility's resource-procurement decisions largely in its own hands, subject to the oversight of the entity's governing body, such as city council, municipal utility board, or a cooperatives' elected board of directors.

As the results of APPA's 2012 study indicate, public power systems and electric cooperatives are developing new generation resources to serve their customers' load by direct ownership and by long-term bilateral power purchase contracts. *See* APPA Study at 8 (37 percent of new capacity in study was under public power or cooperative ownership or contracts). Thus, a municipal joint action agency, which is organized to provide wholesale power to its several municipal

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[19] Complaint for Declaratory and Injunctive Relief for Violations of the Supremacy Clause of the U.S. Constitution, the Federal Power Act and the Public Utility Regulatory Policies Act of 1978, *Allco Finance Ltd. v. Esty*, No. 13-1874 (D. Conn. filed Dec. 18, 2013).

[20] Complaint for Declaratory and Injunctive Relief, *Town of Barnstable v. Berwick*, No. 14-10148 (D. Mass. filed Jan. 21, 2014).

distribution utility members, or a G&T cooperative, which provides wholesale power to its distribution-cooperative members, may have long-term contracts with its members obligating them to pay for their allocable shares of a new power plant's costs of providing service. In addition, public power systems and cooperatives—including public power systems and cooperatives in RTO regions with centralized capacity auctions—regularly purchase wholesale capacity and energy under long-term bilateral contracts.

Amici curiae do not concede that such arrangements would be held to be preempted by the FPA if the district court's decision is affirmed. But public power systems and cooperatives that build or acquire generation capacity supported by long-term contracts could face the prospect of expensive, time-consuming litigation resembling this case and the others now pending in other jurisdictions, accusing them of frustrating FERC's "preferred" RTO capacity market, of distorting the RTO's "price signals," or of "subsidizing" new entry into the wholesale generation market.

As shown above, the district court had no basis for entertaining such claims against New Jersey in this case. Federal courts also have no basis for entertaining similar claims aimed at the resource-procurement practices of public power or cooperative utilities, which generally are entrusted to their business judgment by the FPA and by state and local law. The Court should put a stop in this Circuit to

the coordinated efforts of existing wholesale generators and their affiliates to enlist federal judges in erecting new barriers to entry in the wholesale power markets.

CONCLUSION

The judgment below should be reversed, and the district court should be directed to dismiss the action.

Respectfully submitted,

/s Randolph Lee Elliott
Randolph Lee Elliott
Denise C. Goulet
Miller, Balis & O'Neil, P.C.
Twelfth Floor
1015 Fifteenth Street, N.W.
Washington, DC 20005
(202) 296-2960

Attorneys for American Public Power Association and National Rural Electric Cooperative Association

Susan N. Kelly
Senior Vice President of Policy Analysis and General Counsel
Delia D. Patterson
Assistant General Counsel
American Public Power Association
1875 Connecticut Avenue, N.W.
Washington, DC 20009
202-467-2900

Jay A. Morrison
Vice President, Regulatory Issues
Pamela M. Silberstein
Associate Director, Power Supply Issues
National Rural Electric Cooperative Association
4301 Wilson Boulevard
Arlington, VA 22203
703-907-5811

January 24, 2014

COMBINED CERTIFICATIONS

1. Compliance with L.A.R. 28.3(d)

I certify that I am a member in good standing of the bar of this Court.

2. Compliance with Rule 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,981 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The word count of Microsoft Word 2007 was used, including footnotes.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

3. Compliance with L.A.R. 31.1(c)

The text of the electronic version of this brief is identical to the text in the paper copies. The virus detection program Microsoft System Center 2012 Endpoint Protection was run on the electronic version of this brief and no virus was detected.

January 24, 2014

/s Randolph Lee Elliott

Randolph Lee Elliott
Miller, Balis & O'Neil, P.C.
Twelfth Floor
1015 Fifteenth Street, N.W.
Washington, DC 20005
(202) 296-2960

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25, L.A.R. 25 and Misc. 113.4, I hereby certify that on this day I served a copy of the foregoing brief on the following counsel by U.S. Mail, postage prepaid:

Brian O. Lipman
State of New Jersey
Division of Rate Counsel
140 East Front Street
4th Floor, P.O. Box 003
Trenton, NJ 08625

All other counsel in these consolidated cases are Filing Users of this Court's CM/ECF system and were served via the CM/ECF system by Notice of Docket Activity.

January 24, 2014

/s Randolph Lee Elliott
Randolph Lee Elliott
Miller, Balis & O'Neil, P.C.
Twelfth Floor
1015 Fifteenth Street, N.W.
Washington, DC 20005
(202) 296-2960