Case No. 13-4330, 13-4394 & 13-4501 (consolidated)

IN THE
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.

v.

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

On Appeal from the United States District Court
for the District of New Jersey

BRIEF OF AMICUS CURAIE AMERICAN WIND ENERGY ASSOCIATION IN SUPPORT OF APPELLANTS AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT (Fed. R. App. P. 26.1)

I certify that *amicus curiae*, the American Wind Energy Association ("AWEA"), does not have a parent corporation and that no publicly held corporation owns 10 percent or more of any stake or stock in AWEA.

None of the parties' counsel authored this brief in whole or in part. None of the parties or their counsel contributed money that was intended to fund preparing or submitting the brief. No person other than AWEA contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(c)(5).

Dated: January 24, 2014

/s/ Gene Grace
Gene Grace

Counsel for *Amicus Curiae* the American Wind Energy Association

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I. INTEREST OF AMICUS CURIAE

The American Wind Energy Association ("AWEA") is a national trade association representing a broad range of entities with a common purpose of encouraging the expansion and facilitation of wind energy resources in the United States. AWEA seeks to promote wind energy as a clean source of electricity for consumers.

AWEA has filed a motion for leave to file this *amicus curiae* brief and moves to file this brief to ensure that the Court's decision clarifies that the Federal Power Act ("FPA") preserves state jurisdiction to promote state-mandated solicitations and long-term power contracts as long as FERC's exclusive federal jurisdiction over wholesale rates is not disturbed. If the Court fails to do so, its decision could be misconstrued to expand improperly the scope of the Federal Energy Regulatory Commission's ("FERC" or "Commission") wholesale rate authority under the FPA and, in turn, erroneously narrow the scope of state authority to promote preferred generating resources. In particular, as discussed further below, we urge the Court to provide clear guidance in its opinion so that it does not unnecessarily call into question state competitive electricity procurements that are lawful exercises of state authority (*i.e.*, requirements that utilities purchase capacity and energy at wholesale under specific state mandates) as long as they do

not run afoul of the Supremacy Clause by intruding on FERC's exclusive right to set wholesale power rates.

II. ARGUMENT

A. AWEA submits this brief in support of Appellants urging the Court to reverse the district court's ruling in favor of Plaintiff-Appellees.

AWEA urges the court to reverse the district court's ruling against Appellants by adopting the Appellants' arguments that the New Jersey Long-Term Capacity Pilot Project Act, P.L. 2001, c. 9, approved Jan. 28, 2011, codified at N.J. Stat. Ann. §§ 48:3-51, 48:3-98.2-.4 ("LCAPP Act") does not violate the Supremacy Clause, U.S. Const. art. VI, para. 2. AWEA hereby incorporates by reference the arguments set forth in the Briefs filed by Appellants, CPV Power Development, Inc. ("CPV") and Hess Newark, LLC ("Hess Newark"), asserting that the LCAPP Act does not invade FERC's jurisdiction over wholesale sales of electricity in interstate commerce because, among other reasons, it does not in fact set a wholesale price for capacity. *See* CPV Appellant Br. at 22–46; Hess Newark Appellant Br. at 14–33.

B. If the Court affirms the district court's decision in favor of Plaintiff-Appellees, the Court should clarify that the LCAPP Act violates the Supremacy Clause only inasmuch as the district court found that the Act establishes the wholesale price that generators will receive for their sales of capacity, thereby interfering with FERC's exclusive federal jurisdiction over wholesale rates.

If this Court affirms the district court's decision, we encourage the Court to be explicit that the district court's ruling construing the scope of FERC's jurisdiction is limited to its actual finding: FERC's jurisdiction preempts the LCAPP Act to the extent it establishes a set *price* for capacity from new generation units. If the Court fails to do so, the scope of FERC's wholesale rate authority under the FPA could be erroneously expanded to preempt any wholesale procurement requirement contracts investor owned utilities enter into by order of state mandate, regardless of whether the state action sets a wholesale rate. Such a ruling would, in turn, have the unintended effect of limiting the scope of state authority to lawfully develop its electric generation portfolio to achieve policy objectives.

The FPA vests FERC with the responsibility to set the "rates and charges" of wholesale electric energy and to ensure that those rates are "just and reasonable." 16 U.S.C. § 824d(a); *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47-48 (2003). Thus, by enacting the FPA, Congress created a division between federal and state authority within the broad field of setting rates for electric energy regulation. In line with this division, wholesale price setting is within FERC's exclusive jurisdiction pursuant to the FPA. *Cf. Pub. Utils. Comm'n of R. I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) (asserting that the dormant

Commerce Clause prohibits states from regulating rates for wholesale power sales between utilities in different states).

In the case at hand, the district court found that the LCAPP Act crossed the line into FERC's jurisdiction because the means by which the act sought to bring about the construction of new power plants in New Jersey involved setting the price of wholesale electricity sales. Specifically, the district court found that the LCAPP Act's Standard Offer Capacity Agreements ("SOCAs") "occupy the same field of regulation as the Commission and intrude upon the Commission's authority to set *wholesale energy prices* through its preferred [Reliability Pricing Model] Auction process . . . by establishing the price that [the LCAPP Act] generators will receive for their sales of capacity." Dist. Ct. Mem. Op. (hereinafter "Op.") at 54, 60 (emphasis added). In other words, the district court found that the act was preempted because it seeks to secure new generation by setting or establishing the prices to be received by generators for their wholesale capacity sales.

However, the district court never considered, nor was it asked to by the parties, whether securing of the facility itself or the purpose for taking action to do so was preempted. In other words, the district court did not address whether a state action that promotes the development of certain power plants contemplated to participate in the wholesale energy market would be preempted merely because the

action—increasing the supply of energy resources—affects wholesale energy prices. As such, the district court's decision did not call into question whether the FPA preserves states' jurisdiction to promote certain environmentally desired types of generation facilities when the state action does not set a wholesale electricity price.

To assure that distinction is clear, if the Court affirms the district court decision, we urge the Court to ensure that its decision cannot be misinterpreted to suggest that a state action that secures the construction of a generation facility capable of serving the electric energy needs of a state is not determinative of the preemption issue. Rather, as the district court correctly stated in this case: "In order to determine whether the LCAPP [Act] is preempted under federal law, the first factual issue to resolve is whether the Board-ordered SOCAs . . . *set prices* for wholesale energy sales." Op. at 53 (emphasis added). Put another way, the Court should clarify in its decision that state mandates that ensure long-term electricity supply to state customers by means of the construction and operation of certain generation facilities, by itself, does not invade a federally occupied field and falls within the permissible realm of regulation reserved to the states under the FPA.

In the past, FERC has drawn this distinction between a state action that directly establishes a wholesale rate and a state action either to hold a solicitation, or direct a regulated utility to hold a solicitation, that in turn leads to a wholesale

price under a long-term contract. In fact, FERC has explicitly distinguished between a state action that actually sets a specific price that a generator must charge and such an action that directs a competitive solicitation for specific types of preferred generating resources where generators set their own bid prices. For example, when FERC reviewed California's feed-in tariff, in which the state legislature directed the California Public Utilities Commission ("CPUC") to establish prices for small cogeneration facilities, FERC found that "the [CPUC's decisions under the state statute] are not preempted by the [FPA] only to the extent that the [CPUC] is ordering the utilities to purchase capacity and energy from certain resources, but are preempted to the extent that the CPUC is setting wholesale rates for such transactions." *California Pub. Utils. Comm'n, et al.*, 132 FERC ¶ 61,047 at ¶ 69 (2010), *aff'd* 254 F.3d 250, 253-54 (D.C. Cir. 2001).

In short, if the Court affirms the district court decision, it is critical that the Court clearly draws the distinction between a state directing the establishment of wholesale rates and a state ordering the utilities to purchase energy from certain resources to prevent unintended consequences for lawful state-mandated solicitations and long-term power contracts, including state efforts to promote preferred generating resources to achieve environmental objectives; none of which disturb FERC's exclusive federal jurisdiction over wholesale rates.

III. CONCLUSION

Amicus curiae, AWEA, respectfully requests that the Court reverse the district court's ruling in favor of Plaintiff-Appellees. If the Court affirms the district court's decision, AWEA requests that the Court clarify that the LCAPP Act violates the Supremacy Clause only inasmuch as the district court found that it establishes the wholesale price that generators will receive for their sales of capacity.

Respectfully submitted this 24th day of January 2014.

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CERTIFICATION OF COUNSEL

I, Gene Grace, certify as follows:

1. I am a member of the bar of the U.S. Court of Appeals for the Third Circuit in good standing. *See* 3d Cir. L.A.R. 28.3(d) (2011).

2. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) & 32(a)(7)(B) because this brief contains 1,800 words according to the word count function of Microsoft Word 2007, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. 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 Office Word 2007 in 14-point Times New Roman font.

4. The electronic version of this brief is identical to the paper copies filed separately with the Clerk of Court. *See* 3d Cir. L.A.R. 31.1(c) (2011).

5. Using Symantec version 11.0.6005.562, the electronic version of this brief was scanned for viruses and found to contain none. *See* 3d Cir. L.A.R. 31.1(c) (2011).

Dated: January, 24 2014.

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Counsel for *Amicus Curiae* the
American Wind Energy Association