IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

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 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 U.S. District Court for the District of
New Jersey, No. 3:11-cv-00745-PGS (Hon. Peter G. Sheridan)

BRIEF FOR THE CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY; THE CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION; GEORGE JEPSEN, ATTORNEY GENERAL FOR THE STATE OF CONNECTICUT; CONNECTICUT OFFICE OF CONSUMER COUNSEL; THE NEW ENGLAND CONFERENCE OF PUBLIC UTILITIES COMMISSIONERS, INC.; THE MAINE PUBLIC UTILITIES COMMISSION; THE RHODE ISLAND PUBLIC UTILITIES COMMISSION; THE VERMONT PUBLIC SERVICE BOARD; THE VERMONT DEPARTMENT OF PUBLIC SERVICE; AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

[Caption continued on next page]

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INTEREST OF THE *AMICI CURIAE*

This case implicates issues of critical importance to the *Amici*. In particular, the *Amici* are concerned that a decision affirming the District Court's unduly expansive view of federal jurisdiction under the Federal Power Act ("FPA") could spark a firestorm of litigation challenging long-standing procurement practices that enable the States to ensure that their citizens are safely provided with reliable, clean, and affordable supplies of electric power.[1]

For more than a century, the States have determined whether new power plants are required to meet their citizens' needs, and whether to promote the development of such power plants with ratepayer funds. The States also have the responsibility and authority to regulate their public utilities, and to implement important State policy objectives such as the development of renewable energy sources and innovative technologies to reduce emissions of carbon dioxide and other pollutants.

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[1] As the Court is aware, a Maryland procurement program similar to the New Jersey program at issue here is the subject of an appeal pending in the Fourth Circuit. *PPL EnergyPlus, LLC v. Nazarian*, No. 13-2419 (4th Cir.). Also, in December 2013, an unsuccessful bidder initiated litigation seeking to invalidate a Connecticut procurement designed to support the development of new wind, solar, and other energy sources as allegedly preempted by the FPA. *Allco v. Esty*, No. 13-1874 (D. Conn.). And just this week, a complaint was filed alleging that a Massachusetts offshore wind turbine project is preempted by the FPA and invalid under the dormant Commerce Clause. *Barnstable v. Berwick*, No. 14-10148 (D. Mass.).

It is common practice among the States to conduct — or authorize their regulated utilities to conduct — procurements to develop new power plants. Such procurements typically result in long-term power purchase agreements or other arrangements between new generation resources and State public utilities, with some or all costs recovered from retail ratepayers through their utility bills.

Although procurement programs in the *Amici* States differ from the New Jersey program under review, the *Amici* are nevertheless troubled by the District Court's fundamentally flawed reasoning in finding the New Jersey program both field preempted and conflict preempted by the FPA. Accordingly, the *Amici* respectfully submit this brief as of right pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure in support of Appellants' position that the District Court's judgment should be reversed.[2] In particular, *Amici* urge the Court of Appeals to make clear that a State's exercise of its traditional authority to initiate or authorize a competitive procurement to develop new generation resources — along with any resulting long-term contract between generators and a State's public utilities — is not categorically preempted by the FPA.

The *Amici Curiae* are as follows:

[2] Out of an abundance of caution, the *Amici* also obtained consent from all parties, through their counsel, for the filing of this brief.

The Connecticut Public Utilities Regulatory Authority

The Public Utilities Regulatory Authority ("PURA") is the Connecticut state commission charged with regulating public utility companies and is authorized by State statute to participate in proceedings before federal agencies and courts on matters affecting utility services rendered or to be rendered in Connecticut. Conn. Gen. Stat. § 16-6a. The PURA oversees State procurements of electricity and capacity, and is responsible for the State's interest in obtaining reliable energy. The District Court's decision on appeal could directly impact the State of Connecticut's and PURA's ability to ensure sufficient, reliable and affordable supplies of electric power and could undermine the State's ability to advance State policy objectives such as the development of renewable energy and innovative technologies.

The Connecticut Department of Energy and Environmental Protection

The Connecticut Department of Energy and Environmental Protection ("DEEP") is the State agency authorized by statute to oversee and direct the State's energy and environmental policies and as such has a direct interest in this litigation. Conn. Gen. Stat. § 22a-1, *et seq.*, *id.* §§ 16-1, 16-245a. At the direction of its legislature, Connecticut DEEP has prepared a Comprehensive Energy Strategy that has set clear and achievable goals in terms of procuring renewable energy resources to meet the needs of its mandatory Renewable Portfolio

Standards as well as directing the steps needed to obtain new, low-carbon resources to meet its obligations under the Regional Greenhouse Gas Initiative. *Id*. § 16a-3d. The legislature has further enacted specific statutes authorizing the Commissioner of DEEP to coordinate with the State's electric distribution utilities to obtain new generation to meet these important State environmental policies. *Id*. § 16-245a. As a consequence, the Department has a direct and substantial interest in any litigation that would potentially affect the ability of State officials to direct and satisfy the State's environmental policies particularly related to new generation.

George Jepsen, the Attorney General for the State of Connecticut

The Attorney General is an elected constitutional official and the chief legal officer of the State of Connecticut. Among the Attorney General's responsibilities are interventions in various types of proceedings to protect the State, the public interest and the people of the State of Connecticut, and assuring the enforcement of a variety of laws of the State of Connecticut, including Connecticut laws concerning the competitive procurement of electric generation capacity for reliability and renewable energy policy, to promote the benefits of competition and to assure the protection of Connecticut's electricity consumers from anti-competitive abuses.

Connecticut Office of Consumer Counsel,
by and through Elin Swanson Katz, Consumer Counsel

The Connecticut Office of Consumer Counsel ("OCC") is the State's statutory advocate for utility customers, including electricity customers, pursuant to Conn. Gen. Stat. § 16-2a. OCC therefore has a statutory responsibility to advocate for the interests of Connecticut electric customers, including to ensure that their rates remain just and reasonable and that electricity be highly reliable. OCC also has an interest in promoting renewable and clean sources of electricity for its customers. The outcome of the appeal could directly impact the reliability or sustainable nature of electricity in Connecticut by impeding the State of Connecticut's ability to develop new power generation resources. The outcome of the appeal could also impact rates due to the potential scarcity of electricity supply.

The New England Conference of Public Utilities Commissioners, Inc.

The New England Conference of Public Utilities Commissioners, Inc. ("NECPUC") is a non-profit corporation comprising the utility regulatory bodies of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.[3] NECPUC was established in 1947 and provides regional regulatory

[3] The States of Connecticut, Maine, Rhode Island, and Vermont voted in support of NECPUC's participation in this *amicus* brief. The States of New Hampshire and Massachusetts abstained from the vote.

assistance on matters of common concern to the six New England States in the electricity, gas, telecommunications and water industries.

The Maine Public Utilities Commission

Under Maine law, the Maine Public Utilities Commission is the State commission designated by statute with jurisdiction over rates and service of electric utilities in the State. Me. Rev. Stat. tit. 35-A, § 101 *et seq.*

The Rhode Island Public Utilities Commission

The Rhode Island Public Utilities Commission implements the State's legislative policies establishing, *inter alia*, the fair regulation of public utilities and ensuring rates charged by public utilities are reasonable and just. R.I. Gen. Laws §§ 39-1-1, 39-1-3 and 39-2-1. The Commission has further authority to implement the State's Long-Term Contracting Standard for Renewable Energy and Renewable Energy Standard established pursuant to Chapters 26 and 26.1, Title 39 of the R.I. General Laws.

The Vermont Public Service Board

The Vermont Public Service Board ("VPSB") is the "state commission" as defined by FERC regulations and designated by Vermont statute, with jurisdiction over rates and service of electric utilities in the State. The VPSB also reviews the environmental and economic impacts of proposals to purchase energy supply or build new energy facilities. The VPSB's mission is to ensure high quality electric

service at minimum reasonable costs that best serve the long-term interest of Vermont and its residents, as defined in Vermont statute. The District Court decision on appeal, if upheld, could impair the ability of the VPSB to ensure high quality electric service in conformance with Vermont statute.

The Vermont Department of Public Service

The Vermont Department of Public Service ("VDPS") is charged with representing the interests of the public in utility matters and is also responsible, by statute, for regulated utility planning. Vt. Stat. Ann. tit. 30, § 2. As the State of Vermont's public advocate, VDPS has an affirmative duty to protect the interests of Vermont consumers in securing reliable, safe, reasonably priced power consistent with applicable State and federal statutes. The decision of the District Court has the potential to negatively impact the rates paid by Vermont ratepayers and the planning process for addressing legitimate State policies surrounding resource selection and resource adequacy.

The California Public Utilities Commission

The California Public Utilities Commission ("CPUC") is a constitutionally established State agency charged with the responsibility for regulating electric corporations within the State of California. The CPUC ensures the provision of safe, reliable utility service and infrastructure at reasonable rates while fulfilling California's commitments to environmental enhancement and a healthy California

economy. The CPUC has a statutory mandate to represent the interest of California's electric consumers in legal proceedings before FERC and the courts.

CPUC-jurisdictional public utilities operate within the California Independent System Operator Corporation ("CAISO"). Unlike the regional transmission organizations and independent system operator in which the *Amici* States and New Jersey participate, the CAISO has not instituted an organized, FERC-jurisdictional capacity market.[4] Accordingly, the District Court's findings of field preemption and conflict preemption could not legitimately threaten CPUC-regulated generation planning or procurement processes. But the CPUC is considering, as a policy matter, whether to support development of a limited, backstop capacity auction process in California subject to FERC oversight.[5] The District Court's decision, if upheld on appeal, has the potential to negatively impact California's support for such a market. The CPUC's interest is to ensure that the Court appropriately recognizes (as FERC does) the States' historic and

[4] Load serving entities in California secure capacity contracts necessary to demonstrate compliance with the State's resource adequacy requirements entirely through bilateral transactions or with utility-owned generation.

[5] *See* Joint Reliability Plan of the California Public Utilities Commission and the California Independent System Operator Corporation, http://docs.cpuc.ca.gov/SearchRes.aspx?docformat=ALL&DocID=81666376 at 8-11 (Nov. 8, 2013).

ongoing traditional role in ensuring resource adequacy regardless of the presence or absence of a FERC-regulated capacity market.

SUMMARY OF ARGUMENT

The New Jersey Legislature, in enacting the 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"), properly exercised its police powers and traditional authority in directing the New Jersey Board of Public Utilities ("NJ BPU") to initiate a competitive procurement for new power plants to address the State's pressing energy needs. In addition, the Legislature lawfully required State public utilities to enter into 15-year Standard Offer Capacity Agreements ("SOCAs") with generators to provide a stable source of revenue for the new power plants, to be collected in part through retail ratepayers' utility bills.

As explained in Part I below, the District Court erred in concluding that Congress's grant of authority to FERC with respect to wholesale power transactions constitutes a federal regulatory scheme that is so pervasive that it extends to preempt New Jersey's exercise of its traditional authority to develop new generation through a competitive procurement and long-term agreement mechanism. Such State programs (in New Jersey and elsewhere) do not interfere with, and indeed are entirely compatible with federally regulated markets, as FERC has recognized on multiple occasions.

As explained in Part II below, the District Court erred in holding that the LCAPP and SOCA establish the price that LCAPP generators will receive for sales of capacity. However, it is not necessary for the Court to reach this issue to resolve the appeal. Even if the bid submitted by an LCAPP generator, as incorporated into a SOCA, constitutes a wholesale rate, neither the LCAPP nor the SOCA would run afoul of the FPA.

Finally, as explained in Part III below, the District Court erred in broadly invalidating the LCAPP. At a minimum, the New Jersey Legislature's determination that the State's urgent energy needs necessitated the construction of new generation facilities, and its decision to require the NJ BPU to initiate a competitive procurement to develop such facilities, fell well within the bounds of the State's traditional authority and should not have been invalidated.

ARGUMENT

I. THE DISTRICT COURT'S CONCLUSION THAT THE LCAPP IS PREEMPTED BY THE FPA IS INCONSISTENT WITH THE TEXT AND PURPOSE OF THE FPA AND INTRUDES ON TRADITIONAL STATE POWERS.

It is axiomatic that "Dual sovereignty is a defining feature of our Nation's constitutional blueprint." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (citation omitted). Thus, "[a]lthough the States surrendered many of their powers to the new federal government, they retained a residuary and inviolable sovereignty that is reflected throughout the Constitution's text." *Printz*

v. United States, 521 U.S. 898, 899 (1997). This core tenet of our federalism is enshrined in the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

As James Madison explained in an essay in support of the Constitution's adoption:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 303 (Sesquicentennial ed., 1937).

Electricity is the lifeblood of modern society. It is vital to the "internal order, improvement, and prosperity" of every State, and to the safety, health, and welfare of all Americans. For more than a century, the States have had the responsibility and authority to ensure that the energy needs of their citizens are met. Since the enactment of the FPA in 1935, State regulatory agencies and the Federal Energy Regulatory Commission ("FERC") have concurrently regulated various aspects of the generation, transmission, and distribution of electric energy to citizens across the United States to ensure access to this essential commodity.

The District Court erred in misinterpreting the scope of authority granted to FERC by the FPA and further erred in disregarding the States' historic authority and power to regulate generation resources and public utilities.

A. The District Court's Field Preemption Decision Is Not Supported by the Text or Purpose of the FPA, Which Recognizes the Historic Authority of the States to Regulate Generation Facilities and Public Utilities.

In the early twentieth century, local public utilities were generally vertically integrated monopolies that built, owned, and operated power plants and distributed electricity to their customers subject to regulation by the States. JA-215-16 (Stip. ¶ 1). As the Supreme Court has recognized, 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) (citing *Munn v. Illinois,* 94 U.S. 113 (1877)).

In 1927, after some electric utilities began contracting bilaterally with each other for wholesale power or standby capacity, the Supreme Court found that the States lacked authority to regulate wholesale power sales between utilities in different States in light of the dormant Commerce Clause. *See Pub. Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). In 1935, Congress enacted the FPA, which vested in FERC (formerly the Federal Power Commission) the authority to regulate "the transmission of electric energy in interstate

commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. §§ 824(a), (b)(1).

In enacting the FPA, Congress made clear that the grant of authority to FERC extended "*only to those matters which are not subject to regulation by the States*." *Id.* § 824(a) (emphasis added). In addition, the FPA identified specific areas of State authority on which federal jurisdiction was not to encroach. For example, section 201(b) provided that FERC "shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy . . . . " *Id.* § 824(b)(1).

Nothing in the FPA purports to establish the outer limit of State authority with respect to the regulation of generation resources or the financing of such generation resources through public utilities and ratepayers. The FPA contains no preemption provision and no evidence of Congressional intent to displace State authority with respect to generation resources. Indeed, the FPA's explicit reservation of authority to the States with respect to generation facilities, *Id.* § 824(b)(1), suggests the contrary. *See also Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States"). Subsequent to the passage of the FPA, the States continued to make decisions regarding whether to finance

the construction of new generation resources, and the optimal mix of generation resources to serve their citizens.

The District Court's conclusion that the LCAPP invades a field occupied by Congress has it exactly backwards. The plain text of the FPA demonstrates that the statute does not establish a comprehensive federal regulatory scheme that extends to displace traditional State authority to develop new generation resources through procurements and long-term contracts that contemplate the participation of new generation resources in federal wholesale markets. Indeed, Congress expressly provided that FERC lacks jurisdiction to intrude on traditional State authority to regulate generation resources. *See* 16 U.S.C. § 824(b)(1). The District Court's interpretation of the FPA would render such express provisions reserving authority to the States meaningless. In sum, the District Court's decision erroneously reads the scope of federal jurisdiction to intrude on both traditional State authority to regulate generation resources and the police power of the States to regulate their public utilities by requiring them to enter into long-term contracts with new generation resources.[6]

[6] The District Court further erred in failing to apply the presumption against preemption, which applies with special force in this case because the FPA constitutes legislation in a field which the States have traditionally occupied. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("In all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied . . . we start with the assumption that the historic

(continued...)

B. FERC's Recognition of State Authority to Develop New Generation and Adoption of Market Rules Acknowledging "State-Subsidized" Entry Demonstrate that State Procurement Programs Do Not Conflict with Federally Regulated Markets.

There is no basis for the District Court's holding that the LCAPP poses an obstacle to FERC's implementation of the regional capacity market. *See* JA-86. The advent of federally regulated regional markets for energy and capacity and deregulation[7] in multiple States did not alter the States' independent obligation to "keep the lights on" or diminish State authority to determine whether to develop — through long-term contracts, tax relief, or other subsidies — new generation resources to serve their citizens' needs. *See Conn. Dep't of Pub. Util. Control v. Fed. Energy Regulatory Comm'n*, 569 F.3d 477, 481 (D.C. Cir. 2009), *cert. denied*, 558 U.S. 1110 (2010) ("State and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from [FERC]").

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police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress").

[7] Beginning in the 1990s, many States restructured their electric industries by separating generation functions from the transmission and distribution functions of public utilities. *See* JA-217 (Stip. ¶ 6).

As discussed in Appellants' briefs and below, FERC has acknowledged on multiple occasions that States have the authority to promote the development of new generation resources through long-term contracts. Moreover, FERC has developed market rules in the PJM and New England regional markets in furtherance of "just and reasonable" market prices, without ever suggesting that such State programs are unlawful or that FERC has the ability to interfere with State processes. The ongoing participation of new generation resources with long-term contracts in federally regulated markets demonstrates that State programs to promote the development of new generation resources are compatible with federal regulation of interstate wholesale markets.

1. State Procurement Programs

Although individual procurement programs are structured differently to meet the specific needs of each State, the scope and diversity of State efforts in this area demonstrate the potentially grave consequences of the District Court's unduly broad interpretation of federal jurisdiction under the FPA, if affirmed. In particular, if the States lack authority to direct procurements and approve resulting contracts that finance the construction of new generation resources, the States would be stripped of meaningful tools to ensure reliable electric service and to promote other public policy goals for the health, safety, and welfare of their

citizens.[8] *Amici* provide examples of procurement programs to assist the Court to understand the scope of State initiatives and the compatibility of such initiatives with federally regulated markets.

For as long as the States have regulated electricity, Integrated Resource Planning has been an important tool for State regulators to ensure that there are sufficient resources to meet the forecasted energy needs of its citizens, and to determine the optimal mix of resources to supply energy to the State. Most States, including deregulated States, use some form of Integrated Resource Planning. In Connecticut, for example, DEEP is charged with

> develop[ing] an integrated resources plan for the procurement of energy resources, including, but not limited to, conventional and renewable generating facilities, energy efficiency, load management, demand response, combined heat and power facilities, distributed generation and other emerging energy technologies to meet the projected requirements of their customers in a manner that minimizes the cost of such resources to customers over time and maximize consumer benefits consistent with the state's environmental goals and standards.

Conn. Gen. Stat. § 16a-3a.[9]

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[8] The District Court suggests that States have alternative means of encouraging the development of new generation, such as the utilization of tax-exempt bonding authority and the granting of property tax relief, among other things. JA-74. However, the existence of alternatives does not render State procurements or long-term contracts preempted. Moreover, the alternatives cited by the District Court do not adequately fill the role that long-term contracts play in backing the financing required for the construction of new generation.

[9] Among other policy objectives, Connecticut is currently on track to meet a target of having 27 percent of all energy used in the State of Connecticut come

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Ten years ago, after deregulation, Connecticut faced a reliability crisis in relation to aging power plants, transmission congestion, and an acute shortage of investment in new generation capacity.[10] Acting pursuant to its traditional authority, the Connecticut General Assembly passed the Connecticut Energy Independence Act in 2005, directing the Connecticut Department of Public Utility Control ("CT DPUC")[11] to implement measures to develop new power plants. Conn. Gen. Stat. § 16-243m. Pursuant to the legislation, the CT DPUC conducted a competitive bidding process that spanned twelve months and resulted in the award of long-term contracts to power plant developers, including developers of a

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from clean and renewable resources by 2020. *See* Conn. Gen. Stat. §§ 16-245a, 16-243q.

[10] At the time, the FERC-regulated grid operator in New England identified "acute" reliability concerns in Connecticut relating to aging power plants and transmission congestion, and urgently warned State regulators that, without immediate investment in new generation and transmission infrastructure, Connecticut faced serious threats to reliable electric service. *See, e.g.*, *ISO New England Inc., Connecticut Energy Plan Framework — Recommended Solutions and Actions for the State of Connecticut* (2005) ("[B]ecause of continued growth in electricity use, generating unit retirements, continued transmission bottlenecks, and inadequate development of resources, Connecticut, and Southwest Connecticut specifically face particular and immediate threats to the reliable and efficient provision of electric service"). Moreover, FERC echoed these reliability concerns. *See, e.g., Devon Power LLC*, 113 FERC ¶ 61,075 (2005) at P 5 ("The Commission remains concerned about the resource adequacy situation in New England, especially in the congested areas of Southwest Connecticut and Northeastern Massachusetts, and the resulting impact on wholesale power prices").

[11] The CT DPUC is now the PURA.

gas-fired power plant in Middletown, Connecticut, that averted the pending shortage of generation capacity.

In 2007, the General Assembly passed the Act Concerning Electricity and Energy Efficiency, which further directed the CT DPUC to consider plans to build new peaking generation plants to ensure customers had access to sufficient electric supplies when electricity needs were highest. *See* Section 50, An Act Concerning Electricity and Energy Efficiency, Public Act 07-242 (codified at Conn. Gen. Stat. § 16-243u. Pursuant to the 2007 Act, the CT DPUC again conducted an open, competitive procurement that resulted in a portfolio of long-term contracts with new peaking generators for gas-fired peaking capacity. *See* JA-1011-83; JA-1127-89.

In addition, in May 2013, the Connecticut General Assembly passed a law permitting DEEP to coordinate with other New England States to solicit proposals for renewable energy sources and direct the State's utilities to enter into power purchase agreements with the renewable resources for terms of up to 20 years. S.B. 1138, An Act Concerning Connecticut's Clean Energy Goals, §§ 6-8 (May 30, 2013). As a result, DEEP issued requests for proposals from regional renewable generators to enter into long-term contracts to meet the State's environmental objectives. The result of this major effort was that generators across the region submitted robust, competitive bids for a wide variety of renewable generation

including wind power, solar power, tidal power, and biomass. Many of these proposals were cutting-edge projects of a scale and type not seen before in New England. Without the possibility of long-term procurement contracts, directed and overseen by the State, the scope and scale of these projects would not have been possible.

2. FERC's Response to State Procurements for New Generation

FERC has expressly acknowledged that States have the authority to decide to promote the construction of power plants through long-term contracts. Indeed, FERC has accommodated the participation of such new generation resources subject to market rules designed to satisfy its FPA mandate to ensure that market prices are "just and reasonable."

Addressing the participation of Connecticut power plants holding long-term contracts in the regional New England market, FERC recognized that "states and state agencies may conclude that the procurement of new capacity, even at times when the market-clearing price indicates entry of new capacity is not needed, will further specific legitimate policy goals . . . . " *ISO New England, Inc.*, 135 FERC

¶ 61,029 (2011) at P 20. *See also id.* at P 170 ("The Commission acknowledges the rights of states to pursue policy interests within their jurisdiction").[12]

Moreover, FERC recently implemented certain market rules requiring all new capacity resources, including "state-subsidized"[13] power plants, to make "competitive" offers (as defined by the rules) to satisfy its concerns about the alleged impact of such power plants on the market clearing price. *ISO New England, Inc.*, 142 FERC ¶ 61,107 (2013), *reh'g pending*. At no point in its orders addressing the New England regional market has FERC suggested that Connecticut procurement initiatives are unlawful or pose an obstacle to the administration of the market.[14]

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[12] *See also ISO New England, Inc.*, 126 FERC ¶ 61,080 (2009) at P 38 ("The Commission has accepted the use of long-term bilateral contracts, such as the Connecticut state-sponsored requests for proposals . . . to meet installed capacity and local sourcing requirements"); *ISO New England, Inc.*, 122 FERC ¶ 61,016 (2008) at P 26 ("The Commission's long-standing policy, consistent with a substantial body of judicial precedent, has been to protect the stability of long-term contracts. Contracts, especially long-term contracts like the ones at issue here, provide certainty and stability in energy markets").

[13] FERC's orders often describe new power plants holding long-term contracts with a State's utilities pursuant to a State procurement as "state-subsidized" resources. For purposes of this brief, the *Amici* do not adopt this term but use it solely for the purpose of avoiding unnecessary confusion.

[14] Indeed, the D.C. Circuit has acknowledged the authority of the States to take a wide range of actions "in their role as regulators of generation facilities without direct interference" from FERC, despite the fact that State decisions regarding generation resources necessarily "affect the pool of bidders in the

(continued...)

FERC's recognition of State prerogatives and authority to develop new generation demonstrates that State procurement programs and FERC-regulated markets coexist harmoniously. Moreover, the ongoing participation of new power plants with long-term contracts in the FERC-regulated New England regional market and, as described in New Jersey's brief, PJM, demonstrates that the participation of "state-subsidized" generation resources in FERC-regulated markets poses no obstacle to the administration of such markets.

II. ALTHOUGH THE DISTRICT COURT ERRONEOUSLY DETERMINED THAT THE LCAPP AND SOCA ESTABLISH A WHOLESALE RATE, IT IS NOT NECESSARY FOR THE COURT TO REACH THIS ISSUE BECAUSE THE NEW JERSEY PROCUREMENT DOES NOT RUN AFOUL OF THE FPA EVEN IF IT RESULTS IN A CONTRACT THAT INCLUDES A WHOLESALE RATE.

As discussed in Appellants' briefs, the District Court erred in holding that the LCAPP and SOCA set prices for the wholesale purchase or sale of capacity. However, it is not necessary for this Court to reach this issue.

First, it is significant that New Jersey did not itself determine the payment amount to be incorporated into the SOCAs between local utilities and generators. Rather, New Jersey directed its utilities to enter into agreements with generators on payment terms established by the generators' bids in the State's competitive

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Forward Market, which in turn affects the market clearing price for capacity." *Conn. Dep't of Pub. Util. Control*, 569 F.3d at 481.

procurement. FERC has found this distinction significant, and has never found a long-term contract resulting from a State competitive procurement to run afoul of federal jurisdiction where the payment terms are based on generators' competitive bids.

Second, even assuming that the SOCA contains a wholesale rate for the sale of capacity, the only implication would be that the rate would be subject to a section 205 review by FERC to determine whether the rate is "just and reasonable." *See* 16 U.S.C. § 824d(a). (Of course, FERC would not have jurisdiction to supervise or dictate the terms of the State procurement.)

Thus, whether or not the LCAPP or SOCA establish a wholesale rate for the sale of capacity, the conclusion is the same — there is no basis for preemption of either the LCAPP or the SOCAs.

III. THE DISTRICT COURT ERRED IN INVALIDATING THE ENTIRETY OF THE LCAPP.

Among other things, the LCAPP contained the New Jersey Legislature's finding that the State urgently required new generation capacity to address an "electric power capacity deficit" and to "mitigate local electrical system reliability concerns and solve other issues related to the lack of local generation," including, for example, over-reliance on aging, coal-fired power plants at risk of retirement. *See* N.J. Stat. Ann. § 48:3-98.2. Accordingly, the Legislature ordered the NJ BPU

to initiate a competitive procurement to develop new generation facilities. *See id.* § 48:3-98.3.

The New Jersey Legislature's determination that the State's pressing energy needs necessitated the construction of new generation facilities, and its decision to require the NJ BPU to initiate a competitive procurement to develop such facilities, fell well within the bounds of the State's traditional authority and should not have been invalidated. At a minimum, the District Court should have recognized that it is within a State's power to determine that new generation facilities are needed and to require a State regulatory commission to initiate a competitive procurement to obtain such new generation. In taking the drastic step of invalidating the entirety of the LCAPP, the District Court improperly failed to give due regard to the States' traditional role and authority to regulate generation facilities and public utilities.

CONCLUSION

The District Court erred in ruling that the New Jersey LCAPP and SOCAs are preempted by the FPA. The Court of Appeals should reverse the District Court's decision below, but at a minimum should make clear that the FPA does not displace the States' traditional authority to promote the development of new generation resources through procurements and long-term contracts between new generation resources and State public utilities.

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Respectfully Submitted,

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COMBINED CERTIFICATIONS

1. Bar Membership. I certify that the attorneys whose signatures appear on this brief are members of the Bar of this Court or have filed an application for admission pursuant to 3d Cir. L.A.R. 46.1.

2. Word Count. This brief was prepared in Times New Roman, 14 point font, a proportional typeface. Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify, based on the word-counting function of my word processing system (Microsoft Word 2010) that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d), in that the brief contains 5,468 words, including footnotes, but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. Electronic Filing. I certify pursuant to Third Circuit Local Rule 31.1(c) that the text of the electronically-filed version of this brief is identical to the text in the paper copies of this brief as filed with the Clerk. A virus check of the electronic PDF version of this Brief was performed using Symantec Endpoint Protection, version 12.1, and according to that program, it is free of viruses.

Dated: January 24, 2014

/s/ Susanna Y. Chu
Susanna Y. Chu

CERTIFICATE OF SERVICE

Pursuant to Fed. Rule App. P. 25, 3d Cir. L.A.R. 25, and 3d Cir. Misc. R. 113.4, I hereby certify that I have served the foregoing brief on all counsel in these cases through the Court's CM/ECF electronic filing system. Such counsel were served, pursuant to 3d Cir. Misc. R. 113.4, when this brief was filed through the Court's electronic filing system, by the Notice of Docket Activity generated by the Court's electronic filing system.

Dated: January 24, 2014

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