Nos. 13-4330, 13-4394 & 13-4501

In the United States Court of Appeals for the Third Circuit

PPL ENERGYPLUS, LLC; PPL BRUNNER ISLAND, LLC; PPL HOLTWOOD, LLC; PPL MARTINS CREEK, LLC; PPL MONTOUR, LLC; PPL SUSQUEHANNA, LLC; LOWER MOUNT BETHEL ENERGY, LLC; PPL NEW JERSEY SOLAR, LLC; PPL NEW JERSEY BIOGAS, LLC; PPL RENEWABLE ENERGY, LLC; CALPINE ENERGY SERVICES L.P.; CALPINE MID-ATLANTIC GENERATION, LLC; CALPINE NEW JERSEY GENERATION, LLC; CALPINE BETHLEHEM, LLC; CALPINE MID-MERIT, LLC; CALPINE VINELAND SOLAR, LLC; CALPINE MID-ATLANTIC MARKETING, LLC; CALPINE NEWARK, LLC; EXELON GENERATION COMPANY, LLC; GENON ENERGY, INC.; NAEA OCEAN PEAKING POWER, LLC; PSEG POWER, LLC; ATLANTIC CITY ELECTRIC COMPANY; PUBLIC SERVICE ELECTRIC & GAS COMPANY,

v.

LEE A. SOLOMON, in his official capacity as President of the New Jersey Board of Public Utilities; JEANNE M. FOX, in her official capacity as Commissioner of the New Jersey Board of Public Utilities; JOSEPH L. FIORDALISO, in his official capacity as Commissioner of the New Jersey Board of Public Utilities; NICHOLAS V. ASSELTA, in his official capacity as Commissioner of the New Jersey Board of Public Utilities,

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, JEANNE M. FOX, JOSEPH FIORDALISO, AND NICHOLAS ASSELTA,
Appellants in No. 13-4501

Appeal from the U.S. District Court for the District of New Jersey (Sheridan, J.)

BRIEF OF NRG ENERGY, INC. AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 13-4330 et al.

PPL EnergyPlus, LLC, et al.

v.

Lee Solomon, et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. An original and three copies must be filed. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, NRG Energy, Inc. makes the following disclosure:

(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

NRG Energy, Inc. is a publicly held corporation. NRG (NYSE: NRG) has issued shares to the public. It has no parent corporation.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

T. Rowe Price, Associates Inc., a publicly held company, disclosed through its website that as of September 30, 2013, it is the beneficial owner of approximately 12.7% of the securities of NRG Energy, Inc. No other publicly held company has a 10% or greater ownership in NRG Energy, Inc.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

NRG Energy, Inc. owns all of the Class B common stock of NRG Yield, Inc., representing 65.5% of the voting interests. Shares of NRG Yield's Class A common stock, representing, in the aggregate, 34.5% of the voting interests, are publicly held (NYSE: NYLD). Other than NRG Energy, Inc., no other publicly held company has a 10% or greater ownership interest in NRG Yield, Inc.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A.

/s/Jeffrey A. Lamken

(Signature of Counsel or Party)

Dated: 1/24/14

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INTRODUCTION[1]

The district court was correct that federal law controls here, and that the Federal Energy Regulatory Commission ("FERC" or "the Commission") has exclusive jurisdiction to regulate wholesale energy. But that is why Plaintiffs cannot prevail. The exclusivity of FERC's regulatory authority should have precluded the district court from intruding into this area. By developing a constitutional rule to effectuate its view of FERC's policy choices, the district court displaced FERC's role, sidestepped that agency's expertise, and avoided the Federal Power Act's review provisions.

The district court's ruling illustrates the perils of that course. The court did not merely impose, as a constitutional matter, a limit that FERC itself has declined to adopt. It also interfered with FERC's decision to address the impact of state-sponsored contracts and other potential forms of market power through more tailored mechanisms. Exercising that exclusive authority in this area, FERC and Regional Transmission Organizations ("RTOs") have proceeded cautiously, addressing state-sponsored entry and generation through carefully crafted "minimum offer price rules" intended to prevent damage to FERC's pricing rules without intruding unduly on other values. For example, PJM Interconnection,

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or part; no such party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *amicus* made such a contribution.

L.L.C. (the RTO here) requested FERC approval to change its tariff when confronted with the contracts at issue. It did not ban them. Instead, it uses minimum offer price rules to mitigate any anti-competitive impacts. If efforts to mitigate the exercise of buyer-side market power were imperfect—a contention *amicus* agrees with—it is for FERC to consider a replacement remedy.

The court's substitution of its own constitutional remedy for FERC's expertise harms the marketplace by threatening unrelated bilateral contracts upon which parties and markets rely. Bilateral contracts are the primary means of purchasing energy and capacity in large portions of the country. Many bilateral contracts subject to FERC's jurisdiction, moreover, are the result of state mandates. Where FERC has mitigated state action—to prevent States from exercising buyer-side market power—it carefully limited the intrusion on States by regulating the ***price*** at which any resulting generation bids into the capacity market. FERC does not prohibit the underlying activity (*e.g.*, bilateral contracting) altogether. FERC did not, for example, prohibit the LCAPP contracts at issue here from participating in the market. The district court's blunt invocation of field and conflict preemption, by contrast, is like using a Howitzer to shoot at sparrows. The resulting collateral damage could even threaten to invalidate bilateral contracts and renewable energy efforts that FERC and the RTOs would choose to preserve. And the district court's constitutional holding sidestepped the demanding *Mobile-Sierra*

standard FERC must meet when seeking to invalidate bilateral contracts. The district court thus exercised greater power than FERC itself possesses—and disregarded longstanding protections for federal power contracts—under the rubric of protecting FERC's exclusive jurisdiction.

INTEREST OF *AMICUS CURIAE*

NRG Energy, Inc. ("NRG") is one of the largest power generation and retail electricity businesses within the United States. NRG owns and operates 47,000 megawatts of generation capacity, including 13,000 megawatts of merchant generation in PJM. It also purchases and markets energy and energy-related resources, including electricity, natural gas, oil, coal, and green energy, throughout the United States. NRG and its affiliates have billions of dollars invested in generation facilities that are supported by state-mandated contracts nationwide. Those include long-term contracts with credit-worthy counterparties that lower risks and promote stable revenues. As a generation capacity provider, NRG is directly affected by the issues presented by this case.

NRG makes financial commitments in reliance on the integrity of bilateral contracts. The district court's decision threatens the sanctity of such contracts and purports to give federal courts greater authority to abrogate those contracts than even FERC possesses. If upheld, the court's decision could destabilize wholesale energy and capacity markets, upend decades of settled precedent, and confuse the

scope of FERC's exclusive jurisdiction. For those reasons, NRG has a compelling interest in, and unique insights into, the issues presented in this case.

BACKGROUND

I. THE FEDERAL POWER ACT AND THE DEVELOPMENT OF REGIONAL TRANSMISSION ORGANIZATIONS

A. The Federal Power Act

For over 70 years, the Federal Power Act, 16 U.S.C. §§ 824 *et seq.*, has authorized FERC to regulate the transmission and sale of wholesale electricity so as to ensure just and reasonable rates. "Congress here has granted exclusive authority over rate regulation to the Commission." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 580 (1981). As a result, "[t]he reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state ***or federal courts***." *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 375 (1988) (emphasis added). "The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." *Id.*

B. Regional Transmission Organizations

1. "In the bad old days, utilities were vertically integrated monopolies" where a single utility would generate, transmit, and distribute electricity. *Midwest-ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363 (D.C. Cir. 2004). In the mid-1990s, FERC sought to promote competition by encouraging the development of regional transmission organizations ("RTOs"). *Id.* at 1364. RTOs connect the

"different segments" of transmission facilities owned by its member utilities; offer open access to those facilities for all generators; and operate associated markets for electricity. *Id.* RTOs establish the rules that govern both participation and the pricing of electricity within the markets they operate. *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 233 (D.C. Cir. 2013). RTOs may propose changes to market-design features, but any dispute that arises "falls under [FERC's] jurisdiction." *NYISO, Inc.*, 124 FERC ¶61,301 at 62,685 (2008). RTOs are thus "subject to the Commission's oversight." *Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 737 (D.C. Cir. 2012).

2. The RTO at issue here, PJM, operates in 13 States and the District of Columbia, including most of the mid-Atlantic region and eastern Midwest. "The region PJM serves now includes 185,600 megawatts of generating capacity"—more "electricity than Canada and Mexico combined"—and "more than 59,000 miles of transmission lines." PJM, *2012 Annual Report* 26 (2013).

"Among its duties, PJM is responsible for preventing interruptions to the delivery of electricity in that region by ensuring that its system has sufficient generating capacity." *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1284 (D.C. Cir. 2011). "'Capacity' is not electricity itself but the ability to produce it when necessary"—in essence, the ability to produce additional electricity to keep the lights on during periods of peak demand. *Conn. Dep't of Pub. Util. Control v.*

FERC, 569 F.3d 477, 479 (D.C. Cir. 2009). In a capacity market, "an electricity provider purchases from a generator an option to buy a quantity of energy, rather than purchasing the energy itself." *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 168 (2010). Because electricity generally cannot be stored in sufficient quantities and must instead be produced on demand "instantaneously," capacity is a critical element of electricity markets. FERC, *Energy Primer: A Handbook of Energy Market Basics* 2 (2012).

PJM operates a forward-capacity market to secure sufficient capacity to meet anticipated peak demand three years in the future. That mechanism begins with a "best approximation of demand," and then uses "the power of competitive bidding to help locate th[e] price" for "the average cost of entry for the mix of suppliers capable of providing capacity over the relevant three-year run." *Conn. DPUC*, 569 F.3d at 484. The three-year "lag time allows competition from new suppliers that . . . could develop [needed] capacity within three years of winning a bid." *Md. Pub. Serv. Comm'n*, 632 F.3d at 1285. This market seeks to "create[ ] long-term price signals to stimulate investment, both in maintaining existing generation and in developing new sources of capacity." PJM, *2012 Annual Report*, *supra*, at 19.

C. Bilateral Contracting

PJM's market sits alongside and operates in tandem with the traditional means of meeting energy and capacity needs throughout the Nation: bilateral contracts. *See Nev. Power Co. v. Duke Energy Trading & Mktg., LLC*, 99 FERC ¶61,047 at 61,190 (2002). Under the Federal Power Act, "sellers and buyers may agree on rates by contract." *NRG Power Mktg.*, 558 U.S. at 171. In a typical bilateral contract, a utility agrees to buy and a supplier agrees to sell energy and capacity on specified terms. Such bilateral contracts have a special place in federal energy law and have long been protected from interference by even federal regulators under the *Mobile-Sierra* doctrine. *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 339-44 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956). Even in organized markets operated by RTOs, bilateral contracts play a critical role. *See PacifiCorp v. Reliant Energy Servs., Inc.*, 102 FERC ¶63,030 at P 81 (2003).

Often, bilateral contracts are mandated or approved by state actors. For example, States routinely direct their utilities to make bulk purchases of energy in advance of the time power is produced and consumed. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 538-39 (2008). The market price of energy—which constantly changes—at the time of delivery will typic-

ally differ from the price negotiated in such advance purchase contracts. *Cf. id.* at 547.

One common form of a bilateral contract is a "contract for differences." In a contract for differences, a generator contracts to supply a utility with energy or capacity at specified price. If the ***contract*** price is higher than the price the generator obtains from the RTO, the utility pays the generator the difference. Conversely, if the generator obtains a greater price through the RTO, it pays the difference to the utility. *See, e.g.*, William H. Hieronymus *et al.*, *Market Power Analysis of the Electricity Generation Sector*, 23 Energy L.J. 1, 30 (2002). These contracts thus lock in the generator's price at the contract rate, shifting the risk of lower market prices to the utility.

D. FERC Proceedings Addressing the Impact of State-Sponsored Activities on Capacity Prices

FERC has repeatedly addressed the impact of uneconomic new entry on energy prices in PJM and other RTOs. For example, in *ISO New England, Inc.*, 135 FERC ¶61,029 at P 165 (2011), FERC examined the effect of state-sponsored activities on capacity prices in ISO-New England (New England's RTO). Rather than ban States from entering into the contracts at issue, FERC established minimum offer price rules: Market entrants are subject to an offer floor that prevents new resources from entering the market at a rate significantly below the full cost of a new supply resource (such as a new power plant). *Id.* at P 166. FERC

thus sought to ensure just and reasonable rates by regulating the price at which entrants may "bid" into capacity auctions. *Id.*

In evaluating such issues, FERC "must balance" competing considerations. *New England States Comm. on Elec. v. ISO New England Inc.*, 142 FERC ¶61,108 at P 35 (2013). These include "its responsibility to promote economically efficient markets and efficient prices," and "its interest in accommodating the ability of states to pursue other legitimate state policy objectives." *Id.* FERC thus seeks to avoid "pass[ing] judgment on state policies and objectives" while simultaneously ensuring that entry by state-sponsored resources does not "disrupt[ ] the competitive price signals that [an RTO's] wholesale capacity market protocols are designed to produce." *PJM Interconnection, L.L.C.*, 143 FERC ¶61,090 at P 54 (2013).

II. PROCEEDINGS BELOW

A. New Jersey's Long-Term Capacity Pilot Project Act

In January 2011, New Jersey enacted the Long-Term Capacity Pilot Project Act ("LCAPP"). It did so to "foster[ ]" the "construction of new, efficient generation." N.J. Rev. Stat. § 48:3-98.2(d). The LCAPP directs the State's Board of Public Utilities to solicit offers for Standard Offer Capacity Agreements ("SOCAs") from new sources of generation within the State. *Id.* § 48:3-98.3(c). A SOCA is a Board-approved contract "that provides for eligible generators to

receive payments from the electric public utilities for a defined amount of electric capacity for a term to be determined by the board but not to exceed 15 years." *Id.* §48:3-51.

To obtain a SOCA, a new generator submitted a bid to the Board stating the price it would accept to provide capacity. If approved, the generator contracted with one of New Jersey's four electric public utilities. *Id.* §48:3-98.3(c)(9). The contract contained a Standard Offer Capacity Price, *i.e.*, "the capacity price that is fixed for the term of the SOCA." *Id.* §48:3-51.

Under the contracts, generators "receive payments from the electric public utilities for the difference" between the Standard Offer Capacity Price and the market-clearing price in PJM's forward-capacity auction. N.J. Rev. Stat. §48:3-98.3(c)(4). In other words, a generator will be paid, pursuant to contract, a supplement whenever the PJM auction-clearing price is lower than the Standard Offer Capacity Price. By contrast, if the auction-clearing price is higher than the Standard Offer Capacity Price, a generator pays the utility the difference. *Id.* SOCAs are thus contracts for differences.

B. The District Court's Decision

On February 9, 2011, Plaintiffs filed a complaint urging that the New Jersey SOCA contracts were preempted by federal law. Following a trial, the district court held that New Jersey's LCAPP violated the Supremacy Clause, U.S. Const.

art. VI, cl. 2, and was therefore invalid. The court acknowledged FERC's "decision to exercise its exclusive authority to regulate wholesale electricity sales" in the PJM auction. JA83. The court did not, however, refer the matter to FERC; request FERC's opinion about the validity of the LCAPP; or otherwise seek FERC's expertise. Instead, it agreed with Plaintiffs that the LCAPP "intrudes upon the exclusive jurisdiction of [FERC], by establishing the price that LCAPP generators will receive for their sales of capacity," and thus "invades the field occupied by Congress and is preempted by the Federal Power Act." JA84.

Alternatively, the district court held that the LCAPP was invalid under conflict-preemption principles. Based on the contracts' influence on PJM's auction-pricing mechanism, the court held that the LCAPP "creates an obstacle to [FERC's] preferred method"—*i.e.*, the forward-capacity auction—"for the whole-sale sale of electricity in interstate commerce." JA86. It therefore struck the LCAPP down under conflict preemption. *Id.*

The court also rejected Plaintiffs' Commerce Clause challenge. JA87-JA89.

SUMMARY OF ARGUMENT

I. Rather than defend FERC's exclusive jurisdiction in this area, the district court usurped it. Plaintiffs' challenge represents an impermissible collateral attack on the determinations and rulings of FERC. If the challenged contracts interfere with FERC-approved pricing rules or otherwise invade FERC's

authority, Plaintiffs must complain to FERC. Indeed, Plaintiffs have already challenged—first before FERC and now on a petition for review of FERC's orders—FERC's chosen method of protecting PJM's auction from the adverse impacts of state-sponsored resources. They cannot now offer such a challenge in district court. And even if the district court did not invade FERC's exclusive jurisdiction, it should have referred the matter to FERC under the primary jurisdiction doctrine.

II. The district court's preemption holdings are incorrect. When FERC decides that a State's actions distort wholesale markets, it targets the ***price*** at which state-sponsored resources may bid into the market. It does not, as the district court did here, invalidate the State's actions. The district court thus purported to preserve FERC's authority by going far beyond where FERC itself was willing to go.

Field preemption does not apply whenever actions affect PJM's pricing mechanisms. Plenty of actions do so without violating the Supremacy Clause. The district court's decision to the contrary defies decades of history and common industry practice.

The district court's conflict-preemption ruling is erroneous as well. By the court's own concession, the contracts at issue here are problematic not because they exist but because they affect the pricing produced in FERC-approved capacity auctions. But FERC itself has already addressed that issue. It did not invalidate

the contracts. Instead, it addressed the ***price*** at which the generators involved submit their electricity into PJM's market. By choosing a different mechanism and invalidating the contracts instead, the district court's decision usurped FERC's role and invaded FERC's exclusive jurisdiction. That damages the very interests FERC is charged with protecting: It strips FERC of its ability to balance competing state and market interests in favor of broad preemption whenever a district court determines that a State's actions encroach on the wholesale market.

III. The district court's decision also defies the protection given to contracts under longstanding Supreme Court precedent. Bilateral contracts promote competition, support new resources, mitigate market power, and allow buyers to hedge against market volatility. Under the *Mobile-Sierra* doctrine, FERC may abrogate bilateral contracts only in extraordinary circumstances. The district court, however, invalidated the contracts at issue here merely because it concluded that such contracts affect PJM's auction-pricing mechanisms. But district courts should have no greater power than FERC to abrogate contracts based on the effect on wholesale rates, much less to do so for the alleged purpose of protecting FERC's exclusive jurisdiction.

ARGUMENT

I. PLAINTIFFS' CHALLENGE IS AN IMPERMISSIBLE COLLATERAL ATTACK ON FERC AND PJM

The district court invalidated the contracts at issue on the theory that they intrude on PJM's pricing mechanisms and invade FERC's exclusive jurisdiction. In so doing, however, the district court itself invaded FERC's exclusive authority, entertaining an impermissible collateral attack on FERC-approved market rules.

A. FERC Was the Sole Forum for Plaintiffs' Claim That the Challenged Contracts Interfere with PJM's Pricing Rules

Plaintiffs assert that SOCA generators receive "an impermissible price supplement for an interstate wholesale sale of electricity" that allows them to bid into PJM's forward-capacity auction at artificially low prices. JA78. But the Federal Power Act gives FERC, not district courts, the power to correct such claimed distortions. *See* p. 4, *supra*. The remedy for Plaintiffs' claim is the one that repeatedly has been used in the past: Invoke PJM's market rules and, if those rules prove insufficient to ensure just and reasonable rates, seek relief from FERC.

As FERC has explained, "the deterrence of uneconomic entry falls within [FERC's] jurisdiction." *PJM Interconnection, L.L.C.*, 135 FERC ¶61,022 at P 141 (2011). "Through the [Federal Power Act], Congress preempted states, state courts, and ***even federal courts*** from acting in areas reserved exclusively for the FERC." *Gulf States Utils. Co. v. Ala. Power Co.*, 824 F.2d 1465, 1470 (5th Cir. 1987) (emphasis added). In this case, Plaintiffs must contend ***either*** that PJM's

market rules—federal tariffs approved by FERC—do not adequately protect them from the impact of the SOCAs, or that PJM has not properly implemented those rules. Either complaint belongs before FERC: District courts lack the authority and expertise to determine whether an RTO's market rules must be modified. And violations of federally filed tariffs by a market participant are likewise matters for FERC. *See* 16 U.S.C. § 824e. By filing suit in district court, Plaintiffs mounted an unlawful collateral attack on matters entrusted to a federal agency.

Indeed, Plaintiffs previously challenged the SOCAs and their effect on capacity prices before FERC. After New Jersey enacted the LCAPP, a number of entities, including Plaintiffs here, urged FERC to strengthen rules aimed at curbing the ability of parties, like States, to affect price. *See PJM Interconnection, L.L.C.,* 137 FERC ¶61,145 at P 7 n.3, P 91 (2011); *PJM*, 135 FERC ¶61,022. Plaintiffs asserted, among other things, that new resources should be subject to a longer-term price floor rule. *PJM,* 137 FERC ¶61,145 at PP 130-131. FERC concluded that Plaintiffs' position "could discourage economic entry," and rejected it. *Id.* at P 131. Dissatisfied with the scope of FERC's rulings, many of the same parties here sought review in this Court. That appeal remains pending. *See N.J. Bd. of Pub. Utils. v. FERC* (Nos. 11-4245 *et al.*). If Plaintiffs thought that FERC needed to go further still and invalidate contracts like these—rather than limiting their impact using a minimum offer price rule—they should have raised that argument

before FERC. If unsuccessful there, they were required to seek review in the court of appeals under the Federal Power Act's "specific, complete and exclusive mode for judicial review of the Commission's orders." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); 16 U.S.C. § 825*l*(b). They cannot bypass those processes and ask for the same relief from a district court instead.

Plaintiffs did just that. They seek to invalidate the LCAPP and the contracts thereunder as inconsistent with FERC's and PJM's policies. The district court agreed, invalidating the contracts as an intrusion on FERC's authority to set prices for wholesale energy sales. JA77-JA86. But FERC has never deemed that remedy appropriate, and the court exceeded its authority by imposing that remedy itself. By upholding a challenge based on price impacts that FERC was already addressing, the district court entertained an unlawful collateral attack on FERC's exercise of its authority. The court thereby arrogated to itself a duty that belongs exclusively to FERC. If any contract actually did "intrude upon the Commission's authority to set wholesale energy prices through its preferred" auction process, JA78, Plaintiffs were required to press those challenges before FERC. Having failed to obtain that relief from FERC, Plaintiffs cannot do an end-run by seeking the same remedy from the district court.

B. The District Court Should Have Referred the Matter to FERC Based on Primary Jurisdiction

Even if this suit were not categorically foreclosed, the matter still should have been referred to FERC on the basis of primary jurisdiction. "Primary jurisdiction applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *CSX Transp. Co. v. Novolog Bucks Cnty.*, 502 F.3d 247, 253 (3d Cir. 2007) (quotation marks and citation omitted). "In such cases, courts may refer specific questions to the administrative body charged with their resolution." *Id.* Primary jurisdiction is intended to "serve as a means of coordinating administrative and judicial machinery and to promote uniformity and take advantage of the agencies' special expertise." *Id.* (quotation marks omitted).

To the extent the district court had any authority to hear this suit, it should have referred the matter to FERC under the primary jurisdiction doctrine. This case raises issues within FERC's special competence, including the delicate balance between a State's policy decision to promote generation and FERC's obligation to ensure just and reasonable rates. FERC has chosen a nuanced approach to how those two sometimes-competing interests should be resolved. *See* pp. 19-21, 24-27, *infra*. The district court's solution—invoking a federal constitutional rule to invalidate a state law—cannot be reconciled with FERC's price-

focused approach. Consequently, if this Court were to determine that the district court properly exercised jurisdiction over this matter, it should nonetheless refer the matter to FERC.[2]

II. THE DISTRICT COURT'S PREEMPTION HOLDINGS INTRUDE ON THE VERY FEDERAL AUTHORITY THEY PURPORT TO PROTECT

The district court's preemption rulings are also mistaken on the merits. FERC is well aware of the potential impact of state-sponsored resources on capacity-auction pricing. When FERC has determined that intervention is warranted, it (and the RTOs it regulates) has targeted the ***price*** at which those resources are bid into the market. FERC could have prohibited the state-sponsored resources from participating in the PJM market, but has elected not to. FERC has thus sought to ensure the integrity of the markets it regulates without invalidating contracts or intruding on state sovereign interests. The district court erred by usurping FERC's role to protect wholesale markets. And it compounded that error

[2] To be sure, this Court has stated that "primary jurisdiction arguments can be waived." *CSX Transp. Co.*, 502 F.3d at 253. *But see Atlantis Exp., Inc. v. Standard Transp. Servs., Inc.*, 955 F.2d 529, 532 (8th Cir. 1992) ("[I]t is well established that the doctrine of primary jurisdiction is not waived by the failure of the parties to present it in the trial court or on appeal."). But invoking primary jurisdiction at this juncture would be consistent with this Court's "longstanding practice of avoiding constitutional questions in cases where [it] can reach a decision upon other grounds." *Egolf v. Witmer*, 526 F.3d 104, 109 (3d Cir. 2008). The potential impact of the district court's rulings, moreover, extends well beyond the particular litigants before the Court. It is therefore especially appropriate that the matter receive consideration by the agency with greatest expertise.

by ignoring FERC's nuanced approach to correcting market distortions and using the blunt instruments of field and conflict preemption to invalidate a statute and LCAPP contracts instead.

A. The District Court's Ruling Upsets FERC's Careful Effort To Use Mechanisms That Accommodate Competing Interests

FERC has long been aware that uneconomic entry can distort capacity markets. *See, e.g.*, *NYISO, Inc.*, 124 FERC ¶61,301 at P 36. On the one hand, FERC has explained that "uneconomic entry can produce unjust and unreasonable prices by artificially depressing capacity prices." *Id.* On the other hand, FERC has also "acknowledge[d] the rights of states to pursue policy interests within their jurisdiction." *ISO New England, Inc.*, 135 FERC ¶61,029 at P 170. That includes the use of state programs providing incentives for new and desirable types of generator resources to enter the market. FERC "must balance" those competing considerations on a day-to-day basis as it regulates wholesale markets across this Nation. *New England States*, 142 FERC ¶61,108 at P 35.

To effectuate those policies, FERC does not proscribe state-sponsored contracts. Instead, FERC—through the RTO—applies mitigation rules designed to avoid harm to the competitive dynamic of capacity markets. *See, e.g.*, *Hudson Transmission Partners, L.L.C. v. NYISO, Inc.*, 145 FERC ¶61,156 at PP 4-7 (2013). These rules have two common denominators: First, they all focus on the ***price*** at which entrants enter the market. Second, and concomitantly, they do not ban state-

sponsored bilateral contracts or prohibit parties with those contracts from participating in its markets.

For example, under PJM's minimum offer price rule ("MOPR"), a FERC-approved market monitor screens a supplier's capacity market offer to ensure it is not unduly low. If the offer fails the screen, it will be subject to mitigation and "increased to a competitive level." *PJM*, 135 FERC ¶61,022 at P 6. The purpose of the MOPR is "to ensure that an offer that may be the result of buyer market power does not clear at its artificially low level, thereby injecting uneconomic supply into the market." *Id.* at P 104. Under the MOPR, States are "free" to pursue their own policies, but "there is no valid state interest in ensuring that uneconomic offers can submit below-cost offers into the [forward-capacity] auction." *Id.* at P 142. FERC has approved similar mitigation measures for New England's RTO. *See* pp. 8-9, *supra*.

The MOPR is thus FERC's chosen tool to mitigate state-sponsored resources. Indeed, FERC has ***already rejected*** New Jersey's request that resources approved pursuant to the LCAPP should be exempt from the MOPR. *PJM*, 137 FERC ¶61,145 at P 91. If Plaintiffs thought that FERC did not go far enough, they should have appealed according to the review provisions of the Federal Power Act. *See* pp. 15-16, *supra*. They are not also entitled to bring suit in district court demanding further relief. Once Plaintiffs did bring suit, the district court should

not have imposed a remedy—invalidation of the contract—that goes beyond the sort of remedy FERC has deemed appropriate.

Amicus agrees with Plaintiffs that the FERC-approved market rules do not sufficiently protect auction prices, and that FERC should have imposed more stringent price rules. As a large merchant generator in PJM, NRG would benefit from the invalidation of the SOCA contracts. But FERC has not chosen to exercise its authority by banning such contracts outright. The district court erred by imposing that solution itself. Indeed, as explained below, in doing so, the district court did substantial damage to the very values FERC seeks to protect.

B. The District Court's Field Preemption Ruling Is Mistaken

The district court did not address whether FERC was the proper forum to resolve any disputes. Instead, the court held that ***it*** "is in the best position to determine whether the LCAPP and the related policies implemented by the Board violate the Supremacy Clause." JA74. The district court then held that the State's LCAPP is invalid under the doctrine of field preemption, which "applies where the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir. 2010) (quotation marks and citation omitted). The LCAPP, it ruled, "intrudes upon the exclusive jurisdiction of [FERC], by establishing the price that

LCAPP generators will receive for their sales of capacity" and thus "invades the field occupied by Congress and is preempted by the Federal Power Act." JA84.

The district court's ruling defies nearly a century of federal energy practice. From the advent of the Federal Power Act, actions by States and private parties have affected price—sometimes profoundly—without triggering field preemption. Under the Act, States "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 the Commission." *Conn. DPUC*, 569 F.3d at 481. No one would say that States can play no role in those decisions simply because they affect how an auction operates. The district court itself acknowledged that the Federal Power Act "reserved to the States certain . . . regulatory authority, including that over generation facilities." JA38. That acknowledgement cannot be reconciled with the district court's expansive view of preemption that invalidates state law merely because the law affects PJM's auction-pricing mechanisms. Nor can it be reconciled with FERC's respect for state policies or FERC's targeted approach toward mitigation when those policies encroach on the wholesale market.

The district court appears to have been unaware of the longstanding—and protected—role that bilateral contracts play in energy markets. Utilities and

generators have long entered into such contracts for capacity and other energy products, even though such contracts inevitably affect price. For example, the availability of power through cheaper bilateral contracts can lower prices, and those who purchased such power can force prices lower still by reselling their power into the market. And non-state parties may enter into contracts for differences to reallocate market risks between the utility and the generator, allocating more to the former and less to the latter. *See* p. 8, *supra*.

It cannot be that States are precluded from entering into such contracts. Contracts between States and parties have long been accepted as a valid, vital way to promote energy reliability without intruding on the exclusive jurisdiction of FERC. Taken to an illogical extreme, the district court's ruling could threaten ***any*** bilateral contract that affects the wholesale energy market. That cannot be right, and it certainly cannot be right absent a specific finding of an exercise of buyer-side market power.

Plaintiffs' real concerns are not with bilateral contracts generally. Rather, Plaintiffs challenge ***specific features*** of SOCAs—that they impermissibly incorporate PJM's pricing into their terms. JA78. But that is not an issue of field preemption, which asks whether federal authority in an area is so comprehensive as to exclude state action altogether. It is at best an issue of conflict preemption that

asks whether the SOCAs' terms impermissibly interfere with the pricing mechanisms established under the Federal Power Act.

C. The District Court's Conflict Preemption Ruling Turns Conflict Preemption on Its Head

The district court's conflict preemption ruling fares worse still. Far from preventing a conflict between state law and federal policy, the court created a conflict between its view of federal policy and the actual policies pursued by the agency charged with administering the Federal Power Act.

1. "Conflict preemption nullifies state law inasmuch as it conflicts with federal law, either where compliance with both laws is impossible or where state law erects an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Farina*, 625 F.3d at 115 (quotation marks and citation omitted). The district court here concluded that SOCAs "supplant" the auction's clearing price and thus "create[] an obstacle to [FERC's] preferred method for the wholesale sale of electricity in interstate commerce." JA86.

That is incorrect. PJM and FERC have full authority to determine whether, to what extent, and under what terms, generators are permitted to participate in PJM's energy and capacity markets. *See* pp. 4-6, *supra*. Every new generator's bid is subject to market monitoring and other regulatory review. *See* PJM, *Open Access Transmission Tariff* attach. DD § 5.14(h)(1) (2014). To the extent PJM and FERC have inadequately regulated the conduct of generators with SOCAs, that is a

complaint about PJM's tariff and FERC's regulation of the tariff. It makes no sense to say that the contracts are preempted because they conflict with FERC's policies when FERC has chosen to allow them.

Indeed, FERC's price-floor rules specifically contemplate that state-sponsored contracts will participate in the market, regulating not the contracts themselves but the price at which generators enter the market. *See PJM*, 135 FERC ¶61,022 at P20. And PJM has specifically addressed whether the LCAPP improperly distorts its pricing mechanism. The PJM Independent Market Monitor, charged with ensuring the integrity of the PJM auction process, filed a complaint before FERC alleging that one of the entities with a state contract had "submit[ted] an offer that relie[d] on non-market revenues that it expect[ed] to receive under a state procurement process." Complaint at 2, *Independent Market Monitor for PJM v. Unnamed Participant*, No. EL12-63-000 (FERC May 1, 2012). But the Monitor later withdrew the complaint after finding no effect on the auction's outcome. Notice of Withdrawal of the Independent Market Monitor for PJM at 2, *Independent Market Monitor for PJM v. Unnamed Participant*, No. EL12-63-000 (FERC May 17, 2012). Had FERC wished, it could have denied the Monitor's request to withdraw the complaint and prohibited the generator from participating in the capacity auction. It did not. But the district court, under the rubric of conflict preemption, did precisely what FERC and PJM—the entity responsible for

administering the tariff—specifically refused to do. Indeed, it went well beyond, invalidating the contracts themselves.

The district court's decision intruded gravely into FERC's exercise of its exclusive authority. In evaluating state-sponsored generation, FERC "must balance two considerations"—its "responsibility to promote economically efficient markets and efficient prices, and . . . its interest in accommodating the ability of states to pursue other legitimate state policy objectives." *New England States*, 142 FERC ¶61,108 at P35; pp. 8-9, 19, *supra*. And when FERC does intervene, it addresses market distortions in a much more nuanced way than the district court did.

FERC has not merely chosen to regulate price through a MOPR (as opposed to invalidating contracts). It has also applied the MOPR to specific types of generation (*e.g.*, gas-fired plants) while leaving other types (*e.g.*, nuclear) largely free of regulation. *See PJM Interconnection, L.L.C.*, 143 FERC ¶61,090 at PP166-167 (2013). It has applied the MOPR differently to the same types of generation, depending on the specific circumstances. For example, FERC exempted state-sponsored renewable resources from the MOPR in PJM, but refused to do so in ISO-New England. *See New England States*, 142 FERC ¶61,108 at PP32-37. It did so because it found that "an exemption for renewables is likely to have a greater depressing effect on capacity prices in New England than in PJM." *Id.* at

P 35. FERC has not, however, categorically banned ***in any market*** state-sponsored resources that influence wholesale rates.

Yet the district court did just that. It displaced FERC's nuanced approach in favor of a blanket holding invalidating a state statute and related contracts on the theory that they are inconsistent with FERC's policies. But that ban is not FERC's policy; it is the district court's. FERC's actual policy is to permit such contracts, subject to specific regulatory safeguards. Likewise, FERC has never foreclosed state sponsorship of resources: FERC routinely allows those resources into the market without concluding that a State has intruded on its exclusive jurisdiction. *See* pp. 19-21, 24-27, *supra*. And where bilateral contracts do impermissibly distort wholesale outcomes, FERC still does not ban state-sponsored resources, or invalidate contracts. It instead regulates the price at which that resource is bid in to the market.

The district court's preemption ruling thus itself conflicts with the flexible federal policy established by FERC. It erroneously supersedes FERC's actual policies on state-sponsored generation in favor of the district court's own absolutist view. And it imposes a drastic remedy that defies FERC's chosen course of regulating only the price at which capacity is bid into the auction. The district court's judgment should be reversed. At the very least, the Court should invite FERC and the United States to set forth their views in an *amicus* brief.

D. The District Court's Decision Seriously Damages Federal Interests

As explained above, the district court's decision undermines FERC's authority to balance competing interests, which has been central to its mission. For example, States and the federal government often have significant interests in promoting renewable energy.[3] But renewable resources are often uneconomic.[4] Accordingly, some States have established renewable portfolio standards that mandate a minimum level of renewable energy and provide credits to meet the standards. *See* Database of State Incentives for Renewables & Efficiency, *RPS Data*, http://www.dsireusa.org/rpsdata/index.cfm. FERC has not invalidated those credits—or contracts between States and generators for the sale of renewable energy—simply because they affect the price a generator receives. FERC has instead taken a nuanced view that examines whether, on an RTO-by-RTO basis, state-sponsored renewables should be subject to minimum offer price rules. *See* pp. 19-21, 24-27, *supra*.

The district court's preemption ruling interferes with FERC's regulatory discretion to accommodate those sorts of competing interests. Before the district

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[3] *See* U.S. Dep't of Energy, Office of Energy Efficiency & Renewable Energy, *Fiscal Year 2014 Budget Rollout* (2013), http://energy.gov/sites/prod/files/2013/11/f4/electricity_stakeholder_pres_0513.pdf; U.S. Dep't of Energy, *State Summaries* (2013), http://apps1.eere.energy.gov/states/state_summaries.cfm.

[4] *See* U.S. Energy Information Administration, *Levelized Cost of New Generation Resources in the Annual Energy Outlook 2013* (2013), http://www.eia.gov/forecasts/aeo/er/electricity_generation.cfm.

court's decision, an aggrieved party could have gone to FERC to urge that a renewable energy credit or a contract between a State and a generator that subsidized renewable resources impermissibly distorts PJM's auction-pricing mechanisms. Instead of invalidating a State's actions and associated bilateral contracts, FERC could have applied its more balanced approach to determine whether it needs to mitigate the price impact of such actions. Now, however, a party can skip over FERC and file suit in federal court, all in the name of protecting FERC's exclusive jurisdiction. That cannot be correct.

III. THE DISTRICT COURT'S DECISION UNDERMINES THE *MOBILE-SIERRA* DOCTRINE

Finally, the decision threatens the critical and long-protected role of bilateral contracts. The Federal Power Act "allows regulated utilities to set rates unilaterally by tariff; alternatively, sellers and buyers may agree on rates by contract." *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 171 (2010). Bilateral contracts are the lifeblood of energy and capacity markets. "Long-term contracts are an important tool to achieve and maintain a strong power infrastructure, particularly for new entrants into the generation sector and especially for many renewable energy developers." *Wholesale Competition in Regions with Organized Electric Markets*, 119 FERC ¶61,306 at P 83 (2007). They "are important to effective competition both in regions with organized wholesale markets and in regions without organized markets." *Id.* They are used to support new

resources, mitigate market power, and allow buyers and sellers to meet their specific capacity needs in terms of quantity, price, and duration. *Id.* at P 84. They "hedge against the volatility that market imperfections produce." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 547 (2008). And they help FERC "creat[e] a regimen that will produce adequate and reliable service at just and reasonable rates." *PacifiCorp v. Reliant Energy Servs., Inc.*, 102 FERC ¶63,030 at 65,090 (2003).

Because the Federal Power Act's "regulatory system" is "premised" on preserving "contractual agreements voluntarily devised by the regulated companies," even FERC lacks authority to abrogate contracts unless the demanding *Mobile-Sierra* standard is met: FERC must find that the contracts "harm[ ] the public interest," *Morgan Stanley*, 554 U.S. at 548, an "obstacle" the D.C. Circuit has characterized as "almost insurmountable," *Kansas Cities v. FERC*, 723 F.2d 82, 87-88 (D.C. Cir. 1983). Thus, "the Commission will not modify market-based contracts unless there are ***extraordinary*** circumstances." *Pub. Utils. Comm'n of Cal. v. Sellers of Long Term Contracts*, 99 FERC ¶61,087 at 61,383 (2002). Parties are thus free to contract, "subject to only limited FERC intervention." *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 271 (D.C. Cir. 2007).

The district court's decision circumvents *Mobile-Sierra*'s protections. The court did not ask whether the contracts are so injurious to the "public interest" as to

be candidates for invalidation under *Mobile-Sierra*. It did not ask whether the requisite "extraordinary circumstances" are present. By failing to do so, the district court assumed for itself an authority not even held by FERC: The power to invalidate voluntarily-entered bilateral wholesale power agreements without regard to *Mobile-Sierra*.

The court's holding cannot be reconciled with Congress's decision to delegate regulation of wholesale markets exclusively to FERC. It conflicts with the longstanding principle that the wholesale electricity industry benefits when FERC respects the integrity of contracts. And it cannot be reconciled with FERC's judgment that the best way to deal with state-sponsored resources is not to ban the resource but to regulate the price at which it may enter the market. FERC's exclusive authority in this area warrants protection, but that protection is best provided by reversing the district court's judgment.

CONCLUSION

The district court's judgment should be reversed.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Local Rule 25, I hereby certify that today, January 24, 2014, I served a copy of the Brief of NRG Energy, Inc. as *Amicus Curiae* in Support of Reversal electronically through the Court's CM/ECF system on all registered counsel, and via first-class mail to the following:

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1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 6,988 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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January 24, 2014

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