ORAL ARGUMENT SET FOR MARCH 27, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13-4330 & 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 No. 13-4330

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

HESS NEWARK, LLC,
Intervenor in No. 13-4330

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)

CPV'S SUPPLEMENTAL BRIEF RESPONDING TO THE AMICUS BRIEF OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

Larry F. Eisenstat
Clifton S. Elgarten
Richard Lehfeldt
Jennifer N. Waters
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Tel: (202) 624-2500
Fax: (202) 628-5116

Counsel for Intervenor-Appellant CPV Power Development, Inc.

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INTRODUCTION

Relying on a novel interpretation of Section 206 of the Federal Power Act ("FPA"), 16 U.S.C. § 824e, the Government's amicus brief offers an expansive view of FERC's "exclusive jurisdiction" long ago rejected by the Supreme Court in *Northwest Central Pipeline Corp. v. State Corp. Commission*, 489 U.S. 493 (1989). The Government combines that rejected theory with assertions about the supposed effect of the LCAPP Act on PJM's regional capacity auction that are factually incorrect and contradicted by the Federal Energy Regulatory Commission's ("FERC's") orders, as regulator of that auction, affirmed in *New Jersey Board of Public Utilities v. FERC*, Nos. 11-4245 *et al*. (3d Cir. Feb. 20, 2014) (slip opinion) *("NJBPU")*.

The result leaves the Government speaking out of both sides of its mouth. As regulator, where its actions were subject to hearings and review, it explains that SOCA-supported generators can and did participate in the PJM market without any disruption. *See, e.g., id.* at 55. As *amicus*, given the opportunity to expand its jurisdiction, it offers a starkly different view. This Court, of course, owes deference only to FERC's orders and rules, not contradictory arguments as amicus.

The bottom line here is that there has been no intrusion on FERC's "exclusive jurisdiction." Moreover, if FERC was concerned about any effect of SOCA-supported generators in the auction market, its proper response was to take

action as the regulator of that market to preserve the market; the "remedy" is not preemption of state actions that affect the market.

In fact, contrary to the suggestions in the Government's amicus brief, FERC, acting as regulator, determined that with certain rule changes that it adopted, SOCA-supported generators actually posed *no* threat to that market because they represent economically viable, competitive resources. By their terms, those rules, approved by FERC, "prevent the state's choices from adversely affecting wholesale capacity rates." *Id*. Stated in terms of the applicable legal standards, with FERC having already made the accommodations that avoid disruption to its auction scheme, the LCAPP Act cannot be "so extensive and disruptive" of that market "that federal accommodation must give way to federal preemption." *Nw. Cent.*, 489 U.S. at 517-18.

I. The Government's Amicus Brief Advances A Theory Of Exclusive Jurisdiction Directly At Odds With The Case Law and the FPA.

The Government advances a capacious view of federal power contradicted by the Supreme Court's holding in *Northwest Central*.

In *Northwest Central*, the Supreme Court described the system of "carefully divided," "interlocking" federal and state responsibility under the Natural Gas Act and, by implication, the Federal Power Act. 489 U.S. at 506, 510. Under that system, FERC regulates wholesale rates and markets. States remain responsible for creation of new power plants. *See* CPV Opening Br.-25-31. In considering

preemption questions arising from the inevitable interplay between State and federal authority, courts must "take seriously the lines Congress drew in establishing a dual regulatory system" and avoid "an extravagant interpretation of the scope of federal power" that would extend the notion of exclusive FERC jurisdiction at the States' expense. *Nw. Cent.*, 489 U.S. at 512, 513. For field preemption in particular, the Court held that where a State acts in legitimate pursuit of its goals, and exercises powers reserved to it, actions that merely ***affect*** matters within FERC's authority, specifically rates, are ***not*** preempted. *See id.* at 512-13.

Literally ignoring *Northwest Central*, the Government's amicus brief presents an expansive view of FERC's "exclusive jurisdiction" neither suggested by the parties nor adopted by the trial court or any other court. It rests on an assertion of "exclusive jurisdiction" that FERC does not possess. The Government argues that because the new, SOCA-supported capacity bid into the auction "***affects*** wholesale rates" generated by the auction, it is "a preempted intrusion upon [FERC's] exclusive jurisdiction to regulate wholesale rates and practices 'affecting' rates."[1] Gov't Br.-14 (emphasis added); *see id.* at 10 (LCAPP Act

[1] The Government notably does ***not*** endorse the trial court's theory that the SOCA payments themselves "establish[] the price" received by the SOCA generators for wholesale sales of capacity. *Cf.* JA-84. The Government argues instead that the SOCAs "effectively set[] the wholesale rate" by affecting the clearing price in the auction. Gov't Br.-15.

"directly affect[s] the auction's resulting wholesale capacity rate," and thus intrudes on FERC's "exclusive jurisdiction").

The Government's argument is incorrect. That the entry of this (or any) new capacity into the PJM market may affect prices in that market certainly brings the matter potentially within FERC's jurisdiction, and FERC may regulate, within its assigned sphere of authority, to ensure that the market operates as FERC wishes. That is far different from saying that the LCAPP Act invades FERC's ***exclusive*** jurisdiction and is, therefore, preempted.

Northwest Central flatly contradicts the Government's theory. *See* CPV Opening Br.-29-30. In devising an "interlocking" regulatory framework, Congress knew that state actions ***necessarily*** affect wholesale rates. *See Nw. Cent.*, 489 U.S. at 506, 512-13. For example, state decisions to construct new power plants, or to retire old power plants, by definition affect supply, and thus may impact prices in the FERC-regulated wholesale market. In *Northwest Central*, the Supreme Court squarely held that so long as the State is engaged in the activities for which it is traditionally responsible, actions that merely ***affect*** the rates or transactions subject to FERC jurisdiction are ***not*** field preempted. *See id.* at 512-13. A contrary approach would nullify the States' "traditional powers to regulate rates of production, conserve resources, and protect correlative rights." *Id.* at 514.

The Government offers no case law support for its assertion of "exclusive jurisdiction" over matters ***affecting*** rates. Instead, it cites Section 206, 16 U.S.C. § 824e(a), which it says provides it with "exclusive jurisdiction" over "contracts and practices directly 'affecting' rates." Gov't Br.-11; *see also id.* at 14 (citing 16 U.S.C. §§ 824d-824e). Yet that language does not relate to FERC's exclusive jurisdiction at all. Instead, Section 206 provides for remedial rate review authority limited to "sales 'subject to the jurisdiction of [FERC].'" *Fed. Power Comm'n v. Conway Corp.*, 426 U.S. 271, 276 (1976) (quoting 16 U.S.C. § 824e(a)). Section 206 nowhere ***confers*** jurisdiction on FERC, let alone exclusive jurisdiction. *See id.*

Not only has the Government's theory of exclusive jurisdiction never been accepted by any court (or noticed by the parties or the court below), it would nullify *Northwest Central* and stymie the States' ability to take actions that might "affect" interstate markets. FERC is confusing its remedial jurisdiction with its ***exclusive*** jurisdiction.

The sections of the FPA that describe FERC's exclusive jurisdiction, 16 U.S.C. § 824(a)-(b), specify FERC jurisdiction over sales at wholesale in interstate commerce and over interstate transmission, and then preserve state jurisdiction over generation and local distribution. Because FERC has exclusive jurisdiction over wholesale sales, it has exclusive jurisdiction over rates for such sales.

In contrast, Sections 205 and 206 of the FPA, 16 U.S.C. §§ 824d-824e, which the Government cites here, do not address FERC's exclusive jurisdiction, but merely establish FERC's regulatory and remedial authority in connection with a rate review proceeding. FERC has jurisdiction over practices and contracts affecting rates as necessary to implement its regulation of rates and charges in interstate markets. But saying that FERC has jurisdiction over practices affecting rates is a far cry from saying that FERC has ***exclusive*** jurisdiction over every practice and contract that affects rates, thereby ousting States from engaging in traditional activities merely because they may affect rates. The theory advanced in the Government's brief is flatly inconsistent with the FPA and cannot be reconciled with the Supreme Court's decision in *Northwest Central*.

Indeed, the Government's theory has breathtaking scope. Every state decision to support new power plant construction, or to decline to allow such power plant construction, affects the market. The state incentives that the Government acknowledges as permissible – *e.g.*, tax relief or favorable leases, Gov't Br-18 – "affect" the supply mix and thus potentially change the resulting auction price every bit as much as the New Jersey subsidy at issue here.

No court has held that state initiatives affecting wholesale rates invade ***exclusive*** FERC jurisdiction. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 484 (D.C. Cir. 2009) *("CDPUC")*, cited by the Government, confirms

that FERC may regulate practices and contracts affecting jurisdictional rates as an incident to regulating wholesale sales, even if that regulation affects ***the State's*** generation decisions. *CDPUC* did not hold that a ***State's*** support for new generation is preempted because it ***affects*** wholesale rates.

To the contrary, the D.C. Circuit in *CDPUC* emphasized that state policy choices over generation will "[o]f course . . . ***affect*** the pool of bidders in the [capacity market], which in turn ***affects*** the market clearing price for capacity." 569 F.3d at 481 (emphasis added). "But this is all quite natural," the court said, and mere effects on the federal field will not transform permissible state actions into preempted ones. *See id.*; *see also Nw. Cent.*, 489 U.S. at 512-13. Yet in its amicus brief before this Court, the Government insists that they do.

Perhaps recognizing the absence of a limiting principle for its expansive view of FERC jurisdiction, the Government suggests later in its brief that the real question is whether state initiatives "interfere with [FERC's] statutory responsibility to maintain the reliable operation of wholesale energy markets at just and reasonable rates." Gov't Br.-19-20. The Government then argues that if state programs result in bids "'reflective of [the generation resource's] actual costs,'" preemption would not be appropriate. Gov't Br.-20 (quoting *ISO New England Inc.*, 142 FERC ¶ 61,107 (2013) at P 83).

This sounds almost like a conflict preemption theory, but the Government identifies no conflict of law, or any explicit policy or principle, upon which the conflict can be based. Moreover, as shown below, no conflict exists here because FERC, which has complete supervisory power over the design of the PJM capacity auction, expressly determined that the SOCA-supported generators ***could*** fairly participate in the auction upon a showing that their bid price was ***not*** below cost, which the SOCA-supported generators did.

Far from invading an area of exclusive FERC jurisdiction, the SOCA payments are not rates or charges subject to FERC jurisdiction at all.[2] But even if the SOCAs were subject to FERC jurisdiction, the outcome would not be preemption, because FERC could simply approve, disapprove or modify the contracts as it sees fit under FPA Section 205 or 206, 16 U.S.C. §§ 824d, 824e. *See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 171 (2010); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). If FERC has authority to review the contracts, it cannot follow that they, or any associated rules or practices, are preempted. That the contract arises from a procurement directed by the State does not limit FERC's jurisdiction in any way. And so long as the price set forth

[2] *See* CPV Reply Br.-11-12; *see also Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004) (FERC's jurisdiction is "limited to contracts [] which directly govern[] the rate in a jurisdictional sale – providing for the rate in whole or in part, or specifying or embodying it, or setting forth rules by which it is to be calculated.") (internal quotation marks omitted; first alteration added).

in the contract is determined by that procurement, and not by the State, it will pass substantive review, as well. *See* CPV Reply Br.-17-19. If a contract, rate, or practice is subject to FERC review, it cannot usurp FERC authority.

II. The Government's Amicus Brief Inaccurately Describes The Auction Process And Rules That Govern That Auction; There Is No Conflict.

Though any new supply would plausibly "affect" the regional capacity market in some way, the Government's brief vaguely suggests that, while some effects on the auction would be tolerable, New Jersey's program is not. According to the Government's amicus brief, the LCAPP Act will result in submission of bids not reflective of costs, which in turn will "suppress" market prices. Gov't Br.-13, 15. This seems to be a conflict preemption argument, but the Government never identifies a rule with which there a conflict.[3]

Regardless, any conflict preemption theory is wrong on both the facts and the law. Conflict preemption "must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Nw. Cent.*, 489 U.S. at 515. State law affecting FERC's regulatory authority is conflict preempted only if "the impact of state regulation of production on matters within federal control is so extensive and

[3] In contrast, Appellees disclaimed this argument, clarifying that they did "not contend that . . . the LCAPP Act resulted in artificial suppression of market prices," and "do not claim that the LCAPP Act conflicts with FERC's policies because it affects market prices." *See* CPV Opening Br.-55 n.24.

disruptive . . . that federal accommodation must give way to federal pre-emption." *Id.* at 517-18. The Government makes no effort to show that this standard is met here. And FERC's orders setting up the rules for the PJM capacity auction expressly accommodated bids by SOCA-supported generators, and thus preclude any argument of such "extensive" interference that might prevent accommodation.

The Government reaches back to cite *Northern Natural Gas Co. v. State Corp. Commission*, 372 U.S. 84 (1963), for the proposition that preemption can be found even if FERC could accommodate New Jersey's actions. But as *Northwest Central* held twenty-six years later, 489 U.S. at 513, "non-accommodation" was permissible in *Northern Natural* only because in that case the state regulation was facially outside the State's field of regulation and was "'unmistakably and unambiguously directed at [interstate pipeline] purchasers'" of natural gas, subject to FERC's authority. *Nw. Cent.*, 489 U.S. at 513 (quoting *N. Natural*, 372 U.S. at 92) (emphasis omitted). In other words, *Northern Natural* was not an "affects" case, but rather an attempt by the State directly to regulate within the sphere subject to FERC's authority.

In any event, FERC already accommodated the LCAPP Act with its rules changes. Therefore, arguments about whether FERC had to make adjustments are beside the point. Any conflict between the LCAPP Act and federal law must be judged on the basis of FERC's rules as they now exist.

The Government mistakenly asserts that "bids submitted pursuant to the Act (zero-dollar bids)" help determine the clearing price. Gov't Br.-15. The Government similarly refers to SOCA-supported generators submitting "below-cost" bids, Gov't Br.-10, that "suppress" prices. But this is simply wrong. While the original PJM market tariff exempted state-directed resources from the minimum offer price rule ("MOPR") – thereby allowing below cost bids by state-supported new generators – that exemption was eliminated by FERC in its orders. FERC replaced the exemption with a requirement that new SOCA-supported generators could not participate in the auction without first showing that their bids were cost-based. *See NJBPU*, slip op. at 40 (FERC's revised MOPR "require[ed] them to submit cost-based offers like other entrants or suffer the consequences of mitigation"); JA-53 (revised MOPR rules eliminated state-sponsored projects' ability to bid as price-takers and raised bidding floors to reflect actual costs).

FERC thus resolved the concerns raised here by the Government. And if FERC were concerned about allowing state-supported bids to participate in the auction, FERC presumably could have denied their entry into the RPM capacity auction, and its decision would have been subject to judicial review.

The Government's brief maintains that "both [FERC] and this Court have found [that] this state-supported uneconomic entry into PJM's capacity auction directly affects (suppresses) the auction's resulting wholesale capacity rate." Gov't

Br.-13. But the Government is referring to the auction before FERC modified it. In fact, the Government's brief goes to great lengths to avoid addressing the FERC rule changes that resolved whatever difficulties with below-cost bidding FERC might have feared. For example, quoting *NJBPU*, slip op. at 53, the Government omits the introductory phrase "ensures that its sponsor ***cannot*** …"; and in citing that *NJBPU* opinion at 55, omits the introductory phrase "while approving rules that ***prevent*** …" (emphasis added). With the introductory phrase restored, it is clear that FERC resolved the issue.

Moreover, while the Government brief mentions "zero-dollar bids" as if they were some aberration, the fact is that within the RPM auction, almost all ***incumbent*** generators bid zero, as "price takers," meaning that they will provide their capacity at whatever the clearing price turns out to be. Presumably because the large capital costs associated with power plants are sunk costs, bidding zero as a price-taker is conventional practice, having nothing to do with state subsidies.[4] *See NJBPU*, slip op. at 28-29; JA-51-52. Most of the capacity sold in recent auctions was sold by zero-bidding price takers.

The MOPR, adopted by FERC in its orders, requires ***new*** generators bidding for the first time into the auction to submit an "economic" bid, *i.e.*, a minimum bid

[4] *See* JA-52-53. This is ***not*** an auction in which parties bid and sell at the bid price. Here, they receive the clearing price, even if higher than their bid price.

that reflects their actual costs. *NJBPU*, slip op. at 84. Only if such a bidder clears the auction with its cost-based bid may it bid zero in subsequent auctions.

State-subsidized new generators were at first categorically exempted from the MOPR, and thus could bid into the auction at zero from the very outset. *See NJBPU*, slip op. at 29 (original MOPR exempted any "resource being developed in response to a state regulatory or legislative mandate to resolve a projected capacity shortfall"). But with the change in the MOPR rules, FERC's orders eliminated that exemption. SOCA-supported generators must clear the auction with a bid determined to be economically justified on a cost basis, ***irrespective of any subsidy provided by the SOCA***. *See id.* at 41. The result was that CPV and Hess cleared the auction with an approved, economically-justified bid reflecting their net costs independent of the SOCAs. *See* JA-68 (CPV bid $151.24/MW-day, and the market cleared at $167.46/MW-day, which meant that CPV, Hess and all incumbent bidders that bid zero received that price). On the other hand, the cost-based bid for NRG's project, the third successful bidder for a SOCA, did not clear the market. The result was that FERC's "rules . . . prevent the state's choices from adversely affecting wholesale capacity rates." *NJBPU*, slip op. at 55. In light of those rules, the Government's assertion of "adverse" effect makes no sense.

Indeed, FERC ***rejected*** proposals to impose a special rule on SOCA-supported generators to prove an economic price in successive years. By "clearing

one auction 'the resource demonstrates that its capacity is needed by the market at a price near its full entry cost.'" *Id*. at 41 (quoting *PJM Interconnection, LLC*, 135 FERC ¶ 61,022 (2011) at P 176). Therefore, "'even if discriminatory subsidies are being received, if the resource is needed at the MOPR bid then it is a competitive resource and should be permitted to participate in the auction regardless of whether it also receives a subsidy." *Id.* at 84 (quoting *PJM*, 135 FERC at P 177).

All this is what FERC said ***in its orders*** approving the MOPR rules, and what FERC cited in persuading this Court in *NJBPU* that it had taken a reasonable and consistent position to support its MOPR rules. Yet these orders are now ignored by the Government in its amicus brief. The important point for conflict preemption is that a conflict is not possible: FERC supervises the market, and if the State's actions pose some difficulty for the market, FERC is free to address the issue to ensure that its market operates properly.[5] *See id.* at 49, 53. And FERC has repeatedly shown its ability to do so.

Indeed, the Government's brief ultimately concedes the broad authority that States possess "over their power plants," including the ability to support new entry into the capacity market. Gov't Br.-19. The Government further concedes, as it

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[5] *See PJM Interconnection, LLC*, 137 FERC ¶ 61,145 (2011) at P 3 ("We are forced to act . . . when subsidized entry supported by one state's or locality's policies has the effect of disrupting the competitive price signals that PJM's RPM is designed to produce . . . .").

must, that such entry "'affect[s] the pool of bidders in the Forward [Capacity] Market, which in turn affects the market clearing price of capacity.'" *Id.* (quoting *CDPUC*, 569 F.3d at 481). These concessions vindicate New Jersey's LCAPP Act here.

CONCLUSION

The district court's judgment with respect to field and conflict preemption should be reversed. The district court's judgment on the Commerce Clause claim should be affirmed.

Dated: March 24, 2014

Respectfully submitted,

CPV Power Development, Inc.

/s/ Larry F. Eisenstat

Larry F. Eisenstat (D.C. Bar #417414)
Clifton S. Elgarten (D.C. Bar #366898)
Richard Lehfeldt (D.C. Bar #367021)
Jennifer N. Waters (D.C. Bar #928960)
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Tel: (202) 624-2500
Fax: (202) 628-5116
leisenstat@crowell.com
celgarten@crowell.com
rlehfeldt@crowell.com
jwaters@crowell.com

Counsel for Intervenor-Appellant CPV Power Development, Inc.

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Dated: March 24, 2014

/s/ Larry F. Eisenstat

Larry F. Eisenstat
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Tel: (202) 624-2500
Fax: (202)628-5116

Counsel for Intervenor-Appellant CPV Power Development, Inc.

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25 and Local Appellate Rules 25 and Misc. 113.4, I hereby certify that I have on this 24th day of March, 2014, caused the foregoing document to be served upon each party identified in the attached service list through the Court's CM/ECF system. I further certify that on this day seven hard copies of this brief are being sent to the Clerk of Court via overnight delivery.

/s/ Larry F. Eisenstat

Larry F. Eisenstat
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Tel: (202) 624-2500
Fax: (202)628-5116

Counsel for Intervenor-Appellant
CPV Power Development, Inc.

SERVICE LIST

Robert C. Brady Gibbons One Gateway Center Newark, NJ 07102	Stefanie A. Brand Office of Public Defender Division of the Ratepayer Advocate 140 East Front Street 4th Floor, P.O. Box 003 Trenton, NJ 08625
Candice Chiu Bancroft 1919 M Street N.W. Suite 470 Washington, DC 20036	Susanna Chu Kaye Scholer 901 15th Street, N.W. Washington, DC 20005
Paul D. Clement Bancroft 1919 M Street N.W. Suite 470 Washington, DC 20036	Shannen W. Coffin Steptoe & Johnson 1330 Connecticut Avenue, N.W. Washington, DC 20036
William P. Deni Jr. Gibbons One Gateway Center Newark, NJ 07102	Randolph L. Elliott McCarter & English 1015 15th Street, N.W. 12th Floor Washington, DC 20005
Richard F. Engel Office of Attorney General of New Jersey Division of Law Richard J. Hughes Justice Complex P.O. Box 093 Trenton, NJ 08625-0000	David J. Fioccola Morrison & Foerster 1290 Avenue of the Americas New York, NY 10104-0000

Karis A. Gong Skadden, Arps, Slate, Meagher & Flom Room 10-6 1440 New York Avenue, N.W. Washington, DC 20005	Eugene Grace American Wind Energy Association 1501 M Street Washington, DC 20005
Jennifer S. Hsia Office of Attorney General of New Jersey Division of Law 25 Market Street Richard J. Hughes Justice Complex Trenton, NJ 08625	Justin N. Kattan Dentons US 1221 Avenue of the Americas New York, NY 10020
Clare E. Kindall Office of Attorney General 10 Franklin Square New Britain, CT 06051	Jeffrey A. Lamken MoloLamken 600 New Hampshire Avenue, N.W. The Watergate Washington, DC 20037
Lawrence S. Lustberg Gibbons One Gateway Center Newark, NJ 07102	James P. Melia Pennsylvania Public Utilities Commission 3rd Floor 400 North Street Keystone Building Harrisburg, PA 17120-0000
Brian J. Molloy Wilentz, Goldman & Spitzer 90 Woodbridge Center Drive 8th Floor Woodbridge, NJ 07095	Alex Moreau Office of Attorney General of New Jersey 124 Halsey Street P.O. Box 45029 Newark, NJ 07102

Lisa J. Morelli Office of Attorney General of New Jersey Division of Law 25 Market Street Richard J. Hughes Justice Complex Trenton, NJ 08625	Erin E. Murphy Bancroft 1919 M Street N.W. Suite 470 Washington, DC 20036
Ashley C. Parrish King & Spalding Suite 200 1700 Pennsylvania Avenue, N.W. Suite 200 Washington, DC 20006	Justin T. Quinn Gibbons One Gateway Center Newark, NJ 07102
John L. Shepherd Jr. Skadden, Arps, Slate, Meagher & Flom 1440 New York Avenue, N.W. Washington, DC 20005	Aspassia V. Staevska Pennsylvania Public Utilities Commission 400 North Street Keystone Building Harrisburg, PA 17120-0000
Kenneth R. Stark Pennsylvania Public Utilities Commission 400 North Street Keystone Building Harrisburg, PA 17120-0000	David G. Tewksbury King & Spalding 1700 Pennsylvania Avenue, N.W. Suite 200 Washington, DC 20006
Martin Totaro MoloLamken 600 New Hampshire Avenue, N.W. The Watergate Washington, DC 20037	Richard M. Zuckerman Dentons US 1221 Avenue of the Americas New York, NY 10020

Adam D. Chandler United States Department of Justice Appellate Section Room 3312 950 Pennsylvania Avenue, N.W. Washington, DC 20530	Robert H. Solomon Karin L. Larson Federal Energy Regulatory Commission 888 First Street, N.E. Washington, DC 20426