ORAL ARGUMENT SCHEDULED FOR MARCH 27, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13-4330 and 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

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

BRIEF OF THE PJM POWER PROVIDERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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February 25, 2014

CORPORATE DISCLOSURE STATEMENT AND
FINANCIAL INTEREST OF PJM POWER PROVIDERS GROUP

Pursuant to Third Circuit Local Appellate Rule 26.1.1 and Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned, counsel of record for PJM Power Providers Group ("P3"), hereby states as follows:

P3 is a non-profit corporation that is an Internal Revenue Code 501(c)(6) (26 U.S.C. § 501(c)(6) (2006)) organization composed of suppliers of energy, capacity, and other services within the PJM Interconnection, L.L.C. P3 has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

The PJM Power Providers Group ("P3") is a non-profit organization that supports the development of properly-designed and well-functioning energy markets administered by PJM Interconnection, L.L.C. ("PJM"), a FERC-approved Regional Transmission Organization that manages the supply and movement of power in thirteen states and the District of Columbia. Collectively, P3 members own more than 87,000 megawatts of generation assets, own more than 51,000 miles of transmission lines, serve nearly 12.2 million customers, and employ over 55,000 people in the PJM region. P3 members believe that properly designed and well-functioning competitive wholesale electricity markets are the most effective means of ensuring a reliable supply of power to the PJM region, facilitating investments in alternative energy and demand response technology; and delivering beneficial results to consumers.

The views expressed in this filing represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

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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.

SUMMARY OF ARGUMENT

The District Court's Opinion correctly held that New Jersey's Long Term Capacity Pilot Program ("LCAPP") is preempted under the Federal Power Act ("FPA") and the Supremacy Clause. It should be affirmed because it followed and enforced cornerstone preemption principles. The District Court neither exceeded its own jurisdiction nor invaded that of the Federal Energy Regulatory Commission ("FERC"); it did not undermine the *Mobile-Sierra* doctrine; and it properly considered whether a presumption against preemption applied in this case.

I. Contrary to the views of amicus NRG Energy, Inc. ("NRG"), and amici American Public Power Association and National Rural Electric Cooperative Association (together, "APPA"), the District Court correctly determined that the LCAPP is preempted. JA89. Therefore, the Standard Offer Capacity Agreements ("SOCAs") that New Jersey required the state's electric distribution companies ("EDCs") to execute are "void *ab initio*." JA93.

A. The District Court properly followed five basic preemption principles under the Federal Power Act ("FPA") and the filed rate doctrine: (i) FERC has exclusive authority to regulate rates for transmission and wholesale sales of electric energy under FPA sections 201, 205, and 206, 16 U.S.C. §§ 824, 824d, 824e; (ii) the Supremacy Clause requires that states give binding effect to FERC-approved rates; (iii) FERC's jurisdiction over sales of energy at wholesale includes

jurisdiction over rates for electric generation *capacity*;[2] (iv) parties aggrieved by *FERC's* orders (as opposed to *state* laws or orders) may only seek judicial review in a United States Court of Appeals; and (v) the filed rate doctrine preempts state laws or lawsuits that alter the amount charged under a FERC-approved rate.

Consistent with these principles, the District Court held the LCAPP preempted by federal law because it both intruded into a field regulated exclusively by FERC and also conflicted with existing federal law. Specifically, the court found the LCAPP and SOCAs impermissibly purport to require side payments for wholesale capacity that only FERC may regulate (field preemption), JA80-85, and circumvent FERC's efforts to prevent inappropriate subsidization of generation suppliers (conflict preemption), JA85-86.

B. The District Court did not usurp FERC's jurisdiction because it did not second-guess or preempt a rate set by FERC. Rather, the District Court held the LCAPP unlawful because SOCAs constitute wholesale capacity payments FERC did not approve and New Jersey had no authority to mandate. APPA fails to grasp distinction between a lawful FERC-approved wholesale rate and an unlawful state-mandated rate that invades FERC's jurisdiction.

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[2] As the Supreme Court has explained, "[i]n a capacity market, in contrast to a wholesale energy 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)

C. The District Court did not intrude on FERC's jurisdiction by ruling on a preemption claim; to the contrary, that is its job. FERC itself lacks the authority to enjoin state laws or orders. The District Court "is in the best position to determine whether the LCAPP and the related policies implemented by the Board violate the Supremacy Clause." JA74. FERC is not a party in this controversy, and the Plaintiffs did not need to challenge any FERC orders to perfect their claims. The question here is whether New Jersey's actions—not FERC's—were unlawful.

II. The District Court's decision does not undermine the *Mobile-Sierra* doctrine, which prevents complainants from modifying or abrogating a freely-negotiated contract accepted or approved by FERC unless the contract causes substantial harm to the public interest. The District Court had no reason to apply the *Mobile-Sierra* doctrine here because the SOCAs were mandated by New Jersey, not freely-negotiated, and they were never filed with or approved by FERC.

III. Contrary to the New England state regulators' claim, the District Court correctly found no presumption against preemption under the FPA. States never have regulated interstate transmission, and Congress purposefully eliminated state jurisdiction over wholesale sales of energy. *See New York v. FERC*, 535 U.S. 1, 17-21 (2002).

ARGUMENT

I. THE DISTRICT COURT DID NOT EXCEED ITS JURISDICTION BY HOLDING THAT NEW JERSEY'S LCAPP IS PREEMPTED BY THE FEDERAL POWER ACT

NRG contends that the District Court exceeded its jurisdiction, and invaded FERC's jurisdiction, by holding that New Jersey's LCAPP is preempted under the FPA and the Supremacy Clause. In NRG's view, only FERC, not the District Court, may hold that New Jersey's LCAPP conflicts with FERC's capacity market rules and void the SOCAs New Jersey required the state's utilities to execute with new in-state generators. *See* NRG Br. 11-12, 14-16, 18-21.

APPA makes similar arguments. In APPA's view, the District Court's determination that the LCAPP unlawfully invaded FERC's authority to establish wholesale capacity prices means that the LCAPP establishes wholesale rates, which are subject to FERC's exclusive jurisdiction and beyond the District Court's jurisdiction. *See* APPA Br. 3, 21-25.

NRG and APPA are profoundly mistaken and their re-imagining of FERC and federal district court jurisdiction conflicts with a legion of settled precedent.

A. The District Court Followed and Enforced Five Basic Preemption Principles Under the Federal Power Act and the Filed Rate Doctrine

The preemption question at issue in this appeal is framed by a number of well-settled principles. The District Court followed and enforced each of them.

First, FERC has exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce under FPA section 201, 16 U.S.C. § 824, to approve new rates under FPA section 205, 16 U.S.C. § 824d, or to change existing rates under FPA section 206, 16 U.S.C. § 824e. *See, e.g.*, *New York v. FERC*, 535 U.S. at 21 (holding that the FPA eliminated state jurisdiction over wholesale sales of electricity and that states have never had jurisdiction over electricity transmitted in interstate commerce); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) (holding that FERC has "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce"). The Supreme Court has long held that its decision in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) ("*Attleboro*"), followed by the enactment of the FPA, left "no power in the states to regulate [utilities'] sales for resale in interstate commerce." *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964).

Second, the Supremacy Clause requires that "'rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates.'" *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003) (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962 (1986) (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 581-82 (1981) ("*Arkla Gas*"))). "States may not bar regulated utilities from passing through to retail

consumers FERC-mandated wholesale rates." *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 372 (1988); *see, e.g.*, *Monongahela Power Co. v. Schriber*, 322 F. Supp. 2d 902, 919-20 (S.D. Ohio 2004) (invalidating Ohio retail rate cap to the extent it disallowed recovery of FERC-approved rates); *Pac. Gas & Elec. Co. v. Lynch*, 216 F. Supp. 2d 1016, 1038 (N.D. Cal. 2002) (same as to California retail rate cap).

Third, FERC's exclusive jurisdiction to set just and reasonable rates for energy sold in interstate commerce necessarily includes the authority to establish just and reasonable rates for electric generation capacity. *See, e.g.*, *Miss. Power*, 487 U.S. at 354 (affirming FERC's authority to allocate costs of nuclear power plant capacity); *Connecticut Dept. of Pub. Util. Control v. FERC*, 569 F.3d 477, 483 (D.C. Cir. 2009) ("*CTDPUC*") (holding that regulation of wholesale capacity rates is in the "heartland" of FERC's jurisdiction); *Municipalities of Groton v. FERC*, 587 F.2d 1296, 1300-03 (D.C. Cir. 1978) (rejecting claims that FERC invaded state jurisdiction by instituting a capacity deficiency charge). This Court acknowledged FERC's exclusive jurisdiction over the wholesale capacity market in *Ultimax.com, Inc. v. PPL Energy Plus, LLC*, 378 F.3d 303, 306-08 (3d Cir. 2004) (holding that the filed rate doctrine bars state and federal claims against a utility that complies with FERC's capacity market rules). And this Court recently reaffirmed FERC's exclusive jurisdiction to establish rates for wholesale

generation capacity in *New Jersey Board of Public Utilities v. FERC*, Nos. 11-4245 *et al.*, slip op. at 48-55 (3d Cir. Feb. 20, 2014) ("*NJBPU*"). This Court rejected New Jersey's argument that FERC was required to accept the state's chosen method for incentivizing construction of new generation facilities through state-mandated SOCA side-payments to new in-state capacity suppliers, holding that FERC may lawfully "approv[e] rules that prevent the state's choices from adversely affecting wholesale capacity rates." *Id.*, slip op. at 55.[3]

Fourth, FPA section 313, 16 U.S.C. § 825*l*, permits a party aggrieved by FERC's orders to seek rehearing at FERC, and, if denied, to seek judicial review in a United States Court of Appeals. That statute provides the "specific, complete and exclusive mode for judicial review of [FERC] orders" under the FPA. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) (citing *Safe Harbor Water Power Corp. v. FPC*, 124 F.2d 800, 804 (3d Cir. 1941)). "It is now settled that "'the right to a reasonable rate is the right to the rate which the Commission files or fixes, and, except for review of the Commission's orders, a court can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.'"" *Miss. Power*, 487 U.S. 371 (alterations omitted)

[3] Although "mindful" of the District Court's decision below, as well as a contemporaneous federal district court decision invalidating Maryland's LCAPP-like contract-for-differences program, the Court explained that its decision addressed "the legality of actions taken by FERC, not of those taken by the states." *NJPBU*, slip op. at 33 n.12.

(quoting *Nantahala*, 476 U.S. at 963-64 (quoting *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951))). "This principle binds both state and federal courts and is in the former respect mandated by the Supremacy Clause." *Id.*

Fifth, the filed rate doctrine preempts state laws or lawsuits that directly or indirectly alter the amount charged under a FERC-approved rate. For example, the Supreme Court held in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), that FERC's jurisdiction under the Natural Gas Act ("NGA") fully "occupied the field" of natural gas regulation such that Michigan's attempt to impose limits on utility financing was preempted because those limits would indirectly affect the natural gas companies' earnings under FERC-jurisdictional rates. *Id.* at 307-11.[4]

The filed rate doctrine similarly bars a wide variety of federal and state law claims relating to FERC-regulated activities because the preemptive effect of the

[4] The NGA and FPA are "in all material respects substantially identical" for filed rate doctrine purposes "and decisions interpreting them may be cited interchangeably." *Ky. W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 862 F.2d 69 (3d Cir. 1988) ("*Kentucky III*") (quoting *Arkla Gas*, 453 U.S. at 578 n.7). There are certain differences between FERC's jurisdiction under the NGA and FPA, but those differences are not relevant to the limited issues discussed in this *amicus* brief. For example, FERC regulates natural gas pipeline siting and construction under NGA section 7, 15 U.S.C. § 717f, but FERC lacks corresponding authority over electric transmission construction. On the other hand, FERC's authority under the NGA is limited in ways that make certain precedent inapposite here. *See, e.g.*, Appellees' Br. 25-26 (distinguishing *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493 (1989)).

statutes FERC administers bars any cause of action that "conflicts or interferes with attainment of federal law objectives." *Southern Union Co. v. FERC*, 857 F.2d 812, 817 (D.C. Cir. 1988) (barring state claim for tortious misconduct in natural gas contract negotiations). Thus, courts may not require utilities to pay or receive either more or less than the FERC-authorized rate for FERC-jurisdictional services when plaintiffs seek to collect damages from FERC-regulated utilities for alleged violations of state or federal laws. *See, e.g.*, *Arkla Gas*, 453 U.S. at 584 (barring state law damages for alleged breach of natural gas contract because Louisiana may not "award what amounts to a retroactive right to collect a rate in excess of the filed rate" approved by FERC); *Ultimax.com*, 378 F.3d at 306 (barring claims that utility exercised undue influence in electric capacity market in alleged violation of the Sherman Act, Clayton Act, and various Pennsylvania laws).[5]

[5] *See also, e.g., Simon v. KeySpan Corp.*, 694 F.3d 196 (2d Cir. 2012) (dismissing class action challenges to FERC-regulated capacity auction rates based on alleged violations of the federal Sherman Antitrust Act, New York's General Business Law, and common law); *Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1225-26 (9th Cir. 2007) ("The filed rate doctrine's fortification against direct attack is impenetrable. It turns away both federal and state antitrust actions . . . [RICO] actions. . . [and] state tort actions . . . ."); *T & E Pastorino Nursery v. Duke Energy Trading & Mktg., LLC*, 123 F. App'x 813, 815 (9th Cir. 2005) (barring state antitrust and unfair business practice claims because "Defendants' conduct in the wholesale energy market [is] regulated exclusively by the federal government"); *Pub. Util. Dist. No. 1 of Grays Harbor v. IDACORP, Inc.*, 379 F.3d 641, 651 (9th Cir. 2004) (barring state unjust enrichment claims and rejecting argument that filed rate doctrine does not apply to market-based rates); *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 852-53 (9th Cir. 2004)

This understanding of the filed rate doctrine "has been extended across the spectrum of regulated utilities," *Arkla Gas*, 453 U.S. at 577, since the Supreme Court's decision in *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922).[6] For example, in the telecommunications industry, "[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 226-27 (1998) (quoting *Keogh*, 260 U.S. at 163). "Regardless of the carrier's motive—whether it seeks to benefit or harm a particular customer—the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services." *Id*. at 223. And, when a contract is formed in violation of a federal tariff, the appropriate remedy is to declare the contract unlawful and void. *See id.* at 224 (listing cases).

(barring state unfair business practice claims because public utilities have no "obligations . . . *beyond those* set out in the filed tariffs"); *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 928 (9th Cir. 2002) ("TANC asserts three categories of state law claims against the utility company defendants: (1) *tort and property claim*s for inverse condemnation, nuisance, trespass, and conversion; (2) *claims for breach of contract*, intentional interference with a contractual relationship, and intentional interference with a prospective economic advantage; and (3) a *fraud* claim . . . . *All of these claims are preempted by the Federal Power Act*.") (emphasis added).

[6] For other examples in the rail and transportation industry, *see, e.g.*, *Maislin Indus., U.S., Inc. v. Primary Steel*, 497 U.S. 116, 126, 132 (1990); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) (barring treble damages award in federal antitrust action under Sherman Act and rejecting Solicitor General's request to overrule *Keogh*); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (barring state tort action stemming from railway's decision to cease service).

B. The District Court Did Not Exceed Its Jurisdiction Because It Did Not Examine, Much Less Determine, Whether FERC's Orders Concerning the PJM Capacity Market Create Just and Reasonable Rates

APPA contends that the District Court violated the FPA's exclusive judicial review provisions as described in *Montana-Dakota Utilities* and *City of Tacoma* because the District Court may "not pick and choose which wholesale rates to make lawful." APPA Br. 25; *see id.* at 3, 21-25. This argument rests on the deeply flawed theory that the District Court was obliged to respect New Jersey's attempt to set wholesale capacity prices by requiring New Jersey's electric distribution companies to make additional side payments to new in-state generators through state-mandated SOCA contracts. *See* APPA Br. 24-25.

In APPA's view, the District Court elevated state-mandated SOCA payments to equal dignity with FERC-approved rates when the District Court found "that the SOCAs 'intrude upon the Commission's authority to set wholesale energy prices through its preferred RPM Auction process,' JA 78, and that 'the LCAPP supplants the federal statute, and intrudes upon the exclusive jurisdiction of the Commission, by establishing the price that LCAPP generators will receive for their sales of capacity,' JA 84." APPA Br. 24. But it is nonsense to claim, as APPA does, that the District Court lost the ability to declare the LCAPP or SOCAs invalid because the "SOCAs established prices subject to FERC's exclusive jurisdiction." *Id.* at 25. That is precisely why the LCAPP and SOCAs are illegal.

The District Court's decision did not transform the SOCAs into FERC-approved rates. The reason the District Court found the LCAPP and SOCAs unlawful is because New Jersey purported to require capacity side payments that only FERC has the jurisdiction to authorize.

FPA section 313 and the filed rate doctrine prohibit state and federal trial courts from second-guessing the reasonableness of rates *set by FERC*, which are not subject to judicial review except on direct appeal of FERC's orders. *See, e.g.*, *Miss. Power*, 487 U.S. at 371 (reiterating precedent). That rule has no application here because FERC did not approve New Jersey's LCAPP or the state-mandated SOCA side payments.

The District Court did not invade FERC's jurisdiction by purporting to determine for itself what a just and reasonable rate for wholesale generation capacity would be. The question before the District Court was not whether FERC's capacity market rules are lawful (the question this Court just resolved in *NJBPU*), but instead whether New Jersey's LCAPP was preempted under the FPA, the Supremacy Clause, and the Commerce Clause. *See* JA 83-89. Those are federal questions and they are properly raised by plaintiffs in federal district court. *See, e.g.*, *NE Hub Partners, L.P. v. CNG Transmission Corp*., 239 F.3d 333, 341, 349 & n.19 (3d Cir. 2001). A federal trial court does not examine whether a rate set by FERC is just and reasonable when it determines whether a state law, state

commission order, or state court order conflicts with FERC's orders or trespasses into an area of regulation Congress has reserved for FERC alone. *See* JA83-85 (field preemption); JA85-86 (conflict preemption). Here, as in *Arkla Gas* and its progeny, the District Court simply enforced FERC's exclusive jurisdiction to establish wholesale capacity prices by finding, in essence, that New Jersey may not require electric distribution companies to pay, or new wholesale generators to receive, "a rate in excess of the filed rate" approved by FERC. 453 U.S. at 584.

C. Preemption Claims Are Federal Questions Properly Raised in Federal District Court, Not Before FERC

NRG contends that the District Court lacked jurisdiction to declare the New Jersey LCAPP unconstitutional, or to void the SOCA side payments New Jersey required, because FERC has exclusive jurisdiction to establish just and reasonable rates for wholesale capacity and FERC has not declared New Jersey's scheme illegal. NRG Br. 20-21, 24-27. In NRG's view, the District Court was required to forbear from invalidating New Jersey's LCAPP regime, or from voiding the SOCAs, because FERC has taken a more "nuanced" approach of allowing the LCAPP to exist while mitigating its negative effects on interstate commerce by improving the protections against monopsony abuses under PJM's Minimum Offer Price Rule ("MOPR"). *Id.* at 17, 19, 26, 27, 28.

The problem at the heart of NRG's argument is the erroneous assumption that, because the FPA gives FERC exclusive jurisdiction to set wholesale capacity

rates, the FPA must also give FERC jurisdiction to enjoin unconstitutional state laws or state agency orders. NRG's theory is a mistaken variety of the "*ubi jus, ibi remedium*" theory once used by common law courts of equity to fabricate jurisdiction that was otherwise absent. NRG's theory fails because FERC is a creature of statute and cannot invalidate state laws[7] or prevent state regulators from issuing unlawful orders to retail utilities. FERC cannot enjoin violations of the FPA without acting through a federal district court. *See* 16 U.S.C. § 825m.

As then-Judge Roberts explained, it is not FERC's job to resolve preemption claims when FERC establishes a federal rate: if a state refuses to comply with FERC's orders, then an aggrieved utility's recourse is to institute litigation against its state regulators "armed with principles of federal preemption and the Supremacy Clause." *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1372 (D.C. Cir. 2004). Preemption claims are federal questions properly raised by utilities against their state regulators in federal district court, "not to FERC." *Id.*

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[7] FERC has limited authority to "exempt" utilities from state laws or orders in rare circumstances not present here. Section 205(a) of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), permits FERC to "exempt" utilities from any state law, rule, or regulation that "prohibits or prevents the voluntary coordination of electric utilities, including any agreement for central dispatch, if the Commission determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area." 16 U.S.C. § 824a-1(a). FERC has only invoked that authority once to exempt certain utilities from Virginia state laws and Kentucky state commission orders that would have prevented the utilities from joining PJM. *See New PJM Cos.*, 106 FERC ¶ 63,029, *aff'd* Opinion No. 472, 107 FERC ¶ 61,271 (2004).

This does not mean FERC does not express opinions about the validity of state laws, but only that FERC is aware of its limited authority to compel state obedience to federal mandates. An excellent example of this tension is found in *Virginia Electric & Power Co.*, 125 FERC ¶ 61,391 (2008) ("*VEPCO I*"), *reh'g denied*, 128 FERC ¶ 61,026 (2009) ("*VEPCO II*"). There, FERC held that costs a utility incurred in joining an RTO "are properly recoverable wholesale costs." *VEPCO I* P 32; *id.* at PP 27-28, 30-31. However, FERC recognized it could not directly control how Virginia would address the recovery of those costs by state utilities in the context of a state retail rate freeze because that was a dispute the utilities must address with their state regulators "armed with principles of federal preemption and the Supremacy Clause.'" *Id.* at P 32 & n.35 (quoting *Midwest ISO Transmission Owners*, 373 F.3d at 1372). Nevertheless, FERC emphatically warned that Virginia must exercise its retail jurisdiction consistent with those principles or face litigation from state utilities "in a court of competent jurisdiction." *VEPCO II*, 128 FERC P 32; *id.* at PP 9, 30-31.

Contrary to NRG's claims, *see* NRG Br. 21, the District Court was quite correct in stating 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 also correctly emphasized that this case is not between FERC and the New Jersey Board, but is instead "a controversy between the

plaintiffs (generators and distributors of electricity) and the Board." *Id.* Thus, this case presents a federal question in a private civil action within the original jurisdiction of federal district courts under 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.") and 28 U.S.C. § 1337(a) ("The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . . ."). *See, e.g., NE Hub Partners*, 239 F.3d 341 (listing these statutes as the basis for federal district court jurisdiction in a preemption action under the NGA); *Freehold Cogeneration Assocs. v. Bd. of Reg. Comm'rs of N.J.*, 44 F.3d 1178, 1184 (3d Cir. 1995) (same with regard to preemption action under PURPA).[8] FERC has no corresponding authority under the FPA; rather, FERC itself is required to seek injunctive and declaratory relief in federal district court. *See* 16 U.S.C. § 825m.

1. Plaintiffs Were Not Required to Seek Rehearing or Any Other Form of Preemptive Relief From FERC

This Court has already considered and rejected NRG's argument that the Plaintiffs were required to seek new or additional relief from FERC before filing

[8] *See generally, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights . . . . A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.").

suit in the District Court. *See* NRG Br. 20. This question was squarely presented in *NE Hub Partners*, where Judge Nygaard dissented on the ground that FERC was better suited than the federal trial court to determine whether a hearing before the Pennsylvania Environmental Hearing Board intruded on FERC's jurisdiction to grant NE Hub a certificate of public convenience and necessity to build a natural gas pipeline. *See* 239 F.3d at 349 & n.19 (majority opinion); *id.* at 352 n.5 (Nygaard, J., dissenting). The majority disagreed for two reasons and both reasons apply here.

First, this Court held that NE Hub was not required to seek rehearing from FERC because the company was not challenging the terms of the certificate FERC granted. This Court found "nothing in the Certificate or the NGA that precludes NE Hub's preemption argument and it therefore follows that in making that argument NE Hub is not challenging the terms of the Certificate." 239 F.3d at 349. Here, there is nothing in FERC's orders or the PJM tariff that precludes the Plaintiff-Appellees' preemption claim against the New Jersey Board. And, as discussed above, FERC has no authority to enjoin New Jersey's laws as preempted or otherwise unconstitutional, so there is no reason for Plaintiff-Appellees to request that relief from FERC.

Second, this Court held that preemption claims are questions properly resolved by federal courts, not by FERC:

> Federal agencies do not "delegate" authority to decide federal constitutional and legal questions to courts; as noted above, at 357–58, federal court jurisdiction over such matters comes from Congress. We are aware of no authority granting FERC a right of first refusal to decide such questions, nor does Judge Nygaard proffer any.

239 F.3d at 349 & n.19. NRG does not, and cannot, point to anything in the FPA that gives FERC a "right of first refusal," *id.*, to determine whether New Jersey law is preempted.[9]

What the FPA allows FERC to do, and what FERC properly did in its MOPR Orders, was to "prevent the state's choices from adversely affecting wholesale capacity rates." *NJBPU*, slip op. at 55. That "nuanced" approach, as NRG repeatedly calls it, is the only relief FERC had the authority to compel. *See*

[9] The Fourth Circuit was somewhat more aggressive in asserting federal court jurisdiction to preempt state orders while federal rate proposals were merely pending at FERC. *See Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 614 F. Supp. 64 (S.D. W. Va. 1985) (granting preliminary injunction against state commission while utilities' transmission rate proposal was still pending at FERC), *aff'd sub nom. Appalachian Power Co. v. Consumer Advocate Div. of W. Va. Pub. Serv. Comm'n*, 770 F.2d 159 (4th Cir. 1985); *see also Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 630 F. Supp. 656 (S.D. W. Va. 1986) (granting permanent injunction after FERC established federal transmission rate), *aff'd*, 812 F.2d 898 (4th Cir. 1987). These cases also reinforce the point that only a federal court, not FERC, can preempt or enjoin state proceedings. While those cases were pending in federal court, the state commission twice asked FERC to clarify its view of the preemptive sweep of the FPA. FERC responded both times that, in its view, the state rate proceedings were preempted. *See Appalachian Power Co.*, 812 F.2d at 901 (recounting this history). But only the federal courts had the power to force West Virginia to comply.

id. at 51-55;[10] *see also CTDPUC*, 569 F.3d at 481 (enumerating lawful methods states have to control or incentivize the construction of new generation facilities); District Court Opinion at JA84-85, 88 (acknowledging same).

The creative theory advanced by NRG conflicts with numerous decisions of the Supreme Court, this Court, and other federal courts construing the FPA and other FERC-administered statutes. While many important FERC preemption cases have reached the United States Supreme Court on direct review of state court decisions,[11] most FERC preemption cases originate, as here, in federal district court. If NRG is correct that utilities must first seek initial or additional relief from FERC before bringing a preemption action in federal district court, then a great

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[10] This Court's quotation from FERC's orders on this point merits reproduction:

> Our intent is not to pass judgment on state and local policies and objectives with regard to the development of new capacity resources or unreasonably interfere with those objectives. We are forced to act, however, 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, and that PJM as a whole, including other states, rely on to attract sufficient capacity.

NJBPU, slip op. at 55-56 n.24 (quoting *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 3 (2011); *cf. Miss. Power*, 487 U.S. at 382-83 (Scalia, J. concurring) ("FERC has asserted [wholesale capacity] jurisdiction and has been vindicated. What goes along with the jurisdiction is the responsibility, where the issue is appropriately raised, to protect against allocations that have the effect of making the ratepayers of one State subsidize those of another.").

[11] Supreme Court decisions in this category include, *inter alia*, *New England Power Co.*, *Nantahala*, *Arkla Gas*, *Miss. Power*, and *Entergy*.

number of federal cases were not only wrongly decided, but also *ultra vires*. These would include several Supreme Court decisions,[12] decisions of this Court,[13] decisions of sister circuits,[14] and federal district court decisions that were not appealed.[15]

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[12] *See, e.g., Schneidewind*, 485 U.S. 308-09 (holding that FERC's authority to set natural gas rates "occupies the field" and affirming Sixth Circuit's reversal of district court, which wrongly held that federal preemption of state law is limited to "physical impossibility"); *Pub. Utils. Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943) (affirming district court's determination that NGA preempted Ohio ratemaking proceeding); *cf. New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350 (1989) (reversing district court and Fifth Circuit in holding that abstention in preemption action under the FPA was inappropriate under the *Burford* and *Younger* abstention doctrines). States have also filed actions for injunctive and declaratory relief against FERC in federal district court and the Supreme Court did not suggest that states must first seek relief at FERC before doing so. *See FERC v. Mississippi*, 456 U.S. 742 (1982) (reversing federal district court and affirming the constitutionality of PURPA Titles I and II).

[13] *See, e.g., Ultimax.com*, 378 F.3d at 306 (affirming district court's dismissal of federal and state claims under filed rate doctrine); *NE Hub Partners*, 239 F.3d at 349 (reversing district court's dismissal of preemption action); *Freehold Cogeneration Assocs.*, 44 F.3d at 1184 (reversing district court's determination that PURPA § 210(g) creates an exception to federal district court jurisdiction under 28 U.S.C. § 1331); *Kentucky III*, 862 F.2d at 69 (reversing district court's preemption determination and finding state need not pass through FERC-mandated costs immediately, but may implement retail recovery in a reasonable period of time); *cf., e.g., Ky. W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 791 F.2d 1111 (3d Cir. 1986) (reversing district court and holding that abstention from preemption action against state commission under the NGA was not appropriate under the *Burford*, *Younger*, *Pullman*, or *Colorado River* abstention doctrines).

[14] This includes all six cases listed *supra* note 5. *See also, e.g., AEP Tex. N. Co. v. Tex. Indus. Energy Consumers*, 473 F.3d 581 (5th Cir. 2006) (affirming district court's determination that state commission impermissibly construed FERC-approved tariff under the FPA); *N. Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d

In short, NRG's jurisdictional theory has been explicitly or implicitly rejected in cases too numerous to ignore.

2. FERC's MOPR Orders Did Not, and Could Not, Cure All of the Injuries Inflicted by New Jersey's LCAPP

NRG criticizes the District Court's decision to preempt the New Jersey LCAPP and void the SOCAs as too "drastic" because it "defies FERC's chosen course of regulating only the price at which capacity is bid into the auction." NRG Br. 27. NRG's argument is premised on the mistaken notion that FERC *chose* to

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817, 821 (8th Cir. 2004) ("We agree with the district court that Iowa Code chapter 479A and the implementing administrative code provisions regulate in a field that is occupied by federal law [under the NGA]."); *Pub. Serv. Co. of N.H. v. Patch*, 221 F.3d 198, 199 & n.1 (1st Cir. 2000) (affirming district court's permanent injunction of state rate orders and recounting history of the eight district and appellate court orders issued over the preceding four years); *Sayles Hydro Assocs. v. Maughan*, 985 F.2d 451 (9th Cir. 1993) (affirming district court orders holding that FERC license of hydroelectric plant preempted state permit requirement); *Appalachian Power Co.*, 812 F.2d at 902-05 (affirming district court's permanent injunction preempting state commission rate proceeding); *Middle S. Energy, Inc. v. Ark. Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985) (affirming district court's injunction barring state commission prudence inquiry of cost allocation already established by FERC, but finding it unnecessary to affirm FPA preemption rationale where Commerce Clause rationale was sufficient to preempt state's orders); *cf., e.g.*, *Midwestern Gas Transmission Co. v. McCarty*, 270 F.3d 536, 539 (7th Cir. 2001) (reversing district court's determination that *Younger* abstention doctrine barred preemption action against state commission under NGA and holding that "[m]ere defiance of clear federal law removing an area from potential state regulation is not [a legitimate state] interest").

[15] *See, e.g.*, *Mich. S. Cent. Power Agency v. Constellation Energy Commodities Grp., Inc.*, 466 F. Supp. 2d 912 (W.D. Mich. 2006) (dismissing claims barred by field and conflict preemption under the FPA and the filed rate doctrine); *Monongahela Power Co.*, 322 F. Supp. 2d at 919-20 (invalidating Ohio retail rate cap); *Pac. Gas & Elec. Co.*, 216 F. Supp. 2d at 1038 (same for California).

refrain from exercising authority FERC does not have. NRG correctly observes that FERC "does not ban state-sponsored resources, or invalidate contracts. It instead regulates the price at which that resource is bid in to the market." *Id.* That is all FERC *can* do. Each of the decisions upholding FERC's exclusive jurisdiction to set capacity *prices* also confirms that FERC may not, as NRG puts it, "ban state-sponsored resources." *Id.* As this Court explained, FERC's MOPR Orders did not exceed FERC's jurisdiction because FERC's orders "permit states to develop whatever capacity resources they wish, and to use those resources to any extent that they wish, while approving rules that prevent the state's choices from adversely affecting wholesale capacity rates." *NJBPU*, slip op. at 55; *see id.* at 52-54 (same).

FERC's authority to modify the permissible prices of state-subsidized generation resources with SOCAs may mitigate some of the injury to existing generators or new generators who do not have such subsidies, but the MOPR cannot redress the separate injury electric distribution companies suffer when New Jersey forces them to subsidize in-state generators through inflated SOCA side-payments. FERC cannot prevent New Jersey from compelling such payments from retail service providers like PSEG and Atlantic City, but a federal district court can.

II. THE DISTRICT COURT'S DECISION DOES NOT UNDERMINE THE MOBILE SIERRA *DOCTRINE*

NRG asserts that the District Court's decision "threatens the critical and long-protected role of bilateral contracts," by "circumvent[ing] *Mobile-Sierra's* protections." NRG Br. 29-30. But NRG misstates the *Mobile-Sierra* doctrine.

"Under *Mobile-Sierra* doctrine, the Federal Energy Regulatory Commission . . . must presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement imposed by law." *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 530 (2008). This presumption, in turn, "may be overcome only if FERC concludes that the contract seriously harms the public interest." *Id.*

The purpose of the *Mobile-Sierra* doctrine is to require a heightened showing of serious damage to the public interest when a complainant seeks to abrogate or modify a contract FERC has accepted for filing or otherwise expressly authorized. *See id.* at 546, 550-51; *NRG Power Mktg.*, 558 U.S. at 171-76; *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968); *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

Here, two fundamental *Mobile-Sierra* prerequisites are missing. First, the SOCAs are not voluntary: New Jersey required electric distribution companies

like PSEG and Atlantic City to execute them. Second, the SOCAs have never been submitted, much less accepted, for filing at FERC. Therefore, *Mobile-Sierra* cannot apply here.

III. THERE IS NO PRESUMPTION AGAINST PREEMPTION UNDER THE FEDERAL POWER ACT

The District Court conscientiously examined the question whether it was required to apply a "presumption against preemption." JA81-85 Nevertheless, the New England state regulators, joined by California, badly misread Supreme Court precedent in claiming that the District Court failed to apply a purported "presumption against preemption," adding that this presumption "applies with special force in this case because the FPA constitutes legislation in a field which the States have traditionally occupied." New England Amicus Br. 14 n.6 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). The Supreme Court has squarely rejected this line of argument several times and has specifically held that *Medtronic* does not apply in FPA preemption actions.

In *New York v. FERC*, the Supreme Court held that there is no "presumption against pre-emption" in FPA preemption cases, 535 U.S. at 17-21, and pointedly distinguished *Medtronic*, *id.* at 18. The FPA did not displace state jurisdiction over transmission because "interstate transmission of electric energy [has] never been 'subject to regulation by the states.'" *Id.* at 21 (quoting FPA section 201(a), 16 U.S.C. § 824(a)). And there is no presumption of preemption with regard to sales

of energy or capacity at wholesale because Congress purposefully took away any jurisdiction the states might ever have had. *Id.* ("The FPA authorized federal regulation not only of wholesale sales that had been beyond the reach of state power, but also the regulation of wholesale sales that had been *previously subject* to state regulation.").

The Supreme Court's decision in *New York v. FERC* did not break new ground in rejecting state claims that FPA section 201 provides states with any jurisdiction over power sales that is not expressly given to FERC. The Supreme Court said the same thing thirty-eight years earlier in *Southern California Edison*:

> In short, our decisions have squarely rejected the view of the Court of Appeals that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the [Federal] Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.

376 U.S. at 215-16 (examining *Attleboro, Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 527 (1945), *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507 (1947), and *United States v. Public Utils. Comm'n of Cal.*, 345 U.S. 295 (1953)).

CONCLUSION

This Court should affirm the District Court's Opinion and Order.

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February 25, 2014

COMBINED CERTIFICATIONS

1. BAR MEMBERSHIP

Pursuant to L.A.R. 28.3(d), I, John Lee Shepherd, Jr., counsel for PJM Power Providers Group, certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. WORD COUNT

Pursuant to Fed. R. App P. 32(a)(7)(C) and 3d Cir. L.A.R. 32.1, the undersigned hereby certifies that the foregoing document contains no more than 7,000 words (6,915 words using the word-count feature in Microsoft Word 2010) not including the tables of contents and authorities, and combined certifications.

This brief complies with the typeface requirements of Fed. R. App P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Times New Roman type style.

3. ELECTRONIC FILING

Pursuant to 3d Cir. L.A.R. 31.1(c), I certify that the text of the electronically filed copy of this brief is identical to the text in the paper copies filed with the Clerk's office. A virus check of the electronic PDF version of this brief was performed using Microsoft Forefront Endpoint Protection 2010, which was updated February 20, 2014, and according to that program no virus was detected.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25, 3d Cir. L.A.R. 25 and Misc. 113.4, the undersigned hereby certifies that on this 25th day of February 2014, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system, and that I have served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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