IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PPL ENERGYPLUS, LLC, *et al.*,

v.

LEE A. SOLOMON, in his official capacity as
President of the New Jersey Board of Public Utilities, *et al.*,

v.

CPV POWER DEVELOPMENT, INC.; HESS NEWARK, LLC.

CPV POWER DEVELOPMENT, INC., *Appellant in No. 13-4330*
LEE A. SOLOMON, *et al.*, *Appellants in No. 13-4501*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Honorable Peter G. Sheridan, District Court No. 3:11-cv-00745

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

DAVID L. MORENOFF
Acting General Counsel

ROBERT H. SOLOMON
Solicitor

KARIN L. LARSON
LISA B. LUFTIG
Attorneys

Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426
(202) 502-8236

WILLIAM J. BAER
Assistant Attorney General

DAVID I. GELFAND
Deputy Assistant Attorney General

KRISTEN C. LIMARZI
ADAM D. CHANDLER
Attorneys

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Room 3224
Washington, DC 20530-0001
(202) 353-6638

March 20, 2014

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES (cont.): **PAGE**

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES (cont.): **PAGE**

STATUTES:

INTEREST OF THE AMICI CURIAE

This lawsuit involves the effect of New Jersey's Long Term Capacity Pilot Program Act ("New Jersey Act"), N.J.S.A. §§ 48:3-51, 48:3-98.2-.4, on the regional interstate energy market administered by PJM Interconnection, L.L.C. ("PJM") and overseen by the Federal Energy Regulatory Commission (the "Commission" or "FERC"). In partial response to the New Jersey Act, PJM proposed and the Commission accepted revisions to PJM's FERC-jurisdictional tariff developed, in part, to mitigate the New Jersey Act's price-distorting effect on the PJM wholesale capacity market. *See PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, *on reh'g*, 137 FERC ¶ 61,145 (2011) ("2011 Minimum Price Rule Orders"). On February 20, 2014, this Court affirmed the Commission's acceptance of those PJM tariff revisions. *See N.J. Bd. of Pub. Utils. v. FERC*, Nos. 11-4245, *et al.* (3d Cir. Feb. 20, 2014). The following day, this Court invited the United States to address the question: "Does the Federal Power Act preempt New Jersey's Long Term Capacity Pilot Program Act?" The United States and the Commission respectfully submit that the Federal Power Act preempts the New Jersey Act on the grounds discussed below.

This Court, in its recent decision in *New Jersey Board of Public Utilities*, described in detail the Commission's exercise of its jurisdiction under the Federal Power Act in response to changes in the interstate energy market. *See id*. at 15-18.

Briefly, Congress "unambiguously authorize[d] FERC to assert jurisdiction over two separate activities – transmitting and selling" electric energy at wholesale. *New York v. FERC*, 535 U.S. 1, 19 (2002). The Federal Power Act applies "to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce," and it provides that "[t]he Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy." 16 U.S.C. § 824(b)(1). The Act reserves for the States "jurisdiction . . . over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." *Id.*

As relevant here, the Commission has exclusive jurisdiction to determine whether "rates and charges made, demanded, or received . . . for or in connection with the transmission or sale subject to the jurisdiction of the Commission" are just and reasonable. 16 U.S.C. § 824d(a)-(b). The Commission's jurisdiction extends to "any rule, regulation, practice, or contract affecting" such rates and charges. *Id.* § 824e(a). In a regional capacity market setting such as PJM's, where sales of capacity[1] are made in interstate commerce for resale, the Commission has

[1] "In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases from a generator an option to buy a quantity of

exclusive jurisdiction to set the rates for electricity capacity, either directly or indirectly through a market mechanism, and to review capacity requirements that affect those rates. *See Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 482-84 (D.C. Cir. 2009) ("*Connecticut*").

BACKGROUND

I. PJM's Capacity Markets

PJM operates the high-voltage electric transmission network in thirteen Mid-Atlantic states and the District of Columbia, including New Jersey, and manages the largest competitive wholesale electricity market in the country. *See N.J. Bd.*, slip op. at 19-21 (describing PJM). PJM also administers a Commission-jurisdictional tariff that details the rates, terms, and conditions of regional transmission service and wholesale market mechanisms, including rules governing its wholesale capacity market.

At issue here is PJM's forward-looking locational capacity market, the "Reliability Pricing Model."[2] *Id.* at 13-15, 19-31 (describing PJM's capacity auctions); *see also PPL EnergyPlus, LLC v. Hanna*, No. 11-745, 2013 WL

---

energy, rather than purchasing the energy itself." *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 168 (2010).

[2] "Reliability Pricing Model" means PJM's capacity market model that secures capacity on behalf of electric load serving entities to satisfy load obligations not satisfied through the output of electric generation facilities owned by those entities or otherwise secured by those entities through bilateral contracts.

5603896, at *14 (D.N.J. Oct. 11, 2013) (detailing how capacity resources bid into PJM's Reliability Pricing Model auction and how the "clearing price" is determined). The resulting price of capacity from an auction is referred to as the clearing price. Any capacity supplier that bids at or below the clearing price "clears" the auction and receives the clearing price for its bid capacity. Any capacity supplier that bids above the clearing price fails to "clear" the auction, and its capacity does not sell through the auction. *Id.* A competitive capacity market should send appropriate market signals to build new generation capacity when it is needed. *See Connecticut*, 569 F.3d at 480.

Entities that are net purchasers of capacity (i.e., they sell capacity into the market, but purchase more than they sell) have a natural incentive to keep capacity prices as low as possible. To counter the potential for artificial price suppression, PJM's rules for the capacity auction, as set forth in its FERC-approved tariff, include measures to mitigate buyer-side market power caused by below-cost offers – the Minimum Offer Price Rule ("Minimum Price Rule"). Under the original Minimum Price Rule accepted by FERC in 2006, prior to enactment of the New Jersey Act, offers for capacity were subject to mitigation if they failed three "screens." *N.J. Bd.*, slip op. at 26-27. An offer that failed all three screens would be subject to a mitigated price, i.e., the uneconomic offer is replaced with a price reflecting the cost of new entry. The original Minimum Price Rule included

multiple exemptions, including an exemption for offers submitted by a state-mandated resource, which was defined to include "any planned resource being developed in response to a state regulatory or legislative mandate to resolve a projected capacity shortfall." *Id.* at 29 (detailing the exemption for state-mandated resources).

II. The New Jersey Act

The New Jersey Act is described in detail in both the District Court opinion (at *19-21) and *New Jersey Board of Public Utilities*, slip op. at 31-32. It is a state initiative to develop new generation resources. It is designed to "invoke the [Minimum Price Rule's] exemption for state-mandated resources." *N.J. Bd.*, slip op. at 31.

The New Jersey Act requires generators selected under the statute to "participate in and clear the annual base residual auction conducted by PJM as part of its reliability pricing model."[3] N.J.S.A. § 48:3-98.3(c)(12); *see also Hanna*, 2013 WL 5603896, at *20. This statutory obligation to "clear" PJM's auction is again reflected in the contracts – the "Standard Offer Capacity Agreements" – entered into pursuant to the New Jersey Act between the state's electric

[3] Maryland also created a similar program to develop new generation resources, pursuant to which generators were contractually obligated to bid into and clear PJM's capacity market. *See N.J. Bd.*, slip op. at 31-33 (describing Maryland initiative).

distribution companies (the utilities that distribute electricity to retail customers in the state) and the selected generators. *Hanna*, 2013 WL 5603896, at *24-25. "To ensure that [the selected generators] would clear, New Jersey intended to offer the capacity into [PJM's] market at a price below their actual cost." *N.J. Bd.*, slip op. at 32. Moreover, the New Jersey Act ensures that the selected generators will be reimbursed under the state scheme to the extent the clearing price is below the amount set in the contracts. The state subsidy is thus tied directly and explicitly to the wholesale rate.

III. The Commission's 2011 Minimum Price Rule Orders And Subsequent Appellate Review

In response to the New Jersey Act, a group of power providers operating in PJM filed a complaint with the Commission, arguing that the New Jersey and Maryland initiatives result in buyer-side market power and urging elimination of the Minimum Price Rule exemption for state-mandated resources. *N.J. Bd.*, slip op. at 35. In response, PJM acknowledged that "state programs intended to support new generation entry through out-of-market payments to the generator" have the potential to "raise the price-suppression concerns that [Minimum Price Rule]-type provisions are intended to address." *Id.* at 35-36.

The Commission agreed with PJM and directed it to modify its tariff to eliminate the Minimum Price Rule exemption for state-mandated resources. *See PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 142; *see also N.J. Bd.*, slip

op. at 39-42 (describing the 2011 Minimum Price Rule Orders). As the Commission explained, removal of the state-mandated resource exemption is necessary to prevent "subsidized entry supported by one state's or locality's policies" from "disrupting the competitive price signals [the auction] is designed to produce . . . ." *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 3; *see also PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 143 (any state remains free to seek a state-specific, case-specific exemption).

New Jersey and multiple other parties appealed the 2011 Minimum Price Rule Orders. This Court affirmed the Commission's Orders, including the elimination of the exemption from the Minimum Price Rule for state-mandated resources. *N.J. Bd.*, slip op. at 48-55. Rejecting New Jersey's arguments in support of the New Jersey Act, the Court held that the Commission may lawfully "approv[e] rules that prevent the state's choices from adversely affecting wholesale capacity rates." *Id.* at 55. This Court reasoned that the 2011 Minimum Price Rule 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." *Id.*; *see also id.* at 52-54 (same).

IV. Nature Of This Case

Separate from the Commission's administrative proceedings and the subsequent appeal involving the 2011 Minimum Price Rule Orders, Appellees, a group of wholesale, retail, and marketing companies who produce and sell energy and are located within the PJM market, filed suit in federal district court seeking (i) a declaration that the New Jersey Act is preempted by the Federal Power Act and (ii) an injunction prohibiting the New Jersey Board of Public Utilities from engaging in activities in furtherance of the Act. *Hanna*, 2013 WL 5603896, at *2. The District Court held that the New Jersey Act was preempted by the Federal Power Act. The court concluded that the contracts requiring selected generators to bid into and clear the PJM auction "occupy the same field of regulation as the Commission and intrude upon the Commission's authority to set wholesale energy prices through its preferred . . . auction process." *Id.* at *32. The court further concluded that the New Jersey Act "poses as an obstacle to the Commission's implementation of the [Reliability Pricing Model]" and was therefore preempted under a conflict preemption theory. *Id.* at *36. New Jersey and the other defendants appealed. Neither the United States nor the Commission is a party to this proceeding.

SUMMARY OF ARGUMENT

The New Jersey Act is preempted by the Federal Power Act to the extent that the New Jersey Act directs or requires actions that intrude upon and interfere with the competitive operation of Commission-regulated wholesale markets and the rates they produce. The Commission has exclusive jurisdiction under the Federal Power Act to oversee wholesale electricity markets, including auctions that set wholesale capacity prices. The Commission's jurisdiction extends beyond the rates themselves, to any practice directly affecting wholesale rates.

The Commission and this Court have previously determined that the New Jersey Act, specifically the requirement that selected generators bid into and clear PJM's capacity auction, lowers the auction's resulting clearing price – a practice unmistakably affecting rates. The New Jersey scheme also guarantees payments to or from the selected generators to make up the difference between the market-clearing price and an amount specified in the state-mandated contracts, thereby tying the subsidy explicitly and directly to, and thereby directly affecting, wholesale rates. Accordingly, the United States and the Commission are of the view that the New Jersey Act is preempted because of its price-suppressive and distorting effect on PJM's wholesale capacity market prices. The State's jurisdiction over facilities used for the generation of electric energy is preserved. The New Jersey Act is not preempted to the extent that it directs procurement of

certain generation resources or incentivizes new resources through economic (or non-economic) subsidies, provided those incentives do not directly interfere with the competitive operation of the Commission-regulated regional wholesale market.

ARGUMENT

Congress, in enacting the Federal Power Act, gave the Commission plenary jurisdiction over wholesale sales in interstate commerce. *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964). The District Court accurately stated the fundamental principles of federal preemption generally and, in particular, Federal Power Act preemption. *Hanna*, 2013 WL 5603896, at *31-36 (finding New Jersey Act preempted by the Federal Power Act); *see also PPL EnergyPlus, LLC v. Nazarian*, No. 12-1286, 2013 WL 5432346, at *27-31 (D. Md. Sept. 30, 2013) (finding similar Maryland program preempted by the Federal Power Act). The New Jersey Act's requirement that selected generators bid into and clear the PJM auction, and the subsidies tied directly to the market-clearing price which result in those generators submitting below-cost and market-distorting bids, directly affect the auction's resulting wholesale capacity rate. Those aspects of the New Jersey Act – which might benefit select generation resources in New Jersey, but to the detriment of other resources in other PJM states facing artificially low prices for their capacity – intrude on the exclusive jurisdiction of the Commission over practices affecting wholesale rates in interstate commerce and is preempted.

I. The Commission Has Exclusive Jurisdiction Over Wholesale Capacity Markets Including Practices "Affecting" Such Rates

The Commission oversees PJM's operation of its organized capacity market, the terms and conditions of participation in that market, and the wholesale rates produced by that market. *See Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 479-80 (D.C. Cir. 2008) (rejecting challenge to FERC's authority over regional forward capacity market).[4] Indeed, as this Court recently noted in the related appeal, this dispute "'is fundamentally a dispute over the rates that will be paid to suppliers of capacity,' a concern squarely within FERC's jurisdiction." *N.J. Bd.*, slip op. at 53-54 & n.22 (discussing *Me. Pub. Utils*, 520 F.3d 464).

The Commission's jurisdiction under the Federal Power Act extends to regulating contracts and practices directly "affecting" rates. 16 U.S.C. §§ 824d(c), 824e(a); s*ee Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 374 (1988) (FERC has exclusive jurisdiction over power allocations that affect wholesale rates); *Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 308 (1988) (recognizing Commission's exclusive authority, under similarly structured Natural Gas Act, to regulate "practices affecting" jurisdictional rates); *Miss. Indus. v. FERC*, 808 F.2d 1525, 1542 (D.C. Cir. 1987) (recognizing FERC's authority to review the

[4] The Supreme Court subsequently reversed in part as to another issue. *See NRG Power Mktg.*, 558 U.S. 165 (agreeing with FERC that Federal Power Act "public interest" standard applies to third-party challenges to freely-negotiated wholesale energy contracts).

allocation of capacity costs among various affiliated utilities as a practice affecting rates).

Capacity market rules are practices "affecting" rates within the Commission's jurisdiction. *See, e.g.*, *Connecticut*, 569 F.3d at 483, 485 (finding capacity-related rules, notwithstanding effect on non-jurisdictional generation decisions, are "practice[s] . . . affecting" Federal Power Act wholesales rates); *see also Groton v. FERC*, 587 F.2d 1296, 1302 (D.C. Cir. 1978) (finding charge for failure to maintain a prescribed level of generating capacity "affects" the rate for power and thus is within the Commission's jurisdiction).

In *Connecticut*, the D.C. Circuit addressed Commission orders establishing a forward capacity market in New England, very similar to PJM's capacity market auction. In the New England market, capacity providers (e.g., generators) competitively bid to meet future capacity needs. *Connecticut*, 569 F.3d at 480-81 (describing capacity market operation). Several state regulatory authorities claimed that the Commission crossed the Federal Power Act's jurisdictional divide, which precludes the Commission from regulating generation facilities. *Id.* at 481. The Court affirmed the Commission's exercise of authority, holding that "[w]here capacity decisions about an interconnected bulk power system affect FERC-jurisdictional transmission rates for that system without directly implicating generation facilities, they come within the Commission's authority." *Id.* at 484.

The court found that the capacity requirement, because it "help[s] to find the right price," is a practice "affecting" rates, within federal regulatory authority. *Id.* at 485 (citing Federal Power Act § 206, 16 U.S.C. § 824e(a)).

II. Bidding Behavior Directed By The New Jersey Act Is A Preempted Practice "Affecting" FERC-Jurisdictional Rates

This Court recently acknowledged that the basis for eliminating the Minimum Price Rule exemption for state-mandated resources "relate[s] directly to the wholesale price for capacity, which is squarely, and indeed exclusively, within FERC's jurisdiction." *N.J. Bd.*, slip op. at 54 (citing *Connecticut*, 569 F.3d at 484). If the adoption of PJM's tariff amendment was based on the need to counter the direct impacts of the New Jersey Act on wholesale capacity prices, it logically follows that the aspects of the New Jersey Act to which PJM and the Commission were responding likewise have a direct impact on capacity prices.

Under the New Jersey Act, the state-offered subsidy ("contract for differences") is contingent on the selected generators clearing in PJM's capacity auction. The New Jersey-selected generators guarantee that they will "clear" the auction by submitting below-cost bids, and the state statute guarantees that the generators will be compensated for the difference between what they earn in the market and the price agreed to in their contracts. As both the Commission and this Court have found, this state-sponsored uneconomic entry into PJM's capacity auction directly affects (suppresses) the auction's resulting wholesale capacity rate,

to the detriment of generation resources in every other PJM state. *See N.J. Bd.*, slip op. at 50 ("undisputed" that New Jersey's plan would have an "effect on the prices of wholesale electric capacity in interstate commerce"); *id.* at 53 ("introducing a new resource into [PJM's capacity] auction at a price that does not reflect its costs . . . has the effect of lowering the auction clearing price"); *id.* at 55 ("the state's choices . . . adversely affect[] wholesale capacity rates"); *id.* at 55 n.24 ("neither New Jersey nor Maryland contest that their initiatives *would* affect clearing prices in the [capacity] auction"); *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 143 (below-cost entry suppresses capacity prices); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 3 (state-supported "subsidized entry . . . disrupt[s] the competitive price signals [in] PJM's [capacity market]"). Accordingly, New Jersey's directive that selected generators bid into and clear PJM's capacity auction directly affects wholesale rates and, to that extent, is a preempted intrusion upon the Commission's exclusive jurisdiction to regulate wholesale rates and practices "affecting" rates. *See* Federal Power Act §§ 205-206, 16 U.S.C. §§ 824d-824e; *see also Connecticut*, 569 F.3d at 485 (actions that "help to find the right price . . . amount to a 'practice . . . affecting' rates"); *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 143 ("Commission has exclusive jurisdiction" over wholesale energy rates and has a "duty" to address uneconomic entry into wholesale energy markets).

Additionally, the New Jersey Act's "bidding and clearing" requirement effectively sets the wholesale rate for capacity because the bids submitted pursuant to the Act (zero-dollar bids) determine, in part, the clearing price; i.e., the auction's resulting wholesale capacity rate. In PJM's capacity auction, the capacity bids are "stacked" from lowest-cost bids to highest-cost bids. *Hanna*, 2013 WL 5603896, at *14 (describing auction). PJM, after determining the amount of capacity needed, accepts bids from the lowest price to the highest until it has the requisite capacity. The highest priced bid PJM must accept to obtain enough capacity is the "clearing price." *See id.* Accordingly, the artificial below-cost bids submitted by generators under the New Jersey Act set a lower wholesale rate, undermining the Commission's ability to ensure just and reasonable rates. *See id.* at *35; *see also PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 89 (FERC ensures reasonableness of the wholesale interstate prices determined in the markets PJM administers); *id.* P 141 ("deterrence of uneconomic entry [into capacity auction] falls within [FERC's] jurisdiction"). Thus, the New Jersey Act is preempted to the extent that it sets rates for wholesale sales of capacity. *Compare Freehold Cogeneration Assocs., L.P. v. Bd. of Regulatory Comm'rs of N.J.*, 44 F.3d 1178, 1192 (3d Cir. 1995) (state agency's attempt to modify the rate in a power purchase agreement preempted by federal law), *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 at PP 64-65 (2010) (finding California law that sets wholesale purchase

price preempted by the Federal Power Act), *Midwest Power Sys., Inc.*, 78 FERC ¶ 61,067 at p. 61,246 (1997) (state statute requiring electric utilities to purchase energy from a special state-defined category of generating facilities at a rate to be set by the state utility commission preempted), *and Conn. Light & Power Co.*, 70 FERC ¶ 61,012 (1995) (same), *with Wheelabrator Lisbon, Inc. v. Conn. Dept. of Pub. Utils.*, 531 F.3d 183 (2d Cir. 2008) (state agency action that interprets rights to renewable energy credits but does not modify the purchase price or rates in a wholesale power purchase agreement not preempted by federal law), *and WSPP Inc.*, 139 FERC ¶ 61,061 at PP 21-24 (2012) (transactions involving state-created renewable energy credits alone are not themselves FERC-jurisdictional, but where the sale of a renewable energy credit is bundled with a jurisdictional transaction, and where it "affects the rate for wholesale energy," it becomes FERC-jurisdictional). Moreover, because the New Jersey Act guarantees that the selected generators will be reimbursed under the state scheme if the clearing price is below the amount set in the contracts, the state subsidy is directly and explicitly tied to the wholesale rate.

Here, the FERC-jurisdictional capacity market is designed to "ensure that subsidized entry supported at the state level does not have the effect of disrupting the competitive price signals that PJM's wholesale capacity market protocols are designed to produce and on which PJM's market participants, region-wide, rely."

PJM Interconnection, L.L.C., 143 FERC ¶ 61,090 at P 54 (2013) (order approving further amendments to PJM's Minimum Price Rule). Where Congress has allocated the regulation of that market to the exclusive authority of the Commission, the state regulation must be subordinated. *See N. Natural Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 93 (1963) (state regulation preempted even though Commission could accommodate the state to avoid direct collision).

III. Limited Preemption Of The New Jersey Act Does Not Interfere With Valid State Interests

This interpretation of the Commission's Federal Power Act jurisdiction does not intrude on states' authority "over facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1). As this Court explained last month in *New Jersey Board of Public Utilities*, the Commission's exercise of its Federal Power Act authority – there, to apply PJM mitigation protocols to ensure that state-subsidized resources do not suppress market prices below competitive levels – does not upset the ability of states to "use any resource they wish to secure the capacity they need." *N.J. Bd.*, slip op. at 52; *see id.* at 53 (FERC-approved mitigation means only that a state-sponsored resource be "economical" and unable to "exercise market power" by bidding into the regional auction "at a price that does not reflect its costs and that has the effect of lowering the auction clearing price"). The Commission has expressly acknowledged the rights of states to promote particular generation resources as a legitimate policy interest within their jurisdiction. *See*

PJM Interconnection, L.L.C., 135 FERC ¶ 61,022 at P 142 (a state may "act within its borders to ensure resource adequacy or to favor particular types of new generation"); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 3 (recognizing that states have their own policies and objectives regarding the development of new capacity resources); *id.* P 89 (affirming that states may have policy reasons to "provide assistance for new capacity entry"); *ISO New England Inc.*, 142 FERC ¶ 61,107 at P 97 (2013) (encouraging a stakeholder process to develop a renewable resource exemption from ISO New England's floor mitigation tariff).

A state statue is consistent with federal law to the extent that the state is directing the planning and resource decisions of electric utilities under its jurisdiction. *See Midwest Power Sys., Inc.*, 78 FERC ¶ 61,067 at p. 61,248 (Iowa statute not preempted "to the extent that [it] require[s] [state utilities] to purchase from certain types of generating facilities"); *see also S. Cal. Edison Co.*, 71 FERC ¶ 61,269 (1995) (states have broad powers to direct the planning and resource decisions of utilities under their jurisdiction, including encouraging certain types of generation facilities through tax structure or direct subsidies). Notably, states have numerous ways to incentivize construction of new generation facilities that do not directly affect the setting of FERC-jurisdictional wholesale rates. *See Hanna*, 2013 WL 5603896, at *30 (citing state's tax-exempt bonding authority, property tax relief, favorable site lease agreements, and easing permit approvals); *see also*

Amicus Br. for the Pennsylvania Public Utility Commission at 13-14 (same); Br. for Appellees at 20 (noting that New Jersey has options for incentivizing the construction of generating facilities); *id.* at 35-36 (discussing valid state initiatives); *Nazarian*, 2013 WL 5432346, at *31 (listing means by which states may legitimately promote resource development).

Additionally, a state may take various actions, unrelated to securing additional capacity, which result in indirect effects on a capacity market without encroaching on the Commission's exclusive jurisdiction over setting the price for capacity. *See Connecticut*, 569 F.3d at 481. Specifically, the court in *Connecticut* noted:

> State and municipal authorities retain the right to forbid new [generator] 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. Of course, those choices affect the pool of bidders in the Forward [Capacity] Market, which in turn affects the market clearing price for capacity. . . . But this is all quite natural.

Id.; *see also N.J. Bd.*, slip op. at 51-52 (citing *Connecticut* and agreeing that states have "control over their power plants," as long as they "shoulder the economic consequences of their choices").

Accordingly, states legitimately may subsidize particular resources provided the implementation of the subsidy does not interfere with the Commission's statutory responsibility to maintain the reliable operation of wholesale energy

markets at just and reasonable rates. *See ISO New England, Inc.*, 135 FERC ¶ 61,029 at P 171 (2011) (recognizing the legitimacy of states procuring new capacity, even when the market-clearing price indicates such new capacity is not needed, and giving those resources payments (subsidies) pursuant to state programs). As the Commission has explained, its "concern stems not from the state policies themselves, but from the accompanying price constructs that result in offers into the capacity market from these resources that are not reflective of their actual costs." *ISO New England Inc.*, 142 FERC ¶ 61,107 at P 83 (2013) (quoting *ISO New England Inc.*, 135 FERC ¶ 61,029 at P 170 (2011)).

CONCLUSION

For the reasons stated herein, the U.S. District Court's determination that the New Jersey Act is preempted by the Federal Power Act should be affirmed consistent with the position expressed in this brief.

Respectfully submitted,

s/ Adam D. Chandler

DAVID L. MORENOFF
Acting General Counsel

ROBERT H. SOLOMON
Solicitor

KARIN L. LARSON
LISA B. LUFTIG
Attorneys

Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426
Tel: (202) 502-8236
Fax: (202) 273-0901

WILLIAM J. BAER
Assistant Attorney General

DAVID I. GELFAND
Deputy Assistant Attorney General

KRISTEN C. LIMARZI
ADAM D. CHANDLER
Attorneys

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Room 3224
Washington, DC 20530-0001
Tel: (202) 353-6638

March 20, 2014

CERTIFICATIONS

Bar Membership

Bar admission is waived for federal attorneys.

Word Count and Typeface

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that this Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae is proportionally spaced, has a typeface of 14 points, and contains 4559 words, not including the tables of contents and authorities and the certificates of counsel.

Identical Compliance of Briefs

In accordance with Local Rule 31.1(c), I certify that the text of the electronically filed version of this Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae is identical to the text in the paper copies.

Virus Check

In accordance with Local Rule 31.1(c), I certify that the electronic copy of this brief transmitted to the Court in PDF format has been scanned for computer viruses using McAfee VirusScan Enterprise v.8.8.0 and, according to the program, is free of viruses.

March 20, 2014

s/ *Adam D. Chandler*
Attorney

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), Local Rule 25, and Local Rule 113.4, I hereby certify that I have, this 20th day of March 2014, served the foregoing Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae upon the counsel listed in the Service Report. Such counsel were served, pursuant to Local Rule 113.4, when this brief was filed through the Court's electronic filing system, by the Notice of Docket Activity generated by the Court's electronic filing system.

March 20, 2014

s/ *Adam D. Chandler*
Attorney