Oral Argument Scheduled for March 27, 2014

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

In the United States Court of Appeals for the Third Circuit

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

v.

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

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

CPV POWER DEVELOPMENT, INC.,
Appellant in No. 13-4330

HESS NEWARK LLC
Intervenor in No. 13-4330

LEE A. SOLOMON, JEANNE M. FOX, JOSEPH FIORDALISO, NICHOLAS ASSELTA,
Appellants in No. 13-4501

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL AND STATE CASES

ADMINISTRATIVE DECISIONS

STATUTES

UPDATED STATEMENT OF RELATED CASES AND PROCEEDINGS

On February 20, 2014, this Court denied petitions for review of FERC's "*MOPR II*" Orders,[1] which had been issued in 2011. *New Jersey Board of Pub. Utils. v. FERC,* No. 11-4245, --- F.3d ---, 2014 WL 642943 (3d Cir. Feb. 20, 2014) ("*NJBPU* "). This Court's decision is discussed below.

ARGUMENT

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NEW JERSEY'S LCAPP IS NOT PREEMPTED BY FEDERAL LAW

I. LCAPP IS NOT PREEMPTED BY FIELD PREEMPTION

Plaintiffs' field preemption argument rests on three fallacies: *First,* Plaintiffs assert that when New Jersey restructured its energy industry to disaggregate the roles of vertically integrated utilities, New Jersey somehow *"ceded"* the right to regulate power generation—which the Federal Power Act, 16 U.S.C. § 824, *et seq.*("FPA") places in the State field—to the federal field. (Brief of Appellees PPL EnergyPlus et al. ("PPL Br.") 6-7)(emphasis added). *Second,* Plaintiffs assert that Standard Offer Capacity Agreements ("SOCAs") operate in the federal field because LCAPP Generators receive SOCA payments *"in connection with"* the sale of capacity at wholesale. (PPL Br. 30-31). *Third,* Plaintiffs assert that the New Jersey Board of Public Utilities, (the "Board"), Hess Newark, and CPV have each

[1] *In re PJM Interconnection, LLC,* 135 FERC ¶ 61,022 (2011) (JA465-533), *on rehearing,* 137 FERC ¶ 61,145 (2011) (JA534-611).

improperly characterized SOCAs as "purely financial" agreements, and that because SOCAs are, in fact, not "purely financial," they invade the federal field. (PPL Br. 33).

Each of Plaintiffs' propositions is incorrect: *First,* New Jersey did not, and could not, cede the State field of regulating power generation to federal regulation; the line between the State field and the federal field is defined by the FPA, and has not been and cannot be "ceded" by any State to FERC. *Second,* payments to LCAPP Generators by electric distribution companies ("EDCs"), under the SOCAs, are not in the federal field, because they are made to (or by) LCAPP Generators (in the State field of power generation) by (or to) EDCs (in the State field of local distribution of energy), and while measured by the sale of capacity in the federal field, they are not made in connection with such sale. *Third,* neither the Board, nor Hess Newark, nor CPV has characterized SOCAs as "purely financial" agreements. In any event, that argument is a diversion because all of the attributes of SOCAs, including those which go beyond being purely financial, are outside the federal field of regulation.

With these fallacies eliminated, Plaintiffs' field preemption argument disintegrates.

A. New Jersey's Enactment of EDECA in 1999 Did Not and Could Not "Cede" The Right To Regulate Power Generation From the State Field To the Federal Field

As a foundation for its contention that LCAPP—by regulating power generation—is preempted under principles of field preemption, Plaintiffs assert that New Jersey and those other States which

> restructur[ed] their electricity industries by disentangling their utilities' generation, transmission, and distribution functions and ordering utilities to open their distribution networks to competitors . . . necessarily *ceded* much of their traditional regulatory authority over generation.

(PPL Br. 6-7) (emphasis added). The assertion that New Jersey "ceded" its regulatory authority over power generation is counter to basic principles of field preemption. Under field preemption, the boundaries of the federal field are defined by "the federal statute's scope." *Kurns v. R.R. Friction Prods. Corp.,* 132 S. Ct. 1261, 1263 (2012); *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287 (1995) (field preemption applies when "the scope of a statute indicates that Congress intended federal law to occupy a field exclusively"). Field preemption turns on "Congressional intent," which must be "clear and manifest," as expressed in the terms of the federal statute. *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 336 (3d Cir. 2009), quoting *English v. Gen. Elec. Co.,* 496 U.S. 72, 79 (1990) (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)).

When a federal statute reserves a field of regulation to the States—thus establishing both a federal field and a State field in the regulation of a particular industry, as the FPA has done—the boundary between the federal field and the State field is established by federal law. *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas,* 489 U.S. 493, 514 (1989).

Here, the provisions of the FPA, reserving regulatory control over power generation to the States, could not be clearer:

> *The Commission [FERC]* shall have jurisdiction over all facilities for such transmission or sale of electric energy, but *shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy 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

16 U.S.C. § 824(b)(1) (emphasis added). It necessarily follows that no State, by State statute or otherwise, may "cede" its regulatory authority "over facilities used for the generation of electric energy or over facilities used in local distribution" to federal regulation. Plaintiffs cite no judicial authority for their assertion that when New Jersey enacted its Electric Discount and Energy Competition Act, N.J. P.L. 1999, c. 23 ("EDECA") in 1999, it "ceded" its right to regulate power generation,

or that it could have done so even if it so desired.[2] New Jersey retains the same exact authority to regulate power generation and the local distribution of electricity that it had prior to the restructuring of its electricity industry.

That does not mean that the restructuring of New Jersey's electricity industry—separating the roles of generators, wholesale marketers of electricity and capacity, load servicing entities ("LSEs") which purchase electricity at wholesale and sell it at retail, and EDCs—had no impact on *how* New Jersey could regulate power generation. When regulating a vertically integrated, in-state utility which did not engage in wholesale sales of electricity, New Jersey could regulate with a free hand, because the utility did not function in the federal field. When regulating

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[2] While, as Plaintiffs note (PPL Br. 7), the legislative comments accompanying EDECA referred expansively to "effectively end[ing]" New Jersey's system of government regulation of electricity generation, N.J. P.L. 1999, c. 23, Advance Law A.16, at 109 (1999), the statute itself modified, but did not end, New Jersey's regulation of electricity generation. EDECA recognized that the Board would have continuing responsibility to regulate generation to ensure reliability of service, including to "ensure that all classes of customers in all regions of this State are properly and adequately served." N.J.S.A .48:3-50(b)(8). In addition, EDECA specifically provided that the Board would have, among other regulatory authority, "ongoing oversight and regulatory authority to monitor and review composition of the electric generation and retail power supply marketplace in New Jersey." N.J.S.A 48:3-50(c) (5).

In any event, even if New Jersey had become inactive in the State field of power generation when it enacted EDECA in 1999, that would not "cede" the State field to federal regulation; the field would remain a State field, subject to re-regulation by the State whenever it so elected, consistent with the FPA.

separate power generators and EDCs, New Jersey must structure its statutes to be sure that it does not enter the federal field. And that is exactly what New Jersey did when it enacted LCAPP.

B. LCAPP Uses the State's Authority To Regulate Local Distribution (Within the State Field) To Incentivize Power Generation (Within the State Field) Without Regulating Wholesale Sales of Electricity or Capacity (and Thus Not Entering the Federal Field)

The two areas in which LCAPP operates—power generation and the local distribution of electricity—are reserved for State regulation by the FPA. LCAPP uses the State's authority to regulate local distribution as a means to incentivize power generation. This careful statutory structure respects the boundary between federal and State regulation. (Hess Newark Br. 20-25, 30-33).

In arguing otherwise, Plaintiffs focus principally upon what Hess Newark termed, in its opening brief, the Clear Requirement: That LCAPP Generators must offer to sell their capacity in the PJM Market, abiding by the federally-regulated rules of that market, and that SOCA payments do not come into effect unless the LCAPP Generator "clears the market"—that is, the LCAPP Generator's offer to sell capacity is accepted, and the LCAPP Generator therefore sells its capacity in that market. (JA66-67) (Hess Newark Br. 30-33). Based on the Clear Requirement, Plaintiffs assert that the SOCA payments "are made only if the generator actually delivers capacity to PJM; a generator that constructed a plant but failed to clear the

PJM Market would receive no SOCA payments whatsoever," and therefore argue that SOCA payments should be considered " 'rates and charges made, demanded, or received … for or in connection with the … sale' of capacity at wholesale," within the federal field. (PPL Br. 30-33, quoting FPA, 16 U.S.C. § 824d(a)).

But far from invading the federal field, the Clear Requirement recognizes the boundary between the State and federal fields of regulation, and carefully defers to federal regulation in the federal field.

The purpose of LCAPP is to encourage the development of power plants, and thus to enhance reliability of electricity supply within the State, subjects well within the field of State regulation. Plaintiffs concede that New Jersey did not invade the federal field by requiring that LCAPP Generators actually build power plants in order to receive the incentives. (PPL Br. 33). Having properly required that each LCAPP Generator build a power plant, what, if anything, should LCAPP have provided as to how the LCAPP Generator would sell the capacity of that power plant, to ensure that LCAPP did not regulate within the federal field?

Prior to the enactment of LCAPP, FERC itself provided guidance to answer that question. When the New Jersey Legislature enacted LCAPP in 2011, the original Minimum Offer Price Rule ("MOPR") adopted by PJM under FERC's regulation, was in effect. That original MOPR recognized that States had the authority, within the State field of regulation, to incentivize (or even mandate) the

development of power generation to address a projected capacity shortfall. As described by this Court,

> the MOPR exempted from its operation "any planned resource being developed in response to a state regulatory or legislative mandate to resolve a projected capacity shortfall."

NJBPU, 2014 WL 642943, at *7. Thus, by the original MOPR, prior to the enactment of LCAPP, FERC recognized that: (1) power generators would be built with State incentives, (2) those power generators could offer to sell their capacity in the PJM Market, (3) in doing so, they would follow the rules of that market, and (4) such State incentive programs were within the State field of regulation. Indeed, by providing that generators developed in response to State incentive programs would be exempt from the MOPR, FERC contemplated that all such generators would not only offer to sell their capacity in the PJM Market but, if they bid as "price takers" in reliance on the MOPR exemption, would be assured of clearing that market.

This Court's decision in *NJBPU* properly characterized the original MOPR, in effect when LCAPP was enacted, as FERC's "endors[ement] of a state-mandated exemption with perfectly predictable incentives." *NJBPU ,* 2014 WL 642943, at *20. It would be odd, indeed, for FERC to "endors[e]" a state-mandated exemption, even before the enactment of LCAPP, if FERC believed that having

State-subsidized generators offering capacity into the PJM Market would invade the federal field of regulation.

LCAPP's requirements that, to receive the benefit of SOCAs, LCAPP Generators must (1) offer to sell their capacity in the PJM Market, in accordance with the FERC-regulated rules of that market and (2) clear the market was thus entirely consistent with the position that had already been taken by FERC as to the boundary between the State and federal fields of regulation. When FERC issued its *MOPR II* Order in 2011, changing the rules of the PJM Market so that LCAPP Generators would not automatically clear the market, LCAPP Generators were still obliged to abide by the FERC-regulated rules of the market, providing continued assurance that LCAPP would not invade the federal field.

SOCAs operate entirely within the State field of regulation:

- SOCA payments are made by (or to) EDCs (which operate exclusively in the State field) to (or by) LCAPP Generators, in their role as generators (and thus in the State field).
- The EDCs do not participate anywhere in the chain of the wholesale sale of electricity or capacity. That wholesale chain goes from power generator, through the PJM Market, to the LSEs, where it ends.
- No sales of electricity or capacity take place under SOCAs. (JA1687).
- No title to electricity or capacity is transferred under SOCAs (JA1687).

- The amount of the SOCA payment made by the EDC is based on the volume of electricity distributed by the EDC, and does not depend, at all, on whether the EDC also functions as an LSE and, if so, what volume of electricity it purchases at wholesale as an LSE.

(Hess Newark Br. 20-25). In sum, SOCA payments are not made in consideration for the sale of capacity, are not made by the purchaser of capacity, and are not made anywhere within the wholesale chain of sale. An LCAPP Generator which sells capacity in the PJM Market, is entitled to receive (or obligated to make) payments under its SOCAs, but those payments are entirely separate from, and not made "in connection with" the sale of capacity.

Plaintiffs' argument that SOCA payments should be deemed as though they were a rate or charge received by an LCAPP Generator "in connection with" the sale of capacity, and thus within the federal field, turns on an assertion that the phrase "in connection with" should be construed to capture "a wide variety of different relationships." (PPL Br. 31, quoting *United States v. Loney*, 219 F.3d 281, 284 (3d Cir. 2000). That argument is based on an inappropriately broad definition of "in connection with."[3] FERC's "in connection with" authority is only such

[3] *United States v. Loney*, cited by Plaintiffs, concerned a provision in the Sentencing Guidelines which addressed the use of a firearm "in connection with" another felony offense. 219 F.3d at 284.

authority as is "necessary to make effective the Commission's primary jurisdiction." *Conoco Inc. v. F.E.R.C.,* 90 F.3d 536, 552 (D.C. Cir. 1996), quoting *Northwest Pipeline Corp.,* 60 FERC ¶ 61,213 at 61,729 (1992). Plaintiffs' argument also ignores the language of the FPA which defines the boundary between the federal and State fields:

> [FERC] shall not have jurisdiction, *except as specifically provided in this subchapter and subchapter III of this chapter*, over facilities used for the generation of electric energy or over facilities used in local distribution ….

16 U.S.C. § 824(b)(1) (emphasis added). However broad the phrase "in connection with" may be, it does not "*specifically provide*" for FERC jurisdiction over payments made by LCAPP Generators, which operate "facilities used for the generation of electricity," to EDCs, which operate "facilities used in local distribution," particularly because those payments are not in consideration for the sale of capacity, are not made by the purchaser of capacity, and are not made anywhere within the wholesale chain of sale of capacity.

The manner in which FERC has treated Renewable Energy Certificates ("RECs") is instructive on the limits of the phrase "in connection with." As FERC stated in *WSPP, Inc.,* 139 FERC ¶ 61061 (2012),

> RECs are state-created and state-issued instruments certifying that electric energy was generated pursuant to certain requirements and standards.

Id. at P 21. When a generator produces and sells power from a renewable energy facility, meeting certain requirements and standards, the State issues a REC, which may be sold. Thus, generators which operate renewable energy facilities not only sell energy and capacity, but also sell RECs. Correspondingly, LSEs, which purchase electricity and capacity, also buy RECs to meet State requirements for Renewable Portfolio Standards. RECs may be sold "bundled" in a single sale with the underlying electricity, or independently ("unbundled") from the underlying electricity. Generators which sell renewable energy in States which have REC programs receive payment from two sources for every kilowatt-hour of electricity sold: A payment from the purchaser of the electricity (which could, *e.g.,* be the PJM Market) and a payment from the purchaser of the REC.

In *WSPP, Inc.,* FERC was called upon to address whether, when RECs were sold "unbundled" from the underlying electricity, the sales should nevertheless be treated as having been made "in connection with" that underlying sale, and were thus subject to FERC's jurisdiction. The argument that "unbundled" sales of RECs were made "in connection with" the underlying sales of electricity was much the same as the argument made here, by Plaintiffs, that SOCA payments are received "in connection with" the sale of capacity. The argument is: A generator can only sell a REC if it sells the underlying electricity, and when that generator receives an amount for the sale of the REC, and receives an additional amount for the sale of

the electricity, both amounts should be treated, the argument goes, as though they were received "in connection with" the sale of the electricity. FERC rejected that argument, and held that the distinction between "unbundled" and "bundled" REC transactions was dispositive of FERC's jurisdiction. With respect to "unbundled" sales of RECs, FERC held:

> when an unbundled REC transaction is *independent of a wholesale electric energy transaction,* we conclude, based on available information, that the unbundled REC transaction does not affect wholesale electricity rates, and the charge for the unbundled RECs is not a charge in connection with a wholesale sale of electricity. Thus, an unbundled REC transaction that is independent of a wholesale electric energy transaction does not fall within the Commission's jurisdiction under sections 201, 205 and 206 of the FPA.

Id. at P 24 (emphasis added). With respect to "bundled" sales of RECs, FERC held:

> In a bundled REC transaction, however, where a wholesale energy sale and a REC sale *take place as part of the same transaction*, RECs are charges *in connection with* a jurisdictional service that affect the rates for wholesale energy. Thus, the Commission has jurisdiction over the wholesale energy portion of the transaction as well as the RECs portion of a bundled REC transaction under FPA sections 205 and 206 (regardless of whether the contract price is allocated separately between the energy and RECs).

Id. at P 24 (emphasis added).

The dispositive issue was thus: If the REC sale "take[s] place as part of the same transaction" as the sale of electricity, then the amounts received for the sale of the REC are received "in connection with" the sale of electricity. But if the REC sale takes place in a separate transaction, "independent of a wholesale electric

energy transaction" (even though the REC sale cannot take place unless the underlying electricity is sold), then the amounts received for the REC sale are not "in connection with" the sale of electricity.

SOCA payments are analogous to payments received by generators for REC sales in unbundled transactions.

- There must be an underlying sale of electricity or capacity, but no electricity or capacity is sold in the "unbundled" REC sale, or in a SOCA.
- The generator's contract counterparty in the "unbundled" REC sale may be a different entity than the contract counterparty on the sale of the underlying electricity. The EDCs, which are the generators' contract counterparties under the SOCAs, are always different entities than the contract counterparty on the sale of the underlying capacity, PJM.
- The "unbundled" REC sale and the sale of the underlying electricity do not take place "as part of the same transaction." The SOCA contract and the underlying sale of capacity do not take place "as part of the same transaction."
- When a generator makes an "unbundled" REC sale and also sells the underlying electricity, the market price received for the sale of the underlying electricity is only part of the compensation received by the generator. When an LCAPP generator receives SOCA payments and also

> receives payment for sale of the underlying capacity in the PJM Market, the market price received for the underlying capacity is only part of the compensation received by the generator. To be sure, the amount paid for RECs is not measured by the price for the sale of the underlying electricity, while the amount paid under the SOCAs is measured by the clearing price for the sale of capacity in the PJM Market, but that does not alter the essential fact that, in both instances, the market price is only part of what the generator receives.

Thus, payments received by a generator from an "unbundled" REC sale are not received "in connection with" the underlying sale of electricity, and payments received by an LCAPP generator from a SOCA contract are not received "in connection with" the underlying sale of capacity. This compels the conclusion that SOCA payments—like "unbundled" REC sales—are not in the federal field, and not subject to FERC's jurisdiction.[4]

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[4] A similar analysis has led FERC to conclude that "hedges" or futures contracts which do not "go to physical delivery" are not within FERC's jurisdiction, because they do not involve the actual sale of electricity or capacity. *New York Mercantile Exchange*, 74 FERC ¶ 61,311 (1996) ("*NYMEX*"). Plaintiffs denigrate the significance of that issue, stating that such contracts are simply "bets" based on "passive observation of market performance" (PPL Br. 33-34). But except for those engaged in raw speculation, the reason why generators enter into hedges or futures contracts is to reduce the risk of low prices on actual future sales of electricity or capacity. The fact that a generator may have simultaneous obligations *(cont'd)*

C. Neither the Financial Hedge Attributes of SOCAs, Nor the Additional Provisions of SOCAs, Enter the Federal Field

Plaintiffs also argue that CPV, the Board , and Hess Newark have improperly characterized SOCAs as "purely financial" or "hedge" agreements. (PPL Br. 33). That is incorrect: SOCAs are not "purely financial" agreements, and none of CPV, the Board, and Hess Newark has so asserted. (CPV Br. 39-40; NJ Br. 32; Hess Newark Br. 25-27).

SOCAs have both financial aspects (functioning primarily as hedges) and non-financial aspects (such as the requirements that each LCAPP Generator build a plant and sell its capacity). The reason SOCAs do not invade the federal field is not because they are "purely financial" but none of the requirements imposed by the SOCAs—financial or non-financial—invades the federal field.

There can be no dispute that the financial aspects of SOCAs do not invade the federal field. In *NYMEX,* FERC held that electricity futures contracts that can

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under two different contracts—(1) a hedge or futures contract, to be settled financially, which the generator entered into as a hedge against (2) a contract for the sale of electricity or capacity—does not make both contracts subject to FERC's jurisdiction. Under the FPA, as FERC has acknowledged in *NYMEX,* the federal field covers only those contracts under which "electric energy[or capacity is] sold." Put another way, when a generator enters into a hedge or futures contract to mitigate risk in connection with an actual sale of capacity or electricity, that does not mean that the hedge or futures contract was made "in connection with" the actual sale, and does not make the hedge or futures contract FERC jurisdictional. Similarly, SOCA payments are not received "in connection with" the actual sale of capacity.

be settled financially are not within its jurisdiction unless the "contract goes to delivery, the electric energy sold under the contract will be resold in interstate commerce, and the seller is a public utility." SOCAs do not "go[] to delivery," and there is no "electric energy sold under the [SOCAs]." The sole financial arrangement under the SOCA provides for a financial settlement between the LCAPP Generators and the EDCs, without the sale or delivery of physical electricity or capacity. (Hess Newark Br. 27-28).

And none of the non-financial aspects of SOCAs, individually or collectively, invade the federal field or cause SOCAs to do so. Hess Newark's opening brief reviewed in detail why those requirements—that the LCAPP Generator build a power plant, bid its capacity into the PJM Market in accordance with the FERC-regulated rules of that market, and clear the market—are respectful of the federal field, and do not invade that field. (Hess Newark Br. 28-33). Indeed, no other approach would have been more respectful of the federal field. Should New Jersey have prohibited LCAPP Generators from offering to sell capacity in the PJM Market? That would have artificially inflated market prices, as FERC has recognized in *MOPR II*. Should New Jersey have sought to dictate the terms upon which LCAPP Generators would sell capacity in the PJM Market? That would have been an improper intrusion into FERC's authority. LCAPP got it just right.

II. FERC'S MOPR ORDERS RECOGNIZE THAT LCAPP DOES NOT CONFLICT WITH FEDERAL REGULATION

Plaintiffs do not—and cannot—dispute that the District Court improperly brushed aside FERC's own views on whether LCAPP conflicts with the FPA, and thus ignored this Court's holding that federal agencies'

> unique understanding of the statutes they administer [affords them an] attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Farina v. Nokia, Inc., 625 F.3d 97, 126 (3d Cir. 2010), quoting *Wyeth v. Levine*, 555 U.S. 555, 577 (2009). Instead, Plaintiffs argue that FERC has never weighed in on whether LCAPP invades the federal field or interferes with FERC's regulation in the federal field—an argument predicated on the fanciful notion that in the MOPR proceedings, FERC promulgated rules that allow LCAPP Generators to participate in PJM's wholesale capacity auction not because FERC believed that LCAPP did not intrude on its authority, but simply because the issue of whether LCAPP interfered with the regulation of wholesale capacity prices was "beyond the scope" of the MOPR proceedings. (PPL Br. 48).[5]

[5] In *MOPR II*, FERC did not state that LCAPP's general effect on wholesale capacity prices was "beyond the scope of this proceeding," as Plaintiffs assert. (PPL Br. 48, citing *MOPR II* at P 143). In the section of *MOPR II* quoted by Plaintiffs, FERC declined to consider only the question of whether modifications should be made to the "New Entry Price Adjustment" term.

The idea that FERC would shrink from considering elements of a major State initiative that potentially conflicted with the agency's exclusive jurisdiction (and, moreover, would endorse rules that ultimately help that State initiative move forward), assumes that FERC is nothing short of indifferent about policing its regulatory authority. On the contrary, FERC has stated that it would have been *compelled* to act had it believed that LCAPP interfered with FERC's ability to regulate wholesale capacity prices. FERC acknowledged in *MOPR II*, in language quoted by Plaintiffs (PPL Br. 38), that it ordinarily does not "pass judgment on state and local policies and objectives with regard to the development of new capacity resources, or unreasonably interfere with those objectives." *MOPR II*, 137 FERC ¶ 61,145 at P 3 (JA537). Yet in the very next sentence, omitted from Plaintiffs' brief, FERC states:

> 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.

Id. (emphasis added); *see also MOPR II*, 137 FERC ¶ 61,145 at P 89 (JA561-562) ("[T]he MOPR does not interfere with states or localities that… seek to provide assistance for new capacity entry if they believe such expenditures are appropriate for their state. We seek only to ensure the reasonableness of the wholesale, inter-state prices determined in the markets PJM administers."). In other words, while

FERC need not act if it is faced with a State initiative that merely affects wholesale rates, it is FERC's view that FERC *must* act if State action interferes with the wholesale capacity market. Thus if FERC truly believed that LCAPP intruded into an area of federal regulation or distorted the wholesale capacity market, as Plaintiffs contend, FERC would no doubt have embraced the position advocated by certain Plaintiffs in the MOPR proceedings to limit the participation of LCAPP Generators in the PJM capacity market.

Amicus PJM Power Providers Group ("P3"),[6] in support of Plaintiffs, argues that FERC's MOPR Orders should not be taken as a sign that FERC concluded that LCAPP did not interfere with federal regulation. P3 argues that FERC did what it could, and that a lack of conflict should not be found "premised on the mistaken notion the FERC chose to refrain from exercising authority FERC did not have." (P3 Br. 22-23). But in the proceedings which led to *MOPR III*, PJM, supported by P3, proposed that all generators participating in State programs (including all LCAPP Generators) would automatically be subject to the default offer floor, thereby making it highly unlikely that they would clear the market. FERC had

[6] P3's members include the following Plaintiffs-Appellees or their affiliates: The PPL Parties, the Calpine Parties, Exelon Generation Company, LLC, and Public Service Electric and Gas Company. P3's members also include an affiliate of Amicus NRG Energy, Inc.

authority to accept that proposal, and instead rejected it. This was not a matter of FERC refraining to exercise authority it did not have.

Any claim that LCAPP's effect on wholesale capacity rates fell outside the scope of the MOPR proceedings is put to rest by this Court's recent decision denying petitions to review FERC's *MOPR II* orders. As the Court discussed, New Jersey enacted LCAPP in response to the original MOPR proceedings in 2006:

> The chain of events leading up to FERC's 2011 Orders was set in motion by the *efforts of two states—New Jersey and Maryland—to invoke the MOPR's exemption for state-mandated resources*, efforts which, if successful, would result in the introduction of thousands of megawatts of subsidized capacity into the PJM market.

NJBPU, 2014 WL 642943, at *8 (emphasis added). Plaintiffs cannot seriously contend that FERC was somehow unable to assess in its MOPR proceedings the propriety of a State statute that is a direct outgrowth of those proceedings. Moreover, the Court made clear that LCAPP's effect on wholesale capacity rates was at the very heart of what FERC considered in the MOPR proceedings:

> After reviewing the FERC Orders at issue here and the relevant case law, we conclude that FERC did not exceed its jurisdiction in eliminating the state-mandated provision. Under the FPA, FERC has jurisdiction over rules affecting the rates of the transmission or sale of energy in interstate commerce…. Here it is undisputed that New Jersey[']s plan[] to introduce thousands of megawatts of new capacity into the Base Residual Auction would have had an effect on the prices of wholesale electric capacity in interstate commerce.
>
> * * *

> [W]hat FERC has actually done here is 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. at *15, *17 (emphasis added)(citations omitted). While this Court's decision in *NJBPU* made clear that it was not addressing the preemption issues presented in this case, *Id.* at *8 n.12, this Court's description of how FERC addressed LCAPP bears noting:

> if the states wish to use a new generation resource to satisfy their capacity obligations required under the Reliability Pricing Model, the resource must clear the Base Residual Auction at or near its net cost of new entry. Such a requirement ensures that the new resource is economical—*i.e.*, that it is needed by the market—and ensures that its sponsor cannot exercise market power by introducing a new resource into the auction at a price that does not reflect its costs and that has the effect of lowering the auction clearing price.

Id. at *16.

Simply put, the District Court erred in failing to consider FERC's views on LCAPP, as manifested by its decision not to effectively exclude LCAPP generators from participating in the RPM auction in the PJM Market. Had the District Court considered FERC's view that if an LCAPP Generator clears the PJM Market, in accordance with FERC regulations, that "ensures that the new resource is economical—*i.e.,* that it is needed by the market," the District Court would have been compelled to conclude that LCAPP did not interfere with federal regulation.

III. LCAPP DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

Hess Newark respectfully joins in the arguments made by CPV and the Board, which demonstrate that LCAPP does not violate the dormant Commerce Clause.

CONCLUSION

Hess Newark respectfully requests that the Judgment of the District Court be reversed, and that this Court direct the District Court to enter Judgment (a) holding that LCAPP is not preempted by the FPA, and (b) providing that the SOCAs are valid, and are not void *ab initio*, and that any purported termination of the SOCAs based upon the District Court's prior Judgment is of no effect.

Respectfully submitted,

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March 5, 2014

COMBINED CERTIFICATIONS

A. **Bar Membership.** I certify that the attorney whose name and signature appear on this brief is a member of the Bar of this Court.

B. **Type-Volume.** This brief was prepared in Times New Roman, 14-point, a proportional typeface. Pursuant to FED. R. APP. P. 32(a)(7)(C), I certify, based on the word-counting function of my word processing system (Microsoft Word 2010) that this brief complies with the type-volume limitations of FED.R.APP.P. 32(a)(7)(B), in that brief contains 5,606 words, including footnotes, but excluding the parts of the brief exempted by FED.R.APP.P. 32(a)(7)(B)(iii).

C. **Electronic Filing.** I certify pursuant to THIRD CIRCUIT LOCAL APP.R. 31.1(c) that the text of the electronically-filed version of this brief is identical to the text in the paper copies of this brief as filed with the Clerk. The anti-virus program, Sophos, Version 10.0, has been run against the electronic (pdf) version of this brief before submitting it to this Court's CM/ECF system, and no virus was detected.

Dated: March 5, 2014

/s/Richard M. Zuckerman
Richard M. Zuckerman

CERTIFICATE OF SERVICE

Pursuant to FED.R.APP.P. 25, 3RD CIR. L.A.R. 25, AND 3RD CIR. MISC. R. 113.4, I hereby certify that, on March 5, 2014, I served a copy of the foregoing brief on all counsel in the following manner: All counsel in these consolidated cases are "Filing Users" of this Court's electronic system, and were served, pursuant to 3RD CIR. MISC. R. 113.4, when this brief was filed through the Court's electronic filing system, by the Notice of Docket Activity generated by the Court's electronic filing system.

Dated: March 5, 2014

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