Nos. 14-614 and 14-623

IN THE
Supreme Court of the United States

W. KEVIN HUGHES, ET AL., *Petitioners,*

v.

PPL ENERGYPLUS, LLC, ET AL., *Respondents.*

CPV MARYLAND, LLC, *Petitioner,*

v.

PPL ENERGYPLUS, LLC, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER CPV MARYLAND, LLC

CLIFTON S. ELGARTEN
Counsel of Record
LARRY F. EISENSTAT
RICHARD LEHFELDT
JENNIFER N. WATERS
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 624-2500
celgarten@crowell.com

Counsel for Petitioner CPV Maryland, LLC

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QUESTIONS PRESENTED

1. Is a State's effort to facilitate the construction and operation of a needed power plant by directing a competitive procurement and by directing its local utilities to enter into a long-term contract with the winning developer at the developer's competitively bid price "field preempted" by the Federal Power Act as a State's attempt to set interstate wholesale rates?

2. Is a state-directed, competitively procured contract to support construction of a power plant "conflict preempted" because its long-term pricing structure provides incentives for that construction different from the "price signals" generated by a FERC-supervised yearly forward capacity auction?

PARTIES TO THE PROCEEDING

Petitioner is CPV Maryland, LLC, Invervenor-Appellant below and Intervenor-Defendant in the district court. The then Chairman, Douglas R.M. Nazarian, and each Commissioner of the Maryland Public Service Commission were sued in their official capacities and were Defendants-Appellants below. Harold Williams and Lawrence Brenner remain Commissioners, as does W. Kevin Hughes, now the Chairman. Mr. Nazarian and Kelly Speakes-Backman are no longer members of the Commission, having been replaced by Commissioners Anne E. Hoskins and Jeannette Mills. The current Commissioners are petitioners in No. 14-614.

Respondents, Plaintiffs-Appellees in the court below, are: 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, PSEG Power, LLC, and Essential Power, LLC.

RULE 29.6 STATEMENT

Petitioner CPV Maryland, LLC is an affiliate of the following companies: Toyota Tsusho St. Charles, LLC; MC St. Charles LLC; OG St. Charles LLC; CPV Maryland Holding Company, LLC; CPV Maryland Holding Company II, LLC; CPV Maryland Investment, LLC; CPV Power Holdings, LP; CPV Power Holdings GP, LLC; GIP II CPV Intermediate Holdings Partnership, L.P.; GIP CPV Holdings Partnership, L.P.; GIP CPV Holdings Partnership 3, L.P.; Global Infrastructure Partners II-B Feeder Fund, L.P.; Global Infrastructure Partners II-A, L.P.; Global Infrastructure Partners II-C, L.P.; GIP II-C Eagle AIV, L.P.; Global Infrastructure Partners II-D1, L.P.; and GIP II Friends & Family Fund, L.P.

Mitsubishi Corporation, Osaka Gas Co. Ltd. and Toyota Tsusho Corporation are all public companies that own at least a 10% interest in CPV Maryland, LLC.

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BRIEF FOR PETITIONER
CPV MARYLAND, LLC

PRELIMINARY STATEMENT

Under the Federal Power Act ("FPA"), 16 U.S.C. §§824 *et seq*., Congress preserved the States' authority to determine the need for, and support construction of, new electric generation plants, and to regulate the actions of local utilities, including (a) their contracting and power purchasing decisions, and (b) their charges to retail ratepayers. Ultimately, the States are responsible for ensuring that their citizens' electric power needs, including the need for new power plants, are met. States are also best-positioned to design targeted programs to address those needs—and to attract investor and developer interest in power plant construction projects.

This case turns on Maryland's use of powers that Congress preserved for States under the FPA. Warned of potential power shortages, Maryland determined that a natural gas-fired power plant needed to be built in a resource-constrained region. Maryland, therefore, directed its local utilities to conduct a competitive procurement, offering the successful bidder long-term contracts at the developer's competitively bid price, to build and operate a power plant costing more than half a billion dollars. Those contracts provide the kind of stable, long-term, ratepayer-backed revenue stream that States have historically relied upon, and that States continue to rely upon, to facilitate investment in power plant construction.

Over the contracts' 20-year term, the local utilities pay or receive the *difference* between what the developer bid to build and operate the plant and what the developer earns selling its energy and capacity in federally-supervised energy and capacity markets in compliance with FERC-approved market rules. The utilities will, in turn, recover those payments from (or rebate surpluses to) their retail customers.

Maryland thus pursued an objective—the construction of a new power plant—preserved for the States by the FPA. And it did so using a means—control over the contracting decisions of its local utilities, backed by ratepayer payments—likewise preserved to the States by the FPA.

As shown below, the Fourth Circuit's ruling that Maryland improperly engaged in wholesale rate-setting reflects a basic misunderstanding of what it means to "set" a rate. A competitive procurement is not rate-setting. Though the resulting contracts contain rates, they are not set by the State, but by the winning developer in its competitive bid, here Petitioner CPV Maryland, LLC ("CPV").[1]

The Fourth Circuit's "obstacle to federal purposes" rulings rest on mistaken assumptions about the purposes of the capacity auction supervised by the Federal Energy Regulatory Commission ("FERC"). Auction "price signals" were never intended to be the exclusive source of "incentives" for new construction. And rules established to govern internal auction operations do not state general policies applicable outside the auction. There was no basis to find conflict at all: FERC could and easily did reconcile the tensions between Maryland's procurement and auction operations, expressly determining that its

[1] The acronym is from Competitive Power Ventures. CPV and its affiliates develop natural gas-fired and renewable energy generation facilities and manage generation assets for others. Pet.App.92a.

auction rules avoided any unwanted impact on the auction.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 753 F.3d 467 (4th Cir. 2014) and reprinted at Pet.App.1a. The Fourth Circuit order denying rehearing is reprinted at Pet.App.30a. The district court's opinion is reported at 974 F. Supp. 2d 790 (D. Md. 2013) and reprinted at Pet.App.34a.

JURISDICTION

The Fourth Circuit entered judgment on June 2, 2014. Motions for rehearing and rehearing *en banc* were denied on June 30, 2014. Petitioner filed a petition for a writ of certiorari on November 26, 2014, which was granted on October 19, 2015. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause is set forth at Pet.App.165a. Relevant provisions of the FPA are set forth in an addendum to this brief. Additional statutory provisions, and relevant regulations, are reprinted in the Joint Appendix beginning at J.A.883.

STATEMENT

A. The Federal Power Act

This Court has explained that under the FPA, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction." *Fed. Power Comm'n v. S. Cal. Edison Co.,* 376 U.S.

205, 215–16 (1964). The federal government regulates "transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce … [S]uch Federal regulation, however, … extend[s] only to those matters which are not subject to regulation by the States." 16 U.S.C. §824(a). More specifically, the FPA

> shall apply to … the sale of electric energy at wholesale in interstate commerce, but … shall not apply to any other sale of electric energy …. [FERC] shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction … over facilities used for the generation of electric energy or over facilities used in local distribution ….

Id. §824(b)(1).

This division of authority establishes a framework of interlocking, state-federal jurisdiction over the electric power industry. Congress expressly preserved state authority over generation, including States' longstanding ability to ensure that their citizens receive reliable electric supply by supporting power plant construction (or disapproving it when the State deems that appropriate). Moreover, Congress preserved state authority over local utilities, including their contracting decisions. By regulating local utilities' contracting decisions, States can ensure that adequate levels of generating capacity are built or maintained, and that appropriate mixes of resources (using different fuels and technologies) are available.

1. State responsibility and authority to support power plant construction

The "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). And the FPA, in its original form and as amended, preserves state authority over all of these matters. See *New York v. FERC*, 535 U.S. 1, 24 (2002). "States retain significant control over local matters," including "utility generation and resource portfolios" and "utility buy-side … decisions." *Id.* (internal quotation marks omitted).

While preserving States' historic role—over generation and over local utilities—the FPA vests FERC with authority over the "*sale* of electric energy at wholesale in interstate commerce," 16 U.S.C. §824(a), (b)(1) (emphasis added), and with authority to review "rates … for or in connection with" such sales, *id.* §824d(a). FERC may also assert jurisdiction over "practice[s] or contract[s] affecting" such rates. *Id.* §824e(a). FERC reviews rates set by sellers; FERC does not itself "set" rates. See *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1,* 554 U.S. 527, 531–32 (2008); *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n,* 558 U.S. 165, 171 (2010). FERC's authority reaches "only" matters "not subject to regulation by the States." 16 U.S.C. §824(a). And FERC has no "jurisdiction, except as specifically provided … , over facilities used for the generation of electric energy." *Id.* §824(b)(1).

In 2000, FERC encouraged creation of regional transmission organizations ("RTOs"). See Pet.App. 46a–47a. RTOs primarily coordinate the transmission of electricity on the grid within a region, and may operate pricing and bidding structures that facilitate the operation of wholesale electricity markets.[2] *Id*.

PJM Interconnection, L.L.C. is an RTO that operates transmission facilities in most of thirteen states in the East, including Maryland. PJM also operates organized energy markets and a yearly 3-year forward capacity market. The rules of those organized markets are subject to FERC review, as are prices for sales taking place both within and outside those organized markets. The organized markets complement, but do not supplant, any market participant's ability to buy or sell energy and capacity through bilateral contracts *outside* those organized markets at prices different from the prices for purchases and sales within those markets. Pet.App.52a–53a.

One "collateral benefit," Pet.App.10a, of a forward capacity market is that it can generate "price signals" potentially useful to investors, developers and the States themselves in considering whether to construct additional capacity. Thus, FERC may use its authority over organized markets and rates "to incentivize the procurement or creation of additional capacity to ensure system reliability." See *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) ("*CDPUC*"). While FERC can indirectly influence power plant construction in that way, FERC is barred from ordering the construction of power plants; that authority is reserved to the States. *Id*.;

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[2] Consistent with the district court's terminology, "electricity markets" is used here to mean both capacity and energy markets. See Pet.App.51a–60a.

New England Power Generators Ass'n, Inc. v. FERC, 757 F.3d 283, 290 n.2 (D.C. Cir. 2014).

FERC's use of its authority over rates to influence investment does not interfere with the States' primary, and direct, authority over new generation and power plant construction. *New England Power Generators*, 757 F.3d at 290 n.2. Thus, while FERC capacity market rules and requirements "'may be a factor in a *state's* ultimate determination as to how much electrical generating capacity is built, and where and by whom,'" those "'ultimate determination[s]'" about how much generation should be constructed, by whom and where, are for the States. *CDPUC*, 569 F.3d at 482 (quoting *ISO New England*, 120 FERC ¶61,234, 61,978 (2007)) (emphasis added); see *PJM Interconnection, L.L.C.*, 126 FERC ¶61,275, P 182 (2009) (acknowledging that within PJM, "states may have the incentive and ability to encourage or require their regulated utilities or others to acquire new capacity that could not be supported by market-based revenues alone").

Indeed, as shown below, FERC has been explicit—and courts considering FERC's various capacity auction initiatives have been explicit—that while organized capacity markets can generate helpful information, investors, developers and the States are ultimately free to decide for themselves whether and how to support new power plant construction, as they have done since long before the FPA. See *New England Power Generators*, 757 F.3d at 290–91, 290 n.2 ("states remain free to subsidize the construction of new generators").

In 2005, when Congress expanded FERC's authority over transmission and gave FERC a greater role in setting and enforcing reliability standards, 16 U.S.C.

§§824o *et seq*., Congress again declined to grant FERC authority "to order the construction of additional generation … capacity," *id*. §824o(i)(2), instead confirming that "[n]othing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State ….," *id.* §824o(i)(3).

2. State responsibility and authority over local utilities and ratepayers

"States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pac. Gas & Electric*, 461 U.S. at 205. Additionally, a State retains the authority to determine which generation resources are built within its borders. FERC's authority does "'not affect or encroach upon state authority in such traditional areas as … administration of integrated resource planning and utility buy-side … decisions … [and] authority over utility generation and resource portfolios ….'" *New York*, 535 U.S. at 24 (quoting FERC Order No. 888, 61 Fed. Reg. 21,540, 21,626 n.544 (May 10, 1996)).

Under the historic regulatory model, vertically-integrated utilities generated and sold electricity to retail and wholesale customers. States ensured adequate electric generating capacity by directing or approving plant construction and power purchases from third parties. They allowed their local utilities to proceed on the understanding that they would, over the long term, recover prudently incurred costs, including costs of construction or electricity purchases, from their retail ratepayers.

In many States, utilities remain vertically-integrated. Other States, like Maryland, have partially "restructured" how and from whom electric power is purchased and sold—separating generation from transmission and distribution, and requiring that the electricity needs of their retail ratepayers be competitively procured. But the FPA was not amended in light of those changes: in restructured markets, the States' historic and long-accepted FPA authority remains unchanged.

States have continued to use their regulatory authority over their local utilities to direct them to enter into contracts to support state objectives, or to review and approve contracts, including contracts to purchase energy or capacity at wholesale.[3] States may not only direct utilities to enter into contracts, but may even "dictate the generation resources from which utilities may procure electric energy." *Cal. Pub. Utils. Comm'n*, 134 FERC ¶61,044, P 30 (2011). The manner and degree to which a state utility commission controls the utilities' contracting decisions is a matter of state law.[4]

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[3] *Ky. W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 837 F.2d 600, 608–09 (3d Cir. 1988) (affirming States' authority over the prudence of purchasing decisions where multiple suppliers were available); *Ameren Energy Mktg. Co.,* 96 FERC ¶61,306, 62,189 (2001) (same).

[4] The Maryland courts confirmed that the direction to enter into these long-term contracts is within the state utility commission's authority to "supervise and regulate" local utilities. *In re Calpine Corp.*, No. 24-C-12-002853, slip op. at 16–18, 20 (Balt. City Cir. Ct. Oct. 4, 2013) (internal quotation marks omitted), *appeal pending, stayed sub nom.*, *Md. Office of People's Counsel v. Md. Pub. Serv. Comm'n*, No. 1738.

States use their authority over contracting decisions of their local utilities to pursue various objectives, especially to ensure reliable and adequate supplies of electricity. Many States direct their utilities' purchases of electric power supply to meet their standard offer retail service obligations.[5] Dictating the "resources from which utilities may procure electric energy" also allows States to ensure a diverse mix of fuels (coal, natural gas, nuclear, hydroelectric, solar, etc.). Fuel diversification reduces the risk of shortages and price volatility resulting from shortages, or reliability risks from over-reliance on a single fuel. Directing the contracting decisions of local utilities can also support environmental objectives (*e.g.*, promoting clean, efficient fuels and technologies).

Directing local utilities to enter into long-term contracts for energy or capacity—or approving their plans to do so—fosters price stability for utilities and ratepayers. States direct local utilities to enter into long-term contracts to support the building of new generation, to support new technologies, or to defer shutting down existing plants. Long-term contracts with a State's retail utilities also support the financing of power plant projects costing hundreds of millions of dollars, to assure developers and investors of the stable long-term revenue streams historically available to vertically-integrated utilities that

[5] See Barbara R. Alexander, *Retail Electric Competition: Default Service Policies and Residential Customer Migration* (May 31, 2011) (discussing policies in Massachusetts, Rhode Island, Connecticut, Delaware, Maryland, Pennsylvania, the District of Columbia and Illinois).

recovered their costs through their own retail rates.[6] See Pet.App.43a (describing the "financial guarantee" of recovery through retail rates).

More than 97% of new power plant construction is secured through long-term revenue commitments necessary to underwrite the projects.[7] Those commitments typically take the form of long-term contracts between the developer and the local utility (64%), or construction by a local utility that sells directly to retail consumers (29.6%), anticipating recovery of its costs over time through its retail charges. As of 2013, only 2.4% of recent new electric generation capacity was built solely for sales into the RTO markets, and only 0.1% was constructed for sales into those markets "without any supplemental assistance."[8]

States thus use their authority over the contracting decisions of their local utilities to ensure that sufficient and reliable supplies of electricity will be available to retail ratepayers at stable prices. What States may *not* do is set—*i.e.*, dictate—the price at which energy or capacity is sold at wholesale. See *Cal. Pub. Utils. Comm'n*, 132 FERC ¶61,047, P 69 (2010) *("CPUC")*, and discussion, Part I.C, *infra*.

B. Capacity Markets

"Capacity" is used in this brief and in the opinions below in two related ways. One can buy capacity or

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[6] See Pet. at 32–33, 32–33 nn.27–32, for recent examples of States using their authority to direct their utilities to enter into contracts to achieve these sorts of objectives.

[7] See American Public Power Association, *Power Plants Are Not Built on Spec—2014 Update* at 1-2 and Table 1 (2014), http://goo.gl/t62QuS.

[8] *Id.*

construct a plant of a given capacity. The capacity of the CPV plant under construction in Charles County is roughly 661 megawatts ("MW"). This represents the plant's ability to produce energy on demand. That ability to produce electric energy on demand can be bought and sold, essentially as "an option to buy a quantity of energy, rather than … the energy itself." *NRG*, 558 U.S. at 168. To ensure reliability, local utilities buy (or build) capacity, ultimately passing the cost to the ratepayers. *CDPUC,* 569 F.3d at 479; *New England Power Generators*, 757 F.3d at 291.

1. Sale of capacity through bilateral contracts

Capacity is routinely bought and sold pursuant to bilateral contracts.[9] See Pet.App.52a–53a ("[A] capacity resource, such as a generation facility, may sell energy and capacity directly to a[ ] [load-serving entity] through a bilateral contract at a price determined by the parties, not set by PJM through its market-based mechanisms.").

Capacity prices in long-term, bilateral contracts will invariably be different than spot-market or short-term prices. Price stability is a basic characteristic of long-term contracts. See *Morgan Stanley*, 554 U.S. at 547 ("parties enter into wholesale-power contracts … to hedge against the volatility that market imperfections produce"). And stability is a "dominant concern" of the

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[9] Whether or not the result of a state-directed, supervised or approved procurement, rates built into bilateral contracts for the sale of capacity at wholesale, or "in connection with" such sales, are subject to *FERC* review for justness and reasonableness. *NRG*, 558 U.S. at 171; see 16 U.S.C. §§824d(a), (c), (d), (e), 824e(a). In other words, all wholesale rates—whether for transactions within, or outside, the auction—are subject to FERC review.

FPA. *NRG*, 558 U.S. at 175. Long-term contracts "foster stability in the electricity market, to the benefit of consumers." *Id*. at 174. Not surprisingly then, in the PJM region, "[m]ost capacity is procured through self-supply and contracted (bilateral) resources and the auctions procure any remaining needed capacity."[10]

2. PJM's capacity auction

Like all other RTOs, PJM operates short-term energy markets. Pet.App.53a–54a. And like some RTOs, PJM also operates a forward market for capacity.

A forward capacity market is a mechanism for securing capacity, can aid in identifying potential capacity shortfalls, and can also generate price "signal[s]" that may prompt (or dissuade) investment in new plants (or retirement of old ones). See *New England Power Generators*, 757 F.3d at 287; Primer, *supra* note 10, at 96.

PJM's organized forward capacity market is known as the Reliability Pricing Model ("RPM"). It establishes an annual Base Residual Auction ("BRA"). Pet.App.57a. Within the BRA, PJM acts as buyer and seller of all capacity transacted through the auction.

Bilateral contracting remains a common means of transacting capacity in PJM. Pet.App.61a; see *PJM Interconnection, L.L.C.*, 117 FERC ¶61,331, P 29 (2006); *PJM Interconnection, L.L.C.*, 115 FERC ¶61,079, P 172 (2006); *PJM Interconnection, L.L.C.*, 107 FERC ¶61,112, P 20 (2004). The auction does not displace the bilateral sale and purchase of capacity outside the auction. And the prices established for

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[10] FERC, *Energy Primer: A Handbook of Energy Market Basics* at 96 (July 2015).

transactions within the auction do not control or determine the prices included in bilateral contracts outside the auction.

Nonetheless, as a general matter, all capacity available in the PJM region (including capacity already subject to contract) must be offered into the auction. *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 86 (3d Cir. 2014) *("NJBPU")*. At the same time, all load-serving entities ("LSEs")—including local utilities, and including those that have already contracted for capacity—must purchase through the auction whatever amount of capacity is projected by PJM to be necessary to meet the LSEs' loads (*i.e.*, their customers' capacity needs).[11] 115 FERC ¶61,079, P 91. In that way—by channeling all capacity through the auction—the auction creates a "last resort" means of obtaining and pricing *residual* capacity, *i.e.*, capacity still needed beyond what market participants self-supply or "provide through bilateral contracts." See J.A.514; *id.* at P 71.

The BRA operates as follows:

PJM first determines how much capacity will be needed to meet projected demand for a single year three years hence, and the amount of capacity each LSE must obtain. Under PJM's "must offer requirement," almost all generators and capacity owners—including local utilities that own capacity under bilateral contracts—are required to offer their

[11] "The member-utilities that sell electricity to end-use consumers—known in administrative parlance as [LSEs] …—are then each responsible for providing a proportionate share of the capacity target." *NJBPU*, 744 F.3d at 82.

capacity into the auction.[12] PJM Open Access Transmission Tariff, Attachment DD, §6.6 (eff. Feb. 18, 2012); see 115 FERC ¶61,079, P 91. This includes capacity already the subject of bilateral contracts, at prices different from what the auction price later turns out to be. See 115 FERC ¶61,079, P 91.

Offers to sell are stacked, lowest to highest. The clearing price (*i.e.*, the auction price) is the highest price PJM must accept to purchase the last increment of capacity needed to meet projected demand. Offers above that price are rejected. All accepted offers are paid the clearing price by PJM, no matter how low the offers. Pet.App.9a–10a. Each LSE must then purchase from PJM the full amount of its capacity requirements (as determined by PJM) at the clearing price.[13]

Under PJM's rules, virtually all capacity—with the exception of newly constructed capacity bidding into its first auction (which is subject to minimum pricing rules discussed below)—is offered into the auction at "zero." These offerors are known as "price takers," willing to sell at *whatever* clearing price the auction

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[12] It is possible for an LSE to opt out of this process. See Pet.App.61a.

[13] As FERC explained: "Under RPM, LSEs may procure capacity in advance and outside of the … procurement auction. An LSE's capacity that is procured in advance would be offered into the procurement auction at a price of $0, but it would receive the applicable market-clearing capacity price established in the auction. The LSE would be required to pay the capacity price as determined in the auction for the amount of capacity needed to meet its full capacity obligation. But the auction revenues received by the LSE for its capacity would be used to offset the LSE's purchase payments, thereby reducing its net bill." 115 FERC ¶61,079, P 91.

produces. Pet.App.64a ("PJM has reported that in some BRAs, 80% of the participants bid zero."). All existing generators are permitted to bid zero, as "price takers." Pet.App.10a.

The reason why most capacity is offered at zero is economically straightforward. Construction of a power plant requires enormous up-front investment. See J.A.123–24. However, once a plant begins to operate, these costs are sunk; the marginal cost of continuing to supply capacity is small. Because a rational generator wants to be paid something, rather than nothing, for its capacity, it will offer it at a price certain to clear.[14] Pet.App.64a; see *NJBPU*, 744 F.3d at 86 ("because existing resources already incurred the costs needed to generate capacity, … they [are] permitted to offer their capacity at a price of zero dollars").

Utilities that have purchased existing capacity under long-term bilateral contracts outside the auction also are price takers. They too are required to offer their contracted capacity into the auction, and likewise do so at zero. 115 FERC ¶61,079, P 91 ("capacity that is procured in advance would be offered into the procurement auction at a price of $0"). The price takers will presumably clear the auction, and receive the auction clearing price.

The auction clearing price is the price for all sales and purchases in the auction. But the BRA does not set prices for any transactions occurring outside the auction. Those prices are either negotiated or

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[14] See J.A.124 ("[O]nce a new resource has cleared an auction and its construction is completed, construction costs become sunk. At that point, the incremental costs of taking on a capacity obligation become much smaller, often approximating zero.").

competitively bid. The result is that, as here, most capacity suppliers (and purchasers) in any given year receive (and pay) prices for capacity, including capacity channeled through the auction, different from whatever the BRA price might be for that year.

The economic outcome of a long-term contract under which a utility purchases capacity outside the auction, and then must offer that capacity into the auction, is the same as in the contracts at issue here. A utility that owns capacity under a long-term contract is required to both offer its capacity into the auction and purchase its capacity needs back from the auction. Thus, as with the contracts here, the owner of capacity under a long-term bilateral contract will, each year, realize the difference (plus or minus) between the contract price (which, in the case of the purchase agreement is for the capacity it purchased, and under these contracts, is for the accepted bid price), and whatever clearing price is generated by the auction that year.

C. Maryland's Procurement To Support Needed Power Plant Construction

In late 2011, after a lengthy study period that established reliability concerns in a significant area of the State, Pet.App.82a–85a, the Maryland Public Service Commission ("MPSC") sought proposals to construct a new natural gas power plant. Maryland's inquiry was initially triggered by reliability concerns raised by PJM. Pet.App.79a. As a result of its studies, the MPSC initiated a competitive procurement to elicit proposals from prospective developers to build a power plant in an area referred to as "Southwest MAAC" (comprising part of Maryland and all of Washington, D.C.). The costs of construction were to be recovered via 20-year long-term contracts that the MPSC directed its local utilities to offer the winning bidder(s). Pet.App.87a, 109a, 141a. The form of the contract was appended to the MPSC's request for proposals ("RFP").[15]

With this new power plant, the MPSC sought to "ensure the continued, long-term reliability of the electricity supply to Maryland customers by mitigating key risks," including the risk that the RPM market alone would not attract sufficient development in time to avoid the expected reliability problem. Pet.App.86a. The MPSC also highlighted the risk of "large-scale retirements of generation facilities on which Maryland relies," particularly in light of environmental regulations. J.A.303–04.

The MPSC noted that even though the capacity auction had for several years been "signal[ing]" high prices for capacity in the region, those prices had not prompted developers and investors to build. Pet.App.79a, 91a–92a. Thus, the MPSC looked to exercise its authority over its local utilities by having them offer long-term contracts, pursuant to which the winning bidder would be paid its competitively bid price in exchange for building and operating the plant and satisfying the contract's other requirements. Pet.App.87a; J.A.663. The guaranteed, ratepayer-backed revenue stream was designed to induce developers and their investors to build a new power plant when and where needed.

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[15] Power plants could satisfy the RFP with different quantities of capacity, with bids supplied on a per MW basis. See 14-614 Pet.App.60a; Pet.App.87a. The per MW bid price is simply the mechanism through which the developer recovers its capital investment, plus a reasonable return, over time.

Those long-term contracts were in the form of a CFD—a "contract for differences"—a relatively common mechanism for ensuring price stability.[16] Under these CFDs, the benefits and risks of price fluctuations in capacity and energy markets—which would ordinarily be borne by the winning bidder/developer—are transferred to the local utilities in exchange for a stable stream of revenue.

The successful bidder, who will build and operate the plant, is assured guaranteed revenue over 20 years, at its bid price. The utility and its ratepayers receive or pay the *difference* between the bid price and what the successful bidder earns selling energy and capacity in FERC-supervised organized markets, according to the PJM and FERC-approved rules of those markets, which the successful bidder was required to follow. The developer does not sell capacity or energy to the local utilities. The contract is settled financially, with a payment to or from the local utility. Pet.App.88a. The local utility, in turn, recovers or rebates any net monthly amounts to its ratepayers, depending on whether revenues earned by the developer fall short of, or exceed, its bid price. Pet.App.89a–90a. Hence, the competitive procurement ensured that the ratepayers paid no more than was necessary to get the plant built and operating over that period.

Proposals were received and evaluated by an independent consultant. In April 2012, the MPSC issued the Generation Order, reiterating its determination that the markets had "not provided

[16] Yearly prices within the BRA are "volatile and difficult—if not impossible—to predict with a reasonable degree of reliability." Pet.App.68a.

sufficient certainty for prospective generation suppliers to secure financing in the current economic climate," 14-614 Pet.App.53a, and that "long-term demand for electricity … compels us to order new generation in the amount of 650 to 700 MWs … in Maryland by 2015." 14-614 Pet.App.60a.

Based on an offer determined to provide the "best price," Pet.App.90a, CPV was selected as the winning bidder. CPV's accepted bid was designed by CPV to cover its capital and fixed operating costs, and provide a reasonable return on investment, Pet.App.89a—collectively, its revenue requirements—to build and operate a 661 MW combined cycle natural gas-fired power plant in Charles County, Maryland.[17] Pet.App.89a–90a; see Pet.App.114a. The Fourth Circuit summarized the contracts as requiring CPV

> to build a plant and sell its energy and capacity on the federal interstate wholesale markets. If CPV successfully cleared the market, it would be eligible for payments from the [local utilities] amounting to the difference between CPV's revenue requirements per unit of energy and capacity sold (set forth in its winning bid) and its actual sales receipts. These costs would in turn be passed on to the [local utilities'] retail ratepayers. If CPV's receipts exceeded its approved revenue requirements, it would be obligated to pay the difference to the [local

[17] CPV will receive each month its bid price, less its "energy *profit* and … capacity receipts." J.A.735 (emphasis added); see also Pet.App.111a–112a. Because the contractual unit price for *energy* is the variable operating and maintenance cost plus fuel cost of producing that energy, Pet.App.112a n.51, the result is that *profits* from *energy* sales are credited to the ratepayers.

> utilities]. The CfDs did not require CPV to actually sell any energy or capacity to the [local utilities].

Pet.App.12a–13a.

From CPV's perspective, the stable revenue stream assured by the CFDs would allow it to efficiently finance its $700 million project. J.A.761–62. From the State's ratepayers' perspective, the bid process and pricing structure efficiently ensured that the needed power plant would be built for a price no higher than the successful bidder's revenue requirements, as determined through competitive bidding.

In passing, the Fourth Circuit called these contracts a "subsidy," Pet.App.23a, but the net result of the contracts is yet to be determined. MPSC's analysts projected net payments *to* CPV (the "subsidy") in early years, and *from* CPV to the utilities (and ratepayers) in later years, 14-614 Pet.App.57a, with the result that the CFDs would produce a net "*credit* of $0.49/month [to ratepayers] over the entire life of the contract." Pet.App.90a (emphasis in original) (internal quotation marks omitted).

D. FERC Determined That Its Rules For The PJM Capacity Auction Ensured That Maryland's Procurement Did Not Adversely Affect, Or Conflict With, The Auction

While most capacity suppliers offer into the auction as price takers, first-time offerors are generally not allowed to do so. Certain first-time offerors are required to present a cost-justified bid, reflecting either a default minimum price (set yearly by PJM based on the cost of constructing capacity in the region), or, under an exception process, based on the offeror's proven actual costs. See Pet.App.65a, 92a–94a. The auction rule that limits first-time bidders to cost-based pricing is known as the Minimum Offer Price Rule ("MOPR").

Until the 2012 auction, FERC explicitly exempted new state-supported generators from the MOPR where the State had determined the capacity was needed "to resolve a projected capacity shortfall." *NJBPU*, 744 F.3d at 86 (internal quotation marks omitted). The result was that state-supported generators could bid zero in the auction, and be certain to clear, even if their bid was below their actual cost. *Id*.

In 2011, various incumbent capacity sellers—including several Respondents or their affiliates—complained to PJM and FERC that allowing the winning bidders from Maryland's (and New Jersey's similar) competitive procurement to participate in the auction under the exemption for state-sponsored generators would undermine the auction. *Id.* at 88–89. Therefore, they insisted additional restrictions limiting state-sponsored generators' participation in the auction were necessary. *Id.*

With the Maryland and New Jersey programs before it, FERC determined that any unwanted effect of state-supported generators in the auction—including concerns about uneconomic entry, or price "suppress[ion]," Pet.App.11a—could be readily addressed by subjecting them to a revised minimum offer price rule designed to "determine whether an offer from a new resource is competitive." Pet.App.93a (internal quotation marks omitted). FERC held that by subjecting the bids of state-supported generators to the revised MOPR screen—under which any so-called subsidy to such generators would be rendered irrelevant—it could ensure that these state programs could not "disrupt [ ]… competitive price signals" developed in the PJM auction. J.A.100.

FERC held that a new project that complies with the MOPR, whose bid clears the auction, must be regarded as "a competitive resource and should be permitted to participate in the auction regardless of whether it also receives a subsidy." J.A.92. And once the new project has cleared the auction in the first year, "the resource has demonstrated that it is needed by the market and …. [its] presence in the market … does not artificially suppress market prices." J.A.91.

FERC's order revising the MOPR was challenged in the Third Circuit. See *NJBPU*, 744 F.3d 74. The Third Circuit affirmed FERC's approach because acting within its area of responsibility—auction supervision—FERC had devised rules that "prevent the state's choices from adversely affecting wholesale capacity rates," without interfering with States' prerogatives to support new capacity resources. *Id.* at 98, 111.

Under the new MOPR rule, CPV's bid into the 2012 auction was fully cost-justified based on actual costs, irrespective of any subsidy. Indeed, PJM reviewed CPV's bid, adjusting it to ensure that it was based on a "competitive, cost-based" net cost of entry, and "solely on revenues from PJM-administered markets." Pet.App.94a (internal quotation marks omitted). CPV's PJM-approved, fully cost-justified bid was 40% less than the final auction clearing price. *Id.* FERC found the clearing price resulting from that auction was just and reasonable, see *PJM Interconnection, L.L.C.*, 143 FERC ¶61,090, P 143 (2013), with the result that CPV's and all other offers clearing the auction would be paid the clearing price.

E. The Decisions Below

Having failed to persuade FERC or the Third Circuit to adopt more severe restrictions on the ability of the new generators chosen by Maryland and New Jersey to participate in the auction, Respondents brought this constitutional challenge. Respondents are incumbent generators claiming that because of the additional competition, the prices they will receive for their capacity will be lower than if Maryland had not supported this new generation.[18] CPV intervened.

Respondents asserted that the Maryland initiative was "field preempted," "conflict preempted," and violated the Commerce Clause. The district court held for Respondents on "field preemption," Pet.App.129a, declined to resolve the conflict preemption claim, Pet.App.130a, and rejected Respondents' Commerce Clause claim, Pet.App.130a.

CPV and the Maryland defendants appealed. The Fourth Circuit affirmed. On "field preemption," it held that Maryland invaded FERC's exclusive authority by setting rates for wholesale sales. Pet.App.17a, 21a.

The panel also found that Maryland's initiative posed an "obstacle" to federal purposes (a) "by substituting the state's preferred incentive structure for that approved by FERC," and (b) by the use of a long-term contract with stable prices, which the panel viewed as an obstacle to FERC's "policy choice" to allow a developer to lock-in prices for sales *within* the auction for only three years. Pet.App.22a–24a. The Fourth Circuit did not identify the source of its belief

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[18] They also brought a parallel case challenging New Jersey's program. See *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), *petition pending*, No. 14-634 (filed Nov. 26, 2014).

that FERC intended the auction to be the exclusive source of power plant construction signals or incentives, or why an auction rule setting a lock-in period for auction sales would bar longer-term contracts entered into outside the auction.

SUMMARY OF ARGUMENT

The FPA assigns FERC jurisdiction over wholesale sales of electricity, over rates charged by generators and other sellers within FERC's jurisdiction, and over transmission in interstate commerce. That leaves States with authority over what remains, including authority over the State's local utilities, the contracting and resource planning decisions of those utilities, and equally broad authority over the building of new generation capacity. This is no small matter, as the Nation's electrical energy future depends on providing appropriate support for building necessary electric generating infrastructure, employing a variety of fuels and technologies—matters which are reserved to the States and which FERC cannot direct or control.

Given the FPA's explicit framework of interlocking state-federal jurisdiction, and the States' essential role within that framework, a field preemption claim must surmount a heavy burden. States, of course, must adjust to FERC's initiatives. But the inevitable impact of state programs on the federal field will not suffice as a basis for field preemption. As this Court made clear just last Term, field preemption cannot be found if the State is pursuing objectives and interests preserved for the States under the FPA. And this should be particularly clear where the State is also using means under the States' assigned authority.

Maryland used a long-term contract, awarded by competitive procurement, to address a reliability issue in a particular region. Maryland thus aimed squarely at an objective within the province of the States under the FPA: new power plant construction that Maryland determined was needed for its citizens to be reliably served. But not only Maryland's aim, but the means it chose to implement that aim, fall within the domain reserved to the States by the FPA. Thus, in (1) supporting development of a new power plant (the principal aim), by (2) directing its local utilities to engage in a competitive procurement to secure this plant, and (3) ordering that any net costs of the plant be paid by the State's retail ratepayers, Maryland pursued aims and exercised powers reserved to the States by the FPA.

The Fourth Circuit's theory that Maryland entered the federal field by somehow setting rates for the wholesale sale of capacity rests on a misunderstanding about what it means to "set" a rate. A competitive procurement is not rate-setting. The contract awarded to CPV includes a payment schedule derived from CPV's winning bid to construct and operate a plant for 20 years. The price at which CPV contracted was established by CPV itself, the winning bidder in a competitive procurement. That price was not dictated, and thus not *set*, by Maryland.

There is also no basis to find that Maryland's initiative poses a preempted obstacle to any federal purpose. Maryland's decision to require its local utilities to award contracts with stable, long-term pricing as an incentive to construct new power plants cannot obstruct price signals generated by PJM's yearly auction because that auction was not intended—nor could it reasonably have been intended—to be the exclusive impetus to build new power plants. The price information it generates might serve as *a* basis, but certainly not the only basis, upon which decisions—by investors, developers and the States themselves—to build new power plants are made.

Moreover, the Fourth Circuit's reliance on FERC-approved internal auction rules as a source of "federal policy" reaching beyond the auction is equally incorrect. Auction rules govern the auction, not activities outside it. In particular, the New Entry Price Adjustment ("NEPA") rule, allowing intra-auction price lock-ins for only three years, and in limited circumstances, suggests no disapproval of the pervasive use of long-term contracts outside the auction. Indeed, long-term contracts are regarded as an important part of electricity contracting because of the stability—to generators, utilities and ratepayers—they provide. And bilateral contracts, at prices different from auction prices, remain a regular means of buying and selling capacity, including capacity channeled through the auction.

Finally, the government's suggestion that preemption might be found based on "disruptive" effects of these state-supported contracts on the PJM auction is well wide of the mark. There could be no preempting conflict because FERC, through auction rules, readily can, and did, protect the auction from any impacts it regarded as unwanted. FERC determined that its MOPR rules "reconcile[d] any tension" between Maryland's procurement and the conduct of the auction, preventing any undesired impact. Indeed, FERC determined that any further restrictions on generators like CPV would improperly *exclude* competitive supply.

ARGUMENT

Because Maryland has pursued responsibilities preserved to it by the FPA, and because its initiative does not threaten FERC's regulatory activities, there is no basis here to find either field or conflict preemption.

There is, in fact, a clear division of authority here—"a bright line easily ascertained"[19]—that resolves both the field and conflict preemption issues: FERC is supreme within its domain, which includes making rules for PJM's forward capacity auction. At the same time, States remain free to act within their domain, which includes supporting new generation and directing their utilities' contracting decisions, leaving the generator free to determine its price, subject to FERC review. The fact that state initiatives affect FERC decisions and FERC initiatives affect state decisions cannot—within the framework of divided authority over electricity regulation—be a basis for preemption.

I. Maryland's Procurement Is Not Field-Preempted

All "pre-emption cases … start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted).[20] Where a shift in

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[19] *S. Cal. Edison Co.,* 376 U.S. at 215–16.

[20] The Fourth Circuit's theory that the presumption against preemption can be disregarded because the FPA specifies *federal* regulation of wholesale rates, Pet.App.20a, is tautological. It assumes that Maryland set wholesale rates.

the state-federal division of authority is sponsored by a federal agency, it is appropriate to consider whether Congress authorized that shift. Cf. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001) (where "administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," the Court "expect[s] a clear indication that Congress intended that result"). The presumption against preemption has special force here because the FPA *expressly* preserves state authority over matters not assigned to FERC, including energy generation, local utilities and retail rates. *New York*, 535 U.S. at 22, 24 (quoting 16 U.S.C. §824(b)). *Field* preemption is found only where Congress has expressly displaced States from acting, "or where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Gade v. Nat'l Solid Wastes Mgm't Ass'n*, 505 U.S. 88, 98 (1992) (internal quotation marks omitted). That the Fourth Circuit was impressed with FERC's "comprehensive program" for managing the capacity auction, Pet.App.11a, is wholly inadequate to support a finding of field preemption.

The Court has explained its reluctance to find field preemption based merely on an agency's comprehensive regulatory framework, particularly where, as here, the agency has not affirmatively stated an intention to preempt:

> [A]gencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal

> agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.
>
> Moreover, because agencies normally address problems in a detailed manner …, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt.

Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 717–718 (1985) (internal citations omitted).

The importance of the responsibilities that the FPA reserves to the States also cautions against finding field preemption here. Construction of sufficient electricity generating infrastructure to support projected needs is central to the Nation's energy future. Yet the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Pac. Gas & Elec.*, 461 U.S. at 205. The FPA preserves for States, and forecloses FERC, authority over new generation. FERC "shall not have jurisdiction, except as specifically provided …, over facilities used for the generation of electric energy." 16 U.S.C. §824(b)(1). States thus have a critical role in supporting new generation construction where and when they deem appropriate. Curtailing state power to support new generation entails significant risks.

FERC is granted exclusive jurisdiction over wholesale sales by power generators, and rates "in connection with" such sales. *Id.* §§824(a), (b)(1), 824d(a). And FERC may assert jurisdiction over "practice[s] or contract[s] affecting" rates, as well. *Id.* §824e(a). But FERC's authority "only" reaches matters "not subject to regulation by the States." *Id.* §824(a). Thus, in addition to their authority over generation, States retain their authority over their local retail utilities, including the authority to oversee their contracting decisions and to set retail rates.

The result is a system of divided authority and "interlocking regulation by both federal and state authorities." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.,* 489 U.S. 493, 506 (1989).[21] The States and FERC each have broad authority within their assigned spheres. State initiatives inevitably affect matters within the federal realm. And federal programs and initiatives frequently change the landscape in ways that affect how States pursue their interests. Accordingly, courts must guard against "an extravagant … interpretation" of FERC's authority that would undermine powers reserved to the States. *Id.* at 512–13 (internal quotation marks omitted).

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[21] While *Northwest Central* addressed the Natural Gas Act, the same principles apply under the FPA: Because relevant provisions of the two statutes are "in all material respects substantially identical," there is an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (internal quotation marks omitted).

A. Maryland's Aim—Power Plant Construction—Is Within The State Field

The Court's decision last term in *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015), reaffirmed the importance of the States' preserved powers within the framework of shared authority over energy regulation. The FPA, like the Natural Gas Act, "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." 135 S. Ct. at 1599, 1601 (internal quotation marks omitted). That state laws and programs aimed at a proper state purpose *affect* the federal field, or address conduct subject to federal regulation, cannot be the basis for field preemption. *Id.* at 1601. Those intersections are inevitable within the FPA's framework of divided authority. *Nw. Cent.*, 489 U.S. at 512–14; 135 S. Ct. at 1600–01.

As the Third Circuit recognized in the proceedings arising from New Jersey's similar program to support new power plants needed by that State, preemption cannot plausibly be based on the *effect* of the State's program on prices in interstate electricity markets. *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 255 (3d Cir. 2014). New competitive entry affects prices. The only "law" impacted by that effect is the "law of supply-and-demand." *Id*.

Oneok ultimately sets forth a straightforward test for field preemption: If a state program "targets" or "aims" at objectives within the State's own jurisdictional field, it is not *field* preempted, even if it affects or overlaps the federal field. 135 S. Ct. at 1599–1601. Maryland's program easily satisfies *Oneok*'s test. Maryland aimed at the construction of a new power plant to ensure reliable electricity supplies for the State's citizens, a matter squarely on its side of the line. Because Maryland's action was directed squarely on the state side of the FPA's "'dividing line,'" *id*. at 1600 (quoting *Nw. Cent.*, 489 U.S. at 514), it is not "field preempted."

B. Maryland's Means—Regulating Local Utilities—Is Also Within The State Field

This is a case in which not only the "why"—the aim to support construction of a power plant—but also the "means" rest squarely on the state side of the line. Maryland caused new generation capacity to be built (a proper state goal) by (a) ordering local utilities to award contracts to the winning bidder in a competitive procurement (a matter of state regulation); and (b) providing that any costs would be recoverable through retail rates (also a matter of state regulation).

Maryland pursued a proper objective through proper means. Just as Congress preserved state authority over "facilities used for the generation of electric energy," it also preserved state authority over "facilities used in local distribution." 16 U.S.C. §824(b)(1). That authority includes supervising or directing local retail utilities' contracting decisions in order to ensure adequate and reliable power supply—resource planning and "'buy-side'" decisions. *New York*, 535 U.S. at 24 (quoting FERC Order No. 888, 61 Fed. Reg. at 21,626 n.544) (internal quotation marks omitted).

Long before the FPA, States exercised dominion over local utilities, and nothing in the FPA limited the States' authority "to direct the planning and resource decisions of utilities under their jurisdiction." *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) (internal quotation marks omitted). States use this authority to, among other things, "dictate the generation resources from which utilities may procure electric energy." 134 FERC at P 30; see *S. Cal. Edison Co.*, 71 FERC ¶61,269, 62,080 (1995) (States may "order utilities" to make specific kinds of power purchases.). States may "order utilities to purchase" certain types of generation, using particular fuels and technologies, *Entergy*, 733 F.3d at 417 (internal quotation marks omitted), and to finance their contracts through retail rates and otherwise.

As discussed above, state commissions (or legislatures) may either direct utilities to enter into long-term contracts, or review plans that contemplate such procurements, or review the resulting contracts after the fact. States use their power to direct their utilities to enter into long-term contracts with power plant developers and owners to anchor investment in new power plant construction, or to prevent older generation from retiring. They may direct purchases from generators using efficient or clean technologies—to foster reliability, or even to ensure that collateral objectives, such as cleaner air, are achieved.

Here, after exercising its authority over the contracting decisions of its local utilities, Maryland used its authority over retail sales to ensure that any rebate or subsidy would be passed on to retail ratepayers—just as retail rates have traditionally ensured long-term revenue to support prudent new construction. Given Maryland's objectives, there is no basis to distinguish between supporting new generation by directing a utility to buy capacity under a long-term agreement, and achieving the same end by directing the utility to enter into a long-term CFD to further the same permissible goal of building new generation facilities in the State.

It does not change the analysis of Maryland's "aim" to appreciate that Maryland supported this new power plant construction because it wanted new generation capacity to be available to its citizens. Of course that is true. It thus required CPV's energy and capacity to be sold into the organized PJM electricity markets, following the rules of those markets, and conditioned payments under the contracts on CPV successfully selling the capacity into the auction. States were not given authority over new generation and the adequacy of supply for the sport of it. States ensure that power plants are built because they are interested in ensuring adequate and reliable electricity supplies for their citizens. The basic purpose of Maryland's initiative would be defeated if payments had to be made to CPV even if CPV provided no capacity and energy to the markets.

Moreover, the *financial* basis of the CFDs would be dramatically changed if payments had to be made to CPV even if CPV did *not* successfully sell capacity into the auction. In that case, CPV might obtain no off-setting revenues to counterbalance the local utilities' required monthly payments. That possibility would greatly increase the potential payments from ratepayers to CPV, and thus the overall payments from ratepayers.

Finally, provided that the State's action contemplated compliance with FERC-approved market rules, even if Maryland's aim had been to build new capacity to increase supply to help reduce energy and capacity prices, that would not mean the State was aiming at the federal field. Supply and price are bound together. In assigning States control of new generation, Congress could hardly have believed that States would be indifferent to the tendency of supply to influence price. Affecting price through increased supply is not an invasion of FERC's ultimate *regulatory* authority to determine, *inter alia*, whether the resulting prices are just and reasonable. Both FERC and the States operate subject to the law of supply-and-demand, and neither can claim it as their exclusive field.[22]

At any rate, as is clear from the district court's findings, Maryland here focused squarely on reliability risks in the targeted region. Those risks included transmission-related constraints, over-reliance on particular fuels, and predicted generator retirements, Pet.App.84a–87a, all plainly traditional state objectives that control under this Court's cases in the field of energy preemption. See *Oneok*, 135 S. Ct. at 1600; *Pac. Gas & Elec.*, 461 U.S. at 194–95, 216 (State's "avowed economic purpose" in conditioning nuclear power plant construction on an adequate means of handling nuclear waste saved the law from preemption as impermissible regulation of nuclear safety).

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[22] The Fourth Circuit cited *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988). But as this Court recently explained, in that case the Court thought the State's regulation was "'*directed at* … the control of rates and facilities of natural gas companies,' 'precisely the things over which FERC has comprehensive authority.'" *Oneok,* 135 S. Ct. at 1600 (quoting *Schneidewind*, 485 U.S. at 308) (emphasis in *Oneok*). In *Schneidewind*, the State directly regulated the equity securities of interstate pipelines, thereby "control[ling]" the rates they charged. *Schneidewind*, 485 U.S. at 308–09, 308 n.11. Here, Maryland can at most *affect* rates in PJM markets by increasing supply of electric power generation, *i.e.*, through the law of supply-and-demand.

C. By Directing A Procurement Through Competitive Bids, Maryland Did Not Engage In Rate-Setting

The Fourth Circuit emphasized that Maryland could not exercise powers assigned exclusively to FERC, including the power to "set" rates for wholesale sales of electricity. Pet.App.16a–17a. On that basis, it concluded that Maryland's program was "field preempted because it functionally sets the rate that CPV receives for its sales in the PJM auction." Pet.App.17a.

The Fourth Circuit's conclusion rests on a misunderstanding about what it means for a governmental body to set a rate. Here, Maryland exercised its authority over its utilities to direct them to enter into long-term contracts at a price that Maryland had no role in determining. It solicited bids. The resulting contracts surely *contain* a price, *i.e.*, a rate. But Maryland did not "set" that price or rate. To the contrary, *CPV* determined the price that it successfully bid. That price was the product of CPV's judgment in the context of a competitive procurement, not Maryland price-setting.

There is a fundamental distinction between directing a procurement and setting a price. Under the FPA, bilateral contracts, with prices set by the generator, subject to FERC review, are not only acceptable, but are "essential … as a key factor fostering stability in the electricity market, to the longrun benefit of consumers." *NRG*, 558 U.S. at 174.

Indeed, the FPA gives wholesale *sellers* the right to set the rate (subject to FERC review), *Morgan Stanley*, 554 U.S. at 531–32, and that right was not interfered with here. The prices in the contracts here were determined *by CPV* in a competitive setting. See Pet.App.89a (describing how CPV established its price). And the price at which CPV's capacity sales were made in the auction was the clearing price FERC approved as just and reasonable.

When States direct local utilities to conduct procurements, the resulting contracts include rates. But that does not mean the *State* "sets" the rate. The successful bidder sets the rate, and in a competitive procurement, the resulting rate is plainly competitive. No matter what the product being procured, where the bidder determines its price, it is *not* set by the State.

What States *cannot* do without intruding on FERC authority is actually dictate the price. That would be rate-setting, and would intrude on both the *seller*'s authority to determine the rate at which it chooses to sell, and FERC's authority to determine whether the rate is just and reasonable.

This "bright line" distinction is not only understandable, it is solidly baked into FERC's own precedents. FERC routinely approves (or lets stand) contracts resulting from competitive state-directed procurements to buy electricity over a fixed term. *E.g.*, *Allegheny Energy Supply Co.*, 108 FERC ¶61,082, PP 15, 20, 21 (2004) (approving state-supervised procurement where "[w]inning bidders received the actual price in their offers …."); *Conectiv Energy Supply, Inc.*, 115 FERC ¶61,199, PP 4–6, 20 (2006) (same);[23] see *Doswell Ltd. P'ship*, 50 FERC ¶61,251,

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[23] FERC generally does not review rate agreements resulting from such procurements, but as *Allegheny* and *Conectiv* reflect, if the resulting transaction is between affiliates, FERC will review

61,756–57 (1990) (approving contract prices set by competition).

FERC has explained that a State crosses the line into the federal field only if a State *dictates* the price. See *Midwest Power Sys., Inc.,* 78 FERC ¶61,067, 61,248 (1997); 132 FERC at P 69 (2010) (State action is "*not preempted* … to the extent the [State] is ordering the utilities to purchase capacity and energy"; state action is "preempted to the extent that the [State] is setting wholesale rates.") (emphasis added).[24]

States have long conformed their exercise of authority over their utilities' contracting decisions to the commonsense principles in these cases. Those principles are well-founded. When a State directs a procurement, it is exercising sovereign power over the contracting decisions of its local utilities. So long as the State does not use its sovereign authority to dictate the price, allowing it to be set by the supplier, it is not exercising governmental authority over the supplier's bid or the contract price. Thus, *FERC*'s authority over rates, and over the *sale* of capacity, is not impugned.

The district court dismissed the fact that CPV, not Maryland, set the price, with a footnote. It noted the RFP guidelines gave the MPSC the right to reject all bids, and required MPSC approval of the final

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to ensure that the procurement was competitive. 115 FERC ¶61,199, P 21, P 21 n.9.

[24] In *CPUC*, FERC held that by predetermining the price for wholesale purchases, the State engaged in rate-setting. 132 FERC at PP 3, 64. This Court need not determine whether FERC drew the line in precisely the right place in *CPUC* because Maryland's actions here are far from any rate-setting line.

contract. Pet.App.110a n.48. But the district court's observation misses the point of what it means to set rates. RFPs routinely reserve the right to reject all bids.[25] For example, if the procurement did not elicit competitive bids, or meet the procurement's objectives by addressing the reliability concerns at issue, all bids would presumably have been rejected. One can hardly imagine any procurement conducted without a review, and a mechanism for final acceptance, resulting in a final contract.

That reserved power to decline to accept an offer does not render the bidding process something other than competitive, or mean that the State set the price, or suggest any interference with CPV's prerogative, as seller, to set its price competitively. Declining to accept an offered price cannot be equated with setting a price. Were that so, there would be no sale for which *any* rate would be charged. Nor is there evidence in this case of any review, let alone MPSC decision, superseding CPV's bid, or establishing a price other than what CPV bid. That the MPSC signed off on the final contract is precisely the kind of authority that state commissions have long exercised over utility contracting. Maryland set no rate here.

While it is sufficient to say that Maryland did not set a rate, there are other reasons why the Fourth Circuit's rate-setting theory holds no water. The

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[25] See, *e.g.*, League of Minnesota Cities, *Competitive Bidding Requirements in Cities* at 11 (Sept. 10, 2015); Xcel Energy, *2015 Request for Proposals: Energy and Renewable Energy Credits (RECs) From Qualified Community Solar Gardens* at 3 (Jun. 11, 2015); Portland General Electric Company, *Request for Proposals: Renewable Energy Resources* at 9 (Oct. 1, 2012); Avista, *Bidding and Contracting*, https://goo.gl/oAZZa5 (last accessed Dec. 6, 2015).

contracts provide for payments or rebates beyond whatever revenues CPV receives from capacity and energy market sales. Pet.App.89a–90a. The consideration for that payment structure is based on the fact that CPV provides a "product" different from merely making capacity and energy available for a single year, *i.e.*, the only "product" that is bid into the PJM auction. The contracts include an obligation to build in a designated region, employ a particular technology, utilize a specified fuel, and operate for 20 years. The capacity auction is almost entirely indifferent to these sorts of objectives; the "product" Maryland solicited cannot be either bought or sold in the auction. Most fundamentally, these contracts provide a fixed price commitment over 20 years—a hedge that by definition will be priced differently from single-year prices generated in the PJM auction.

Moreover, the Fourth Circuit's concept of the "field" ignores the fact that for decades FERC has structured its own regulations against the backdrop of state public utility commission control over local utility contracting. Thus (as explained above and below), when FERC approved the PJM capacity auction, it did so knowing that most capacity channeled through the auction would already be under bilateral contract, and that States could and were continuing to direct or facilitate such contracts to encourage new generation. See Part II, *infra*.

Indeed, when FERC first established the PJM auction, it exempted state-supported new generation from the MOPR applicable to other new generators. *NJBPU,* 744 F.3d at 79. It found that exemption "reasonable because it enables states to meet their responsibilities to ensure local reliability." 117 FERC at P 104. That accommodation of state-supported new generation—which continues—necessarily reflects FERC's understanding that state support for new generation does not invade the federal field. While it is true that federal agencies are not the final arbiters of preemption, an agency's understanding that it can easily accommodate state initiatives is surely an important sign that those initiatives pose no threat to its authority, nor conflict with its objectives.

D. *Mississippi Power & Light* Cannot Support The Fourth Circuit's Field Preemption, Or Any Other Preemption, Theory

The Fourth Circuit reasoned that the contracts are field preempted because the ultimate payments to CPV will be different than whatever CPV obtains selling energy and capacity in the PJM markets. The Fourth Circuit identified no reason to adopt such a standard. And there is none because under the FPA, parties (subject to FERC review) can contract as they see fit. Rather, the Fourth Circuit portrayed its conclusion as compelled by logical extension of this Court's "trapped cost" cases, *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986). See Pet.App.18a.

The most basic flaw in the Fourth Circuit's reasoning remains that whether or not these contracts provide for payments different from what CPV is ultimately paid for its energy and capacity in the PJM markets, they were not *set* by Maryland, but rather by CPV, and thus raise no preemption concern. The second basic flaw is that bilateral contracting of all sorts takes place outside the auction with no sense that it invades FERC territory. Finally, the payments in the CFD were not in exchange simply for CPV's agreement to sell capacity through the auction for a single year, but to build a power plant capable of providing capacity and energy over 20 years.

But even on its own terms, the Fourth Circuit's reliance on these trapped cost cases for its field preemption holding rests on a misunderstanding of their import. As this Court recently explained, *"Mississippi Power* … is best read as a *conflict* pre-emption case, not a field pre-emption case." *Oneok*, 135 S. Ct. at 1601 (emphasis added); see also *Nantahala*, 476 U.S. at 973 ("The [state] ruling … conflicts with FERC's orders"); *Mississippi Power*, 487 U.S. at 377 ("conflict with … federal authority over the same activity") (internal quotation marks omitted).

In *Mississippi Power*, the State denied effect to a federally-authorized rate for a utility's wholesale purchase by barring its utility from passing the cost on to ratepayers, "trapping" that cost. 487 U.S. at 372. While States have "'jurisdiction over retail sales,'" they cannot exercise that authority "'to prevent the wholesaler-as-[retail-]seller from recovering the costs of paying the FERC-approved rate …. Such a trapping of costs is prohibited.'" *Id.* (quoting *Nantahala*, 476 U.S. at 970). See *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 49–50 (2003) (cost-trapping where FERC took jurisdiction over wholesale cost allocations).

The Fourth Circuit reasoned that if it is impermissible to refuse to allow a utility to recover what it paid for energy at a federally-approved rate, then it "stands to reason" that it also must be improper to require a utility to make payments higher than what the generator earns in federal electricity markets. Pet.App.18a.

Yet that does not "stand to reason" at all. There is no trapped cost here. Maryland guaranteed that the local utilities would recover any CFD-related costs from their ratepayers. Unlike a refusal to allow a utility to recover for a FERC-approved payment, an *additional* payment mechanism or payment stream does not nullify that federal price. It is an addition; it carries no sting of nullification. An additional payment no more nullifies the underlying rate than would any other *additional* payment from any source, or any hedge contract purchased or sold to a generator or utility on the financial markets, or, for that matter, any forgiveness of payments (such as tax payments) otherwise to be made. And, as explained above, the additional payment is entirely justified because the State and its citizens obtain consideration for it—in the form of increased reliability, desired construction, long-term operation and stable prices. Those benefits are separate from whatever the price may be for a single-year capacity purchase or sale in the residual auction.

Finally, the conflicts in *Mississippi Power* and *Nantahala* were sharply presented because FERC had taken jurisdiction over the precise payments that the States' later action, trapping the resulting cost, thwarted. Specifically, FERC had approved the appropriate wholesale price the utility paid to a generator, and the State's action fundamentally contradicted FERC's order.

Here, in contrast, there is no conflict with any FERC order. In fact, notwithstanding any out-of-auction payments that might be made under these contracts, FERC expressly accepted the participation of these state-sponsored resources in the PJM auction, pursuant to the FERC-approved rules of that auction.

See J.A.91–92, 123. FERC also found the price paid for CPV's capacity in the auction—the auction clearing price—to be just and reasonable. 143 FERC at P 143. In short, *Mississippi Power* does not support the Fourth Circuit's decision under a "field" or "conflict" preemption rationale.

II. Maryland's Procurement Does Not Conflict With FERC Regulation

As the Court observed in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188 (2014), "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." (Internal quotation marks omitted).

Given the FPA's framework of explicitly divided authority over energy regulation, the Court has cautioned that the inevitable "jurisdictional tensions" between state and federal initiatives in energy regulation should not be mistaken for a *conflict* giving rise to preemption. See *Nw. Cent.*, 489 U.S. at 515 ("[C]onflict preemption analysis must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States ...."). Conflict preemption is justified only when "the impact of state regulation ... on matters within federal control is so extensive and disruptive" that the basic principle of "federal accommodation" of state initiatives must give way to nullification of the state action. *Id*. at 517–18. Nothing in this case approaches that standard.

The Fourth Circuit's conflict preemption rulings identify no actual conflict with a federal statute or regulation. Rather, they rely solely on unjustified assumptions about purposes underlying the capacity auction, and auction rules, that would supposedly be obstructed by Maryland's support for the construction of CPV's power plant. Those ostensible purposes simply do not exist—at least not in a form that would reach beyond the auction to preempt state activity outside the auction.

There is a difference between FERC establishing a capacity auction as *a* source of price information to influence investment, on the one hand, and FERC establishing an auction as the sole source of signals or incentives, on the other. The Fourth Circuit's ruling barring Maryland from providing incentives to new construction would make sense only if the auction were intended to be the exclusive source of incentives or price signals. But it was not. As shown below, price signals from the auction may provide useful information to investors, developers and the States in considering whether to build new capacity. But it was never conceived as an exclusive source of incentives to build power plants.

The Fourth Circuit similarly failed to distinguish between internal auction rules, which establish policies and practices for the auction, and the extension of such policies to preempt state actions outside the auction. FERC's decision not to use the PJM auction to provide long-term price guarantees does not amount to an attempt to ban state-sponsored long-term contracts operating outside the auction (even assuming that FERC had authority to do so). Auction rules supervise the auction: they establish no policies—and certainly no policies against long-term contracting—outside the auction.

Reliance on unwarranted assumptions, in lieu of evidence of the kind of federal purpose that cannot tolerate the impact of state actions, exemplifies the sort of "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" that has been cited as anathema to federalism and the Court's preemption jurisprudence. *Gade*, 505 U.S. at 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment). There is no basis for finding a conflict here, let alone under the stringent standards set forth in *Northwest Central*.

A. The Capacity Auction Was Not Intended To Be The Exclusive Impetus For New Power Plant Construction

The Fourth Circuit noted that while the auction serves many objectives, including ensuring the availability of residual capacity, a "collateral benefit" is that it may generate price signals useful to investors, developers and States themselves, in determining whether to build new capacity. The Fourth Circuit then held that "Maryland's initiative disrupts this scheme by substituting the state's preferred incentive structure for that approved by FERC." Pet.App.23a.

The flaw in that conclusion is that there is no support for any Congressional or FERC intention to designate capacity auction price signals as the *sole* source of incentives for building new power plants, displacing state governments from exercising their FPA-confirmed authority over power plant construction with incentives of their own. States, like private parties, can interpret price "signals" as they choose, and decide whether to support new generation, irrespective of auction signals.

Indeed, because it is a truism that markets are "less than perfect," *Oneok*, 135 S. Ct. at 1597, there is no reason to believe (and, in any event, the Fourth Circuit points to nothing that would support the belief) that FERC or Congress would risk entrusting the strength of, and sustained investment in, the Nation's electricity generation infrastructure to a single market mechanism, or to the limited information provided by a one-year price signal—displacing States from acting more directly to address what they determine to be unmet needs.

Under the FPA, the *governmental* authority to *directly* promote power plant construction when *existing* markets have not is denied to FERC and reserved to the *States*. *CDPUC*, 569 F.3d at 481. FERC has, at best, only an indirect role in encouraging new generation, through rate and market regulation. See *id.* (FERC can regulate a futures market to help incentivize new generation, but States remain at liberty to act independently); *ISO New England, Inc.*, 122 FERC ¶61,144, PP 14, 16 (2008) ("*how* those [generating] resources are provided is up to the [utilities] and the states" utilizing mechanisms such as "contracts to purchase power") (emphasis in original).

States look farther into the future and have authority to take more focused action to support power plant construction than whatever indications of investment opportunity emanate from a single year's auction "price signals." Cf. Pet.App.22a. States also can target incentives to further fuel mix, or environmental or renewable energy objectives, to which the auction is indifferent. States necessarily fill those vital roles because FERC itself is denied the power to order construction of new generation capacity.

Thus, FERC's use of its power over market structures to generate information useful to investors does not conflict with separate state initiatives, using long-term contracts, to support new generation capacity. The two types of incentives, one state and one federal, one informational (price signals) and one direct (long-term contracts), can and do co-exist. Both FERC and the States can use the tools at their disposal to spur needed power plant construction.

But even if it were plausible that Congress or FERC *might* put the entirety of the Nation's electricity future in one annual auction market basket, neither has done so. As pointed out above, the fact that the auction structure is complex cannot be taken to mean that it was to be exclusive. "Given the presumption that state and local regulation … can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety." *Hillsborough*, 471 U.S. at 717–18.

Not only is there no evidence of an intent to establish the PJM auction as the exclusive source of incentives to invest in new generation, the evidence is precisely to the contrary. FERC confirmed at every stage that it was aware of the limited efficacy of the auction mechanism to promote investment—and that it would not supplant the States' role.

From the very outset of its capacity auction initiatives, FERC acknowledged that auction price signals would *not* always be "sufficient to provide appropriate incentives for efficient investment decisions—whether new entry or a retirement decision is at stake." 117 FERC at P 77. FERC acknowledged that "dependence on price volatility for investment is an inadequate foundation for cost-effective financing of new infrastructure." 107 FERC at P 20. Therefore, rather than view capacity auctions as conflicting with the use of long-term contracts to support investment, FERC expected that "[i]deally, the market should encourage LSEs to engage in long-term bilateral contracting to support needed investment." *Id.* Thus, when West Virginia argued that the auction impinged on state authority, FERC explained that it was preserving States' authority, noting LSEs retained the ability to provide "an incentive for the construction of new capacity by entering into long-term bilateral agreements." 115 FERC ¶61,079, P 172.

In *CDPUC*, the D.C. Circuit sustained New England's nascent capacity auction as legitimate under FERC's market and rate authority. 569 F.3d at 484–85. Its decision rested on the explicit understanding that the auction left intact the States' FPA-ensured "right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from [FERC]." *Id.* at 481. The D.C. Circuit later approved rules for that auction on the same understanding: Those rules left "states … free to subsidize the construction of new generators, and [LSEs] to build or contract for any self-supply they believe is necessary." *New England Power Generators*, 757 F.3d at 291.

Even more recently, in approving changes in the PJM auction's MOPR, specifically in response to the Maryland and New Jersey initiatives, FERC reiterated that while it viewed the auction as successful, it had no desire to "interfere with states or localities that, for policy reasons, seek to provide assistance for new capacity entry if they believe such expenditures are appropriate for their state." J.A.81, 100, 108.

Indeed, from the earliest days of the PJM auction, FERC acknowledged that States had the authority to "encourage or require" local utilities to acquire new capacity, supported by charges to ratepayers. Indeed, in terms directly applicable here, FERC explained that it regarded minimum offer price rules as the proper means of addressing any undesired effect of such state support for new generation on auction operations. As FERC explained:

> [S]tates may have the incentive and ability to encourage or require their regulated utilities or others to acquire new capacity that could not be supported by market-based revenues alone, require retail out-of-market payments to support such investment, offer the capacity into the market as a price-taker, and thereby depress market-clearing prices received by other at-risk existing suppliers. The basic framework for preventing this anti-competitive behavior is to establish minimum offer prices for such new capacity.

See 126 FERC at P 182.

And when the Third Circuit approved FERC's MOPR changes, it also did so on the understanding that FERC's auction rule changes addressed a matter within FERC's authority—the proper way of handling Maryland's and New Jersey's support for new power plant construction *within* the auction. At the same time, it left Maryland and New Jersey free to move forward with those initiatives *outside* the auction. See *NJBPU*, 744 F.3d at 98.

Bilateral contracting, outside the auction, poses no threat to the auction. The residual auction is conducted against the backdrop of bilateral contracting, which remains the predominant method for buying capacity and energy in PJM. The auction sets the price for auction transactions only. What happens in the auction stays in the auction. Transactions outside the auction take place every day.

There is an obvious division of authority here: FERC can use the tools at its disposal, including control of auction processes, to indirectly influence new construction. States can likewise use the far more effective tools at their disposal to do so directly. FERC can construct auction rules to allow its auction to function as desired; States can act outside the auction, fully consistent with FERC market rules.

The Fourth Circuit's ruling that FERC's *indirect* and limited role in encouraging power plant construction through a capacity auction preempts the States' *direct* and primary role in supporting new generating capacity turns the FPA on its head.

B. The Capacity Auction's "NEPA" Rule Does Not Preclude Long-Term Contracts

The Fourth Circuit also held that one of the internal auction rules—the NEPA—reflected a FERC policy choice against use of long-term contracts as an incentive for power plant construction. Pet.App.23a–24a. A sufficient answer to the Fourth Circuit's conclusion is that internal auction rules—embodied in PJM's FERC-approved tariff—run the auction. They do not prescribe policies applicable outside the auction.

And there is certainly no federal policy against using long-term contracts to support new construction.

As described above, the residual auction solicits offers of capacity for a single year, three years forward. PJM makes rules to govern the auction, and those rules are included in the FERC-approved tariff.

NEPA is one such rule. It allows certain new capacity suppliers, under limited circumstances, to lock in a price for three years, not just one year. See Pet.App.10a (quoting *PJM Interconnection, L.L.C.*, 128 FERC ¶61,157, P 101 (2009)).

As conceived by FERC, NEPA had a narrow purpose. It was "intended only to address the issue of lumpy investments in a small LDA,"[26] 128 FERC at P 94, "until sufficient load growth would be expected to support the new entry by reducing the surplus attributable to such lumpy investment," *id.* at P 101. The same issues would not even arise "in large LDAs." *Id.* Thus, NEPA addresses a specific problem: a generator unable to realize sufficient sales on account of low load growth in early years.

In 2009, various developers, including CPV, and Maryland urged FERC to revise NEPA. They urged extending its duration to seven or ten years, and using it to provide price stability for various power plant construction projects.

FERC rejected the proposal because NEPA was not intended to go beyond protecting "against lumpy investment." *Id.* at P 102. And the auction itself was not, in FERC's view, designed to provide "long-term revenue assurance for developers." *Id.* at P 94.

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[26] LDA means Locational Delivery Area. See Pet.App.69a–72a for a fuller definition.

Locked-in prices would impose higher costs on auction purchasers, and violate an auction principle of not discriminating against existing generators in favor of new generators. Given the auction's basic purpose, FERC chose not to reconfigure the auction to provide the long-term price stability that Maryland and CPV proposed.

As the above recitation makes clear, NEPA is an internal auction rule, reflecting how FERC wants to use the auction. The increased costs associated with expanding NEPA would have been imposed on buyers in the auction. FERC decided not to use the auction as a means of providing long-term price stability.

Not one word of FERC's reasoning suggests a "policy" reaching state activities *outside the auction* or disapproval of long-term contracts outside the auction. Indeed, if FERC wanted to stand against long-term contracts like these, it could have granted the request by some of the Respondents to further restrict the participation of new generators supported by such contracts from the auction. See discussion, Part II.C, *infra*.

Indeed, the Fourth Circuit's hypothesis that NEPA reflects a FERC policy against long-term contracts is especially ill-conceived. It is commonplace that transactions take place outside the auction on terms different from the auction sales, involving capacity later sold into the auction. And these are often long-term contracts.

The FPA does not merely allow contracts, it is "premised" on them. *In re Permian Basin Area Rate Cases,* 390 U.S. 747, 822 (1968). They are "essential" to "fostering stability in the electricity market, to the longrun benefit of consumers." *NRG*, 558 U.S. at 174.

Any rule against long-term contracts would "threaten to inject more volatility into the electricity market by undermining a key source of stability." *Morgan Stanley*, 554 U.S. at 551. And FERC, by rule, requires every RTO, including PJM, to facilitate long-term contracting by posting offers for long-term contracts on their websites. 18 C.F.R. §35.28(g)(2). As shown above, FERC expected long-term contracts to be used to spur new investment when auction price signals failed to do so.

In sum, FERC's decision not to transform NEPA, or the auction, into a mechanism for providing long-term price stability suggests no general FERC policy against States using long-term contracts to provide price stability and thereby encourage the development of new generation.

C. The Government's Professed Concern About Market Disruption Conflicts With The Facts Of This Case And FERC's Own Conclusions

In its amicus brief opposing certiorari, the government endorsed neither the Fourth Circuit's "rate-setting" theory, nor its theories about preemptive purposes emanating from the auction. Instead, the government used words like "distort[ion]," "interfere[nce]," and "price-suppressi[on]," and hypothesized a situation in which a generator operating with the benefit of a subsidy could bid below cost, which the government suggested would negatively impact the workings of the auction.

It is a sufficient answer to the government's argument that if FERC were concerned about unwanted impacts on auction operations from state initiatives like Maryland's, FERC could easily prevent such impacts. Moreover, under the FPA, state exercises of authority, even those in tension with federal initiatives, should generally be accommodated, and conflict preemption should be found only when the state action is manifestly disruptive. See *Nw. Cent.*, 489 U.S. at 517–18. The ease with which FERC *could* exercise its authority to avoid any "disrupt[ion]" precludes any finding of the kind of conflict that could give rise to preemption.

Indeed, recognizing FERC's authority over such issues, various incumbent generators (including many of the Respondents) asked FERC to make it more difficult for new generators supported by the proposed Maryland and New Jersey contracts to participate in the auction. See *NJBPU*, 744 F.3d at 88 n.13, 88–89. In response, FERC actually exercised its authority over the auction and determined that with a small change to its MOPR, it could (and it did) prevent Maryland's program "from adversely affecting wholesale capacity rates." *Id.* at 98.

FERC responded with a solution that "reconcile[d] the tension" between the auction's objectives and the States' programs. J.A.100. Previously, state-supported new generation found by the State to be needed to meet reliability concerns was categorically exempted from the MOPR, the minimum offer price rule that eliminates below-cost bidding. *NJBPU,* 744 F.3d at 86. FERC determined that by subjecting state-supported natural gas power plants like CPV's to the MOPR—which requires cost-justified bids, independent of any state subsidy—the auction would run as FERC desired.

With the Maryland and New Jersey initiatives in view, FERC *held* that the MOPR prevented these contracts from "disrupting … competitive price signals" from the auction. J.A.100. FERC *held* that a power plant whose bid clears under the MOPR is "a competitive resource and should be permitted to participate in the auction regardless of whether it also receives a subsidy." J.A.92. Any contrary approach would improperly "discourage the entry of new capacity that is economic." J.A.91. Moreover, FERC determined that, just as with other market participants, if a developer operating under a long-term agreement submitted a clearing bid in compliance with the MOPR in its first year, MOPR restrictions were unneeded in future years: Having once cleared the auction, "the resource has demonstrated that it is needed by the market and … [its] *presence in the market … does not artificially suppress market prices." Id.* (emphasis added). The Third Circuit affirmed because FERC's ruling left States free to take the steps they deem necessary, while preventing any unwanted impact on the auction. *NJBPU*, 744 F.3d at 98.

Of course, as the Third Circuit observed, there may be an effect on auction prices. Increased supply may result in price reductions—the "law of supply-and-demand." *Solomon*, 766 F.3d at 255. But there is a difference between price "suppression" from added supply, which FERC obviously does not find objectionable, and "artificially suppress[ing]" prices by below-cost bidding, which FERC ensured would not occur under its MOPR. See J.A.91 (bids under the MOPR rules do "not artificially suppress market prices").

In opposing certiorari, the government hypothesized a theoretical hole in FERC's MOPR that would make it possible to bid, and possibly even clear with, a "minimum-offer *default price*—even if the generator's actual costs are higher than the default price." U.S. Br.16 (emphasis added). That is because the yearly-established default price—if a bidder uses it—is based on a *generic* cost of constructing new capacity, not the bidder's actual cost. See Pet.App.93a n.41. But whether or not possible, none of that was at issue here because CPV did not use the default price. Pet.App.93a–94a.

The government's argument is, at its core, a collateral attack on FERC's decision to allow that theoretical—but unlikely[27]—possibility to occur. In light of FERC's determination that its rules ensure that a particular form of bid does not adversely impact the auction, the government cannot be free in this Court to take a contrary position, and claim conflict preemption on that basis.

For example, while changing the MOPR to subject new natural gas generation to its requirements, FERC continues to exempt other state-supported projects, such as wind, solar and other renewable power projects. Because FERC has made that decision, the government cannot plausibly argue that allowing state-supported renewable-power projects in the auction with below-cost bids creates a conflict with the auction.

In any event, no below-cost bidding issue is presented here. CPV did not offer a "default" price. Under the MOPR, CPV offered its capacity into the auction at a FERC-approved, cost-justified price,

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[27] Unlikely because (a) the default price is based on a PJM-determined analysis of construction costs; and if the "default price" is set high, (b) an offer at that price will not clear (and thus does not affect the auction price); and (c) is not likely to be below an offeror's actual costs.

disregarding any subsidy. PJM reviewed the offer, and adjusted it. CPV's cost-justified offer cleared the auction. See *id.*

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted.

CLIFTON S. ELGARTEN
Counsel of Record
LARRY F. EISENSTAT
RICHARD LEHFELDT
JENNIFER N. WATERS
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 624-2500
celgarten@crowell.com

Counsel for Petitioner
CPV Maryland, LLC

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ADDENDUM

Federal Power Act, Section 201

16 USCS § 824

§ 824. Declaration of policy; application of Part

(a) Federal regulation of transmission and sale of electric energy. It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part [*16 USCS §§ 824* et seq.] and the Part next following [*16 USCS §§ 825* et seq.] and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce.

(1) The provisions of this Part [*16 USCS §§ 824* et seq.] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission 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 Part [*16 USCS §§ 824* et seq.] and the Part next following [*16 USCS §§ 825* et seq.], 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.

(2) Notwithstanding section 201(f) [subsec. (f) of this section], the provisions of sec-tions 203(a)(2), 206(e), 210, 211, 211A, 212, 215, 216, 217, 218, 219, 220, 221, and 222 [*16 USCS §§ 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u*, and *824v*] shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this Act [*16 USCS §§ 791a* et seq.] with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 203(a)(2), 206(e), 210, 211, 211A, 212, 215, 216, 217, 218, 219, 220, 221, or 222 [*16 USCS § 824b(a)(2), 824e(e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u*, or *824v*], shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce. For the purpose of this Part [*16 USCS §§ 824* et seq.], electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale". The term "sale of electric energy at wholesale" when used in this Part [*16 USCS §§ 824* et seq.] means a sale of electric energy to any person for resale.

(e) "Public utility" defined. The term "public utility" when used in this Part [*16 USCS §§ 824* et seq.] or in the Part next following [*16 USCS §§ 825* et seq.] means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part [*16 USCS §§ 824* et seq.] (other than facilities subject to such jurisdiction solely by reason of section 206(e), 206(f), 210, 211, 211A, 212, 215, 216, 217, 218, 219, 220, 221, or 222 [*16 USCS § 824e(e), 824e(f), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u*, or *824v*]).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt. No provision in this Part [*16 USCS §§ 824* et seq.] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (*7 U.S.C. 901* et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records.

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 2005.

Federal Power Act, Section 205

16 USCS § 824d

§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates. All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful. No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules. Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes. Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five month period. Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the

Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause".

(1) Not later than 2 years after the date of the enactment of this subsection [Nov. 9, 1978] and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate

schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

Federal Power Act, Section 206

16 USCS § 824e

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues. Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest. Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 205 of this Act [*16 USCS § 824d*] and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the rea-sons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company". Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.

(d) Investigation of costs. The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales.

(1) In this subsection:

(A) The term "short-term sale" means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term "applicable Commission rule" means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 201(f) [*16 USCS § 824(f)*] voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4) (A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.