Nos. 13-2419 (L) & 13-2424

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PPL ENERGYPLUS, LLC, et al.,

Plaintiffs–Appellees

v.

DOUGLAS R.M. NARAZARIAN et al.;

Defendants–Appellants

And

CPV MARYLAND, LLC,

Intervenor–Appellant

Appeal from Judgment of the United States District Court
for the District of Maryland (No. 1:12-cv-01286-MJG)

BRIEF FOR AMERICAN PUBLIC POWER ASSOCIATION AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AS AMICI CURIAE SUPPORTING APPELLANTS AND REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

FERC Orders

Regulations

Other Authorities

INTEREST OF AMICI CURIAE[1]

The American Public Power Association (APPA) represents the Nation's more than 2,000 not-for-profit, publicly owned electric utilities, which serve over 47 million customers, in every state except Hawaii, and provide over 15 percent of all kilowatt-hour sales of electricity to ultimate customers. The association's utility members are load-serving entities, with the primary goal of providing customers in the communities they serve with reliable electric power and energy at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of the association's members with the long-term interests of the residents and businesses in their communities.

The National Rural Electric Cooperative Association (NRECA) represents the Nation's more than 900 not-for-profit, member-owned rural electric utilities, which provide electricity to approximately 42 million consumers in 47 states, or 13 percent of the Nation's population. Rural electric cooperatives account for approximately 11 percent of all kilowatt-hour sales of electricity in the Nation. NRECA's members also include approximately 65 generation and transmission (G&T) cooperatives, which supply wholesale power to their distribution cooperative owner-members. Both distribution and G&T cooperatives were formed

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

to provide reliable electric service to their owner-members at the lowest reasonable cost.

Both associations' utility members participate in wholesale power markets in regions of the Nation where "Regional Transmission Organizations" (RTOs), including the RTO discussed in this case, PJM Interconnection, L.L.C. (PJM), operate the electric transmission grid. Since the advent of RTOs over a decade ago, the associations' members in RTO regions have continued to exercise their business judgment to obtain electric generation capacity and electric energy from various sources, including (a) generation facilities they purchase or build; (b) purchases under long- and short-term bilateral wholesale contracts; and (c) purchases from RTOs. The associations' interest in this case is to ensure that their members continue to be able to obtain the mix of capacity resources that, in their judgment, best enables them to meet their environmental and other regulatory obligations and provide reliable service at the lowest reasonable cost.

SUMMARY OF ARGUMENT

The decision below gets this case backwards. It is the district court—not the State of Maryland—that has intruded on the exclusive authority of the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA), 16 U.S.C. §§ 824–824u, to regulate rates for interstate wholesale electricity sales.

The FPA expressly preserves state jurisdiction over retail electric rates and over facilities for the generation of electricity and its local distribution. Where, as here, FERC's regulation of the wholesale electricity markets in the PJM region allows purchasing utilities to choose among alternative wholesale suppliers, the FPA does not prohibit a state regulator from overseeing the wholesale electricity procurement by utilities subject to its jurisdiction. That is what the Maryland Public Service Commission (MPSC) did here in its challenged Order No. 84815, JA 1307–1336. Contrary to the district court's holding, the MPSC did not set wholesale rates in violation of any FERC tariff. Accordingly, the district court had no basis for declaring the MPSC's order preempted by the FPA.

But the FPA *does* prohibit federal courts from determining in the first instance whether a rate in a FERC tariff is unlawful under the FPA. The "filed rate" doctrine holds that courts, except when reviewing a FERC order, must give binding effect to the wholesale electric rates established or accepted by FERC. By determining which FERC-allowed wholesale rates in the PJM region are "approved by FERC," JA 292, and which are "illegal and unenforceable," JA 349, the district court clearly overstepped the mark. For this reason, too, its judgment should be set aside.

The district court's decision is also contrary to public policy. It consigns developers of new power plants to selling their capacity in a yearly PJM

centralized auction that is subject to substantial price volatility. But building new power plants requires long-term financial arrangements. Often these arrangements take the form of long-term wholesale contracts with load-serving entities—i.e., electric distribution companies, public power systems, or electric cooperatives—that purchase the plant's output to serve their customers. Congress and FERC have found that such long-term arrangements are lawful and in the public interest. Unless the district court's judgment is reversed, national energy policy may be frustrated by federal-court litigation attacking similar long-term arrangements—which appears to have already begun.

The MPSC did not apply its order to Maryland's public power systems or electric cooperatives. Indeed, FERC and many other states do not comprehensively regulate public power and cooperative utilities. But many public power and cooperative utilities participate in wholesale electricity markets and rely on long-term contracts to purchase power and develop power plants to serve their customers. Amici curiae do not concede that such long-term contracts would be held to be preempted by the FPA if the district court's judgment is affirmed. But the decision below potentially could undermine their continued ability to make these needed long-term arrangments.

ARGUMENT

I. FERC allows sales of capacity in the PJM region under bilateral contracts as well as in PJM's auctions.

The district court erroneously held that the State of Maryland was preempted from exercising authority reserved to it in the FPA. *See infra* Section II. It compounded that error by deciding matters entrusted in the FPA to FERC's exclusive determination. *See infra* Section III. Both errors spring from the district court's failure to appreciate the legal significance of the uncontested fact that there are two, parallel FERC-regulated mechanisms for sales of capacity in the PJM region—a bilateral market, in which buyers and sellers enter into capacity sales transactions directly with one another, and PJM's centralized capacity auction.

A. FERC has accepted market-based rate tariffs of public utilities authorizing capacity sales under bilateral contracts in the PJM region.

Congress amended the FPA in 1935 in order "to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758 (1973). The FPA gives FERC exclusive jurisdiction over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce"; over "all facilities" used for such

transmission and sale; and over "public utilities" that own or operate such facilities. 16 U.S.C. §§ 824(b)(1), 824(e). *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (interstate wholesale rates).[2]

The FPA provides that "[a]ll rates and charges made, demanded, or received by any public utility" for the transmission or sale of electric energy subject to FERC's jurisdiction "shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." 16 U.S.C. § 824d(a). To enable FERC to enforce this standard, the FPA requires every public utility to file with FERC "schedules showing all [jurisdictional] rates and charges… together with all contracts which in any manner affect or relate to such rates [or] charges." 16 U.S.C. § 824d(c). A public utility cannot change its rate schedules without giving prior notice by filing the change with FERC. 16 U.S.C. § 824d(d). If FERC finds that such a rate is "unjust, unreasonable, unduly discriminatory or preferential," the FPA provides that FERC "shall determine the just and reasonable rate … to be thereafter observed and in force, and shall fix the same by order." 16 U.S.C. § 824e(a).

Although the FPA does not prescribe a particular method for establishing just and reasonable rates, FERC traditionally has reviewed rates based on the cost

[2] Public power systems and most electric cooperatives are not "public utilities" under the FPA. 16 U.S.C. § 824(f).

of service. *See* 18 C.F.R. §§ 35.12, 35.13 (2013). In recent years, however, FERC has waived the cost-of-service filing requirements and allowed electricity sales at market-based rates—i.e., by negotiation with the purchasers. FERC grants blanket market-based rate authority to a public utility upon a showing that it lacks, or has adequately mitigated, any market power. *See* 18 C.F.R. §§ 35.36–35.42 (2013). This blanket authority allows the public utility to make sales at changing market rates without the prior notice and filing of each contract and new rate; instead, FERC requires the public utility to file periodic reports on its market-based rate transactions after the fact. *See* 18 C.F.R. § 35.10b (2013). While FERC's scheme of market-based rates is not without its critics, it is not at issue in this appeal. *See Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1*, 554 U.S. 527, 548 (2008).

The important point is that FERC authorizes public utilities to sell capacity at market-based rates in the PJM region through bilateral contracts negotiated with the purchasers, not just in PJM's centralized capacity auction. The district court acknowledged this fact. JA 221, 231, 233, 301. Moreover, FERC has granted blanket authority to make sales of "capacity" at market-based rates to the very generator, CPV Maryland, LLC, whose contracts are at issue here. *See CPV Shore, LLC*, 142 FERC ¶ 61,081, P 1 (2013). As the district court also acknowledged,

JA 305, this blanket authority includes sales under contracts negotiated with the purchasers and in PJM's centralized auctions.

B. PJM's tariff allows capacity sales under bilateral contracts.

To ensure open-access, non-discriminatory transmission service and to separate the operation of the transmission grid from the economic interests of electricity generators, FERC has encouraged the creation of RTOs. *See Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004). These entities, which do not own or operate any generation facilities, operate the transmission facilities of transmission-owning utilities and "provide open access to the regional transmission system to all electricity generators at rates established in a single, unbundled, grid-wide tariff that applies to all eligible users in a non-discriminatory manner." *Id.* at 1364 (internal quotation omitted). PJM is an RTO that operates the transmission grid in Maryland and several other states. *PJM Interconnection, L.L.C.*, 101 FERC ¶ 61,345 (2002). It is a regulated public utility under the FPA. *Pennsylvania-New Jersey-Maryland Interconnection*, 103 FERC ¶ 61,170, PP 16-21 (2003).

While FERC specifies the minimum functions that all RTOs must perform, these functions do not include the administration of capacity markets. 18 C.F.R. § 35.34 (2013) . In 2006, FERC accepted tariff amendments providing for PJM to administer auctions to procure capacity for the purpose of ensuring grid

reliability—what PJM calls the Reliability Pricing Model or RPM. *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006), *order on reh'g*, 119 FERC ¶ 61,318 (2007). Three aspects of the RPM structure should be noted.

1. PJM annually conducts a "Base Residual Auction" for capacity to be supplied for a one-year term, three years in the future. *Id. See generally* PJM, *Manual 18: PJM Capacity Market* 88-90 (rev. 20, Nov. 20, 2013) (available at www.pjm.com/~/media/documents/manuals/m18.ashx) ("*PJM Capacity Market Manual*"). But this auction still allows load-serving entities to make use of self-supplied capacity resources and long-term, bilateral capacity agreements. Indeed, the "RPM structure" includes both the "Base Residual Auction" and the "Bilateral Market." *Id.* at 5. The Base Residual Auction is "residual" because self-supply and the bilateral market operate *first*. In its initial order accepting elements of the RPM proposal, FERC "conclude[d] that, after [load-serving entities] have had an opportunity to procure capacity on their own, it is reasonable for PJM to procure capacity in an open auction …," but "[t]his, however, should be a last resort." *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079, P 71 (2006). As FERC described it, PJM's proposal was that load-serving entities "may either (a) build their own needed capacity or create an incentive for the construction of new capacity by entering into long-term bilateral agreements, (b) refrain from entering into bilaterals and pay the (presumably higher) prices set by the [proposed RPM

auction] demand curve, or (c) develop transmission or demand response solutions to capacity problems." *Id.*, P 172. Soon thereafter, FERC approved a settlement that "preserve[d] provisions of [PJM's proposal] that support self-supply and bilateral contracts …." *PJM Interconnection*, 117 FERC ¶ 61,331, P 29. In 2011, FERC approved amendments to the auction rules, but the rules continued to provide for participation in the auction by capacity resources that load-serving entities own or acquire by bilateral contract and designate as their "self-supply." *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, PP 191–197, *order on reh'g*, 137 FERC ¶ 61,145 (2011), *pet. for review pending sub nom. N.J. Bd. of Pub. Utils. v. FERC*, Nos. 11-4245 *et al.* (3rd Cir.). The currently effective RPM structure contains provisions to accommodate self-supplied capacity that load-serving entities own or acquire in the bilateral market. *See PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, PP 107–115 (2013), *reh'g pending.*

2. The RPM structure effectively requires load-serving entities in the PJM region to offer and clear their generating capacity resources in the Base Residual Auction. This includes (a) the capacity from generating facilities owned by load-serving entities and (b) the capacity from generating facilities purchased by load-serving entities in the bilateral market. *See PJM Capacity Market Manual* at 4–6, 39–45, 57–63. PJM assigns a capacity obligation to each load-serving entity (based on its load and a reserve margin) and charges it for its proportionate share of the

capacity PJM procures in the RPM auction. *See id.* at 4, 7–14, 140. But if a load-serving entity also offers its owned or purchased capacity in the auction, then it may receive offsetting revenue from PJM. *See id.* at 14. If the load-serving entity's capacity offer clears the auction, it avoids paying twice for capacity—once to PJM and once to a third-party capacity seller or to finance its generating facility. This process also enables a load-serving entity to use owned or purchased capacity resources to hedge against PJM's auction prices. *See id.* at 4, 6 (explaining the hedging function of the bilateral market). As the district court noted, PJM's auction prices are subject to volatility. JA 291.

3. In the orders cited above, FERC has approved various changes to the intial rules for PJM's capacity auction, including the maximum and minimum prices that may be offered by suppliers in the auction and how capacity resources clear the auction. *See also* MPSC Br. at 10-13. These auction rules have been and remain highly controversial.[3] While these rules affect the ability of load-serving entities to finance and build new generating facilities, and to purchase long-term capacity resources, these rules are not at issue in this case. The important point is that throughout its existence, the RPM structure has permitted bilateral contracting for capacity in the PJM region—at prices and terms determined outside of the Base

[3] Petitions for review of FERC's 2011 orders amending the auction rules are before the Third Circuit in *N.J. Bd. of Pub. Utils. v. FERC*, Nos. 11-4245 *et al.* (3rd Cir.) (argued Sept. 10, 2013).

Residual Auction and regulated by FERC through its oversight of public utility sellers' market-based rate tariffs.

C. The FPA and FERC regulations support long-term power contracting.

Consistent with its orders on PJM's RPM structure cited above, FERC has adopted general regulations that encourage and facilitate long-term power-supply agreements in RTO regions.

Congress amended the FPA in 2005 by adding a new section 217, 16 U.S.C. § 824q, which requires in relevant part that "[t]he Commission shall exercise the authority of the Commission under this chapter [of the FPA] in a manner that … enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs." 16 U.S.C. § 824q(b)(4).[4] To implement this directive, FERC adopted regulations requiring RTOs with organized electricity markets, like PJM, to make available long-term firm (i.e., generally uninterruptible) transmission rights. 18 C.F.R. § 42.1 (2013).[5] These

[4] Load-serving entities are defined as utilities, including public power systems and electric cooperatives, obligated by state law or contract to provide electric service to end-users. 16 U.S.C. § 824q(a). For background on this statuate, see Jay Morrison, *EPACT '05 Implementation: Is FERC in Full Compliance?* 28 Energy L.J. 631 (2007).

[5] *See* Long-Term Firm Transmission Rights in Organized Electricity Markets, Order No. 681, 71 Fed. Reg. 43,564 (Aug. 1, 2006), *order on reh'g*, Order No.

regulations require that RTOs make available firm transmission rights with terms long enough "to meet the needs of load serving entities to hedge long-term power supply arrangements made or planned to satisfy a service obligation," and that RTOs "must be able to offer firm coverage for at least a 10 year period." 18 C.F.R. § 42.1(d)(4) (2013).

In 2008, FERC adopted regulations requiring RTOs to dedicate a portion of their web sites for market participants to post offers to buy or sell power on a long-term basis (one year or more), with the goal of promoting greater use of long-term contracts by improving market transparency. 18 C.F.R. § 35.28(g)(2) (2013).[6] The Commission explained the importance of long-term contracts in these terms:

> Long-term power contracts are an important element of a functioning electric power market. Forward power contracting allows buyers and sellers to hedge against the risk that prices may fluctuate in the future. Both buyers and sellers should be able to create portfolios of short-, intermediate-, and long-term power supplies to manage risk and meet customer demand. Long-term contracts can also improve price stability, mitigate the risk of market power abuse, and provide a platform for investment in new generation and transmission.[7]

681-A, 71 Fed. Reg. 68,440 (Nov. 16, 2006), *order on reh'g*, Order No. 681-B, 74 Fed. Reg. 13,103 (Mar. 26, 2009).

[6] *See* Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 73 Fed. Reg. 64,100, PP 4, 277-309 (Oct. 28, 2008), *order on reh'g*, Order No. 719-A, 74 Fed. Reg. 37,776 (July 29, 2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

[7] *Id.*, P 278.

It would be an exceedingly incongruous result if PJM's capacity-auction process were construed in the teeth of these Congressional and FERC policies to preclude generators and load-serving entities from entering into long-term capacity arrangements to hedge against the price volatility of PJM's annual capacity auctions. Yet that is the implication of the district court's holding, which rests on its finding that a generator cannot receive a stable, long-term contract price for capacity sales in the PJM region, because FERC supposedly "has fixed the price for wholesale energy and capacity sales in the PJM Markets as the market-based rate produced by the auction processes approved by FERC and utilized by PJM." JA 292.

II. Maryland was not preempted from directing utilities to enter into long-term capacity agreements.

As noted above, the FPA applies to "the sale of electric energy at wholesale in interstate commerce" and gives FERC jurisdiction over all facilities used for such sales. 16 U.S.C. § 824(b)(1). Absent a specific provision, however, the FPA "shall not apply to any other sale of electric energy," and FERC "shall not have jurisdiction ... over facilities used for the generation of electric energy or over facilities used in local distribution …." *Id.* "Congress by these terms plainly was trying to reconcile the claims of federal and of local authorities and to apportion federal and state jurisdiction over the industry." *Conn. Light & Power Co. v. FPC*,

324 U.S. 515, 531 (1945). To be sure, the FPA occupies a field; but Congress was careful to delineate the limits of that field. "Need 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. Conserv. & Dev. Comm'n*, 461 U.S. 190, 205 (1983).[8]

The district court acknowledged that Maryland retained the responsibility for siting and construction of power plants. JA 283–285. But it reasoned that Maryland must exercise this responsibility without interfering with FERC's exclusive authority to regulate wholesale sales of electricity in interstate commerce. JA 286, 310. In this instance, it held that the MPSC's order was preempted because it set the FERC-jurisdictional wholesale price that CPV Maryland will receive for its sales of capacity in PJM. JA 292, 310.

Appellants argue that FERC does not have jurisdiction over the CPV Maryland contracts approved by the MPSC. CPV Br. at 30–34; MPSC Br. at 16. But even if these contracts establish wholesale prices subject to FERC's jurisdiction, the MPSC still has acted well within the authority reserved to it by the

[8] *See New York v. FERC*, 535 U.S. 1, 24 (2002) (noting traditional subjects of state authority over retail utilities identified by FERC, "including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM [demand-side management]; authority over utility generation and resource portfolios; and authority to impose nonbypassable distribution or retail stranded cost charges").

FPA. In particular, the MPSC did not establish any wholesale prices contrary to any FERC tariff.

A. The FPA allows Maryland to direct utility companies under its jurisdiction to enter into the challenged contracts.

The jurisdiction that the FPA preserves for state and local regulators is broad enough to encompass the MPSC's actions in this case. When FERC regulates the rates for interstate wholesale electric energy under the FPA, it regulates the sales and the public utlity sellers; in most instances, it does not directly regulate the purchases or the purchasers. Thus, it is well established that the FPA allows state and local regulators, in exercising their jurisdiction over retail rates, to examine the question whether it was prudent for a wholesale buyer to purchase at a FERC-regulated rate given the available alternatives, and if not, how much of the purchase price should be disallowed from the retail rates charged by the buyer. *See Ky. W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 837 F.2d 600, 606–09 (3rd Cir. 1988); *Pike County Light & Power Co. v. Pa. Pub. Util. Comm'n*, 465 A.2d 735, 738 (Pa. Commw. 1983); *Narragansett Elec. Co. v. Burke*, 381 A.2d 1358 (R.I. 1977); *Cent. Vt. Pub. Serv. Corp.*, 84 FERC ¶ 61,194 at 61,974 (1998). While a state cannot review the reasonableness of the rate set by FERC, it may determine whether it is in the public interest for the wholesale purchaser whose retail rates it regulates to pay a particular FERC-set wholesale rate in light of its purchase

alternatives. "[I]t might well be unreasonable for a utility to purchase unnecessary quantities of high-cost power, even at FERC-approved rates, if it had the legal right to refuse to buy that power." *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 374–75 (1988) (dicta).[9]

Stated more generally, the FPA preserves the authority of state regulators to oversee their regulated retail utilities' purchasing decisions in FERC-regulated wholesale markets. Thus, without running afoul of the FPA, a state can require a utility whose rates it regulates to enter into a long-term bilateral wholesale purchase agreement rather than purchase in the wholesale markets operated by an RTO, if the governing FERC tariffs allow wholesale purchasers that choice.

That is, at most, what the MPSC did here. As noted, there are two, parallel FERC-regulated mechanisms for sales of capacity in the PJM region—the bilateral market and the PJM auction. The FPA and the governing FERC tariffs allowed the MPSC to determine that long-term bilateral contracts voluntarily executed by the generation developers provided a more stable and reasonable mechanism over the

[9] The exception to this rule is when FERC sets, or approves a tariff that sets, both the price and the quantity of the transaction, leaving no room for a state regulator to oversee the purchasing decisions of its utilites. *See Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47–51 (2003); *Miss. Power*, 487 U.S. at 372-74; *Appalachian Power Co. v. Pub. Serv. Comm'n of W.V.*, 813 F.2d 898 (4th Cir. 1987). But FERC has imposed no such requirement here. Load-serving entities do not have to satisfy their capacity requirements exclusively from purchases made on their behalf by PJM in its centralized auction; they may use self-supplied capacity resources they own or purchased in the bilateral market. *See supra* section I.B.

long term for Maryland retail ratepayers to pay for needed capacity resources than exclusively relying on PJM to purchase capacity in annual auctions at more volatile prices and then charge the costs to Maryland's utilities. In directing its regulated utilities to enter into these contracts, the MPSC acted within its authority and consistent with the governing FERC tariffs.[10]

B. Maryland has not established wholesale prices in violation of the FPA.

The district court rested its preemption holding on its finding that the MPSC had set or established a contract price that CPV Maryland would receive for its sales of capacity in the PJM auction. JA 292, 310. But the MPSC did not set or establish the contract price that CPV Maryland would receive, and its actions did not violate any FERC tariff or order.

As the district court found, CPV Maryland proposed its prices in the state-regulated procurement process, and the MPSC chose from among these proposals. JA 265–266. The state did not compel CPV Maryland to offer or to accept any particular price. Under the state's procurement process, a generator could propose any price it wanted and, until it executed an agreement, could walk away if

[10] The analysis does not change because the MPSC ordered that the payments to (or rebates from) CPV Maryland are to be recovered in a surcharge to a particular class of retail electric customers. JA 1335. That choice is a rate-setting matter within Maryland's authority over "all other sales" and "local distribution" reserved in the FPA.

dissatisfied with the price or terms the MPSC demanded. As the district court notes, CPV Maryland "configured and proposed the contract price to the PSC as part of its proposal, and the PSC adopted and accepted CPV's contract price in the Generation Order." JA 289. *See also* JA 294 (CPV "configure[d] the contract price submitted to and accepted by the PSC"). That is a far cry from the MPSC fixing or establishing the price.

Moreover, the MPSC's actions were fully consistent with the governing FERC tariff. If, as the district court found, these contracts established a wholesale price subject to FERC's exclusive jurisdiction, then CPV Maryland's market-based rate tariff authorized it to sell capacity in a bilateral contract at a negotiated price. By authorizing and directing the electric distribubtion companies to enter into the contracts at the price that CPV Maryland had proposed and the MPSC accepted, the MPSC did not "set" the contract price, JA 290, much less "an out-of-market price," JA 310, in violation of the FPA or the governing FERC tariffs.

The district court noted, correctly, that the MPSC order and the challenged contracts required CPV Maryland to offer its capacity in the RPM auction and clear the auction. JA 289. But in so doing, the MPSC and the contracts did not operate outside the PJM tariff—they operated in accordance with it. If CPV Maryland's capacity cleared the RPM auction—as it did in the 2012 auction—the generator would receive the RPM clearing price for the sale of its capacity, and

PJM would charge Maryland load-serving entities their share of the cost of that capacity and all other capacity clearing the auction. If CPV Maryland did *not* participate in and clear the RPM auction, however, PJM would have to acquire other capacity instead, and it would pass through those costs to PJM load-serving entities, including those in Maryland. Thus, the requirement that CPV Maryland participate in and clear the RPM auction avoided having Maryland ratepayers pay for capacity that did not benefit them under the PJM tariff.

By providing a long-term price hedge against the volatility of RPM auction prices, both for CPV Maryland and for Maryland ratepayers, the contract payments (or rebates) functioned like any long-term wholesale power contract with a fixed rate. *See Morgan Stanley*, 554 U.S. at 551. The RPM structure approved by FERC accommodates that result. *See supra* Section I.B.

III. The theory of the district court's decision is inconsistent with the FPA and violates the filed rate doctrine.

FERC's exclusive authority over rates for interstate wholesale sales of electric energy has several consequences, which together have come to be known as the "filed rate" doctrine. First, the parties to a transaction are bound by the rate filed with or fixed by FERC. The doctrine thus "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal

regulatory authority." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (*Arkla*).[11] Second, FERC itself has "no power to alter a rate retroactively." *Id.* at 578. Third, the filed rate is binding on state and federal courts. *Miss. Power*, 487 U.S. at 371. Fourth, under principles of federal preemption, the filed rate is binding on state utility regulators. *Id.* at 372; *Nantahala*, 476 U.S. at 963–66. "The considerations underlying the doctrine … are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." *Arkla*, 453 U.S. at 577-78 (internal quotation omitted). All courts of appeals that have addressed the question have applied the filed rate doctrine to FERC market-based wholesale electric tariffs and rates.[12]

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[11] *Arkla* concerned the Natural Gas Act, 15 U.S.C. §§ 717–717z . But as the Court noted there, the relevant provisions of that act and the FPA are substantially identical. 453 U.S. 577 n.7.

[12] *See Utilimax.com, Inc. v. PPL EnergyPlus, LLC*, 378 F.3d 303, 307–08 (3d Cir. 2004); *Simon v. Keyspan Corp.*, 694 F.3d 196, 204–08 (2d Cir. 2012); *Pub. Util. Dist. No. 1 of Grays Harbor County v. IDACORP Inc.*, 379 F.3d 641, 650–52 (9th Cir. 2004); *Town of Norwood v. New Eng. Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000). *See also Tex. Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 509–10 (5th Cir. 2005) (applying filed rate doctrine to state-regulated wholesale market-based rate). While the filed rate doctrine bars the claims in this case, amici curiae are not arguing that the doctrine bars antitrust claims for damages or injunctive relief concerning FERC market-based rates. *See Simon v. Keyspan*, 694 F.3d at 204–08 (noting issue but holding antitrust claim was barred). This case does not present that issue, since the plaintiffs-appellees assert claims arising under traditional administrative and utility law. The district court noted that this case is distinguishable from *Dynegy* because it does not involve any allegation of seller

This case involves only the third prong of the filed rate doctrine; the fourth prong is not implicated because the MPSC's actions were consistent with the governing FERC tariffs. *See supra* Section II. But the district court failed to recognize that the FPA prohibits it from entering a judgment that declares contracts to be "illegal and unenforceable," JA 349, on the ground that they contain FERC-jurisdictional rates that *the court* finds to be unlawful. The filed rate doctrine plainly prohibits the district court from determining that a FERC-jurisdictional contract price is unlawful under the FPA because another FERC tariff governs the sale.

In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), the Supreme Court held that because Congress in the FPA gave FERC's predecessor, the Federal Power Commission, the authority to determine the reasonableness of wholesale electric rates, a litigant "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Id.* at 251. Accordingly, "the right to a reasonable rate is the right to the rate which the Commission files or fixes, and … except for review of the Commission's orders, the courts can assume no right to a different one on the

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misconduct or violation of a FERC market-based rate tariff. JA 307–308. But that distinction *strengthens* the argument for applying the filed-rate doctrine here.

ground that, in its opinion, it is the only or the more reasonable one." *Id.* at 251-52. Yet that is precisely what the district court did here.[13]

The district court's sole basis for finding federal preemption was its determination that the only lawful price for capacity sales was the PJM auction price. The court held that MPSC's order established a wholesale price that "is determined outside of the auction mechanisms approved by FERC and utilized by PJM," while FERC "has fixed the price for wholesale energy and capacity sales in the PJM Markets as the market-based rate produced by the auction processes approved by FERC and utilized by PJM." JA 292. The court held that the MPSC's order was preempted because it set "an out-of-market price" for sales of capacity by CPV Maryland. JA 310.

Thus, the theory that the district court employed to find federal preemption is itself inconsistent with the federal statute and FERC's regulatory scheme. If, as the district court held, these contracts established rates subject to FERC's exclusive jurisdiction, then the court could not declare the contracts "illegal and unenforceable," JA 349, on the ground that their rates depart from other FERC-jurisdictional rates for these sales, JA 292, 310. Such a declaration would infringe

[13] FERC's orders under the FPA are subject to exclusive judicial review in the courts of appeals. 16 U.S.C. § 825*l*. Such orders cannot be collaterally attacked in other litigation. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-37 (1958).

on "the exclusive powers of the Commission to determine what those rates are to be." *Montana-Dakota Utils.*, 341 U.S. at 250. While the FPA requires that all wholesale rates be just and reasonable, "the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce." *Id.* at 251. The district court could not make its own determination of which of these rates was lawful under the FPA. Therefore, the district court should have dismissed the complaint for failure to state a claim upon which relief could be granted.[14]

IV. The district court's decision potentially threatens legitimate wholesale contracting practices of public power utilities and electric cooperatives.

Maryland's policy concerns, which led it to seek long-term agreements with generator developers to facilitate the development of clean, efficient new generation capacity in the state, are hardly unique to Maryland. If they have not done so already, other states can be expected to consider adopting similar kinds of programs.

[14] The complaint requested that the court determine the lawfulness of the challenged contract rates under the FPA as the predicate for finding preemption. JA 278, 286. Under the FPA, however, that determination is committed to FERC's exclusive jurisdiction. Thus, even if the district court generally could assert jurisdiction over a complaint alleging federal preemption, JA 308, the complaint in this case did not state a preemption claim upon which relief can be granted. *See Montana-Dakota Utils.*, 341 U.S. at 249–50 (finding no federal cause of action). Finally, there is no basis for the district court to stay this action while it refers the FPA questions to FERC; any relief for appellees lies at FERC, whose orders are reviewable in a court of appeals. *See supra* n.13.

A 2012 study by APPA shows the importance of stable, long-term financial arrangements to the construction of new power plants. *See* American Public Power Association, *Power Plants Are Not Built On Spec* (Mar. 2012) (available at www.publicpower.org/files/PDFs/PowerPlantsArenotBuiltonSpecMarch2012%5F1331649529309%5F2.pdf). This study found that the great bulk of new generation capacity completed in the Nation in 2011 was built by developers who had long-term financial arrangements in place—either (1) the developer had a long-term contract with a utility that was purchasing the power to serve its customers, or (2) the developer was a vertically integrated utility building capacity to supply power to its customers. *Id.* at 1. Only two percent of the new generation project capacity completed in 2011 was built for shorter-term, market sales such as in centralized RTO capacity auctions. *Id.* The most recent results of the Base Residual Auction (for delivery in 2016/2017) do not appear to be that stark, but they still show that load-serving entities continue to use self-supplied capacity resources in PJM.[15]

Given the importance of long-term arrangements for the financing of new generation—and the fact that Congress and FERC policy have supported long-term

[15] Of the generation capacity that requested and was granted exemption from PJM's "minimum offer price rule" and then cleared the market, 71% received a "Competitive Entry Exemption" and 29% a "Self-Supply Exemption." *See* PJM, *2016/2017 RPM Base Residual Auction Results* 4 (available at http://pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2016-2017-base-residual-auction-report.ashx). It is unclear whether this is a shift or an anomaly.

power contracting by load-serving entities, *see supra* Section I.C—the district court's decision is especially troubling. Unless it is reversed, national energy policy may be frustrated.

If other states in PJM or in the other RTOs with similar capacity auctions adopt policies resembling Maryland's, they will likely face similar lawsuits.[16] An appeal is pending in the Third Circuit involving issues similar to this case arising from a complaint by generators in PJM against New Jersey's utility commission.[17] Moreover, a complaint recently filed in the District of Connecticut cites the district court's decision here and the decision on appeal in the Third Circuit.[18] And a complaint has been filed in the District of Massachusetts against that state's utility commissioners alleging that their approval of a utility's procurement of capacity from a planned wind-power project was preempted by the FPA.[19]

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[16] ISO New England Inc. and the New York Independent System Operator, Inc., conduct similar capacity auctions. *See* FERC, *Centralized Capacity Market Design Elements*, Commission Staff Report AD13-7-000 (Aug. 23, 2013) (available at www.ferc.gov/CalendarFiles/20130826142258-Staff%20Paper.pdf).

[17] *See PPL EnergyPlus, LLC v. Solomon*, Nos. 13-4330 *et al.* (3d Cir. appeal docketed Nov. 25, 2013).

[18] Complaint for Declaratory and Injunctive Relief for Violations of the Supremacy Clause of the U.S. Constitution, the Federal Power Act and the Public Utility Regulatory Policies Act of 1978, *Allco Finance Ltd. v. Esty*, No. 13-1874 (D. Conn. filed Dec. 18, 2013).

[19] Complaint for Declaratory and Injunctive Relief, *Town of Barnstable v. Berwick*, No. 14-10148 (D. Mass. filed Jan. 21, 2014).

The MPSC's order did not apply to Maryland's public power systems or electric cooperatives. JA 1308, 1335–1336. Indeed, unlike Maryland, most states do not regulate the rates of public power systems or cooperatives. The law in those states leaves the public power or cooperative utility's resource-procurement decisions largely in its own hands, subject to the oversight of the entity's governing body, such as city council, municipal utility board, or a cooperatives' elected board of directors.

As the results of APPA's 2012 study indicate, public power systems and electric cooperatives are developing new generation resources to serve their customers' load by direct ownership and by long-term bilateral power purchase contracts. *See* APPA, *supra*, at 8 (37 percent of new capacity in study was under public power or cooperative ownership or contracts). Thus, a municipal joint action agency, which is organized to provide wholesale power to its several municipal distribution utility members, or a G&T cooperative, which provides wholesale power to its distribution-cooperative members, may have long-term contracts with its members obligating them to pay for their allocable shares of a new power plant's costs of providing service. In addition, public power systems and cooperatives—including public power systems and cooperatives in RTO regions with centralized capacity auctions—regularly purchase wholesale capacity and energy under long-term bilateral contracts.

Amici curiae do not concede that such arrangements would be held to be preempted by the FPA if the district court's decision is affirmed. But public power systems and cooperatives that build or acquire generation capacity supported by long-term contracts could face the prospect of expensive, time-consuming litigation resembling this case and the others now pending in other jurisdictions, accusing them of setting wholesale prices outside the RTO capacity markets, distorting RTO price signals, or of subsidizing market entry by new generators.

As shown above, the district court had no basis for finding the MPSC's order preempted in this case. Federal courts also have no basis for making similar preemption findings regarding the resource-procurement practices of public power or cooperative utilities, which generally are entrusted to their business judgment by the FPA and by state and local law. Amici curiae urge the Court to halt the efforts of power generators to enlist federal judges in erecting spurious barriers to entry in the wholesale power markets.

CONCLUSION

The judgment below should be reversed, and the district court should be directed to dismiss the action.

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,847 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The word count of Microsoft Word 2007 was used, including footnotes.

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