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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PPL ENERGYPLUS, LLC, *et al.*,
Plaintiffs-Appellees,
v.
DOUGLAS NAZARIAN, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland
(Marvin J. Garbis, J.)

BRIEF OF MARYLAND ENERGY ADMINISTRATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS FOR REVERSAL

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

The Maryland Energy Administration ("MEA") is an agency of the State of Maryland established by the General Assembly to coordinate and advance the State's energy policies.[1] Md. Code Ann., State Gov't § 9-2002; *see id.* § 9-2002(b) ("With the approval of the Governor, the Administration shall implement and administer conservation, allocation, or other energy programs or measures under State law or federal laws, orders, or regulations."). Although by law MEA is independent from the Maryland Public Service Commission ("PSC"), MEA works with the PSC to ensure that Maryland's residents have access to adequate, clean, affordable energy.

MEA's duties include a broad range of actions to "establish or carry out sound energy policies or practices, including energy management and energy conservation." Md. Code Ann., State Gov't § 9-2003(1). As part of its statutory mission, MEA has taken the lead in supporting energy efficiency, conservation, and the development of clean and renewable energy projects, including wind, solar, biomass, and geothermal systems. In furtherance of the State's energy policies, MEA provides grants, loans, and other incentives to "invest in the promotion, development, and implementation" of "cost-effective energy efficiency

[1] Rule 29(a) of the Federal Rules of Appellate Procedure authorizes a state to "file an amicus-curiae brief without the consent of the parties or leave of court."

and conservation" measures and "renewable and clean energy resources." State Gov't § 9-20B-05(f)(1), subparagraphs (i) and (ii). These financing tools and incentives can, when necessary, allow renewable energy facilities to sell energy below their production costs, thereby fostering the growth of the nascent renewable energy industry by enabling it to compete with traditional power generators.

The district court's decision in this case directly and materially impairs Maryland's ability to ensure that its citizens have adequate energy resources, a right and responsibility of the states that has long been recognized and preserved by Congressional enactments, as interpreted by the Supreme Court. By departing from the guidance found in both statute and applicable precedent, the lower court's decision threatens to disrupt the well-established balance of federal and state authority over the regulation of energy production and distribution. Specifically, the decision impinges on the states' heretofore unquestioned authority to determine how much and what type of energy is needed to meet local requirements, and how best to fill that need. As explained more fully in the appellants' briefs, such an intrusion upon the states' essential role conflicts with controlling precedent and cannot be justified by the record now before this Court. If left standing, the district court's decision is likely to encourage further challenges aimed at impeding the

states' efforts to anticipate and address their residents' energy needs.[2] MEA is especially concerned that, unless corrected by this Court, the preemption analysis adopted by the district court will hinder Maryland's ability to support and advance new energy sources, which are indispensable in the State's ongoing initiatives to secure reliable and affordable energy for its citizens.

ARGUMENT

THE DISTRICT COURT'S DECISION THREATENS MARYLAND'S ABILITY TO DEVELOP ESSENTIAL NEW ENERGY SOURCES.

The lower court's decision is particularly troubling to the MEA because its analysis might be construed to set no limit on what actions by the State, other than the "Contract for Differences" arrangement involved in this case, might conceivably be deemed to "*ultimately* . . . establish the price for wholesale energy," as the district court phrased it (JA 292 (emphasis added)), and thereby run the risk of being declared preempted under the Federal Power Act ("FPA"), 16 U.S.C. §§ 824-824w (2012). That is, the district court's reliance on the potentially limitless and malleable qualifier "ultimately" creates uncertainty that is likely to encourage further attacks on state initiatives to develop renewable energy resources.

[2] A similar decision from the District of New Jersey is on appeal to the United States Court of Appeals for the Third Circuit. *See PPL Energy Plus, LLC, et al., v. Solomon, et al.*, Nos. 13-4330, 13-4394, and 13-4501 (consolidated). The briefs of the parties and *amici* in that appeal (available from PACER) address some of the same issues that are raised in this appeal. Notably, several of those briefs take the position that the arrangement at issue in New Jersey was, in effect, a "contract for differences," the same financing tool at issue in this appeal.

In the short time since the district court issued its decision on September 30, 2013, new lawsuits challenging state efforts to promote renewable energy have been filed in two other federal courts. In December 2013, a complaint raising a federal preemption challenge to a Connecticut program to support the development of renewable energy sources, such as wind and solar power, was filed in federal district court in Connecticut. *See Allco Finance Ltd. v. Esty*, No. 13-1874 (D. Conn.). More recently, a similar federal complaint was filed in Massachusetts challenging state support of an offshore wind development project, again asserting that the FPA preempts state authority to proceed. *See Town of Barnstable v. Berwick*, No. 14-10148 (D. Mass.) (complaint filed Jan. 21, 2014). At issue in *Town of Barnstable* is a long-term agreement to purchase power that operates in ways that are similar to the CFD in this case. The *Town of Barnstable* asserts that Massachusetts ran afoul of the FPA merely by requiring an electric utility to enter into a long-term contract requiring the utility to purchase power from a wind farm developer.

While these suits are only the two most recent examples, the state initiatives targeted there are precisely the type of programs that the MEA supports to provide the new energy resources that will supply Maryland's power needs in the future. The success of these programs necessarily depends on increasingly sophisticated financing arrangements designed to encourage the development of renewable

energy and to ensure that Marylanders will have an adequate supply of energy. The state programs can take many forms, which include but are not limited to demand response programs, energy conservation and efficiency efforts, developing micro-grids, and developing new sources of clean and renewable generation. Such programs could be at risk of preemption under the lower court's analysis of what might "ultimately" affect the wholesale price of energy.

Thus, if left uncorrected, the lower court's decision threatens to hamstring Maryland efforts to secure necessary new energy sources. It needlessly poses this obstacle to the public interest based on a misconceived notion of federal authority under the FPA, one that FERC itself has neither endorsed nor sought to assert in this matter. As the district court acknowledged, though FERC has reviewed CPV's Application for Market-Based Rate Authorization, "FERC has not passed judgment, one way or another, on . . . whether the CfD is a 'FERC-jurisdictional' contract, or any other potential issue within its regulatory jurisdiction." (JA 306.) Nor has Congress seen fit to extend FERC's jurisdiction under the FPA at the expense of the states in the way contemplated by the district court decision. As explained in the legal arguments advanced by appellants CPV and PSC, as well as the *amici* supporting them, the district court's judgment constitutes an unwarranted and unjustified intrusion on state authority. It is a needless departure from the

FPA's balancing of federal and state authority, and neither state nor federal interests will be well served by its consequences.

CONCLUSION

For the reasons stated, the district court's judgment should be reversed.

Respectfully submitted,

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February 11, 2014

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed R. App. P. 32(a)(7)(B) because this brief contains 1223 words, excluding parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this

brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point, Times New Roman.

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CERTIFICATE OF FILING AND SERVICE

I certify that, on the 11th day of February 2014, I electronically filed with the Clerk of the Court via CM/ECF System the foregoing Brief of Maryland Energy Administration as *Amicus Curiae*.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

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I certify that on Feb 11, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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