**Nos. 13-2419, 13-2424**

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# In the United States Court of Appeals for the Fourth Circuit

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

and

CPV MARYLAND, LLC,
*Intervenor-Appellant*.

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Appeal from Judgment of the United States District Court for the District of Maryland, No. 1:12-cv-01286-MJG, Hon. Marvin J. Garbis, U.S.D.J.

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## BRIEF OF THE MARYLAND OFFICE OF PEOPLE'S COUNSEL AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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## Table of Contents

## Table of Authorities

***Cases***



***Statutes***

***Administrative Orders***



***Other Authorities***

## I. Interest Of Maryland Office Of People's Counsel And Authority To File

The Office of People's Counsel ("OPC") is the statutory representative of the interests of residential and noncommercial utility customers in all matters or proceedings over which the Maryland Public Service Commission (the "Commission" or "PSC") has original jurisdiction, "including a proceeding on the rates, service, or practices of a public service company." Md. Pub. Utilities Code Ann. (hereinafter, cited as "MPUA") § 2-204(a)(2) (2010). In addition, OPC is authorized to appear before any federal or State unit "to protect the interests of Maryland residential and noncommercial customers." MPUA § 2-205(b). In appearances before the PSC and the courts on behalf of residential and noncommercial customers, OPC is specifically empowered with all the rights of counsel for a party to the proceeding. MPUA § 2-205(a). Accordingly, OPC represents and protects the interests of all Maryland residential and noncommercial utility consumers in federal and state administrative and judicial proceedings.

All parties to this appeal have consented to OPC filing a brief as *amicus curiae*.[1]

OPC was an active participant in the proceedings in PSC Case No. 9214, which resulted in the Commission order that is being challenged by the plaintiffs. OPC provided comments to the Commission on the need for new generation in

[1] Because all parties have consented to OPC filing this brief, OPC has not filed a motion for leave to file. Fed. R. App. P. 29(a) (2013).

Maryland, and the effect that the "Contract for Differences" with CPV Maryland, LLC ("CPV") would have on the electricity capacity market in Maryland. JA 1314-1315. OPC appeared at the Commission hearing held in the matter on January 31, 2012, and responded to questions from the Commission. OPC has filed an appeal of the Commission order in Maryland State court and that appeal is now pending before the Maryland Court of Special Appeals.[2] OPC also participated in the Federal Energy Regulatory Commission ("FERC") proceedings cited in this brief.

OPC sought leave to participate as an *amicus* before the District Court in this case, and offer information and argument on the potential effects that the declaratory and injunctive relief requested by plaintiffs would have on residential electric utility ratepayers within Maryland and on the availability of safe, adequate and reliable electric generation to serve their needs.[3] Additionally, OPC sought leave to provide argument on the consistency of the Commission's action with the statutory and historic role of the State of Maryland in planning generation resources for reliability and environmental purposes, and consistency with

[2] The order has also been appealed by the three Maryland utilities that are the subject of the order as well as one generating company and was upheld by the Maryland Circuit Court for Baltimore City. *In Re Calpine Corp.*, No. 24-C-12-002853 (Baltimore City Cir. Ct. October 4, 2013. The appeal of the Circuit Court decision has been docketed as *Md. Off. of People's Counsel v. Md. Pub. Serv. Commn.*, No. 1738, Sept. Term 213 (Md. Ct. Spec. App. 2013).

[3] *Brief In Support Of Motion by Maryland Office of People's Counsel To Participate As Amicus Curiae*, at 1 (June 26, 2012).

principles of interstate commerce.[4] Further, OPC sought leave to explain the Commission's Order's benefits to Maryland residential ratepayers and the legitimate state interests that it serves.[5] On June 28, 2012, the District Court issued an order granting OPC status in the case as an *amicus curiae* intervenor.

## II. The District Court's Decision

This case was brought by three companies that own generating plants in the region administered by PJM Interconnection, L.L.C. ("PJM"). The plaintiffs complained that decisions made by the Maryland Public Service Commission would result in the development of a new plant in the region and that this additional competitor in the wholesale electricity market had depressed, and would depress, certain market prices. JA 65. They asserted that the decisions of the Commission violated the Supremacy Clause of the United States Constitution, on both field preemption and conflict preemption grounds, and the Commerce Clause. JA 66-70. The District Court entered an Order finding that the Commission's decisions violated the Supremacy Clause on field preemption grounds. JA 311. The District Court found that the Commission's decision did not violate the Commerce Clause and declined to make a ruling on the plaintiffs' conflict preemption claim. JA 311-312.

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[4] *Id*.
[5] *Id*. at 1-2.

The Commission decision challenged by the plaintiffs was issued in *Whether New Generating Facilities Are Needed To Meet Long-Term Demand For Standard Offer Service*, Maryland Public Service Commission Case No. 9214. The primary order from that case was Order No. 84815, which was issued on April 12, 2012 (the "PSC Order"). JA 1307-1336. The PSC Order directed three of Maryland's electric distribution utilities to enter into contracts with CPV providing financial incentive to CPV to build a new electric generating plant that would be interconnected to a portion of the regional electricity grid known as Southwest Mid-Atlantic Area Council ("SWMAAC"). JA 1335-1336.

The PSC Order was issued after the Commission heard, over a multiyear process that included a number of docketed cases, evidence and argument on the ability of the electric grid serving Maryland to provide adequate and reliable service at various times in the future. JA 250-267. OPC submitted comments and appeared at the Commission's hearings to argue in support of the Commission pursuing action to encourage the development of new generation resources that were necessary to maintain adequate reliability for Maryland customers. JA 1314-1315. Based on this record, the Commission made a finding that in order to satisfy its statutory duty under Maryland law to ensure reliable electric service, it needed to take action to encourage the development of additional electricity supply that would be available to serve Maryland customers. JA 1329-1330. To accomplish

that goal, the Commission ordered certain Maryland utilities to issue a request for proposals ("RFP") to enter into a twenty-year contract for differences ("CfD") with CPV. After settlement of various payment obligations, the contract would result in CPV receiving a set contract price from the utilities for the electricity supplied from the new plant and the utilities receiving certain short-term market payments for the electricity supplied from the new plant (the contracts that the three Maryland utilities have entered into with CPV are referred to herein as the "CPV Contract"). JA 263-265. The utility payments under the contract would be based on prices stated in the contract. These payments would be offset by the revenues the utilities would receive, which would be based on short-term market prices. The difference, which could be positive or negative, would be passed on by the utilities to a portion of its customers as a charge or credit on their bills. JA 1332-1333.

The District Court found that, because the PSC Order "establishes the price ultimately received by CPV" for wholesale energy and capacity sales, JA 310, the Order encroached on "an exclusive federal field" in violation of the Supremacy Clause. JA 311. The Court also found that 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. According to the District Court, the Order encroaches on FERC's exclusive domain because CPV will be "compensated according to the 'contract price' set by

the PSC in the Generation Order and not according to the market-based rates set in the FERC-approved PJM Markets." *Id*.

## III. Summary of Argument

In the decision that was the genesis for the case at bar, the Commission used its regulatory authority over local Maryland utilities to protect the public safety, health and welfare of Maryland citizens by taking action to ensure sufficient generating capacity is available to provide reliable electricity service. This case presents an issue of critical importance to electric customers in Maryland. All states regulate aspects of electric generation supply because of the importance of reliable electricity service to all customers. The District Court's decision finds that the Commission's action, which, at its core, was a traditional exercise of regulatory authority over local electric utilities, violates the Supremacy Clause of the United States Constitution based on aspects of the Commission's actions that could arguably be applied to many other regulatory actions that states have taken for decades and continue to take in states that have restructured their electricity industry as well as those that regulate electric utilities in a more traditional manner. The District Court's decision is in error because it misinterprets federal regulatory jurisdiction under the Federal Power Act ("FPA")[6], improperly expanding it to cover Maryland's exercise of traditional state regulatory authority.

[6] 16 U.S.C. §§ 824 to 824w.

## IV. Argument

### A. The States Have Authority To Regulate Generation Facilities and Public Utilities.

#### 1. The Reasoning Of The District Court Threatens Many Routine Exercises of State Authority.

For over a century, states have exercised authority over the resource and procurement decisions of local utilities to protect the public interest and advance a variety of public policies—and the states continue to do so today.[7] The PSC Order, at its heart, is an order requiring three local Maryland utilities to make a particular procurement decision – to enter into the CPV Contract.[8] There are many options available to procure or produce electricity to serve retail customers. The decisions that are made among these choices can have significant economic and environmental impact. The state's primary interest in regulating these decisions is to ensure that the reliability of electricity service is maintained by ensuring that there are adequate resources available to serve the needs of customers within the state. States also influence procurement decisions in order to achieve the lowest cost for customers while maintaining price stability. In addition, states seek to encourage conservation and the development of renewable resources for both

[7] *See e.g.*, Energy Bar Assn, *Report Of The State Commission Practice & Regulation Committee*, 30 Energy L.J. 765, 765-828 (2009) (summarizing the ongoing regulation of public utilities by State government agencies).

[8] If the CPV Contract is not a procurement of a wholesale electricity product, then this case is easily resolved because the Commission did not act within a federally regulated field. 16 U.S.C. § 824(a).

economic and environmental benefits. These exercises of state authority are crucial because utilities' interests in resource and procurement matters are not always aligned with those of the public.

The reasoning behind the District Court's decision threatens these state actions to protect the public interest and advance public policies. While the plaintiffs complain that the PSC Order will affect prices in the wholesale market by changing the supply and demand fundamentals of the market, state regulatory actions regularly have such an effect. Further, the state programs that advance these policies often involve contracts for electricity products that determine the ultimate compensation that the resource owner will receive for providing the electricity product. Thus, the District Court's reasoning could arguably be applied to a wide variety of actions falling within traditional state jurisdiction.

The most important of these policies and interests is the public's interest in reliable electricity service. The state has a primary concern of ensuring that there is sufficient electricity supply to meet the needs of its citizens. The District Court accepted "the position that the State of Maryland has a legitimate interest and federally permissible role in securing an adequate supply of electric energy for Maryland residents in the present and in the future." JA 284. This is the interest and role that the Commission acted under in this case. It is vital that the state have the ability to carry out this role because decisions by individual customers cannot

determine whether a commercial-size generating station is built and regulatory authority over these procurement decisions does not exist elsewhere. As the District Court recognized, FERC does not have the authority to order the construction of new generation; "that authority is retained by the states under the FPA.". JA 207. Therefore, the state's authority to take action to incent sufficient generation to avoid black-outs and their attendant harms is of vital importance to customers.

States also influence procurement decisions to reduce economic risk for customers in the state by diversifying the mix of resources that serve customers. To that end, states require diversified procurement approaches, directing utilities to include longer-term procurement approaches to promote price stability and reduce the risk of adverse consequences for customers from short term fluctuations in fuel and electricity market prices. As discussed in the following section, the Commission has done just that with respect to procurement for standard offer services ("SOS") customers, who are customers who buy electricity from their local utility.[9] JA 249-250.[10]

In order to achieve both environmental and economic benefits, states have also taken action to encourage the development of renewable power sources and of

[9] MPUA § 7-510(c)(2).

[10] *See also Re Competitive Selection of Electricity Supplier/Standard Offer or Default Service For Investor-owned Utility Small Commercial Customers*, 97 Md.P.S.C. 384, 398-401 (Nov. 8, 2006).

"demand resources," which encourage conservation by reducing demand in lieu of increasing supply. Many states, including Maryland, have laws that require companies selling retail electricity to procure a certain percentage of that power from renewable resources and have established a cap for the additional compensation paid for that renewable power.[11] This is generally known as a renewable portfolio standard (or "RPS"). States have also required local utilities to enter into long-term contracts with developers of renewable resources. [12]

With regard to demand side resources, Maryland, like other states, has required their local utilities to offer programs that compensate, at levels determined by the state, customers for their ability to reduce load on demand.[13] These demand resources can be sold in the wholesale market, increasing supply and affecting wholesale prices.[14] Again, these are exercises of traditional state regulatory authority as recognized by the FPA.[15] However, under the erroneous reasoning of the District Court's decision, it could be argued that all such actions

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[11] MPUA § 7-701 et seq.; *see also* Ivan Gold and Nidhi Thakar, *A Survey Of State Renewable Portfolio Standards: Square Pegs For Round Climate Change Holes?*, 35 Wm. & Mary Envtl. L. & Policy Rev. 183, 184-257 (2010).

[12] Two such efforts in Connecticut and Massachusetts have resulted in federal court complaints claiming that state actions are preempted based on the theory used by the District Court in the instant case. *Alco v. Esty*, No. 13-1874 (D. Conn.); *Barnstable v. Berwick*, No. 14-10148 (D. Mass.).

[13] *Re Baltimore Gas and Electric Company*, 99 Md.P.S.C. 252, 267 (2008).

[14] *Id*.

[15] *See*, *infra*, section IV.C.

would intrude into an exclusively federal area because they "set" or "establish" the price of a wholesale electricity product.

State influence on local utility procurement and resource decisions will (simply by altering supply and demand) result in wholesale prices that are different than what they would have been in the absence of the state action. That established reality is the only harm claimed by the plaintiffs in this case. Further, many of these state actions could be argued to "set" or "establish" price for the resources involved. However, these are traditional exercises of the states' authority to regulate its local utilities. The following section of this brief discusses in more detail the wide variety of ways for local utilities to procure power and their discretion as to how and when to do so. While the sales of electricity that are part of the local utilities' procurement may be regulated by FERC, the states, as recognized by the FPA and FERC, regulate the procurement decisions of the local utilities.

While some states, including Maryland, have changed the manner in which they regulate the electricity business in their states (referred to as "restructuring" or "deregulation"), those states have not ceded their jurisdictional authority over resource and procurement decisions and there has been no expression by Congress of the desire to expand federal regulation of the matters that have traditionally been regulated by the states. Federal and state regulation in the electric industry

continues to co-exist today. For example, other states in the PJM region, such as West Virginia, Virginia, and Indiana, continue to regulate the electric industry in their states in the traditional manner.[16] Those states directly control the level of compensation that companies receive for the generation of electricity by the utilities in their states.[17]

The reasoning behind the District Court's decision could even implicate actions taken by the states that regulate public utilities in a more traditional manner. For example, Virginia has directed its largest investor-owned utilities to join a regional transmission organization. Va. Code Ann. § 56-577 (Westlaw current through 2013 1st Sp. Sess.). Dominion Virginia Power is a PJM member, and it bids generation into the PJM-run capacity and energy markets. *See In re Va. Elec. & Power Co.*, 238 P.U.R.4th 193, 2004 WL 2725171, *2 (Va. S.C.C. Nov. 10, 2004), However, the ultimate compensation received by the utility for the power generated by its plants is established by the Commonwealth of Virginia, through laws passed by its legislature and orders of the State Corporation Commission ("SCC") implementing those laws. *See* Va. Code Ann. §§ 56-585.1 and 56-585.2 (Westlaw current through 2013 1st Sp. Sess.). That compensation, which is paid by Virginia ratepayers, is within the authority of the SCC, and may

[16] Energy Bar Assn, *Report Of The State Commission Practice & Regulation Committee*, 30 Energy L.J. 765, 765-828 (2009); *see also* T. 5-6 (Nazarian, March 5, afternoon session).
[17] *Id.*

be higher or lower than the compensation that the plant would receive solely from the PJM-run auctions. Further, the presence of these plants in the PJM-run auctions influences those auctions, possibly resulting in different prices. Again, it could be argued that the Commonwealth is "establishing" the price for that power. However, these plants operate in the PJM markets under FERC-approved PJM rules. Despite the fact that the Commonwealth establishes the compensation for these plants, it is exercising a traditional state role and is not encroaching on any exclusive federal domain.

The ongoing system of state regulation of buyer-side decisions in states that have not "restructured" co-exists with the PJM market and its FERC-approved rules.[18] The generators in these states are not compensated based on the prices set in PJM-run markets and the investment decisions for those generators are not determined by prices in PJM-run markets. No FERC policy statement, regulation, or order objecting to the states continuing to undertake this type of regulation, even in the context of an RTO wholesale market, has been cited. However, those state decisions impact the level of supply, which impacts the balance of supply and demand in the wholesale markets and impacts prices in those markets.

FERC has implemented rules, particularly the Minimum Offer Price Rule ("MOPR") in the PJM market, that limit the impact of state decisions on wholesale

[18] *Id.*

market prices in circumstances that FERC finds to be of concern for the proper functioning of the wholesale market. JA 842-843.[19] FERC could have (and still could) further limit the impact of such state activities on prices, but has chosen not to do so because these state activities support FERC policies by bringing an additional competitor into the market. JA 889.[20]

All of these state actions are traditional exercises of state authority over generation resources and procurement decisions by local utilities acting as buyers in the wholesale market. The District Court's erroneous conclusion that the PSC Order acts to "set" or "establish" the price for the sale of power in the wholesale markets, leads to the same argument being made about these other traditional exercises of state authority over local electric utilities. Therefore, it threatens to undo many other protections currently afforded customers by state regulation and undo many state policy initiatives regarding conservation and renewable power.

**2. FERC And The Federal Courts Have Recognized That The State Action Taken In This Case Is A Traditional Exercise Of State Authority Over Local Utilities Reserved To The States Under The FPA.**

[19] *PJM Interconnection, L.L.C.* and *PJM Power Providers Group v. PJM Interconnection, L.L.C.*, "Order Accepting Proposed Tariff Revisions, subject to conditions, And Addressing Related Complaint," 135 FERC ¶61,022, P6 (2011) ("FERC 2011 MOPR Order").
[20] FERC 2011 MOPR Order at P175.

FERC itself, and the federal courts, have recognized that states have traditional authority to regulate the decisions of local utilities for resource procurement. The Supreme Court has noted that FERC had recognized the state's traditional authority in adopting its Order No. 888[21] in which FERC required all utilities owning transmission to allow other companies access to their transmission lines to transfer power being sold in interstate commerce.

> Moreover, FERC has recognized that the States retain significant control over local matters even when retail transmissions are unbundled. See, e. g., Order No. 888, at 31,782, n. 543 ("Among other things, Congress left to the States authority to regulate generation and transmission siting"); id., at 31,782, n. 544 ("This Final Rule will not affect or encroach upon state authority in such traditional areas as the authority over local service issues, 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").

*New York v. FERC*, 535 U.S. 1, 24 (2001) (emphasis added).

By requiring the three Maryland utilities to take the procurement action required by the PSC Order, the Commission was exercising its traditional authority

[21] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. *New York v. FERC*, 535 U.S. 1 (2002).

over "utility buy-side … decisions" and its authority over "utility generation and resource portfolios." *Id*. In recognition of this traditional role, FERC has specifically acknowledged state authority to direct utilities to enter into long-term contracts to encourage the development of new generation that will be bid into RPM and capacity markets run by organizations like PJM in other parts of the country.

For the PJM market, FERC has approved a set of rules, called the Minimum Offer Price Rules ("MOPR") that dictate a minimum bid to sell their capacity for certain generating units. The MOPR rules apply to plants, such as the CPV plant at the center of this controversy, that are supported by a long-term contract that was the result of procurement process done under state authority. FERC adopted these rules to allay concerns of some market participants that some plants that had been awarded contracts in such a process would make very low bids into the capacity market and result in unreasonably low prices. In response to these concerns, which were strenuously contested, FERC found that so long as the generation plant that is the subject of a state-sponsored contract is required to bid into the PJM-run markets at offer levels that indicate that the unit, if selected, is cost-effective and, therefore, its entry into the market is economic, the entry of that unit into the market should not be prevented. JA 880.[22] FERC stated that it "believe[s] that

[22] FERC 2011 MOPR Order at P141.

the MOPR that we accept, subject to modifications in this proceeding, including the unit-specific review process proposed in PJM's compliance filing, serves to reconcile the tension that has arisen between policies enacted by states and localities that seek to construct specific resources, and our statutory obligation to ensure the justness and the reasonableness of the price determined in the RPM." JA 910.[23] Further, FERC has found that the MOPR, as approved by FERC in the 2011 MOPR Order, ensures "that the wholesale capacity market prices remain at just and reasonable levels." JA 880.[24] FERC also states that its regulation does not, and is not intended to, "encroach on a state's ability to act within its borders to ensure resource adequacy or to favor particular types of new generation." *Id*.[25]

Instead of finding that the participation of units with contracts like the one resulting from the PSC Order frustrate FERC's policies with regard to the wholesale electricity markets in the PJM region, FERC has expressly found that, with certain regulation in place, this type of state action adds supply to the market, is actually beneficial to the market and FERC's policy goals for the sale of electricity at wholesale, and should not be unreasonably hampered. JA 880.[26] While the PSC Order may be at odds with the way that the plaintiffs, and their

[23] *PJM Interconnection, L.L.C.* and *PJM Power Providers Group v. PJM Interconnection, L.L.C.*, "Order on Compliance Filing, Rehearing, and technical Conference," 137 FERC ¶61,145, P4 (2011).
[24] FERC 2011 MOPR Order at P141.
[25] *Id*. at P142.
[26] FERC 2011 MOPR Order at P141.

advocates and experts, would like the wholesale electricity market to be, it is not at odds with the way that Congress and FERC want the wholesale electricity market to be. Therefore, there is simply no conflict between the PSC Order and federal regulation of the wholesale electricity market.

Electric companies in Maryland have long had the responsibility under state law to provide electricity for retail customers in their service territory. The "restructuring" of the electricity industry in Maryland has not changed that. Prior to electric restructuring, electric companies had the obligation to provide electricity to all the customers in their service territory. After restructuring, electric companies still have obligations to provide electricity. They must provide all the electricity used by a segment of the customers in their service territory known as standard offer service ("SOS") customers. MPUA §7-510(c)(3)(ii)(2) ("On or after July 1, 2003, an electric company continues to have the obligation to provide standard offer service to residential and small commercial customers . . . ."). Additionally, the Commission has authority, which it exercised in this case, to require electric companies to "require or allow an investor-owned electric company to construct, acquire, or lease, and operate, its own generating facilities, and transmission facilities necessary to interconnect the generation facilities with the electric grid, subject to appropriate cost recovery" in order to "meet long-term, anticipated demand in the State for standard offer service and other electricity

supply." MPUA §7-510(c)(6).[27] Maryland's utilities have various approaches to acquiring electricity for their SOS customers. The Commission has reviewed and approved the various approaches taken by the utilities.[28] The utilities subject to the PSC order, which are investor-owned utilities, have been ordered by the Commission to procure power for SOS customers using a series of two-year contracts that are procured in a laddered fashion two times per year.[29] In making this decision, the Commission heard arguments from parties supporting the inclusion of shorter-term contracts in the portfolio as well as longer-term contracts in the portfolio. The Commission approved a portfolio structure for this procurement by balancing interests such as lowest cost, stability of prices, and maintenance of a competitive retail supply market.[30] The contracts in the SOS portfolio establish the compensation that the suppliers will be paid for the electricity they will supply. Just like the CPV Contract, the SOS supply contract prices may be higher or lower than the prices those suppliers could have received

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[27] The order has also been appealed by the three Maryland utilities that are the subject of the order as well as one generating company and was upheld by the Maryland Circuit Court for Baltimore City. *In Re Calpine Corp*., No. 24-C-12-002853 (Baltimore City Cir. Ct. October 4, 2013. The appeal of the Circuit Court decision has been docketed as *Maryland. Off. of People's Counsel v. Md. Pub. Serv. Commn*., No. 1738, Sept. Term 213 (Md. Ct. Spec. App. 2013).

[28] *Re Competitive Selection of Electricity Supplier/Standard Offer or Default Service for Investor-owned Utility Small Commercial Customers*, 97 Md.P.S.C. 384, 387 (Nov. 8, 2006).

[29] *Id.* at 402.

[30] *Id*. at 398-401.

by choosing to sell only through the PJM auctions as opposed to the through the utilities' procurement. Both the PSC Order at the heart of this case and the oversight of procurement of power for SOS are traditional exercises of state authority over its local utilities to further the public interest in its state and are not subject to federal preemption.

### B. The District Court Decision Is Based On An Erroneous Interpretation of FERC Regulation Under The Federal Power Act.

The District Court based its ruling on a finding that 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 This finding is in error because it is incorrect that FERC has "fixed" a price for wholesale energy and capacity in the PJM Markets. FERC's regulatory scheme for wholesale energy and capacity markets allows for there to be many different ways to procure the same product. For example, energy and capacity delivered on a particular day can be procured through PJM-run auctions and would have a price set in those auctions. However, the same energy and capacity, to be delivered on the same day, could have been purchased through a bilateral contract entered into months prior and have a different price that would be set by the contract. The same energy and capacity, to be delivered on the same day, also could have been procured years prior as part of a multiyear deal involving the purchase of power from a particular power plant and have still a different price.

In short, there are countless ways to procure the same energy and capacity being delivered on the same day. The District Court recognized this in the background section of its decision but did not properly incorporate the import of that finding in its conclusions in the case. JA 221 ("Transactions on the PJM markets are not the only permissible FERC-regulated wholesale transactions. Private parties can buy and sell wholesale energy, capacity, and ancillary services outside the PJM markets and thus outside the prices set by PJM in such markets.").

Pursuant to the FPA, FERC regulates these "sale[s] of electric energy at wholesale in interstate commerce . . . ." 16 U.S.C. § 824(b)(1). FERC's regulation of these sales requires that an entity desiring to make such a sale be granted authority by FERC prior to making the sale and that the sale be at a rate that is "just and reasonable." *Morgan Stanley Capital Group, Inc. v. Public. Utility Dist. No. 1*, 554 U.S. 527, 531-32 (2008). However, FERC does not dictate that energy and capacity to be delivered to a certain location on a certain day have a particular price in order to be "just and reasonable." *Id*. at 537. As the District Court recognized, under FERC's regulation, all of the different sales of energy and capacity delivered to the same location on the same day can be "just and reasonable" sales despite that fact that they were for different prices. JA 223.

However, the District Court came to a conclusion that contradicts this basic fact about FERC regulation when it found that "PJM sets the prices received by

generators for sales into the PJM Markets through market-based auction processes that are filed with, and approved by, FERC." JA 287. This statement is incorrect. PJM sets *a* price for generation sales through its markets, but because there are many permissible FERC-regulated ways to sell generation in the market, PJM does not set *the* market price.

This distinction is critical to understanding that CPV's receipt of a different level of compensation for its generation under the CPV Contract than it would receive from PJM-run auctions in the absence of the CPV Contract does not mean that the state is intruding on FERC's exclusive domain. If FERC required that all sales of capacity and energy be made at the prices established in PJM-run auctions, then the CPV Contract would be vulnerable to charges that it produced rates that were not "just and reasonable." However, because FERC allows many different transactions to result in "just and reasonable" prices, such critique of the CPV Contract falls short.

Furthermore, the PSC Order did not dictate the price for any sale of energy or capacity on the wholesale market. Instead, the Commission ordered local utilities to accept the contract offer of CPV, which was made through the RFP process, resulting in contractual obligations for CPV. [31] Maryland has imposed no

[31] FERC itself has acknowledged the black-letter principle that normally "at least two different parties are needed for an enforceable contract . . . ." *Allegheny Power System, Inc.*, 80 FERC ¶ 61,143 at P. 61,536 n. 67 (1997)(citing *Restatement*

regulatory obligation on CPV to sell at a particular price; nor has the Commission attempted to make a determination that the price in the contract is a "just and reasonable" rate. The only regulation that the state undertook in the instant case was to direct three local utility companies to make a particular procurement decision and execute the contracts that went along with that decision. FERC does not regulate, nor have authority to regulate, the decisions of *buyers* to choose which of the countless ways to procure wholesale electricity. The states have always had the authority to regulate those decisions; have routinely exercised that authority; and continue to exercise that authority.

There has been some argument in this case over whether or not the CPV Contract falls within the jurisdiction of FERC under the FPA. While not directly ruling on the issue, the District Court approached its analysis as if it the contract is FERC-jurisdictional. JA 303. Indeed, it would be difficult to conclude that the Commission's action in this case is preempted as invading the field of FERC, as created by the FPA, if the CPV Contract were entirely outside of that field.[32] If the CPV Contract is FERC-jurisdictional, then FERC has regulatory authority to prevent CPV, as the seller, from making the sales called for in the CPV Contract at

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*(Second) of Contracts* § 9 ("There must be at least two parties to a contract, a promisor and a promisee, but there may be any greater number.").)

[32] Intervenor-appellant CPV Maryland, LLC argues that the contract is not FERC-jurisdictional. *Opening Brief for Intervenor-Appellant CPV Maryland, LLC*, at 30-34.

the prices established in that contract. *See Morgan Stanley*, 554 U.S. at 532 ("After a rate goes into effect, whether or not [FERC] deemed it just and reasonable when filed, [FERC] may conclude, in response to a complaint or on its own motion, that the rate is not just and reasonable and replace it with a lawful rate."). To date, FERC has not been asked to rule on whether the sales called for in the Contracts are "just and reasonable"; but FERC could be asked to make that determination if requested or FERC could choose to review that issue on its own motion. *Id*. If FERC determined that the sales called for in the CPV Contract would not be just and reasonable, and that decision was upheld, then the CPV Contract would be void and the sales would not happen.

If there is a dispute over whether the CPV Contract is FERC-jurisdictional, FERC would decide that issue in the first instance and its decision would be subject to appeal. The Maryland Commission has not, nor attempted to, take any action to force those sales to occur despite a FERC ruling that the sales would not be just and reasonable. FERC's authority to prevent those sales has not been frustrated or obstructed by the state action in this case.

### C. The PSC Order Does Not Encroach On A Field That Congress Intended To Be Exclusively Occupied By Federal Regulation.

As the District Court noted in its discussion of the legal principles involved in a Supremacy Clause analysis, "[i]t is a familiar and well-established principle that the Supremacy Clause . . . invalidates state laws that 'interfere with, or are

contrary to,' federal law." JA 271 (citing *Hillsborough Co., Fla. V. Automated Med. Labs, Inc.*, 471 U.S. 707, 712-13 (1985) (internal citations omitted)). In examining whether state action is preempted by a federal statute, "'[t]he purpose of Congress is the ultimate touchstone' of preemption analysis." *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (internal citation omitted). When reviewing a claim of preemption, whether by "express provision, by implication, or by a conflict between federal and state law," the United States Supreme Court has stated that the presumption is that "Congress does not intend to supplant state law." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). "This is particularly true where a party claims that federal law bars state action in areas of traditional state regulation, such as public works. In such cases preemption shall not be found absent evidence that it was Congress' 'clear and manifest purpose to do so.'" *Frank Bros. Inc. v. Wisc. Dept. of Transp.*, 409 F.3d 880, 885 (7th Cir. 2005) (internal citations omitted) A party alleging field preemption bears "the burden to establish, in the context of field preemption, that it was the clear 'manifest purpose of Congress'" to occupy an entire field. *Id.* at 886-887 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

In this case, the finding that the PSC Order encroaches on a field that Congress intends to be exclusively the purview of the federal government is in error because Congress, in the FPA, has explicitly reserved for the states authority

over entities making generation acquisition decisions. *See New York v. FERC*, 535 U.S. 1, 22-24; *see also* 16 U.S.C. § 824(b)(1). Thus, the states retain authority to make decisions concerning how much generation is on the system, what kind of generation is built and where it is built. States have made those decisions for decades. JA 207. The FPA states that federal regulation of the business of "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary" and in the public interest. 16 U.S.C. § 824(a). This section also states that "such Federal regulation, however, … extend[s] only to those matters which are not subject to regulation by the States." *Id*.

As the states had made decisions over the amount of generation on the electric system and the type of generation on the system for many years at the time of passage of the FPA, the intention of Congress not to preempt the states on those issues is clear. Further, the FPA curtails FERC jurisdiction by stating that FERC "shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce . . . ." 16 U.S.C. § 824(b)(1). The Energy Policy Act of 2005 gave FERC jurisdiction to set certain reliability standards. However, Congress was careful to state that this was not intended to preempt

traditional state authority. 16 U.S.C. § 824o(i)(3) ("Nothing 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, as long as such action is not inconsistent with any reliability standard . . . .").

Therefore, Congress has expressly limited the federal field in electricity regulation so that it excludes the regulation of generation resources and electricity procurement. The Maryland action in this case is within the field excluded by Congress and, therefore, not preempted by federal law.

## V. Conclusion

For the foregoing reasons, the Court should reverse the decision of the District Court finding that the PSC Order violates the Supremacy Clause of the United States Constitution.

Respectfully submitted,

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I, William F. Fields, counsel for the Maryland Office of People's Counsel, certify that I am a member in good standing of the bar of the United States Court of Appeals for the Fourth Circuit.

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I hereby certify that no counsel for a party authored this brief in whole or in part. Additionally, I certify that no person other than the Maryland Office of People's Counsel made a monetary contribution to its preparation or submission.

Dated: February 11, 2014

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I hereby certify that I have on this 11th day of February, 2014, caused this "Brief Of Maryland Office Of People's Counsel As *Amicus Curiae* In Support Of Appellants" to be served upon each party identified in the attached service list, via CM/ECF. I have also caused seven paper copies of the "Brief Of Maryland Office Of People's Counsel As *Amicus Curiae* In Support Of Appellants" to be mailed, via the United States Postal Service, First Class, postage pre-paid, to the clerk of this Court.

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# UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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