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

OPENING BRIEF OF THE MARYLAND PUBLIC SERVICE COMMISSION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1, the Maryland Public Service Commission declares that it has neither a parent corporation nor publicly held stock.

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JURISDICTION

On November 22, 2013, the Maryland Public Service Commission (PSC) filed a timely appeal of the district court's October 24, 2013 judgment disposing of all parties' claims. JA 349. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court lacked subject-matter jurisdiction and should have dismissed the case.

ISSUES

The PSC is responsible for ensuring the availability of generation capacity adequate to meet the state's anticipated demand. Fulfilling that responsibility, the PSC directed three Maryland retail utilities[1] to sign long-term "contracts for differences" (CFDs) with the winner of a state-run solicitation of offers to build a power plant. The plant will sell capacity and energy into regional wholesale electricity markets. The contracts transfer market-price risk to the utilities' customers, who will pay or receive the difference between the contract and interstate market prices. The Plaintiff-Appellees (hereafter, plaintiff-generators) are generators who participate in the markets but who are not subject to the PSC's

[1] The record below also refers to the retail utilities as "electric distribution companies" or EDCs, reflecting that Maryland required its retail utilities to divest their generation and to act primarily as delivery companies and power providers of last resort.

order and are strangers to the CFDs. The district court invalidated the PSC's order and the CFDs on field-preemption grounds. JA 349.

The issues presented are:

1. Did the district court have subject-matter jurisdiction?

2. Was the PSC's order preempted by the Federal Power Act (FPA), 16 U.S.C. §§ 824 *et seq*.?

The answer to each question is no.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The PSC incorporates Defendant-Appellant CPV's Statement of the Case and Statement of Facts.

SUMMARY OF ARGUMENT

The decision below erred in two fundamental ways. First, it adjudicated a case that the plaintiff-generators lacked constitutional standing to bring. Second, it concluded wrongly that the Federal Energy Regulatory Commission's (FERC's) exclusive wholesale-rate jurisdiction preempts state retail-utility regulation that in no way challenges or duplicates federal authority. The FPA does not preempt a state PSC order directing retail utilities to sign contracts that were, as CPV correctly argues, *outside* of FERC's jurisdiction, or alternatively, *subject* to it.

Plaintiff-generators' case should have been dismissed for lack of Article III standing. Plaintiff-generators claim injury because, in their view, the CFD allows CPV to bid successfully in PJM's capacity auction,[2] reducing prices and the plaintiff-generators' revenues. But those claims are an impermissible collateral attack on FERC's rulings—issued in response to the very state programs and contracts at issue here—that: (1) state-supported resources may participate in PJM's auction subject to certain rules, and (2) their participation in compliance with those rules yields just-and-reasonable PJM auction rates.

FERC's rules and the resulting outcomes constitute "filed rates" that the district court was powerless to modify. Whatever auction prices result from CPV's participation are, and will be, the just and reasonable rates for plaintiff-generators' auction sales; plaintiff-generators are entitled to nothing else. Their claimed injuries—that CPV's participation, in accordance with FERC's tariffs, suppressed auction prices, reduced the plaintiff-generators' revenues, or increased their risks—are not legally cognizable, let alone traceable to the PSC's Order. Although the district court made no findings as to the plaintiff-generators' injuries, the record

[2] PJM Interconnection, LLC ("PJM") is "a FERC-approved [Regional Transmission Organization] [that] carries out its responsibilities . . . pursuant to FERC-approved tariffs." JA 217. "PJM administers . . . wholesale markets in which electric energy products are sold . . . according to prices set in each of the respective markets." JA 220 (footnote omitted).

permits only one conclusion: that the plaintiff-generators lacked Article III standing.

More broadly, the crux of the plaintiff-generators' claimed injury rests not with the CFD, as such, but with how CPV's CFD-backed resource would participate in PJM's wholesale markets—a matter exclusively within FERC's jurisdiction. The court lacked subject matter jurisdiction to address those issues.

Should the Court reach the merits, the district court must be reversed. The decision is wrong regardless of whether the CFDs are construction-financing arrangements outside of FERC's jurisdiction, as CPV correctly argues, or FERC-jurisdictional wholesale capacity-and-energy contracts, as the court implied. The conclusion that the PSC intruded on FERC's authority because the CFDs "set" FERC-jurisdictional wholesale rates misapprehends the Federal Power Act's rate-setting machinery. Jurisdictional utilities routinely enter into bilateral contracts that "set" FERC-jurisdictional wholesale rates in the first instance. Such contracts do not usurp FERC authority because they are *subject to* FERC's exclusive authority to review them and determine if the rates are just and reasonable. FERC has addressed matters relating to the PSC's actions and the CFDs in several proceedings, but has never suggested, let alone found, that they usurp its authority.

That the PSC compelled retail utilities to enter into the CFDs is of no moment, even if the CFDs were FERC-jurisdictional. The FPA gives FERC

authority over the rates, terms, and conditions of wholesale sales, but leaves states responsible for regulating retail utilities' generation-development and wholesale-purchasing decisions to ensure the adequacy of supply and consistency with state policies. The decision below improperly interferes with arrangements essential to the development of a resource that Maryland has found to be needed and that FERC has deemed competitive for purposes of participation in PJM's markets. This Court should act promptly to reverse the court's decision and allow Maryland to fulfill its responsibility to its citizens to ensure that the state has sufficient generating capacity.

STANDARD OF REVIEW

This appeal presents questions of law that are reviewed *de novo*. *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005) (subject-matter jurisdiction); *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 595 (4th Cir. 2005) (preemption).

ARGUMENT

I. THE DISTRICT COURT LACKED SUBJECT-MATTER JURISDICTION

The district court lacked subject-matter jurisdiction because: (i) the plaintiff-generators lacked Article III standing and (ii) their dispute is within FERC's exclusive jurisdiction.

A. Plaintiff-generators lacked standing

"Article III, § 2, of the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). "Standing to sue is part of . . . what it takes to make a justiciable case," *id.*, and requires a plaintiff to demonstrate that:

> (1) . . . he or she suffered an actual or threatened injury that is not conjectural or hypothetical, (2) the injury [is] fairly traceable to the challenged conduct; and (3) a favorable decision [is] likely to redress the injury.

Miller v. Brown, 462 F.3d 312, 316 (4th Cir. 2006) (citation omitted). It is "long-settled" that these elements "must affirmatively appear in the record," *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (quotation omitted), even where only declaratory relief is sought, *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).[3] Standing is essential to the court's subject-matter jurisdiction, and may be

[3] Plaintiff-generators sought both declaratory and injunctive relief. JA 39.

challenged at any time. *Long Term Care Partners, LLC v. U.S.*, 516 F.3d 225, 230-31 (4th Cir. 2008).[4]

The decision below discusses neither Article III's prerequisites nor the plaintiff-generators' alleged injuries. The words injury, injuries, damage, harm, or aggrieved appear nowhere in the decision. The district court's silence notwithstanding, this Court should decide the issue because "the record permits only one resolution." *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982). The record establishes that plaintiff-generators lacked Article III standing.

1. Plaintiff-generators have no justiciable injury

Plaintiff-generators' complaint challenges a PSC Order that does not regulate them.[5] They are strangers to the CFDs, and neither pay nor receive anything under them. They own generating resources, and sell capacity and energy from them, including into the PJM capacity and energy markets. JA 65. Their alleged injury is that CPV's new generation "will suppress PJM market prices [and] caus[e] the Generator Plaintiffs . . . to lose sales . . . and receive reduced revenues from the energy and capacity sales they continue to make in PJM

[4] The PSC challenged plaintiff-generators' standing. JA 113.

[5] The Maryland retail utilities appealed the PSC's order to state court, which upheld the PSC's decision. *In re Calpine Corp.*, No. 24-C-12-002853 (Balt. Cty. Cir. Ct. Oct. 4, 2013), *appeal pending sub nom. Md. Office of People's Counsel v. Md. Pub. Serv. Comm'n*, No. 1738, Sept. Term 2013 (Md. Ct. Spec. App. docketed Nov. 6, 2013).

markets." *Id*. Their trial evidence was to like effect. *See* JA 394 (testimony that CPV's participation in the 2012 PJM capacity auction cost one of the plaintiff-generators $90 million, because "prices would have cleared higher" absent CPV's participation); JA 396-97 (confirming that PSEG's "gripe" was that CPV's participation allegedly interfered with competition in the PJM market); JA 361-62 (testimony that the PSC Order and CFDs "interfere[] with market operations as they are intended in the PJM marketplace," and that this interference "may lower prices" and create "risk" in investment decisions).[6]

These alleged injuries are nonjusticiable, because any claimed revenue loss results from the FERC-approved participation of CPV's resource in PJM's capacity and energy markets. These markets operate pursuant to rules set forth in FERC-filed tariffs, JA 217,[7] which govern who can participate in the PJM markets and how resulting prices are set. CPV's proposed resource bid into and cleared PJM's 2012 capacity auction in accordance with these tariffs. JA 270. The relevant tariff requires capacity resources to offer energy into the PJM markets. *See* n.13, *infra*. All of the resulting PJM capacity and energy prices are just and reasonable

[6] Similarly, Plaintiffs' expert witness Dr. Willig testified that the PSC Order and CFDs would put the PJM "competitive market[] at risk." JA 2011.

[7] *See also PJM Interconnection, LLC*, 143 FERC ¶ 61,090, P1 n.2 (JA 988) (2013), *reh'g pending* ("May 2013 Order") ("PJM's capacity market auction rules (collectively the Reliability Pricing Model (RPM)) are governed by Attachment DD of the PJM [Open Access Transmission Tariff].").

rates by operation of law. *Simon v. KeySpan Corp.*, 694 F.3d 196, 204-207 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1998 (2013).

Under the filed-rate doctrine, plaintiffs can "claim no rate as a legal right that is other than the filed rate . . . , and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (*Montana-Dakota*). "'[T]he rate . . . duly filed is the only lawful charge.'" *Bryan v. BellSouth Commc'ns, Inc.*, 377 F.3d 424, 429 (4th Cir. 2004) (*quoting AT&T Inc. v. Cent. Office Tel. Inc.*, 524 U.S. 214, 222 (1998)). Such rates are "per se reasonable and unassailable in judicial proceedings." *Simon*, 694 F.3d at 204 (internal quotation omitted). Every court that has considered the issue has found that FERC-filed tariffs—including regional auction tariffs such as PJM's—are entitled to "filed rate" protection. *Id*. at 206-07 and cases cited therein. The filed-rate doctrine thus bars "all claims—state and federal—that attempt to challenge [the terms of a tariff] that a federal agency has reviewed and filed." *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 853 (9th Cir. 2004) (quotation omitted).

Plaintiffs have waived any claim to damages, JA 752, and suffered none in any event. "The filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue." *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 488 (8th

Cir. 1992) (citation omitted). What is true for the past is true going forward. No future bid by CPV's new resource into PJM's markets will cause plaintiff-generators any justiciable harm, because the resulting auction rates will be just and reasonable as a matter of law.[8] And plaintiff-generators' claimed "investment risk" injury, JA 362, is merely another way of saying that they fear that PJM auction prices will be lower than they believe they should be. The filed-rate doctrine bars claims of prospective injury where, as here, the wrong alleged is governed by "the rules established by FERC" for the tariffed transaction. *In re Cal. Wholesale Elec. Antitrust Lit.*, 244 F. Supp. 2d 1072, 1078 (S.D. Cal. 2003), *aff'd*, 384 F.3d 756 (9th Cir. 2004). *See also Town of Norwood, Mass. v. New England Power Co.*, 202 F.3d 408, 420 (1st Cir. 2000); *Transmission Agency of N. Cal. v. Sierra Pac. Power Co*., 295 F.3d 918, 931 (9th Cir. 2002). Plaintiff-generators thus have no cognizable injury.

2. Plaintiff-generators' alleged injuries are traceable to FERC, not PSC, action

The filed-rate doctrine's "central underpinning" is "to preserv[e] the exclusive role of federal agencies in approving rates . . . by keeping courts out of the rate-making process," *Simon*, 694 F.3d at 207 (quotation omitted). The decision below violates that boundary. CPV could lawfully bid its resource into PJM's

[8] The district court itself found that "the rates set by the PJM Markets and ultimately received by generation facilities that participate in such markets are just and reasonable." JA 282.

markets because of FERC-approved PJM tariff provisions governing the participation of state-supported resources—not because of the PSC Order.

While seeking to safeguard FERC's jurisdiction against PSC incursion, the court mistakenly ignored that FERC already addressed and resolved concerns over participation in PJM markets by state-supported resources. FERC has issued at least five substantive orders in three proceedings dealing with matters relating to the CFDs,[9] but has never suggested that the agreements encroached on its exclusive wholesale-rate authority. FERC held instead that state-supported resources may participate in PJM's capacity markets subject to certain rules.

The first proceeding began in February 2011, when a trade group including plaintiff-generators complained to FERC about the then-pending Maryland initiative (which resulted in CPV's selection) and a similar New Jersey program. JA 1084-85, 1101, 1119, 1124, 1144-45, 1153-54. The complainants described the state initiatives, JA 1083-85, attached the PSC's draft RFP, *see* JA 1157, and asked FERC to modify PJM tariff provisions governing the participation of state-

[9] The three proceedings are: (1) *PJM Interconnection, LLC*, 135 FERC ¶ 61,022 (2011) (JA 837), *reh'g granted and technical conference established*, 135 FERC ¶ 61,228 (2011), *reh'g granted in part*, 137 FERC ¶ 61,145 (2011) (JA 906), *clarification rejected*, 138 FERC ¶ 61,160 (2012), *reh'g denied*, 138 FERC ¶ 61,194 (2012), *pet. for review pending sub nom. New Jersey Bd. of Pub. Utils. v. FERC*, Nos. 11-4245 *et al.* (3d Cir. argued Sept. 10, 2013); (2) May 2013 Order (JA 984); and (3) *CPV Shore, LLC*, 142 FERC ¶ 61,081 (2013) (JA 1059).

supported resources in PJM's capacity auction.[10] They urged FERC to apply a cost-based offer floor, thereby ensuring that state-supported resources clear only if they are "economic" without state support. *See* JA 1147-49. PJM's market monitor took a harder line, urging FERC to hold that only resources without state support may participate in PJM's auction. JA 888.

While FERC agreed that state-supported resource offers should be subject to the cost-based offer floor, JA 879-80,[11] it found that a state-supported resource clearing under these rules is "economic" and "does not artificially suppress market prices." JA 889. From then on, the resource is "competitive . . . and should be permitted to participate in the auction" without an offer floor, "regardless of whether it also receives a subsidy." JA 889-90.

CPV's resource cleared the 2012 capacity auction based on an offer reflecting PJM's calculation of CPV's costs. JA 270. Having done so, CPV may

[10] Complainants alleged that the states had sponsored uneconomic resources in order to "suppress" auction prices. JA 846. PJM's tariff includes a "minimum offer price rule" (MOPR) that, when triggered, "mitigates" or increases certain below-cost offers to prevent artificial price effects. JA 842. Originally, some state-supported resources were exempt. JA 843. Complainants urged FERC to eliminate the exemption and apply the MOPR to state-supported resources. JA 875.

[11] Maryland, New Jersey, and other affected entities have appealed this aspect of FERC's decision, arguing that FERC should have retained tariff provisions that exempted state-sponsored resources from the MOPR, while certain plaintiff-generators and their trade group appealed other aspects. *New Jersey Bd. of Pub. Utils. v. FERC*, Nos. 11-4245 *et al.* (3d Cir. argued Sept. 10, 2013).

now participate in future auctions as a "price taker," submitting near $0 offers that virtually guarantee clearing. *See* JA 235.

This result led to the second proceeding, in which some plaintiff-generators claimed that CPV's clearing revealed a flaw in the cost-review process for individual resources, and urged that it be eliminated. *See* JA 1024, 1027, 1029 (summarizing Competitive Markets Coalition comments). FERC rejected that request, JA 1031-32, pointing to the clearing of CPV's resource (and others) as showing why offers should be permitted to reflect "competitive costs . . . below the benchmark." JA 1031. FERC also noted with apparent approval PJM's assertion that "the resulting [2012] auction prices were just and reasonable." JA 1031-32.

In the third proceeding, CPV sought to facilitate its ability to make sales by seeking "market-based rate" authority from FERC. JA 306.[12] CPV's application included a draft of the CFD for informational purposes, even though CPV claimed that the agreement was not FERC-jurisdictional. *Id.* One of the plaintiff-generators contested CPV's characterization of the CFD as non-jurisdictional, JA 1065-66, but FERC declined to reach the issue while granting CPV's application. JA 1072.

[12] Market-based-rate authority enables public utilities that lack market power to negotiate power sales agreements and make them effective without filing them at FERC as otherwise required. *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 535-38 (2008). Such agreements operate under the utility's umbrella market-based-rate tariff and are entitled to filed rate protection. *See Simon*, 694 F.3d at 204-07.

Plaintiff-generators' case below was—and the court's decision is—an impermissible collateral attack on these orders (certain of which are now pending on appeal in the Third Circuit), seeking in court what FERC declined to give: an order preventing resources with state-mandated CFDs from competing in PJM markets. CPV's lawful market participation is traceable to FERC's decisions, and any relief from that circumstance must be sought there.

B. Plaintiff-generators' case is barred by FERC's exclusive jurisdiction

Plaintiffs-generators' alleged injuries turned on their belief that state support for CPV's resource interferes with PJM market operations and wrongfully alters market outcomes. *See* JA 361, 397. But only FERC, which has "exclusive authority to regulate the . . . sale at wholesale of electric energy in interstate commerce," *New England Power Co. v. N.H.*, 455 U.S. 331, 340 (1982) (citation omitted), may decide whether and how state-supported resources participate in wholesale markets. The court thus had no jurisdiction to address whether CPV's state-sponsored resource "interferes with . . . the PJM marketplace." JA 361. Where plaintiffs seek relief "predicated upon the unreasonableness of the established rate"—here, FERC rules governing market participation of state-supported resources—they must raise their concerns with the agency with jurisdiction over that rate. *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 442, 448 (1907).

Similarly, "[i]f a court concludes that a dispute brought before the court is within the primary jurisdiction of an agency, it will dismiss the action on the basis that it should be brought before the agency instead." Richard J. Pierce, Jr. et al., *Administrative Law and Process* § 5.8 at 206 (3d ed. 1999) (emphasis omitted). *See also Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 433 (2d Cir. 2013) (dismissing claims that Vermont sought to strong-arm a generator with market-based-rate authority to sell power on terms more favorable to the state, because the generator's "recourse should be first to FERC to determine whether" the new agreement "complies with [the FPA's] standard").

And where, as here, the agency has addressed the core of a dispute, preemption claims should be dismissed for want of subject-matter jurisdiction to avoid "'conflicting interpretations of federal law.'" *Cal. Dump Truck Owners Ass'n v. Nichols*, 924 F. Supp. 2d 1126, 1142-44 (E.D. Cal. 2012) (quoting *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1211 (2012)).

II. THE FPA DID NOT PREEMPT THE PSC ORDER

The court held that the PSC violated the Supremacy Clause, U.S. Const. art. VI, cl. 2, by directing Maryland retail utilities to sign agreements that the court viewed as establishing rates for capacity and energy sales in PJM markets—a field occupied comprehensively by FERC. JA 310-11. That ruling was wrong as a matter of law.

CPV's brief explains correctly that the agreements were not FERC-jurisdictional. While certain CFD payments were calculated by reference to CPV's market sales, those sales occur under and are compensated in accordance with PJM's tariff.[13] Any different or additional CFD compensation was consideration for something PJM cannot require: CPV's agreement to build a plant. JA 283-84.

Alternatively, even if the CFDs are construed to have set wholesale rates, they are subject to FERC's jurisdiction and FERC may decide whether the rates satisfy FPA standards. Assuming without conceding that the CFDs establish rates for wholesale sales, we demonstrate below that—even if this is so—the FPA did not preempt the PSC's order.

The court acknowledged that its field-preemption finding "raises the implication that the CfD . . . is a FERC-jurisdictional contract," JA 308, but it never explained how an order directing retail utilities to sign contracts *subject to* FERC's jurisdiction could be preempted *by* that jurisdiction. To the contrary, the FPA's rate-review provisions establish a sequential process: public utilities set their own rates either unilaterally or by contract, including by agreement with buyers whose purchasing decisions are state-circumscribed. Assuming the seller is

[13] Once CPV committed to build the plant, PJM's tariff *required* it to offer capacity into the PJM auction, *Mirant Energy Trading, LLC v. PJM Interconnection, LLC*, 122 FERC ¶ 61,007, P 35 (2008), and, if the capacity cleared, to offer the plant's output into the energy market, *PJM Interconnection, LLC*, 115 FERC ¶ 61,079, P 115 (JA 804) (2006), *reh'g denied*, 117 FERC ¶ 61,331 (2006).

FERC-regulated, FERC's job is to ensure that the resulting transaction's rates, terms, and conditions comport with FPA requirements.[14] The PSC's conduct of a different, complementary analysis does not justify a preemption finding.

A. The PSC did not intrude on FERC's rate-review authority

Under the FPA, FERC does not set rates in the first instance. Public utilities set them, either unilaterally or by contract. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 341 (1956) (*Mobile*); *S.Carolina Generating Co. v. FPC*, 249 F.2d 755, 760 (4th Cir. 1957). The FPA specifically "permits utilities to set rates with individual electricity purchasers through bilateral contracts." *Morgan Stanley Capital Grp.*, 554 U.S. at 531.

Utility rate-setting does not require FERC's approval. The FPA left "[t]he initial rate-making and rate-changing powers of [public utilities] . . . unaffected." *Mobile* at 343.[15] Thus, utility rates take effect automatically unless FERC acts affirmatively to suspend them, *Borough of Lansdale, Pa. v. FPC*, 494 F.2d 1104, 1110-11 (D.C. Cir. 1974), and contract rates bind the parties even if never filed. *Id.* at 1113. FERC "superintend[s]" this process, *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 167 (2010), to ensure that rates developed in

[14] FERC lacks rate-review authority over wholesale sales by so-called "non-public utilities," including states and their political subdivisions. 16 U.S.C. § 824(f).

[15] Although *Mobile* involved FERC's oversight of interstate wholesale natural gas sales, the FPA and the Natural Gas Act are identical in relevant respects. *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956).

this manner "are just and reasonable and not unduly preferential, discriminatory, or disadvantageous to any party." *Appalachian Power Co. v. PSC of W. Va.*, 812 F.2d 898, 902 (4th Cir. 1987). While FERC's authority to make that determination is "paramount," *Mobile* at 344, its role in the rate-setting process remains "essentially passive and reactive." *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) (*quoting City of Winnfield, La. v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984) (Scalia, J.)).

In finding that the PSC violated the Supremacy clause, the court found it determinative that the PSC directed retail utilities to sign contracts that "fixe[d] the monetary value" of the capacity and energy sold by CPV at wholesale. JA 292. But so does every wholesale capacity or energy sales contract. The court held that the CFD was different because "[t]he contract price became operative only after [it was] reviewed, evaluated, and accepted by the PSC in an agency order," JA 289-90, making it a "price 'set' or 'determined' by the PSC." But even if correct, that characterization would not support a field-preemption finding.

Mobile explains that FERC does not set rates in the first instance; public utilities and their contracting counterparties do, subject to FERC's ability to review the rates' lawfulness. Here, the PSC exercised its undoubted authority to determine that Maryland needed more capacity to meet anticipated long-term demand, *see* JA 1329-30, and it directed state utilities to solicit proposals for needed new

capacity. The PSC then evaluated multiple, competitive supply offers, JA 1331, JA 265, and found that CPV's offer, which could afford Maryland ratepayers savings over the life of the contract, provided "the best price for [Maryland standard offer] ratepayers." JA 1332. The PSC neither determined whether any of the offers were just, reasonable, and not unduly discriminatory for FPA purposes, nor second-guessed any FERC decision on this subject. In deciding which RFP respondent offered the best deal to Maryland retail ratepayers, the PSC exercised traditional state authority and did not step into FERC's FPA rate-review role.

B. The FPA does not preempt states from directing retail utilities to issue RFPs or to buy from the winners

If Maryland's retail utilities had agreed to the CFDs voluntarily, i.e., without state involvement, the plaintiff-generators might still complain that the agreements were unjust, unreasonable, or unduly discriminatory; but they could not credibly contend that executing the agreements usurped FERC's authority by "fixing" or "establishing" a wholesale rate. *See* JA 307. The PSC's control over the utilities' purchasing decisions did not transform this initial rate-setting into an unconstitutional infringement of FERC's authority.

State oversight of retail utilities' purchases does not usurp FERC's paramount—but reactive—role to ensure the resulting rates' legality. To the contrary, states have unquestioned authority to decide which products retail utilities buy and from whom. Under the FPA, states retained their traditional authority over

"'integrated resource planning and utility buy-side . . . decisions,'" "'utility generation and resource portfolios,'" and the imposition of "'non-bypassable distribution . . . charges'" effectuating those decisions. *New York v. FERC*, 535 U.S. 1, 24 (2002) (quoting FERC order on review).[16] Wholesale ratemaking "does not [generally] determine whether a purchaser has prudently chosen from among available supply options." *Ameren Energy Mktg. Co.*, 96 FERC ¶ 61,306, 62,189 (2001). "That is generally a question that the state commissions address," *id.*,[17] typically based on a "combination of price and non-price factors," *Allegheny Energy Supply Co.*, 115 FERC ¶ 61,221, P 9 (2006); *Commonwealth Atl. Ltd. P'ship*, 51 FERC ¶ 61,368, 62,238 & nn.11-12 (1990).[18]

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[16] *See also Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 222 (1983) ("Congress has allowed the States to determine—as a matter of economics—whether a nuclear plant vis-a-vis a fossil fuel plant should be built.").

[17] *See also, e.g., Kentucky W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 837 F.2d 600, 608-09 (3d Cir.) ("FERC's rate-making determination does not govern the entire wholesale transaction" or preclude states from exercising their "traditional power to consider the prudence of a retailer's purchasing decision."), *cert. denied*, 488 U.S. 941 (1988); Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697-A, 73 Fed. Reg. 25,832, 25,892 & n.597 (May 7, 2008), *cert. denied sub nom. Pub. Citizen Inc. v. FERC*, 133 S. Ct. 26 (2012) ("Order No. 697-A"); *Central Vt. Pub. Serv. Corp.*, 84 FERC ¶ 61,194, at 61,972 (1998), and cases citing therein.

[18] The only exception, not present here, is "in the narrow situation where the Commission, in setting a wholesale rate, leaves the purchaser no legal choice but to purchase a specified amount of power" from a specific resource, precluding alternatives. Order No. 697-A, P 416.

Along with after-the-fact prudence reviews, states exercise their authority by supervising competitive power-supply solicitations. *E.g.*, *Commonwealth Atl. Ltd. P'ship*, *supra*; *see also* 18 C.F.R. § 35.27(b)(1) (providing that nothing in FERC's rate-filing regulations "[l]imits the authority of a State commission in accordance with State and Federal law to establish . . . [c]ompetitive procedures for the acquisition of electric energy . . . purchased at wholesale."). And far from disapproving state involvement, FERC has encouraged and even relied on it. *E.g.*, *Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082, PP 18, 36-39 (2004) (emphasizing that a utility's solicitation was based on an RFP developed in a PSC proceeding and subject to PSC and PSC-selected consultant supervision).

The advent of PJM's wholesale markets did not displace the states' authority. It did not eliminate state authority to decide what resources should be developed in the state. *See Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 482-83 (D.C. Cir. 2009). Nor did it mandate exclusive reliance on the PJM market to develop new generation capacity. To the contrary, FERC itself described the procurement of capacity through PJM's "Base Residual Auction" as a "last resort" for acquiring capacity not secured through bilateral contracts or other means. JA 785.

As PSEG—one of the plaintiff-generators—told the Third Circuit recently:

> Any state in PJM can, at any time, sponsor the construction of any new generating plant it desires. Any

> state in PJM can, at any time, enter into any contract with any new generator it desires.

Final Opening Br. on Behalf of Cross-Petitioners/Respondents PJM Power Providers Group and PSEG Energy Resources & Trade LLC, at 63-64, *New Jersey Bd. of Pub. Utils. v. FERC*, Nos. 11-4245 *et al.* (3d Cir. argued Sept. 10, 2013). The district court erred in finding otherwise.

C. That CFD prices differed from the PJM market prices is of no moment.

While it did not rule on the plaintiffs' conflict-preemption arguments, the court seemed concerned that the CFDs set prices for CPV's market sales that were "different from" the PJM auction prices. JA 301. If the court assumed that FERC could not view such differing prices as just and reasonable, that assumption was wrong.

First, as CPV demonstrates and as summarized above, the CFD compensates CPV for more than what the PJM tariff compensates or could require: CPV's agreement to build a power plant.

Second, the CFD and PJM markets cover different time frames. The PJM markets are short-term, with prices and commitments that fluctuate at least yearly. The CFD is a long-term agreement. JA 261-62. FERC practice is to assess the reasonableness of long-term contract rates over the term of the contract. *E.g.*, *Northern Va. Elec. Coop., Inc. v. Old Dominion Elec. Coop.*, 116 FERC ¶ 61,173,

P 12 (2006). There is no cause to assume that FERC would treat the CFD prices and PJM auction rates as comparable.

Third, as noted above, the PJM capacity and energy markets are residual spot markets meant to supplement bilateral contracts. As the court acknowledged, PJM sellers and buyers routinely enter into bilateral contracts at prices that differ from the PJM market prices. JA 221. The buyers then may offer the purchased power into the PJM markets. JA 231; *see also* JA 891. The result is that the bilateral seller receives the contract price, while the buyer pays the contract price and receives the market price—the same financial result as occurs under the CFD without any bilateral sale.

Finally, FERC itself has acknowledged the legitimacy of bilateral contracting specifically to incentivize generation development. When FERC initially accepted PJM's capacity auction, states who thought it encroached on their authority challenged FERC's decision. FERC responded by emphasizing the flexibility that states and their load-serving utilities retain to decide how best to meet their capacity needs, JA 824, including the flexibility to "create an incentive for the construction of new capacity by entering into long-term bilateral agreements." *Id.* That is exactly what the PSC directed the Maryland utilities to do, and the court erred in treating that action as a suspect incursion into FERC's province.

CONCLUSION

The Court should reverse and vacate the decision below, because the court lacked subject-matter jurisdiction and the FPA did not preempt the PSC's actions.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 34(a), the PSC requests an opportunity for oral argument.

Respectfully submitted,

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February 4, 2014

CERTIFICATE OF WORD COUNT

I hereby certify as follows:

1. This brief complies with the page limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,432 words, excluding the 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 proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Date: February 4, 2014

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STATUTORY ADDENDUM

Attached pursuant to Fed. Rule App. P. 28(f) are:

- Constitution of the United States, art. III, § 2
- Constitution of the United States, art. VI, cl. 2
- Federal Power Act § 201(f), 16 U.S.C. § 824(f)
- 28 U.S.C. § 1291
- 18 C.F.R. § 35.27(b)(1)

Constitution of the United States, art. III, § 2

Constitution of the United States, art. VI, cl. 2

make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.[8]

[4]The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[5]No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[6]In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office,[9] the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7]The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[8]Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION. 2. [1]The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

[2]He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[3]The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE. III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION. 2. [1]The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;[10]—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different

[8]This clause has been superseded by amendment XII.

[9]This clause has been affected by amendment XXV.

[10]This clause has been affected by amendment XI.

States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2]In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3]The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. [1]Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2]The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE. IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. [1]The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2]A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3]No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[11]

SECTION. 3. [1]New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2]The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

[11]This clause has been affected by amendment XIII.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE. VI.

[1]All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2]This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[3]The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth IN WITNESS whereof We have hereunto subscribed our Names,

G°. WASHINGTON—*Presid*^{t}.

and deputy from Virginia

[Signed also by the deputies of twelve States.]

New Hampshire

JOHN LANGDON

Federal Power Act § 201(f), 16 U.S.C. § 824(f)

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),[1] 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

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

(g) Books and records

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

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

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

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

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

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

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

(4) Nothing in this section shall—

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

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

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

(June 10, 1920, ch. 285, pt. II, § 201, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 847; amended Pub. L. 95–617, title II, § 204(b), Nov. 9, 1978, 92 Stat. 3140; Pub. L. 102–486, title VII, § 714, Oct. 24, 1992, 106 Stat. 2911; Pub. L. 109–58, title XII, §§ 1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985.)

REFERENCES IN TEXT

The Rural Electrification Act of 1936, referred to in subsec. (f), is act May 20, 1936, ch. 432, 49 Stat. 1363, as amended, which is classified generally to chapter 31 (§ 901 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 901 of Title 7 and Tables.

The Public Utility Holding Company Act of 2005, referred to in subsec. (g)(5), is subtitle F of title XII of Pub. L. 109–58, Aug. 8, 2005, 119 Stat. 972, which is classified principally to part D (§ 16451 et seq.) of subchapter XII of chapter 149 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of Title 42 and Tables.

AMENDMENTS

2005—Subsec. (b)(2). Pub. L. 109–58, § 1295(a)(1), substituted "Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title" for "The provisions of sections 824i, 824j, and 824k of this title" and "Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title" for "Compliance with any order of the Commission under the provisions of section 824i or 824j of this title".

Subsec. (e). Pub. L. 109–58, § 1295(a)(2), substituted "section 824e(e), 824e(f), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title" for "section 824i, 824j, or 824k of this title".

[1] So in original. Section 824e of this title does not contain a subsec. (f).

28 U.S.C. § 1291

AMENDMENTS

1994—Pub. L. 103–337 substituted "Court of Appeals for the Armed Forces" for "Court of Military Appeals" in section catchline and wherever appearing in text.

1989—Pub. L. 101–189 substituted "section 867(a)(1)" for "section 867(b)(1)" in par. (1), "section 867(a)(2)" for "section 867(b)(2)" in par. (2), and "section 867(a)(3)" for "section 867(b)(3)" in par. (3).

EFFECTIVE DATE

Section effective on the first day of the eighth calendar month beginning after Dec. 6, 1983, see section 12(a)(1) of Pub. L. 98–209, set out as an Effective Date of 1983 Amendment note under section 801 of Title 10, Armed Forces.

§ 1260. Supreme Court of the Virgin Islands; certiorari

Final judgments or decrees rendered by the Supreme Court of the Virgin Islands may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Virgin Islands is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(Added Pub. L. 112–226, §2(a), Dec. 28, 2012, 126 Stat. 1606.)

EFFECTIVE DATE

Pub. L. 112–226, §3, Dec. 28, 2012, 126 Stat. 1607, provided that: "The amendments made by this Act [enacting this section and amending section 1613 of Title 48, Territories and Insular Possessions] apply to cases commenced on or after the date of the enactment of this Act [Dec. 28, 2012]."

CHAPTER 83—COURTS OF APPEALS

AMENDMENTS

1996—Pub. L. 104–331, §3(a)(2), Oct. 26, 1996, 110 Stat. 4069, added item 1296.

1984—Pub. L. 98–620, title IV, §402(29)(C), Nov. 8, 1984, 98 Stat. 3359, struck out item 1296 "Precedence of cases in the United States Court of Appeals for the Federal Circuit".

1982—Pub. L. 97–164, title I, §127(b), Apr. 2, 1982, 96 Stat. 39, added items 1295 and 1296.

1978—Pub. L. 95–598, title II, §236(b), Nov. 6, 1978, 92 Stat. 2667, directed the addition of item 1293, "Bankruptcy appeals", which amendment did not become effective pursuant to section 402(b) of Pub. L. 95–598, as amended, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

1961—Pub. L. 87–189, §4, Aug. 30, 1961, 75 Stat. 417, struck out item 1293 "Final decisions of Puerto Rico and Hawaii Supreme Courts".

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, §48, 65 Stat. 726; Pub. L. 85–508, §12(e), July 7, 1958, 72 Stat. 348; Pub. L. 97–164, title I, §124, Apr. 2, 1982, 96 Stat. 36.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§225(a), 933(a)(1), and section 1356 of title 48, U.S.C., 1940 ed., Territories and Insular Possessions, and sections 61 and 62 of title 7 of the Canal Zone Code (Mar. 3, 1911, ch. 231, §128, 36 Stat. 1133; Aug. 24, 1912, ch. 390, §9, 37 Stat. 566; Jan. 28, 1915, ch. 22, §2, 38 Stat. 804; Feb. 7, 1925, ch. 150, 43 Stat. 813; Sept. 21, 1922, ch. 370, §3, 42 Stat. 1006; Feb. 13, 1925, ch. 229, §1, 43 Stat. 936; Jan. 31, 1928, ch. 14, §1, 45 Stat. 54; May 17, 1932, ch. 190, 47 Stat. 158; Feb. 16, 1933, ch. 91, §3, 47 Stat. 817; May 31, 1935, ch. 160, 49 Stat. 313; June 20, 1938, ch. 526, 52 Stat. 779; Aug. 2, 1946, ch. 753, §412(a)(1), 60 Stat. 844).

This section rephrases and simplifies paragraphs "First", "Second", and "Third" of section 225(a) of title 28, U.S.C., 1940 ed., which referred to each Territory and Possession separately, and to sections 61 and 62 of the Canal Zone Code, section 933(a)(1) of said title relating to jurisdiction of appeals in tort claims cases, and the provisions of section 1356 of title 48, U.S.C., 1940 ed., relating to jurisdiction of appeals from final judgments of the district court for the Canal Zone.

The district courts for the districts of Hawaii and Puerto Rico are embraced in the term "district courts of the United States." (See definitive section 451 of this title.)

Paragraph "Fourth" of section 225(a) of title 28, U.S.C., 1940 ed., is incorporated in section 1293 of this title.

Words "Fifth. In the United States Court for China, in all cases" in said section 225(a) were omitted. (See reviser's note under section 411 of this title.)

Venue provisions of section 1356 of title 48, U.S.C., 1940 ed., are incorporated in section 1295 of this title.

Section 61 of title 7 of the Canal Zone Code is also incorporated in sections 1291 and 1295 of this title.

In addition to the jurisdiction conferred by this chapter, the courts of appeals also have appellate jurisdiction in proceedings under Title 11, Bankruptcy, and jurisdiction to review:

(1) Orders of the Secretary of the Treasury denying an application for, suspending, revoking, or annulling a basic permit under chapter 8 of title 27;

(2) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(3) Orders of the Secretary of the Army under sections 504, 505 and 516 of title 33, U.S.C., 1940 ed., Navigation and Navigable Waters;

(4) Orders of the Civil Aeronautics Board under chapter 9 of title 49, except orders as to foreign air carriers which are subject to the President's approval;

(5) Orders under chapter 1 of title 7, refusing to designate boards of trade as contract markets or suspending or revoking such designations, or excluding persons from trading in contract markets;

(6) Orders of the Federal Power Commission under chapter 12 of title 16;

(7) Orders of the Federal Security Administrator under section 371(e) of title 21, in a case of actual controversy as to the validity of any such order, by any person adversely affected thereby;

(8) Orders of the Federal Power Commission under chapter 15B of title 15;

(9) Final orders of the National Labor Relations Board;

(10) Cease and desist orders under section 193 of title 7;

(11) Orders of the Securities and Exchange Commission;

(12) Orders to cease and desist from violating section 1599 of title 7;

(13) Wage orders of the Administrator of the Wage and Hour Division of the Department of Labor under section 208 of title 29;

(14) Orders under sections 81r and 1641 of title 19, U.S.C., 1940 ed., Customs Duties.

The courts of appeals also have jurisdiction to enforce:

(1) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System, and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(2) Final orders of the National Labor Relations Board;

(3) Orders to cease and desist from violating section 1599 of title 7.

The Court of Appeals for the District of Columbia also has jurisdiction to review orders of the Post Office Department under section 576 of title 39 relating to discriminations in sending second-class publications by freight; Maritime Commission orders denying transfer to foreign registry of vessels under subsidy contract; sugar allotment orders; decisions of the Federal Communications Commission granting or refusing applications for construction permits for radio stations, or for radio station licenses, or for renewal or modification of radio station licenses, or suspending any radio operator's license.

Changes were made in phraseology.

AMENDMENTS

1982—Pub. L. 97–164, § 124, inserted "(other than the United States Court of Appeals for the Federal Circuit)" after "The court of appeals" and inserted provision that the jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

1958—Pub. L. 85–508 struck out provisions which gave courts of appeals jurisdiction of appeals from District Court for Territory of Alaska. See section 81A of this title which establishes a United States District Court for the State of Alaska.

1951—Act Oct. 31, 1951, inserted reference to District Court of Guam.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–164 effective Oct. 1, 1982, see section 402 of Pub. L. 97–164, set out as a note under section 171 of this title.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85–508 effective Jan. 3, 1959, on admission of Alaska into the Union pursuant to Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c.16 as required by sections 1 and 8(c) of Pub. L. 85–508, see notes set out under section 81A of this title and preceding section 21 of Title 48, Territories and Insular Possessions.

TERMINATION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE

For termination of the United States District Court for the District of the Canal Zone at end of the "transition period", being the 30-month period beginning Oct. 1, 1979, and ending midnight Mar. 31, 1982, see Paragraph 5 of Article XI of the Panama Canal Treaty of 1977 and sections 2101 and 2201 to 2203 of Pub. L. 96–70, title II, Sept. 27, 1979, 93 Stat. 493, formerly classified to sections 3831 and 3841 to 3843, respectively, of Title 22, Foreign Relations and Intercourse.

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of

18 C.F.R. § 35.27(b)(1)

disputed issues whether the customer will market or broker a portion or all of the capacity and energy associated with stranded costs allowed by the Commission.

(iii) If a customer undertakes the brokering option, and the customer's brokering efforts fail to produce a buyer within 60 days of the date of the brokering agreement entered into between the customer and the utility, the customer shall relinquish all rights to broker the released capacity and associated energy and will pay stranded costs as determined by the formula in paragraph (c)(2)(iii) of this section.

(d) *Recovery of retail stranded costs*—1) *General requirement.* A public utility may seek to recover retail stranded costs through rates for retail transmission services only if the state regulatory authority does not have authority under state law to address stranded costs at the time the retail wheeling is required.

(2) *Evidentiary demonstration necessary for retail stranded cost recovery.* A public utility seeking to recover retail stranded costs in accordance with paragraph (d)(1) of this section must demonstrate that:

(i) It incurred costs to provide service to a retail customer that obtains retail wheeling based on a reasonable expectation that the utility would continue to serve the customer; and

(ii) The stranded costs are not more than the customer would have contributed to the utility had the customer remained a retail customer of the utility.

[Order 888–A, 62 FR 12460, Mar. 14, 1997]

§ 35.27 Authority of State commissions.

Nothing in this part—

(a) Shall be construed as preempting or affecting any jurisdiction a State commission or other State authority may have under applicable State and Federal law, or

(b) Limits the authority of a State commission in accordance with State and Federal law to establish

(1) Competitive procedures for the acquisition of electric energy, including demand-side management, purchased at wholesale, or

(2) Non-discriminatory fees for the distribution of such electric energy to retail consumers for purposes established in accordance with State law.

[Order 697, 72 FR 40038, July 20, 2007]

§ 35.28 Non-discriminatory open access transmission tariff.

(a) *Applicability.* This section applies to any public utility that owns, controls or operates facilities used for the transmission of electric energy in interstate commerce and to any non-public utility that seeks voluntary compliance with jurisdictional transmission tariff reciprocity conditions.

(b) *Definitions*—(1) *Requirements service agreement* means a contract or rate schedule under which a public utility provides any portion of a customer's bundled wholesale power requirements.

(2) *Economy energy coordination agreement* means a contract, or service schedule thereunder, that provides for trading of electric energy on an "if, as and when available" basis, but does not require either the seller or the buyer to engage in a particular transaction.

(3) *Non-economy energy coordination agreement* means any non-requirements service agreement, except an economy energy coordination agreement as defined in paragraph (b)(2) of this section.

(4) *Demand response* means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy.

(5) *Demand response resource* means a resource capable of providing demand response.

(6) *An operating reserve shortage* means a period when the amount of available supply falls short of demand plus the operating reserve requirement.

(7) *Market Monitoring Unit* means the person or entity responsible for carrying out the market monitoring functions that the Commission has ordered Commission-approved independent system operators and regional transmission organizations to perform.

(8) *Market Violation* means a tariff violation, violation of a Commission-approved order, rule or regulation, market manipulation, or inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 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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