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

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

PPL ENERGYPLUS, LLC, et al.,

*Plaintiffs-Appellees,*

v.

DOUGLAS R.M. NAZARIAN, et al.,

*Defendants-Appellants,*

and

CPV MARYLAND, LLC,

*Intervenor-Appellant.*

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

## REPLY BRIEF FOR INTERVENOR-APPELLANT CPV MARYLAND, LLC

Larry F. Eisenstat
Clifton S. Elgarten
Richard Lehfeldt
Jennifer N. Waters
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2500

*Counsel for Intervenor-Appellant CPV Maryland, LLC*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

**FERC Orders**

**Statutes**



**Regulations**

## INTRODUCTION

To satisfy its citizens' needs for reliable electric power supplies, the Maryland Public Service Commission ("Maryland") solicited proposals for the construction of a new, environmentally-friendly power plant. It offered the successful bidder, CPV Maryland, LLC ("CPV"), a form of revenue guarantee – a contract for differences ("CfD") – at its bid price, to cover the enormous costs of constructing a new power plant. The size of the CfD's yearly revenue supplement (or rebate) is measured as the difference between CPV's revenue requirement as bid and the revenues CPV receives when it sells capacity and energy into the federally-supervised wholesale energy markets in compliance with the Federal Energy Regulatory Commission's ("FERC's") rules governing those markets.

In response to Maryland's initiative, and a similar initiative in New Jersey, Appellees raised objections at FERC, resulting in proceedings under Section 206 of the Federal Power Act ("FPA") to review the rules governing CfD-supported generators' participation in PJM's reliability pricing model ("RPM") capacity auction. In a series of rulings, FERC eliminated exemptions from certain auction rules granted to power plants constructed under a state mandate to address "a projected capacity shortfall." FERC required CfD-supported power plants to offer approved, cost-justified bids – irrespective of any subsidy – when they sold their capacity into the RPM auction. FERC's rule changes were recently sustained on

judicial review by the Third Circuit. *See N.J. Bd. of Pub. Utils. v. FERC*, No. 11-4245, slip op. at 50, 59, 82-83, 87 (3d Cir. Feb. 20, 2014) ("*NJBPU*"). In its orders, FERC rejected Appellees' request to effectively exclude CfD-supported generators from the auction and also rejected a range of further restrictions on their participation in the auction process.[1] *Id.* FERC thus addressed competing interests, while "approving rules that prevent the state's choices from adversely affecting wholesale capacity rates." *See id.* at 55.

Not content with FERC's rule changes, Appellees continued to press their objections as constitutional claims, one of which the district court accepted. For their field preemption argument, Appellees here argue that the CfDs set rates "in connection with" wholesales capacity sales, which Appellees claim invades FERC's exclusive jurisdiction. For conflict preemption, an issue not addressed by the district court, they claim a conflict between the way FERC supposedly wants the PJM capacity auction to function and Maryland's decision to subsidize power plant construction.

[1] CPV participated in the 2012 auction under the revised procedures. Its bid "cleared" the auction, allowing CPV to sell its capacity at the clearing price. JA270. FERC determined the resulting rate to be just and reasonable, JA1031-32 (*PJM Interconnection, L.L.C.*, 143 FERC ¶61,090 (2013) at P 143), and the Third Circuit affirmed the rules underlying that determination. *NJBPU*, slip op. at 87.

With respect to both "field preemption" and "conflict preemption," Appellees both ignore the Supreme Court's standards for determining whether a State's actions in this area of interlocking State and federal authority are preempted, and obscure the basic fact that, in requiring its ratepayers to support needed power plant construction, Maryland was fulfilling one of its core responsibilities under the FPA.

1. *Field Preemption*: The CfD payments do not invade FERC's exclusive jurisdiction over rates and charges for wholesale sales of energy under FPA §201, 16 U.S.C. §824(a)-(b), and, therefore, are not "field preempted," for several reasons. First, the CfDs do not govern any sale of electricity or capacity; they are not wholesale sales agreements at all. Wholesale capacity sales are made through bilateral agreements or through the PJM auction. The CfDs, in contrast, are what they appear to be, namely, a means of providing a subsidy in the form of a third-party payment.

Appellees' assertion that the CfDs might someday be held to fall within FERC's remedial authority under FPA §§205 and 206, 16 U.S.C. §§824d, 824e, over contracts or practices "in connection with" or "affecting" wholesales rates, is not an argument for ***field*** preemption. While FERC's remedial jurisdiction goes beyond FERC's exclusive jurisdiction over interstate wholesale sales, the Supreme Court has held that state actions merely affecting wholesale rates are ***not*** field

preempted. *See Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 512-13 (1989). Because the CfD payments do not regulate within FERC's sphere of exclusive jurisdiction, they are not "field preempted."

Second, the CfDs embody a payment schedule determined through a competitive procurement. They do not contain prices fixed or "dictate[d]" by the State. *Cf.* Appellees' Br.-37. That is an essential distinction under the FPA. As part of its traditional responsibility to ensure adequate and reliable electrical supplies, a State may direct its electricity distribution companies ("EDCs") to enter into long-term contracts. FERC itself has repeatedly held that insofar as the price in such contracts is determined competitively, and not prescribed by the State, the State does not invade FERC's rate-supervision authority and its action is not preempted. Indeed, as a substantive matter, such a contract will be approved by FERC.

Third, if, as Appellees claim, the CfDs are subject to FERC jurisdiction under Sections 205 and 206, that too would preclude a finding of preemption. Contracts subject to FERC jurisdiction do not usurp that jurisdiction.

2. *Conflict Preemption*: For conflict preemption, a State program with a proper purpose and involving the exercise of traditional state powers is preempted only in the extreme case where its effect on FERC's program is "so extensive and

disruptive" that the basic rule of "federal accommodation [of the State's initiatives] must give way to federal pre-emption." *Nw. Cent.*, 489 U.S. at 517-18.

That standard is not met here, twice over. First, FERC has already addressed and accommodated the CfD-supported generators in the PJM capacity auction, specifically by adjusting rules of entry with the minimum offer price rule ("MOPR"). FERC determined that under those revised rules, qualifying CfD-supported generators like CPV are competitive resources that properly participate in the auction, and the auction is not adversely affected by that participation. *NJBPU*, slip op. at 55, 84. That such accommodation was not only possible but achieved precludes a finding that the CfDs were so "extensive and disruptive" of the auction as to trigger conflict preemption.

Second, even if FERC had not actually accommodated the CfD-supported generators, FERC has the regulatory power – subject to judicial review – to ensure that its market is shielded from whatever potential disruption Appellees might perceive. FERC's ample control over the auction market and who participates in it precludes any claim that Maryland's CfD support for new generation could materially disrupt the auction.

Moreover, Appellees' specific argument that Maryland's program conflicts with the "NEPA" exception confuses FERC's prerogative to make supervisory judgments about the PJM auction with issues concerning the States' separate

authority to support new generation. In setting auction rules, FERC rejected a proposal to allow certain generators to "lock in" a price for 10 years in the auction, with the added costs of that lock-in imposed on purchasers in the auction. FERC's rejection of that proposal for preferential pricing in the auction it supervises says nothing at all about whether ***States***, in exercising their powers, can underwrite the construction of new power plants.

3. *Commerce Clause*: Maryland's procurement entailed no discrimination against out-of-state interests. Businesses from any State were invited to compete on equal terms to build the new power plant in the necessary location. Maryland's decision to require the power plant to be built in the SWMAAC area, where it was needed by Maryland citizens, does not discriminate against interstate businesses or interests.

## ARGUMENT

### I. WHETHER FERC-JURISDICTIONAL OR NOT, THE CfDs ARE NOT "FIELD PREEMPTED"

As shown in CPV's opening brief, the CfDs are not field preempted. They do not govern a sale of capacity subject to FERC's exclusive, field-preemptive jurisdiction under FPA §201. Moreover, even if the CfDs had governed wholesale sales of capacity, which they do not, Maryland has ***not*** "dictated" prices or rates in the CfDs; the payment schedule in the CfDs was set by competitive procurement. Finally, even if the CfDs are subject to FERC's jurisdiction, they are not

preempted: Contracts subject to FERC's authority do not usurp that authority. *See* Section I.B, *infra*.

### A. The CfDs Do Not Establish Rates Or Charges Within FERC's Exclusive Jurisdiction

#### 1. Maryland's program is within the scope of its traditional police powers, preserved under the FPA

The FPA carefully divides responsibility between FERC and the States. FPA §201 defines the statutory field that States are "field preempted" from entering. That Section grants FERC exclusive jurisdiction over interstate markets and wholesale energy sales. 16 U.S.C. §824(a)-(b); *see New York v. FERC*, 535 U.S. 1, 6-7 (2002). Section 201 also preserves the States' longstanding authority over retail rates, electricity distribution companies, and the adequacy of the electric supply, including development of new generating capacity. CPV Br.-17-18. Congress denied FERC authority over construction of additional generation capacity. FERC's influence on such construction is only indirect. Because markets, "in theory, incentivize the development of new generation resources," *NJBPU*, slip op. at 21, FERC may indirectly influence investment in new plants through market supervision.

Congress thus entrusted States with the responsibility of ensuring that needed power plants are built. While Appellees concede that this was true historically, they argue that Maryland "ceded" that authority by dismantling the old

vertically-integrated utility structure. Appellees' Br.-7-8. But while the industry structure has changed, the legal framework has not: The responsibility to ensure that necessary power plants are built still resides with the States. There is no reason why States cannot ***both*** benefit from improved, competitive markets, supervised by FERC, ***and*** support new construction as needed.[2]

To prevail on their field preemption claim, Appellees must overcome (a) the presumption against preemption applicable when States exercise traditional powers, particularly powers expressly preserved by Congress, *see* CPV Br.-14-16; and (b) the Supreme Court's admonitions that courts be wary of construing FERC's authority so broadly that it impairs the States' powers under the FPA, *id.* at 20-22. Courts must "take seriously the lines Congress drew in establishing a dual regulatory system," and avoid capacious and "extravagant" interpretations of exclusive federal jurisdiction at the expense of the States' preserved powers. *Nw. Cent.*, 489 U.S. at 512-13.[3]

---

[2] The report that Appellees cite for their "ceding" contention explains that Maryland ***never*** disclaimed its power "to require utilities to buy or build generation, or to enter into long-term contracts for the purchase of electricity." P391 at 33.

[3] Appellees argue that *Northwest Central* does not reach these issues because Section 1(b) of the Natural Gas Act ("NGA") and Section 201(b) of the FPA are not "substantially identical." Appellees' Br.-26-27. But the "Supreme Court has held that the [NGA] and [FPA] are 'in all material respects substantially identical,' and constructions of one are authoritative for the other." *Tenn. Gas Pipeline Co. v.*

(Continued...)

Appellees argue that this Court can disregard the presumption and the Supreme Court's admonitions because Maryland engaged in impermissible "rate-setting." Appellees' Br.-31. But Appellees' argument assumes its conclusion – an incorrect conclusion at that. The question is ***whether*** Maryland is exercising its preserved powers or has impermissibly set a rate for a wholesale capacity sale. The presumption, and *Northwest Central*, are guides in answering that question.

Finally, Appellees treat Maryland's objectives as irrelevant. Appellees' Br.-37. Yet in addressing similar preemption issues, where a State's actions might be characterized as permissible or not, the Supreme Court has held that what the State intends – here, to spur new construction with supplemental CfD payments, rather than to regulate wholesale rates – can be determinative. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 213-16 (1983).

---

(Continued...)

*FERC*, 860 F.2d 446, 454 (D.C. Cir. 1988) (citation omitted). The Court has applied this principle to FPA §201(b). *See FPC v. S. Cal. Edison Co*., 376 U.S. 205, 211-16 (1964) (citing FPA and NGA precedents interchangeably and stating that "[§] 201(b) of the Power Act has its counterpart in [§] 1(b) of the Gas Act."). The Court was correct. Each Act divides responsibility between FERC and the States. Each circumscribes FERC authority using the phrase: "shall not apply to any other." 15 U.S.C. §717(b); 16 U.S.C. §824(b)(1). Just as the NGA "shall not" extend to production, the FPA "shall not" extend to electricity generation.

### 2. The CfDs do not govern a wholesale sale of capacity

Appellees argue that, because CPV must sell its capacity to PJM in the auction, and because CfD payments reference, and will supplement, CPV's auction sale revenues, the CfDs contemplate payments "received" "in connection with" a capacity sale. Appellees' Br.-32. Appellees call this "rate-setting at its most blatant," and argue that it invades FERC's exclusive jurisdiction. *Id*. at 31.

There are several major fallacies in that theory. First, as shown in Section I.B, *infra*, a market-determined price, the product of a State-directed competitive procurement, is not "set" by a State. It is set by the market. Thus, even for a FERC-jurisdictional sale of capacity at wholesale (which the CfDs are not), a State's direction to its EDC to conduct a procurement falls squarely within the State's traditional Section 201 authority, and does not invade FERC's exclusive jurisdiction. A State crosses the line into FERC's Section 201 jurisdictional realm only if the State, ***not*** the market, sets the price for the wholesale sale.

Second, that the CfDs might be subject to FERC review does not change the result. Contracts, whether state-directed or not, that are subject to FERC review do not usurp FERC's jurisdiction. *See* Section I.B, *infra*.

But aside from these two flaws in FERC's preemption theory discussed in the next section, the CfDs do not invade FERC's exclusive jurisdiction because

they do not, at bottom, govern a wholesale sale subject to FERC's exclusive jurisdiction at all.

To understand why the CfDs could not be said to govern any wholesale sale of energy subject to FERC's exclusive jurisdiction, it is helpful to begin with first principles. FERC's jurisdiction, preemptive of state action, is set forth in FPA §201(a)-(b), 16 U.S.C. §824(a)-(b). Section 201 defines a sphere of FERC jurisdiction, to the ***exclusion*** of States, over "transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce." 16 U.S.C. §824(a). *See New York*, 535 U.S. at 12, 20-21 (FERC's exclusive jurisdiction applies to "interstate transmissions" and "interstate wholesale sales.") (emphasis omitted). Section 201 equally confirms the States' own longstanding power to regulate generation facilities and ensure resource adequacy. *See Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) ("*CDPUC*").

In contrast, FERC's remedial rate review jurisdiction is set forth under Sections 205 and 206, 16 U.S.C. §§824d, 824e. *See New York*, 535 U.S. at 6-7, 11; *Miss. Indus. v. FERC*, 808 F.2d 1525, 1543 (D.C. Cir. 1987) (referring to FERC's "exclusive rate authority over wholesale transactions and its remedial authority as set forth in sections 205 and 206"). FERC's remedial authority necessarily includes review of rates and charges for interstate wholesale sales as defined by

Section 201. But that review authority is broader, empowering FERC, in a proper administrative proceeding, to address contracts and practices in connection with or affecting wholesale "sales 'subject to the jurisdiction of [FERC].'" *FPC v. Conway Corp.*, 426 U.S. 271, 276 (1976) (quoting 16 U.S.C. §§824d(b), 824e(a)); *see also NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 171 (2010); *Miss. Indus.*, 808 F.2d at 1548.

FERC's remedial authority can thus reach matters connected with or affecting rates. Nonetheless, the Supreme Court has squarely held that FERC's "field preemptive" jurisdiction, displacing the States, does ***not*** extend to state actions merely affecting matters regulated by FERC. *Nw. Cent.*, 489 U.S. at 512-13. Insofar as field preemption is concerned, States are barred only from directly regulating within the field exclusively assigned to FERC under Section 201. Appellees' contrary theory would transform FERC's remedial authority into a sweeping grant of exclusive jurisdiction over everything affecting wholesale rates. *Northwest Central* rules that theory out precisely because it would divest States of their reserved powers under Section 201. *See id.*

As demonstrated in CPV's opening brief, CPV Br.-30-33, the district court erred in ruling that the CfDs actually did invade FERC's exclusive jurisdiction by setting an "ultimate price" for a capacity sale. A rate, charge, or price pertains to an exchange transaction, paid ***for*** a good or service, as part of that exchange. It is

***not***, as here, a separate payment from a third party.[4] Moreover, FERC's Section 201 jurisdiction covers wholesale sales of capacity. But Maryland's CfDs do not directly govern any wholesale sale of capacity. *Cf. Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004) (FERC's jurisdiction is "limited to contracts [] which directly govern[] the rate in a jurisdictional sale – providing for the rate in whole or in part, or specifying or embodying it, or setting forth rules by which it is to be calculated.") (internal quotation marks omitted). Third-party subsidies or CfD payments are called "out of market" for a reason. *See, e.g.*, JA946 (*PJM Interconnection, L.L.C.*, 137 FERC ¶61,145 (2011) at P 132) (approving entry in the auction of generating resources receiving out-of-market payments). Capacity sales, by contrast, are embodied either in bilateral power contracts between a buyer and seller, or take place in the PJM auction. The fact that the CfDs do not "directly govern" a sale of capacity at wholesale cannot

[4] If a State or environmentally-minded philanthropist decided to encourage wind power in the PJM region by offering an extra dollar per megawatt sold by a wind generator willing to construct a new facility, that supplemental payment could not be regarded as a "rate or charge" subject to FERC's exclusive jurisdiction. It would be seen as a subsidy supplemental to revenues received from the sale of capacity or electricity in the marketplace.

be overcome by simply deeming the third-party, out-of-market payment a "price ultimately received."[5] *Cf.* Appellees' Br.-37.

Appellees do not directly defend the district court's "ultimate price" theory or argue that Maryland's CfDs actually fall within the scope of Section 201. They assert that the CfD payments are made "in connection with" an interstate capacity sale as that phrase is used in Section 205. Appellees' Br.-32. But even if "in connection with" could be construed broadly enough to reach the CfDs, Appellees are improperly confusing FERC's remedial authority under Sections 205 and 206 with FERC's ***field*** preemptive, exclusive jurisdiction, under Section 201. That FERC's remedial authority extends to matters connected with, or affecting, wholesale rates, does not mean that state actions merely affecting wholesale rates are preempted. To the contrary, the Supreme Court has held that such state actions are ***not*** field preempted. *Nw. Cent.*, 489 U.S. at 512-13.

It is true, of course, that when FERC exercises its remedial jurisdiction under Sections 205 and 206, its orders have the force of federal law under the

[5] Appellees ask why the Generation Order addresses the price of capacity. Appellees Br.-33-34. The answers are obvious: It would have been foolish for Maryland to subsidize costs the generator could recover simply by selling in the interstate market. Therefore, Maryland measured the yearly supplement against revenues actually received from sales. Moreover, the requirement that capacity be sold in the interstate market reflects the reason why States require new power plants to be built: If they were built, but did not make their production available, they would do little good for the State's citizens.

Supremacy Clause, and are themselves preemptive. Thus, once FERC acts under those sections by, *e.g.*, setting wholesale rates or reviewing contracts that affect wholesale rates, its actions preclude States from taking inconsistent actions, or from failing to give effect to those actions. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986); *Miss. Indus.*, 808 F.2d at 1548. But a state action, taken under its preserved powers, is not preempted absent a conflict with FERC's exercise of its remedial jurisdiction. *See id.*; *Nw. Cent.*, 489 U.S. at 517-18.

Moreover, even FERC's remedial authority is not as broad as Appellees suggest. FERC itself has not construed its jurisdiction to reach agreements relating to sales that do not actually go to delivery.[6] FERC's "in connection with" authority only reaches subjects "necessary to make effective [FERC's] primary jurisdiction" – *i.e.*, over wholesale sales of energy. *Conoco Inc. v. FERC*, 90 F.3d 536, 552 (D.C. Cir. 1996) (internal quotation marks omitted). Courts have also found that FERC's "in connection with" authority must be construed by FERC case-by-case, and that its reach is largely within FERC's discretion.[7]

---

[6] *See, e.g., N.Y. Mercantile Exch.*, 74 FERC ¶61,311 (1996) at 61,986-87; *Revised Pub. Util. Filing Requirements*, 66 Fed. Reg. 67,134, 67,135-36 (Dec. 28, 2001), FERC Stats. & Regs. ¶35,541.

[7] *See N. Natural Gas Co. v. FERC*, 929 F.2d 1261, 1273 (8th Cir. 1991) ("Congress foresaw [FERC's] need for the ability to regulate other aspects of the

(Continued...)

Indeed, at the margins, where there is a possibility of FERC intrusion on state power, jurisdiction is, in part, a matter of FERC discretion. *See New York*, 535 U.S. at 28 ("[FERC] had discretion to decline to assert such jurisdiction . . . in part because of the complicated nature of the jurisdictional issues."); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374 (1988) (focusing on whether FERC actually and properly ***exercised*** its jurisdiction); *Conoco*, 90 F.3d at 549 (FERC declined jurisdiction over certain facilities); *see also N. Natural*, 929 F.2d at 1273 (noting FERC's flexibility in determining whether a rate or charge is "in connection with" a jurisdictional sale). Thus, in the absence of FERC's assertion of jurisdiction, there is no basis to find field preemption.

The larger point, of course, is that CfD payments are simply not paid as part of the purchase or sale of energy or capacity at wholesale, nor do they govern such sales, and so are not within FERC's exclusive jurisdiction at all. They are a separate payment supporting new power plant construction, financed by Maryland's ratepayers, and thus fall squarely within the powers preserved to the

---

(Continued...)

. . . industry as necessary to make effective its primary control over interstate transportation and sales."); *Entergy Servs., Inc.*, 139 FERC ¶61,103 (2012) at P 33 ("[FERC] has discretion in determining what rules and practices are 'for or in connection with' . . . jurisdictional services.").

States by Section 201.[8] Indeed, Appellees offer no reason why Congress, having carefully preserved States' power to support new power plant construction through its ratepayers, would have granted FERC jurisdiction, let alone ***exclusive*** jurisdiction, over such financial support for new power plant construction.

### B. If The CfDs Are FERC-Jurisdictional, They Are Not Preempted

Equally important, ***even if*** the CfDs were subject to FERC review under Sections 205 and 206, the result is not preemption, for two reasons. First, if FERC-jurisdictional, the CfDs would simply be subject to FERC review like any other bilateral contract. FERC would then determine whether the contracts should be accepted, rejected, or modified. *See NRG*, 558 U.S. at 171; *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). Indeed, within PJM's geographic region (and the U.S.), capacity is purchased through bilateral agreements, at prices different from

[8] Appellees' suggestion that preemption can be found because CPV receives payments "different from . . . the rate that FERC has approved" in the PJM auction, Appellees' Br.-33, 46, makes no sense for purposes of either field or conflict preemption. First, the payments would only be field preempted if they set a rate within FERC's exclusive jurisdiction. Second, the auction was never designed to set a uniform rate for capacity. Bilateral contracts, common in the region, routinely set long-term prices for capacity different from the auction price. And it is no wonder that the CfDs set forth a pricing schedule that does not match the auction's capacity prices: They provide compensation for construction and address a 20-year period, rather than a single-year spot market price. And, in establishing the auction, FERC itself expressly endorsed the outside-the-auction means of "creat[ing] an incentive for the construction of new capacity by entering into long-term bilateral agreements." JA824 (*PJM Interconnection, L.L.C.*, 115 FERC ¶61,079 (2006) at P 172).

the residual auction clearing price, using various payment mechanisms.[9] Such bilateral contracts for capacity sales are subject to FERC's regulatory jurisdiction even if the State directed its EDCs to enter into those contracts.[10] *See e.g.*, *Allegheny Energy Supply Co.*, 108 FERC ¶61,082 (2004) at P 15. A contract that is subject to FERC's jurisdiction does not usurp FERC's jurisdiction. Appellees' argument ignores the fact that if the CfDs are subject to Section 205 or 206, they are no more "preempted" than any other contract from a state-directed procurement.

Appellees insist the situation here is different because unlike other bilateral contracts, the CfDs were not "freely negotiated." Appellees' Br.-42. But whether a bilateral contract is "freely negotiated" has no bearing on FERC jurisdiction; it impacts, at most, "justness and reasonableness." *See*, *e.g.*, *NRG Power*, 558 U.S. at 167 (if a bilateral contract is voluntarily entered into, rates are presumed "just and reasonable" unless "the contract seriously harms the public interest"). Likewise, in *Morgan Stanley Capital Grp., Inc. v. Public Utility District No. 1*, 554

---

[9] *See*, *e.g.*, NRG Energy, Inc. Amicus Br.-2, 6-7; APPA and NRECA Amicus Br.-7, 11-12. Moreover, capacity purchased under bilateral contracts is also "bid" into PJM's residual capacity auction, typically at zero. *See* JA794 (115 FERC at P 91). These "zero" bids affect the auction like any other zero bids.

[10] Nowadays, FERC seldom reviews bilateral contracts because generators, like CPV, that obtain "market-based rate" authority can sell at agreed prices, subject only to after-the-fact reporting. *Californians for Renewable Energy, Inc.*, 119 FERC ¶61,058 (2007) at PP 27, 41.

U.S. 527, 537 (2008), *see* Appellees' Br.-42, whether the contract at issue was "freely negotiated" spoke only to whether it would be presumed "just and reasonable"; FERC's jurisdiction was not doubted. FERC reviews bilateral agreements directed by a State as readily as it reviews any other bilateral agreement.

Second, even if subject to FERC's jurisdiction under Sections 205 and 206, the CfDs would not be preempted. A State's direction to an EDC to purchase energy or capacity is ***not*** "rate-setting" if the price is determined by a competitive procurement, rather than set by the State. In ensuring that sufficient resources are available to the State's citizens, a State may direct its utilities to buy capacity or energy. *See* 18 C.F.R. §35.27 (FERC recognizes States' authority to "establish . . . [c]ompetitive procedures for the acquisition of electric energy . . . purchased at wholesale."). Those directions from a State fall squarely on the States' side of the jurisdictional line established by Section 201. *See New York*, 535 U.S. at 24 (recognizing States' authority over, *inter alia*, "utility buy-side and demand-side decisions . . . [and] authority over utility generation and resource portfolios"). What the State cannot do is set the price that governs the sale; the price must be the product of a competitive bid. *See Midwest Power Sys., Inc.*, 78 FERC ¶61,067 (1997) at 61,246 (State directed procurement is "preempted to . . . the extent [the State] set[s] rates for the wholesale sales of electric energy.").

Accordingly, Appellees' assertion about Maryland lacking the authority to "dictate the rates" or "establish[] the price," Appellees' Br.-37, is simply empty rhetoric. Even if the CfDs contained a price or rate for the sale of capacity, which they do not, Maryland did not "dictate" that price or rate; it directed a procurement. A State's direction to its EDCs to procure capacity is simply one way for a State to address its traditional responsibility to ensure an adequate, reliable electricity supply. As explained above, such directions do not invade FERC's exclusive jurisdiction. Where, as here, the State merely directs the procurement, and the rates themselves are the product of a competitive market process, the State is not "setting a rate" for a wholesale sale; its actions do not regulate in FERC's exclusive jurisdiction; and they are therefore ***not*** preempted. *Compare Allegheny*, 108 FERC ¶61,082; *Doswell Ltd. P'ship*, 50 FERC ¶61,251 (1990) at 61,756-57 (approving state-certified agreement, with prices set by competition), *with Cal. Pub. Utils. Comm'n*, 132 FERC ¶61,047 (2010) at P 64 (state-imposed price is preempted); *Midwest Power*, 78 FERC at 61,248 (rejecting state-imposed prices).[11]

[11] These principles are illustrated in *Allegheny*, 108 FERC ¶61,082. FERC there approved agreements that Maryland directed an EDC to enter into after a bid process. *See id.* at P 15. FERC examined the resulting contract because the successful bidder was affiliated with the EDC, and because FERC reviews affiliate contracts to ensure that the rate is competitive. *See id.* at P 20. FERC determined that the State-directed contract, at the competitive price, met its standards. *See id.* at P 21.

## II. NO CONFLICT EXISTS BETWEEN THE GENERATION ORDER AND FEDERAL LAW (OR POLICY)

Appellees base their conflict preemption argument primarily on a supposed conflict between what they envision as FERC's "policy" concerning one of its RPM auction rules, the new entry price adjustment ("NEPA"), and Maryland's decision to grant a CfD to the builder of the needed power plant. Appellees also assert that the participation of state-subsidized power plants in PJM's auction conflicts with the auction's purposes and distorts its "signals." Appellees' Br.-44.

Conflict preemption "must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Nw. Cent.*, 489 U.S. at 515. State law affecting FERC's regulatory authority is conflict preempted only if "the impact of state regulation of production on matters within federal control is so extensive and disruptive . . . that federal accommodation must give way to federal pre-emption." *Id.* at 517-18. Appellees make no effort to meet this standard, nor could they. FERC's orders establishing rules for the PJM capacity auction expressly accommodated bids by CfD-supported generators, and thus preclude any argument of such "extensive" interference that it might prevent accommodation.

### A. FERC Has Specifically Approved The Participation Of CfD-Supported Generators In The RPM Auction

Appellees argue that FERC's modifying the RPM capacity auction rules (at Appellees' request, to limit an exemption from such rules for state-mandated resources), *see NJBPU*, slip op. at 38-42, itself shows a "fundamental conflict" between "FERC's policies" and the CfDs.[12] Appellees' Br.-50. This argument flies in the face of *Northwest Central*, which observes that interactions between state and federal programs are inevitable. As is pertinent here, all new power plants built at the initiative of the States will affect capacity markets. *See CDPUC*, 569 F.3d at 481. Thus, FERC must ordinarily accommodate state initiatives supporting new power plants, just as States must adjust to federal initiatives. *See Nw. Cent.*, 489 U.S. at 517-18.

Conflict preemption is found only where FERC cannot accommodate a State's exercise of its congressionally preserved powers, not where FERC can, and has, done so. *See id*. FERC may take steps to protect a market it supervises. *See, e.g.*, *NJBPU*, slip op. at 40. That FERC here accommodated state-sponsored generation in that market is not evidence of a preemptive conflict, but rather dispositive evidence of lack of a conflict.

---

[12] *But see Arizona v. United States*, 132 S. Ct. 2492, 2527 (2012) (Alito, J., concurring in part and dissenting in part) ("I am aware of no decision of this Court recognizing that mere policy can have pre-emptive force.").

Early rules governing the PJM capacity auction not only allowed state-supported new generators to participate, but FERC's judgment was to categorically exempt state-mandated new generation from rules applied to all other new generators. *Id.* at 29. In response to the request of incumbent generators (like Appellees and their amici), FERC later adjusted the rules to require state-supported generators, in their first year of participation, to bid and clear the auction with an approved, cost-justified price (computed without considering any subsidy), *id*. at 40, and CPV did so. FERC determined that these changes to the auction rules protected the integrity of the auction market, *see id.* at 55, concluding that "even if discriminatory subsidies are being received, if the resource is needed at the MOPR bid then it is a competitive resource and should be permitted to participate in the auction regardless of whether it also receives a subsidy." *Id.* at 41 (internal quotation marks omitted); *accord id*. at 82-84.

FERC also expressly rejected proposals for stricter requirements on CfD-supported entities, for example, by requiring them to submit cost-based MOPR bids in subsequent years. *Id.* at 41. Instead, FERC determined that the PJM market was best served by allowing CfD generators to participate on the same terms as other incumbent generators: FERC reasoned that because most of the costs of providing capacity are sunk costs, CfD-supported generators had the same basis for bidding as price-takers in subsequent years as did other incumbent

generators. *See* JA946 (137 FERC at P 132) ("[N]ot imposing an offer floor on any resource that has cleared an RPM auction at a competitive price is reasonable, even if the resource receives out-of-market payments."). Indeed, following state-supported generators' participation in the 2012 auction, FERC pronounced the results just and reasonable. *See* JA1031-32 (*PJM Interconnection, L.L.C.*, 143 FERC ¶61,090 (2013) at P 143).

Appellees would plainly have preferred that FERC exclude CfD-supported competition from the auction, since that is what they proposed. But FERC declined to do so. That decision was affirmed by the Third Circuit. *See generally NJBPU*, slip op. FERC has thus demonstrated both the supervisory authority and responsibility to ensure that state-subsidized power plants cannot disrupt its objectives for PJM's capacity markets.[13] Appellees' disruption claims are ultimately regulatory matters within the exclusive authority of FERC to consider, in a proper proceeding, and subject to judicial review. They cannot properly be determined in the guise of a conflict preemption claim.

### B. Appellees' NEPA Theory Does Not Support Conflict Preemption

Appellees argue that, by its refusal to extend its "NEPA exception" from three to 10 years, FERC made a "policy" choice about subsidizing new power

[13] FERC considers itself "forced to act . . . when subsidized entry supported by one state's . . . policies has the effect of disrupting the competitive price signals that PJM's RPM is designed to produce." JA909-10 (137 FERC at P 3).

plant construction that conflicts with Maryland's decision to encourage new power plant construction through its 20-year CfDs.

Appellees' NEPA argument mixes apples and oranges. The NEPA exception is a special auction price rule that operates within FERC's sphere of authority, the FERC-supervised RPM capacity auction. It suggests no rules or policies for what happens outside the auction. The NEPA allows qualifying new resources in small locational delivery areas to lock in an auction price for three years, even if that price exceeds clearing prices in subsequent auctions. *See PJM Interconnection, L.L.C.*, 128 FERC ¶61,157 (2009) at P 92. The three-year lock-in exception was created to address "lumpy investments in a small [locational delivery area]." *Id.* at P 94. That special pricing rule requires capacity purchasers in the auction to bear the costs of a locked-in price.

Appellees correctly note that various parties, including Maryland, urged FERC to extend the NEPA exception's lock-in price for 10 years in order to encourage new investment. *See id*. at PP 95-96; *see also PJM Interconnection, L.L.C.*, 126 FERC ¶61,275 (2009) at P 143. In rejecting that proposal, FERC found that it (a) went "beyond the intent of the original provision," *i.e.*, "lumpy investments," and (b) would impermissibly discriminate since incumbent generators could not lock in their prices. 128 FERC at PP 94, 96. In other words,

FERC refused to impose inflated costs on capacity buyers within the auction to lock in preferential long-term prices for only some generators.

But Appellees' argument derails where they try to extrapolate from a FERC decision about expanding a pricing exception in the market FERC supervises some broad general policy pronouncement limiting state subsidies for new power plants. That argument is not only far-fetched, it is rooted in a fundamental misconception of the FPA. FERC approves rules for the markets it supervises; it issues no policies with the force of law concerning the use of state subsidies to support new power plants. Congress reserved that area to the States themselves. That FERC has declined to endorse a preferential pricing structure for new generators, to be paid by capacity purchasers within the PJM auction it supervises, has no bearing on whether ***Maryland*** may itself encourage new generation resources, underwritten by Maryland ratepayers, outside that auction – here, through a long-term CfD.

Indeed, FERC disclaimed any intention to "interfere with states or localities that, for policy reasons, seek to provide assistance for new capacity entry if they believe such expenditures are appropriate for their state." JA909, 933-34 (137 FERC at PP 3, 89); JA880 (*PJM Interconnection, L.L.C.*, 135 FERC ¶61,022 (2011) at P 141). If FERC perceived a "conflict" between its three-year NEPA rule and Maryland's 20-year CfDs, then it could have addressed it either in its MOPR ruling or in its order determining that the results of the 2012 auction were

"just and reasonable." At bottom, if the asserted policy against state-subsidized power plants existed, and was important to the conduct of the market FERC supervises, FERC possessed the means to protect its market through the rules governing that market. *See NJBPU*, slip op. at 41, 84.

## III. THE DISTRICT COURT PROPERLY REJECTED APPELLEES' COMMERCE CLAUSE CLAIM

The district court concluded that Maryland did not discriminate against out-of-state interests, and that the locational constraint created by the realities of electricity distribution in the SWMAAC imposed no burden on interstate commerce. JA342, 345. Appellees challenge only the "no discrimination" ruling. That ruling is correct.

### A. Maryland Did Not Discriminate Against Out-Of-State Interests

Maryland's Generation Order did not discriminate against out-of-state interests. The procurement was open to companies from any State willing to build a power plant to address Maryland's need for such construction in the SWMAAC, with neither overt nor hidden preferences for in-state businesses. This is dispositive of the Commerce Clause discrimination claim. *See, e.g.*, *Sandlands C&D LLC v. Cnty. of Horry*, 737 F.3d 45, 52 (4th Cir. 2013) ("Under the Dormant Commerce Clause, . . . the question is whether [a party] has been treated differently from other private businesses . . . .").

Appellees nonetheless assert that the locational requirement "plainly rendered almost all out-of-state market participants . . . ineligible." Appellees' Br.-54. This is flatly wrong. Neither the Order nor the RFP stopped any out-of-state market participants from bidding to build a plant in the SWMAAC, which was the need Maryland identified.[14]

### B. Maryland Did Not Discriminate By Seeking To Locate A Power Plant Where It Would Serve The Interests Of Its Citizens

With no discrimination against out-of-state companies in the procurement, Appellees suggest that discrimination arises from the requirement that the power plant be built "inside the Southwest MAAC Locational Deliverability Area." Appellees' Br.-54 (internal quotation marks omitted).

But Appellees nowhere define any actionable form of discrimination. Bidders were required to build in the SWMAAC area because that is where the need existed. As Appellees acknowledge, locational requirements for where the power plant had to be built derived from "transmission constraints,"[15] Appellees' Br.-11, 44, that resulted in the SWMAAC's having "the highest RPM prices, the

[14] Several out-of-state entities submitted bids, and one cleared threshold requirements, ultimately losing out based on analysis of which project would result in least cost to ratepayers. JA1331.

[15] The Commerce Clause is not offended when States address issues "inherently local, not interstate, in nature." *Brown v. Hovatter*, 561 F.3d 357, 364 (4th Cir. 2009).

least development of generation," and being "most at risk for reliability problems caused by load swings, generator retirements, and transmission issues." JA260. If not located there, the new generation would not address the problems Maryland had identified. That is not discrimination; it is a legitimate response to the fact that existing resources were not meeting the need.

Appellees assert "harm" based on their inability to participate in the RFP using existing plants located outside Maryland, Appellees' Br.-56, but their harm allegation only highlights the fallacy in their discrimination argument. Their complaint is about the decision to build ***new*** power plants, as opposed to relying on existing resources, regardless of location.[16] Or perhaps it is "discrimination" in favor of building new plants where needed, versus where not needed. But it is certainly ***not*** impermissible discrimination against out-of-state interests.

Appellees theorize that impermissible discrimination can be found in the very idea that Maryland wanted to build a new power plant to benefit Maryland's citizens and Maryland's economy – and not the citizens or economy of other States. *See* Appellees' Br.-59. But it is odd to suggest that Maryland violates the

[16] Appellees assert that a new Maryland power plant could "displac[e] out-of-state supply." Appellees' Br.-56 (emphasis omitted). But it could also displace in-state supply. That a new power plant will create more competition does not render it an impermissible discrimination or a burden on interstate commerce of any type heretofore recognized.

Commerce Clause by considering the benefits to Marylanders when calling upon them to subsidize new power plant construction. Congress in the FPA assigned to the ***States*** the responsibility of providing for adequate generation resources, based on the understanding that States would look after the interests of their own citizens and their economy. A State may take into account the benefits to its citizens when it decides whether to enlist its ratepayers to finance a project, such as construction of a power plant.

Moreover, "[d]irect subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause's prohibitions]." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988); *accord Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 590-91 (1997) (distinguishing subsidies, which are permissible, from discriminatory taxes, which are not). Here, Maryland ratepayer support was available to any company, from any State, that was able to satisfy the identified need for a new power plant in the SWMAAC.

## CONCLUSION

The district court's judgment on preemption should be reversed and, on the Commerce Clause, affirmed.

Dated: April 3, 2014

Respectfully submitted,

CPV Maryland, LLC

*/s/ Larry F. Eisenstat*

Larry F. Eisenstat (D.C. Bar #417414)
Clifton S. Elgarten (D.C. Bar #366898)
Richard Lehfeldt (D.C. Bar #367021)
Jennifer N. Waters (D.C. Bar #928960)
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Tel: (202) 624-2500
Fax: (202) 628-5116
leisenstat@crowell.com
celgarten@crowell.com
rlehfeldt@crowell.com
jwaters@crowell.com

*Counsel for Intervenor-Appellant CPV Maryland, LLC*

## TYPE-VOLUME CERTIFICATION

This brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B), because this brief contains 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The "Word Count" function of Microsoft Word 2010 was used for this purpose.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(7) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: April 3, 2014

*/s/ Larry F. Eisenstat*
Larry F. Eisenstat
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
Tel: (202) 624-2500
Fax: (202) 628-5116

*Counsel for Intervenor-Appellant*
*CPV Maryland, LLC*

## CERTIFICATE OF SERVICE

I hereby certify that I have on this 3rd day of April, 2014, caused the foregoing brief to be served upon each party identified in the attached service list, via email through the Court's CM/ECF system or via U.S. Mail, first class, postage prepaid. I further certify that on this day 8 hardcopies of this brief are being sent to the Clerk of Court via overnight delivery.

Dated: April 3, 2014

*/s/ Larry F. Eisenstat*
Larry F. Eisenstat
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
Tel: (202) 624-2500
Fax: (202) 628-5116

*Counsel for Intervenor-Appellant*
*CPV Maryland, LLC*

**SERVICE LIST**

| | |
|---|---|
| Andrew Jay Graham<br>John Augustine Bourgeois<br>Geoffrey H. Genth<br>Kramon & Graham, PA<br>Suite 2600<br>Commerce Place<br>1 South Street<br>Baltimore, MD 21202-0000 | David Lawrence Meyer<br>Morrison & Foerster<br>2000 Pennsylvania Ave., NW<br>Suite 6000<br>Washington, DC 20006-1812 |
| Candice Chiu<br>Paul D. Clement<br>Erin E. Murphy<br>Bancroft<br>1919 M Street N.W.<br>Suite 470<br>Washington, DC 20036 | Shannen Wayne Coffin<br>Steptoe & Johnson, LLP<br>Room 832<br>1330 Connecticut Avenue, NW<br>Washington, DC 20036-1795 |
| James Kilpatrick McGee<br>Alexander & Cleaver, PA<br>11414 Livingston Road<br>Fort Washington, MD 20744-5146 | Scott H. Strauss<br>Jeffrey Alan Schwarz<br>Peter J. Hopkins<br>Spiegel & McDiarmid, LLP<br>2nd Floor<br>1333 New Hampshire Avenue, NW<br>Washington, DC 20036-0000 |
| Howard Robert Erwin, Jr.<br>Kristin Case Lawrence<br>Maryland Public Service Commission<br>General Counsel's Office<br>6 St. Paul Street<br>Baltimore, MD 21202-0000 | Susanna Y. Chu<br>Kaye Scholer, LLP<br>901 15th Street, NW<br>Washington, DC 20005-0000 |

| | |
|---|---|
| John P. Coyle<br>Duncan & Allen<br>Suite 300<br>1575 Eye Street, NW<br>Washington, DC 20005<br>Email: jpc@duncanallen.com | Randolph Lee Elliott<br>McCarter & English, LLP<br>12th Floor<br>1015 15th Street, NW<br>Washington, DC 20005-2605 |
| William Frederick Fields<br>Maryland Office of People's Counsel<br>Suite 2102<br>6 St. Paul Street<br>Baltimore, MD 21202-0000 | Kimberly Brickell Frank<br>Kaye Scholer, LLP<br>901 15th Street, NW<br>Washington, DC 20005-0000 |
| Jeffrey A. Fuisz<br>Kaye Scholer, LLP<br>425 Park Avenue<br>New York, NY 10022-0000 | Geoffrey H. Genth<br>Kramon & Graham, PA<br>Suite 2600<br>Commerce Place<br>1 South Street<br>Baltimore, MD 21202-0000 |
| Karis Anne Gong<br>Skadden, Arps, Slate, Meagher & Flom, LLP<br>Room 10-6<br>1440 New York Avenue, NW<br>Washington, DC 20005-2107 | Eugene Grace<br>American Wind Energy Association<br>1501 M Street<br>Washington, DC 20005 |
| Andrew Jay Graham<br>Kramon & Graham, PA<br>Suite 2600<br>Commerce Place<br>1 South Street<br>Baltimore, MD 21202-0000 | Peter J. Hopkins<br>Spiegel & McDiarmid, LLP<br>2nd Floor<br>1333 New Hampshire Avenue, NW<br>Washington, DC 20036-0000 |

| | |
|---|---|
| Jeffrey A. Lamken<br>Martin V. Totaro<br>MoloLamken, LLP<br>The Watergate<br>600 New Hampshire Avenue, NW<br>Washington, DC 20037 | Ashley Charles Parrish<br>King & Spalding, LLP<br>1700 Pennsylvania Avenue, NW<br>Washington, DC 20006-0000 |
| Delia Denise Patterson<br>American Public Power Association<br>Suite 1200<br>1875 Connecticut Avenue, NW<br>Washington, DC 20009 | Jeffrey Alan Schwarz<br>Spiegel & McDiarmid, LLP<br>1333 New Hampshire Avenue, NW<br>Washington, DC 20036-0000 |
| John Lee Shepherd Jr.<br>Skadden, Arps, Slate, Meagher & Flom, LLP<br>1440 New York Avenue, NW<br>Washington, DC 20005-2107 | Pamela M. Silberstein<br>National Rural Electric Cooperative Association<br>4301 Wilson Boulevard<br>Arlington, VA 22203 |
| Randall L. Speck<br>Kaye Scholer, LLP<br>901 15th Street, NW<br>Washington, DC 20005-0000 | Steven M. Talson<br>Maryland Energy Administration<br>AAG<br>Suite 300<br>60 West Street<br>Annapolis, MD 21401 |