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

REPLY BRIEF OF THE MARYLAND PUBLIC SERVICE COMMISSION

H. Robert Erwin
Ransom E. Davis
William Donald Schaefer Tower
6 St. Paul Street
Baltimore, Maryland 21202
(410) 767-8076

Scott H. Strauss
Peter J. Hopkins
Jeffrey A. Schwarz
SPIEGEL & MCDIARMID LLP
1333 New Hampshire Ave. NW
Washington, DC 20036
(202) 879-4000

ATTORNEYS FOR THE MARYLAND PUBLIC SERVICE COMMISSION

April 3, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

FEDERAL AGENCY CASES

FEDERAL CONSTITUTION AND STATUTES

FEDERAL ADMINISTRATIVE REGULATIONS

OTHER AUTHORITIES

SUMMARY OF ARGUMENT

The Maryland Public Service Commission (Maryland or PSC) sought to fulfill its obligation to ensure the availability of generating capacity adequate to meet anticipated reliability needs by directing Maryland retail utilities to sign long-term "contracts for differences" (CFDs) with CPV Maryland, LLC (CPV), the winner of a state-run competitive solicitation. Plaintiff-generators argue that they are injured by competition from CPV's state-supported resource. But that competition imposes no harm because it occurs entirely in Federal Energy Regulatory Commission (FERC)-regulated markets, and pursuant to PJM's FERC-approved tariff. Plaintiff-generators persuaded FERC to revise PJM's tariff to subject new state-supported resources to a cost-based entry test. CPV passed that test, and FERC found the resulting auction rates just and reasonable.

In the court below, plaintiff-generators mounted another attempt to exclude CPV from PJM's markets—this time challenging the state support agreements on constitutional grounds. They lacked standing to do so. Plaintiff-generators have no cognizable injury-in-fact because they have received and will continue to receive the just-and-reasonable, FERC-approved auction prices. Their alleged harm is traceable to FERC's decisions about how state-supported resources participate in wholesale markets—and not to Maryland's actions.

Plaintiff-generators also are wrong on the merits. Maryland's order requiring its retail utilities to enter into CFDs with CPV did not enter any exclusive federal field. Federal Power Act (FPA) Section 201, 16 U.S.C. § 824, preserves state authority over the adequacy of generating capacity. Maryland supports CPV's contention that, contrary to the district court's findings, the CFDs are construction financing contracts, and not FERC-jurisdictional rates. Even if the CFDs are FERC-jurisdictional, the FPA would not preempt Maryland's order. FPA rate-setting authority belongs to public utilities (here, CPV) that contract to sell electricity in interstate commerce. FERC ensures that the resulting rates comport with FPA requirements. Assuming the CFDs are FERC-jurisdictional, FERC's rate-review authority remains to be exercised.

With respect to their field-preemption claim—the only one the district court granted—plaintiff-generators never explain how state decisions leading to contracts that are either outside of or subordinate to FERC's jurisdiction can usurp or conflict with it. Their retort that the CFDs were not "freely negotiated" misses the point, and ignores that retail utilities' wholesale-purchasing decisions are frequently subject to state control, including state-supervised solicitations. Plaintiff-generators cite no case finding preemption where a state directed retail utilities to contract at rates offered by a generation developer, subject (if the agreement was jurisdictional) to FERC review. The FPA is clear: even if the CFDs

are FERC-jurisdictional, Maryland could direct the electric distribution companies (EDCs) to enter them; CPV could choose to enter them and set a FERC-jurisdictional contract rate; and FERC can regulate those rates. The arrangement accords with the FPA and is not preempted.

Plaintiff-generators next argue—incorrectly—that Maryland's order conflicts with a supposed federal policy requiring uniform compensation to PJM capacity sellers.[1] In fact, federal law requires no such uniformity—especially not as between 20-year bilateral agreements and annual spot-market prices.

More fundamentally, state-federal conflict is a structural impossibility here. If the CFDs are found to be outside of FERC's jurisdiction, there is obviously no conflict. If the CFDs are FERC-jurisdictional, then they are subordinate to FERC's authority and FERC may modify them. FERC also sets the tariff rules under which CFD-backed resources participate in PJM's markets and the extent, if any, to which they affect prices. Operating under those rules, PJM revised CPV's offer to reflect PJM's own estimate of CPV's costs; that cost-based offer cleared; FERC declared the resource competitive and the resulting auction prices just and reasonable; and FERC held that CPV should be free hereafter to submit zero-price bids—just like all existing resources, including those of plaintiff-generators. Plaintiff-generators, not Maryland, seek to end-run FERC's decisions.

[1] The district court did not reach conflict-preemption claims.

Finally, plaintiff-generators argue Commerce Clause claims not properly before the Court. The district court's judgment declared that Maryland violated the Supremacy Clause, reserved jurisdiction to consider injunctive relief if needed, and dismissed plaintiff-generators' Commerce Clause claims with prejudice. Their attempt to revive those claims without cross-appealing is barred because it requires a rewriting of the judgment: Commerce Clause theories cannot provide an alternative basis for affirming a declaratory judgment obtained on preemption grounds. Even if properly raised here, their claims lack merit. Maryland solicited offers to build a new generating facility in the Southwest Mid-Atlantic Area Council (SWMAAC) PJM-capacity zone, where PJM and others said—and the PSC found—that more generation capacity was needed for local reliability purposes. The solicitation was open to any developer, from any state, willing to build the facility. As the district court found, Maryland did not impede anyone from building any other resource anywhere they wanted.

ARGUMENT

I. PLAINTIFF-GENERATORS LACKED STANDING

Plaintiff-generators lacked Article III standing because they suffered no "injury-in-fact" traceable to the Maryland order.

A. Plaintiff-generators have no injury-in-fact

Plaintiff-generators argue that they suffered "financial and pecuniary harm" (Br. 16) of "about" $90 million (JA 394) from CPV's participation in PJM markets. Yet they abandoned their damages claim because they did "not … [think] of the pecuniary harms as something as to which [the district court] could feasibly enter relief." JA 752. That belief is correct because any damages would be based, impermissibly, upon entitlement to a hypothetical capacity-auction price different from the one that resulted from CPV's FERC-approved auction participation. *See, e.g.*, *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992).

Courts have long held that the FERC-filed rate is "for all purposes, the legal rate." *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156, 163 (1922). Here, PJM's auction rules and the resulting prices are the filed rate, and are "unassailable in judicial proceedings." *Simon v. KeySpan Corp.*, 694 F.3d 196, 204 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1998 (2013).

FERC determined that CPV's resource—which cleared the auction with a cost-based offer calculated by PJM (JA 270)—is "economic[,]" "competitive," and "does not artificially suppress market prices" (JA 889-90), but instead produces "just and reasonable" rates. JA 1031-32. And because CPV cleared, it now is required to bid into PJM's corresponding energy market (JA 804) and future

capacity auctions.[2] As PJM's tariff now calls for CPV's participation, a judicial declaration frustrating or preventing that participation would run afoul of the filed-rate doctrine.

"[A]n 'injury in fact' [is] an invasion of a judicially cognizable interest." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). Because plaintiff-generators are entitled to nothing but the operation of the filed rate, "they failed to allege an injury-in-fact" resulting from CPV's participation in PJM markets. *McCray v. Fid. Nat'l Title Ins. Co.*, 682 F.3d 229, 243 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 1242 (2013). In *McCray*, the Third Circuit affirmed the dismissal for lack of standing of claims that defendants had illegally fixed title-insurance prices filed with Delaware's insurance commissioner. Employing reasoning applicable here, *McCray* found that alleged future losses or damages arising from the continued operation of "current [filed] rates do not constitute a[n] [Article III] injury under the filed rate doctrine." *Id.* at 243 n.15.[3]

---

[2] *See N.J. Bd. of Pub. Utils. v. FERC*, No. 11-4245, 2014 U.S. App. LEXIS 3084, at *18 n.4 (3d Cir. Feb. 20, 2014) ("*NJBPU*"); *Mirant Energy Trading, LLC v. PJM Interconnection, LLC*, 122 FERC ¶ 61,007, P 35 (2008) (must offer obligation).

[3] *McCray*'s finding that there was no injury-in-fact disposes of plaintiff-generators' claim that Maryland has raised a "prudential standing argument[]." Br. 38 n.2 (citation omitted). And, as discussed *infra*, plaintiff-generators have likewise failed to meet the "traceability" element of Article III standing. Because plaintiff-generators are entitled to nothing other than the "'just and reasonable'" (*id.* 41) PJM tariff rate and have no injury-in-fact, let alone one traceable to Maryland's actions, the district court lacked "jurisdiction to decide the constitutionality of

Plaintiff-generators' claimed future losses also are wholly "conjectural or hypothetical," *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (internal citation omitted), and not a proper basis for Article III standing. *McCray*, 682 F.3d at 243-44. The district court found that future PJM auction results depend upon "all the factors that play into the market-based auction process administered by PJM" (JA 340), including demand levels, unit participation, bidding strategies and market rules—that are all subject to change.

Plaintiff-generators claim (Br. 40-41) that "[i]t strains credulity to suggest that competitors [will] not be injured" if CPV bids its capacity into future auctions at a zero price. But, again, their complaint is with FERC's rules, under which a resource that clears one capacity auction can bid thereafter at a zero price. *See* JA 235. "PJM has reported that in some [auctions], 80% of the participants bid zero" (*id.*), likely including plaintiff-generators themselves.[4] FERC expressly rejected plaintiff-generators' calls to continue subjecting state-supported resources (but only those resources) to minimum-offer requirements after clearing one auction with a cost-based offer. *NJBPU*, at *43, 101-04.

Plaintiff-generators claim "competitor" standing (Br. 38) to challenge CPV's "entrance … into the business," quoting *Ass'n of Data Processing Serv. Orgs., Inc.*

[Maryland's] regulatory actions." *Id.* (emphasis and citation omitted).

[4] Other estimates put the percentage of zero bidders at above 95 percent. *See* n.28, *infra.*

v. Camp, 397 U.S. 150, 154 (1970) ("*Camp*"), and related cases.[5] But CPV's entrance occurred via rules that the plaintiff-generators litigated before FERC and the Third Circuit. Plaintiff-generators had standing to do so because those proceedings involved a challenge to agency rules controlling new entry.[6] But competitor-standing cases afford no free pass to challenge upstream actions creating potential rivals.

Plaintiff-generators cannot evade the filed-rate bar and attack collaterally PJM's tariff or CPV's participation pursuant to it. *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 375 (1988).[7] And while plaintiff-generators seek a

---

[5] Plaintiff-generators' *Camp* quotation is unfairly truncated. The Court stated that "an existing entrepreneur had standing to challenge the legality of the entrance of a newcomer into the business, *because the established business was allegedly protected by a valid city ordinance that protected it from unlawful competition.*" *Id*. at 154 (emphasis added, citation omitted). Here, PJM's FERC-approved tariff provides for—rather than protects against—CPV's market participation, and the Constitution does not protect plaintiff-generators from that competition.

[6] *See id.* (Administrative Procedure Act (APA) challenge to ruling of Comptroller of the Currency); *Leaf Tobacco Exps. Ass'n v. Block*, 749 F.2d 1106, 1112 (4th Cir. 1984) (APA challenge to ruling of Secretary of Agriculture); *U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1331 (D.C. Cir. 2002) (Communications Act challenge to FCC ruling); *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 605 (D.C. Cir. 2002) (same); *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 43 (D.C. Cir. 1999) (Interstate Commerce Act challenge to FERC ruling); *Liquid Carbonic Indus. Corp. v. FERC*, 29 F.3d 697, 701 (D.C. Cir. 1994) (challenge to FERC ruling under Public Utilities Regulatory Policies Act of 1978).

[7] The filed-rate doctrine bars claims that challenge the formation of filed rates. While not present here, it is noteworthy that the filed-rate doctrine is sufficiently expansive that it has barred rate challenges even where their formation is tainted by bribery, *H.J. Inc.*, 954 F.2d at 488, antitrust conspiracy, *Square D Co. v. Niagara*

competitor exception to that rule, the Supreme Court has never found one, and this Court refused to recognize one. *Lifschultz Fast Freight, Inc. v. Consol. Freightways Corp. of Del.*, 998 F.2d 1009 (4th Cir. 1993), summarily affirming district court decision, 805 F. Supp. 1277, 1296 (D.S.C. 1992), that "the filed rate doctrine applies to actions by competitors as well as customers." Like the ICC in *Lifschultz*, FERC "is the sole source of any rights relating to an [alleged] injury caused by a filed rate for not only customers, but for the entire public, including competitors." 805 F. Supp. at 1295.

B. Plaintiff-generators' supposed injuries are traceable to actions by FERC, not Maryland

Article III standing requires alleged injuries to be "fairly traceable" to the challenged action. *Allen v. Wright,* 468 U.S. 737, 757 (1984). Maryland's order arguably helps the development of CPV's resource, but, by itself, inflicts no injury on plaintiff-generators. If CPV's resource were dedicated to an industrial use, it would have no impact on the PJM prices that are plaintiff-generators' sole concern. Plaintiff-generators' supposed injury is traceable only to FERC-approved rules that allow CPV to participate in PJM's markets and determine how that participation affects PJM capacity and energy prices. FERC—not Maryland—controlled CPV's entry and price effects.

Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986), and breach of fiduciary duty, *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246 (1951).

This Court has said that it is "substantially more difficult" to satisfy standing requirements "when a plaintiff is not the direct subject of government action, but rather when the asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Frank Krasner Enters., Ltd. v. Montgomery Cnty., Md.*, 401 F.3d 230, 234-5 (4th Cir. 2005) (internal citation omitted). In *Frank Krasner*, a gun-show operator lacked standing to challenge a county ordinance restricting funding to convention centers that allowed gun sales. *Id.* at 236. The gun-show operator failed the traceability test because he was "once-removed" from the county's action. *Id.* The convention center could have eschewed the funding and continued hosting gun shows, so its contrary decision broke the causation necessary to challenge the county's ordinance. *Id.* Similarly, here, plaintiff-generators' "injuries" relate solely to CPV's alleged impact on PJM market prices—impacts controlled exclusively by PJM and FERC, "third part[ies] not before the court." *Id.*[8] Again, plaintiff-generators had standing to and sought PJM tariff changes before FERC. CPV complied with those revised rules, and cleared the ensuing capacity auction.

[8] *See also Mirant Potomac River, LLC v. EPA*, 577 F.3d 223, 230 (4th Cir. 2009) (harm caused by Virginia regulations rather than by the challenged EPA approval of Virginia's State Implementation Plan for compliance with Clean Air Interstate Rule).

II. MARYLAND'S ORDER IS NOT PREEMPTED

Plaintiff-generators also are wrong on the merits.[9]

A. Maryland's order is not field-preempted

Under the CFDs, Maryland EDCs assume the market-price risk for CPV's capacity sales as consideration for CPV's agreement to build a power plant. *See* Md. Br. 16. Even if such agreements are deemed to establish FERC-jurisdictional rates, Maryland's order is not preempted because retail regulation that initiates a transaction subject to FERC's authority cannot usurp or displace that authority.[10] Plaintiff-generators essentially ignore this point, instead asserting repeatedly that Maryland "set," "regulate[d]," and "dictate[d]" wholesale rates "determined by the state's own regulatory process." Br. 15, 25-26, 30, 37, 41, 42. Likewise, the district court's core finding is that Maryland impermissibly set a wholesale rate. JA 310. Plaintiff-generators' claims are false and the court's finding is incorrect.

The FPA accords wholesale rate-setting authority to public utilities making sales in interstate commerce;[11] and neither states[12] nor FERC[13] may interfere with

---

[9] In parallel Third Circuit proceedings, the United States was invited to brief whether the FPA preempts New Jersey's Long-Term Capacity Pilot Program (LCAPP) Act. Order, *PPL EnergyPlus, LLC v. Solomon*, Nos. 13-4330 *et al.* (3d Cir. Feb. 21, 2014). Because the United States has not sought to participate here, and no party has sought to lodge its brief, we do not address it here.

[10] *See* Md. Br. 17-18 and the cases cited there.

[11] *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 171 (2010); *Morgan Stanley Capital Grp., Inc. v. Pub. Utils. Dist. No. 1*, 554 U.S. 527, 531 (2008); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 341

that statutory right. Maryland's directive that its EDCs accept CPV's offer is not prohibited rate-setting. Here, CPV, a public utility, developed the CFD rate offered in response to Maryland's solicitation (JA 264), and willingly entered into the CFDs, setting any CFD rate by contract. "[T]he FPA … permits utilities to set rates … through bilateral contracts." *Morgan Stanley Capital Grp.*, 554 U.S. at 531. FERC's exclusive FPA authority is to ensure that rates set initially by public utilities comport with FPA standards and, if not, to remedy them. *Mobile*, 350 U.S. at 341.[14] As amici American Public Power Association and National Rural Electric Cooperative Association explain:

> [T]he FPA requires every public utility to file with FERC "schedules showing all [jurisdictional] rates and charges… together with all contracts which in any manner affect or relate to such rates [or] charges." 16 U.S.C. § 824d(c). A public utility cannot change its rate schedules without giving prior notice by filing the change with FERC. 16 U.S.C. § 824d(d). If FERC finds that such

---

(1956); *S. Carolina Generating Co. v. FPC*, 249 F.2d 755, 760 (4th Cir. 1957).

[12] *California Pub. Utils. Comm'n*, 132 FERC ¶ 61,047, P 69 ("*Cal PUC 1*"), *clarified*, 133 FERC ¶ 61,059 (2010), holding the state's program preempted to the extent the state displaced a public-utility seller's right to file with FERC the rate "it proposes to charge."

[13] *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) (FERC cannot "force public utilities to file particular rates" or "prohibit public utilities from filing changes in the first instance.") (citations omitted), *mandate enforced*, 329 F.3d 856 (D.C. Cir. 2003).

[14] *Mobile* involved the Natural Gas Act, but the FPA's rate-review provisions are "substantially identical." *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956).

> a rate is "unjust, unreasonable, unduly discriminatory or preferential," the FPA provides that FERC "shall determine the just and reasonable rate … to be thereafter observed and in force, and shall fix the same by order." 16 U.S.C. § 824e(a).

Br. 6. While FERC's rate-review authority is "paramount," *Mobile*, 350 U.S. at 344, it remains "passive and reactive." *Atlantic City Elec. Co.*, 295 F.3d at 10 (quotation omitted).[15] Ordering retail utilities to accept CPV's terms, potentially subject to FERC review, did not usurp FERC's role.[16]

Plaintiff-generators respond that the CFDs are "not … bilateral contract[s]" subject to FERC approval because they were not "'freely negotiated …' among willing counterparties," asserting without support that "*state-mandated* contract[s]" are "nothing like any mechanism FERC approves." Br. 42 (citation omitted). That is wrong for reasons demonstrated in our opening brief, which plaintiff-generators ignore. Although FERC alone decides the legality of wholesale rates, states may

[15] While passive, FERC's authority does not depend on the filing of the CFDs. The CFDs need not be filed, if within CPV's market-based rate authority. JA 1072. FERC monitors market-based rates through the filing of quarterly electronic reports. JA 305. If the CFDs are FERC-jurisdictional and required to be filed, FERC may order CPV to file them. *E.g.*, *AES Huntington Beach, L.L.C.*, 87 FERC ¶ 61,221, 61,877-78, *reconsideration denied*, 87 FERC ¶ 61,381 (1999).

[16] Plaintiff-generators argue (Br. 26) that FPA § 201(b), 16 U.S.C. § 824(b), includes language—missing from the NGA's analogous provision—that purportedly subordinates state jurisdiction over generation to FERC's jurisdiction over wholesale rates. That language does not address Maryland's demonstration that it did not set a wholesale rate because, under the FPA's rate provisions, CPV—not FERC—has initial rate-setting authority, and the CFDs potentially constitute utility-set rates subject to FERC review.

direct retail utilities' power-supply planning and purchasing decisions.[17] FERC acknowledges state authority over generation development and power purchasing,[18] including the power "to dictate a utility's actual purchase decisions" and "the generation resources from which utilities may procure electric energy." *California Pub. Utils. Comm'n*, 134 FERC ¶ 61,044, P 30 & n.62 (2011). Because sellers offer at particular prices, the ability to choose among competing resources necessarily includes selecting among offered prices. Thus, where a seller offers a rate and the resulting contract is subject to FERC review, state orders directing retail utilities to enter those contracts are not preempted. *Cal PUC 1*, P 69.[19]

States exercise authority over power purchasing both after-the-fact (via prudence review) and before-the-fact (e.g., through renewable-portfolio standards

[17] *See* Md. Br. 19-21 & nn.16-18.

[18] *Id*. 20. FERC recently explained that its own jurisdiction "centers on sales for resale …, not on purchases." Standards of Conduct for Transmission Providers, Order No. 717, 73 Fed. Reg. 63,796, 63,813 (Oct. 27, 2008) (subsequent history omitted).

[19] Amici Electric Power Supply Association and Edison Electric Institute (EPSA/EEI) say the CFDs are not bilateral contracts because the EDCs do not buy capacity and energy under them and because the capacity-buyer, PJM, "has not chosen the rate under the CPV contracts." Br. 17. But those facts reinforce that the CFDs are not FERC-jurisdictional. CPV's capacity and energy sales occur under and are compensated through PJM's tariff. Like any hedge, the CFDs transfer the market-price risk of those sales to CPV's bilateral counter-parties and the construction price of the plant is net of that revenue stream. As with any bilateral agreement in PJM's market, PJM is not a party to—and pays nothing under—the CFDs.

or by conducting resource solicitations).[20] Indeed, FERC relies on state supervision as a check on affiliate self-dealing.[21] FERC acted in 2007 specifically to facilitate state-mandated resource planning and competitive solicitations—the very activities that resulted in the CFDs.[22]

Plaintiff-generators seem to argue that FERC rulings acknowledging state authority are *ultra vires*, as "it is *Congress*, not FERC, that has declared regulation of the wholesale market off-limits to the states." Br. 42. But courts defer to agencies' interpretation of the scope of their statutory jurisdiction.[23] And Congress presumably knows FERC's interpretation, and has not amended the FPA to reverse it.[24]

Plaintiff-generators argue that Maryland gave up *some* control over retail power costs in requiring its retail utilities to divest their generation facilities. Br. 7.

---

[20] *See* Md. Br. 21; *see also* EPSA/EEI Br. 33-34.

[21] Md. Br. 21.

[22] *See* Standards of Conduct for Transmission Providers, Notice of Proposed Rulemaking, 72 Fed. Reg. 3,958, 3,959, 3,964, 3,965 (Jan. 29, 2007); Order No. 717, *supra*, P 77.

[23] *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868 (2013) ("Statutory ambiguities" including those relating to jurisdiction are to be resolved "not by the courts but by the administering agency.").

[24] *See Johnson v. Transportation Agency, Santa Clara Cnty.*, 480 U.S. 616, 629 n.7 (1987); *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 170-71 (4th Cir. 1998), *aff'd*, 529 U.S. 120, 144 (2000) (Congressional inaction "ratified the FDA's long-held position" that it lacked jurisdiction to regulate tobacco products); *Gilchrist v. Newport News Shipbuilding and Dry Dock Co.*, 135 F.3d 915, 919 (4th Cir. 1998).

Previously, there was no wholesale sale when retail utilities owned the generation used to serve retail customers, so Maryland—not FERC—determined the rate for power produced by those assets. After divestiture, that power is purchased at wholesale, so FERC decides the legality of those rates. Even after restructuring, however, states retain authority over retail utilities' purchasing decisions and power-supply portfolios. *New York v. FERC* , 535 U.S. 1, 24 (2002).

B. There is no conflict between Maryland's order and federal law

Plaintiff-generators' conflict theory—which the district court declined to reach (JA 311-12)—fares no better. Plaintiff-generators claim that federal law mandates uniform rates for resources selling capacity in PJM, subject to a narrow exception permitting some new resources to lock-in prices for three years. *See* Br. 44. Their theory fails because, structurally, no conflict can exist here. If the CFDs are FERC-jurisdictional, and they are found to offend some rate-uniformity policy or distort wholesale markets, then FERC can modify them in a regulatory proceeding under the FPA. Likewise, PJM's capacity and energy rates are governed by PJM's tariff, subject to FERC's supervision. The CFDs have no wholesale-market effect but that which FERC allows.

1. Plaintiff-generators' conflict-preemption arguments cannot be reconciled with FERC's orders

Plaintiff-generators' conflict theory cannot be reconciled with FERC's orders. Plaintiff-generators portray Maryland as end-running FERC decisions (Br. 46), but FERC itself suggested Maryland's path. And Maryland, in following it, complied at every step with FERC's rules.

When PJM proposed its capacity-auction design, West Virginia challenged it as intruding into state jurisdiction over generation. JA 824. FERC disagreed, finding that states and utilities could choose among: (a) building needed capacity; (b) "*creat[ing] an incentive for the construction of new capacity by entering into long-term bilateral agreements*"; or (c) "refrain[ing] from" those steps and paying the "prices set by the demand curve." *Id.* (emphasis added).[25] Maryland chose the second option.[26]

FERC later approved a minimum-offer price rule (MOPR) addressing the concern that buyer support for new capacity could depress clearing prices. The MOPR initially exempted state-mandated resources developed to address

[25] FERC held that PJM capacity market payments were "not sufficient to provide appropriate incentives for efficient investment decisions—whether new entry or a retirement decision is at stake." *PJM Interconnection, LLC*, 117 FERC ¶ 61,331, P 77 (2006).

[26] When it approved PJM's proposed capacity market in 2006, FERC was free to incentivize construction of new generation through market signals. But it did not remove States' long-standing tools, such as CFDs, to acquire needed new generation.

perceived capacity shortfalls (JA 874-75, 879), allowing those resources to submit below-cost offers that ensured that they would clear. *See* JA 876. Maryland, informed by PJM, believed it faced a shortfall and began investigating the need to spur new capacity. JA 1308-10. These actions were "perfectly predictable" from the outset; but FERC changed its mind and withdrew the MOPR exemption (after New Jersey and Maryland began to rely on it), because of new appraisals concerning how state-supported generation could affect market prices. *NJBPU* at *76-77. FERC emphasized that its decision did not interfere with "states … that for policy reasons … provide assistance for new generation entry if they believe such expenditures are appropriate for their state." JA 880.[27]

Without the exemption, CPV's state-selected resource could no longer clear with a below-cost offer. JA 236, 268-69. Maryland went ahead with its program knowing that its selected resource would be subject to those rules.[28] Under the current MOPR, if a new resource is offered below certain price benchmarks, PJM reviews the offer to ensure that it reflects the resource's net costs *excluding state*

[27] *See also New England States Comm. on Elec. v. ISO New England Inc.*, 142 FERC ¶ 61,108 (2013) (LaFleur, concurring) ("[S]tates have the unquestioned right to make policy choices through the subsidization of capacity"); *Midwest Power Sys., Inc.*, 78 FERC ¶ 61,067, 61,248 (1997) ("[S]tates also may seek to encourage renewable or other types of resources … by giving direct subsidies." (internal citations omitted)).

[28] Maryland issued its order selecting CPV almost a year after FERC eliminated the MOPR exemption.

subsidies (JA 979-80, 990), and, where necessary, adjusts the offer to reflect PJM's cost estimate. *See* JA 270. Here, PJM reviewed CPV's offer and adjusted it upward. *Id*. The resulting cost-based offer cleared PJM's auction. *Id*.

FERC has held that CFD-backed resources clearing with cost-based offers are competitive and economic and do not distort auction prices regardless of their state support. JA 889-90.[29] As even plaintiff-generators admit (Br. 39), despite complaints that PJM insufficiently adjusted CPV's offer (JA 1029), FERC endorsed the resulting auction prices as just and reasonable (JA 1031-32), and rejected calls to eliminate opportunities for other state-supported resources to clear based on PJM cost estimates. *Id*.

Maryland and CPV thus did everything possible to comply with FERC's capacity-auction rules. Maryland succeeded, and FERC endorsed the result. Any claim that Maryland's or CPV's actions conflict with federal law or policy is untenable.

[29] FERC rejected requiring (only) state-supported resources to clear multiple auctions before they would be permitted to submit zero bids like other existing resources. JA 889, 945-46, 1048-49. While plaintiff-generators decry zero bidding by CPV (Br. 40-41), the district court found that in some annual capacity auctions, 80 percent of the participants bid zero. JA 235. Indeed, at oral argument before the Third Circuit on appeal of FERC's MOPR orders, FERC counsel stated that "over 95 percent of the resources that bid into the auction are price takers." Transcript of Oral Argument at 84-85, *N.J. Bd. of Pub. Utils. v. FERC*, Nos. 11-4245 *et al.* (3d Cir. argued Sep. 10, 2013).

2. Neither the FPA nor FERC policy requires price uniformity

Plaintiff-generators allege that the difference between CPV's CFD compensation and PJM auction prices violates a "federal policy" of uniform PJM capacity sales rates. We anticipated and rebutted that argument, observing that: (1) PJM expressly allows bilateral capacity sales, which set unique, contract-specific prices; and (2) the CFDs are long-term agreements, while PJM's markets and rates are short-term transactions. Md. Br. 22-23.[30] Plaintiff-generators ignore those points.

The FPA does not mandate uniform rates. It allows rates to be set by contract, *Morgan Stanley*, 554 U.S. at 531, making rate differences inevitable.[31] This is especially the case as between short-term spot-market prices—like PJM's capacity auction, which sets a different price every year—and long-term agreements like the CFDs, which are used to hedge the risk of spot-market price volatility. *See Morgan Stanley*, 554 U.S. at 547 ("Markets are not perfect, and one of the reasons that parties enter into wholesale-power contracts is precisely to

[30] For example, PJM capacity sellers can seek to exit the market on 90 days' notice by "delisting" their unit[s] on grounds that they are uneconomic. *PJM Interconnection, LLC*, 110 FERC ¶ 61,053, PP 123-137, *order on reh'g*, 112 FERC ¶ 61,031, PP 92-98 (2005). The CFDs prevent CPV from doing so. JA 1370.

[31] *See United Mun. Distribs. Grp. v. FERC*, 732 F.2d 202, 212 (D.C. Cir. 1984) (upholding rate differences resulting from a utility's settlement with a subset of protesting customers).

hedge against the volatility that market imperfections produce."); Dist. Ct. Trial Tr. at 95-96 (Mar. 11, 2013, afternoon session) ("3/11/13 pm Tr."). Such contracts play an "essential role" in "fostering stability in the electricity market." *NRG*, 558 U.S. at 174.

Plaintiff-generators' claims notwithstanding (Br. 44-46), FERC's establishment of a single-clearing-price auction, with a limited new-entry-pricing exception, created no broad rate-uniformity requirement. Those provisions relate to what PJM buys and PJM customers pay through the annual auction—but that auction is not PJM's sole capacity marketplace. Bilateral sales are common,[32] explicitly allowed,[33] and result in virtually the same economic outcomes as the CFDs. When bilateral capacity buyers offer and clear purchased capacity into the PJM auction, then, as under the CFDs, the bilateral seller receives the contract price, the bilateral buyer pays the contract price and receives the market price, and PJM pays the market price.[34]

---

[32] JA 364-66, 481-82; 3/11/13 pm Tr. at 97.

[33] JA 221 ("[A] capacity resource, such as a generation facility, may sell energy and capacity directly to an LSE through a bilateral contract at a price determined by the parties, not set by PJM…."); *see also id.* 231, 250, 301, 305, 341, 785 ("[A]fter LSEs have had an opportunity to procure capacity on their own, it is reasonable for PJM to procure capacity in an open auction…. This, however, should be a last resort."). Consistent with its "last resort" status, the PJM auction is called the "Base Residual Auction."

[34] *See* JA 231 (A load-serving entity can satisfy its capacity obligations by, among other things, "[e]ntering into a bilateral contract with a capacity resource with the

CFDs are not esoteric instruments invented to manipulate capacity auctions. *Cf.*, EPSA/EEI Br. 16-17. CFDs are common arrangements that transfer market-price risk in much the same way as a bilateral power purchase agreement, without any physical sale between the contracting parties.[35] They are therefore particularly useful for—and commonly used by—states that wish to support new generation development with long-term contracts but whose retail market structures may not readily accommodate long-term physical transactions.

In any case, FERC set the terms on which CPV participated in PJM's auction (JA 879-81, 888-900) and endorsed successful participation on those terms (JA 1031-32), knowing about the CFDs and how they work. *E.g.*, JA 840-41, 863-64, 989-90. FERC's MOPR orders—issued *after* the single-price and new-entry-pricing orders on which plaintiff-generators mistakenly rely—refute any claim that the CFDs conflicted with policies expressed in earlier orders.

---

parties to the agreement determining the price for capacity."). Here, the EDCs do not take title to the CFD capacity, but Maryland ratepayers receive the reliability benefit of CPV committing to sell into PJM for 20 years without paying for an otherwise duplicative amount of PJM capacity.

[35] U.S. Dept. of Energy et al., Guide to Purchasing Green Power at 21, DOE/EE-0307 (Mar. 2010), *available at* http://www.epa.gov/greenpower/documents/purchasing_guide_for_web.pdf (CFDs are "financial agreement[s] that allow[] renewable power suppliers and purchasers to lock in stable power prices and revenues."); Paul Astolfi et al., "Financing Renewable Energy," 23 Com. Lending Rev. 3, 7 (2008).

III. PLAINTIFF-GENERATORS WAIVED THEIR COMMERCE CLAUSE CLAIMS

The district court found that Maryland's order did not violate the Commerce Clause. JA 350. Plaintiff-generators did not appeal this aspect of the judgment, but argue at length (Br. 51-60) that the district court erred. Their arguments are not properly before this Court.

Plaintiff-generators claim (Br. 51 n.4) that this Court may consider their arguments because "appellees sought the same relief" on their Commerce Clause and preemption claims. This contention is wrong. Counts I and II of their complaint (preemption and Commerce Clause, respectively) each sought injunctive relief (JA 70, 73), but the judgment below did not grant it. JA 349-50.[36] Counts I and II *also* sought declaratory relief pursuant to the Declaratory Judgment Act (28 U.S.C. §§ 2201(a) and 2202), requesting different declarations. *Compare* JA 70 *with id.* 73. The Declaratory Judgment Act authorizes courts to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). *See also Aetna Casualty & Surety Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937) (Declaratory judgments "clarify[] and settl[e] the legal relations in issue.").

[36] With respect to Count I, the court retained jurisdiction "to consider injunctive relief" if necessary. *Id.* 350.

The district court entered a judgment that: (1) declared Maryland's order was "violative of the Supremacy Clause" (JA 349), and (2) dismissed with prejudice "[a]ll claims in . . . Count II" (*id.* 350), including the requested declaration that Maryland's order violated the Commerce Clause. Plaintiff-generators ask this court to re-write the judgment. Absent cross-appeal, they may not raise arguments "that seek to alter or modify the judgment below." *Rosenruist-Gestao E. Servicos LDA v. Virgin Enters., Ltd.*, 511 F.3d 437, 447 (4th Cir. 2007) (*citing El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999)). This rule is "inveterate and certain," and "in more than two centuries of repeatedly endorsing [it], not a single one of [the Supreme Court's] holdings has ever recognized an exception." *El Paso*, 526 U.S. at 479-480 & n.3 (citations omitted).

Plaintiff-generators' Commerce Clause arguments provide no basis for affirming the court's Supremacy Clause declaration, and contradict the court's Commerce Clause judgment. Declarations based on the two legal theories are not interchangeable because they announce different rights and legal relations. A declaration addressing whether a state order is preempted under the Supremacy Clause settles the legal relationship between the state (and its action) and *Congress* (and its respective acts). *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 21 (1824). Here, the Supremacy Clause judgment addressed (incorrectly) the scope of state authority to take actions allegedly affecting interstate wholesale electricity

sales rates. Dismissal of plaintiff-generators' Commerce Clause claims, in contrast, settled legal relationships concerning the Maryland solicitation's alleged discrimination between in-state and out-of-state interests. The FPA and Commerce Clause claims, the declaratory judgments that flow from them, and how Maryland would need to structure any future efforts to comply, are all manifestly different.[37]

IV. AS HELD BELOW, MARYLAND DID NOT VIOLATE THE COMMERCE CLAUSE

Even if properly before this Court, plaintiff-generators' Commerce Clause claims fail. Plaintiff-generators claim (Br. 54-56) that Maryland's order is facially discriminatory[38] because the state sought new generation to be built in SWMAAC, a PJM-demarcated zone limited to central Maryland and the District of Columbia. JA 1310. Plaintiff-generators allege that limitation left "out-of-state interests wholly ineligible for a 'competitive advantage' in the interstate market." Br. 56. The allegation is false. *See* JA 1310, 1331. Maryland's actions do not "implicate[]" the dormant Commerce Clause because they place no burdens "on the flow of []

[37] Simply stated, a preemption violation requires modification of the CFD. A Commerce Clause violation would require modification of Maryland's solicitation.

[38] Plaintiff-generators refer briefly to alleged discriminatory "effects" (Br. 51-52, 56), but fail to address the district court's factual finding that Maryland's order imposed no burden on interstate commerce (JA 344-45), let alone show how that finding is clear error. Plaintiff-generators claim (Br. 56) that "trial evidence" showed that the CPV unit "*displac[ed]*" economic out-of-state supply, but the district court rejected that contention. JA 340.

commerce" in the interstate energy market. *Brown v. Hovatter*, 561 F.3d 357, 363-64 (4th Cir. 2009).

The district court made specific factual findings that Maryland *did not*: (1) "erect any barriers to the sale or transmission of electric energy at wholesale in and out of SWMAAC and within the PJM region" (JA 337); (2) "provid[e] a competitive advantage to an in-SWMAAC generation facility selling electric energy at wholesale at the expense of other generation facilities competing in the same market" (*id*.); (3) "discriminatorily displace imported power" (*id.* 340); or (4) "require any out-of-state competitor to establish a physical presence in SWMAAC or Maryland to supply electric energy to Maryland residents" (*id.* 342). *See generally* JA 337-42. Plaintiff-generators have not shown that any of these factual findings are clearly erroneous.

The district court also found that "[t]he mere fact that the PSC sought to procure a new generation facility located within SWMAAC does not, standing alone, discriminate *against* the flow of interstate commerce." JA 337. Maryland's decision was sensible: it sought new generation in an electric zone defined by PJM (the contours of which PJM could change) because that is where PJM and others told the state its reliability need was greatest. The PSC concluded: "because of the

transmission constraints in SWMAAC, the new generation must be located there to address the need and there is no other means to address our purpose." JA 1330.[39]

Maryland placed no residency restrictions on bidders; any developer, including plaintiff-generators, could bid. JA 342, 1310, 1330-31.[40] Both external and in-state developers faced the same obligation: build a plant within SWMAAC. That PPL had "readily available sites … in Pennsylvania" but did not "have generation assets [or a plant site] location that was in SWMAAC" (Br. 56) is of no moment. Nothing in the Commerce Clause requires Maryland to protect the plaintiff-generators' chosen business model. *Brown*, 561 F.3d at 363-64.[41]

---

[39] *See also* JA 1324-30. Plaintiff-generators' claim that "uncontested record evidence" showed that by 2011, PSC advisors had concluded that reliability concerns "no longer remained." Br. 57-58 (citing Ex. P.42, a PSC consultant report). While noting "improvement in Maryland's situation" as of 2011, the report states that "there are still several risk factors that could affect the State's need for new capacity." Ex. P.42 at 17. The PSC itself concluded that there is "a need for new generation in Maryland by 2015" (JA 1329), noting that changes in circumstances notwithstanding, concerns remained about reliance upon: (1) in-state coal-fired generation, (2) variable load forecasts, and (3) out-of-state resources and transmission facilities. JA 1325-27. The district court likewise found that Maryland is facing "several key risk factors that could rapidly change Maryland's future [energy] supply needs" (JA 259), while noting in its judgment that the court was "not address[ing] any question regarding the validity of the PSC's findings included in the Generation Order[.]" JA 350. Plaintiff-generators impermissibly attack the judgment in urging factual findings contrary to the Generation Order.

[40] None of the plaintiff-generators bid on the RFP; PPL declined (in part) because the "RFP acted in a manner inconsistent with [PPL's] market principles." JA 335.

[41] Plaintiff-generators' cases (Br. 52, 55) are inapposite. In *Toomer v. Witsell*, 334 U.S. 385 (1948), the court struck down shrimp processing locational restrictions because those activities could occur just as readily elsewhere. 334 U.S. at 403-04.

Even if considered facially discriminatory, Maryland's order survives a commerce clause challenge because it "serves a legitimate local [health and safety] purpose," *Maine v. Taylor*, 477 U.S. 131, 138 (1986). It "ensur[ed] that Maryland residents have available to them an adequate and reliable supply of electric energy." JA 344. The district court found Maryland's decision to be rational. JA 345. And PJM has identified and continues to treat SWMAAC as a separate electric reliability zone because it has experienced transmission constraints in the past, and could do so again in the future. JA 1326. Thus, Maryland's purpose could not "be served as well by available nondiscriminatory means." *Maine*, 477 U.S. at 138. While plaintiff-generators contend that a hypothetical plant could have been built in Pennsylvania and provided the same reliability benefits, they submitted no evidence showing that this would have been feasible in fact, and the district court made no such finding. The law has "never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 311 (1997) (citation omitted).

Electric-reliability needs and new power plants to satisfy them are more geographically particularized. They are also more particularized than the local milk-processing requirements invalidated by *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354-55 (1951), which struck down the law precisely because there were "reasonable and adequate alternatives" to ensure the wholesomeness of out-of-state milk.

CONCLUSION

The Court should vacate the decision below because plaintiff-generators lacked standing. If the merits are reached, the Court should reverse the district court's judgment that Maryland violated the Supremacy Clause, and should dismiss challenges to (or should affirm) the district court's judgment that Maryland did not violate the Commerce Clause.

Respectfully submitted,

/s/ Scott H. Strauss

H. Robert Erwin
Ransom E. Davis

William Donald Schaefer Tower
6 St. Paul Street
Baltimore, Maryland 21202
(410) 767-8076

Scott H. Strauss
Peter J. Hopkins
Jeffrey A. Schwarz
SPIEGEL & MCDIARMID LLP
1333 New Hampshire Ave. NW
Washington, DC 20036
(202) 879-4000

Counsel for the Maryland Public Service Commission

April 3, 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 6,943 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: April 3, 2014

/s/ Scott H. Strauss

Scott H. Strauss

Law Offices of:
Spiegel & McDiarmid LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 879-4000

STATUTORY ADDENDUM

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

- U.S. Const. art I, § 8, cl. 3
- U.S. Const. art. III
- U.S. Const. art. VI, cl. 2
- Federal Power Act § 201, 16 U.S.C. § 824
- 28 U.S.C. § 2201(a)
- 28 U.S.C. § 2202

U.S. Const. art. I, § 8, cl. 3

paid out of the Treasury of the United States.[6] They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2]No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. [1]All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2]Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[3]Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. [1]The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2]To borrow Money on the credit of the United States;

[3]To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4]To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5]To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

---

[6]This clause has been affected by amendment XXVII.

[6]To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[7]To establish Post Offices and post Roads;

[8]To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9]To constitute Tribunals inferior to the supreme Court;

[10]To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

[11]To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12]To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13]To provide and maintain a Navy;

[14]To make Rules for the Government and Regulation of the land and naval Forces;

[15]To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16]To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17]To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings;—And

[18]To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9. [1]The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2]The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[3]No Bill of Attainder or ex post facto Law shall be passed.

[4]No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.[7]

[5]No Tax or Duty shall be laid on Articles exported from any State.

[6]No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall

[7]This clause has been affected by amendment XVI.

lic 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 will 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 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

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

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.

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,

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

U.S. Const. art. VI, cl. 2

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^{O}. WASHINGTON—Presid^{t}.

and deputy from Virginia

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

may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final condition would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the reservation. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(b) Alternative prescriptions

(1) Whenever the Secretary of the Interior or the Secretary of Commerce prescribes a fishway under section 811 of this title, the license applicant or any other party to the license proceeding may propose an alternative to such prescription to construct, maintain, or operate a fishway.

(2) Notwithstanding section 811 of this title, the Secretary of the Interior or the Secretary of Commerce, as appropriate, shall accept and prescribe, and the Commission shall require, the proposed alternative referred to in paragraph (1), if the Secretary of the appropriate department determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative—

(A) will be no less protective than the fishway initially prescribed by the Secretary; and

(B) will either, as compared to the fishway initially prescribed by the Secretary—

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

(3) In making a determination under paragraph (2), the Secretary shall consider evidence provided for the record by any party to a licensing proceeding, or otherwise available to the Secretary, including any evidence provided by the Commission, on the implementation costs or operational impacts for electricity production of a proposed alternative.

(4) The Secretary concerned shall submit into the public record of the Commission proceeding with any prescription under section 811 of this title or alternative prescription it accepts under this section, a written statement explaining the basis for such prescription, and reason for not accepting any alternative prescription under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final prescription would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(June 10, 1920, ch. 285, pt. I, § 33, as added Pub. L. 109–58, title II, § 241(c), Aug. 8, 2005, 119 Stat. 675.)

SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(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).

Subsec. (f). Pub. L. 109–58, §1291(c), which directed amendment of subsec. (f) by substituting "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," for "political subdivision of a state,", was executed by making the substitution for "political subdivision of a State," to reflect the probable intent of Congress.

Subsec. (g)(5). Pub. L. 109–58, §1277(b)(1), substituted "2005" for "1935".

1992—Subsec. (g). Pub. L. 102–486 added subsec. (g).

1978—Subsec. (b). Pub. L. 95–617, §204(b)(1), designated existing provisions as par. (1), inserted "except as provided in paragraph (2)" after "in interstate commerce, but", and added par. (2).

Subsec. (e). Pub. L. 95–617, §204(b)(2), inserted "(other than facilities subject to such jurisdiction solely by reason of section 824i, 824j, or 824k of this title)" after "under this subchapter".

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by section 1277(b)(1) of Pub. L. 109–58 effective 6 months after Aug. 8, 2005, with provisions relating to effect of compliance with certain regulations approved and made effective prior to such date, see section 1274 of Pub. L. 109–58, set out as an Effective Date note under section 16451 of Title 42, The Public Health and Welfare.

STATE AUTHORITIES; CONSTRUCTION

Nothing in amendment by Pub. L. 102–486 to be construed as affecting or intending to affect, or in any way to interfere with, authority of any State or local government relating to environmental protection or siting of facilities, see section 731 of Pub. L. 102–486, set out as a note under section 796 of this title.

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

Pub. L. 95–617, title II, §214, Nov. 9, 1978, 92 Stat. 3149, provided that:

"(a) PRIOR ACTIONS.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall apply to, or affect, any action taken by the Commission [Federal Energy Regulatory Commission] before the date of the enactment of this Act [Nov. 9, 1978].

"(b) OTHER AUTHORITIES.—No provision of this title [enacting sections 823a, 824i to 824k, 824a–1 to 824a–3 and 825q–1 of this title, amending sections 796, 824, 824a, 824d, and 825d of this title and enacting provisions set out as notes under sections 824a, 824d, and 825d of this title] or of any amendment made by this title shall limit, impair or otherwise affect any authority of the Commission or any other agency or instrumentality of the United States under any other provision of law except as specifically provided in this title."

§ 824a. Interconnection and coordination of facilities; emergencies; transmission to foreign countries

(a) Regional districts; establishment; notice to State commissions

For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnection and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Sale or exchange of energy; establishing physical connections

Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) Temporary connection and exchange of facilities during emergency

During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the

28 U.S.C. §§ 2201(a) and 2202

1960—Pub. L. 86–682, §10, Sept. 2, 1960, 74 Stat. 708, added item for chapter 173.

CHAPTER 151—DECLARATORY JUDGMENTS

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

(June 25, 1948, ch. 646, 62 Stat. 964; May 24, 1949, ch. 139, §111, 63 Stat. 105; Aug. 28, 1954, ch. 1033, 68 Stat. 890; Pub. L. 85–508, §12(p), July 7, 1958, 72 Stat. 349; Pub. L. 94–455, title XIII, §1306(b)(8), Oct. 4, 1976, 90 Stat. 1719; Pub. L. 95–598, title II, §249, Nov. 6, 1978, 92 Stat. 2672; Pub. L. 98–417, title I, §106, Sept. 24, 1984, 98 Stat. 1597; Pub. L. 100–449, title IV, §402(c), Sept. 28, 1988, 102 Stat. 1884; Pub. L. 100–670, title I, §107(b), Nov. 16, 1988, 102 Stat. 3984; Pub. L. 103–182, title IV, §414(b), Dec. 8, 1993, 107 Stat. 2147; Pub. L. 111–148, title VII, §7002(c)(2), Mar. 23, 2010, 124 Stat. 816.)

AMENDMENT OF SECTION

For termination of amendment by section 501(c) of Pub. L. 100–449, see Effective and Termination Dates of 1988 Amendment note below.

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., §400 (Mar. 3, 1911, ch. 231, §274d, as added June 14, 1934, ch. 512, 48 Stat. 955; Aug. 30, 1935, ch. 829, §405, 49 Stat. 1027).

This section is based on the first paragraph of section 400 of title 28, U.S.C., 1940 ed. Other provisions of such section are incorporated in section 2202 of this title.

While this section does not exclude declaratory judgments with respect to State taxes, such suits will not ordinarily be entertained in the courts of the United States where State law makes provision for payment under protest and recovery back or otherwise affords adequate remedy in the State courts. See *Great Lakes Dredge & Dock Co. v. Huffman*, La. 1943, 63 S.Ct. 1070, 319 U.S. 293, 87 L.Ed. 1407. See also *Spector Motor Service v. McLaughlin*, Conn. 1944, 65 S.Ct. 152, 323 U.S. 101, 89 L.Ed. 101. See also section 1341 of this title forbidding district courts to restrain enforcements of State taxes where State courts afford plain, speedy, and efficient remedy.

Changes were made in phraseology.

1949 ACT

Section corrects a typographical error in section 2201 of title 28, U.S.C.

REFERENCES IN TEXT

Section 7428 of the Internal Revenue Code of 1986, referred to in subsec. (a), is classified to section 7428 of Title 26, Internal Revenue Code.

Section 516A(f)(10) of the Tariff Act of 1930, referred to in subsec. (a), is classified to section 1516a(f)(10) of Title 19, Customs Duties.

Sections 505 and 512 of the Federal Food, Drug, and Cosmetic Act, referred to in subsec. (b), are classified to sections 355 and 360b, respectively, of Title 21, Food and Drugs.

Section 351 of the Public Health Service Act, referred to in subsec. (b), is classified to section 262 of Title 42, The Public Health and Welfare.

AMENDMENTS

2010—Subsec. (b). Pub. L. 111–148 inserted ", or section 351 of the Public Health Service Act" before period.

1993—Subsec. (a). Pub. L. 103–182 substituted "merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930)," for "Canadian merchandise,".

1988—Subsec. (a). Pub. L. 100–449 temporarily substituted "1986," for "1954 or" and inserted "or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority," after "title 11,". See Effective and Termination Dates of 1988 Amendment note below.

Subsec. (b). Pub. L. 100–670 inserted "or 512" after "505".

1984—Pub. L. 98–417 designated existing provisions as subsec. (a) and added subsec. (b).

1978—Pub. L. 95–598 inserted reference to proceedings under section 505 or 1146 of title 11.

1976—Pub. L. 94–455 substituted "taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954" for "taxes".

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

1954—Act Aug. 28, 1954, extended provisions to Alaska.

1949—Act May 24, 1949, corrected spelling of "or" in second sentence.

EFFECTIVE DATE OF 1993 AMENDMENT

Amendment by Pub. L. 103–182 effective on the date the North American Free Trade Agreement enters into force with respect to the United States [Jan. 1, 1994], but not applicable to any final determination described in section 1516a(a)(1)(B) or (2)(B)(i), (ii), or (iii) of Title 19, Customs Duties, notice of which is published in the Federal Register before such date, or to a determination described in section 1516a(a)(2)(B)(vi) of Title 19, notice of which is received by the Government of Canada or Mexico before such date, or to any binational panel review under the United States-Canada Free-Trade Agreement, or to any extraordinary challenge arising out of any such review that was commenced before such date, see section 416 of Pub. L. 103–182, set out as an Effective Date note under section 3431 of Title 19.

EFFECTIVE AND TERMINATION DATES OF 1988 AMENDMENT

Amendment by Pub. L. 100–449 effective on date United States-Canada Free-Trade Agreement enters into force (Jan. 1, 1989), and to cease to have effect on date Agreement ceases to be in force, see section 501(a), (c) of Pub. L. 100–449, set out in a note under section 2112 of Title 19, Customs Duties.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95–598 effective Oct. 1, 1979, see section 402(c) of Pub. L. 95–598, set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–455 applicable with respect to pleadings filed with the United States Tax Court, the District Court of the United States for the District of Columbia, or the United States Court of Claims more than 6 months after Oct. 4, 1976, but only with respect to determinations (or requests for determinations) made after Jan. 1, 1976, see section 1306(c) of Pub. L. 94–455, set out as an Effective Date note under section 7428 of Title 26, Internal Revenue Code.

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. c16, 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.

EFFECT OF TERMINATION OF NAFTA COUNTRY STATUS

For provisions relating to effect of termination of NAFTA country status on sections 401 to 416 of Pub. L. 103–182, see section 3451 of Title 19, Customs Duties.

AMOUNT IN CONTROVERSY

Jurisdictional amount in diversity of citizenship cases, see section 1332 of this title.

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

(June 25, 1948, ch. 646, 62 Stat. 964.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 400 (Mar. 3, 1911, ch. 231, § 274d, as added June 14, 1934, ch. 512, 48 Stat. 955; Aug. 30, 1935, ch. 829, § 405, 49 Stat. 1027).

This section is based on the second paragraph of section 400 of title 28, U.S.C., 1940 ed. Other provisions of such section are incorporated in section 2201 of this title.

Provision in said section 400 that the court shall require adverse parties whose rights are adjudicated to show cause why further relief should not be granted forthwith, were omitted as unnecessary and covered by the revised section.

Provisions relating to submission of interrogatories to a jury were omitted as covered by rule 49 of the Federal Rules of Civil Procedure.

Changes were made in phraseology.

CHAPTER 153—HABEAS CORPUS

Sec.

SENATE REVISION AMENDMENT

Chapter catchline was changed by Senate amendment. See 80th Congress Senate Report No. 1559.

AMENDMENTS

1978—Pub. L. 95–598, title II, § 250(b), Nov. 6, 1978, 92 Stat. 2672, directed the addition of item 2256 "Habeas corpus from bankruptcy courts", 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.

1966—Pub. L. 89–711, § 3, Nov. 2, 1966, 80 Stat. 1106, substituted "Federal courts" for "State Courts" in item 2254.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 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:

John Augustine Bourgeois
Email: jbourgeois@kg-law.com

Candice Chiu
Email: cchiu@bancroftpllc.com

Paul D. Clement
Email: pclement@bancroftpllc.com

Shannen Wayne Coffin
Email: scoffin@steptoe.com

David D. Cross
Email: dcross@crowell.com

Geoffrey H. Genth
Email: ggenth@kg-law.com

Susanna Y. Chu
Email: susanna.chu@kayescholer.com

Randolph Lee Elliott
Email: relliott@mccarter.com

Jeffrey A. Fuisz
Email: jeffrey.fuisz@kayescholer.com

David Lawrence Meyer
Email: dmeyer@mofo.com

Erin Elizabeth Murphy
Email: emurphy@bancroftpllc.com

Jennifer Nash Waters
Email: jwaters@crowell.com

Clifton Scott Elgarten
Email: celgarten@crowell.com

Andrew Jay Graham
Email: AGraham@kg-law.com

James Kilpatrick McGee
Email: jmcgee@alexander-cleaver.com

Larry F. Eisenstat
Email: leisenstat@crowell.com

Kimberly Brickell Frank
Email: kfrank@kayescholer.com

Eugene Grace
Email: ggrace@awea.org

Jeffrey A. Lamken
Email: jlamken@mololamken.com

Richard Lehfeldt
Email: rlehfeldt@crowell.com

Delia Denise Patterson
Email: dpatterson@publicpower.org

Randall L. Speck
Email: rspeck@kayescholer.com

Steven M. Talson
Email: steven.talson@maryland.gov

Martin V. Totaro
Email: mtotaro@mololamken.com

William Frederick Fields
Email: billf@opc.state.md.us

John P. Coyle
Email: jpc@duncanallen.com

Karis Anne Gong
Email: karis.gong@skadden.com

Ashley Charles Parrish
Email: aparrish@kslaw.com

John Lee Shepherd Jr.
Email: john.shepherd@skadden.com

Pamela M. Silberstein
Email: pam.silberstein@nreca.coop

/s/ Scott H. Strauss

Scott H. Strauss
Spiegel & McDiarmid LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 879-4000