No. 14-694

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH L. FIORDALISO, *et al.*,
Petitioners,

v.

PPL ENERGYPLUS, LLC, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF THE NEW YORK STATE PUBLIC SERVICE COMMISSION, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JONATHAN D. FEINBERG
SOLICITOR
Counsel of Record
NEW YORK STATE PUBLIC
SERVICE COMMISSION

ALAN T. MICHAELS
SALOMON MENYENG
Assistant Counsel
3 Empire State Plaza
Albany, NY 12223-1350
(518) 474-1585
Alan.Michaels@dps.ny.gov

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INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae* is the New York State Public Service Commission, which has statutory authority to protect the reliability and adequacy of electric service within New York, and has responsibilities to ensure energy reliability and develop energy policy (the NYPSC).[1] The Third Circuit erroneously found that the Federal Power Act preempted New Jersey's incentive program to develop cleaner and more efficient electric generation within its state. The NYPSC has a direct interest in the outcome of this matter. The Third Circuit decision will, at the very least, substantially hinder state development of new electric generation and the refurbishment of older generation in states with competitive wholesale electric markets.

The Third Circuit incorrectly determined that a state program creating an incentive for the development of electric generation was field preempted. The Third Circuit recognized that states could provide "subsidies" for such generation, but incorrectly decided that the New Jersey program was not permitted. New Jersey, however, awarded the winning participant in its program a "subsidy,"

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[1] No other person than the NYPSC or its counsel authored this brief or provided financial support for it. Pursuant to Supreme Court Rule 37, counsel of record received timely notice of the intent to file this *amicus* brief, and parties granted universal consent to the submission of *amicus* briefs. This brief supports the position of Petitioners.

outside of the revenues available in regional wholesale electric markets.[2] Contrary to the Third Circuit's belief, a state is not limited to a definition of "subsidy" as a lump sum payment when acting within its protected sphere of developing generation resources and ensuring electric adequacy and reliability. It can, rather, as New Jersey did here, use other mechanisms to award subsidy payments that go beyond the revenues a generator otherwise obtains.

Congress provided the states with a mandate to develop resource planning when it preserved states' authority over facilities used for the generation of electric energy and those used for local distribution.[3] Resource adequacy remains a state issue, one where the federal government surely lacks the knowledge of local conditions prerequisite for the proper oversight of electric reliability. Vesting this authority with the states is necessary to promote new and renewable technologies, develop adequate resources, and incorporate alternative fuels. Further, stricter federal environmental regulations

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[2] The Third Circuit used the term "subsidy," albeit without recognizing that payments to generators may be the most cost-effective, if not the only, means of meeting reliability and resource adequacy goals. That term is therefore used in this brief. *See, PPL Energyplus, LLC v. Solomon,* 766 F.3d 241, 253 n.4 (3d Cir. 2014) ("New Jersey may also directly subsidize generators so long as the subsidies do not essentially set wholesale prices.").

[3] 16 U.S.C. §824(b)(1), §824o(i).

compel additional local planning to achieve compliance, a matter within State authority under the Federal Power Act.

Whether a state has restructured its electric industry and provided for competitive wholesale markets should have no effect on its ability to perform its responsibilities for the promotion and siting of generation.[4] The Third Circuit's decision places restrictions on the methods states located in competitive wholesale markets can use to encourage new generation and refurbish old generation. Those restrictions interfere with protected state authority over resource planning and threaten the adequacy of electric service and reliability of electric generation. Therefore, this Court should grant certiorari and vacate the Circuit Court's decision.

SUMMARY

The Third Circuit's decision unduly limits the ability of states to conduct their long-term resource planning. Such state actions are protected by the Federal Power Act (FPA), which preserved states' authority over generation resources. The states' authority has been recognized by the Federal Energy

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[4] *New York v. FERC*, 535 U.S. 1, 24 (2002) ("FERC has recognized that the States retain significant control over local matters even when retail transmissions are unbundled. *See, e.g.*, Order No. 888, at 31,782, n.543 ('Among other things, Congress left to the States authority to regulate generation and transmission siting')").

Regulatory Commission (FERC) and the courts.[5] Such protected and long-accepted state authority may not be eroded by a misapplication of preemption. The Third Circuit decision adversely impacts the ability of states located in competitive electric markets to conduct their resource planning and to preserve grid reliability, by unreasonably restricting those techniques available for protected "subsidies" of new electric generation and refurbishment of old generation that are shielded from preemption.

REASON FOR GRANTING THE WRIT

The State of New Jersey exercised federally protected resource adequacy powers pursuant to the FPA.[6] The Third Circuit erroneously found exercise of those powers to be field preempted, thereby depriving states of their authority under the FPA. The lower court's decision threatens states' authority over resource planning and the continued reliability of electric supply.

A. New Jersey Legislated Within the Field Preserved for the States.

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[5] *See*, FERC Order No. 888 n.544 ("This Final Rule will not affect or encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning... authority over utility generation and resource portfolios"); *see also*, *New York v. FERC*, 535 U.S. at 24.

[6] 16 U.S.C. §824(b)(1), §824o(i).

The Third Circuit should not have found preemption in this matter. New Jersey acted within the states' authority, protected under the Federal Power Act, when it created a statutory incentive program for the development of electric generation. With the misapplication of preemption, the Third Circuit decision compromises states' abilities to conduct resource planning, notwithstanding that federal law allocates that duty to them.

In 2011, New Jersey passed the Long Term Capacity Agreement Pilot Program Act (LCAPP) for the purpose of promoting new electricity generating facilities within the state. The New Jersey legislature found that the state was experiencing an electric power deficit.[7] Due to a lack of new generation facilities, New Jersey became more reliant upon an aging fleet of generation plants.[8] Many of the facilities are coal-burning units which are at risk of retirement due to an inability to cover avoided costs.[9]

The LCAPP requires electric public utilities to procure a certain amount of electricity from eligible generators (essentially, developers of new generation facilities who voluntarily enter the program).[10] Pursuant to LCAPP, the utilities then pay the

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[7] N.J. Stat. §48:3-98.2(e).
[8] *Id.* at §48:3-98.2(h).
[9] *Id.* at §48:3-98.2(g).
[10] *Id.* at §48:3-98.3(c); §48:3-51.

participating generators a "subsidy" equivalent to an amount specified within a contract under the program.[11]

There exists no preemption when New Jersey acted within its protected powers to regulate generation and promote reliability and resource adequacy. The state statute created an incentive that was provided to a program-participating generator outside of the market clearing price. New Jersey created this additional "subsidy" clearly within the authority vested in the states. Moreover, states have legitimate interests in ensuring that retail prices are just and reasonable as well as in the reliability of electric generation.[12] In furtherance of these interests, states may craft a methodology enabling distribution utilities to procure needed new capacity on behalf of consumers that is not only reflective of wholesale prices, but also minimizes exposure to price uncertainty. Such a methodology, which provides a hedge against price shocks, is supportive of, and complements, rather than overrides, wholesale markets.

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[11] N.J. Stat. §48:3-98.3(c)(4).

[12] *See, PPL Energyplus, LLC v. Solomon,* 766 F.3d at 247, *quoting, Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 205 (1983) (the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States)."

The Third Circuit opined that "New Jersey could have used other means to achieve its policy goals" than LCAPP.[13] In so stating, the Court does not recognize that it has hobbled the ability to create incentives for generation. The list of permissible means of providing generation incentives the Third Circuit offers instead is insufficient, because none of the listed items overcomes the high capital costs of constructing electric generating facilities.[14]

Further, the Third Circuit stated that a state "may also directly subsidize generators so long as the subsidies do not essentially set wholesale prices."[15] The Court apparently believes lump sum payments to generators are an acceptable "subsidy" mechanism while the "contracts for differences" used by New Jersey are not. There is, however, no difference for field preemption purposes between the lump sum payments the Third Circuit would permit and the contract for differences it rejects. The Court's insistence on lump sum payments is in derogation of state authority over resource adequacy and reliability.

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[13] *PPL Energyplus, LLC v. Solomon,* 766 F.3d at 253 n.4.

[14] The Circuit Court's list of permissible means includes tax exempt bonds, property tax relief, favorable lease agreement on public lands, the gifting of brownfield properties and the relaxation of permit approvals. *Id.* However, these may do little to address the problem of how to finance and build new power plants when existing electric capacity revenues may be insufficient for the task.

[15] *PPL Energyplus, LLC v. Solomon,* 766 F.3d at 253 n.4.

The lump sum mechanism is a blunt instrument that is less effective in encouraging new generation and refurbishment of old generation in many instances. For example, a lump sum approach imposes on the state the need to exercise prescience in determining what level of payment would result in the appropriate incentive. A state using a lump sum payment to provide an incentive for generation will run the risk of paying either too much or too little over the life of a contract.

Finally, it would be difficult to craft a contract for a lump sum that would require the generator to perform obligations to generate under a contract. What is critical to a state incentive regime is not only that a generator build a new facility (or refurbish an existing one), but also that a generator operate thereafter so the state may obtain the benefit of the "subsidies" it provides. Clearly, a lump sum might be broken into separate payments over time to accomplish that goal without implicating preemption, even under the Third Circuit's decision. States should not be forced to engage in such wasteful techniques merely to avoid preemption when a different contract format would accomplish state goals more efficiently. When the state is engaged in promoting reliability instead of setting rates in wholesale markets, so exalting form over substance undermines the goals the FPA's reliability exception was intended to achieve.

B. New Jersey Recognized the Appropriate Separation of Federal and State Authority.

The Federal Power Act identifies the state and federal jurisdictions within the energy field. The FPA specifies that FERC has jurisdiction over facilities used for interstate and wholesale transmission and rates.[16] However, the federal law preserved state jurisdiction over generation and local distribution.[17] Additionally, even prior to the passage of the Federal Power Act, it has long been recognized that the states could manage resource policy through their use of police powers. When states traditionally occupied an area of regulation prior to any federal involvement, it is assumed that

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[16] 16 U.S.C. §824(b)(1). ("The provisions of this part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, ... The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy...").

[17] 16 U.S.C. §824(b)(1). ("The Commission ... shall not have jurisdiction ... 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."). *See, New York v. FERC*, 535 US at 19, (2002), "FERC's jurisdiction over the sale of power has been specifically confined to the wholesale market"; *see also, Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 371 U.S. App. D.C. 446 (D.C. Cir. 2006).

the states' historic police powers were not superseded unless clearly specified by Congress.[18]

Here, New Jersey created a program to promote generation through a "subsidy" program implemented through long-term contracts. Such a monetary incentive to develop generation is well within an area of regulation expressly reserved for the states by Congress.[19] Based upon the Third Circuit decision, in contrast, any state activity to create a financial incentive for the development of alternative and new generation will be hindered.

Moreover, the federal government retains its regulatory powers within New Jersey's program. LCAPP recognizes the wholesale market price is the rate established by the FERC-regulated regional transmission organization (RTO). Since there is no preemption, the Circuit Court's decision should be reviewed and overturned.

C. New Jersey Did Not Set Wholesale Rates, and Thereby Did Not Enter a Federally Occupied Field.

The LCAPP did not regulate wholesale rates. Rather, the program recognized the rates

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[18] *See, Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), *citing*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[19] 16 U.S.C. §824(b)(1), §824o(i).

established by PJM Interconnection LLC (PJM), the FERC-regulated RTO. The program merely provided for the payment of a "subsidy," in addition to the cleared market rate, established in contracts between local utilities and participating generators arrived at through a competitive procurement process.

Bilateral contracts are a common feature of the competitive wholesale electric markets where market-based rates are in effect,[20] whether entered into through a procurement process or negotiated otherwise. Unless FERC decides otherwise, such contracts are accepted within the scope of market-based rate as just and reasonable. FERC has never investigated, much less found, that the contracts within LCAPP were other than just and reasonable. As a result, LCAPP is fully consistent with FERC practices providing for negotiation of bilateral contracts between local utilities and participating generators for the purchase of capacity.

Rather than regulating wholesale rates, LCAPP, as the Third Circuit recognized, supplements those FERC market-based rates.[21] The program does not interfere with the rates established by PJM, but instead provides for a

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[20] *See, Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1*, 554 U.S. 527 (2008); *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 479 (2002).

[21] *PPL Energyplus, LLC v. Solomon,* 766 F.3d at 254. ("the statute's explicit objective is to supplement capacity prices.").

"subsidy" outside of those rates. The state "subsidy" thus passes muster under the division between state and federal authority in the Federal Power Act; FERC sets wholesale rates and states regulate generation, through the "subsidy" payments addressing reliability and adequacy goals.

The Third Circuit incorrectly concluded that "LCAPP artfully steps around the capacity transactions facilitated by PJM."[22] While, as the Third Circuit notes, "electricity distribution companies do not participate in PJM's capacity auction,"[23] PJM does charge such "load-serving entities for the proportional share of the capacity they obtain through PJM."[24] Bilateral contracts generally allow the local distribution companies to meet the capacity obligations charged against them, and there is no reason to exclude the LCAPP contracts from that function.

LCAPP provided for the payment of a "subsidy" after market prices become known. Contrary to the Third Circuit decision, this supplementation of auction prices with "subsidy" payments does not set a "rate." The rate remains the one set by the operation of FERC capacity markets. The wholesale auction price remains the same after LCAPP, and only those generators in the

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[22] *Id.*
[23] *Id.*
[24] *Id.*

program receive the LCAPP "subsidy." For generators outside the State program, the auction price is the only revenue received.

Therefore, there are two separate transactions: first, the market price clears the FERC-regulated auction; second, participants in the State promotional program receive a "subsidy" for generation development. Such supplementation of the market price with "subsidies" is the most efficient way of structuring a state "subsidy" program for electric generation. As discussed above, the Third Circuit's insistence that only lump sum "subsidies" pass muster under the Federal Power Act does not respect state authority over resource adequacy and reliability. The reasoning advanced by the Third Circuit as to why New Jersey has set a rate does not remedy that error, because it does not support the conclusion that lump sum "subsidies" are the only mechanism allowable for making the "subsidy" payments without triggering preemption.

CONCLUSION

For the foregoing reasons, the Court should grant the writ of certiorari and reverse the decision of the lower court.

Respectfully submitted,

JONATHAN D. FEINBERG
Solicitor
Counsel of Record

ALAN T. MICHAELS
SALOMON MENYENG
Assistant Counsel
3 Empire State Plaza
Albany, NY 12223-1350
(518) 474-1585

Counsel for Amicus Curiae the New York State Public Service Commission

January 12, 2015