IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

VILLAGE OF OLD MILL CREEK, ET AL.,
Plaintiffs-Appellants,
No. 17-2433
v.
ANTHONY M. STAR,
Defendant-Appellee.
and
EXELON GENERATION COMPANY, LLC,
Intervening Defendant-Appellee.

ELECTRIC POWER SUPPLY ASSOCIATION, ET AL.,
Plaintiffs-Appellants,
No. 17-2445
v.

ANTHONY M. STAR, ET AL.
Defendants-Appellees.
and
EXELON GENERATION COMPANY, LLC,
Intervening Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
SUPPORTING PLAINTIFFS-APPELLANTS IN PART AND SEEKING REVERSAL

AMICUS BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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STATEMENT OF THE CASE

Plaintiffs Village of Old Mill Creek, Ferrite International Company, Got it Maid, Nafisca Zotos, Robert Dillon, Richard Owens, and Robin Hawkins (collectively consumer plaintiffs[1]) are residential, commercial and industrial customers who take delivery of electricity from Commonwealth Edison Company and Ameren Illinois. A. 133-4, ECF-1 pp. 6-7. Consumer plaintiffs filed this action seeking a declaration that subsection (d-5) of Illinois Public Act 99-0906 "is invalid because it is preempted by federal law and unconstitutional" and a permanent injunction prohibiting the Director of the Illinois Power Agency from implementing the statute. A. 150, ECF-1 p. 24. The statute requires Commonwealth Edison and Ameren Illinois to purchase Zero Emissions Credits (ZECs) from nuclear-fueled generating plants that are awarded contracts by the Illinois Power Agency. A. 140, ECF-1, p. 13. The price of the ZECs will be established by the contract and may be reduced each year through an adjustment clause based on the projected wholesale energy and capacity prices, which, combined form the "wholesale market price index." A. 141, ECF-1, p. 14. The statute specifically provides that Commonwealth Edison and Ameren Illinois will charge the cost of the ZECs to their retail customers, including the plaintiffs, through their delivery service charges and also specifically ties the adjustment clause to federally-regulated wholesale market

[1] Several competitive power suppliers (Calpine Corporation, Dynegy, Inc., Eastern Generation, LLC, and NRG Energy, Inc.) as well as the Electric Power Supply Association (EPSA) also filed a complaint raising similar objections to that of the consumer plaintiffs, and the two complaints were considered together by the district court. They have been consolidated on appeal.

rates. *Id.* Plaintiffs allege that the statute is tethered to wholesale rates and is thus preempted by the Federal Power Act's (FPA) grant of exclusive jurisdiction over the sale of electricity at wholesale to the Federal Energy Regulatory Commission (FERC). A. 143-4, ECF-1, p. 16-17. *See Hughes v. Talen*, 136 S. Ct. 1288, 194 L.Ed.2d 414 (2016).

In a Memorandum Opinion and Order issued on July 14, 2017, District Court Judge Manish S. Shah granted a motion filed by the Illinois Power Agency and Exelon Corporation to dismiss the complaint. *Village of Old Mill Creek v. Star*, 2017 U.S. Dist. LEXIS 109368 (N.D. Ill. July 14, 2017)(ECF-78). The district court found, among other things, that the consumer plaintiffs lacked "prudential standing" to raise their claims of preemption and that they failed to state a cause of action because "the Federal Power Act does not authorize a private cause of action for injunctive relief against the defendants." *Id.* at *19-20, *26 (ECF-78 at 15, 21).

INTEREST OF AMICUS CURIAE

The National Association of State Utility Consumer Advocates (NASUCA) is a voluntary association of forty-four consumer advocate offices in forty-one states and the District of Columbia. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts.[2] While the precise statutory authority granted to each NASUCA member in its particular state may vary, all NASUCA member offices are charged with representing the interests of their

[2] NASUCA also has associate and affiliate members who represent utility consumers but are not created by state law or do not have statewide authority.

respective states' retail customers.

NASUCA files this brief as *amicus curiae* in this matter to address specifically the lower court's determinations that (1) retail customers lack standing to raise issues related to wholesale rates, and (2) that private parties may not maintain an equitable claim in federal court seeking to declare a state statute preempted by the Federal Power Act (FPA) pursuant to the Supreme Court's decision in *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 191 L.Ed.2d 471 (2015). As the statutory representatives of retail customers, and as long-recognized participants in proceedings before FERC and the federal courts, NASUCA's members have a particular responsibility pursuant to state statute as to these issues, and NASUCA's participation will assist the court in addressing the impact of the lower court's rulings. Consent of the parties to this action has been obtained, pursuant to Federal Rule of Appellate Procedure 29(a)(2). For these reasons, NASUCA respectfully submits this brief as *amicus curiae*.

ARGUMENT

I. RETAIL CUSTOMERS HAVE STANDING TO RAISE ISSUES REGARDING WHOLESALE RATES

Standing is a jurisdictional prerequisite designed to ensure that the parties before the court have a sufficient concrete interest in the matter to create a constitutionally required "case or controversy." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L.Ed.2d 635 (2016). Since the enactment of the Federal Power Act (FPA or Act), it has long been recognized that one of the statute's primary goals is to

protect consumers by ensuring that the rates they pay are just and reasonable. *Pub. Sys. v. FERC*, 606 F.2d 973 (D.C. Cir. 1979). The Act creates a complicated balance between federal and state jurisdiction, *See FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 776, 193 L.Ed.2d 661 (2016). However, the Act's separation between federal jurisdiction over wholesale rates and state jurisdiction over retail rates has never been used to prevent access to FERC and the federal courts by retail customers. This is because it is well established that wholesale rates are passed through to retail customers, thus impacting directly the amount they pay on their monthly bills. In fact, states are specifically prohibited from reexamining federal decisions regarding wholesale rates. *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 365, 370-373, 108 S. Ct. 2428, 101 L.Ed.2d 322 (1988) and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 959-961, 970, 106 S. Ct. 2349, 90 L.Ed.2d 943 (1986). Thus, a decision barring retail customers from participating at the federal level effectively bars them from any remedy relating to a significant portion of the rates they pay. For this reason, NASUCA and its members have long litigated issues affecting wholesale rates without any serious challenge to their standing on behalf of the retail ratepayers they represent. By finding otherwise, the court below has erected such a barrier for the first time and has done so in contravention of the language and purpose of the FPA.

Under the FPA, any person "aggrieved" by an order issued by FERC may seek judicial review of the Commission's order. 16 U.S.C. §825l(b). A party is

considered "aggrieved" if it has Article III standing. *Orangeburg v. FERC*, 2017 U.S. App. LEXIS 12597 (D.C. Cir. 2017). In other words, to demonstrate standing, a party must show "an actual or imminent injury in fact, fairly traceable to the challenged agency action that will likely be redressed by a favorable decision." *Id.* at *12; *see also Lujan* v. *Defenders of Wildlife,* 504 U.S. 555, 560-561, 119 L.Ed.2d 351, 112 S. Ct. 2130 (1992); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 471-472, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982).

The district court recognized that the consumer plaintiffs in this case had constitutional Article III standing. *Village of Old Mill Creek v. Star, supra*, 2017 U.S. Dist. LEXIS 109368, *19 (ECF-78 at 14). The court noted that "the ZEC program authorizes utilities to recover its costs from all retail consumers through an 'automatic adjustment clause tariff.'" *Id.* The court acknowledged that "[t]he consumer plaintiffs are injured by the ZEC charges on their bills, which are traceable to the Illinois statute and would be redressed if the charges were prohibited." *Id.* However, the court found that the consumer plaintiffs lacked prudential standing to bring preemption claims under the Federal Power Act because they were not "within the statute's zone of interests." *Id.* Noting that FERC's jurisdiction under the FPA is limited to wholesale sales of electricity, and not matters subject to regulation by the states, the court found that "[t]he consumer plaintiffs' claim is expressly excluded from §824's interests because the states have the power to regulate retail sales of electricity and impose retail charges that are

subject to state regulation." *Id.* at *20 (ECF-78 at 15). The court concluded that "Given that the consumer plaintiffs' injury involves the retail surcharge, their interests are outside the zone of interests of the federal statutes." *Id.*

The doctrine of prudential standing was described by the Supreme Court in *Bennett v. Spear*, 520 U.S. 154 (1997) as follows:

> In addition to the immutable requirements of Article III, "the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." Like their constitutional counterparts, these "judicially self-imposed limits on the exercise of federal jurisdiction," are "founded in concern about the proper--and properly limited--role of the courts in a democratic society," but unlike their constitutional counterparts, they can be modified or abrogated by Congress. Numbered among these prudential requirements is the doctrine of particular concern in this case: that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit.

Id. at 162 (citations omitted).

The "zone of interest" test was originally developed "as a limitation on the cause of action for judicial review conferred by the Administrative Procedure Act" but has since been extended to all statutorily created causes of action. *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 134 S. Ct. 1377, 1388, 188 L.Ed.2d 392 (2014). The test must be applied unless the language of the statute at issue expressly negates it. *Id.*; *Bennett, supra,* 520 U.S. at 162. While the breadth of the "zone of interests" will vary based on the statutory provision at issue, the Court has stated that the benefit of the doubt should go to the plaintiff and that the test "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be

assumed that' Congress authorized that plaintiff to sue." *Lexmark, supra*, 134 S. Ct. at 1389 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199, 2210, 183 L. Ed. 2d 211, 225 (2012)). Contrary to the district court's ruling below, *Village of Old Mill Creek v. Star, supra*, 2017 U.S. Dist. LEXIS 109368, *19 (ECF-78 at 14), the courts very much do consider the overall purpose of the statute at issue in analyzing whether the plaintiffs' claims are within a statute's zone of interest. *Id.; see also White Oak Realty, LLC v. United States Army Corp of Eng'rs*, 2014 U.S. Dist. LEXIS 123227, *20-21 (E.D. La. 2014).

The district court in this case misapplied the Supreme Court's jurisprudence on prudential standing and the zone of interests in at least three ways. First, it ignored language in the FPA that demonstrates a legislative intent to allow broad standing and negate the need to apply the zone of interests test. Second, the court failed to recognize that the language of the FPA supports a standing requirement consistent with Article III standing. Although acknowledging that the ZEC statute impacts retail customers through additional charges on their bills and that this impact would be redressed if the charges were prohibited under the FPA, the court did not properly account for this constitutional Article III standing. Third, the court misapplied the zone of interests test, ignoring the well-established jurisprudence that calls for a liberal application of the test, as well as the fact that the retail consumer plaintiffs clearly do fall within the zone of interests of the FPA. For these reasons, the decision below finding that the consumer plaintiffs lack prudential standing should be overturned.

The district court ignored well-established Supreme Court precedent that before applying the zone of interest test to determine prudential standing, a court must determine whether Congress has, in the language and intent of the statute, indicated intent to negate the zone of interest test and confer broad standing. In *Bennett*, *supra*, the Supreme Court found that the citizen's suit provision of the statute at issue, the Endangered Species Act, negated the zone of interests test, as the statute provided that "any person" could file a civil suit under the Act. *Id.* In doing so, the court cited *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972), which held that the language in the 1968 Civil Rights Act allowing an action to be brought "by a person who claims to have been injured" demonstrated "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Id.* at 210-11 (quoting *Hackett* v. *McGuire Bros., Inc.*, 445 F.2d 442 (3rd Cir. 1971)).[3]

Here, 16 USCS § 825e provides that "any person, electric utility, State, municipality or State Commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act" may apply to the Commission for relief. "Person" is defined in 16 USCS § 796(4) as

[3] The *Bennett* court did find that one of plaintiffs' claims which sought to redress an alleged violation of the ESA by the Secretary of Interior did not fall under the citizen suit provision's liberal standing requirement. As to that claim, the Court found that plaintiffs must fall within the "zone of interest" of the specific statutory requirement that gave rise to their claim. The Court found that they did not and that plaintiffs therefore lacked standing to bring that claim. *Bennett v. Spear, supra*, 520 U.S. at 175-76. It is this aspect of the decision in *Bennett* that was cited by the district court, despite the overall grant of standing in that case.

"an individual or a corporation." Similarly, 16 USCS § 825l provides that "[a]ny person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, electric utility, State, municipality, or State commission is a party" may seek rehearing and ultimately judicial review of that Order.[4] The FPA further provides, at 16 USCS § 825p, that federal courts have exclusive jurisdiction to hear cases alleging:

> violations of this Act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, or order thereunder.

Similar to the language analyzed in *Bennett* and *Lexmark*, above, the language of these provisions demonstrates intent by Congress to establish broad standing to redress violations of or orders issued under the Federal Power Act.

Indeed, that is the interpretation that FERC itself has applied to the statute. See 18 CFR 385.206 (a) ("Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction."); 18 CFR 385.102(d) (broadly defining "person"). In an Order on Certification of Questions issued in *IMO American Elec. Power Serv. Corp.*, Docket No ER07-1069-006, 153

[4] The issue of standing is distinct from the issue of whether a plaintiff must exhaust administrative remedies. Standing blocks access to judicial relief altogether. The exhaustion of administrative remedies is a prerequisite designed to obtain the review of an agency with particular expertise prior to judicial review. For further discussion of why exhaustion should not be required here, see fn. 10 below.

FERC ¶61,167, 2015 FERC LEXIS 2158 (2015), FERC was asked to provide guidance on whether the statute allows retail customers to file complaints at FERC even though the FPA limits the jurisdiction of the Commission to matters involving wholesale rates. The Commission stated:

> The plain language of the FPA and the Commission's implementing regulations allow broad participation in proceedings before the Commission. Specifically, section 306 of the FPA explicitly authorizes "[*a*]*ny* person" to file a complaint with the Commission. The Commission's regulations are to a similar effect. For example, Rule 206(a) of the Commission's Rules of Practice and Procedures provides that "[*a*]*ny person* may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission or for any other alleged wrong over which the Commission may have jurisdiction."

Id. at *61977-78.

The Commission found that "[t]his understanding is consistent with the FPA's statutory scheme," and that "this issue is not a matter of first impression, as both the courts and the Commission have concluded previously that protecting consumers is one of the Commission's primary responsibilities." *Id.* (citing *Pub. Sys. v. FERC*, 606 F.2d 973, 979 n. 27 (D.C. Cir. 1979) ("the Federal Power Act aim[s] to protect consumers from exorbitant prices and unfair business practices").

This language in the FPA is equivalent to that found in *Bennett* and *Trafficante* and similarly evinces "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Trafficante, supra,* 409 U.S. at 210-11. As acknowledged by the district court, the alleged injury to retail customers is sufficient to satisfy Article III requirements. The Act requires retail

suppliers to purchase the ZECs conferred on the facilities that are selected to receive them, the cost of which will be passed on to their customers. *Village of Old Mill Creek v. Star, supra*, 2017 U.S. Dist. LEXIS 109368, *12-*15, (ECF-78. at 8-11). The cost of the ZECs is subject to a "price adjustment" based on the degree to which the market price index for the delivery year exceeds the baseline market price index. *Id.* The specific purpose of the price adjustment is "to ensure that the procurement remains affordable to retail customers in this State if electricity prices increase." *Id.*

Thus, the statute at issue in this case expressly contemplates that the costs of the ZEC program will be borne by retail customers. Even if the impact on retail rates was not expressly contemplated, the fact that the wholesale rates referenced in the ZEC statute will ultimately pass through to retail ratepayers is sufficient to establish the injury necessary to confer Article III standing. As the Supreme Court stated in *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 776, 193 L.Ed.2d 661 (2016):

> It is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other. To the contrary, transactions that occur on the wholesale market have natural consequences at the retail level. And so too, of necessity, will FERC's regulation of those wholesale matters. Cf. *Oneok, Inc.* v. *Learjet, Inc.*, 575 U. S. ___, ___, 135 S. Ct. 1591, 194 L. Ed. 2d 511, 523 (2015) (noting that in the similarly structured world of natural gas regulation, a "Platonic ideal" of strict separation between federal and state realms cannot exist). When FERC sets a wholesale rate, when it changes wholesale market rules, when it allocates electricity as between wholesale purchasers — in short, when it takes virtually any action respecting wholesale transactions — it has some effect, in either the short or the long term, on retail rates.

See also, *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 365, 370-373, 108 S. Ct. 2428, 101 L.Ed.2d 322 (1988) and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 959-961, 970, 106 S. Ct. 2349, 90 L.Ed.2d 943 (1986)(both holding that an order regulating wholesale purchases fell within FERC's jurisdiction and preempted contrary state action, even though it clearly affected retail prices); *IMO American Elec. Power Serv. Corp., supra*, at *61977 (holding that plaintiff as an end-use customer will pay some portion of a transmission rate flowed through to her retail bill has sufficient injury in fact to confer standing). Given these direct impacts on retail customers, and the fact, acknowledged by the district court, that this injury would be redressed by a ruling prohibiting the ZEC charges, the retail plaintiffs can establish Article III standing. Since the FPA contains language evincing intent to allow broad standing, this is sufficient to find that the retail plaintiffs in this case, contrary to the decision below, do have standing to bring this action.

Even if the court were to find that application of the "zone of interests" test is required, retail consumers are clearly within the zone of interests protected by the FPA. *Pennsylvania Water & Power Co. v. Federal Power Comm'n.*, 343 U.S. 414, 41, 72 S. Ct. 843 (1952) ("A major purpose of the whole Act is to protect power consumers against excessive prices"). The very purpose of the requirement in the FPA that the Commission ensure that rates are "just and reasonable," is the protection of the consumer. As the D.C. Circuit Court of Appeals stated in *Pub. Sys. v. Federal Energy Regulatory Comm'n, supra*, 606 F.2d at 979:

> Both the Natural Gas Act and the Federal Power Act aim to protect consumers from exorbitant prices and unfair business practices. This purpose can be seen in the statutory requirement that rates be just, reasonable, and nondiscriminatory. 16 U.S.C. § 824d(a), (b) (1976); 15 U.S.C. § 717c(a), (b) (1976). See *FPC v. Hope Natural Gas Co., supra*, 320 U.S. at 611-12, 64 S. Ct. 281; *Pennsylvania Water & Power Co. v. FPC,* 343 U.S. 414, 418, 72 S. Ct. 843, 96 L. Ed. 1042 (1952); *MacDonald v. FPC*, 164 U.S.App.D.C. 248, 256, 505 F.2d 355, 363 (1974), Cert. denied sub nom. *George Mitchell & Associates v. MacDonald*, 421 U.S. 912, 95 S. Ct. 1568, 43 L. Ed. 2d 778 (1974); *American Public Power Ass'n v. FPC*, 173 U.S.App.D.C. 36, 41, 522 F.2d 142, 147 (1975) (Bazelon, C. J., concurring). Of course, protection of the consumer includes maintaining the financial integrity of the regulated firm; but the focus of regulation remains control of the economic power of utilities that enjoy monopoly status.

In this respect, the district court misapplied the zone of interests test. The court only looked at the sections of the statute cited by plaintiffs in the complaint, 16 U.S.C. §824 and 824d, even though the Supreme Court itself looked at the overall purpose of the statute in *Lexmark* and *Bennett.*[5] The court noted that 16 U.S.C. §824 stated that the sale of electric energy for "ultimate distribution to the public is affected with the public interest." *Village of Old Mill Creek v. Star, supra*, 2017 U.S. Dist. LEXIS 109368 *19-20 (ECF-78 at 15), but found that the language in 16 U.S.C. §824a that excluded jurisdiction "for matters subject to regulation by states" placed the consumer plaintiffs outside the zone of interests of the statute. The district court reasoned that because the alleged injury here "involves the retail surcharge" the retail customers' interests are therefore "outside the zone of

[5] *See White Oak Realty, LLC v. United States Army Corp of Eng'rs*, 2014 U.S. Dist. LEXIS 123227, *19 (E.D. La. 2014) ("even assuming *Bennett* requires the zone of interest test *only* be applied to the statutory provision allegedly violated, the *Lexmark* Court overruled *Bennett* on this point.")

interests of the federal statutes." *Id.*[6]

This is far too narrow an application of a test that is intended not to be "especially demanding." *Lexmark, supra*, 134 S. Ct. at 1389. The court ignored the cases discussed above that demonstrate that protection of the public from excessive rates was a main purpose of the FPA, particularly the provisions requiring that rates be "just and reasonable." That retail consumers are also impacted by matters regulated at the state level does not mean that the well-established and often acknowledged impact of wholesale rates passed through to their retail bills does not affect them. Because "transactions that occur on the wholesale market have natural consequences at the retail level," *FERC v. Electric Power Supply Ass'n*, *supra,* 136 S. Ct. at 776, it is not reasonable to ignore these consequences when analyzing whether retail customers are within the zone of interest of the statute requiring that wholesale rates be just and reasonable.[7] For this reason, the district court erred in holding that the consumer plaintiffs lack "prudential standing."

II. THE DISTRICT COURT MISAPPLIED *ARMSTRONG V. EXCEPTIONAL CHILD CENTER* TO PRECLUDE PLAINTIFFS' CAUSE OF ACTION TO RAISE PREEMPTION CLAIMS

In its decision below, the district court ruled that plaintiffs could not

[6] The district court did not address whether this reasoning would allow plaintiffs to bring their preemption claims in state court. Doing so would however appear to contradict 16 U.S.C. §825p, which vests exclusive jurisdiction over suits in equity claiming violations of the FPA in the federal courts.

[7] Of course many actions can be taken at the state level that will not, like the Illinois ZEC statute, reference wholesale rates or that are within areas traditionally reserved to the states. See, *FERC v. Electric Power Supply Ass'n, supra*. Actions challenging issues on matters reserved to the states would have to be brought before state commissions or in state courts.

maintain a private suit to address whether the Illinois statute is preempted under the Supremacy Clause of the Constitution. *Const., Art. VI, cl. 2.* Applying *Armstrong v. Exceptional Child Center, Inc.,* 135 S. Ct. 1378, 191 L.Ed.2d 471 (2015), the court found that the FPA "does not authorize a private cause of action for injunctive relief against the defendants." *Village of Old Mill Creek v. Star, supra*, 2017 U.S. Dist. LEXIS 109368, *26 (ECF-78. at 21). In doing so, the court misapplied *Armstrong* and has erected procedural hurdles that threaten to foreclose timely adjudication of constitutional claims arising out of the division between federal and state jurisdiction over gas and electric rates. The outcome is unworkable and fails to take into account the specific goal of the FPA to establish a "cooperative federalism" system of regulation.

In *Armstrong*, the Supreme Court analyzed three routes by which private entities might bring an action to assert preemption of a state statute. First, the Court confirmed that the Supremacy Clause does not, by itself, create a cause of action to seek an injunction against the enforcement of a statute alleged to be preempted. *Armstrong, supra,* 135 S. Ct. at 1383. However, in a plurality opinion, the court noted:

> To say that the Supremacy Clause does not confer a right of action is not to diminish the significant role that courts play in assuring the supremacy of federal law. For once a case or controversy properly comes before a court, judges are bound by federal law.

Id. at 1384. The district court cited a number of instances where the federal courts must step in to affirm the supremacy of federal law, including "if an individual claims federal law immunizes him from state regulation, the court

may issue an injunction upon finding the state regulatory actions preempted." *Id.* (citing *Ex Parte Young*, 209 U.S. 123, 155-156, 28 S. Ct. 441, 52 L.Ed. 714 (1908)). However, the court ruled that because the power to enjoin unconstitutional actions under the Supremacy Clause is a judge-made equitable remedy, the underlying statute that gives rise to federal jurisdiction must permit private enforcement in order for private parties to bring an action to enjoin a state statute they claim is preempted. *Id.* at 1384-85.

In *Armstrong*, the court found that §30A of the Medicaid Act, 42 U.S.C. §1396a(a)(30)(A), which establishes reimbursement rates for certain medical services under state Medicaid plans, precluded such private equitable enforcement. *Id.* The Court based its decision on the language of the statute, which provided a specific remedy for the "breach" of the "Spending Clause contract" between states and the federal government under Medicaid, combined with the "judicially unadministrable nature" of §30A's text. The Court stated, "Explicitly conferring enforcement of this judgment-laden standard upon the Secretary alone establishes, we think, that Congress 'wanted to make the agency remedy that it provided exclusive….'" *Id.* (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 292, 122 S. Ct. 2268, 153 L.Ed.2d 309 (2002)). Finally, in a portion of the decision that did not gain a majority of votes, the *Armstrong* court found that §30A of the Medicaid Act itself did not provide a statutory private right of action. *Id.* at 1387.

Since *Armstrong*, the courts have carefully analyzed the language of each

statute to determine whether private enforcement is permitted to allow for an equitable preemption remedy. *See, e.g., Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 136 (2d Cir. 2016)(equitable action permitted under the Airport Noise and Capacity Act of 1990, 49 U.S.C.S. §§ 47521-47534); *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 903 (10th Cir. 2017)(equitable action not permitted under § 903 of the Controlled Substances Act, 21 U.S.C.S. §903); *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F.Supp. 3d 604, 640 (M.D. La. 2015)(equitable action permitted under §23A of the Medicaid Act, 42 U.S.C. § 1396a(a)(23)(A)); *BellSouth Telecomm's., LLC v. Louisville/Jefferson Cnty. Metro Gov't*, 2016 U.S. Dist. LEXIS 97226, *20 (W.D. Ky. 2016)(equitable action permitted under Pole Attachment Act, 47 U.S.C. § 224).

Contrary to the decision below, the Federal Power Act does not demonstrate a desire on the part of Congress to preclude a private right of action in equity to allege preemption of a state statute that impermissibly impacts federal wholesale electricity rates. The FPA was enacted in 1935. Prior to that time, regulation of the generation, transmission and distribution of electricity was primarily the jurisdiction of state and local agencies. *FERC v. EPSA*, *supra*, 136 S. Ct. at 767. After the Supreme Court held that states could not regulate interstate wholesale transactions in *Public Util. Comm'n of R. I.* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89-90, 47 S. Ct. 294, 71 L.Ed. 549 (1927), the FPA was enacted to fill the "Attleboro gap" in the regulation of electricity. *FERC v. EPSA*, *supra*, 136 S. Ct. at 767. Thus, a primary purpose of the FPA was to balance the division of

responsibility between state and federal regulators of electricity. *Id.*

Needless to say, maintaining that balance has been a complex task. The federal courts have been called upon on multiple occasions to determine where the lines are drawn between state and federal regulation. *See, e.g., Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, *supra,* 487 U.S. at 365, 370-373 (holding that an order regulating wholesale purchases fell within FERC's jurisdiction and preempted contrary state action); *Nantahala Power & Light Co.* v. *Thornburg*, *supra,* 476 U.S. at 959-961, 970 (same); *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 636-641, 92 S. Ct. 1827, 32 L.Ed.2d 369 (1972) (holding similarly in the natural gas context); *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 191 L.Ed.2d 511 (2015) (holding that anti-trust claims are not among those preempted under the Natural Gas Act). Last term alone, two cases analyzing this division of responsibility were heard by the Supreme Court. *FERC v. Electric Power Supply Ass'n, supra*, 136 S. Ct. 760; *Hughes v. Talen*, *supra*, 136 S. Ct. 1288.

The decision below is the first to apply *Armstrong* to the FPA and in doing so, the Court ignored these long-standing decisions as well as central provisions of the FPA itself. There is no doubt that the FPA provides broad jurisdiction to FERC to fix rates and charges (16 U.S.C. §824(d), (e)), to order the furnishing of service (16 U.S.C. §824(f)), to oversee transmission and reliability (16 U.S.C. §824(o)), and to oversee wholesale electricity markets (16 U.S.C. §824(t), (v)). FERC also has broad authority to establish rules and regulations, 16 U.S.C. §825(h), conduct investigations, 16 U.S.C. §825 (f), and enforce provisions of the Act, 16 U.S.C.

§825(m). Without much further analysis, the district court concluded that the grant of such authority indicated that Congress intended these remedies to be exclusive. *Village of Old Mill Creek v. Star, supra,* 2017 U.S. Dist. LEXIS 109368, *26 (ECF-78 at 20). In doing so, the court summarily dismissed the language of 16 U.S.C. §825(p), which provides that the federal courts:

> shall have exclusive jurisdiction of violations of this Act [16 USCS §§ 791a et seq.] or the rules, regulations, and orders thereunder, and of all *suits in equity* and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this Act [16 USCS §§ 791a et seq.] or any rule, regulation, or order thereunder.

(emphasis added).

The district court found that this provision only applied to enforcement actions brought under 16 U.S.C. §825(m), even though there is no such limitation in the language of the provision.[8] In support of its limited reading of §825(p), the Court cited *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249, 71 S. Ct. 692, 95 L.Ed. 912 (1951). That case found that in establishing the reasonableness of rates, federal court jurisdiction must come in the form of a review of a Commission order, as set forth in 16 U.S.C. §825l. It does not limit §825p to enforcement provisions brought by the Commission under §825m.[9]

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[8] Although not cited by the district court, the District Court of the Southern District of Florida in *Gainesville v. Florida Power & Light Co.*, 488 F. Supp. 1258 (S.D. Fla. 1980) determined that §825(p) was merely a grant of jurisdiction and did not create a substantive cause of action for damages to private parties. The court did not address whether it demonstrated intent by Congress to preclude an equitable remedy under the Supremacy Clause.

[9] Nor does the existence of a remedial provision relating to cogeneration facilities in one section of the Public Utilities Regulatory Policies Act (PURPA), 16 U.S.C. §824a-3(h)(2)(B), demonstrate a Congressional intent to foreclose a private equitable remedy for the entire

It may well be that some portions of the FPA, like the Medicaid Act at issue in *Armstrong*, provide for exclusive remedies that foreclose a private equitable action. It may also be that certain actions involve matters that are best left to the administrative agency due to issues of expertise.[10] However, this case is not an action to fix rates or seeking damages from a violation of the Act. It is an equitable action seeking a declaration that a state statute impermissibly and unconstitutionally intrudes on matters that have been reserved for a federal administrative agency under the FPA. The constitutional review sought is not a matter within the expertise of FERC or a matter for which an exclusive remedy has been provided in the statute. Indeed, it is not clear that FERC could, consistent with comity and the separation of powers, declare a state statute unconstitutional.

FPA. As noted above, while *Armstrong* itself found that §30A of the Medicaid Act provided for an exclusive remedy that foreclosed private equitable relief to enforce that provision, other courts have reviewed §23(A) of the same statute to find that it did allow for a private equitable remedy for alleged violations of §23(A). *Planned Parenthood of Gulf Coast, Inc. v. Gee,* 862 F.3d 445, 459-460 (5th Cir. La 2017)(agreeing with the Sixth, Seventh, and Ninth Circuits to hold that 42 U.S.C. § 1396a(a)(23) creates a private right of action) *See also Planned Parenthood Gulf Coast, Inc. v. Kliebert*, *supra,* 141 F. Supp. 3d 604. The analysis must be more exacting and the intent clearer before concluding that such a sweeping obstacle to equitable relief was intended.

[10] It is important to distinguish between an inquiry under *Armstrong* which would deprive a plaintiff of a cause of action to redress certain constitutional claims and a requirement that they exhaust administrative remedies. Exhaustion is appropriate as a matter of comity where there is an issue that falls within the expertise of an administrative agency. *See*, *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, *supra,* 341 U.S. at 254 ("If the court is presented with a case it can decide but some issue is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer that issue.") The constitutional claims raised here, however, are legal issues better left to the courts. If, once the court decides the threshold constitutional claims, further issues must be resolved regarding wholesale electricity rates or markets, they can be resolved in the following already-pending FERC proceeding *Calpine Corp. et al v. PJM Interconnection*, FERC Docket No. EL 16-49 (filed August 30, 2017).

Kendall-Jackson Winery, Ltd. v. Branson, 82 F.Supp. 2d 844 (N.D. Ill.2000). This, on the other hand, is clearly the province of the courts. *See, e.g., Hughes v. Talen*, *supra*, 136 S. Ct. 1288.

As a practical matter, the decision below presents an unworkable obstacle for parties seeking to enjoin state actors from usurping powers that are properly preempted by the FPA. It would require them to proceed first to the FERC. This will likely postpone adjudication of the constitutional claims and will certainly require more extensive and time consuming proceedings. Complex cases before FERC can take at least a year, not including proceedings on rehearing that can follow the issuance of an Initial Decision. *See FERC Summary of Procedural Time Standards for Hearing Cases*.[11] The power of a federal administrative agency to declare a state statute unconstitutional is dubious at best. *Oestereich v. Selective Serv. Sys. Local Bd.*, 393 U.S. 233, 242, 89 S. Ct. 414, 21 L.Ed 2d 402 (1968) ("adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."); *Johnson v. Robison*, 415 U.S. 361, 368, 94 S. Ct. 1160, 39 L.Ed.2d 389 (1974) (quoting *Oestereich).* While this rule is not mandatory, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215, 114 S. Ct. 771, 127 L.Ed.2d 29 (1994), counsel could find no published decision in which FERC has ever specifically overturned a state statute on the grounds that it was unconstitutional. On the other hand, there are many cases in which the validity of a state statute or regulation in light of the preemptive

[11] See https://www.ferc.gov/legal/admin-lit/time-sum.asp.

scope of the FPA has been considered in the Courts. *See, e.g., Hughes v. Talen*, *supra*, 136 S. Ct. 1288; *Oneok, Inc. v. Learjet, Inc., supra*, 135 S. Ct. 1591; *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 109 S. Ct. 1262, 103 L.Ed.2d 509 (1989); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S. Ct. 1145, 99 L.Ed.2d 316 (1988); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 103 S. Ct. 2296, 76 L.Ed.2d 497 (1983); *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393 (2d Cir. 2013); *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014). This rule should apply with particular force when a *federal* administrative agency is reviewing a legislative enactment of a *state* Legislature.

Thus, a rule that requires litigants to bring preemption claims first to FERC is likely to result in postponing an answer on the preemption question. As the question of whether a state statute is preempted is not a matter within the expertise of FERC, and may not even be within FERC's legal authority to decide, the procedural obstacles created by the district court's decision are unnecessary and unworkable. *See, Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., supra,* 341 U.S. at 254 ("we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose.")[12]

The Court below also based its ruling on a belief that a determination of whether rates are "just and reasonable" is "judicially unadministrable" like the

[12] Moreover, given that FPA preemption is rooted in the Commerce Clause, FPA cases often include constitutional claims under that provision as well. The procedural requirements established by the decision below would thus require plaintiffs to split their constitutional claims or postpone adjudication of their Commerce Clause claims as well.

Medicaid rates in *Armstrong*. *Village of Old Mill Creek v. Star, supra,* 2017 U.S. Dist. LEXIS 109368, *27-*29 (ECF-78 at 21-22). The court stated that "[t]he declaration sought by plaintiffs would require a court to draw some lines, to give the state direction on how not to interfere with wholesale rates while acting within its undisputed authority to regulate, and once a court enters that arena, it treads on FERC's exclusive expertise." *Id.*. This is not the relief sought on the face of the underlying complaint. As noted, plaintiffs here are not asking the court to set rates. The issue in this case is whether the legislation is preempted. If the court decides that it is, parties would be free to pursue the goals of the preempted portions of the ZEC statute at FERC. If it is not, there will still need to be proceedings at FERC to determine how this statute will be addressed in the wholesale markets.[13] The "just and reasonable" standard is well-established in utility ratemaking and has been administered by both the courts and administrative agencies for many years. *Bluefield Water Works v. PSC of West Virginia*, 262 U.S. 679, 43 S. Ct. 675, 67 L.Ed. 1176 (1923); *Federal Power Comm'n v Hope*, 320 U.S. 591, 64 S. Ct. 281, 88 L.Ed. 333 (1943). It is not judicially "unadministrable" and, unlike the statute in *Armstrong*, does not support a finding that Congress intended to foreclose a private equitable remedy to raise preemption claims under the FPA.

[13] As noted above and by the court below, there is an ongoing proceeding at FERC. *Id.*, at *25, fn 20. (ECF-78 at 20.) *See* fn 10 above.

CONCLUSION

For the reasons set forth above, NASUCA respectfully requests that this Court overrule these aspects of the district court decision and find that (1) retail plaintiffs have standing to raise issues regarding wholesale rates; and (2) that the FPA does not foreclose an equitable action by private parties to seek a declaration that a state statute, regulation or administrative action is preempted and an injunction against its implementation.

Respectfully submitted,

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CERTIFICATION

I hereby certify that according to "word count" feature of Word 2013 used by counsel in the preparation of this brief, it contains 6,994 words (less than 7,000 words), not including the cover page, table of contents, table of citations, certification, signature blocks, and proof of service. I certify further that attorneys for the National Association of State Utility Consumer Advocates (NASUCA) authorized the brief and that no other person other than members of NASUCA contributed money to fund the preparation and submission of the brief.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 6, 2017, I caused the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

By: */s/ Robert Gordon Mork*
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