Nos. 13-2419(L) & 13-2424

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

PPL ENERGYPLUS, LLC; PPL BRUNNER ISLAND, LLC; PPL HOLTWOOD, LLC; PPL MARTINS CREEK, LLC; PPL MONTOUR, LLC; PPL SUSQUEHANNA, LLC; LOWER MOUNT BETHEL ENERGY, LLC; PPL NEW JERSEY SOLAR, LLC; PPL NEW JERSEY BIOGAS, LLC; PPL RENEWABLE ENERGY, LLC; PSEG POWER, LLC; ESSENTIAL POWER, LLC,

Plaintiffs – Appellees,

v.

DOUGLAS R.M. NAZARIAN; HAROLD WILLIAMS; LAWRENCE BRENNER; KELLEY SPEAKES-BACKMAN; KEVIN HUGHES,

Defendants – Appellants,

and

CPV MARYLAND, LLC

Defendant.

Appeal from the U.S. District Court for the District of Maryland (Garbis, J.)

BRIEF OF NRG ENERGY, INC. AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 13-2419 Caption: PPL EnergyPlus, LLC et al. v. Douglas Nazarian, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

NRG Energy, Inc.
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☑ YES ☐ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
If yes, identify all such owners:

T. Rowe Price Associates Inc., a publicly held company, disclosed through its website that as of September 30, 2013, it is the beneficial owner of approximately 12.7% of the securities of NRG Energy, Inc. No other publicly held company has a 10% or greater ownership in NRG Energy, Inc.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☑ YES ☐ NO
If yes, identify entity and nature of interest:

NRG Energy, Inc. owns all the Class B common stock of NRG Yield, Inc. ("Yield"), representing 65.5% of the voting interests. Shares of Yield's Class A common stock, representing, in the aggregate, 34.5% of the voting interests, are publicly held (NYSE: NYLD). Other than NRG Energy, Inc., no other publicly held company has a 10% or greater ownership interest in Yield.

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Jeffrey A. Lamken Date: 2/11/2014

Counsel for: NRG Energy, Inc.

CERTIFICATE OF SERVICE

****

I certify that on 2/11/2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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/s/ Jeffrey A. Lamken (signature) 2/11/2014 (date)

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INTRODUCTION[1]

The district court correctly concluded that federal law controls here and that the Federal Energy Regulatory Commission ("FERC" or "the Commission") has exclusive jurisdiction. But that is why the judgment below should be reversed. The exclusivity of FERC's authority should have precluded the district court from intruding into this area. Developing a constitutional rule to effectuate its view of FERC's policy choices, the district court displaced FERC's role, sidestepped that agency's expertise, and avoided the Federal Power Act's review provisions.

The district court's ruling illustrates the perils of that course. The court did not merely impose, as a constitutional matter, a limit that FERC itself has declined to adopt. It also interfered with FERC's decision to address the impact of state-sponsored contracts and other potential forms of market power through more tailored mechanisms. Exercising their exclusive authority, FERC and Regional Transmission Organizations ("RTOs") have proceeded cautiously, addressing state-sponsored entry and generation through carefully crafted "minimum offer price rules" designed to prevent damage to FERC's pricing rules without intruding unduly on other values. For example, PJM Interconnection, L.L.C. (the RTO here) does not ban state-sponsored resources. Instead, it uses minimum offer price

[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or part; no such party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *amicus* made such a contribution.

rules—addressing the *price* at which such resources offer energy into the market—to mitigate any anti-competitive impacts. If efforts to mitigate the exercise of buyer-side market power are imperfect—a contention *amicus* agrees with—FERC alone has authority to require a different remedy.

The district court's imposition of its own remedy threatens unrelated bilateral contracts upon which parties and markets rely. Bilateral contracts are the primary means of purchasing energy and capacity in large portions of the country. Many bilateral contracts subject to FERC's jurisdiction, moreover, are the result of state mandates. Where FERC mitigates such state action—to prevent States from exercising buyer-side market power—it carefully limits the intrusion on States by regulating the *price* at which any resulting generation bids into the capacity market. FERC does not prohibit the underlying activity altogether. FERC did not, for example, prohibit the contract at issue here. The district court's invocation of the blunt instrument of preemption to invalidate the contract entirely, by contrast, is like using a Howitzer to shoot sparrows. The resulting collateral damage could even threaten to invalidate bilateral contracts and renewable energy efforts that FERC and the RTOs would choose to preserve. And the district court's constitutional holding sidestepped the demanding *Mobile-Sierra* standard FERC must meet when seeking to invalidate bilateral contracts. The court thus exercised greater power than FERC itself possesses—and disregarded longstanding protections for

federal power contracts—under the rubric of protecting FERC's exclusive jurisdiction. That result should not be sustained.

INTEREST OF *AMICUS CURIAE*

NRG Energy, Inc. ("NRG") is one of the largest power generation and retail electricity businesses in the United States. NRG owns and operates 47,000 megawatts of generation capacity, including 13,000 megawatts of merchant generation in PJM. It also purchases and markets energy and energy-related resources, including electricity, natural gas, oil, coal, and green energy, throughout the United States. NRG and its affiliates have billions of dollars invested in generation facilities that are supported by state-mandated contracts nationwide. Those include long-term contracts with credit-worthy counterparties that lower risks and promote stable revenues. As a generation capacity provider, NRG is directly affected by the issues presented by this case.

NRG makes financial commitments in reliance on the integrity of bilateral contracts. The district court's decision threatens the sanctity of such contracts and purports to give federal courts greater authority to abrogate those contracts than even FERC possesses. If upheld, the court's decision could destabilize wholesale energy and capacity markets, upend decades of settled precedent, and confuse the scope of FERC's exclusive jurisdiction. For those reasons, NRG has a compelling interest in, and unique insights into, the issues presented in this case.

BACKGROUND

I. THE FEDERAL POWER ACT AND THE DEVELOPMENT OF REGIONAL TRANSMISSION ORGANIZATIONS

A. The Federal Power Act

For over 70 years, the Federal Power Act, 16 U.S.C. §§ 824 *et seq.*, has authorized FERC to regulate the transmission and sale of wholesale electricity so as to ensure just and reasonable rates. "Congress here has granted exclusive authority over rate regulation to the Commission." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 580 (1981). As a result, "[t]he reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state *or federal courts*." *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 375 (1988) (emphasis added). "The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." *Id.*

B. Regional Transmission Organizations

1. "In the bad old days, utilities were vertically integrated monopolies" where a single utility would generate, transmit, and distribute electricity. *Midwest-ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363 (D.C. Cir. 2004). In the 1990s, FERC sought to promote competition by encouraging the development of regional transmission organizations ("RTOs"). *Id.* at 1364. RTOs connect the "different segments" of transmission facilities owned by its member utilities; offer open access to those facilities for all generators; and operate associated markets for

electricity. *Id.* "[S]ubject to the Commission's oversight," *Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 737 (D.C. Cir. 2012), RTOs establish rules that govern both participation and the pricing of electricity within the markets they operate, *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 233 (D.C. Cir. 2013). RTOs may propose changes to their pricing rules and other market-design features, but any dispute "falls under [FERC's] jurisdiction." *NYISO, Inc.*, 124 FERC ¶61,301 at 62,685 (2008).

The RTO at issue here, PJM, operates in 13 States and the District of Columbia, including most of the mid-Atlantic region and eastern Midwest. "The region PJM serves now includes 185,600 megawatts of generating capacity"—more "electricity than Canada and Mexico combined"—and includes "more than 59,000 miles of transmission lines." PJM, *2012 Annual Report* 26 (2013).

2. "Among its duties, PJM is responsible for preventing interruptions to the delivery of electricity in that region by ensuring that its system has sufficient generating capacity." *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1284 (D.C. Cir. 2011). "'Capacity' is not electricity itself but the ability to produce it when necessary"—in essence, the ability to produce additional electricity to keep the lights on during periods of peak demand. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009). In a capacity market, "an electricity provider purchases from a generator an option to buy a quantity of energy, rather

than purchasing the energy itself." *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 168 (2010). Because electricity generally cannot be stored in sufficient quantities and must instead be produced on demand "instantaneously," capacity is a critical element of electricity markets. FERC, *Energy Primer: A Handbook of Energy Market Basics* 2 (2012).

PJM operates a forward-capacity market to secure sufficient capacity to meet anticipated peak demand three years in the future. That mechanism begins with a "best approximation of demand," and then uses "the power of competitive bidding to help locate th[e] price" for "the average cost of entry for the mix of suppliers capable of providing capacity over the relevant three-year run." *Conn. DPUC*, 569 F.3d at 484. The three-year "lag time allows competition from new suppliers that . . . could develop [needed] capacity within three years of winning a bid." *Maryland*, 632 F.3d at 1285. The market seeks to "create[ ] long-term price signals to stimulate investment, both in maintaining existing generation and in developing new sources of capacity." PJM, *2012 Annual Report*, *supra*, at 19.

C. Bilateral Contracting

Under the Federal Power Act, "sellers and buyers may agree on rates by contract." *NRG Power Mktg.*, 558 U.S. at 171. PJM's market sits alongside and operates in tandem with such bilateral contracts, which have long been the traditional means of meeting energy and capacity needs throughout the Nation.

See Nev. Power Co. v. Duke Energy Trading & Mktg., LLC, 99 FERC ¶61,047 at 61,190 (2002).

In a typical bilateral contract, a utility agrees to buy and a supplier agrees to sell energy and capacity on specified terms. Such bilateral contracts have a special place in federal energy law. As a result, the "*Mobile-Sierra* doctrine" has long protected them from interference or modification by even federal regulators. *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). In organized markets operated by RTOs, bilateral contracts still play a critical role. *See PacifiCorp v. Reliant Energy Servs., Inc.*, 102 FERC ¶63,030 at P 81 (2003).

Often, bilateral contracts are mandated or approved by state actors. For example, States routinely direct their utilities to make bulk purchases of energy in advance of the time power is produced and consumed. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 538-39 (2008). Because the market price of energy constantly changes, the price for such energy at the time of delivery will typically differ from the price negotiated in such advance-purchase contracts. *See id.* at 547.

One common form of a bilateral contract is a "contract for differences." In a contract for differences, a generator contracts to supply a utility with energy or capacity at specified price. If the *contract* price exceeds the price the generator

obtains from the RTO, the utility pays the generator the difference. Conversely, if the generator obtains a greater price through the RTO, it pays the difference to the utility. *See, e.g.*, William H. Hieronymus *et al.*, *Market Power Analysis of the Electricity Generation Sector*, 23 Energy L.J. 1, 30 (2002). These contracts thus lock in the generator's price at the contract rate, shifting the risk of lower market prices (and the benefits of higher prices) to the utility.

D. FERC Proceedings Addressing the Impact of State-Sponsored Activities on Capacity Prices

FERC has repeatedly addressed the impact of "uneconomic" new entry, such as state-sponsored facilities, on energy prices in PJM and other RTOs. For example, in *ISO New England, Inc.*, 135 FERC ¶61,029 at P165 (2011), FERC examined the effect of state-sponsored activities on capacity prices in New England's RTO. Rather than ban States from entering into bilateral contracts, FERC established minimum offer price rules: Market entrants are subject to an offer floor that prevents new resources from entering the market at a rate significantly below the full cost of a new supply resource (such as a new power plant). *Id.* at P166. FERC thus sought to ensure just and reasonable rates by regulating the price at which new entrants may "bid" into capacity auctions. *Id.*

In evaluating such issues, FERC has concluded that it "must balance" competing considerations. *New England States Comm. on Elec. v. ISO New England Inc.*, 142 FERC ¶61,108 at P35 (2013). Those interests include "its

responsibility to promote economically efficient markets and efficient prices," and "its interest in accommodating the ability of states to pursue other legitimate state policy objectives." *Id.* FERC thus seeks to avoid "pass[ing] judgment on state policies and objectives" while ensuring that entry by state-sponsored resources does not "disrupt[] the competitive price signals that [an RTO's] wholesale capacity market protocols are designed to produce." *PJM Interconnection, L.L.C.*, 143 FERC ¶61,090 at P 54 (2013).

II. PROCEEDINGS BELOW

A. Maryland's Efforts To Increase Capacity

In December 2011, the Maryland Public Service Commission ordered Maryland electric distribution companies to issue requests for proposal that would allow "for the construction and operation of new generation resource(s)." JA261. A supplier (*i.e.*, a generator) that contracted with an electric distribution company pursuant to such requests would be awarded "a long-term contract for differences." *Id.* Under the contract for differences, "the actual revenue received by the supplier for its sale of energy and capacity in the PJM Markets is compared to what the supplier would have received for those sales had the contract prices been controlling, and any difference is settled between the supplier" and the electric distribution company. JA265. "If the *contract prices are higher* than the market prices, the *[electric distribution company]* pays the difference to the supplier";

conversely, if "the *market prices are higher* than the contract prices, the *supplier* pays the difference to the [electric distribution company]." *Id.* (emphasis added). In other words, a generator supplying energy or capacity will be paid, pursuant to contract, a supplement whenever the PJM auction-clearing price is lower than the contract price. By contrast, if the auction-clearing price is higher than the contract price, the generator pays the utility the difference.

After evaluating bids, the Maryland Public Service Commission issued a Generation Order in April 2012 directing three electric distribution companies to enter into a contract for differences with CPV Maryland, LLC for the construction of a generation plant. JA265-JA266. The Generation Order and resulting contract for differences are at issue here.

B. The District Court's Decision

In April 2012, Plaintiffs filed a complaint urging that federal law preempted the Generation Order. Following a trial, the district court held that the Generation Order violated the Supremacy Clause, U.S. Const. art. VI, cl. 2. According to the district court, "under field preemption principles," the Maryland Public Service Commission "is impotent to take regulatory action to establish the price for wholesale energy and capacity sales" because such action falls within FERC's "exclusive domain." JA292. The court likewise repeatedly acknowledged FERC's "exclusive authority" and its "exclusive jurisdiction over setting wholesale electric

energy and capacity rates or prices." JA282 & n.46; *see also* JA278, JA281, JA283, JA287, JA292, JA299, JA309. But the court did not refer the matter to FERC; request FERC's opinion about the Generation Order's validity; or otherwise seek FERC's expertise. Instead, it found "that the Generation Order, through the [contract for differences]," was invalid because it "establishes the price ultimately received by CPV for its actual physical energy and capacity sales to PJM in the PJM Markets." JA292.

The district court also concluded that its field-preemption holding "render[ed] moot the question of whether the Order would also be held to violate the Supremacy Clause because it is conflict preempted." JA311. It found no violation of the dormant Commerce Clause. JA312. And it found "meritless" Plaintiffs' claim that the Maryland Public Service Commission "deprived them of their federal statutory rights protected by 42 U.S.C. § 1983." JA345.

SUMMARY OF ARGUMENT

I. Rather than defend FERC's exclusive jurisdiction in this area, the district court usurped it. Plaintiffs' challenge represents an impermissible collateral attack on the determinations and rulings of FERC. If the challenged contract interferes with FERC-approved pricing rules in some way that those rules and tariffs do not adequately address, or it otherwise invades FERC's authority, Plaintiffs must complain to FERC. Indeed, Plaintiffs have already challenged—

first before FERC and now on a petition for review—FERC's chosen method of protecting PJM's auction from the adverse impacts of state-sponsored resources. They cannot now bring such a challenge in district court. And even if the district court did not invade FERC's exclusive jurisdiction, it should have referred the matter to FERC under the primary jurisdiction doctrine.

II. The district court's preemption holding is incorrect. When FERC decides that a State's actions (or even private actions) improperly distort wholesale markets, FERC targets the *price* at which state-sponsored resources may bid into the market. It does not, as the district court did here, invalidate the State's actions or the contracts at issue. The district court thus purported to preserve FERC's authority by going far beyond where FERC itself was willing to go.

Field preemption does not apply whenever actions affect PJM's pricing mechanisms. Many actions, by private entities and States alike, do so without violating the Supremacy Clause. The district court's decision to the contrary defies decades of history and common industry practice.

Nor does conflict preemption apply. FERC itself has already addressed whether the Generation Order and resulting contract for differences impermissibly interfere with PJM's market. It did not invalidate the Generation Order. Instead, it addressed the *price* at which the generators involved submit their electricity into PJM's market. Invalidating the contract for differences based on conflict

preemption would damage the very interests FERC is charged with protecting: It would strip FERC of its ability to balance competing state and market interests in favor of broad preemption whenever a district court determines that a State's actions encroach on the wholesale market.

III. The district court's decision also defies the protection given to contracts under longstanding Supreme Court precedent. Bilateral contracts promote competition, support new resources, mitigate market power, and allow buyers to hedge against market volatility. Under the *Mobile-Sierra* doctrine, FERC may abrogate bilateral contracts only in extraordinary circumstances. The district court, however, invalidated the contract at issue here merely because it concluded that such contracts interfere with PJM's auction-pricing mechanisms. But courts should have no greater power than FERC to abrogate contracts based on their effect on wholesale rates, much less to do so to protect FERC's exclusive jurisdiction.

ARGUMENT

The district court invalidated the Generation Order and associated contract on the theory that they intrude on PJM's pricing mechanisms and invade FERC's exclusive jurisdiction. In so doing, however, the district court itself invaded FERC's exclusive authority.

I. PLAINTIFFS' CHALLENGE IS AN IMPERMISSIBLE COLLATERAL ATTACK ON FERC AND PJM

A. FERC Was the Sole Forum for Claiming That the Challenged Contract Interferes with PJM's Pricing Rules

"Plaintiffs contend that the Generation Order impermissibly invades a field occupied exclusively by FERC . . . because the Generation Order sets the wholesale price received by CPV for its capacity and energy sales into the PJM Markets." JA273. But the Federal Power Act gives FERC, not district courts, the power to correct such claimed distortions. *See* p. 4, *supra*. The remedy for Plaintiffs' claim is one that repeatedly has been used in the past: Invoke PJM's market rules and, if those rules prove insufficient to ensure just and reasonable rates, seek relief from FERC.

As FERC has explained, "the deterrence of uneconomic entry falls within [FERC's] jurisdiction." *PJM Interconnection, L.L.C.*, 135 FERC ¶61,022 at P 141 (2011). "Through the [Federal Power Act], Congress preempted states, state courts, and *even federal courts* from acting in areas reserved exclusively for the FERC." *Gulf States Utils. Co. v. Ala. Power Co.*, 824 F.2d 1465, 1470 (5th Cir. 1987) (emphasis added). Here, Plaintiffs contend *either* that PJM's market rules—federal tariffs approved by FERC—do not adequately protect them from the Generation Order's impact, or that PJM has not properly implemented those rules (hence the need for district court intervention). Either complaint belongs before

FERC: District courts lack the authority and expertise to determine whether an RTO's market rules must be modified. And violations of federally filed tariffs by market participants are likewise matters for FERC. 16 U.S.C. § 824e. By filing suit in district court, Plaintiffs mounted an unlawful collateral attack on matters entrusted to a federal agency.

Indeed, Plaintiffs previously urged FERC "that individual state decisions should not be permitted to distort the operation of an interstate market over which the Commission has jurisdiction." *PJM Interconnection, L.L.C.,* 137 FERC ¶61,145 at P 7 n.3, P 195 (2011); *see PJM*, 143 FERC ¶61,090 at P 5, PP 210-212. Plaintiffs asserted, among other things, that new resources should be subject to a longer-term price floor rule. *PJM,* 137 FERC ¶61,145 at PP 130-131. FERC concluded that Plaintiffs' position "could discourage economic entry," and rejected it. *Id.* at P 131. Dissatisfied with the scope of FERC's rulings, many of the same parties here sought review in the Third Circuit. That appeal remains pending. *N.J. Bd. of Pub. Utils. v. FERC* (3d Cir. Nos. 11-4245 *et al.*). If Plaintiffs think FERC needed to go further still and invalidate contracts like CPV's contract for differences—rather than limiting their impact using a minimum offer price rule—they should have raised that argument before FERC. If unsuccessful there, they were required to seek review in the court of appeals under the Federal Power Act's "specific, complete and exclusive mode for judicial review of the Commission's

orders." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); 16 U.S.C. §825*l*(b). They cannot bypass those processes and ask for the same relief from a district court instead.

But Plaintiffs did just that. They seek to invalidate the Generation Order and CPV's contract for differences as inconsistent with FERC's and PJM's policies. The district court agreed, invalidating the contract as an intrusion on FERC's authority to set wholesale prices. JA273-JA311. But FERC has never deemed that remedy appropriate, and the court exceeded its authority by imposing that remedy itself. By upholding a challenge based on price impacts that FERC was already addressing through minimum offer price rules, the district court entertained an unlawful collateral attack on FERC's exercise of its authority. If the Generation Order actually did improperly "secure new generation by setting or establishing the prices to be received by CPV for its wholesale energy and capacity sales," JA286, Plaintiffs were required to press those challenges before FERC. Having failed to obtain that relief from FERC, Plaintiffs cannot do an end-run by seeking the same remedy from the district court.

B. The District Court Should Have Referred the Matter to FERC Based on Primary Jurisdiction

Even if this suit were not categorically foreclosed, the matter should have been referred to FERC on the basis of primary jurisdiction. "Primary jurisdiction applies to claims properly cognizable in court that contain some issue within the

special competence of an administrative agency." *In re Bulldog Trucking, Inc.*, 66 F.3d 1390, 1399 (4th Cir. 1995) (quotation marks omitted). "It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." *Id.*

To the extent the district court had authority to hear this suit, it should have referred the matter to FERC. This case raises issues within FERC's special competence, including the balance between a State's policy decision to promote generation and FERC's obligation to ensure just and reasonable rates. FERC has chosen a nuanced, price-based approach to how those two sometimes-competing interests should be resolved. *See* pp. 18-21, 23-26, *infra*. The district court's solution—invoking a federal constitutional rule to invalidate a state law and contract—cannot be reconciled with FERC's approach. Consequently, if this Court were to determine that the district court properly exercised jurisdiction over this matter, it should refer the matter to FERC.[2]

[2] Some courts have held that "the doctrine of primary jurisdiction . . . is waivable." *CSX Transp., Inv. v. Transp.-Commc'ns Int'l Union*, 413 F. Supp. 2d 553, 564 (D. Md. 2006). *But see Atlantis Exp., Inc. v. Standard Transp. Servs., Inc.*, 955 F.2d 529, 532 (8th Cir. 1992) ("[I]t is well established that the doctrine of primary jurisdiction is not waived by the failure of the parties to present it in the trial court or on appeal."). But invoking primary jurisdiction at this juncture would be consistent with this Court's recognition that federal courts must "strive to avoid rendering constitutional rulings unless absolutely necessary." *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 157 (4th Cir. 2010). The potential impact of the district court's rulings, moreover, extends beyond the particular litigants before the

II. THE DISTRICT COURT'S PREEMPTION HOLDING INTRUDES ON THE VERY FEDERAL AUTHORITY IT PURPORTS TO PROTECT

The district court's preemption ruling is also mistaken on the merits. FERC is well aware of the potential impact of state-sponsored resources on capacity-auction pricing. When FERC has determined that intervention is warranted, it (and the RTOs it regulates) targets the *price* at which resources are bid into the market. FERC has not prohibited state-sponsored resources from participating in the PJM market or banned their contracts. Instead, FERC has sought to ensure the integrity of wholesale markets without such intrusions into state sovereign or contractual interests. The district court erred by usurping FERC's role to protect wholesale markets. And it compounded that error by ignoring FERC's nuanced approach to correcting market distortions and using the blunt instrument of field preemption to invalidate the Generation Order instead.

A. The District Court's Ruling Upsets FERC's Careful Effort To Use Mechanisms That Accommodate Competing Interests

FERC has long been aware that uneconomic entry can distort capacity markets. *See NYISO, Inc.*, 124 FERC ¶61,301 at P 36. FERC has explained that "uneconomic entry can produce unjust and unreasonable prices by artificially depressing capacity prices." *Id.* At the same time, FERC has "acknowledge[d] the

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Court. It is therefore especially appropriate that the matter receive consideration by the agency with greatest expertise.

rights of states to pursue policy interests within their jurisdiction." *ISO New England, Inc.*, 135 FERC ¶61,029 at P 170. That includes the use of state programs to provide incentives for new and desirable types of generator resources to enter the market. FERC "must balance" those competing considerations on a day-to-day basis as it regulates wholesale markets across this Nation. *New England States*, 142 FERC ¶61,108 at P 35.

To effectuate those policies, FERC does not proscribe state-sponsored contracts. Instead, FERC has approved RTO mitigation rules designed to prevent harm to the competitive dynamic of capacity markets. *See, e.g.*, *Hudson Transmission Partners, L.L.C. v. NYISO, Inc.*, 145 FERC ¶61,156 at PP 4-7 (2013). These rules have two common denominators: First, they focus on the *price* at which entrants enter the market. Second, and concomitantly, they do not ban state-sponsored bilateral contracts or prohibit parties with those contracts from participating in its markets.

For example, under PJM's minimum offer price rule ("MOPR"), a FERC-approved market monitor screens a supplier's capacity market offer to ensure it is not unduly low. If the offer fails the screen, it is subject to mitigation and "increased to a competitive level." *PJM*, 135 FERC ¶61,022 at P 6. The purpose of the MOPR is "to ensure that an offer that may be the result of buyer market power does not clear at its artificially low level, thereby injecting uneconomic

supply into the market." *Id.* at P 104. Under the MOPR, States are "free" to pursue their own policies, but "there is no valid state interest in ensuring that uneconomic offers can submit below-cost offers into the [forward-capacity] auction." *Id.* at P 142. FERC has approved similar mitigation measures for New England's RTO. *See* pp. 8-9, *supra*.

The MOPR is thus FERC's chosen tool to mitigate state-sponsored resources. FERC has subjected those resources to the MOPR, despite Maryland's argument that PJM was "inappropriately target[ing] state procurement processes undertaken in good faith to assure reliability." *PJM*, 143 FERC ¶61,090 at P 35; *see id.* at PP 141-144; *PJM*, 137 FERC ¶61,145 at P 89, P 133, PP 139-141. If Plaintiffs thought that FERC did not go far enough—and should have invalidated the contract and the Generation Order instead—they should have raised that issue before FERC and sought review of the resulting order under the Federal Power Act's review provisions. *See* pp. 15-16, *supra*. They are not also entitled to bring suit in district court demanding further relief instead. But once Plaintiffs did bring suit, the district court should not have imposed a remedy—invalidation of the contract—that goes beyond the sort of remedy FERC has deemed appropriate.

Amicus actually agrees with Plaintiffs that the FERC-approved market rules do not sufficiently protect auction prices, and that FERC should have imposed more stringent rules. As a large merchant generator in PJM, NRG would benefit

from the invalidation of state-sponsored contracts. But FERC has not chosen to exercise its authority by banning such contracts outright. The district court erred by imposing that solution itself. Indeed, as explained below, in doing so, the court did substantial damage to the very values FERC seeks to protect.

B. The District Court's Field Preemption Ruling Is Mistaken

The district court held the Generation Order invalid under the doctrine of field preemption, which applies "when federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it." *Pinney v. Nokia, Inc.*, 402 F.3d 430, 453 (4th Cir. 2005) (quotation marks omitted). The Generation Order, it ruled, intrudes on the "exclusive domain" of FERC by "establish[ing] the price ultimately received by CPV for its actual physical energy and capacity sales." JA292.

That ruling defies nearly a century of federal energy practice. From the advent of the Federal Power Act, actions by States and private parties have affected price—sometimes profoundly—without triggering field preemption. Under the Act, States "retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from the Commission." *Conn. DPUC*, 569 F.3d at 481. No one would say that States can

play no role in those decisions simply because they affect how an auction operates. The district court itself acknowledged that the Federal Power Act reserved to the States "certain areas of the electric energy regulation field, including . . . regulation concerning the siting and construction of physical facilities used for the generation of electric energy." JA277. That acknowledgement cannot be reconciled with the district court's expansive view of preemption that invalidates state law merely because the law affects PJM's auction-pricing mechanisms. Nor can it be reconciled with FERC's respect for state policies or FERC's targeted approach toward mitigation when those policies encroach on the wholesale market.

The district court ignored the longstanding and protected role that bilateral contracts play in energy markets. Utilities and generators have long entered into such contracts for capacity and other energy products, even though such contracts inevitably affect price. For example, the availability of power through cheaper bilateral contracts can lower prices, and those who purchase such power can force prices lower still by reselling it into the market. And non-state parties may enter into contracts for differences to reallocate market risks between the utility and the generator, allocating more to the former and less to the latter. *See* p. 8, *supra*.

It cannot be that States, and States alone, are precluded from entering into such contracts. Contracts between States and parties have long been accepted as a valid, vital way to promote energy reliability without intruding on FERC's

exclusive jurisdiction. Taken to an illogical extreme, the district court's ruling could threaten *any* bilateral contract that affects prices in RTO-operated wholesale energy markets. That cannot be right, and it certainly cannot be right absent a specific finding of an exercise of buyer-side market power.

Plaintiffs' real concerns are not with bilateral contracts generally. Rather, Plaintiffs challenge *specific features* of CPV's contract for differences: They claim that it impermissibly sets the price CPV receives for capacity. But an otherwise indistinguishable contract for differences between purely private entities would have an identical effect. Yet such private action would not be "preempted." *See generally Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 228-230 (1993). Plaintiffs thus seek to impose a disabling limit on the contractual abilities of States alone. Such objections, moreover, are not properly addressed under the rubric of field preemption, which asks whether federal authority in an area is so comprehensive as to exclude state action altogether. It is at best an issue of conflict preemption that asks whether the contract's terms impermissibly interfere with the pricing mechanisms established under the Federal Power Act.

C. Conflict Preemption Principles Do Not Support—and Undermine—The District Court's Decision

State law "can be set aside by conflict preemption . . . when state law stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress." *Pinney*, 402 F.3d at 457 (quotation marks omitted). Having concluded that "the Generation Order . . . is field preempted," the district court deemed the claim of conflict preemption "moot." JA311. Because this Court might consider conflict preemption as an alternative ground, *Mann v. Haigh*, 120 F.3d 34, 36 (4th Cir. 1997), *amicus* addresses that issue as well.

Here, there is no basis for conflict preemption. PJM and FERC have full authority to determine whether, to what extent, and under what terms, generators are permitted to participate in PJM's energy and capacity markets. *See* pp. 4-6, *supra*. As a result of their exercise of that authority, every new generator's bid is subject to market monitoring and other regulatory review. *See* PJM, *Open Access Transmission Tariff* attach. DD § 5.14(h)(1) (2014). To the extent PJM and FERC have inadequately regulated the conduct of the Maryland Public Service Commission and CPV, that is a complaint about PJM's tariff and FERC's regulation of the tariff. It makes no sense to say that the Generation Order and the resulting contract for differences are preempted because they conflict with FERC's policies when FERC has chosen to allow them.

Indeed, FERC's price-floor rules specifically contemplate that state-sponsored contracts will participate in the market, regulating not the contracts themselves but the price at which generators enter the market. *See PJM*, 135 FERC ¶61,022 at P20. And PJM has specifically addressed whether state-

supported contracts improperly distort its pricing mechanism. The PJM Independent Market Monitor, charged with ensuring the integrity of the PJM auction process, filed a complaint before FERC alleging that one of the entities with a state contract had "submit[ted] an offer that relie[d] on non-market revenues that it expect[ed] to receive under a state procurement process." Complaint at 2, *Independent Market Monitor for PJM v. Unnamed Participant*, No. EL12-63-000 (FERC May 1, 2012). But the Monitor later withdrew the complaint after finding no effect on the auction's outcome. Notice of Withdrawal of the Independent Market Monitor for PJM at 2, *Independent Market Monitor for PJM v. Unnamed Participant*, No. EL12-63-000 (FERC May 17, 2012). Had FERC wished, it could have denied the Monitor's request to withdraw the complaint and prohibited the generator's participation in the capacity auction. It did not. Applying conflict preemption here would do precisely what FERC and PJM—the entity responsible for administering the tariff—specifically refused to do.

In evaluating state-sponsored generation, moreover, FERC "must balance two considerations"—its "responsibility to promote economically efficient markets and efficient prices, and . . . its interest in accommodating the ability of states to pursue other legitimate state policy objectives." *New England States*, 142 FERC ¶61,108 at P35; pp. 8-9, 19, *supra*. When FERC does intervene, it addresses market distortions in a much more nuanced way. FERC has not merely chosen to

regulate price through a MOPR (as opposed to invalidating contracts). It has also chosen to apply the MOPR only to specific types of generation (*e.g.*, gas-fired plants) while leaving other types (*e.g.*, nuclear) largely free of regulation. *See PJM Interconnection, L.L.C.*, 143 FERC ¶61,090 at PP 166-167 (2013). It has applied the MOPR differently to the same types of generation, depending on the specific circumstances. For example, FERC exempted state-sponsored renewable resources from the MOPR in PJM, but refused to do so in another RTO (ISO-New England). *See New England States*, 142 FERC ¶61,108 at PP 32-37. It did so because it found that "an exemption for renewables is likely to have a greater depressing effect on capacity prices in New England than in PJM." *Id.* at P 35. And nowhere has FERC categorically banned state contracts or certain categories of such contracts because of their effect on wholesale rates.

Applying conflict preemption here would impose precisely the results FERC has rejected. It would displace FERC's nuanced approach in favor of a blanket holding invalidating Maryland's Generation Order and related contract for differences on the theory that they are inconsistent with FERC's policies. But the resulting ban is not FERC's policy. FERC's policy is to permit such contracts, subject to specific regulatory safeguards. Likewise, FERC has never foreclosed state sponsorship of resources: FERC routinely allows those resources into the market without concluding that a State has intruded on FERC's exclusive

jurisdiction. *See* pp. 18-21, 23-26, *supra*. And where bilateral contracts do impermissibly distort wholesale outcomes, FERC still does not ban state-sponsored resources, or invalidate contracts. It instead regulates the price at which such resources are bid in to the market.

Applying conflict preemption here thus does not protect FERC's prerogatives so much as it invades them. It would erroneously supersede FERC's actual, flexible policies on state-sponsored generation in favor of a federal court's absolutist prohibition. And it would impose a drastic remedy that defies FERC's chosen course of regulating only the price at which capacity is bid into the auction.

D. The District Court's Decision Damages Federal Interests

The district court's decision undermines FERC's authority to balance competing interests. For example, while States and the federal government often have significant interests in promoting renewable energy,[3] such renewable resources are often uneconomic.[4] The primary way to promote renewable energy is to ensure a generator receives an adequate income stream for that resource. Accordingly, some States have established renewable portfolio standards that

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[3] *See* U.S. Dep't of Energy, Office of Energy Efficiency & Renewable Energy, *Fiscal Year 2014 Budget Rollout* (2013), http://energy.gov/sites/prod/files/2013/11/f4/electricity_stakeholder_pres_0513.pdf; U.S. Dep't of Energy, *State Summaries* (2013), http://apps1.eere.energy.gov/states/state_summaries.cfm.

[4] *See* U.S. Energy Information Administration, *Levelized Cost of New Generation Resources in the Annual Energy Outlook 2013* (2013), http://www.eia.gov/forecasts/aeo/er/electricity_generation.cfm.

mandate a minimum level of renewable energy and provide credits to meet the standards. *See* Database of State Incentives for Renewables & Efficiency, *RPS Data*, http://www.dsireusa.org/rpsdata/index.cfm. FERC has not invalidated those credits—or contracts for differences between States and generators for the sale of renewable energy—simply because they affect the price a generator receives. FERC has instead taken a nuanced view that examines whether, on an RTO-by-RTO basis, state-sponsored renewables should be subject to minimum offer price rules. *See* pp. 18-21, 23-26, *supra*.

The district court's preemption ruling interferes with FERC's regulatory discretion to accommodate those sorts of competing interests. Before the district court's decision, an aggrieved party could have gone to FERC to urge that a renewable energy credit or a contract between a State and a renewable generator impermissibly distorts PJM's auction-pricing mechanisms. Instead of invalidating a State's actions and associated bilateral contracts, FERC could have applied its more balanced approach to determine whether it needs to mitigate the price impact of such actions. Now, however, a party can skip over FERC and file suit in district court, all in the name of protecting FERC's exclusive jurisdiction. And the district court might invalidate a critical tool to promote renewable resources—contracts for differences—all while ignoring FERC's balanced approach. That cannot be correct. The district court's judgment should be reversed. At the very least, the

Court should invite FERC and the United States to set forth their views in an *amicus* brief.

III. THE DISTRICT COURT'S DECISION DEFIES *MOBILE-SIERRA*

Finally, the district court's decision threatens the critical and long-protected role of bilateral contracts. The Federal Power Act allows "sellers and buyers [to] agree on rates by contract." *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 171 (2010). Such bilateral contracts are the lifeblood of energy and capacity markets. "Long-term contracts are an important tool to achieve and maintain a strong power infrastructure, particularly for new entrants into the generation sector and especially for many renewable energy developers." *Wholesale Competition in Regions with Organized Electric Markets*, 119 FERC ¶61,306 at P 83 (2007). They "are important to effective competition both in regions with organized wholesale markets and in regions without organized markets." *Id.* They are used to support new resources, mitigate market power, and allow buyers and sellers to meet their specific capacity needs in terms of quantity, price, and duration. *Id.* at P 84. They "hedge against the volatility that market imperfections produce." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 547 (2008). And they help FERC "creat[e] a regimen that will produce adequate and reliable service at just and reasonable rates." *PacifiCorp v. Reliant Energy Servs., Inc.*, 102 FERC ¶63,030 at 65,090 (2003).

Because the Federal Power Act's "regulatory system" is "premised" on preserving "contractual agreements voluntarily devised by the regulated companies," even FERC lacks authority to abrogate contracts except in exceptional circumstances. Under the *Mobile-Sierra* doctrine, FERC must respect bilateral contracts unless it finds that they "harm[] the public interest," *Morgan Stanley*, 554 U.S. at 548, an "obstacle" the D.C. Circuit has characterized as "almost insurmountable," *Kansas Cities v. FERC*, 723 F.2d 82, 87-88 (D.C. Cir. 1983). Thus, "the Commission will not modify market-based contracts unless there are extraordinary circumstances." *Pub. Utils. Comm'n of Cal. v. Sellers of Long Term Contracts*, 99 FERC ¶61,087 at 61,383 (2002). Parties are free to contract, "subject to only limited FERC intervention." *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 271 (D.C. Cir. 2007).

The district court's decision circumvents *Mobile-Sierra*'s protections. The court did not ask whether the contract here is so injurious to the "public interest" as to be a candidate for invalidation under *Mobile-Sierra*. Nor did it find "extraordinary circumstances." By failing to do so, the district court assumed for itself an authority not even held by FERC: The power to invalidate voluntarily-entered bilateral wholesale power agreements without regard to *Mobile-Sierra*.

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The district court's holding cannot be reconciled with Congress's decision to delegate regulation of wholesale markets exclusively to FERC. It conflicts with the longstanding principle that the wholesale electricity industry benefits when FERC respects the integrity of contracts. And it cannot be reconciled with FERC's judgment that the way to deal with state-sponsored resources is not to ban the resource but to regulate the price at which it may enter the market. FERC's exclusive authority in this area warrants protection. But that protection is best provided by reversing the district court's judgment.

CONCLUSION

The district court's judgment should be reversed.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Dated: 2/11/2014

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I hereby certify that on this 11th day of February, 2014, I caused the foregoing brief to be served upon each party identified in the attached service list through the Court's CM/ECF system or via U.S. Mail, first class, postage prepaid. I also caused eight paper copies to be filed with the Clerk by FedEx overnight delivery directed to the following address:

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