No. 14-634, 14-694

IN THE
# Supreme Court of the United States

CPV POWER DEVELOPMENT, INC.,
EIF NEWARK, LLC.,
*Petitioners,*
v.
PPL ENERGYPLUS, LLC, ET AL.,
*Respondents.*

JOSEPH L. FIORDALISO, ET AL.,
*Petitioners,*
v.
PPL ENERGYPLUS, LLC, ET AL.,
*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of California**

## BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF PETITIONERS

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## INTEREST OF AMICUS CURIAE[1]

The National Association of Regulatory Utility Commissioners ("NARUC") is a quasi-governmental nonprofit organization founded in 1889. NARUC represents the government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with, among other things, ensuring the provision of safe, affordable and reliable electric service to the citizens within their respective borders. [2] NARUC's member commissions are directly impacted by the decisions below.

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[1] In accordance with U.S. Sup. Ct. Rule 37.2(a), 28 U.S.C.A., all parties have consented to the filing of this brief and their letters are on file with the Clerk of the Court. Pursuant to U.S. Sup. Ct. Rule 37.6, 28 U.S.C.A., NARUC states the following: (1) NARUC counsel authored this brief, (2) no counsel for a party to the decision below, or other entity, authored this brief in whole or in part, (3) no person or entity other than NARUC made a financial contribution to the preparation or submission of this brief.

[2] Both the United States Congress and federal courts have recognized that NARUC is a proper party to represent the collective interest of State regulatory commissions. *See e.g.*, 47 U.S.C. § 410 (1986), where Congress calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities. *See also USA v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), *aff.* 672 F.2d 469 (5th Cir. Unit "B" 1982); *aff. en banc*, 702 F.2d 532 (5th Cir. Unit "B" 1983, *rev'd*, 471 U.S. 48 (1985). *See also Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC,* 513 F.2d 1142 (9th Cir. 1976).

The Third Circuit in *PPL EnergyPlus, LLC v. Lee A. Solomon*, 766 F.3d 241 (3rd Cir. 2014), and the Fourth Circuit in *Douglas R.M. Nazarian v. PPL EnergyPlus, LLC*, 753 F.3d 467 (4th Cir. 2014), impermissibly constrained crucial State functions that are necessary to ensure the long-term reliability of the electric grid.

Both cases concern State-mandated contracts between a utility and developer to construct power plants the State found necessary to maintain electric reliability. The subject contracts specifically left the determination of the capacity price to the FERC-administered regional market. Both Circuits held that the FERC-supervised capacity market prohibits the use of such contracts.

In both cases, the yearly payments would be made to the generators for their agreements to build new capacity (*e.g.*, new power plants) and not in exchange for sales of PJM's short-term capacity product into PJM's capacity market. Such yearly payments could not constitute rates for selling that wholesale capacity product into PJM's capacity market. If they did, then arguably all such payments, whether offered directly (*e.g.*, in the form of a subsidy payment) or indirectly (*e.g.*, in the form of a tax rebate) would constitute wholesale rate-setting. By effectively holding that buy-side long-term contracts for new generation exceed State authority by setting wholesale prices, both decisions open the door for attacks on all State-directed

mechanisms to assure adequate generation capacity.

The Federal Power Act (FPA) expressly preserves State authority over facilities used for the generation of electric energy.[3] Even the Federal Energy Regulatory Commission (FERC) acknowledges that States continue to have authority to create incentives "for the construction of new capacity by entering into long-term bilateral agreements."[4]

Indeed, FERC has no authority to order the construction or siting of new generation; nor order that the need for such construction be determined exclusively by a FERC-supervised short term market. Only States can maintain diverse generation resource options through, *inter alia*, ordering of long-term integrated resource planning, construction of new facilities, or contracts with generation developers that include terms necessary to ensure such construction. The decisions below effectively eviscerate State authority to ensure timely construction of new generation. NARUC's

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[3] *See* 16 U.S.C. § 824(b)(1).

[4] *PJM Interconnection, LLC*, 115 FERC ¶ 61,079 at P172 (2006). *See also New York v. FERC*, 535 U.S. 1, 24 (2002) (*quoting* FERC Order No. 888 at 31,782 n.544) (the FPA protects State authority over "integrated resource planning and utility buy-side" decisions and "utility generation and resource portfolios.")

member commissions play a crucial role in long-term energy resource planning.

*If the decisions below stand, they can only significantly undermine State authority to ensure reliable electric service and invite countless inefficient lawsuits over related State programs that have a similar impact.*

Recognizing the inevitable impact of these decisions, NARUC passed a *Resolution on Preserving State Authority Over New Electric Generation*[5] effectively mandating the association's participation in this proceeding to:

> protect and preserve States' authority to decide the type, amount and timing of new or existing generation facilities that will be constructed or maintained within the State to achieve legitimate State policy objectives [and] to safeguard and guarantee *States' continued right to operate programs to procure new generation or maintain existing generation for reliability, affordability and environmental purposes through use of long-term*

[5] *See Resolution on Preserving State Authority Over New Electric Generation*, (July 16, 2014), attached hereto at Appendix.

> *contracts* or any State statutory or regulatory actions.[6]

To date, States have been successful in utilizing a wide range of policies to encourage deployment of new technologies able to deliver the cleaner, more reliable electric supplies demanded by today's consumers, including energy storage, clean-coal, off-shore wind, solar, and efficient combined-cycle gas generation. Integrated resource planning, which includes assuring needed new generation sources, is a continuous and crucial aspect of the task Congress expressly acknowledged belongs to States. FERC has neither the jurisdiction nor the resources to handle that task. Recent and pending federal environmental regulations have placed even more pressure on States' ongoing plans to adjust generation sources. These two court decisions place roadblocks on these crucial State actions. Delay in bringing new generation resources online can threaten the reliability of the electric grid. The Court should grant certiorari and vacate both decisions.

## SUMMARY

The Third and Fourth Circuit decisions threaten the States' Federal Power Act-preserved authority

[6] *Id* (*emphasis added*).

over integrated resource planning, utility procurement decisions, utility generation, and resource portfolios. From a jurisdictional perspective, the Circuit Courts misapplied the "field preemption" doctrine to an area where Congress has expressly acknowledged States' exclusive jurisdiction. The practical effect of these decisions is to hamstring States' ability to engage in the long-term planning required to ensure safe, affordable and reliable electric service.

## REASONS WHY THE PETITION SHOULD BE GRANTED

### The Third and Fourth Circuit Decisions Threaten the States' Federal Power Act-Protected Authority Over Integrated Resource Planning, Utility Procurement Decisions, Utility Generation, and Resource Portfolios

States have long held exclusive regulatory responsibility for assuring generation resource adequacy for retail customers.[7] States retain the

[7] *See New York v. FERC*, 535 U.S. 1, 24 (2002) (enumerating areas of State authority to include: reliability of local service, administration of integrated resource planning and utility buy-side and demand-side decisions, including demand-side management, authority over utility generation

footnote cont. on next page

right to even limit new construction to more expensive, environmentally–friendly units.[8] FERC itself recognizes that States, in pursuing legitimate policy goals, can procure new generation capacity, even when short-term market prices suggest new capacity is not needed.[9] The decisions at issue unlawfully constrain States' ability to ensure resource adequacy and will certainly have significant practical consequences.

### A. Preemption is Not Applicable.

If State regulation of an area existed before the federal regulation, a clear showing of congressional intent to preempt is required.[10] Prior to the adoption of the Federal Power Act, States unequivocally possessed authority over resource adequacy as part of their traditional police powers. That authority includes jurisdiction to order utilities to construct or procure new generation. In the Federal Power Act, Congress did not modify

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footnote cont.

and resource portfolios, and authority to impose distribution or retail stranded cost charges).

[8] *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009).

[9] *ISO New England, Inc.*, 135 FERC ¶ 61,029, P20 (2011).

[10] *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

States' authority over resource adequacy. Instead, Congress expressly excluded FERC from matters traditionally regulated by the States and expressly preserved State authority over generation [11] by including a "specific grant of power to the States to regulate production." [12] The rise of regional transmission organizations did not change State authority over purchasing decisions of regulated electric distribution utilities. States have consistently regulated and approved contracts to ensure resource adequacy. This is precisely what Congress expects States to accomplish. Accordingly, "field preemption" is simply not applicable – a clear showing of congressional intent to preempt is absent.

The application of the field preemption doctrine to generation procurement, an area where States have clear authority, has the strong potential to undermine State Commissions' jurisdictional authority in related areas. Because the Courts held that the Maryland and New Jersey procurements are field preempted, any effort to allow a generator to earn more money than it otherwise would through wholesale capacity sales would always be preempted if such additional income is determined

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[11] 16 U.S.C. § 824(a) & (b)(1).

[12] *See Nazarian*, 753 F.3d 467, 480 (*citing NW Cent. Pipeline Corp*, 489 U.S. 493, 515 (1989)).

to be a "rate received for their capacity."[13] By these decisions, State authority over integrated resource planning, utility procurement decisions, utility generation, and renewable generation portfolios, all heretofore unquestionably reserved to the States by Congress, are now subject to the same legal challenge, and therefore remain at risk. Review of these decisions is warranted.

### B. The Third and Fourth Circuit Decisions Frustrate States' Ability to Engage in Long-Term Resource Adequacy Planning

To date, States have met their mandate to ensure reliable service through a variety of tools. Long-term contracts have been the mainstay of non-utility power development for three decades, never questioned on Constitutional or other grounds. New power plants cost in the billions of dollars, suggesting that any reasonable financier would require a dedicated income stream prior to breaking ground. Long-term contracts appear to be essential

[13] *Nazarian,* 766 F.3d at 253. As discussed by Petitioners, even if these contracts are FERC-jurisdictional, preemption is still not warranted because FERC could review them to determine if they set just and reasonable rates. *See* Petition for a Writ of Certiorari, *Nazarian v. PPL EnergyPlus, LLC*, No. 14-614, 2014 WL 6706153 (U.S. docketed Nov. 26, 2014) at pp. 11-14.

to the financing and construction of new power plants[14] and it is common practice for States to conduct procurements to develop new power plants. The Third and Fourth Circuit decisions arguably eliminate the States' Congressionally-sanctioned ability to ensure resource adequacy by preventing utilities from entering into competitively procured long-term power plant construction contracts if the winning bidder earns a single dollar more than it would from its wholesale capacity sales. This inhibits development of new generation.

States routinely engage in integrated resource planning over a ten-year horizon, if not longer. Elimination of the ability of States to procure new generation through long-term contracting eliminates a major long-term planning tool. Any curtailment of a State's ability to engage in long-term resource adequacy planning will necessarily reduce reliability of generation sources and FERC does not stand in a position to substitute for States in terms of long-term resource adequacy planning. FERC cannot order generation, even to compel generating facilities as a means of remedying insufficient service.[15] Moreover, FERC-supervised capacity markets offer the participants the

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[14] *See* American Public Power Association, *Power Plants Are Not Built on Spec—2014 Update* at p. 2 and Table 1 (2014), available at: http://goo.gl/t62QuS.

[15] *See* 16 U.S.C. § 824f.

opportunity to purchase electric capacity for no more than three years in the future, promising generators and utilities only relatively short-term assurances. Review of these decisions is necessary to avoid interference with the ability of States to engage in long-term resource planning for the good of their citizenry.

## CONCLUSION

For the reasons set forth, *supra*, NARUC urges the Court to grant the writs of certiorari and reverse the decisions of the courts of appeals.

Respectfully submitted,

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December 24, 2014

# APPENDIX

## APPENDIX

### *Resolution on Preserving State Authority Over New Electric Generation*

**WHEREAS**, The National Association of Regulatory Utility Commissioners (NARUC) is a national organization representing State Commissions statutorily responsible for regulating utilities that provide energy services; *and*

**WHEREAS**, State Commissions have a statutory obligation to ensure that the electric utilities they regulate provide safe and reliable service to retail customers at just and reasonable rates; *and*

**WHEREAS**, State Commissions have long had exclusive regulatory responsibility for assuring generation resource adequacy for retail electric customers; *and*

**WHEREAS**, In Section 201 of the Federal Power Act (FPA), Congress specifies that federal regulation under the FPA "extend[s] only to those matters that are not subject to regulation by the States"; *and*

**WHEREAS,** The FPA reserves to the States authority over facilities used in the generation of electric energy; *and*

**WHEREAS**, The FPA protects State authority over "integrated resource planning and utility buy-side" decisions and "utility generation and resource portfolios," *New York v. FERC*, 535 U.S. 1, 24 (2002) (*quoting* FERC Order No. 888 at 31,782 n.544); *and*

**WHEREAS**, Over the last several years, storms and periods of extraordinary weather events have

challenged the existing generation infrastructure; *and*

**WHEREAS**, Numerous States have enacted or are considering the enactment of statutes and their commissions have implemented or may consider implementing programs designed to address the States' need to ensure the construction of new generation, to maintain existing generation, and to address environmental concerns; *and*

**WHEREAS**, The U.S. Court of Appeals for the Fourth Circuit, in its published decision in *PPL EnergyPlus, LLC v. Nazarian*, __ F.3d __, 2014 WL 2445800 (4th Cir. June 2, 2014), has ruled that Maryland's programs providing for regulated retail utilities to contract with new generators are preempted by the FPA; *and*

**WHEREAS**, The U.S. District Court for the District of New Jersey, utilizing the same reasoning as adopted by the 4th Circuit, ruled that New Jersey's statute which is similar to Maryland's program, is also preempted by the FPA, *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp. 2d 372 (D.N.J. 2013), appeal pending, Nos. 13-4330 et al. (argued Mar. 27, 2014); *and*

**WHEREAS**, The application of broad and sweeping field preemption doctrine in these two decisions has the potential to adversely impact the States' FPA-protected authority over integrated resource planning, utility procurement decisions, utility

generation, distribution, and resource portfolios; *and*

**WHEREAS,** The two decisions' application of broad and sweeping field preemption doctrine to prohibit or invalidate State-sanctioned contracts supporting new generation undermines and conflicts with the State Commissions' jurisdictional authority to ensure clean, affordable and reliable electric energy; *now, therefore be it*

**RESOLVED**, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its Summer Meeting in Dallas, Texas, continues to support legal and legislative actions to protect and preserve States' authority to decide the type, amount and timing of new or existing generation facilities that will be constructed or maintained within the State to achieve legitimate State policy objectives; to promote such new development through State supervision of retail utility contracting; to safeguard and guarantee States' continued right to operate programs to procure new generation or maintain existing generation for reliability, affordability and environmental purposes through use of long-term contracts or any State statutory or regulatory actions; and to ensure that nothing in the Federal Power Act be deemed to preempt or prohibit such activity by the States.

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*Passed by the Committees on Electricity and on Energy Resources and the Environment.*

*Adopted by the Board of Directors, July 16, 2014.*