NOS. 14-614, 14-623

In the
Supreme Court of the United States

W. KEVIN HUGHES, ET AL., *Petitioners*,
v.
TALEN ENERGY MARKETING, LLC
(F/K/A PPL ENERGYPLUS, LLC), ET AL., *Respondents*.

CPV MARYLAND, LLC, *Petitioner*,
v.
TALEN ENERGY MARKETING, LLC
(F/K/A PPL ENERGYPLUS, LLC), ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE ELECTRIC POWER SUPPLY ASSOCIATION, THE EDISON ELECTRIC INSTITUTE, AND PJM POWER PROVIDERS GROUP, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

INTEREST OF *AMICI CURIAE*[1]

This case presents another opportunity for the Court to reaffirm the Federal Power Act's division of jurisdictional authority between state and federal regulators. *See FERC v. Electric Power Supply Ass'n*, No. 14-840. Its disposition will have direct impacts on the wholesale energy and capacity markets regulated by the Federal Energy Regulatory Commission ("FERC"). It could also affect the delicate balance between competing policy objectives that FERC has achieved in approving the competitive market rules for wholesale sales of energy and capacity within the multi-state region administered by PJM Interconnection, L.L.C. ("PJM").

Amici the Electric Power Supply Association ("EPSA"), the Edison Electric Institute ("EEI"), and the PJM Power Providers Group, Inc. ("P3") are major power industry trade associations. EPSA and EEI are national trade associations whose members include companies operating in PJM's multi-state region. P3 is a regional trade association focused on the PJM region. Through this brief, they offer their perspectives on the important jurisdictional issues raised in this case. They also seek to emphasize the narrowness of the question presented. The judgment below can and should be affirmed on the limited ground that states have no authority to regulate

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[1] Pursuant to Sup. Ct. R. 37.2(a), all parties have filed blanket consent letters with the clerk of court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

wholesale sales and, therefore, they may not require that sellers participating in FERC-regulated wholesale markets receive state-mandated payments for wholesale sales of electricity in those markets at a price different from the wholesale price set through FERC-approved market mechanisms. Affirming the judgment below on that ground would not and should not impede appropriate efforts by states to exercise their traditional regulatory powers.

EPSA, EEI, and P3 have a strong interest in this case because the Maryland Public Service Commission's order directly and adversely affects their members that participate in the organized wholesale energy and capacity markets. In particular, the order interferes with the market rules that FERC has found are appropriate to produce just and reasonable wholesale rates.

Because EPSA's, EEI's, and P3's members are often subject to regulation at both the state and federal levels, they have a strong interest in ensuring that the jurisdictional lines that Congress established in the Federal Power Act are respected. Just as FERC should not be permitted to interfere with the states' exclusive authority over the regulation of retail sales, the states also should not be permitted to interfere with FERC's exclusive authority over the regulation of wholesale sales.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Power Act grants FERC broad and exclusive jurisdiction over the transmission and sale of "electric energy at wholesale in interstate commerce." 16 U.S.C. §§ 824(b), 824d(a), 824e. That authority includes responsibility for ensuring that "rates and charges made, demanded, or received . . . for or in connection with the transmission or sale" of electricity at wholesale are "just and reasonable." *Id.* § 824d(a). It also obligates FERC to eliminate "unduly discriminatory or preferential" practices that might prevent market participants from competing on an even playing field. *Id.* § 824e(a).

Exercising its exclusive authority, FERC has approved market rules in the PJM region that are designed to ensure that the markets produce wholesale prices that are just and reasonable and not unduly discriminatory. The market rules allow suppliers to compete for the opportunity to sell energy and capacity by participating in carefully structured auctions administered and "cleared" by PJM. Suppliers submit offers of energy and capacity into the multi-state markets, and PJM accepts the offers from lowest to highest until it has secured a sufficient supply of energy or capacity. In each case, the highest offer accepted sets the "clearing price" paid to all suppliers offering at or below that price. FERC has determined that the prices set through these competitive market processes are just and reasonable and not unduly discriminatory, and that they serve important federal policy goals, including ensuring a reliable supply of energy and capacity and

encouraging an appropriate mix of new and existing generation resources.

Until the late 1990s, Maryland's utilities were vertically integrated, meaning that the same companies generated, delivered, and sold power to state retail customers. In 1999, however, Maryland made the decision to restructure its markets to allow suppliers to compete to serve retail customers, while also requiring that utilities divest their generation assets. With this divestiture, electricity sold to Maryland's retail customers is purchased from the organized PJM wholesale markets regulated by FERC. And by restructuring, Maryland gave its citizens the opportunity to share in the benefits provided by competitive markets. At the same time, because it chose to avail its citizens of the competitively priced electricity available in the FERC-regulated wholesale markets, Maryland is required to comply with the rules that FERC has established for those markets.

This case requires the Court to consider the legality of an order by the Maryland Commission that in purpose and effect changes the wholesale rate that CPV Maryland, LLC ("CPV") receives for energy and capacity sold through the PJM multi-state markets. In the proceedings below, after a trial that spanned six days, the district court found based on the record before it that the Maryland Commission's order is preempted because it impermissibly changes the rates received "for or in connection with the transmission or sale" of electricity at wholesale.

Pet.App. 34a–162a.[2] The Maryland Commission's order also creates strong incentives for CPV to submit below-cost offers into PJM's auction, which threatens to distort the multi-state markets and prevent them from functioning as FERC intended. *See, e.g.*, Pet.App. 21a–24a.

The Fourth Circuit unanimously affirmed the district court's decision and agreed that the Maryland Commission's order is preempted. *See* Pet.App. 8a–25a. In a related case, the Third Circuit reached the same result, unanimously affirming another district court order holding that a similar effort by New Jersey to regulate wholesale sales is also preempted. *See PPL EnergyPlus, L.L.C. v. Solomon*, 766 F.3d 241 (2014). Indeed, every judge to have considered the issue has agreed that state regulation that in purpose and effect requires energy suppliers to receive a rate for wholesale sales of electricity that is different from the applicable FERC-approved rate impermissibly invades FERC's exclusive jurisdiction. The decision below is correct and should be affirmed.

[2] Citations are to the petitioner's appendix in No. 14-623.

ARGUMENT

I. The Federal Power Act Grants FERC Exclusive Jurisdiction Over Wholesale Sales Of Electricity.

Under the Supremacy Clause of the U.S. Constitution, state laws that contravene federal law are "void" and "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746–47 (1981). State laws are preempted "when the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (internal quotation omitted); *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). State laws are also preempted when they impermissibly conflict with federal law, either because they "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 298 (1988), or because "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963); *see generally ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594–95 (2015).

Unlike many other statutes, the Federal Power Act renders unnecessary any "case-by-case analysis of the impact of state regulation upon the national interest." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) (internal quotation marks and citation omitted). A case-by-case analysis is unnecessary because the statute draws a "bright line, easily ascertained" between the jurisdiction of the states and the federal government.

Id. (quoting *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215–16 (1964) ("*Edison*")). Congress directed that States would retain their traditional and exclusive authority over the regulation of retail sales of electricity. *See ONEOK*, 135 S. Ct. at 1599 (reiterating that the Natural Gas Act, like the Federal Power Act, "was drawn with meticulous regard for the continued exercise of state power" (citations omitted)). At the same time, Congress granted FERC "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce," *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982), as well as exclusive jurisdiction over any matters that "directly affect[] . . . wholesale rates." *Nantahala*, 476 U.S. at 966–67 (1986); *see also* 16 U.S.C. §§ 824(a), 824d(a), 824d(c), 824e(a). Just as FERC has no power to regulate retail sales, which are exclusively subject to regulation by the states, the Act leaves "no power in the states to regulate . . . sales for resale in interstate commerce," which are exclusively subject to regulation by FERC. *Edison*, 376 U.S. at 214–16.

Because the Federal Power Act establishes exclusive, not concurrent, spheres of authority, this Court has long recognized that FERC occupies the field with respect to regulating the transmission and wholesale sales of electricity in interstate commerce, and that any attempts by the states to regulate within that field are preempted. *See, e.g.*, *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39 (2003); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988); *Nantahala*, 476 U.S. 953. When it comes to rate regulation, nothing else would make sense. The decision to set a rate, by

either dictating a price or choosing the market mechanism by which a price is set, involves policy judgments that balance competing interests, including the interests of all market participants. Regulating rates thus involves not only an *affirmative* judgment in favor of particular policy goals but also a *negative* judgment on any alternative requirements that could be imposed in pursuit of different policy goals.

Recognizing that Congress has vested FERC with exclusive jurisdiction over wholesale sales, this Court has held that "the right to a reasonable rate is the right to the rate" that FERC "files or fixes." *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951). That principle, known as the "filed rate doctrine," is intended to "preserv[e] . . . the agency's primary jurisdiction over reasonableness of rates" by ensuring "that regulated companies charge only those rates of which the agency has been made cognizant," *Arkansas La. Gas Co v. Hall*, 453 U.S. 571, 577–78 (1981), and by prohibiting states from "usurp[ing] a function that Congress has assigned" to FERC. *Id.* at 582.

Contrary to petitioners' assertions, *see* CPV Br. 28–29, the Federal Power Act does not leave room for any "presumption against preemption," at least where wholesale sales subject to FERC's exclusive jurisdiction are involved. That often criticized doctrine, *see, e.g.*, Robert N. Weiner, *The Height of Presumption: Preemption and the Role of Courts*, 32 Hamline L. Rev. 727 (2009), has no role to play where, as here, it is undisputed that Congress has clearly and expressly divided authority between state

and federal regulators. States have never had authority to regulate interstate electric transactions, including transactions occurring in the multi-state region administered by PJM, *see Public Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 90 (1927), and the regulation of wholesale sales is an area "where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). Congress's allocation of jurisdictional authority should be followed faithfully, not grudgingly and certainly not with any thumb on the scales either in favor or against preemption.

II. The Maryland Commission's Order Is Preempted Because It Changes The Rate For Wholesale Sales.

Understanding the statutory scheme is important, but this case at its heart does not raise any difficult questions of statutory interpretation. All sides recognize that Congress divided jurisdiction between the states and FERC and that the states have no authority to regulate wholesale sales. Instead, this case is about how the statutory requirements should be applied to the facts. And its disposition will depend in no small part on how successful petitioners are in convincing the Court to reconsider what, until now, would have been a truism: a state order requiring that a wholesale seller receive a price different from the market-clearing price for wholesale sales bid into a FERC-regulated market regulates wholesale sales and thus impermissibly intrudes on FERC's exclusive jurisdiction.

The Court should reject petitioners' creative attempts to deny this reality, confuse the issues, and circumvent the limits on state jurisdiction. The Maryland Commission's order is preempted for two related reasons: *First*, by purposefully changing the compensation a seller receives for wholesale sales of energy and capacity cleared in the PJM market, the order impermissibly invades a field that Congress reserved exclusively for FERC. *Second*, by purposefully interfering with the FERC-approved rules that govern PJM's wholesale energy and capacity markets, the order impermissibly conflicts with federal law.

A. Maryland's Order Impermissibly Changes The Wholesale Rate.

The preemption question in this case is straightforward. The aim and practical effect of the Maryland Commission's order is to require that one generator, CPV, be compensated for the energy and capacity it sells in the multi-state markets administered by PJM at a price that differs from the market clearing price determined under the FERC-approved auction rules. The Maryland Commission's order is therefore preempted. By changing the rate that CPV receives for its wholesale sales into the PJM markets, the order invades the field of FERC's exclusive jurisdiction over the rates "made, demanded, or received . . . for or in connection with" wholesale sales. 16 U.S.C. § 824d(a). The intrusion on FERC's exclusive jurisdiction could hardly be clearer.

That conclusion is supported by more than just sound legal logic. The district court, after a lengthy

trial and considering extensive evidence and expert testimony, made detailed findings that the Maryland Commission's order is designed to change the rates that CPV will be paid for wholesale energy and capacity sales in the PJM markets. Petitioners have never made any showing that those findings are clearly erroneous. *See* Fed. R. Civ. P. 52(a)(6). Instead, their main strategy has been to run away from the district court's findings with an array of distractions.

Petitioners appear to suggest that the Court should ignore the means by which the Maryland Commission has sought to regulate (by changing the price that CPV receives for its wholesale sales to PJM) and instead consider only what the Maryland Commission claims is the ultimate goal of its regulation (to incentivize more generation). *See* CPV Br. 32. Petitioners thus appear to argue that as long as the stated objective of Maryland's regulation is lawful, it makes no difference that the state is employing an unlawful means to achieve that objective. But if that were the rule, the jurisdictional divide that Congress has created would be meaningless. Just as FERC has no authority to regulate retail sales, even if its purported ultimate aim is to better manage the wholesale markets, a state cannot regulate wholesale sales (as the district court found that Maryland did in this case), even if its purported ultimate aim is to procure more generation.

Implicitly recognizing this problem, petitioners urge the Court to conclude that the Maryland Commission's order is not regulating wholesale sales,

but merely conducting a procurement for more generation capacity and regulating its local utilities. CPV Br. 33–37; Md. Br. 11, 19–20, 27–31. But that cannot be squared with either reality or the record-based factual findings made by the district court. The payments required by the Maryland Commission are not just tied to the successful construction of new generating facilities; they are "directly contingent upon CPV's clearing capacity" through the wholesale capacity auctions administered by PJM. Pet.App. 119a. As the district court found, "[e]ven if CPV constructs and operates" its new generating facility, it "will receive no payment under the compensation scheme if it does not clear capacity in" PJM's capacity auction. *Id*. The district court also found that Maryland's order requires CPV to offer its energy into the PJM energy market, and that the payment to CPV is calculated "based on CPV's physical energy and capacity sales into the PJM Markets." Pet.App. 118a; *see also id.* at 119a–123a (noting former Maryland Commission Chairman Nazarian's acknowledgment that physical deliveries of energy and capacity by CPV into the PJM markets were a critical component of the Maryland Commission's order and the CPV contracts).

The Maryland Commission's order thus requires CPV to sell energy and capacity into the PJM wholesale markets and requires that Maryland's electric distribution companies compensate CPV for energy and capacity sold into the PJM markets at a price that is different from the applicable PJM market-clearing price. The order is therefore preempted because it regulates the prices "made, demanded, or received . . . for or in connection with"

wholesale sales of electricity. 16 U.S.C. § 824d(a); *see also Silkwood*, 464 U.S. at 248 ("any state law falling within [an exclusively federal] field is preempted").

There is no merit to petitioners' suggestion that the CPV contracts are nothing more than familiar "contracts for differences," structured as "hedges," or "financial" arrangements that fall beyond the scope of FERC's exclusive jurisdiction. *See* CPV Br. 12, 41, 44; Md. Br. 15, 20. Although private financial contracts that hedge against market risk are commonplace, the terms of those contracts are not dictated by state regulators and contingent on sales cleared in the PJM multi-state market. The Maryland Commission is running a bidding process—essentially a parallel, state-controlled auction—for the same energy and capacity that clears in the PJM wholesale markets. It has therefore overstepped its jurisdictional boundaries by setting the price that CPV receives for selling energy and capacity at wholesale. *See* 16 U.S.C. § 824b.

Petitioners are also wrong in arguing that the payments to CPV occur "outside" PJM's markets and, therefore, do not regulate wholesale sales. CPV Br. 51–54; Md. Br. 46–47. The sales of capacity and energy at issue in this case—CPV's wholesale sales of energy and capacity into the PJM markets—are manifestly not occurring "outside of" PJM's markets. The Federal Power Act regulates the "rates and charges made, demanded, or received by any public utility for or in connection with . . . [the] sale of electric energy" subject to FERC's jurisdiction—that is, what public utilities are paid for the electricity they sell—not what purchasers pay for the electricity

they purchase. 16 U.S.C. § 824d(a). That CPV calculated its own bid price or that CPV is not selling energy and capacity to the electric distribution companies is beside the point. What is relevant—and fatal to petitioners' position—is that the state-mandated payments are paid to CPV as consideration for CPV's wholesale *sale* of energy and capacity to PJM. *See* Pet.App. 118a (contract "mandates a financial settlement only if CPV clears the [capacity auction] in any given year" and settlement is "based on CPV's physical energy and capacity sales into the PJM Markets").

Petitioners' observation that FERC does not set rates in the first instance and that rates are instead initially set by public utilities, including through private contracts, Md. Br. 5–6, is also beside the point. The issue here is not who sets the rates in the first instance but who regulates them. The relevant rates in this case are the market rules governing PJM's organized markets, which were set in the first instance by PJM and then accepted by FERC. Petitioners' assertions that the CPV contracts are no different from any other bilateral contract (where buyers and sellers negotiate payments between themselves), *see* Md. Br. 40–43; CPV Br. 12–17, 27, 37, 42, 52, ignore that the Maryland scheme requires utilities to enter into contracts with payments mandated by the state, that the payments depend on CPV participating in and clearing the wholesale markets, and that PJM (not any of the contracting parties) is the buyer of the energy and capacity whose price was established through its auction. PJM is the public utility whose FERC-approved tariff sets forth the rules for sales in its auctions. It did

not set the rules for the separate Maryland-controlled, parallel-pricing auction or agree to the price set forth in the CPV contracts. Nor is the CPV-contract price the rate accepted by FERC for sales to PJM.

In short, through its order, the Maryland Commission has unlawfully and unilaterally attempted to regulate wholesale rates by prescribing the rules for a parallel-state auction that determines what CPV will receive for its wholesale sales of energy and capacity in PJM's multi-state markets. If the Maryland Commission had an objection to the rules for PJM's markets, its recourse was to file a complaint with FERC under the Federal Power Act. *See Mass. Dep't of Pub. Utils. v. United States*, 729 F.2d 886, 886 (1st Cir. 1984) (agreeing with FERC that if a state "objects to [a rate] rule . . . , it should file a complaint in accordance with . . . § 206 of the Federal Power Act"). The Maryland Commission's attempt to circumvent that process by directly regulating wholesale rates intrudes on a field of exclusive federal regulation and is therefore preempted.

B. Maryland's Order Impermissibly Conflicts With Federal Law.

Because FERC occupies the field of wholesale regulations, it is not surprising that the Maryland Commission's order also impermissibly interferes with FERC's carefully constructed regulatory regime governing PJM's markets. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (the Supremacy Clause invalidates state laws that "interfere with, or are contrary to," federal law). In setting wholesale rates,

FERC is required to ensure that rates are just and reasonable, *see* 16 U.S.C. § 824d(a), and to balance "difficult (and often competing) objectives," *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 349 (2000), for preserving the reliability and efficiency of the wholesale markets. If it is not struck down, the Maryland Commission's order will upset that delicate balance. It will also threaten more uncertainty and disruption by inviting other states to follow Maryland's (and New Jersey's) example.

First, the Maryland Commission's order conflicts with the rules for the organized energy and capacity markets set forth in PJM's FERC-approved tariff. In approving PJM's energy and capacity market rules, FERC endorsed the principle that the price resulting from the competitive market auction would be available to all suppliers with accepted offers for their energy and capacity (and rejected arguments that payments should instead be based on each supplier's offer price). *See PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 141 (2006) ("*PJM I*"); *Pennsylvania–New Jersey–Maryland Interconnection*, 81 FERC ¶ 61,257, at 62,271 (1997). As FERC explained when approving the capacity market rules, "a competitive market with a single, market-clearing price creates incentives for sellers to minimize their costs." *PJM I*, 117 FERC ¶ 61,331, at P 141. Indeed, the single-clearing price is a core element of PJM's capacity market design. Market rules that produce a single clearing price have "the benefit of encouraging all sellers to place bids that reflect their actual marginal opportunity costs," *id.* at P 141 n.101, resulting in "a competitive market in which the same price is paid to all suppliers based on

the marginal cost of the least efficient supplier necessary to serve that market." *Maryland Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 127 FERC ¶ 61,274, at P 15 (2009).

Maryland's payment scheme for wholesale sales directly interferes with the careful balance of regulatory objectives achieved by the FERC-approved market clearing process. *See* Resp. Br. 38 n.3 (noting that Maryland has never suggested that in pursuing those objectives FERC is impermissibly regulating generation or acting ultra vires). Although CPV is selling capacity and energy into the PJM administered markets, Maryland's order ensures as a matter of state law that CPV will not receive the "single[] market-clearing price" for that capacity and energy set through the PJM administered auction process. *PJM I*, 117 FERC ¶ 61,331 at P 141. Instead, the price paid to CPV for its wholesale sales of energy and capacity, though cleared in the PJM markets, is the price set in the contracts mandated by the Maryland Commission. Pet.App. 119a–123a; *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 88 (3d Cir. 2014) ("*NJBPU*") ("the Maryland contracts require CPV to sell capacity in the PJM markets, and for the [electric distribution companies] to pay CPV any difference between the price received in the market and a predetermined contract price").

Second, the Maryland Commission's order threatens to distort the multi-state wholesale markets. *See* Pet.App. 22a–23a (Maryland's order "has the potential to seriously distort the PJM auction's price signals … [by] substituting the state's preferred incentive structure for that approved by

FERC"). Because the Maryland Commission's order requires CPV's capacity to clear in PJM's capacity auctions and, as an exercise of Maryland's regulatory power, guarantees the price CPV will receive for its wholesale sales to PJM, the order creates strong incentives for CPV to offer its capacity "into the PJM market at a price below its actual [marginal] cost to ensure that [it] would clear." *NJBPU*, 744 F.3d at 88. That could "crowd out other capacity" and might "result in a lower overall clearing price." *Id.* at 85. Indeed, it is "undisputed" that Maryland's order will affect "the prices of wholesale electric capacity in interstate commerce." *Id.* at 96; *see also id.* at 98 n.24 (Maryland does not contest that its order "would affect clearing prices").

Third, market-wide price suppression appears to be precisely what the Maryland Commission had in mind when it adopted its wholesale payment scheme. As the Maryland Commission's order makes plain, the state is dissatisfied with FERC decisions about how to structure PJM's multi-state capacity markets because the FERC-approved market construct "has brought no new generation to Maryland, in spite of the fact that clearing prices for capacity in [parts of Maryland] have averaged almost double those of" other regions. Pet.App. 91a. The Maryland Commission further complained about "exorbitant capacity charges" that "have increased energy costs to Maryland ratepayers by hundreds of millions of dollars." *Id.*; *see also* Pet.App. 79a (consumers in Maryland "pay much higher than average prices for wholesale (and thus retail) electricity") (quoting Maryland Commission). Although Maryland representatives raised similar complaints in

proceedings before FERC, *see PJM I*, 117 FERC ¶ 61,331, at PP 74, 77, the Maryland Commission was dissatisfied with FERC's response and elected to take matters into its own hands by overriding the "one year [price] signal, three years into the future" provided by PJM's capacity auctions. Pet.App. 91a; *see also* Pet.App. 24a. The Maryland Commission's order is thus an avowed effort not only to change wholesale rates but also to override federal policies with which it disagrees.

III. Preventing States From Regulating Wholesale Sales Will Not Impede State Efforts To Encourage Generation.

It is important to recognize that by affirming the lower court's decision striking down the Maryland Commission's order, the Court would not prevent states from encouraging generation development and protecting retail customers. There is no dispute that the Federal Power Act does not displace the states' traditional authority to promote the development of new generation resources through appropriate means. Nor is there any dispute that the states possess jurisdiction to examine the prudence of retail utilities' wholesale purchases in appropriate circumstances. *See, e.g.*, *Kentucky W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 837 F.2d 600, 608–09 (3d Cir. 1988); *Pike Cnty. Light & Power Co.-Elec. Div. v. Pa. Pub. Util. Comm'n*, 465 A.2d 735, 738 (Pa. Commw. 1983). As respondents' explain, states have an "array of tools" at their disposal for achieving legitimate goals. Resp. Br. 26, 39–40. Examples include providing appropriate subsidies or tax incentives, promoting appropriate renewable or other fuel-based

standards, or returning to a vertically integrated regime.

The problem with the Maryland Commission's order is not that Maryland has exercised its traditional powers over generation facilities and load-serving utilities' procurement practices. The problem is that instead of exercising options within its jurisdiction, Maryland has sought to regulate wholesale rates by mandating that CPV receive additional state-regulated payments for wholesale sales of energy and capacity in PJM's multi-state markets. In short, the Maryland Commission's order seeks to intrude on FERC's exclusive jurisdiction by regulating wholesale sales of energy and capacity that clear through PJM's wholesale markets.

There is accordingly no reason to be concerned that affirming the lower courts will preclude lawful state efforts to promote renewable generation resources or permissible long term contracting that does not interfere with FERC's exclusive jurisdiction. Indeed, *amici* urge the Court to avoid making any unnecessarily broad jurisdictional pronouncements that go beyond the facts of this case and could have unintended consequences for the regulation of the nation's energy and capacity markets. There is no need for this Court to say anything about the validity of bilateral contracts, state procurement processes, or state regulation of utility purchasing decisions. Instead, the Court can and should simply hold that, however the Federal Power Act may be applied in other cases, it is clear that a state cannot seek to regulate the rates received by suppliers that participate in FERC-regulated wholesale markets for

wholesale sales in contravention of FERC's market rules.

* * *

This Term, the Court has two cases that present it with an opportunity to reaffirm the jurisdictional line established by Congress in the Federal Power Act, which for decades has successfully governed the regulation of the nation's energy and capacity markets. In *FERC v. Electric Power Supply Association*, No. 14-840, the Court has been asked to consider the lawfulness of a FERC rulemaking that invades the states' exclusive authority by paying retail customers to reduce their retail purchases for the purpose of reducing retail sales. And in this case, the Court is being asked to consider the lawfulness of a state commission order that invades FERC's exclusive authority by changing the wholesale rate that a wholesale supplier receives for wholesale sales of electricity to a federally regulated wholesale-market operator.

The cases are very different in their particulars, *see* Resp. Br. 38 n.3, but they raise similar concerns about regulatory overreach. In both cases, government regulators have blatantly attempted to circumvent the jurisdictional lines drawn by Congress by imposing rate levels for sales that are not within their jurisdiction. In both cases, government regulators have claimed that what matters is not the impermissible means by which they have regulated but the stated ultimate purpose behind their regulation. In both cases, the regulators are acting because they are dissatisfied with the policy choices that Congress has decided should fall

within the exclusive purview of a different regulator. And in both cases, underlying the technical arguments is a broader appeal to the purported exigencies of changed circumstances and recent market developments.

The stakes are much too important to accept these extravagant justifications for accreting unauthorized regulatory power. If the jurisdictional line that Congress drew in the Federal Power Act is to have any continuing force it must at least prohibit the extreme jurisdictional violations at issue in these two cases. State-mandated payments to wholesale sellers that guarantee the sellers a rate different from the FERC-authorized wholesale rate for their wholesale sales should be struck down as impermissible wholesale regulation, just as FERC-mandated payments that guarantee retail customers a rate different from the state-authorized retail rate for reducing their retail sales should be struck down as impermissible retail regulation.

In this case, the Court need not and should not go any further than to reaffirm the basic principle that states, like Maryland, have no authority to regulate wholesale sales by changing the wholesale prices received by a wholesale seller for selling electricity into the FERC-regulated wholesale markets. Maryland has no need to invade FERC's jurisdiction to accomplish its stated regulatory objectives. It should be required to remain within the exclusive regulatory sphere that Congress intended.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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