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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PPL ENERGYPLUS, LLC, *et al.*,

Plaintiffs-Appellees,

v.

DOUGLAS NAZARIAN, *et al.*,

Defendants-Appellants,

and

CPV MARYLAND, LLC,

Intervenor-Appellant.

Appeal from Judgment of the United States District Court
for the District of Maryland, No. 1:12-cv-01286-MJG

BRIEF OF THE PJM POWER PROVIDERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

Glen Thomas
PJM POWER PROVIDERS GROUP
1060 First Avenue
Suite 400
King of Prussia, PA 19406
(610) 768-8080

John Lee Shepherd, Jr.
Karis Anne Gong
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7338

Counsel for PJM Power Providers Group

March 17, 2014

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

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 13-2419, 13-2424 Caption: PPL EnergyPlus, LLC v. Nazarian

Pursuant to FRAP 26.1 and Local Rule 26.1,

PJM Power Providers Group
(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:

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:

Some members of the PJM Power Providers Group have an indirect interest in the outcome of this case. They are described in the attached Corporate Disclosure and Financial Interest Statement of the PJM Power Providers Group.

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/ John Lee Shepherd, Jr. Date: March 17, 2014

Counsel for: PJM Power Providers Group

CERTIFICATE OF SERVICE

****

I certify that on March 17, 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:

/s/ John Lee Shepherd, Jr. March 17, 2014
(signature) (date)

CORPORATE DISCLOSURE AND FINANCIAL INTEREST STATEMENT OF PJM POWER PROVIDERS GROUP

Pursuant to Fourth Circuit Local Appellate Rule 26.1 and Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned, counsel of record for PJM Power Providers Group ("P3"), hereby states as follows:

P3 is a non-profit corporation that is an Internal Revenue Code 501(c)(6) (26 U.S.C. § 501(c)(6) (2006)) organization composed of suppliers of energy, capacity, and other services within the PJM Interconnection, L.L.C. P3 has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

P3 is composed of the following members: Calpine Corporation, DPL Energy, LLC, Edison Mission Energy, EquiPower Resources Corp., Essential Power, LLC, Exelon Corp., GDF SUEZ North America, Inc., Homer City Generation, L.P., NextEra Energy Resources, LLC, NRG Energy Inc., PPL Corporation, PSEG Energy Resources & Trade LLC ("PSEG"), and Topaz Power Management, LP.

The following members of P3 have already filed corporate disclosures in this case: Calpine Corporation, Essential Power, LLC, NRG Energy Inc., PPL Corporation, and PSEG Energy Resources & Trade LLC.

The following members of P3 are publicly-held corporations that (i) may have a direct financial interest in the outcome of this case, and (ii) have not already

filed corporate disclosures in this case. Their corporate disclosures are included below:

Edison Mission Energy ("EME"), an indirect subsidiary of Edison International ("EIX"), is a holding company whose subsidiaries and affiliates are engaged in the business of owning, leasing, operating, and selling energy and capacity from independent power production facilities. It also engages in hedging and energy trading activities in power markets, and provides scheduling and other services through its Edison Mission Marketing & Trading, Inc. ("EMMT") subsidiary. On December 17, 2012, EME and 16 of its wholly-owned subsidiaries filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtor Entities remain in possession of their property and continue their business operations uninterrupted as "debtors-in-possession" under the jurisdiction of the Bankruptcy Court. In October 2013, EME entered into an Asset Purchase Agreement and the Debtor Entities entered into a Plan Sponsor Agreement that, upon completion, would implement a reorganization of the Debtor Entities through a sale of substantially all of EME's assets, including its equity interests in substantially all of its debtor and non-debtor subsidiaries, to a wholly-owned subsidiary of NRG Energy Inc. The Bankruptcy Court issued a Confirmation Order in March 2014, which confirmed the Plan. The completion of the NRG Sale is expected in April 2014.

Exelon Corporation is a holding company, headquartered at 10 South Dearborn Street, Chicago, Illinois, with operations and business activities in 47 states, the District of Columbia and Canada. Exelon owns Commonwealth Edison Company ("ComEd"), Baltimore Gas and Electric Company ("BGE") and PECO Energy Company ("PECO"). Together ComEd, BGE and PECO own electric transmission and electric distribution systems that deliver electricity to approximately 6.6 million customers in central Maryland (BGE), Northern Illinois (ComEd) and southeastern Pennsylvania (PECO). PECO distributes natural gas to nearly 500,000 consumers in the suburban Philadelphia area. BGE distributes natural gas to over 600,000 customers in central Maryland and also operates a liquefied natural gas facility for the liquefaction and storage of natural gas as well as associated propane facilities. ComEd, BGE and PECO are members of PJM. Exelon Generation is one of the largest competitive power generators in the U.S., with approximately 35,000 megawatts of owned capacity comprising one of the nation's cleanest and lowest-cost power generation fleets, located in a number of organized markets. The company's Constellation business unit is one of the nation's leading marketers of electricity and natural gas and related products in wholesale and retail markets. These businesses serve approximately 100,000 business and public sector customers and approximately one million residential customers in various markets throughout the United States.

GDF SUEZ Energy North America, Inc. is a subsidiary of the global energy group GDF SUEZ, which is publicly traded on foreign stock exchanges.

Homer City Generation, L.P. is an indirect subsidiary of General Electric Company. No publicly-held company has a 10% or greater ownership interest in General Electric Company.

NextEra Energy Resources, LLC and its affiliates, NextEra Energy Generators, are indirect wholly-owned subsidiaries of NextEra Energy, Inc. (f/k/a FPL Group, Inc.), a publicly-held energy and utility holding company. The following subsidiaries of NextEra Energy, Inc. have issued publicly-held securities: Florida Power & Light Company, FPL Group Capital 2 Inc., FPL Group Capital Trust I, FPL Group Capital Trust II, FPL Group Capital Trust III, FPL Group Trust I, FPL Group Trust II, FPL Recovery Funding LLC, ESI Tractebel Acquisition Corp., and ESI Tractebel Funding Corp. No other parents, affiliates or subsidiaries of NextEra Energy Generators are publicly held or publicly traded. No publicly-held company has a 10% or greater ownership interest in NextEra Energy, Inc.

The following members of P3 are privately-held corporations that (i) may have a direct financial interest in the outcome of this case, and (ii) have not already filed corporate disclosures in this case. Their corporate disclosures are included below:

EquiPower Resources Corp. is a power generation portfolio company of Energy Capital Partners, which is a private equity firm.

Topaz Power Management, LP, is a privately-held entity that provides asset management services for privately-held electric generation assets.

Respectfully submitted,

/s/ *John Lee Shepherd, Jr.*
John Lee Shepherd, Jr.
Karis Anne Gong
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7338
john.shepherd@skadden.com

Counsel for PJM Power Providers Group

March 17, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL COURT PRECEDENT PAGE(S)

FEDERAL AGENCY PRECEDENT

FEDERAL STATUTES

INTEREST OF AMICUS CURIAE[1]

The PJM Power Providers Group ("P3") is a non-profit organization that supports the development of properly-designed and well-functioning energy markets administered by PJM Interconnection, L.L.C. ("PJM"), a FERC-approved Regional Transmission Organization that manages the supply and movement of power in thirteen states and the District of Columbia. Collectively, P3 members own more than 87,000 megawatts of generation assets, own more than 51,000 miles of transmission lines, serve nearly 12.2 million customers, and employ over 55,000 people in the PJM region. P3 members believe that properly designed and well-functioning competitive wholesale electricity markets are the most effective means of ensuring a reliable supply of power to the PJM region, facilitating investments in alternative energy and demand response technology, and delivering beneficial results to consumers.

The views expressed in this filing represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

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[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.

SUMMARY OF ARGUMENT

The District Court correctly held that Maryland's Generation Order is preempted under the Federal Power Act ("FPA") and the Supremacy Clause. It should be affirmed because it followed and enforced cornerstone preemption principles. The District Court did not exceed its jurisdiction or invade the jurisdiction of the Federal Energy Regulatory Commission ("FERC"); it did not undermine the *Mobile-Sierra* doctrine; and it properly considered whether a presumption against preemption applied in this case.

I. Contrary to the views of amicus NRG Energy, Inc. ("NRG"), and amici American Public Power Association and National Rural Electric Cooperative Association (together, "APPA"), the District Court correctly determined that the Generation Order is preempted. JA311. Therefore, the Fixed/Indexed Pricing Contracts for Differences ("Pricing Contracts") that Maryland required the state's electric distribution companies ("EDCs") to execute are "illegal and unenforceable." JA349.

A. The District Court properly followed five basic preemption principles under the FPA and the filed rate doctrine: (i) FERC has exclusive authority to regulate rates for transmission and wholesale sales of electric energy under FPA sections 201, 205, and 206, 16 U.S.C. §§ 824, 824d, 824e; (ii) the Supremacy Clause requires that states give binding effect to FERC-approved rates;

(iii) FERC's jurisdiction over sales of energy at wholesale includes jurisdiction over rates for electric generation capacity;[2] (iv) parties aggrieved by *FERC's* orders (as opposed to *state* laws or orders) may only seek judicial review in a United States Court of Appeals; and (v) the filed rate doctrine preempts state laws or lawsuits that alter the amount charged under a FERC-approved rate.

Consistent with these principles, the District Court correctly held that the Generation Order "sets or establishes the wholesale energy and capacity prices to be received by CPV for its sales into the PJM Markets," thereby "encroach[ing] upon an exclusive federal field." JA311.

B. The District Court did not usurp FERC's jurisdiction because it did not second-guess or preempt a rate set by FERC. Rather, the District Court held the Generation Order unlawful because payments under the Pricing Contracts constitute wholesale capacity payments that FERC did not approve and Maryland had no authority to mandate. APPA fails to grasp the distinction between a lawful FERC-approved wholesale rate and an unlawful state-mandated rate that invades FERC's jurisdiction.

[2] "In a capacity market, in contrast to a wholesale energy 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).

C. The District Court did not intrude on FERC's jurisdiction by ruling on a preemption claim; to the contrary, that is its job. FERC lacks the authority to enjoin state laws or orders. The District Court properly exercised its "jurisdiction to decide the constitutionality of the [Maryland] PSC's regulatory actions and to enjoin enforcement of an unconstitutional state action." JA308. FERC is not a party in this controversy, and the Plaintiffs did not need to challenge any FERC orders to perfect their claims. The question here is whether Maryland's actions—not FERC's—were unlawful.

II. The District Court's decision does not undermine the *Mobile-Sierra* doctrine, which prevents complainants from modifying or abrogating a freely-negotiated contract accepted or approved by FERC unless the contract causes substantial harm to the public interest. The District Court had no reason to apply the *Mobile-Sierra* doctrine here because the Pricing Contracts were mandated by Maryland, not freely-negotiated, and they were never filed with or approved by FERC.

III. Contrary to the State Regulators' claim, the District Court correctly found no presumption against preemption under the FPA. States never have regulated interstate transmission, and Congress purposefully eliminated state jurisdiction over wholesale sales of energy. *See New York v. FERC*, 535 U.S. 1, 17-21 (2002).

ARGUMENT

I. THE DISTRICT COURT DID NOT EXCEED ITS JURISDICTION BY HOLDING THAT MARYLAND'S GENERATION ORDER IS PREEMPTED BY THE FEDERAL POWER ACT

NRG contends that the District Court exceeded its jurisdiction, and invaded FERC's jurisdiction, by holding that the Maryland Generation Order is preempted under the FPA and the Supremacy Clause. In NRG's view, only FERC, not the District Court, may hold that the Generation Order intrudes on FERC's authority and invalidate the Pricing Contracts. *See* NRG Br. 11-12, 14-16, 18-21.

APPA makes similar arguments. In APPA's view, the District Court's determination that the Generation Order unlawfully invaded FERC's authority to establish wholesale capacity prices means that the Generation Order and the Pricing Contracts establish wholesale rates, which are subject to FERC's exclusive jurisdiction and beyond the District Court's jurisdiction. *See* APPA Br. 2-3, 20-24.

NRG and APPA are profoundly mistaken and their re-imagining of FERC and federal district court jurisdiction conflicts with a legion of settled precedent.

A. The District Court Followed and Enforced Five Basic Preemption Principles Under the Federal Power Act and the Filed Rate Doctrine

The preemption question at issue in this appeal is framed by a number of well-settled principles. The District Court followed and enforced each of them.

First, FERC has exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce under FPA section 201, 16

U.S.C. § 824; to approve new rates under FPA section 205, 16 U.S.C. § 824d; or to change existing rates under FPA section 206, 16 U.S.C. § 824e. *See, e.g.*, *New York v. FERC*, 535 U.S. at 21 (holding that the FPA eliminated state jurisdiction over wholesale sales of electricity and that states have never had jurisdiction over electricity transmitted in interstate commerce); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) (holding that FERC has "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce"). The Supreme Court has long held that its decision in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) ("*Attleboro*"), followed by the enactment of the FPA, left "no power in the states to regulate [utilities'] sales for resale in interstate commerce." *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964).

Second, the Supremacy Clause requires that "'rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates.'" *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003) (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962 (1986) (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 581-82 (1981) ("*Arkla Gas*"))). "States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates." *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 372 (1988); *see, e.g.*, *Monongahela Power Co. v.*

Schriber, 322 F. Supp. 2d 902, 919-20 (S.D. Ohio 2004) (invalidating Ohio retail rate cap to the extent it disallowed recovery of FERC-approved rates); *Pac. Gas & Elec. Co. v. Lynch*, 216 F. Supp. 2d 1016, 1038 (N.D. Cal. 2002) (same as to California retail rate cap).

Third, FERC's exclusive jurisdiction to set just and reasonable rates for energy sold in interstate commerce necessarily includes the authority to set rates for electric generation capacity. *See, e.g.*, *Miss. Power*, 487 U.S. at 354 (affirming FERC's authority to allocate costs of nuclear power plant capacity); *Conn. Dept. of Pub. Util. Control v. FERC*, 569 F.3d 477, 483 (D.C. Cir. 2009) ("*CTDPUC*") (holding that regulation of wholesale capacity rates is in the "heartland" of FERC's jurisdiction); *Ultimax.com, Inc. v. PPL Energy Plus, LLC*, 378 F.3d 303, 306-08 (3d Cir. 2004) (holding that the filed rate doctrine bars state and federal claims against a utility that complies with FERC's capacity market rules); *Municipalities of Groton v. FERC*, 587 F.2d 1296, 1300-03 (D.C. Cir. 1978) (rejecting claims that FERC invaded state jurisdiction by instituting a capacity deficiency charge). The Third Circuit recently reaffirmed FERC's exclusive jurisdiction to establish wholesale generation capacity rates in *New Jersey Board of Public Utilities v. FERC*, Nos. 11-4245 *et al.*, slip op. at 48-55 (3d Cir. Feb. 20, 2014) ("*NJBPU*"). There, New Jersey and Maryland argued that FERC erred in eliminating a state-mandate exemption that both states invoked to justify their programs requiring

utility side-payments to incentivize construction of new generation facilities. The Third Circuit held that FERC may lawfully "approv[e] rules that prevent the state's choices from adversely affecting wholesale capacity rates." *Id.*, slip op. at 55.[3]

Fourth, FPA section 313, 16 U.S.C. § 825*l*, permits a party aggrieved by FERC's orders to seek rehearing at FERC and, if denied, to seek judicial review in a United States Court of Appeals. That statute provides the "specific, complete and exclusive mode for judicial review of [FERC] orders" under the FPA. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). "It is now settled that 'the right to a reasonable rate is the right to the rate which the Commission files or fixes, and, except for review of the Commission's orders, a court can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.'" *Miss. Power*, 487 U.S. 371 (alterations omitted) (quoting *Nantahala*, 476 U.S. at 963-64 (quoting *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951))). "This principle binds both state and federal courts and is in the former respect mandated by the Supremacy Clause." *Id.*

Fifth, the filed rate doctrine preempts state laws or lawsuits that directly or indirectly alter the amount charged under a FERC-approved rate. For example, the

[3] Although "mindful" of the District Court's decision below, as well as a contemporaneous federal district court decision invalidating New Jersey's similar program, the Court explained that its decision addressed "the legality of actions taken by FERC, not of those taken by the states." *NJPBU*, slip op. at 33 n.12.

Supreme Court held in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), that FERC's jurisdiction under the Natural Gas Act ("NGA") fully "occupied the field" of natural gas regulation such that Michigan's attempt to impose limits on utility financing was preempted because those limits would indirectly affect the natural gas companies' earnings under FERC-jurisdictional rates. *Id.* at 307-11.[4]

The filed rate doctrine similarly bars a wide variety of federal and state law claims relating to FERC-regulated activities because the preemptive effect of the statutes FERC administers bars any cause of action that "conflicts or interferes with attainment of federal law objectives." *S. Union Co. v. FERC*, 857 F.2d 812, 817 (D.C. Cir. 1988) (barring state claim for tortious misconduct in natural gas contract negotiations). Thus, courts may not require utilities to pay or receive either more or less than the FERC-authorized rate for FERC-jurisdictional services when plaintiffs seek to collect damages from FERC-regulated utilities for alleged

[4] The NGA and FPA are "in all material respects substantially identical" for filed rate doctrine purposes "and decisions interpreting them may be cited interchangeably." *Ky. W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 862 F.2d 69 (3d Cir. 1988) ("*Kentucky III*") (quoting *Arkla Gas*, 453 U.S. at 578 n.7). There are certain differences between FERC's jurisdiction under the NGA and FPA, but those differences are not relevant to the issues discussed in this *amicus* brief. For example, FERC regulates natural gas pipeline siting and construction under NGA section 7, 15 U.S.C. § 717f, but FERC lacks corresponding authority over electric transmission construction. On the other hand, FERC's authority under the NGA is limited in ways that make certain precedent inapposite here. *See, e.g.*, Appellees' Br. 26-27 (distinguishing *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493 (1989)).

violations of state or federal laws. *See, e.g.*, *Arkla Gas*, 453 U.S. at 584 (barring state law damages for alleged breach of natural gas contract because Louisiana may not "award what amounts to a retroactive right to collect a rate in excess of the filed rate" approved by FERC); *Ultimax.com*, 378 F.3d at 306 (barring claims that utility exercised undue influence in electric capacity market in alleged violation of the Sherman Act, Clayton Act, and various state laws).[5]

This understanding of the filed rate doctrine "has been extended across the spectrum of regulated utilities," *Arkla Gas*, 453 U.S. at 577, since the Supreme

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[5] *See also, e.g.*, *Simon v. KeySpan Corp.*, 694 F.3d 196 (2d Cir. 2012) (dismissing class action challenges to FERC-regulated capacity auction rates based on alleged violations of the federal Sherman Antitrust Act, New York's General Business Law, and common law); *Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1225-26 (9th Cir. 2007) ("The filed rate doctrine's fortification against direct attack is impenetrable. It turns away both federal and state antitrust actions . . . [RICO] actions. . . [and] state tort actions . . . ."); *T & E Pastorino Nursery v. Duke Energy Trading & Mktg., LLC*, 123 F. App'x 813, 815 (9th Cir. 2005) (barring state antitrust and unfair business practice claims because "Defendants' conduct in the wholesale energy market [is] regulated exclusively by the federal government"); *Pub. Util. Dist. No. 1 of Grays Harbor v. IDACORP, Inc.*, 379 F.3d 641, 651 (9th Cir. 2004) (barring state unjust enrichment claims and rejecting argument that filed rate doctrine does not apply to market-based rates); *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 852-53 (9th Cir. 2004) (barring state unfair business practice claims because public utilities have no "obligations . . . *beyond those* set out in the filed tariffs"); *Transmission Agency of N. Cal. v. Sierra Pac. Power Co.*, 295 F.3d 918, 928 (9th Cir. 2002) ("TANC asserts three categories of state law claims against the utility company defendants: (1) *tort and property claim*s for inverse condemnation, nuisance, trespass, and conversion; (2) *claims for breach of contract*, intentional interference with a contractual relationship, and intentional interference with a prospective economic advantage; and (3) a *fraud* claim . . . . *All of these claims are preempted by the Federal Power Act*.") (emphasis added).

Court's decision in *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922).[6] For example, in the telecommunications industry, "[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 226-27 (1998) (quoting *Keogh*, 260 U.S. at 163). "Regardless of the carrier's motive—whether it seeks to benefit or harm a particular customer—the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services." *Id*. at 223. And, when a contract is formed in violation of a federal tariff, the appropriate remedy is to declare the contract unlawful and void. *See id.* at 224 (listing cases).

B. The District Court Did Not Exceed Its Jurisdiction Because It Did Not Examine, Much Less Determine, Whether FERC's Orders Concerning the PJM Capacity Market Create Just and Reasonable Rates

APPA contends that the District Court violated the FPA's exclusive judicial review provisions as described in *Montana-Dakota Utilities* and *City of Tacoma* because, once the District Court determined that Maryland had attempted to establish a wholesale rate, the District Court lacked jurisdiction to determine whether that rate "was lawful under the FPA." APPA Br. 24; *see id.* at 2-3, 20-24.

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[6] For other examples in the rail and transportation industry, *see, e.g.*, *Maislin Indus., U.S., Inc. v. Primary Steel*, 497 U.S. 116, 126, 132 (1990); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) (barring treble damages award in federal antitrust action under Sherman Act and rejecting Solicitor General's request to overrule *Keogh*); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (barring state tort action stemming from railway's decision to cease service).

This argument rests on the deeply flawed theory that the District Court was obliged to respect Maryland's attempt to set wholesale capacity prices by requiring Maryland's electric distribution companies to make side payments to new in-state generators through the state-mandated Pricing Contracts. *See id.* at 23-24.

In APPA's view, the District Court elevated state-mandated Pricing Contract payments to equal dignity with FERC-approved rates when the District Court determined that "the only lawful price for capacity sales was the PJM auction price" and that "the MPSC's order established a wholesale price that 'is determined outside of the auction mechanisms approved by FERC and utilized by PJM.'" *Id.* at 23 (quoting JA292). But it is nonsense to claim, as APPA does, that the District Court lost the ability to declare the Generation Order or Pricing Contracts invalid because "these contracts established rates subject to FERC's exclusive jurisdiction." *Id.* That is precisely why the Generation Order and Pricing Contracts are illegal. The District Court's decision did not transform the Pricing Contracts into FERC-approved rates. The reason the District Court found the Generation Order and Pricing Contracts unlawful is because Maryland purported to require capacity side payments that only FERC has the jurisdiction to authorize.

FPA section 313 and the filed rate doctrine prohibit state and federal trial courts from second-guessing the reasonableness of rates *set by FERC*, which are not subject to judicial review except on direct appeal of FERC's orders. *See, e.g.*,

Miss. Power, 487 U.S. at 371 (reiterating precedent). That rule has no application here because FERC did not approve Maryland's Generation Order or the state-mandated Pricing Contract side payments.

The District Court did not invade FERC's jurisdiction by purporting to determine for itself what a just and reasonable rate for wholesale generation capacity would be. The question before the District Court was not whether FERC's capacity market rules are lawful, but instead whether Maryland's Generation Order was preempted under the FPA, the Supremacy Clause, and the Commerce Clause. *See* JA202-03, 274-75. Those are federal questions and they are properly raised by plaintiffs in federal district court. 28 U.S.C. § 1331; *see, e.g.*, *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013) ("Neither party has questioned the District Court's jurisdiction to decide whether federal law preempted the [Iowa Commission's] decision, and rightly so.") (citing *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642-43 (2002)); *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 341, 349 & n.19 (3d Cir. 2001).

A federal trial court does not examine whether a rate set by FERC is just and reasonable when it determines whether a state law, state commission order, or state court order conflicts with FERC's orders or trespasses into an area of regulation Congress has reserved for FERC alone. *See* JA271-311. Nor did the District Court purport to do so: "Plaintiffs are not asking that this Court determine a price

or rate for CPV's energy and capacity sales that would be fair." JA307-08. Here, as in *Arkla Gas* and its progeny, the District Court simply enforced FERC's exclusive jurisdiction to establish wholesale capacity prices by finding, in essence, that Maryland may not require electric distribution companies to pay, or new wholesale generators to receive, "a rate in excess of the filed rate" approved by FERC. 453 U.S. at 584.

C. Preemption Claims Are Federal Questions Properly Raised in Federal District Court, Not Before FERC

NRG contends that the District Court lacked jurisdiction to declare the Maryland Generation Order unconstitutional, or to void the Pricing Contract side payments Maryland required, because FERC has exclusive jurisdiction to establish just and reasonable rates for wholesale capacity and FERC has not declared Maryland's scheme illegal. NRG Br. 14-16, 18-21. In NRG's view, the District Court was required to forbear from invalidating Maryland's Generation Order, or from voiding the Pricing Contracts, because FERC has taken a more "nuanced" approach of allowing the Generation Order to exist while mitigating its negative effects on interstate commerce by improving the protections against monopsony abuses under PJM's Minimum Offer Price Rule ("MOPR"). *Id.* at 16, 17, 18-21, 25-26.

The problem at the heart of NRG's argument is the erroneous assumption that, because the FPA gives FERC exclusive jurisdiction to set wholesale capacity

rates, the FPA must also give FERC jurisdiction to enjoin unconstitutional state laws or state agency orders. NRG's theory is a mistaken variety of the "*ubi jus, ibi remedium*" theory once used by common law courts of equity to fabricate jurisdiction that was otherwise absent. *See, e.g.*, *Town of Concord v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992). NRG's theory fails because FERC is a creature of statute and cannot invalidate state laws[7] or prevent state regulators from issuing unlawful orders to retail utilities. *Town of Concord*, 955 F.2d at 73 (rejecting "*ubi jus, ibi remedium*" argument because the petitioners' rights are constrained by the Federal Power Act). FERC cannot enjoin violations of the FPA without acting through a federal district court. *See* 16 U.S.C. § 825m.

As then-Judge Roberts explained, it is not FERC's job to resolve preemption claims when FERC establishes a federal rate: if a state refuses to comply with FERC's orders, then an aggrieved utility's recourse is to institute litigation against its state regulators "armed with principles of federal preemption and the

[7] FERC has limited authority to "exempt" utilities from state laws or orders in rare circumstances not present here. Section 205(a) of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), permits FERC to "exempt" utilities from any state law, rule, or regulation that "prohibits or prevents the voluntary coordination of electric utilities, including any agreement for central dispatch, if the Commission determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area." 16 U.S.C. § 824a-1(a). FERC has only invoked that authority once to exempt certain utilities from Virginia state laws and Kentucky state commission orders that would have prevented the utilities from joining PJM. *See New PJM Cos.*, 106 FERC ¶ 63,029, *aff'd*, Opinion No. 472, 107 FERC ¶ 61,271 (2004).

Supremacy Clause." *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1372 (D.C. Cir. 2004). Preemption claims are federal questions properly raised by utilities against their state regulators in federal district court, "not to FERC." *Id.*

This does not mean FERC does not express opinions about the validity of state laws, but only that FERC is aware of its limited authority to compel state obedience to federal mandates. An excellent example of this tension is found in *Virginia Electric & Power Co.*, 125 FERC ¶ 61,391 (2008) ("*VEPCO I*"), *reh'g denied*, 128 FERC ¶ 61,026 (2009) ("*VEPCO II*"). There, FERC held that costs a utility incurred in joining an RTO "are properly recoverable wholesale costs." *VEPCO I* at P 32; *id.* at PP 27-28, 30-31. However, FERC recognized it could not directly control how Virginia would address the recovery of those costs by state utilities in the context of a state retail rate freeze because that was a dispute the utilities must address with their state regulators "armed with principles of federal preemption and the Supremacy Clause.'" *Id.* at P 32 & n.35 (quoting *Midwest ISO Transmission Owners*, 373 F.3d at 1372). Nevertheless, FERC emphatically warned that Virginia must exercise its retail jurisdiction consistent with those principles or face litigation from state utilities "in a court of competent jurisdiction." *VEPCO II* at P 32; *id.* at PP 9, 30-31.

Contrary to NRG's claims, *see* NRG Br. 21, the District Court was quite correct in stating that "the implication that the [Pricing Contract], standing by itself,

is a FERC-jurisdictional contract . . . does not strip this Court of jurisdiction to decide the constitutionality of the PSC's regulatory actions and to enjoin enforcement of an unconstitutional state action." JA308. This case presents a federal question in a private civil action within the original jurisdiction of federal district courts under 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). *See, e.g.*, *Sprint Commc'ns*, 134 S. Ct. at 588 (2013); *NE Hub Partners*, 239 F.3d 341 (listing 28 U.S.C. §§ 1331 and 1337 as the basis for federal district court jurisdiction in a preemption action under the NGA).[8] FERC has no corresponding authority under the FPA; rather, FERC itself is required to seek injunctive and declaratory relief in federal district court. *See* 16 U.S.C. § 825m.

1. Plaintiffs Were Not Required to Seek Rehearing or Any Other Form of Preemptive Relief from FERC

The Third Circuit has considered and rejected NRG's argument that the Plaintiffs were required to seek new or additional relief from FERC before filing suit in the District Court. *See* NRG Br. 14-16. This question was squarely presented in *NE Hub Partners*, where Judge Nygaard dissented on the ground that FERC was better suited than the federal trial court to determine whether a hearing before the Pennsylvania Environmental Hearing Board intruded on FERC's

[8] *See generally, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights.").

jurisdiction to grant NE Hub a certificate of public convenience and necessity to build a natural gas pipeline. *See* 239 F.3d at 349 & n.19 (majority opinion); *id.* at 352 n.5 (Nygaard, J., dissenting). The majority disagreed for two reasons and both reasons apply here.

First, the Court held that NE Hub was not required to seek rehearing from FERC because the company was not challenging the terms of the certificate FERC granted. The Court found "nothing in the Certificate or the NGA that precludes NE Hub's preemption argument and it therefore follows that in making that argument NE Hub is not challenging the terms of the Certificate." 239 F.3d at 349. Here, there is nothing in FERC's orders or the PJM tariff that precludes the Plaintiffs' preemption claim against the Maryland Public Service Commission. And, as discussed above, FERC has no authority to enjoin Maryland's laws as preempted or otherwise unconstitutional, so there is no reason for Plaintiffs to request that relief from FERC.

Second, the Third Circuit held that preemption claims are properly resolved by federal courts, not by FERC:

> Federal agencies do not "delegate" authority to decide federal constitutional and legal questions to courts; as noted above, at 357–58, federal court jurisdiction over such matters comes from Congress. We are aware of no authority granting FERC a right of first refusal to decide such questions, nor does Judge Nygaard proffer any.

239 F.3d at 349 & n.19. NRG does not, and cannot, point to anything in the FPA that gives FERC a "right of first refusal," *id.*, to determine whether Maryland law is preempted.[9]

What the FPA allows FERC to do, and what FERC properly did in its MOPR Orders, was to "prevent the state's choices from adversely affecting wholesale capacity rates." *NJBPU*, slip op. at 55. That "nuanced" approach, as NRG repeatedly calls it, is the only relief FERC had the authority to compel. *See id.* at 51-55;[10] *see also CTDPUC*, 569 F.3d at 481 (enumerating lawful methods

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[9] This circuit has been somewhat more aggressive in asserting federal court jurisdiction to preempt state orders even while federal rate proposals were merely pending at FERC. *See Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 614 F. Supp. 64 (S.D. W. Va. 1985) (granting preliminary injunction against state commission while utilities' transmission rate proposal was still pending at FERC), *aff'd sub nom. Appalachian Power Co. v. Consumer Advocate Div. of W. Va. Pub. Serv. Comm'n*, 770 F.2d 159 (4th Cir. 1985); *see also Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 630 F. Supp. 656 (S.D. W. Va. 1986) (granting permanent injunction after FERC established federal transmission rate), *aff'd*, 812 F.2d 898 (4th Cir. 1987). These cases also reinforce the point that only a federal court, not FERC, can preempt or enjoin state proceedings. While those cases were pending in federal court, the state commission twice asked FERC to clarify its view of the preemptive sweep of the FPA. FERC responded both times that, in its view, the state rate proceedings were preempted. *See Appalachian Power Co.*, 812 F.2d at 901 (recounting this history). But only the federal courts had the power to force West Virginia to comply.

[10] The Third Circuit's quotation from FERC's orders on this point merits reproduction:

> Our intent is not to pass judgment on state and local policies and objectives with regard to the development of new capacity resources or unreasonably interfere with those objectives. We are forced to act,

states have to control or incentivize the construction of new generation facilities); District Court Opinion at JA285-86 (acknowledging same).

The creative theory advanced by NRG conflicts with numerous decisions of the Supreme Court, this Court, and other federal courts construing the FPA and other FERC-administered statutes. While many important FERC preemption cases have reached the United States Supreme Court on direct review of state court decisions,[11] most FERC preemption cases originate, as here, in federal district court. If NRG is correct that utilities must first seek initial or additional relief from FERC before bringing a preemption action in federal district court, then a great number of federal cases were not only wrongly decided, but also *ultra vires*. These would include

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> however, when subsidized entry supported by one state's or locality's policies has the effect of disrupting the competitive price signals that PJM's RPM is designed to produce, and that PJM as a whole, including other states, rely on to attract sufficient capacity.

NJBPU, slip op. at 55-56 n.24 (quoting *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 3 (2011)); *cf. Miss. Power*, 487 U.S. at 382-83 (Scalia, J. concurring) ("FERC has asserted [wholesale capacity] jurisdiction and has been vindicated. What goes along with the jurisdiction is the responsibility, where the issue is appropriately raised, to protect against allocations that have the effect of making the ratepayers of one State subsidize those of another.").

[11] Supreme Court decisions in this category include, *inter alia*, *New England Power Co.*, *Nantahala*, *Arkla Gas*, *Miss. Power*, and *Entergy*.

several Supreme Court decisions,[12] decisions of this Court,[13] decisions of sister circuits,[14] and federal district court decisions that were not appealed.[15]

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[12] *See, e.g.*, *Schneidewind*, 485 U.S. 308-09 (holding that FERC's authority to set natural gas rates "occupies the field" and affirming Sixth Circuit's reversal of district court, which wrongly held that federal preemption of state law is limited to "physical impossibility"); *Pub. Utils. Comm'n of Ohio v. United Fuel Gas Co*., 317 U.S. 456 (1943) (affirming district court's determination that NGA preempted Ohio ratemaking proceeding); *cf. New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350 (1989) (reversing district court and Fifth Circuit in holding that abstention in preemption action under the FPA was inappropriate under the *Burford* and *Younger* abstention doctrines). States have also filed actions for injunctive and declaratory relief against FERC in federal district court and the Supreme Court did not suggest that states must first seek relief at FERC before doing so. *See FERC v. Mississippi*, 456 U.S. 742 (1982) (reversing federal district court and affirming the constitutionality of PURPA Titles I and II).

[13] *See, e.g.*, *Wash. Gas Light Co. v. Prince George's Cnty. Council*, 711 F.3d 412 (4th Cir. 2013) (affirming district court denial of preemption claims without requiring referral to FERC); *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120 (4th Cir. 2008) (preempting county ordinance restricting liquefied natural gas siting and reversing contrary district court judgment).

[14] This includes all six cases listed *supra* note 5. *See also, e.g.*, *Ultimax.com*, 378 F.3d at 306 (affirming district court's dismissal of federal and state claims under filed rate doctrine); *NE Hub Partners*, 239 F.3d at 349 (reversing district court's dismissal of preemption action); *Freehold Cogeneration Assocs.*, 44 F.3d at 1184 (reversing district court's determination that PURPA § 210(g) creates an exception to federal district court jurisdiction under 28 U.S.C. § 1331); *Kentucky III*, 862 F.2d at 69 (reversing district court's preemption determination and finding state need not pass through FERC-mandated costs immediately, but may implement retail recovery in a reasonable period of time); *cf., e.g.*, *Ky. W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 791 F.2d 1111 (3d Cir. 1986) (reversing district court and holding that abstention from preemption action against state commission under the NGA was not appropriate under the *Burford*, *Younger*, *Pullman*, or *Colorado River* abstention doctrines); *AEP Tex. N. Co. v. Tex. Indus. Energy Consumers*, 473 F.3d 581 (5th Cir. 2006) (affirming district court's determination that state commission impermissibly construed FERC-approved tariff under the FPA); *N. Natural Gas Co.*

In short, NRG's jurisdictional theory has been explicitly or implicitly rejected in cases too numerous to ignore.

2. FERC's MOPR Orders Did Not, and Could Not, Cure All of the Injuries Inflicted by Maryland's Generation Order

NRG criticizes the District Court's decision to preempt the Maryland Generation Order and void the Pricing Contracts as too "drastic" because it "defies FERC's chosen course of regulating only the price at which capacity is bid into the auction." NRG Br. 27. NRG's argument is premised on the mistaken notion that

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v. Iowa Utils. Bd., 377 F.3d 817, 821 (8th Cir. 2004) ("We agree with the district court that Iowa Code chapter 479A and the implementing administrative code provisions regulate in a field that is occupied by federal law [under the NGA]."); *Pub. Serv. Co. of N.H. v. Patch*, 221 F.3d 198, 199 & n.1 (1st Cir. 2000) (affirming district court's permanent injunction of state rate orders and recounting history of the eight district and appellate court orders issued over the preceding four years); *Sayles Hydro Assocs. v. Maughan*, 985 F.2d 451 (9th Cir. 1993) (affirming district court orders holding that FERC license of hydroelectric plant preempted state permit requirement); *Appalachian Power Co.*, 812 F.2d at 902-05 (affirming district court's permanent injunction preempting state commission rate proceeding); *Middle S. Energy, Inc. v. Ark. Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985) (affirming district court's injunction barring state commission prudence inquiry of cost allocation already established by FERC, but finding it unnecessary to affirm FPA preemption rationale where Commerce Clause rationale was sufficient to preempt state's orders); *cf., e.g., Midwestern Gas Transmission Co. v. McCarty*, 270 F.3d 536, 539 (7th Cir. 2001) (reversing district court's determination that *Younger* abstention doctrine barred preemption action against state commission under NGA and holding that "[m]ere defiance of clear federal law removing an area from potential state regulation is not [a legitimate state] interest").

[15] *See, e.g., Mich. S. Cent. Power Agency v. Constellation Energy Commodities Grp., Inc.*, 466 F. Supp. 2d 912 (W.D. Mich. 2006) (dismissing claims barred by field and conflict preemption under the FPA and the filed rate doctrine); *Monongahela Power Co.*, 322 F. Supp. 2d at 919-20 (invalidating Ohio retail rate cap); *Pac. Gas & Elec. Co.*, 216 F. Supp. 2d at 1038 (same for California).

FERC *chose* to refrain from exercising authority FERC does not have. NRG correctly observes that FERC "does not ban state-sponsored resources, or invalidate contracts. It instead regulates the price at which such resources are bid in to the market." *Id.* That is all FERC *can* do. Each of the decisions upholding FERC's exclusive jurisdiction to set capacity *prices* also confirms that FERC may not, as NRG puts it, "ban state-sponsored resources." *Id.* As the Third Circuit explained, FERC's MOPR Orders did not exceed FERC's jurisdiction because FERC's orders "permit states to develop whatever capacity resources they wish, and to use those resources to any extent that they wish, while approving rules that prevent the state's choices from adversely affecting wholesale capacity rates." *NJBPU*, slip op. at 55; *see id.* at 52-54 (same).

FERC's authority to modify the permissible prices of state-subsidized generation resources with Pricing Contracts may mitigate some of the injury to existing generators or new generators who do not have such subsidies, but the MOPR cannot redress the separate injury electric distribution companies suffer when Maryland forces them to subsidize in-state generators through inflated side-payments. FERC cannot prevent Maryland from compelling such payments from retail service providers like BGE and Delmarva, but a federal district court can.

II. THE DISTRICT COURT'S DECISION DOES NOT UNDERMINE THE *MOBILE SIERRA* DOCTRINE

NRG asserts that the District Court's decision "threatens the critical and long-protected role of bilateral contracts" by "circumvent[ing] *Mobile-Sierra's* protections." NRG Br. 29-30. But NRG misstates the *Mobile-Sierra* doctrine.

"Under *Mobile-Sierra* doctrine, the Federal Energy Regulatory Commission . . . must presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement imposed by law." *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 530 (2008). This presumption, in turn, "may be overcome only if FERC concludes that the contract seriously harms the public interest." *Id.*

The purpose of the *Mobile-Sierra* doctrine is to require a heightened showing of serious damage to the public interest when a complainant seeks to abrogate or modify a contract FERC has accepted for filing or otherwise expressly authorized. *See id.* at 546, 550-51; *NRG Power Mktg.*, 558 U.S. at 171-76; *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968); *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

Here, two fundamental *Mobile-Sierra* prerequisites are missing. First, the Pricing Contracts are not voluntary: Maryland required electric distribution

companies like BGE and Delmarva to execute them. Second, the Pricing Contracts have never been submitted, much less accepted, for filing at FERC. After reviewing the relevant facts, the District Court correctly determined that "FERC has not passed judgment, one way or another, on the reasonableness or fairness of the terms of [the Pricing Contract], whether the [Pricing Contract] is a 'FERC-jurisdictional' contract, or any other potential issue within its regulatory jurisdiction." JA306. Further, contrary to APPA's view that "CPV Maryland's market-based rate tariff authorized" the Pricing Contracts, APPA Br. 19, a market-based rate tariff does not authorize CPV to exercise market power—whether state-conferred or otherwise—to set rates. Therefore, *Mobile-Sierra* cannot apply here.

III. THERE IS NO PRESUMPTION AGAINST PREEMPTION UNDER THE FEDERAL POWER ACT

The District Court conscientiously examined the question whether the "presumption (of a lack of congressional intent to displace state law)" applied. JA272-73. Nevertheless, several state regulators badly misread Supreme Court precedent in claiming that the District Court failed to apply a purported "presumption against preemption," adding that this presumption "applies with special force in this case because the FPA constitutes legislation in a field which the States have traditionally occupied." State Regulators' Amicus Br. 19 n.6 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). The Supreme Court

has squarely rejected this line of argument several times and has specifically held that *Medtronic* does not apply in FPA preemption actions.

In *New York v. FERC*, the Supreme Court held that there is no "presumption against pre-emption" in FPA preemption cases, 535 U.S. at 17-21, and pointedly distinguished *Medtronic*, *id.* at 18. The FPA did not displace state jurisdiction over transmission because "interstate transmission of electric energy [has] never been 'subject to regulation by the states.'" *Id.* at 21 (quoting FPA section 201(a), 16 U.S.C. § 824(a)). And there is no presumption of preemption with regard to sales of energy or capacity at wholesale because Congress purposefully took away any jurisdiction the states might ever have had. *Id.* ("The FPA authorized federal regulation not only of wholesale sales that had been beyond the reach of state power, but also the regulation of wholesale sales that had been *previously subject* to state regulation.").

The Supreme Court's decision in *New York v. FERC* did not break new ground in rejecting state claims that FPA section 201 provides states with any jurisdiction over power sales that is not expressly given to FERC. The Supreme Court said the same thing thirty-eight years earlier in *Southern California Edison*:

> In short, our decisions have squarely rejected the view of the Court of Appeals that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-

> by-case analysis. This was done in the [Federal] Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.

376 U.S. at 215-16 (examining *Attleboro*; *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 527 (1945); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507 (1947); and *United States v. Pub. Utils. Comm'n of Cal.*, 345 U.S. 295 (1953)).

CONCLUSION

This Court should affirm the District Court's Opinion and Order.

Respectfully submitted,

/s/ Glen Thomas
Glen Thomas
PJM POWER PROVIDERS GROUP
1060 First Avenue
Suite 400
King of Prussia, PA 19406
(610) 768-8080

/s/ *John Lee Shepherd, Jr.*
John Lee Shepherd, Jr.
Karis Anne Gong
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7338

Counsel for PJM Power Providers Group

March 17, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App P. 32(a)(7)(C), the undersigned hereby certifies that the foregoing document contains no more than 7,000 words (6,979 words using the word-count feature in Microsoft Word 2010) not including the tables of contents and authorities, and combined certifications.

This brief complies with the typeface requirements of Fed. R. App P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Times New Roman type style.

Respectfully submitted,

/s/ *John Lee Shepherd, Jr.*
John Lee Shepherd, Jr.
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005

Counsel for
PJM Power Providers Group

March 17, 2014

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25 and 4th Cir. L.A.R. 25(b)(3), the undersigned hereby certifies that on this 17th day of March, 2014, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system, and that I have served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

Respectfully submitted,

/s/ *John Lee Shepherd, Jr.*
John Lee Shepherd, Jr.
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005

Counsel for
PJM Power Providers Group

March 17, 2014