NO. 14-694

In the
Supreme Court of the United States

JOSEPH L. FIORDALISO, MARY-ANNA HOLDEN, AND DIANNE SOLOMON, IN THEIR OFFICIAL CAPACITY AS COMMISSIONERS OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES,
Petitioners,

v.

PPL ENERGYPLUS, L.L.C., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

JOHN J. HOFFMAN
Acting Attorney General of the State of New Jersey
RICHARD F. ENGEL*
DEPARTMENT OF LAW & PUBLIC SAFETY
25 W. Market Street
PO Box 093
Trenton, NJ 08625
(609) 984-4863
richard.engel@dol.lps.state.nj.us
Attorneys for Petitioners

On the brief
LISA J. MORELLI
T. DAVID WAND
* *Counsel of Record*

September 30, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

<u>Page(s)</u>

Other Authorities

I. The Brief of the United States as Amicus Curiae Perpetuates the Third Circuit's Mistakes, and This Court Should Grant the Writ of Certiorari

The Supplemental Brief of Petitioners CPV Power Holdings, Inc., LP and EIF Newark, LLC, filed with this Court on September 30, 2015, thoroughly explains why the United States' brief misapplies this Court's decision in *Oneok, Inc. v. Learjet, Inc.,* 135 S. Ct. 1591 (2015). It also explains how the United States' brief relies on theories the Third Circuit rejected and embraces the Third Circuit's flawed reasoning. Therefore, in the interest of judicial economy, Petitioners Joseph L. Fiordaliso, Mary-Anna Holden, and Dianne Solomon ("New Jersey Petitioners"), Commissioners of the New Jersey Board of Public Utilities, will not repeat those arguments here but, rather, endorse them in full.

II. New Jersey Took Appropriate Action to Cure Capacity Market Failures

The United States' Brief reflects a profound misunderstanding of the purpose of the Long Term Capacity Pilot Program Act ("LCAPP"), N.J. Stat. Ann. §§ 48:3-51, 48:3-98.2-.4, particularly its purpose in remediating the energy issues facing New Jersey and the capacity market. Despite the theory that PJM Reliability Pricing Model ("RPM") markets will send price signals indicating where generation is needed most, New Jersey's reality was very different.

From the time the RPM became operational in 2007, until the enactment of LCAPP in 2011, no new intermediate or baseload power plants were built in

New Jersey or made available to New Jersey residents. N.J. Stat. Ann. § 48:3-98.2(b). In addition, PJM anticipated that 3,100 megawatt ("MW") of New Jersey generating capacity would retire by mid-2015 (18% of all existing New Jersey generation), and that over 11,000 MW of coal-fired capacity in the greater PJM area was at risk of retiring. N.J. Stat. Ann. § 48:3-98.2(g).

To resolve these reliability issues, there are only two options: (1) construct additional transmission lines, or (2) create additional generation in or near the location where the reliability issue will occur. Pet. 14-694 App. 117a. However, increased reliance on transmission lines adds to the cost of power, while a generation facility constructed closer to the delivery area lowers transmission costs. Pet. 14-694 App. 64a. Faced with these challenges, New Jersey chose to incentivize the building of new generation facilities by working within the capacity market construct approved by the Federal Energy Regulatory Commission ("FERC"). Far from setting wholesale rates, the contracts for differences were the result of competitive bids submitted by developers who answered New Jersey's request for proposals. Pet. 14-694 App. 11a.

Notwithstanding New Jersey Petitioners' expertise in utility regulation, the United States and Third Circuit suggest alternative methods to incentivize generation. U.S. Br. 21; Pet. 14-694 App. 22a n.4. For example, the Third Circuit claims New Jersey may use its tax-exempt bonding authority, offer property tax relief or favorable site-lease agreements, or ease permit approvals. U.S. Br. 21-22; Pet. 14-694 App. 22a n.4. The United States also asserts contracts between generators and utilities that are not directly tied to participation in and clearing the PJM auction may be acceptable. U.S. Br. 22. However, the United States fails to explain how these forms of state sponsorship do not conflict with the nebulous concept of "effectively" setting rates, since any new generation will impact the market and displace other market participants.

Also, from a practical standpoint, these proposed options are not likely to spur new generation. The reality is that only a very small portion of new generation is accomplished without long-term commitments. *See* Pet. 14-634, at 2. Further, most of the new generation in PJM was accomplished under utility ownership and long-term contracts. *See* American Public Power Assoc., *Power Plants Are Not Built on Spec, 2014 Update*, at 7 (2014) (available at http://goo.gl/t62QuS). Contrary to the Third Circuit's and the United States' policy preferences on incentivizing new generation, "one of the reasons that parties enter into wholesale-power contracts is precisely to hedge against the volatility that market imperfections produce." *Morgan Stanley Capital Group v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 547 (2008). Accordingly, this Court should not allow the false policy alternatives presented in the courts below to serve as a basis for denying New Jersey's petition and for invalidating a proper exercise of states' rights under the Federal Power Act ("FPA"), 16 U.S.C. § 824, et seq.

III. The Real-World Consequences of the Decisions Below Impede the States' Ability to Incentivize New "Economic" Generation

The Third Circuit’s decision has a continuing and severe effect on states' ability to procure reliable and sufficient generation of electric power. Noting that the Third Circuit "went out of their way" to emphasize that their preemption decisions were limited to the specific circumstances of the New Jersey and Maryland programs, the United States asserts that these decisions will not undermine states' efforts to incentivize new generation, including renewables. Despite the Third Circuit's statement that its preemption holding is narrow, numerous challenges to states' programs that purportedly compel a specific wholesale transaction have been filed in the wake of the Third Circuit's ruling:[1]

- *Riggs v. Curran*, Civil No. 1:15-CV-00343-S-LDA (D. R.I. filed Aug.14, 2015): The Rhode Island General Assembly passed a statute requiring National Grid, the state's only electric distribution company, to solicit proposals for a project to enhance the electric reliability and environmental quality of a town on Block Island. The Public Utilities Commission ("PUC") subsequently approved a power purchase agreement ("PPA") between Deepwater Wind, the project developer, and National Grid. The plaintiffs allege that the PUC's order approving the PPA violates the FPA because it "intrudes on FERC's exclusive jurisdiction to regulate wholesale transactions." The plaintiffs also argue that the PPA "erects obstacles" and "interferes" with FERC's market-based pricing regime.

- *Entergy v. Zibelman*, Docket No. 15-cv-230 (DHN/TWD) (N.D.N.Y. filed February 27, 2015): In 2012, the owner of the Dunkirk generating sta-

[1] These matters have also followed *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476 (4th Cir. 2014), that held a State of Maryland initiative, similar to LCAPP, "functionally sets the rate that [a generator] receives for its sales in the PJM auction."

tion (NRG), a 625-MW coal-fired power plant in New York near Buffalo, announced it was mothballing the plant due to unfavorable economic conditions. In January 2013, the New York Public Service Commission (PSC), citing reliability concerns, ordered National Grid, a New York electric distribution utility, to evaluate alternatives to retirement, and in June 2014 the PSC approved a 10-year contract between Dunkirk and National Grid that provides for annual payments from the utility to the generator, and requires NRG to continue operating and add 436 MW of natural-gas fired capacity to the plant. Plaintiff Entergy, the owner of a nuclear plant in New York, claimed that the Dunkirk contract effectively sets a wholesale energy price and is therefore field preempted by FERC's exclusive jurisdiction over wholesale power sales. Entergy and other plaintiffs also argued that the PSC's approval is conflict preempted because the out-of-market payments will suppress the market price and therefore conflict with FERC's regulatory approach that markets provide price signals to market participants. NRG has since announced it will shut the Dunkirk plant for the foreseeable future, stating that the Entergy lawsuit "has created a tremendous amount of uncertainty" in moving forward with the repowering project.

- *Allco Finance Ltd. v. Klee*, Case No. 3:15-cv-608 (D. Conn. filed April 26, 2015): Allco challenged a Request for Proposal ("RFP") issued by the Connecticut Department of Energy and Environmental Protection (DEEP) in conjunction with regulators in Massachusetts and utilities in those two states and Rhode Island. The RFP solicits offers for renewable energy and transmission to deliver renewable energy, including projects that "may enable parties in each state to achieve their respective state's clean energy goals more cost effectively than if each state were to proceed unilaterally." Allco asserted claims under the Supremacy Clause, reiterating its argument (rejected by a federal district court in December 2014, see below) that state regulators cannot "force" Connecticut utilities to sign wholesale energy contracts, because such compulsion would be preempted by the Federal Power Act.

- *Allco Finance, Ltd. v. Klee*, Docket No. 15-20 (2d Cir. appeal filed January 2, 2015): The plaintiffs asserted in the district court that the State "fixed the wholesale price of energy" when the Connecticut Department of Energy and Environmental Protection ("DEEP") directed Connecticut's distribution companies to enter into contracts with terms, including price, that DEEP selected. The plaintiffs argued that DEEP's actions are invalid and must yield to FERC's exclusive authority under the Supremacy Clause doctrine of field preemption. The plaintiffs also claimed that DEEP "compelled" the distribution companies to execute contracts at specific prices in derogation of FERC's regulatory framework which, according to the plaintiffs, requires that wholesale energy contracts be freely negotiated between buyers and sellers. The district court, on December 10, 2014, rejected the plaintiffs' contention that the State fixed the contract prices, and instead concluded that the State "play[ed] no role in determining the price offered by bidders" in response to the RFP. Although utilities were "compelled to accept the prices in bidders' offers," which were selected by the State, the sellers' offer prices were not constrained by state law. The court therefore held that the State's scheme did not set prices, its order to utilities directing them to sign the contracts was within the State's authority to regulate its utilities, and therefore the State's order did not amount to wholesale ratemaking and is not field preempted. The court did not address the conflict preemption claim. The matter is now on appeal to the Second Circuit.

- *Town of Barnstable, Mass. v. O'Connor*, Civil Action No. 14-cv-10148-RGS (D. Mass. filed January 21, 2014): The plaintiffs opposing Cape Wind, a proposed 130-turbine offshore wind facility, challenged the validity of a contract Cape Wind signed with NStar, a Massachusetts electric utility. The plaintiffs argued that the contract is under FERC's exclusive jurisdiction, and that any price set by the contract therefore is preempted by the FPA. The district court dismissed the action primarily on 11th Amendment grounds, but in May 2015 the First Circuit held that the 11th Amendment did not insulate the State from the plaintiffs' claims and remanded the case to the district court for further proceedings. The case is now stayed in light of NStar's termination of the Cape Wind-NStar contract.

As these recent court challenges make clear, the decisions below are being used in an effort to thwart states' efforts to procure efficient and environmentally sound new generation for their citizens, whether via contracts or competitive non-discriminatory procurements. Rather than simply being able to rely on

FERC's market rules, including the PJM minimum offer price rule ("MOPR"), which are designed to ensure that competition will not be harmed by the entry of uneconomic investment, states and energy developers are now faced with the uncertainty that legal challenges to the RFP procurement process will be raised for every project that involves any sort of "out-of-market" payment—including projects like those in New Jersey that are deemed "economic" new entrants.

As explained in the New Jersey Petitioners' briefs, as well as those of amici, so long as FERC/PJM market rules contain a bid floor to mitigate uneconomic entry (as they currently do), such rules ensure that capacity auction prices are not significantly lower than legitimate competitive expectations and that the market clears on the basis of legitimate expectations of supply and demand. Disallowing out-of-market payments via contracts or agreements does not resolve the concern of uneconomic entry, because contracts or other financial arrangements that provide a subsidy to a resource developer would not have to be specific to a particular unit. The only means of ensuring that uneconomic generation does not enter the market and artificially depress auction prices is a bid floor that mitigates uneconomic entry.

The Circuit Court's focus on the existence of out-of-market payments merely enables parties to challenge states' proposed resource development programs, when in fact such payments do not enable the resource developer to evade FERC's market rules—rules that prevent a resource from clearing the auction when it is an uneconomic addition. In sum, contrary to their purported "narrow" scope, the decisions below will have a chilling effect on state programs to attract development of new generation resources to support reliability and resource adequacy concerns.

CONCLUSION

For these supplemental reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN J. HOFFMAN
Acting Attorney General
of the State of New Jersey
RICHARD F. ENGEL*
DEPARTMENT OF LAW & PUBLIC SAFETY
25 W. Market Street
PO Box 093
Trenton, NJ 08625
(609) 984-4863
richard.engel@dol.lps.state.nj.us
Attorneys for Petitioners

On the brief
LISA J. MORELLI
T. David Wand
* *Counsel of Record*