Nos. 14-614 and 14-623

IN THE

Supreme Court of the United States

W. KEVIN HUGHES, ET AL.,

Petitioners,

v.

TALEN ENERGY MARKETING, LLC,
FKA PPL ENERGYPLUS, LLC, ET AL.,

Respondents.

CPV MARYLAND, LLC,

Petitioner,

v.

TALEN ENERGY MARKETING, LLC,
FKA PPL ENERGYPLUS, LLC, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* ALLCO RENEWABLE ENERGY LIMITED IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE[1]

Allco's interest is combating climate change by seeking to enforce rights of the Federal Power Act's special class of electric generators known as "Qualifying Facilities" or "QFs"[2]. By enforcing laws that benefit renewable energy Qualifying Facilities on a broad scale, Allco's goal is to open up markets broadly to Qualifying Facilities by overcoming both the reluctance of utilities to purchase from Qualifying Facilities, and the reluctance of State Commissions (many of which are amici in this case) to enforce the rights of Qualifying Facilities conferred by Congress under the Federal Power Act and the Public Utility Regulatory Policies Act ("PURPA").[3]

President Barack Obama has rightly called climate change the greatest threat to national security. We now regularly see reports of collapsing glaciers in Antarctica caused by the continued

[1] The parties have lodged blanket letters of consent to the filing of amicus curiae briefs in this case. Pursuant to this Court's Rule 37.6, amicus curiae states that no party or counsel for a party authored this brief in whole or in part and that no entity or person, aside from amicus, their members, and their counsel, has made a monetary contribution towards the preparation or submission of this brief.

[2] 16 U.S.C. § 824a-3; *id.* § 796(17)(C) ("qualifying small power production facility"); § 796(18)(C) ("qualifying cogeneration facility").

[3] *See, e.g., Winding Creek Solar, LLC v. Florio*, 3:13-cv-04934 (N.D. Cal. filed October 24, 2013); *Allco Finance Ltd. v. Klee,* No. 15-20 (2d Cir. filed January 2, 2015); *Allco Finance Ltd. v. Klee*, No. 3:15-CV-00608 (D. Conn. filed April 26, 2015).

inaction on climate change.[4] Since 2000 the planet has experienced 14 of the hottest years on record, and recently scientists at the US National Oceanographic and Atmospheric Administration have debunked the notion that climate change has slowed down.[5] Last June researchers at Stanford, Princeton and Berkeley issued a report that the effects of climate change, pollution and deforestation have caused the Earth to enter the beginning of a new extinction phase where humans could be among the first casualties.[6] The evidence that dramatic and immediate action is required continues every day.

A reversal in this case would harm the long-term development of renewable energy because it would sabotage QF development. Contrary to the assertions of various amici, Congress has given States specific authority under PURPA to regulate wholesale sales by Qualifying Facilities, including compelling a 20-year contract such as was sought here by Maryland CPV, LLC ("CPV"). CPV just simply did not qualify for that special treatment because its plant did not meet the design standards

[4] http://www.nytimes.com/2014/11/23/us/climate-change-threatens-to-strip-the-identity-of-glacier-national-park.html?_r=0, http://www.nytimes.com/aponline/2015/02/27/world/ap-aa-antarctica-glacial-melting.html, http://www.nytimes.com/2015/06/02/science/mount-everest-glaciers-melt-disappear-nepal.html.

[5] http://m.smh.com.au/environment/us-meteorological-body-finds-global-warming-slow-down-did-not-happen-20150605-ghgvhn.html.

[6] http://www.bbc.com/news/science-environment-33209548.

required to be a Qualifying Facility. The petitioners and amici in support of petitioners have chosen to ignore that authority, which provides more than enough flexibility to not only meet all renewable energy goals of the various States multiple times over, but the capacity needs at issue here.

The petitioners and their amici, however, are not content with the States' power under PURPA, which they conveniently disregard. Rather they ask this Court to overlook the plain language of the Federal Power Act and create a massive loophole to allow States through a command and control process to compel wholesale sales of electricity under the guise of regulation of the construction of new generation.

Such a loophole would allow States unlimited ability to compel wholesale transactions that support the political whims of a State, further sabotaging QF development. One State might prefer coal plants, another gas plants, still others nuclear or other forms of electric generation.

The States seek not only to use compelled wholesale transactions to support new electric generation in their own States, but they seek to use compelled wholesale transactions to compel new construction in other States as well, all under the guise of "local portfolio management." Amicus the State of Connecticut, for example, has sought to compel Connecticut utilities to enter into long-term wholesale power purchase contracts with non-Qualifying Facilities to build new generation in

Maine, the energy from which would be re-sold in further wholesale transactions outside Connecticut.[7]

Whatever residual authority Congress intended to create for States under the Federal Power Act, it surely did not include the ability to compel a utility in its State to enter into a long-term wholesale transaction for construction of new generation in another State. Yet that, among other power, is the authority petitioners seek from this Court.

As this case demonstrates, States are seeking the ability to create their own constructs and market mechanisms for regulating the wholesale supply of energy and capacity outside of the Federal Energy Regulatory Commission's ("FERC's") approved market mechanisms and Congress' preference for Qualifying Facility generation under PURPA.[8]

This Court should maintain the bright line preempting State action that mandates wholesale energy transactions (other than with Qualifying Facilities under PURPA). Maintenance of that

[7] *Allco Finance Ltd. v. Klee,* No. 15-20 (2d Cir. filed January 2, 2015); *Allco Finance Ltd. v. Klee*, No. 3:15-CV-00608 (D. Conn. filed April 26, 2015).

[8] As it turns out FERC's market mechanism worked in the SWMAAC capacity zone, which is at issue in this case. The most recent PJM capacity auction for 2018/2019 continued the pattern of the past several years where the result was the SWMAAC zone having a price no higher than any other PJM zone. *See,* http://www.pjm.com/~/media/879A2FA2A1794C7887A98686A70336D2.ashx.

bright line not only is mandated by the plain language of the statute, but will have the benefit of forcing States to address their renewable energy goals, and in the case of Maryland, their desire for gas-fired generation, through PURPA—Congress' designated avenue.

STATEMENT

A. Legal Background.

1. The Federal Power Act and Competitive Wholesale Electricity Markets.

For most of the twentieth century, electric utilities were vertically integrated companies that enjoyed a monopoly over a service area, and both generated electricity and delivered it to retail customers within that service area. Because utilities typically operated within a single state, they were subject to extensive state regulation. State commissions set the electricity rates that utilities could charge their retail customers in order to allow the utilities to recover the costs associated with generating and delivering electricity, plus a reasonable rate of return. *See, New York v. FERC*, 535 U.S. 1, 5 (2002) ("*New York*").

Utilities began to recognize the advantage of being able to draw upon generation resources owned by other utilities to satisfy demand at peak times, and they began constructing transmission lines running across service areas and across state boundaries. Initially, interstate sales of electricity were unregulated. This Court had held that States were powerless to regulate such sales under the Commerce Clause, *see, Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927) ("*Attleboro*"), resulting in what became known as "the *Attleboro* gap." *New York*, 535 U.S. at 5-6.

It was against the backdrop of a State's absence of power to regulate wholesale transactions that in 1935, Congress enacted the Federal Power Act to fill that gap, as well as to "extend[] federal coverage to some areas that previously had been state regulated." *Id.* at 6. Specifically, Congress gave the Federal Power Commission – now FERC – exclusive authority to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). "[W]holesale," in this context, means any "sale of electric energy to any person for resale." *Id.* § 824(d). Thus, any sale of electricity in interstate commerce (with the exception of sales under PURPA, discussed *infra* at 22-25, 29-31, and another exception not relevant here for certain hydroelectric energy) falls within FERC's exclusive regulatory authority, unless it is a "retail" sale to the factory, business or home that will actually consume the electricity. *See, FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964) (Congress left "no power in the states to regulate … sales for resale in interstate commerce."). Although Congress occupied the field of wholesale electricity sales, it reserved "except as specifically provided," a State's authority that the State previously enjoyed "over facilities used for the generation of electric energy or over facilities used in local distribution," 16 U.S.C. § 824(b)(1).

As the interstate electricity transmission grid developed, and as technology improved for transmitting electricity over long distances, interstate wholesale electricity markets became increasingly important. *New York*, 535 U.S. at 7-8. In the 1990s, Congress and FERC began to recognize the benefits of promoting competition in the market for electric generation. *Id.* at 10-11. Many states followed suit. Utilities divested their generation assets to competitive generation companies that sold power in the wholesale market, and entities known as retail electric suppliers bought electricity in the wholesale market and competed for the opportunity to resell it to retail customers. The utilities continue to enjoy a monopoly over the service of distributing electricity over their network of wires. They also purchase electricity on the wholesale market to sell to retail customers that have not chosen another retail electric supplier.

Today, the wholesale electricity markets in various areas of the United States are overseen by FERC-regulated independent system operators, which operate an energy market, in which generators compete to sell electricity by submitting "bids" in real time. Those ISOs match supply and demand on a continuing basis and using a FERC-approved auction process, determine the market price for electricity based on the bid of the least costly generation resource needed for supply to match demand. *See, Blumenthal v. FERC*, 552 F.3d 875, 878 (D.C. Cir. 2009); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 797 (D.C. Cir. 2007). Similarly, ISOs make sure sufficient capacity exists in the system through a competitive auction three years out. These competitive methods are intended to result in the operation of the most efficient set of generation resources at any particular point in time. Generators also sell electricity to wholesale buyers in freely negotiated, voluntary bilateral contracts, pursuant to FERC-approved market-based tariffs. "These tariffs, instead of setting forth rate schedules or rate-fixing contracts, simply state that the seller will enter into freely negotiated contracts with purchasers." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 537 (2008).

2. PURPA: Relaxing the Ban on State Regulation of Wholesale Transactions and Policies Promoting Specific Classes of Generation.

In 1978, Congress enacted PURPA to "accelerate the development of renewable and inexhaustible energy sources…" H.R. Rep. No. 95-496(IV), at 14 (1978). It directed FERC to adopt rules, and for state commissions to implement those rules, requiring utilities to purchase power from certain types of generators known as Qualifying Facilities, 16 U.S.C. § 824a-3(a)– specifically, qualifying renewable energy facilities, 16 U.S.C. § 796(17)(C), and qualifying cogeneration facilities, 16 U.S.C. § 796(18)(C). Congress and FERC further directed that Qualifying Facilities were to be paid at a rate equal to the utility-buyer's "avoided costs" – that is, the costs that the utility would otherwise have incurred but for its purchase from the Qualifying Facility. 16 U.S.C. § 824a-3(b), (d); 18 C.F.R. § 292.304(b)(2); *see also Am. Paper Inst., Inc.*

v. Am. Elec. Power Serv. Corp., 461 U.S. 402, 417 (1983).

Under PURPA, States have the authority to implement and apply rules requiring utilities to purchase from Qualifying Facilities, 16 U.S.C. § 824a-3(f)(1), including compelling the entry into long-term 20-year agreements, such as was sought by CPV in this case. In these respects, PURPA reflects a limited exception to FERC's otherwise exclusive authority over wholesale electricity sales.

In addition to implementing PURPA, some States have also tried to encourage the growth of renewable generation by adopting "renewable portfolio standards."[9] These require utilities and other retail electric suppliers doing business in a state to procure a certain percentage of their electric supply from certain types of generators. However, importantly States do not mandate construction of new facilities. Rather such renewable energy mandates give the utility the option to make a payment in the nature of a State tax, commonly referred to as an alternate compliance payment, in order to avoid constructing or acquiring renewable energy.

Thus, State renewable portfolio standards do not facially mandate any particular wholesale transaction. Rather, they leave each wholesale buyer/retail supplier to voluntarily negotiate

[9] *See, e.g.*, U.S. Energy Information Admin., "Most states have Renewable Portfolio Standards," *available at* http://www.eia.gov/todayinenergy/detail.cfm?id=4850.

contracts with renewable generators in order to satisfy the portfolio requirement, or to ignore the requirement and pay the alternative compliance payment.

In most cases, utilities and other retail suppliers demonstrate compliance with renewable portfolio standards by obtaining renewable energy credits ("RECs"), which reflect the "environmental attributes" of electricity generated using renewable fuel. Sometimes utilities and retail suppliers voluntarily negotiate contracts for electricity and RECs. But RECs can also be bought and sold independent of electricity; thus, renewable generators frequently will sell their RECs to utilities through a negotiated contract, and separately sell the electricity into the energy market. When RECs are sold independent of electricity, FERC generally regards the sale of RECs as outside its authority over wholesale electricity sales. *See, WSPP Inc.*, 139 FERC ¶ 61,061, P 24 (2012) ("[A]n unbundled REC transaction that is independent of a wholesale electric energy transaction does not fall within the Commission's jurisdiction under sections 201, 205 and 206 of the [Federal Power Act].").

B. Maryland Targets the Higher Wholesale Rates in the Mid-Atlantic Area Council Zone through the Procurement at Issue.

Here Maryland's real motive or "target" was to reduce wholesale prices in the SWMAAC (Southwest Mid-Atlantic Area Council) zone, an interstate zone consisting of Maryland and the District of Columbia. Thus Maryland's target was clearly wholesale rates in an interstate market. The means that it used were intruding into the wholesale field by mandating a wholesale transaction which would result in the construction of a new facility within the SWMAAC zone that could underbid the capacity resources whose prices Maryland thought were too high.

Maryland was simply not happy with the "price separation" of the zones that included Maryland. Price separation is the situation where "[a]s the result of the import limitation, a lower-priced capacity resource located outside the LDA [Locational Deliverability Area] may be 'skipped' or excluded from the stack of bids used by PJM to create the supply curve." Pet. App. 100a.[10] The result is "more expensive capacity resources located within the LDA to fulfill the LDA's capacity target level." *Id.* at 101a.

Maryland's target was the elimination of that price separation for the SWMAAC: wholesale prices were too high in Maryland's judgment. Maryland consumers had to "pay much higher than average prices for wholesale (and thus retail) electricity." *Id.* at 109a. So Maryland engaged in a process the goal or target of which was to lower the market price to Marylanders by compelling a wholesale transaction which would increase supply.

To that end the State of Maryland solicited proposals for long-term wholesale contracts that would result in new generation in the SWMAAC

[10] Unless otherwise noted, all appendix citations are to the appendix to the petition in No. 14-623 ("Pet. App.").

zone. The CPV bid reflected the fixed revenue stream CPV needed to construct and operate the proposed plant over the 20-year contract term. The Maryland state commission reviewed the CPV bid, selected CPV as the winner, negotiated directly with CPV and ordered the State's utilities to enter into contracts providing CPV with the requested revenue stream. CPV did not qualify as a Qualifying Facility under the Federal Power Act.

CPV received a long-term 20-year contract at a fixed price for each megawatt-hour of energy it produced.[11] While most of the discussion in this case has focused on the capacity auction, the contract-for-differences covered revenue from capacity as well as energy. CPV received that fixed revenue stream under an agreement referred to as a

[11] Providing generators with revenue assurance by compelling utilities to enter into a complicated contract-for-differences is the equivalent of compelling the utilities to buy the electricity itself under a long-term power purchase agreement. A power purchase agreement is economically identical to the contract-for-differences at issue here, as is illustrated in the following example:

In both cases, the generator submits a bid to the state specifying the long-term rate per megawatt or megawatt-hour that the generator needs to be guaranteed (for example, $60). Suppose that the market price for energy is $50. Under a power purchase agreement, the generator sells to utility for $60. The utility then resells into the spot market (or avoids purchases from the spot market) at $50. Under the contract-for-differences, the generator sells into the spot market at $50. The utility makes a side payment to the generator of $10. In both cases, the generator's net revenue is $60 and the utility's net cost is $10.

contract for differences, which guaranteed that CPV as a wholesale seller would receive a fixed price from the wholesale sale of energy and capacity to PJM Interconnection, LLC ("PJM"), the wholesale market-maker for the mid-Atlantic region. As the contract itself makes clear, that fixed price will differ from the price that CPV otherwise would have received from selling its electricity into the FERC-approved energy and capacity markets administered by PJM.

SUMMARY OF THE ARGUMENT

The Fourth Circuit's decision (as well as the similar decision of the Third Circuit[12]) finally is set to right the ship for renewable energy and efficient cogeneration development, as Congress envisioned with the PURPA.

Under the Federal Power Act, Congress reserved to the FERC the exclusive authority to regulate wholesale sales of electricity in interstate commerce including rates, rules, regulations, practices, and contracts related thereto. 16 U.S.C. § 824(b)(1). Nothing in the Act suggests that the States share power to regulate these matters.

As this Court held in *Attleboro*, States never had the authority to regulate interstate sales of electricity, regardless of the target or motive of the States. The States were simply powerless to regulate such sales, no matter what their local intra-state

[12] *PPL EnergyPlus LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), *petitions for cert. filed*, Nos. 14-634, 14-694.

interest was. *See, Attleboro*, 273 U.S. at 90. (Such sales are "not subject to regulation by either of the two States in the guise of protection to their respective local interests.")

Thus in 1935 when the Federal Power Act was passed, Congress was not displacing traditional State authority over wholesale sales. It cannot be said that States enjoyed some "traditional" authority over such sales when the Act was enacted, whether under the guise of "portfolio management" or authority over local generation facilities as this Court made clear in *Attleboro*.

The plain language of the Federal Power Act vests the regulation of such wholesale transactions solely within FERC's jurisdiction. Although the language of the Federal Power Act leaves States with certain authority over generation facilities, the plain "except as specifically provided" language of Section 201(b)(1) of the Act qualifies that authority by carving out wholesale transactions.

In Section 210 of PURPA, Congress carved out a narrow exception to FERC's exclusive authority to foster electric generation by generators that used efficient cogeneration or renewable generation technology. 16 U.S.C. § 824a-3; *id.* §§ 796(17)(C), 796(18)(C). Generators falling within PURPA are known as "Qualifying Facilities," and States have certain authority to regulate wholesale sales by Qualifying Facilities, including compelling a fixed 20-year contract rate, such as the one CPV sought here. Congress has not made that same accommodation for non-Qualifying Facilities, such as

CPV that do not meet the design standards for Qualifying Facilities. Facilities not meeting those design standards are expected to compete on their own merits in the FERC-regulated wholesale market.

As this Court made clear in *Attleboro*, States were powerless to regulate wholesale transactions, which includes the power to compel such a transaction in the first place. *Attleboro* makes it clear that at the time the Federal Power Act was passed, neither State authority over utility portfolio management nor local generation facilities provided a State the ability to regulate a wholesale transaction, such as the one at issue in this case, regardless of the "target" or "motivation" of the State. *See, Attleboro* at 273 U.S. at 87 (rejecting the State's argument that in order to "effectively exercise its power to regulate the rates for electricity furnished [to in-state retail] consumers, [the State needed to] also regulat[e] the rates for the [utility's wholesale transaction].") No one can seriously argue that when Congress enacted the Act, it was reserving to the States authority to compel transactions over which this Court said they never had.

The facts of this case are straight-forward: Maryland's decision to force a utility to enter a wholesale power contract through its command and control process plainly constitutes regulation in the field of wholesale energy sales, which is categorically field preempted.

A reversal in this case would effectively eliminate any restriction on a State's ability to regulate wholesale sales for new facilities. States would be able to compel wholesale transactions that support the political whims of a State, further sabotaging Qualifying Facility development. One State might prefer coal plants, another gas plants, still others nuclear or other forms of electric generation.

Furthermore, if this Court permits Maryland to use its jurisdiction over in-state generation facilities or "portfolio management" as an excuse to compel wholesale transactions, (1) the authority given to States under PURPA to compel wholesale transactions with Qualifying Facilities (including compelling long-term 20-year rates as CPV sought here) would be superfluous, (2) Congress' PURPA price-limit of avoided costs, which insures ratepayer neutrality, would no longer be a constraint on State action: States would be free to compel wholesale transactions at any price, regardless of the method of procurement, (3) States would be free to pursue their own market construct, ignoring and undermining the FERC-approved system, and (4) the logical extension would be State authority to regulate all wholesale sales under the guise or "target" of regulating retail rates or another "local interest," exactly what was rejected in *Attleboro* and banned at the time the Federal Power Act was enacted.

Maryland's action is also conflict preempted. FERC has adopted a market-based approach to regulating the energy markets in PJM. In ordering the execution of the contract with CPV, Maryland pursued a conflicting regulatory framework – one in which the state can compel a utility to enter into a non-voluntary wholesale power transaction at a price that differs from the prevailing market price. Not only does that framework conflict with FERC's chosen regulatory approach, but it also undermines the special treatment that Congress intended to give to Qualifying Facilities under PURPA, including the authorization to compel long-term contracts, such as the 20-year contract sought by CPV. This is the epitome of a conflict with federal law.

ARGUMENT

I. Maryland's Order Compelling a Wholesale Transaction is Field Preempted.

Under the theory of field preemption, state action is preempted when it intrudes into an area that Congress has occupied for exclusive federal regulation. *See, Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) ("If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted."). When Congress has reserved a field for exclusive federal regulation, a plaintiff need not demonstrate any actual conflict with federal regulation in order to demonstrate preemption; it is enough that the state has acted in a field that is forbidden to it. *See, Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) ("[w]here Congress occupies an entire field, … even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.")

As the Fourth Circuit recognized, "A wealth of case law confirms FERC's exclusive power to regulate wholesale sales of energy in interstate commerce." Pet. App. 17a; *see, e.g.*, *S. Cal. Edison*, 376 U.S. at 215-16 ("Congress meant to draw a bright line, easily ascertained, between state and federal jurisdiction.... This was done ... by making [FERC] 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."); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) (the Federal Power Act "delegated to [FERC] exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production.")[13]

Thus, for example, the Federal Power Act gives FERC exclusive authority not only to set all "rates and charges made, demanded, or received ... in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission," but also "all rules and regulations affecting or pertaining to such rates or charges." 16

[13] With respect to the Federal Power Act, even the ordinary presumption against preemption of traditional state authority has no application here. Wholesale electricity sales in interstate commerce were never subject to state regulation, *see New York*, 535 U.S. at 6, and thus the Federal Power Act does not displace the state's traditional police powers. What is more, the presumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence," *United States v. Locke*, 529 U.S. 89, 108 (2000), which is true of wholesale electricity regulation. *See,* Pet. App. 22a.

U.S.C. § 824d(a).

A. Whether Viewed as a Power Purchase Agreement or as a Separate Contract-for-Differences, Maryland's Action Intruded into a Field Reserved for FERC.

In addition to the exclusive jurisdiction conferred over wholesale sales, the second sentence of Section 201(b)(1) of the Act gives the FERC the exclusive jurisdiction over the *facilities* used for the sale of electric energy at wholesale in interstate commerce. The FERC's jurisdiction over facilities has an exception that provides the FERC:

> shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

The plain language of the statute makes it clear that whatever authority is exercisable by a State under the State's authority over facilities does not extend to wholesale sales.[14] That is the bright-

[14] The language in Section 201(a) of the Federal Power Act referencing State authority is a mere policy declaration that does not affect the plain language in the first sentence of Section 201(b)(1). *See, New York*, 535 U.S. at 22 ("we have described the precise reserved state powers language in §

line in this case. The State's reserved authority to regulate facilities is of no relevance to the central issue, which is whether the specific transactions are "the sale of electric energy at wholesale in interstate commerce," and if they were, did Maryland exercise any authority over such wholesale sales. The answer to both in this case is unquestionably yes. The agreements with CPV, whether viewed as an integrated power purchase agreement between CPV and a utility, or as a financial contract-for-differences, are clearly wholesale sales of electric energy in interstate commerce. In addition, those wholesale sales only came into being because of the singular act of the State of Maryland compelling those transactions. Thus, Maryland acted in a field of exclusive Federal jurisdiction, and its action is pre-empted and the contracts void. *See, Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 248 (1984) ("If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted.")

Even assuming *arguendo* that Maryland did not set a rate here, setting a rate is only part of regulating and compelling a wholesale transaction. Exclusive Federal jurisdiction applies to "any rule, regulation, practice, or contract affecting such rate, charge, or classification." (*see*, 16 U.S.C. § 824e). Whether or not Maryland set a rate is not determinative of whether it intruded into a field of

201(a) as a mere policy declaration that cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose.") (internal quotations and citations omitted.)

exclusive Federal regulation. Section 201(b)(1) of the Act provides exclusive jurisdiction for wholesale sales and contracts, not just prices or rates. Regardless of whether Maryland fixed a rate, State authority is pre-empted in all respects over "the sale of electric energy at wholesale" and there is no dispute that the transactions at issue fall within that category.

B. Maryland's Target Was Wholesale Prices, a Field Reserved for FERC.

Here Maryland's real motive or "target" was to reduce wholesale prices in the SWMAAC (Southwestern Mid-Atlantic Area Council) zone, an interstate zone consisting of Maryland and the District of Columbia. Thus Maryland's target was clearly wholesale rates in an interstate market. The means that Maryland used to manipulate the rates were mandating a wholesale transaction that would result in the construction of a new facility within the SWMAAC zone.

There was never a real concern that there would not be sufficient resources. The PJM Reliability Assurance Agreement ensured "that adequate Capacity Resources … [would] be planned and made available to provide reliable service to loads with the PJM Region." Pet. App. 89a. PJM obtains commitments for adequate capacity and reliability including a reserve margin three years out, which allows plenty of time to plan for contingencies. Pet. App. 86a.

Maryland's concern was not that those resources would be unavailable, inadequate or unreliable. Rather Maryland just simply did not like the price at which it expected those resources to be delivered. "Marylanders have paid and will continue to pay higher prices than others in the PJM region due to our higher LMPs." Pet. App. 85a.

Maryland engaged in a process the goal or target of which was to lower the market price to Marylanders. The means that it used was to compel a specific wholesale transaction through its command and control process. Compulsion of a specific wholesale transaction by the State plainly constitutes regulation of wholesale sales, the regulation of which is reserved exclusively to FERC.

C. The Federal Power Act's Preemptive Provisions are Necessary to Render PURPA Effective.

PURPA was enacted for the express purpose of creating a new class of "favored cogeneration and small power facilities" in the overall regulatory scheme. *FERC v. Mississippi*, 456 U.S. 742, 751 (1982). It did so by enacting a limited exception, applicable to such facilities, to the blanket prohibition on state regulation of wholesale energy sales, as well as an open access interconnection and transmission policy for such generators. 16 U.S.C. §824a-3. The Federal Power Act's preemptive provisions are necessary to render PURPA effective – by preempting state regulation *except as to* Qualifying Facilities, the Federal Power Act ensures that Qualifying Facilities are singled out for favored treatment.

Under PURPA and its implementing regulations, Congress put a limit on the price at which a State could compel a wholesale energy transaction in order to assure ratepayer neutrality. That price limit is equal to the utility-buyer's "avoided costs" – that is, the costs that the utility would otherwise have incurred but for its purchase from the Qualifying Facility. 16 U.S.C. § 824a-3(b), (d); 18 C.F.R. § 292.304(b)(2). In the case of new facilities, which generally need a long-term contract, the avoided cost rate is the long-term rate under 18 C.F.R. § 292.304(d)(2)(ii). Thus, in respect of Qualifying Facilities, Maryland could compel a wholesale transaction at a fixed 20-year rate, such as what was sought by CPV here. CPV, however, is not a Qualifying Facility so Congress' specific authorization to allow a State to compel such a rate does not apply.

Maryland's manipulation of the wholesale market specifically harms Qualifying Facilities in two ways. First, it makes superfluous the authority provided to States to regulate wholesale transactions for the benefit of Qualifying Facilities. That specific State authority includes the State's ability to compel wholesale transactions at a 20-year fixed rate such as what CPV sought here.[15] CPV, however, is not a

[15] FERC has stated that long-term fixed rates are permitted because "'an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility.'" *JD Wind 1 LLC*, 130 FERC ¶ 61,127, at para. 23 (2010) (quoting 45 Fed. Reg. at 12,218). For many investors, being "able to evaluate the

Qualifying Facility, thus Congress' has chosen not to make the same accommodation for non-Qualifying Facilities such as CPV. Maryland should not be able to effectively eliminate a Qualifying Facility's preferred status by making an end-run around FERC's exclusive jurisdiction, and Congress' preference and design standards for Qualifying Facility generation.

Second, Maryland's action would lower prices that new Qualifying Facility generation, Congress' preferred choice, might obtain. When power is purchased from CPV, it relieves the utility of the need to purchase that power from some alternative source. Naturally, as Maryland intended, the utility would shed their most expensive alternative source of power first. This means that the cost of the most expensive power in the utility's portfolio has *decreased* as a result of the procurement – in PURPA's lingo, its "avoided costs" have decreased. And accordingly, so too has the rate that a Qualifying Facility could receive under PURPA. This injury-in-fact would be caused by Maryland's action. In light of that statutory scheme, it is easy to understand how Qualifying Facilities would be injured by State actions compelling wholesale transactions with non-Qualifying Facilities.

Simply put, if this Court permits Maryland to use its jurisdiction over in-state generation facilities or "portfolio management" as an excuse to compel

financial feasibility" of a QF in this manner, *id.* (quoting 45 Fed. Reg. at 12,218), is a critical prerequisite for moving forward with a project.

wholesale transactions, (1) the authority given to States under PURPA to compel wholesale transactions with QFs would be superfluous, (2) Congress' PURPA price-limit of avoided costs, which insures ratepayer neutrality, would no longer be a constraint on State action: States would be free to compel wholesale transactions at any price, regardless of the method of procurement, and (3) States would be free to pursue their own market construct, ignoring and undermining the FERC-approved system, and Congress' preference and design standards for Qualifying Facility generation.

D. Maryland's Actions Do Not Fall Within the State's Authority Reserved under the Federal Power Act over Generation Facilities or to Direct Utility Planning and Resource Decisions.

Although Congress occupied the field of wholesale electricity sales, it reserved "except as specifically provided," a state's authority that the state previously enjoyed "over facilities used for the generation of electric energy or over facilities used in local distribution," 16 U.S.C. § 824(b)(1).

Notwithstanding the fact that when the Federal Power Act was passed, States had no authority to regulate wholesale transactions under the guise of local power, the petitioners assert that under the Federal Power Act States retain power to "'direct the planning and resource decisions of utilities under their jurisdiction,'" (quoting *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013)) ("Vermont Legislature can direct retail utilities to 'purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma,' if it so chooses".) That statement in *Entergy* quoted from this Court's opinion in *New York* in which this Court observed merely that the "purchase [of] electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma", *New York,* 535 U.S. at 8, was physically possible. It neither says nor implies anything about the power of a State to compel a wholesale transaction from such facilities.

Moreover, the language the opinion in *Entergy* and from this Court's opinion in *New York,* 535 U.S. at 24, referencing State jurisdiction of local service issues, demand side management (which is an absence of an energy transaction), resource planning, utility generation and resource portfolios, and retail stranded cost charges says nothing about that authority reducing FERC's exclusive jurisdiction over wholesale sales.

Rather States act as a regulator, approving utility's resource plans, and regulating the terms on which power plants are built and retired within their own borders. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009). But the state's power in this regard is not unbounded. As the statute makes clear, States retain such authority "except as specifically provided" by the Federal Power Act, 16 U.S.C. § 824(b)(1) – and the Federal Power Act expressly provides that FERC shall have exclusive authority over wholesale electricity sales.

Thus, a State cannot invoke its authority over resource planning decisions in order to justify the regulation of wholesale sales. Nor can Maryland claim to be acting pursuant to the state's reserved power under Section 16 U.S.C. §824(b)(1) with respect to "facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1). It is clear that at the time the Federal Power Act was passed the States had no such authority regardless of the effect on the local interest. *See, Attleboro*, 273 U.S. at 90. (Such sales are "not subject to regulation by either of the two States in the guise of protection to their respective local interests.")

II. Maryland's Actions are Conflict Preempted.

Under the theory of conflict preemption, state action is preempted when it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (quoting *Hines v. Davidowitz*, 312 U. S. 52, 66-67 (1941)).

A. Maryland's Actions Conflict with Implementation of FERC's Market-Based Regulatory Scheme.

FERC has exercised its authority by adopting a market-based regulatory structure for the Maryland region. Pet. App. 80a *et seq*. FERC has established, through PJM, an interstate auction market on which electricity is bought and sold in real time, Pet. App. 82a-85a, and capacity is purchased through the Base Residual Auction. Pet.

App. 91a-92a. FERC has also allowed generators, through "market-based tariffs," to enter into "freely negotiated contracts with purchasers." *Morgan Stanley*, 554 U.S. at 531. The rationale for FERC's policy is that the dynamics of the free and competitive marketplace will enable buyers to obtain electricity at the lowest prices.

Here, Maryland has waded into FERC's field of regulation and adopted a regulatory scheme different than FERC's: one in which state commissions can compel entry into a wholesale electricity contract, and do so at a price that is neither the FERC-regulated market price resulting from PJM, nor a price that is either freely negotiated between seller and purchaser, or the price permitted by PURPA.

Under the Federal Power Act, however, only FERC gets to make the rules governing wholesale electricity transactions. As Justice Scalia has noted, "[i]t is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring). Maryland's actions both intrude on the field reserved exclusively for FERC, and thus are field preempted, and also conflict with FERC's chosen market-based regulatory approach and the favored status and rights of Qualifying Facilities under the Federal Power Act, and thus are conflict preempted as well.

The federal field is not narrowly limited to wholesale pricing. As the plain language of the statute makes clear, federal authority extends to "the sale of electric energy at wholesale in interstate commerce" more broadly, 16 U.S.C. § 824(b)(1), and includes "all rules and regulations affecting or pertaining to such rates or charges." *Id.* § 824d(a). That grant of authority to FERC includes the power to regulate the circumstances and prices under which buyers and sellers are permitted to enter wholesale electricity contracts, as well as whether such contracts must be voluntary. And it precludes States from deciding otherwise.

Indeed, if States were free to compel their utilities to enter into whichever wholesale electricity transactions that the State preferred, including at prices different than the market price for electricity, FERC's entire market-based regulatory scheme could unravel. State-mandated purchasing decisions could be guided by any number of factors other than cost and thus FERC's goal of establishing a competitive market designed to meet demand at least cost would be frustrated. Thus, it is simply irrelevant that the state played no role in determining the price offered by bidders. The State compelled the utility to enter a contract with the State's chosen winner, and thereby mandated a wholesale sale of electricity that would not have taken place absent the State's compulsion. And this Court has held that the Federal Power Act "left no power in the states to regulate … sales for resale in interstate commerce." *S. Cal. Edison*, 376 U.S. at 215.

B. Maryland's Actions Compelling a Wholesale Transaction with a non-Qualifying Facility conflict with PURPA.

Congress has chosen to allow States to compel wholesale contracts, including at fixed rates over 20 years such as was sought by CPV, only for Qualifying Facilities under PURPA. Congress has not made the same accommodation for projects like CPV that do not meet the design standards for Qualifying Facilities.[16] Facilities not meeting those design standards are expected to compete on their own merits in the FERC-regulated wholesale market.

Congress relaxed the ban on State's involvement in the area of wholesale sales in order to benefit Qualifying Facilities. Thus any procurement that attempts to go beyond the limits set by Congress harms the very market participants

[16] *See, e.g., Cal. Pub. Utils. Comm'n*, 132 F.E.R.C. ¶61,047 (2010) at P64:

> The Commission's authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities. [*citing* 16 U.S.C. §§ 824, 824d, 824e; *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988)]. While Congress has authorized a role for States in setting wholesale rates under PURPA, Congress has not authorized other opportunities for States to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission's actions or inactions can give States this authority.

that Congress intended to benefit. Interference with that policy will impede the achievement of Congress' goals in enacting PURPA.

The simple fact is that there are more than enough Qualifying Facilities with which Maryland can compel wholesale transactions for 20-year terms in full compliance with the Federal Power Act and PURPA. Similarly, PURPA provides more than enough authority for States to meet all renewable energy goals multiple times over. The States have no one to blame but themselves if they refuse to follow the path that Congress has permitted.

III. Reversal Will Create a Massive Loophole With no Practical Limit on a State's Authority to Regulate Wholesale Sales.

Reversal in this case would create a massive loophole in the Federal Power Act that would destroy FERC's ability to regulate the market in a uniform and coherent manner. FERC has chosen a market-based approach to regulation, in which some generators sell their output into a wholesale auction administered by PJM, and others enter voluntary bilateral contracts with willing purchasers. Such a market-based system simply cannot function as FERC intended if States are free to mandate involuntary wholesale transactions that, but for the State's intervention into the wholesale marketplace, would never have taken place.

Under the guise of regulating utility purchasing decisions, States could simply take over the entire wholesale market, effectively eliminating

FERC's regulatory power and supplanting its chosen regulatory approach. The Federal Power Act prevents even the possibility of such interference by excluding States altogether from the field of wholesale sales.

Of course, with respect to Qualifying Facilities under PURPA Congress has reached a different conclusion and *has* authorized State regulation of wholesale sales, including the ability to compel a 20-year fixed-rate contract such as CPV sought here, but only for facilities meeting the design standards for Qualifying Facilities.

But the authority petitioners seek from this Court does not stop with facilities within a State's own borders. The States seek not only to use compelled wholesale transactions to support new electric generation in their own States, but they seek to use compelled wholesale transactions to compel new construction in other States as well, all under the guise of "local portfolio management." Amicus the State of Connecticut, for example, has sought to compel Connecticut utilities to enter into long-term wholesale power purchase contracts from non-Qualifying Facilities to build new generation in other States, the energy from which would never reach Connecticut but would be re-sold in further wholesale transactions outside Connecticut. *See,* fn. 7, *supra.*

Whatever the scope of a State's reserved authority, it is limited to facilities within the state's own borders. As this Court has observed "the legislative history [of the Federal Power Act] is replete with statements describing Congress' intent to preserve state jurisdiction *over local facilities*." *New York*, 535 U.S. at 535 (emphasis added). Local facilities are facilities within a State's own borders, not facilities located several States away.

Finally, the logical extension of the petitioners' argument would be State authority to regulate all wholesale sales under the guise or "target" of regulating retail rates or another "local interest," thus unraveling the FERC-approved system and Congress' preference for Qualifying Facility generation.

The issue here is a narrow one which does not detract from a State's ability to influence utilities' purchasing decisions to buy from certain types of generation, or reviewing those for prudence in connection with retail rate recovery. Yet, there needs to be a line drawn somewhere and Congress drew the bright-line in the first sentence of Section 201(b)(1) of the Act at wholesale sales in interstate commerce, which the contracts with CPV unquestionably are.

IV. A Market-Based Tariff Filing with FERC Cannot Bring Life Back to a Void Agreement.

Even if this case were viewed as State compulsion of a specific power purchase agreement between a seller and a utility, the State intrusion into FERC's exclusive jurisdiction cannot be cured by CPV's seeking approval from FERC for market based rate authority.

Here, the contract is the product of unlawful and pre-empted state action, and thus void. A prospective future market based rate filing years in the future[17] does not cure the fact that the contract is the product of illegal state action now for the simple reason that an agreement that is compelled based upon illegal state action is void *ab initio* and no subsequent action can bring life back to a void contract.

The question of whether a contract is the product of unlawful state action is a question for the courts, not the FERC. The contracts here are void and thus any filing at FERC based upon those agreements would be a substantive nullity. The FERC has rejected CPV's attempt to bring life back into its contracts. *See, CPV Shore, LLC*, 148 FERC ¶ 61,096 at P28 (2014) (stating "[i]n considering whether the rates, terms, and conditions in a contract are just, reasonable, and not unduly preferential or discriminatory under the FPA the contract must first be a valid contract. The Commission must reject a rate filing that is a nullity.")

Moreover, the petitioners offer no basis upon which the FERC could accept the contracts. Petitioners have not explained why, if the contracts are "market-based rate" transactions, they would even be filing them. In Order No. 2001, the FERC

[17] A filing for market-based rate authority cannot be filed earlier than 120 days before the commercial operation date of the facility.

made clear that market-based rate contracts, other than affiliate contracts (*i.e.*, contracts to which *Allegheny* and *Edgar* would be relevant[18]) should not be filed and should instead be reported in the relevant market-based rate seller's electric quarterly reports.[19] Since that time, the FERC has consistently rejected sellers' attempts to file individual market-based rate contracts, stating that "agreements under market-based rate tariffs *shall not* be filed with the Commission." [20] Moreover, even when the FERC required the filing of market-based rate contracts prior to the implementation of Order No. 2001, the FERC made clear that the filings were "not traditional [FPA] section 205 filings, but rather [we]re informational filings submitted in response to

[18] *See, Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082 (2004) ("*Allegheny*") and *Boston Edison Co. re: Edgar Elec. Energy Co.,* 55 FERC ¶ 61,382 (1991) ("*Edgar*").

[19] *See Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127 at P 7, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003), *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *on reh'g & clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, FERC Stats. & Regs. ¶ 31,282 (2008).

[20] *Westar Energy, Inc.*, Docket No. ER06-1429-000 (Oct. 10, 2006) (unreported) (emphasis added). *See also, e.g.*, *First Energy Corp.*, Docket Nos. ER06-1386-000, *et al.* (Oct. 4, 2006) (corrected Oct. 10, 2006) (unreported) (same); *Am. Elec. Power Serv. Corp.*, Docket No. ER06-907-000 (June 12, 2006) (unreported) (same).

the filing requirements found in the orders granting market-based rate authority."[21] The FERC further made clear that it was "not required by the FPA to act on such filings," or "to find that such agreements themselves are just and reasonable," and that "the filing of such agreements d[id] not serve as a vehicle to challenge the justness and reasonableness of either the agreements themselves or the underlying market-based rate authority."[22] Even if the FERC were to ignore the fact that the contracts are substantive nullities, it would still be compelled to reject CPV's filings as unnecessary and unjustified under its market-based rate filing rules. Thus, any attempt by petitioners to convince this Court that the FERC would be approving the contracts in connection with a market-based rate authority filing is simply incorrect.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

[21] *GWF Energy LLC*, 97 FERC ¶ 61,297 at 62,391 (2001), *reh'g denied*, 98 FERC ¶ 61,330 (2002).

[22] *Id. See also, Pub. Utils. Comm'n of Cal. v. Sellers of Long Term Contracts to the Cal. Dept. of Water Res.*, 100 FERC ¶ 61,098 at P 16 (FERC acceptance of market-based rate contract did not mean that "the Commission has determined the justness and reasonableness of the . . . contract"), *reh'g denied*, 100 FERC ¶ 61,333 (2002).

Respectfully submitted this 19th day of January 2016.

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