No. 09-277

In the Supreme Court of the United States

CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL AND RICHARD BLUMENTHAL, ATTORNEY GENERAL FOR THE STATE OF CONNECTICUT,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, OHIO ATTORNEY GENERAL, AND SOUTH CAROLINA OFFICE OF REGULATORY STAFF AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Federal Energy Regulatory Commission's (FERC) asserted authority over the Installed Capacity Requirement, on the ground that it is "a practice affecting rates," contravene the Federal Power Act's specific limits on FERC's authority, and express preservation of State authority over generation facilities and system adequacy?

PARTIES TO THE PROCEEDING

The parties to the proceedings before the United States Court of Appeals for the D.C. Circuit included Petitioner Connecticut Department of Public Utility Control, who was also a party before the Federal Energy Regulatory Commissioner. Petitioner Richard Blumenthal, Attorney General for the State of Connecticut, intervened in support of the petitioner in the Court of Appeals.

The Federal Energy Regulatory Commission was the Respondent in the Court of Appeals, and is therefore the respondent here, represented by the Office of the Solicitor General, under the Court's Rule 12.

The following parties before the Federal Energy Regulatory Commission intervened in support of the petitioner in the Court of Appeals: Maine Public Utilities Commission; Massachusetts Department of Public Utilities; and NSTAR Electric and Gas Corporation.

The following parties before the Federal Energy Regulatory Commission intervened in support of the respondent in the Court of Appeals: New England Power Poll Participants Committee; Boston Generating, LLC; Dominion Energy Marketing, Inc.; Dominion Energy New England, Inc.; Dominion Nuclear Connecticut, Inc.; Dominion Retail, Inc.; FPL Energy, LLC; Milford Power Company, LLC; Mirant Canal, LLC; Mirant Energy Trading, LLC; Mirant Kendall, LLC; NRG Power Marketing, LLC; Connecticut Jet Power, LLC; Devon

Power, LLC; Norwalk Power, LLC; Middletown Power, LLC; Montville Power, LLC; Somerset Power, LLC; and ISO New England, Inc.

The following party was granted leave by the Court of Appeals to intervene in support of the respondent: New England Power Generators Association, Inc.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to U.S. Sup.Ct. Rule 29.6, the National Association of Regulatory Utility Commissioners (NARUC) states as follows: NARUC is a quasi-governmental non-profit association incorporated in the District of Columbia. NARUC has no parent corporation nor is there any publicly held corporation that owns stock or other interest in NARUC. NARUC is supported predominantly by dues paid by its State public utility commissioner members and through revenues generated by meetings of those members held three times each year.

As governmental agencies, the California Public Utilities Commission, the Ohio Attorney General, and the South Carolina Office of Regulatory Staff, are exempt from the filing of a corporate disclosure statement under U.S. Sup.Ct. Rule 29.6.

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INTEREST OF AMICI CURIAE[1]

The National Association of Regulatory Utility Commissioners ("NARUC"), founded in 1889, is a national organization whose members include the agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the rates and conditions of service associated with the intrastate operations of electric, natural gas, water, and telephone utilities. NARUC's members ensure that electric utility services are provided at rates and conditions that are just, reasonable and nondiscriminatory.

Both Congress[2] and federal courts[3] have consistently recognized NARUC as a proper entity

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1 Pursuant to S. Ct. R. 37, *amici* state that (i) no counsel for a party authored this brief in whole or in part, (ii) no counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, (2) Counsel of Record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief, (3) the parties have consented in writing to the filing of this brief.

2 *See* 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members to Federal-State Joint Boards to consider issues of concern to both State and federal regulators); *See also* 47 U.S.C. § 254 (1996) (describing functions of the Joint Board on Universal Service). See also *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "Carriers, to get the cards, applied to [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations the ICC issued to create the "bingo card" system).

to represent the collective interests of the State utility commissions. NARUC is joined in this filing by some of its members.

The California Public Utilities Commission (CPUC) is charged with representing the interests of California consumers of electricity. *See* CAL. CONST. art. XII § 1 (2008). The CPUC's role protecting the public is recognized under federal law. Section 308 of the Federal Power Act (FPA) authorizes FERC to admit the CPUC as a party to any proceeding in which it is interested, *see* 16 U.S.C. § 825g(a) (2000), and FERC by rule allows the CPUC to intervene as of right, without motion, upon timely notice, *see* 18 C.F.R. § 386.214(a)(2). In this regard, the FPA reflects a "special solicitude" for State agencies "designed to recognize precisely the interest of the [S]tates in protecting their citizens in this traditional governmental field of utility regulation." *Md. People's Counsel v. FERC*, 760 F.2d 318, 320-21 (D.C. Cir. 1985).

The Ohio Attorney General is legal counsel to Ohio's numerous State agencies, departments, boards, and commissions, including the Public Utilities Commission of Ohio, which is charged with ensuring the availability of adequate and reliable electric service for Ohio consumers. Ohio Rev. Code Ann. §§ 109.02, 4928.02 (Anderson 2009). Ohio's interest in this case is to preserve its

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[3] *See United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff'd* 672 F.2d 469 (5th Cir. 1982), *aff'd en banc on reh'g,* 702 F.2d 532 (5th Cir. 1983), *rev'd on other grounds*, 471 U.S. 48 (1985).

ability to implement a recently enacted, comprehensive statutory scheme for electricity regulation, which addresses capacity issues by simultaneously seeking to reduce demand and increase supply from renewable resources. *See* Ohio Rev. Code Ann. § 4928.01 *et seq.* (Anderson 2009). FERC's overreaching decision below may frustrate Ohio's efforts to address these statutory mandates within the clear bounds of its own jurisdiction as established by the FPA's dual regulatory system.

The South Carolina Office of Regulatory Staff ("ORS") is a State governmental agency and an associate member of NARUC. The South Carolina ORS was created by the South Carolina General Assembly, 2004 S.C. Act No. 175. Under Act 175, the ORS is a party of record in all filings, applications and proceedings before the State Public Service Commission and is charged with representing the "public interest" which is defined in the Act as balancing the concerns of the using and consuming public, the preservation of the financial integrity of the State's public utilities, and economic development and job attraction and retention in the State. S.C. CODE ANN. § 58-4-10 (Supp. 2008). The ORS has additionally been charged under S.C. CODE ANN. § 58-4-50(A)(8) (Supp. 2008) to "provide legal representation of the public interest before [S]tate courts, federal regulatory agencies, and federal courts in proceedings that could affect the rates or service of any public utility."

NARUC's member commissions have a vital interest in the outcome of this case. From hospitals to offices to schools, electricity is essential. Adequacy decisions have a significant impact on the health and welfare of each State's citizens and necessarily on States' ability to exercise their police powers. As Congress, in the Federal Power Act (FPA) recognized, such complex decisions are best made by the States because they are uniquely positioned to assess both electricity demand, including the amount, type, character, location, density, duration of the load, as well as the best way to meet that demand.[4]. These State adequacy (or capacity) determinations must balance competing priorities and also factor in a variety of factors, including local concerns about land use, energy planning, and the substantial lead time needed to plan, design, and construct needed infrastructure.

The decision below not only undermines States' ability to establish adequacy requirements, it also frustrates the careful balance between State and federal authority Congress established in Title II of the FPA. Federal Power Act, tit. II, ch 287, 49 Stat. 803 (1935) (codified, as amended, at 16 U.S.C. §§ 824 *et seq.* and §§ 825 *et seq.*) The Court of

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4 When setting the reserve margin, an ICR equivalent, in New York, the Reliability Council considers "load characteristics, uncertainties in load forecasts, the transfer capability and configuration of the New York State transmission system, interconnections with other control areas, generation outages and deratings, and local reliability rules, as well as other pertinent inputs." *See* N.Y. Pub. Serv. Comm'n Case 07-E-0088, *Order Adopting Installed Reserve Margin For The New York Control Area For The 2009-2010 Capability Year*, (Issued and Effective February 17, 2009).

Appeals decision misconstrues the Installed Capacity Requirement as a market input and ignores specific statutory limitations on FERC jurisdiction. It virtually guarantees additional and unnecessary litigation at taxpayer expense and severely constrains all of NARUC's member commission's ability to protect their constituents. The writ should be granted.

ARGUMENT

I. The writ should be granted to resolve conflicting circuit decisions on the propriety of granting deference to agency interpretations of the scope of its authority.

The Court should grant the writ, because the decision below, *Conn. Dept. of Public Utility Control v. FERC,* 569 F. 3d. 477 (D.C. Cir. 2009), continues a split in the circuits with respect to the application of "*Chevron*"[5] deference to agency determinations of their own jurisdiction. That decision improperly grants deference to FERC's expansive reading of its jurisdictional authority.[6] Petitioners in the Seventh or Second Circuits do not encounter this hurdle when federal agencies make similar jurisdictional claims. In this case, the granting of deference is particularly egregious because FERC's jurisdictional bootstrapping defeats Congress's preservation of State authority over the adequacy of service. Mindful of the admonition in S. Ct. R. 37(1), we adopt, rather than reiterate, Petitioner's arguments about the need for Supreme Court Review to resolve the split in the circuits on this issue. (*See* Pet. Br. at 22–25). The United States Courts of Appeals need additional guidance from this Courts on when Chevron deference is and is not appropriate to apply.

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5 *See Chevron U.S.A. v. Natural Resources Defense Council,* 476 U.S. 837 (1984).

6 A similar rule may prevail in the Third, Fourth, and Ninth Circuits. *See* Pet. Br. at 18–19.

II. The writ should be granted to protect State authority, specifically reserved by Congress in the Federal Power Act, to regulate adequacy of the electric system.

In addition to the circuit split, the decision below conflicts with this Court's precedent on other important issues. Specifically, the decision allows FERC to set the level of Installed Capacity Requirements, accepting its dubious rationale that FERC is merely regulating "practices affecting wholesale rates." *Conn. Dep't of Pub. Util. Control v. FERC,* 569 F.3d 477, 479. (D.C. Cir. 2009). That determination conflicts directly with this Court's precedent recognizing State authority.[7]

The Court of Appeals decision diminishes individual State's ability to govern adequacy—an important local concern reserved for State oversight by Congress in the FPA. Unless review is granted, the decision below is a green light for additional federal agency jurisdictional bootstrapping. It allows FERC to rationalize actions in areas where the statute specifically intends to limit federal authority. *See Conn. Light & Power Co v. FPC,* 324 U.S. 515, 532 (1945) (the FPA "plainly... state[s] circumstances under which the Commission shall not have jurisdiction.")

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[7] *See Conn. Light & Power Co. v. FPA,* 324 U.S. 515, 526 ("Probably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill." (quoting H.R. Rep. No. 1318 74th Cong. 1st Session. 8)).

In particular, the Court should review the decision's finding that FERC's general jurisdiction, over "practices affecting" FERC-jurisdictional wholesale rates[8] nullifies the statute's specific limits on federal jurisdiction over system adequacy and generation facilities.

The Court of Appeal's statutory construction conflicts with this Court's findings that, while Congress made federal jurisdiction over wholesale sales plenary, such jurisdiction does not extend to areas "which Congress has made explicitly subject to regulation by the States." *FPC v. Southern California Edison Co.*, 376 U.S. 205, 216 (1964).

This Court has found that FERC's general authority over rates does not erode specific prohibitions against federal authority.[9] The FPA

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

9 *See, e.g. NW Central Pipeline Corp. v. State Corp. Comm'n of Kansas,* 489 U.S. 493, 514, (Noting a similar provision in the Natural Gas Act (NGA) § 1(b), 52 Stat. 821 (codified at 15 U.S.C. 717(b)) that gives FERC authority over rates does not justify expanding FERC jurisdiction into areas governed by the States: "To find field pre-emption of Kansas' regulation merely because purchasers' costs and hence rates might be affected would be largely to nullify that part of NGA § 1(b) that leaves to the States control over production, for there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market and contractual situations."); *FPC v. Panhandle Eastern Pipe Line Co.,* 337 U.S. 498, 507-508 (1949) (Interpreting the NGA to say that, "[n]othing in the sections indicate that the power given to the Commission [over authorized natural gas sales] could have been intended

explicitly preserves State authority over generation and adequacy in section 201, specifying that FERC "...shall not have jurisdiction, except as specifically provided... over facilities used for the generation of electric energy." FPA § 201(b)(1); 16 U.S.C. § 824(b)(1) (2006).

In addition to the section 201 reservations included when the FPA was first enacted, Congress recently reiterated its intent to reserve State jurisdiction over adequacy and generation. The Energy Policy Act of 2005 adds Section 215 to the FPA.[10] That section gives FERC authority to enact reliability standards for the bulk power system. Even though reliability is often understood as a combination of adequacy and security,[11] Congress specifically preserved adequacy as a State

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to swallow all the exceptions of the same section and thus extend the power of the Commission...." (emphasis added)).

[10] Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594; 16 U.S.C. § 824o (2006).

[11] The North American Reliability Corporation (NERC), the organization selected as the Electric Reliability Organization under FPA § 215, defines reliability as a combination of adequacy and security. "NERC defines reliability as the ability to meet the electricity needs of end-use customers, even when unexpected equipment failures or other factors reduce the amount of available electricity. NERC breaks down reliability into adequacy and security." North American Reliability Corp., *Understanding the Grid: Reliability Terminology, available at* http://www.nerc.com/page.php?cid=1|15|122, last visited Sept. 27, 2009.

jurisdictional aspect of reliability. Section 215 contains a savings clause that explicitly states FERC is "not authorize[d] to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy or safety of electric facilities or services." 16 U.S.C. § 824o(i)(2) (2006) (emphasis added).[12] The FPA reiterates this prohibition in defining a reliability standard – specifying that such a standard "does not include any requirement to enlarge... or construct new ... generation capacity." FPA § 215 (a)(3); 16 U.S.C. § 824o(a))(3) (2006).

Aside from these express Congressional prohibitions concerning generation, safety and adequacy, the statute never gives FERC authority to regulate the ICR.[13]

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[12] While these limits on FERC's authority are not new, it is significant that Congress re-articulated these limits during the most recent major modifications to the Federal Power Act. "[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). When it enacted Section 215, Congress "spoke[ ] subsequently and more specifically to the topic" of system adequacy and said that FERC may not regulate such matters. Taken in its entirety, the language and history of the FPA displays a clear and consistent Congressional intent to preserve State jurisdiction over generation and adequacy.

[13] Subchapters II and III of the FPA specifically provide limited FERC jurisdiction over generation in some instances, but these do not extend to FERC authority over ICR. Section 207 allows FERC, upon complaint of a State Commission, to determine whether the "interstate service of any public utility is inadequate or insufficient" and, after notification to all impacted State commissions, to "determine the proper,

This Court has recently reiterated the long standing principle that, "we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, __ U.S. __, __, 129 S. Ct. 1187, 1195 (U.S. 2009) (*quoting Lohr*, 518 U.S., at 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (*quoting*, in turn, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Even the D.C. Circuit has recognized that to respect the States, "Federal law 'may not be interpreted to reach into areas of [S]tate sovereignty unless the language of the federal law compels the intrusion.'" *Am. Bar Ass'n. v. FTC*, 430 F.3d 457, 471 (D.C. Cir. 2005) (quoting *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999)).

The vague phrase "practice affecting... rates" does not represent, by any reasonable measure, a "clear and manifest purpose of Congress" to preempt the States' sovereign interest, historic oversight, and statutory authority over adequacy and generation.

The D.C. Circuit provides a novel and illogical foundation for its decision to affirm FERC's

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adequate, or sufficient service to be furnished." This provision supports the need for certiorari in this case. It preserves the States' original jurisdiction over adequacy and specifically prohibits FERC from ordering the enlargement of generating facilities. 16 U.S.C. § 824f (2006).

exercise in jurisdictional bootstrapping.[14] It argues that FERC may set the ICR for the purpose of setting wholesale capacity rates without infringing on the States' authority to ensure system adequacy. This unrealistic reading not only ignores the practical impact of FERC's unjustifiable intrusion into State authority, but also ignores the purpose, intent, and effect of the ICR.

Although this Court has not reviewed the ICR directly, it has identified capacity as the ability to meet peak electricity demand at any given time in a manner that is essential to ensuring adequacy and that affects generation. *See Gainesville Utilities Dep't v. Florida Power Corp.*, 402 U.S. 515, 518 (1971). [15]

Even FERC conceded elsewhere that the ICR is an adequacy requirement. In 2002, FERC specified that the reserve margin requirements which States imposed during most of the last century were intended "to ensure adequate

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[14] The Court of Appeals construed the ICR as only "a key input into the market-based mechanism that determines transmission tariffs and end-user costs in the New England bulk power system." *Conn. Dep't of Pub. Util. Control v. FERC,* 569 F.3d 477, 478-479 (D.C. Cir. 2009).

[15] *Gainsville* addressed the benefits of interconnection for meeting capacity requirements, specifically noting that "[i]nstalled reserves refer to the remaining generating capacity of a utility...." 402 U.S. 515, 518 n. 2. This Court explains that reserves are needed to efficiently maintain capacity given that demand fluctuates. This Court also acknowledged that reserve margins are important to ensuring adequacy and tied to generation. *Id.* at 518.

supplies" and that such reserve margins are a "resource adequacy requirement...."[16] It also explicitly acknowledged that, if FERC sets the level of the reserve margin, this "assure[s] the development of both new supply and demand response resources." *Id.* at ¶479.

In sum, FERC recognized its setting of the level of required capacity is an adequacy requirement that may require the development of new generation. Indeed, this was the central rationale for FERC's prior attempt to establish "a minimum level of resource adequacy ...." 100 F.E.R.C. P61, 138 (F.E.R.C. 2002), at ¶490.

The ICR is clearly more than an input into the forward capacity market. As this Court has recognized, capacity is first and foremost a requirement for meeting peak demand. *Gainsville,* 402 U.S. 515, 518. Under basic economics, the amount of capacity that must be acquired in a market will affect the capacity market price. But this is a secondary effect of ICR, not its principal purpose or effect.

Generally speaking, the ICR is not a rate-setting tool. It is a requirement imposed upon Load Serving Entities ("LSEs") to demonstrate their ability to meet consumer needs. First and foremost, it is designed and intended, to ensure

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[16] FERC Docket No. RM01-12-000, Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, 100 F.E.R.C. ¶61,138 (F.E.R.C. 2002) at ¶¶481-82.

that LSEs are capable of providing consumers with the electricity they need, at the moment they need it.

The Court of Appeals abstracts the ICR from its real world implications and construes it as a market input affecting wholesale electricity rates. In so doing it unjustifiably allows FERC to intrude into the State authority over adequacy and generation without any "clear or manifest" instruction from Congress justifying the intrusion. This decision sets the stage for extensive litigation that will continue to undermine congressionally-sanctioned State authority to protect consumers.

CONCLUSION

For these reasons, the writ should be granted.

Respectfully Submitted,

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