No. 09-277

DEC 14 2009

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

REPLY TO BRIEF IN OPPOSITION

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The Court should grant Connecticut's Petition for two key reasons. First, this case provides an appropriate vehicle for the Court to settle the muddle among the circuit courts over the extent to which they should defer to an agency's interpretation of its own statutory powers. Second, given the exceptional importance of decisions about maintaining and developing resources to produce electric energy, the Court should act to reign in the Federal Energy Regulatory Commission's ("FERC's") usurpation of the States' statutorily protected jurisdiction over electric resource adequacy and generation facilities. FERC's Brief in Opposition does not detract from these core justifications for granting certiorari, and, pursuant to Rule 15.6, this Reply refutes the few new points that FERC raises.

I. The Court Should Grant Certiorari To Resolve The Undisputed Conflict Among The Circuits About Whether *Chevron* Deference Applies To An Agency's Interpretation Of Its Own Jurisdiction.

FERC does not challenge Connecticut's showing that the lower courts are hopelessly fractured on the fundamental question of whether – and, if so, how – they must defer to an agency's interpretation of its own statutory jurisdiction. Pet. at 24-25. FERC attempts to state a "generally" applicable rule of deference, FERC Br. at 9, without acknowledging the diverse views among the circuits, ranging along the

entire spectrum from unstinting ratification of the agency's views (as in the D.C. Circuit) to a *de novo* examination of the statutory provisions (as in the Seventh Circuit). Nor does FERC contest or even recognize the applicability of this Court's recent decisions that preserve traditional State powers against a federal agency's intrusions beyond its statutory mandate. Pet. at 29-31.

Instead, FERC attempts to expunge the Court of Appeals' express declaration that "[w]e afford *Chevron* deference to the Commission's assertion of jurisdiction." Pet. App. 9. As demonstrated throughout its opinion, the Court of Appeals was true to its word. Indeed, judicial deference played a central role in the Court of Appeals' affirmation of every material aspect of FERC's interpretation of its own jurisdiction to set the Installed Capacity Requirement ("ICR") for New England. A few examples will suffice.

First, the Court of Appeals reflected its deference from the outset when it framed the issue to be decided: "does setting the ICR represent the kind of direct regulation of generation facilities *plainly forbidden* by section 201?" Pet. App. 10; FERC Br. at 9 (emphasis added). By stating the issue in the negative, the Court of Appeals invoked the erroneous premise that whatever is not forbidden is permitted. By structuring its analysis in this way, the Court disregarded the fundamental principle of federal administrative law that an agency like FERC "is 'a creature of statute,' and has 'only those authorities conferred upon it by Congress'; 'if there is no statute

conferring authority, a federal agency has none.'" *North Carolina v. EPA*, 531 F.3d 896, 922 (D.C. Cir. 2008) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)); *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("no matter how 'important, conspicuous, and controversial' the issue . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress") (internal citations omitted). This misconception of the agency's authority permeated the Court of Appeals' analysis. *See, e.g.*, Pet. App. 13-14 ("Section 201 prohibits the Commission from regulating generating facilities but says nothing about its power to review the capacity requirements . . . ."), 14 ("[n]either section [207 nor 215], however, unambiguously prohibits the Commission from requiring [public utilities] to obtain adequate capacity[,]" "[n]or does anything in section 215(i) prohibit the Commission from requiring capacity purchases . . . .").

Rather than determining whether FERC's regulation of ICR was a lawful exercise of Congressionally conferred authority, the Court of Appeals seized on the absence of any statutory prohibition and merely considered whether FERC acted "reasonably." *See id.* at 15 ("[t]hat reasonable concerns about system adequacy might factor into the fairness of those charges is precisely what brings them within the heartland of the Commission's section 206 [sic] jurisdiction"); FERC Br. at 13 (contending that, "[a]s the court of appeals noted here," FERC's review of the

capacity requirement "involved . . . reasonable line-drawing") (citing Pet. App. 15). Of course, a court exercising *Chevron* deference must affirm "a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Instead of determining whether Congress gave FERC authority to set the amount of required capacity – as it was required to do – the Court gave FERC the benefit of the doubt at every turn, acceding to the agency's analysis so long as it was not unreasonable, the hallmark of *Chevron* deference.

Second, after acknowledging that "'[c]apacity' is not electricity itself [*i.e.*, energy] but the ability to produce it when necessary," Pet. App. 4, the Court of Appeals unquestioningly accepted FERC's argument for jurisdiction over capacity under section 201(b)(1), which gives FERC "jurisdiction over . . . [the] sale of electric *energy* at wholesale in interstate commerce . . . ." 16 U.S.C. § 824(b)(1) (2006) (emphasis added); Pet. App. 13-14 (inferring FERC jurisdiction over capacity from the absence of any prohibition in section 201). In sharp contrast, however, the Court dismissed any limitation on FERC's jurisdiction imposed by section 207, 16 U.S.C. § 824f (2006) (which prohibits FERC from compelling "the enlargement of generating facilities" or compelling a public utility "to sell or exchange energy" to assure "the proper, adequate, or sufficient service to be furnished"), because the Court believed "this section seems to be about *energy* itself rather than capacity." Pet. App. 14; FERC Br. at 11-12 (emphasis added). Rather than construing section 201

consistently as also being "about energy itself rather than capacity," the Court of Appeals adopted FERC's incongruous interpretation to justify federal jurisdiction to set ICR.

Third, both FERC's and the Court of Appeals' purposefully coincident omissions also reflect the Court's unswerving deferral to the agency's interpretation. For instance, although Connecticut raised the issue repeatedly at the agency and before the Court, neither even mentioned the requirement in section 201(b)(1) that any grant of federal jurisdiction over generation facilities must be "specifically provided." 16 U.S.C. § 824(b)(1). Apparently oblivious to the canon of interpretation requiring every clause and word in the statute to be given effect, *Duncan v. Walker*, 533 U.S. 167, 174 (2001), the Court and FERC rest their inference of authority to set ICR on their identical interpretation of capacity as a "practice[ ]" "affecting . . . rates" under section 205, 16 U.S.C. § 824d (2006), deliberately disregarding the limitation in section 201(b)(1) that permits FERC jurisdiction over generation facilities only if "specifically provided." The Court simply followed FERC's lead in every significant respect, even when the agency disregarded applicable statutory directives.

Finally, the Court of Appeals followed in lockstep with FERC's summary dismissal of the statutory prohibitions on FERC's authority "to set and enforce compliance with standards for adequacy . . . of electric facilities or services." 16 U.S.C. § 824o(i)(2) (2006). FERC and the Court both rejected any

consideration of this "savings provision," contending that it "deals only with the authority that [this] section provides rather than what the Act as a whole forbids," *i.e.*, proscribing FERC jurisdiction to set resource adequacy standards. Pet. App. 14; FERC Br. at 12; *see* Pet. App. 94, 170-71. Both the Court and FERC ignore the basic principle of statutory construction that a statute should be read in its entirety. *See* Pet. at 30-31 (showing that "Congress would not have taken these categorical steps . . . to confine FERC's powers [by precluding federal actions to ensure the adequacy and reliability of electric service] if it had actually intended for FERC to assume precisely those same powers through its expansive reading of the statute.").

Contrary to FERC's contention, FERC Br. at 9-10, this case provides a propitious vehicle for the Court to decide the extent of any *Chevron* deference to an agency's interpretation of its own jurisdiction. FERC's interpretation – to which the lower court unambiguously deferred in every relevant respect – extends the Federal Power Act's ("FPA's") "practices" "affecting . . . rates" language to an extreme that infringes on those fundamental State responsibilities that Congress carefully shielded from federal authority and that this Court has recognized in its increasingly nuanced application of *Chevron* when an agency's actions trigger federalism concerns. *See* Pet. at 29-30. Deference here will give FERC and other federal agencies license to accrete authority that Congress never intended.

II. The Court Should Grant Certiorari To Decide An Issue Of Exceptional Importance: Whether By Setting ICR FERC Impermissibly Usurps State Authority Over Resource Adequacy And Generation Facilities.

When FERC sets ICR, it indisputably establishes the number of megawatts of capacity that each utility in a State "must provide." Pet. App. 99-100. Despite this unequivocal mandate to provide a specified amount of capacity, the Court of Appeals adopted FERC's litigation position, asserting that FERC does not "require" installation of a particular quantity of capacity. *Id.* at 10. In fact, FERC characterized ICR as "the amount of resources [public utilities] *must provide* (which leads ultimately to a determination of the amount of resources each individual State's [public utilities] *must provide*) . . . ." *Id.* at 99-100 (emphasis added); *see* FERC Br. at 5 (ICR is the number of megawatts public utilities "will be required to purchase"). Rather than merely "review[ing]" an ICR number proposed by others, as FERC asserts repeatedly, *see* FERC Br. at 5, 7, 8, 10, 12, FERC *sets* the ICR by "direct[ing]" the system operator to increase or decrease specific calculations of the ICR constituents (*e.g.*, the extent to which a region can rely on neighboring areas for capacity), thereby dictating the installed capacity that each State "must provide." Supp. Pet. App. 16-17.

This obligation necessarily compels States both to maintain existing capacity through the continued operation of less efficient, more polluting generators

and, if FERC's projection of expected demand exceeds the installed capacity, to build new generation facilities that will meet FERC's projections of expected demand. Because of transmission limitations, capacity is location-sensitive, *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318, 62,844-62,845 (2007), so that a utility may be precluded from relying on imported power, as FERC suggests. FERC Br. at 10; Pet. App. 10. Even demand response (*i.e.*, a customers' ability to reduce its system usage when requested) often implicates installation or operation of distributed generation facilities (*e.g.*, diesel generators located at an individual retail customers' factory or commercial building).

By setting the amount of the ICR, FERC directly preempts the traditional authority exercised by every State to determine the "public need and necessity" for generation facilities. Contrary to FERC's claims, FERC Br. at 13-14, the New England States and States throughout the country have historically regulated and continue to regulate electric capacity needs. Pet. at 10-12. Indeed, virtually every State requires a finding of need and necessity as a prerequisite for permitting a generation facility. *See*, *e.g.*, CONN. GEN. STAT. §§ 16-50p(a), (h) (2009) (Pet. App. 281, 288) (requiring a showing of "public need," *i.e.*, that an energy facility "is necessary for the reliability of the electric power supply of the state"); FLA. STAT. ANN. § 403.519(3) (2009) (requiring a showing of "public need and necessity" for an electrical power plant based on "the need for electric system reliability and integrity, the need for adequate electricity at a

reasonable cost, the need for fuel diversity and supply reliability," cost effectiveness, and the use of renewable energy sources to the extent reasonably available); 220 ILL. COMP. STAT. 5/8-406(b) (2009) (requiring a showing that construction of the proposed facility "is necessary to provide adequate, reliable, and efficient service to [the utility's] customers"). This Court has also repeatedly acknowledged the States' traditional authority to determine the need for electric capacity. Pet. at 10-11.

FERC's rationale for displacing this deep-rooted State authority is both mistaken and far-reaching. FERC impermissibly extrapolates the authorized federal regulation of wholesale capacity *charges* into the prohibited function of setting the *amount* of capacity that each State "must provide." FERC and the Court of Appeals rely extensively on *Municipalities of Groton v. FERC*, 587 F.2d 1296 (D.C. Cir. 1978), for the proposition that because FERC can set wholesale capacity charges, it has equal plenary authority to set the quantity of capacity required. Pet. App. 15-16; FERC Br. at 14. *Groton* never purported, however, to do anything other than set the wholesale charge for capacity if a public utility did not provide sufficient resources to meet a State-jurisdictional capacity requirement. It did not allow FERC to set the level of required capacity. Indeed, until the beginning of this decade, FERC had deferred to State authority to set the required *amount* of capacity, lest it infringe on the FPA's preservation of State jurisdiction. *See* Pet. at 13-14; *see also Central and South*

West Services, Inc., 49 FERC ¶ 61,118, 61,502 (1989) (requiring a utility to report the amount of its planning reserve levels (the equivalent of ICR) but emphasizing that this requirement "does not sanction a specific planning reserve level for any other purpose" and urging the utility to be "best guided" in setting its reserve levels by industry standards "and by the individual state commissions . . . .").

As the Court of Appeals held in *Maine Public Utilities Commission v. FERC*, 520 F.3d 464, 480 (D.C. Cir. 2008), *cert. granted sub nom. NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 129 S. Ct. 2050 (Apr. 27, 2009) (No. 08-674) (argued Nov. 3, 2009),[1] ICR is an "exogenously determined" input into the mechanism used to determine the capacity charge. In that case, the Court of Appeals affirmed FERC's mechanism to set the capacity charge under *Groton* but held that it did not have to consider whether FERC had authority to set the amount of required capacity – a distinct matter that would not affect the validity or invalidity of the wholesale capacity charge. *Id.* at 479-80. On the other hand, no appellate case before this one has granted FERC jurisdiction to set the amount of capacity.

The Court of Appeals' use of the phrase "practices affecting . . . rates" as the sole jurisdictional basis for

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[1] FERC correctly noted that *NRG Power Marketing* presents "entirely independent legal issues" that have no implications for this case. FERC Br. at 14 n.*.

this asserted authority has ramifications for a wide range of State functions. Pet. at 37. Neither FERC nor the Court of Appeals explains the limits – if there are any – on FERC's asserted power to regulate "practices affecting . . . rates." *See* FERC Br. at 13-14; Pet. App. 17. Such an open-ended mandate is particularly troubling in light of FERC's recent application of the Court of Appeals' rubric to compel States to adopt particular laws and regulations for retail customers. Pet. at 36-37. If the ruling below is permitted to stand, nothing will restrain FERC from exerting authority over nearly any practice by asserting that it somehow affects rates. This unbridled ability to intrude on those functions that Congress purposefully left to the States will have potentially grave consequences for Congress' decision to divide jurisdiction between FERC and the States and, therefore, for traditional principles of federalism.

CONCLUSION

The Court should grant the writ of certiorari to determine the deference, if any, owed to FERC when it defines the limits on its own jurisdiction in a Congressionally dictated dual regulatory system, thereby aggrandizing power and authority at the federal level to the detriment of the States. The Court should also grant the petition to decide whether the nebulous phrase "practices affecting . . . rates" permits

FERC to dictate the amount of electric capacity resources that each State "must provide" when Congress has reserved that function to the States.

Respectfully submitted,

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