No. _____

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

PETITION FOR A WRIT OF CERTIORARI

JOHN S. WRIGHT
MICHAEL C. WERTHEIMER
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
10 Franklin Square
New Britain, CT 06051
(860) 827-2684

Counsel for Petitioner Richard Blumenthal, Attorney General for the State of Connecticut

RANDALL L. SPECK
Counsel of Record
KIMBERLY B. FRANK
LISA B. KATZ
REBECCA E. GRUNFELD
KAYE SCHOLER LLP
901 15th Street, NW
Washington, DC 20005
(202) 682-3510

Counsel for Petitioner Connecticut Department of Public Utility Control

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

The Federal Power Act ("FPA") draws a "bright line" between federal and State regulatory jurisdiction. The plain language of the FPA precludes the Federal Energy Regulatory Commission ("FERC") (1) from regulating electricity generation facilities unless "specifically provided" or (2) from setting or enforcing compliance with standards for the adequacy, sufficiency, or reliability of electricity facilities or services to be furnished. 16 U.S.C. §§ 824(b)(1), 824f, 824o(i)(2)-(3). Nevertheless, FERC relies on its interpretation of the phrase "practices . . . affecting" jurisdictional rates in Section 205, 16 U.S.C. § 824d, to assert authority to set the amount of installed electric capacity that Connecticut must provide for adequate, reliable service – *i.e.*, the Installed Capacity Requirement ("ICR"). The questions presented are:

1. Should a court defer to FERC's interpretation of its jurisdiction under the FPA to set the amount of installed electric capacity that each State must provide for adequate, sufficient, reliable service?

2. Does FERC's asserted jurisdiction to set ICR as a "practice . . . affecting" wholesale rates encroach impermissibly on the States' traditional powers, which Congress preserved in the FPA, to determine the adequacy, sufficiency, and reliability of electric facilities or services to be furnished and to regulate generation facilities?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Connecticut Department of Public Utility Control was the petitioner in the U.S. Court of Appeals for the D.C. Circuit and a party before the Federal Energy Regulatory Commission. 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 under this Court's Rule 12.6.

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 Pool 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;

PARTIES TO THE PROCEEDINGS BELOW – Continued

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.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Connecticut Department of Public Utility Control (the "Department") and Richard Blumenthal, Attorney General for the State of Connecticut, (collectively, "Connecticut") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-19) is reported at 569 F.3d 477. The orders of the Federal Energy Regulatory Commission ("FERC") (Pet. App. 22-83, 137-157, and 197-210) are reported at 118 FERC ¶ 61,157, 119 FERC ¶ 61,161, and 122 FERC ¶ 61,144, and the orders denying rehearing (Pet. App. 84-136, 158-196, and 211-216) are reported at 120 FERC ¶ 61,234, 121 FERC ¶ 61,125, and 123 FERC ¶ 61,036.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 23, 2009. Pet. App. 20-21. The Court denied rehearing and rehearing *en banc* on July 28, 2009.

Pet. App. 217-220. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2006).

STATUTES AND REGULATIONS

Relevant portions of the Federal Power Act, tit. II, ch. 687, 49 Stat. 803, 838-63 (1935) (codified, as amended, at 16 U.S.C. §§ 824-824w and 825-825u (2006)), are set forth at Pet. App. 222-263. Relevant portions of pertinent State statutes are set forth at Pet. App. 276-315.

STATEMENT OF THE CASE

I. STATUTORY FRAMEWORK

A. The Federal Power Act

This case is about Congress' preservation of States' rights to make decisions about the quantity of electricity production – *i.e.*, generation – facilities needed to provide adequate service. The FPA establishes a dual jurisdictional structure, assigning some defined areas of electricity regulation to FERC but otherwise prohibiting federal intrusion into the States' domain. Rather than a case-by-case determination of State or federal jurisdiction based on a general standard, the FPA defines a "bright line" of demarcation. *See FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964) ("Congress meant to draw a bright line easily ascertained, between state and federal

jurisdiction, making unnecessary such case-by-case analysis").

Section 201(a) shapes the over-arching framework by carving out the States' reserved jurisdiction from the specifically delineated federal scope, declaring

> that Federal regulation of matters relating to generation to the extent provided in this subchapter [16 U.S.C. §§ 824 *et seq.*] and subchapter III of this chapter [16 U.S.C. §§ 825 *et seq.*] and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

16 U.S.C. § 824(a); *see Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 527 (1945) (finding that "such a declaration is relevant and entitled to respect as a guide in resolving any ambiguity or indefiniteness in the specific provisions which purport to carry out its intent," and "[i]t cannot be wholly ignored"). Congress further prescribed in Section 201(b) that

> [t]he Commission *shall have jurisdiction* over all facilities for such transmission [of electricity in interstate commerce] or sale of electric energy [at wholesale in interstate commerce], *but shall not have jurisdiction*,

> except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy . . . .

16 U.S.C. § 824(b)(1) (emphasis added).

Congress stressed this prohibition on FERC's jurisdiction over generating facilities. Section 202(b) plainly declares that FERC "shall have no authority to compel the enlargement of generating facilities . . . ." *Id.* § 824a(b). Similarly, Section 207 defines narrow circumstances when FERC can "[o]rder[ ] furnishing of adequate service."

> Whenever the Commission, upon complaint of a State commission, . . . shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission *shall have no authority to compel the enlargement of generating facilities for such purposes* . . . .

Id. § 824f (emphasis added).

As foreshadowed by the exception in Section 201(b)(1), Congress did "specifically provide" for FERC jurisdiction over generating facilities in certain expressly identified, exceptional circumstances. For example, during a war, when "the Commission determines that an emergency exists by reason of . . . a shortage of electric energy or of facilities for the

generation or transmission of electric energy," Section 202(c) grants FERC authority to require "such generation . . . as in its judgment will best meet the emergency and serve the public interest." *Id.* § 824a(c). Section 203(a)(1) requires a public utility to obtain a FERC order authorizing it to "purchase, lease, or otherwise acquire an existing generation facility" if the facility meets a minimum threshold value and is used for interstate wholesale sales. *Id.* § 824b(a)(1)(D). Section 301 requires public utilities to make and keep accounts and records for generation facilities, *id.* § 825(a), and Section 303 makes FERC's reporting and depreciation requirements applicable to United States governmental agencies' generation facilities that produce electric energy for ultimate distribution to the public. *Id.* § 825b. These explicit exceptions delimit the comprehensive proposition that FERC "shall not have jurisdiction . . . over facilities used for the generation of electric energy . . . ." *Id.* § 824(b)(1).

FERC does not rely on the FPA's jurisdictional framework in Sections 201 or 202 but instead claims authority to set the Installed Capacity Requirement ("ICR") in New England because it is a "practice" "affecting . . . rates" under Section 205:[1] "All rates and

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[1] The Court of Appeals mistakenly relies on FPA Section 206, 16 U.S.C. § 824e(a), for FERC's jurisdiction over practices affecting rates. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 483 (D.C. Cir. 2009) (*"Conn. Dep't II"*) (Pet. App. 18). These proceedings arise, however, under Section 205, 16 U.S.C. § 824d. *See* Pet. App. 86, 147-48, 200-01. Both Sections 205 and

(Continued on following page)

charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable . . . ." *Id.* § 824d(a). Section 205 further provides that FERC may require every public utility to file "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." *Id.* § 824d(c).

B. The Energy Policy Act Of 2005

Section 1211 of the Energy Policy Act of 2005 amended the FPA to bolster the reliability of the "bulk-power system" and to create an Electric Reliability Organization. Pub. L. 109-58, 119 Stat. 594, 941-46 (codified at 16 U.S.C. § 824o). Congress made clear, however, that while the "bulk-power system" includes "electric energy from generation facilities needed to maintain transmission system reliability," the term "reliability standard" "does *not* include any requirement to enlarge [existing generation] facilities

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206 include similar, but not identical, language permitting FERC to *consider* practices affecting jurisdictional rates when assessing the justness and reasonableness of rates. *See FPC v. Conway Corp.*, 426 U.S. 271, 280-82 (1976); *infra* at 34.

or to construct new . . . generation capacity." 16 U.S.C. § 824o(a)(1), (3) (emphasis added). Congress further emphasized that this amendment "does not authorize the [Electric Reliability Organization] or the Commission to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy . . . of electric facilities or services." *Id.* § 824o(i)(2). Moreover, "[n]othing in this section shall be construed to preempt any authority of any State to take action to ensure the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any reliability standard . . . ." *Id.* § 824o(i)(3).

II. INSTALLED CAPACITY REQUIREMENTS

A. Defining Installed Capacity Requirements

ICR is a reliability standard that specifies the number of megawatts of electric production capability deemed sufficient to provide adequate electric service. This "resource adequacy measure[ ]," *ISO New England Inc.*, 123 FERC ¶ 61,290 (2008) at P 27, identifies "the total amount of capacity required by the system to meet peak [demand] plus a reserve margin," *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) at P 201 n.177, or "the minimum level of [electric production] capacity that is necessary to maintain reliability on the grid." *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 469 (D.C. Cir. 2008),

cert. granted sub nom. NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n, 129 S. Ct. 2050 (2009). "Capacity" is "the ability to produce electric energy to serve load, when called by" the regional system operator. Pet. App. 100.

Resource adequacy measures like ICR may be developed using a variety of assumptions, including planned and unplanned generation facility outages, estimates for anticipated load growth, and the postulated benefits of relying on generation capacity from neighboring electrical systems. From a technical, reliability standpoint, ICR is not a single, empirically derived data point – *i.e.*, there can be "More Than One Acceptable Resolution" for ICR, and "two solutions to a technical issue are acceptable." JA 331. Thus, although a range of megawatt amounts can reasonably satisfy all objective reliability planning criteria, one end of that range may be patently unreasonable when assessed within the context of the resulting costs or State policy considerations. Under FERC's currently authorized process for New England, however, the regional system operator "determines the values it will file with the Commission," JA 9, notwithstanding whether the States concur.

Once the regional system operator fixes ICR and files it with FERC, the ICR becomes a mandatory obligation that each State's public utilities must provide. The ICR also sets an individual State's "Local Sourcing Requirement," *i.e.*, "the minimum amount of resources that an import-constrained zone

[like Connecticut] must maintain in order to meet reliability needs." JA 14. *See* JA 24; *Devon Power LLC*, 115 FERC ¶ 61,340 at P 121 (the Local Sourcing Requirement is the portion of the ICR "that must be obtained within each zone," *e.g.*, within Connecticut). FERC characterizes 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*) . . . ." Pet. App. 99-100 (emphasis added).

ICR has been generally characterized as "generating capacity." *See*, *e.g.*, *New England Power Pool*, 83 FERC ¶ 61,045, 61,262 (1998) (equating ICR with "the amount of installed *generation* that is needed to meet loads in [New England]") (emphasis added); JA 115 (defining ICR as "a measure of the installed *generating* capability," "the amount of *generating* capacity needed to meet the reliability requirements," and "the amount of *generating* capacity needed in New England") (emphasis added). The ICR may be satisfied by either generation facilities or enforceable demand reduction, but generation facilities have historically provided virtually all of New England's capacity. JA 124 (98% of capacity supplied by generation facilities). Given their overwhelming predominance as the way public utilities must meet their ICR obligations, constructing new generation facilities to meet ICR is effectively an "imperative." *See* Pet. App. 13; *see also* J. Alexander Cooke, *The Resource Adequacy Requirement in FERC's Standard Market Design: Help for*

Competition or a Return to Command and Control?, 20 YALE J. ON REG. 431, 453 (2003) (concluding that the suggestion that ICR does not directly regulate "generation capacity" is "a sleight of hand" attempt "to evade the FPA's explicit restrictions").

B. States' Traditional Responsibility For Determining The Need For Electric Capacity

In enacting the FPA, Congress observed that "[p]robably, no bill in recent years has so recognized the responsibilities of State regulatory commissions as does title II of this bill." *Conn. Light & Power*, 324 U.S. at 526 (quoting H.R. REP. NO. 74-1318, at 8 (1935)). The statute "removed every encroachment upon the authority of the States," and "[t]he limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section [of the FPA] in a effort *to prevent the expansion of Federal authority over State matters*." S. REP. NO. 74-621, at 18 (1935) (emphasis added). One well-recognized State responsibility in 1935 was to assure the availability and reliability of electric production facilities. *See Restructuring of the Elec. Indus.*, 163 P.U.R. 4th 1, 10 (Conn. DPUC 1995) (reporting that through the 1930s, Connecticut's electric regulation agency focused on availability and reliability). Indeed, this Court and FERC have recognized "traditional state regulatory authority" over "most power production." *New York v. FERC*, 535 U.S. 1, 12 n.9 (2002) (quoting *Promoting Wholesale*

Competition through Open Access Non-Discriminatory Transmission Services by Public Utilities, 75 FERC ¶ 61,680 (1996), 61 Fed. Reg. 21,540, 21,626 (May 10, 1996)). States have historically regulated "electricity production," "determin[ed] questions of need, reliability, cost and other related state concerns," "regulated for many years and in great detail" the "economic aspects of electrical generation," determined the "[n]eed for new power facilities," made "the initial decision regarding the need for power," and "exercise[d] their traditional authority over the need for additional generating capacity . . . ." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 194, 205-06, 212 (1983).

Not surprisingly, therefore, Connecticut statutes charge its regulators with precisely these responsibilities. For example, the "Connecticut Energy Advisory Board" must "review the state's energy and capacity resource assessment and develop a comprehensive plan for the procurement of energy resources," assess "the energy and capacity requirements of customers for the next three, five and ten years," and develop a State procurement plan that specifies "the total amount of energy and capacity resources needed to meet the requirements of all customers." CONN. GEN. STAT. §§ 16a-3a, 16a-3b, and 16a-3c (2009). The General Assembly has directed the Department to "determine the level of [a utility's] reserve capacity," to reduce that reserve capacity requirement when justified, and to solicit additional generating facilities as needed to assure adequate

service. *Id.* §§ 16-19aa(a), 16-19ss(a). The Connecticut Siting Council must prepare annual resource plans and forecasts and must make a finding of public need to site any new generation facility, *i.e.*, the facility must be necessary to assure the reliability of Connecticut's electric power supply. *Id.* §§ 16-50p, 16-50r. It is State policy to "encourage and allow for a sufficient number of in-state generating facilities to ensure an adequate and reliable power supply within the state . . . ," and "assurance of safe, reliable and available electric service to all customers" is an "essential governmental objective." *Id.* §§ 16-244(7)-(8). Other New England States – like most States – have similar regulatory directives. *See*, *e.g.*, ME. REV. STAT. ANN. tit. 35-A, § 3210-D (2008); R.I. GEN. LAWS § 42-98-2 (2008); MASS. GEN. LAWS ch. 164, § 69I (2009); N.H. REV. STAT. ANN. § 162-H:1, (2009); VT. STAT. ANN. tit. 30, § 202a(1) (2008).

C. FERC's Treatment Of Installed Capacity Requirements

FERC has espoused a variety of positions on its jurisdiction to set electric reserve or capacity requirements. For example, in 2002, FERC proposed to create a regional "resource adequacy requirement to provide for sufficient supply and demand resources to avert [resource] shortages." *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, 100 FERC ¶ 61,138 (2002) at P 459, 67 Fed. Reg. 55,452, 55,511 (Aug. 29, 2002). Relying on its "broad" authority to

remedy undue discrimination and anticompetitive effects, FERC proposed to require that each regional system operator "forecast the future demand for its [geographic] area, facilitate determination of an adequate level of future regional resources by a Regional State Advisory Committee, and assign each [public utility] in its area a share of the needed future resources based on the ratio of its load to the regional load." *Id.* at PP 101, 474. This proposal was modeled after "the traditional reserve margin requirement imposed by states on monopoly utilities" and was "designed to complement, not replace, existing state resource adequacy programs." *Id.* at PP 480-81.

This proposal drew concerns that it would "infringe on state jurisdiction," and in response, FERC issued a "White Paper" "indicat[ing] that . . . nothing in the Final Rule would change state authority over resource adequacy requirements . . . ." *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, 112 FERC ¶ 61,073 (2005) at PP 3-4, 70 Fed. Reg. 43,140, 43,141 (July 26, 2005). Despite these assurances, the States' doubts persisted, and FERC terminated the rulemaking without a final rule. *Id.* at P 7. In contemporaneous proceedings, States continued to insist that "the Resource Adequacy issue is wholly outside of the Commission's purview" and that "the Commission has no authority over adequacy of generation." *Midwest Indep. Transmission Sys. Operator, Inc.*, 103 FERC ¶ 61,210

(2003) at P 17. In response, FERC "agree[d] . . . that resource adequacy programs, in particular, are the responsibility of the states." *Id.* at P 21.

Notwithstanding this agreement that resource adequacy programs are States' responsibility, in New England, FERC has asserted plenary jurisdiction to dictate the amount of capacity resources that public utilities in each State must provide. In April 2003, FERC first ordered the New England system operator "to make a timely [FPA] Section 205 filing of" Objective Capability values, an earlier term for ICR. *NSTAR Elec. & Gas Corp. v. New England Power Pool*, 103 FERC ¶ 61,093 (2003) at P 23. In 2005, at the inception of this case, FERC took a step further, asserting its "authority to accept" the proposed ICR, making its own assessment of the proper amount of required capacity, rejecting Connecticut's objections, and increasing or decreasing the level of required capacity reserves based on its own judgments. *ISO New England Inc.*, 112 FERC ¶ 61,254 (2005).

D. Installed Capacity Requirements And The Forward Capacity Market

In New England, "[t]he purpose of calculating the ICR . . . is to determine the amount of resources that need to be procured in the [Forward Capacity Market] in order to meet the resource-adequacy reliability criterion." JA 58. The regional system operator files "the Installed Capacity Requirements and Local Sourcing Requirements for each upcoming

Power Year . . . with [FERC] pursuant to Section 205 of the [FPA]." JA 29. ICR is an "exogenously-determined" "input" into the Forward Capacity Auction mechanism. *Me. Pub. Utils. Comm'n*, 520 F.3d at 480. Through this auction, each public utility "must provide" its allotted megawatt share of the ICR. *See supra* at 9.

III. PROCEEDINGS BELOW

A. Proceedings Before FERC

FERC initially asserted its "authority to accept [the] proposed [ICR]" because it was "simply determining the [ICR], as the [Independent System Operator] Tariff and the New England Participants Agreement provide." *ISO New England Inc.*, 112 FERC ¶ 61,254 at P 17. The U.S. Court of Appeals for the D.C. Circuit found this rationale wanting and remanded to FERC for further proceedings, relying on *SEC v. Chenery Corp.*, 318 U.S. 80 (1942). *Conn. Dep't of Pub. Util. Control v. FERC*, 484 F.3d 558 (D.C. Cir. 2007) ("*Conn. Dep't I*"). In two subsequent proceedings and on remand of the first proceeding, FERC declared its jurisdiction based on FPA Section 205, 16 U.S.C. § 824d(a), contending that setting ICR was a practice "affecting" transmission and wholesale power sales rates and charges, thereby conferring on itself authority to set ICR, notwithstanding the FPA's declaration that FERC "shall not have jurisdiction" over generation facilities or resource adequacy determinations. Pet. App. 31-32, 147-48, 204. Connecticut submitted timely rehearing requests, which FERC

denied on the same grounds. Pet. App. 105-06, 182-83, 215.

B. Proceedings In The Court Of Appeals

Within 60 days of each rehearing order, Connecticut filed petitions with the Court of Appeals for the D.C. Circuit for review of FERC's orders, as required by FPA Section 313(b), 16 U.S.C. § 825*l*(b). The Court of Appeals consolidated those three proceedings. On June 23, 2009, without fully analyzing the FPA's unambiguous text preserving the States' jurisdiction, the Court of Appeals deferred to FERC's interpretation of the phrase "practices affecting . . . rates" as conferring authority to set the ICR, denied the petitions, and entered judgment. Pet. App. 18-19. The Court of Appeals "afford[ed] *Chevron* deference to the Commission's assertion of jurisdiction." *Id.* at 9 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

In affirming FERC's authority to set ICR, the Court of Appeals first acknowledged that "a higher ICR may . . . feel like an imperative," but nevertheless concluded that it did not "directly compel[] construction of new generation facilities." *Id.* at 13. Second, the Court of Appeals found "nothing in the Federal Power Act [that] expressly proscribes requiring [public utilities] to pay for a certain amount of capacity," and dismissed as irrelevant those provisions – Sections 207 and 215(i)(2)-(3) – that directly prohibit the exercise of federal jurisdiction over

resource adequacy. *Id.* at 13-14. Third, the Court of Appeals accepted FERC's interpretation of ICR as a practice affecting rates, placing it "within the heartland of the Commission's section 206 jurisdiction, *see* § 824e(a)."[2] *Id.* at 15. Fourth, the Court of Appeals found that its precedents establishing FERC's jurisdiction to set the amount of capacity "charge[s]" or to allocate the costs of capacity among corporate affiliates were indistinguishable from FERC's authority to set the amount of electric facilities or capacity (measured in megawatts) that each public utility in a State must provide. *Id.* at 15-17.

On July 14, 2009, Connecticut petitioned for panel rehearing or rehearing *en banc*. On July 28, 2009, the Court of Appeals denied those petitions.

REASONS FOR GRANTING THE PETITION

The Court of Appeals' judgment upsets the clear-cut balance that Congress struck when it apportioned jurisdiction for electric regulation between FERC and the States. The FPA plainly states that FERC "shall not have jurisdiction" over electricity production facilities, it "shall have no authority to compel the enlargement of generating facilities" in the name of adequate or sufficient service to be furnished, and it may not "preempt any authority of any State to take

[2] *See supra* note 1 at 5-6.

action to ensure the . . . adequacy, and reliability of electric service within that State." 16 U.S.C. §§ 824(b)(1), 824f, 824o(i)(3). By deferring to FERC's criterion for accreting authority – *i.e.*, whether a practice "affects" jurisdictional rates – the Court of Appeals departs from the no-deference rule of some of its sister circuits and disregards the governing statute, thereby permitting FERC to expand its powers exponentially into realms that Congress made clear it did not intend. When FERC mandates capacity requirements, in the form of ICR, it usurps the States' traditional responsibility to determine the need for electric capacity and thereby disrupts the federalism principles that guided Congress when it enacted and later amended the FPA. This Court should grant the requested writ to preclude FERC's assertion of jurisdiction over regulatory decisions that the FPA, by its plain text, expressly reserved to the States.

First, the lower courts urgently require the Court's direction on the fundamental applicability of *Chevron* to an agency's interpretation of its own powers when Congress has expressly and unambiguously partitioned State and federal responsibility along a bright line. States challenging FERC's jurisdiction in the Court of Appeals for the D.C. Circuit, as in this case – or in the Third, Fourth, and Ninth Circuits, where a similar rule may prevail – must overcome the court's usually dispositive deference to the agency's determination of its own jurisdiction, while petitioners in the Seventh or

Second Circuits may face no such hurdle. *See infra* at 24-25. Scholars, as well, can decipher no reliable answer from this Court's decisions. *See* Nathan A. Sales and Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 102 (forthcoming, 2009), *available at* http://law.case.edu/faculty/adler_jonathan/articles/Silence-proof.pdf. Consequently, lower courts are left adrift, reaching different conclusions from circuit to circuit and sometimes from panel to panel within a circuit. The dueling rules create an intolerable uncertainty that must be resolved.

This case presents the issue starkly. The FPA by equal measures confers jurisdiction on FERC and precludes a federal assumption of the States' traditional regulatory role. By dictating the number of megawatts of installed electric production capability that public utilities in each State "need" and "must provide," FERC extends its own jurisdiction – and strips away State jurisdiction – based on its aggrandizing construction of the statute. In these circumstances, deference to the agency is tantamount to an abdication of judicial oversight to enforce the FPA's Congressionally-imposed constraints on the reach of federal regulation.

By deferring to FERC's extravagant reading of its FPA-constrained jurisdiction, the Court of Appeals' judgment conflicts with the rule in other circuits and this Court's precedents. Whether analyzed (1) as Congress' refusal to delegate interpretive authority to FERC over jurisdictional decisions, (2) under the

familiar "plain language" rubric of *Chevron* step one, *Chevron*, 467 U.S. at 842-43, or (3) as a Congressionally prohibited intrusion on traditional state powers, FERC's rendering of the statute is unjustifiable and should carry no weight. The Court of Appeals erred by deferring to FERC's ungrounded interpretation of its own jurisdiction, and this Court should grant the writ to provide essential guidance by resolving the split on this question among the Courts of Appeals and the conflicts between this Court's precedent and the Court of Appeals for the D.C. Circuit.

Second, Congress did not intend for Section 205 to confer open-ended federal authority over "practices affecting . . . rates," thereby nullifying the carefully drawn protections against infringement of States' traditional powers. This Court has cautioned against construing such an amorphous phrase so that it swallows up the express statutory limits on FERC's jurisdiction. *See, e.g., Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 514 (1989); *Conway*, 426 U.S. at 280-82; *FPC v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 507-08 (1949); *infra* at 33-34. FERC's ungrounded reading of its powers over "practices affecting . . . rates" to encompass setting the amount of required capacity would rewrite the FPA, conferring on itself substantial new authority over areas traditionally reserved to the States and that Congress unambiguously placed off limits. Rather than respecting the bright line between the federal and State domains that Congress designed, by deferring to FERC's unsubstantiated interpretation of

its own jurisdiction, the Court of Appeals has created an indeterminate boundary between federal and State jurisdiction that must be revisited in each case, always deferring to the agency's self-interested view of whether a "practice" affects rates. This Court should grant Connecticut's petition to assess the validity and implications of such a radical new rule.

Finally, this case threatens critical State initiatives to develop cost-effective generation facilities and other resource adequacy measures that meet local needs and satisfy reliability requirements. Congress left regulation of electricity production with the States because they are best able to address local health, public safety, and welfare concerns and needs. States have taken the lead in setting objectives to lower greenhouse gas emissions, facilitating development of new nuclear resources, displacing fossil-fueled generation with "clean" coal, wind, and solar facilities, reducing demand, and using energy more efficiently. By assuming the right to dictate the amount of required generation in a State – including, for instance, determinations about how to assign a capacity "value" to intermittently operating wind or solar generation facilities and how much peak electric demand will grow – FERC will stifle those State-sponsored innovations. The extraordinarily adverse effects on federalism from FERC's judicially sanctioned misappropriation of administrative power warrant granting the writ.

I. The Court Of Appeals' Decision Conflicts With This Court's Guidance And The Rule In Other Circuits For Deference To An Agency's Interpretation Of Its Statutory Jurisdiction.

A. The Court Of Appeals Improperly Deferred To FERC's View Of The Division Between State And Federal Jurisdiction When Congress Did Not Delegate Such Interpretative Authority To The Agency.

The premise for *Chevron* deference derives, at least in part, from the proposition that Congress intended to delegate authority to the administrative agency to interpret ambiguous statutory terms. *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (holding "that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law"); *see also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 369-70 (1986) ("courts have used 'legislative intent to delegate the law-interpretive function' as a kind of legal fiction"); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255, 261 (1988) ("the vital pre-condition for this conclusion [to defer to the agency's interpretation] is the court's determination that the agency has been delegated the power to define the

statute"). If Congress made clear in the statute that it never intended for the agency to define the bounds of its own authority, courts have no basis for granting *Chevron* deference. *See Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 386 (1988) (Brennan, J., dissenting) (courts should not defer to an agency's interpretation of a statute that "is designed to confine the scope of the agency's jurisdiction to the areas Congress intended it to occupy"); *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 369 (1946) (when Congress did not delegate authority, "[a]n agency may not finally decide the limits of its statutory power" because "[t]hat is a judicial function").

Congress intended to fix in the FPA a "clear and complete" line between State and federal jurisdiction that would "cut sharply and cleanly between" their respective spheres, thus obviating the need for case-by-case determinations. *S. Cal. Edison*, 376 U.S. at 214-15 (quoting *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n*, 332 U.S. 507, 517 (1947)). As in *New York v. FERC*, 535 U.S. at 23, "the statutory text [is] the clearest guidance," and it circumscribes the respective realms of responsibility without equivocation – FERC "shall have jurisdiction," and it "shall not have jurisdiction." Congress intended for the FPA to provide a definitive apportionment of federal and State powers that would not require administrative interpretation, but to the extent that it did not make that decision clear, the courts properly resolve any jurisdictional dispute, without deference to the agency. Antonin Scalia, *Judicial Deference to Administrative*

Interpretations of Law, 1989 DUKE L.J. 511, 516 (1989). Moreover, the FPA was designed to confine federal jurisdiction while preserving the States' traditional powers, making it incongruous for the federal agency to decide the reach of its own authority.

The Court of Appeals here reflexively invoked *Chevron* deference to FERC's interpretation of its own jurisdiction without examining the threshold question – whether Congress intended to give this agency's view such primacy. Pet. App. 9. For the past 15 years, the Court of Appeals for the D.C. Circuit has consistently reviewed an agency's interpretation of its own jurisdiction "with the familiar *Chevron* framework in mind." *Okla. Natural Gas Co. v. FERC*, 28 F.2d 1281, 1283-84 (D.C. Cir. 1994); *but see ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987) (concluding that it was "highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power"); *Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285, 1288 (D.C. Cir. 1990) (Thomas, J.) (considering the deference issue "unsettled"). Other circuits have held, however, that *Chevron* deference does *not* apply to an agency's determination of its own jurisdiction. *E.g.*, *N. Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 846-47 (7th Cir. 2002); *Bolton v. Merit Sys. Prot. Bd.*, 154 F.3d 1313, 1316 (Fed. Cir. 1998); *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 199 (2d Cir. 2004) (Oakes, J., Sotomayor, J.); *but see Snell Island SNF LLC v. NLRB*, 568 F.3d 410, 415

(2d Cir. 2009) (applying *Chevron* deference where "the question presented involves an agency's jurisdiction or power to act"). Some other circuits apparently share the D.C. Circuit's current view, although sometimes with reservations and material variations. *See, e.g., Air Courier Conference of Am./Int'l Comm. v. U.S. Postal Serv.*, 959 F.2d 1213, 1223 (3d Cir. 1992) (deferring to agency interpretation of its own jurisdiction), *but see id.* at 1225-26 (Becker, J., concurring) (noting that the court's holding does not require deference, reading the precedents differently, and describing a "more limited" deference on jurisdictional questions); *Saipan Stevedore Co. Inc. v. Dir., Office of Workers' Comp. Programs*, 133 F.3d 717, 723 (9th Cir. 1998) (giving agency's interpretation of the statute's jurisdictional reach "some weight" but only if the interpretation implicates the agency's "special competence"); *EEOC v. Seafarers Int'l Union*, 394 F.3d 197, 201 (4th Cir. 2005) (applying *Chevron* to an agency's interpretation of the bounds of its power because the Supreme Court has never held that *Chevron* should not apply). This Court has not decided the issue. *See* Sales & Adler, 2009 U. ILL. L. REV. at 104. The lower courts require further guidance that granting certiorari in this case will provide.

B. The Court Of Appeals' Decision Disregarded Clear Statutory Limitations On Federal Jurisdiction.

Even if Congress had intended for FERC to interpret ambiguous terms to expand its own jurisdiction, the agency is still bound by the unambiguous language of the FPA, and the plain text of the operative jurisdictional provision is clear: The Commission "shall have jurisdiction" over transmission in interstate commerce and the sale of electric energy at wholesale, "but *shall not have jurisdiction*, except as specifically provided . . . , over facilities used for the generation of electric energy . . . ." 16 U.S.C. § 824(b)(1) (emphasis added). True to this bright-line distinction between federal and State powers, the remainder of the statute specifies unmistakably those exceptional, "specifically provided" circumstances when FERC may exercise jurisdiction over generation facilities. *Id.* §§ 824a(c), 824b(a), 825(a), 825b; *supra* at 4-5. Lest there be any doubt, Congress reiterated its proscription on FERC's authority to order additional generation facilities in order to assure adequate, sufficient, or reliable electric service. *Id.* §§ 824f, 824o(i)(2)-(3). By linking generation facilities in this way with adequate, sufficient, or reliable electric service, Congress unambiguously reserved "generation . . . capacity" determinations for the States. This respect for States' traditional prerogative to determine the amount of "adequate" electricity production resources permeates the FPA.

The text of the statute alone should have ended the analysis. Under *Chevron* step one, "[f]irst, always, is the question whether Congress has spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43; *see Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462 (2002) (concluding that "[i]n the context of an unambiguous statute, we need not contemplate deferring to the agency's interpretation"). The Court of Appeals bypassed this essential first step, skipping directly to the supposed "ambiguity" introduced by the phrase "practices . . . affecting . . . rates" in Section 206, 16 U.S.C. § 824e(a).[3] Seizing on the mantra that "[w]e afford *Chevron* deference to the Commission's assertions of jurisdiction," Pet. App. 9, the Court of Appeals never examined Congress' intent, as revealed in the statute's plain language.

As it had in *Chevron*, this Court reiterated in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), that Congress' clearly expressed intent – reflected in the statute when examined as a whole – controls any determination of an agency's jurisdiction. After scrutinizing the "overall regulatory scheme," including subsequently enacted legislation, the Court found a "clear intent [that] the FDA's

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[3] *See supra* note 1 at 5-6.

assertion of jurisdiction is impermissible." *Id.* at 126. "[A] reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Id.* at 132. Moreover, "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Id.* at 133.

Because it rushed to defer to the agency's view, the Court of Appeals never undertook this required examination of Congress' expressed intent. Instead of applying the precept that an agency "has no power to act . . . unless and until Congress confers power on it," *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986), the Court of Appeals looked only at whether the FPA "expressly proscribes requiring [public utilities] to pay for a certain amount of capacity." Pet. App. 13. It did not consider the overarching, bright line that the FPA struck between federal and State jurisdiction. It did not analyze the meaning of the phrase "specifically provided" in Section 201(b)(1), 16 U.S.C. § 824(b)(1), which delimits any exceptions to the strict prohibition on federal jurisdiction over generation facilities. *See infra* at 34-35. It did not evaluate the import of the 2005 amendments in Section 215(i), 16 U.S.C. § 824o(i), to shed light on Congress' intention to place resource adequacy determinations entirely off limits for FERC. *See infra* at 30-31. It dismissed the explicit prohibitions on FERC powers to compel the enlargement of

generation facilities to achieve "adequate" service in Section 207, 16 U.S.C. § 824f, as applying only to "*energy*," Pet. App. 14 (emphasis added), without considering the fact that FERC's *only* jurisdictional grant applies solely to "energy," and not to "capacity." *See* 16 U.S.C. § 824(b)(1). In sum, the Court of Appeals short-circuited *Chevron's* essential first step. If left undisturbed, the result will mean a fundamental transfer to FERC of jurisdiction over traditional State responsibilities for determining the amount of needed capacity, effectuated through administrative fiat and contrary to Congress' clearly expressed intent. The Court should grant certiorari to decide whether this power transfer from States to federal administrators is inconsistent with the plain text of the FPA.

C. Contrary To This Court's Recent Holdings, The Court Of Appeals' Construction Of The FPA Gave Insufficient Weight To The Preservation Of Traditional State Powers.

The FPA does not confer interpretative authority on FERC to construe its own statutory jurisdiction vis-a-vis the States' traditional authority. Even "the presence of some uncertainty" on this point, however, would "not expand *Chevron* deference to cover virtually any interpretation" of the FPA so long as it is possible to "discern the outer limits" of any potentially ambiguous terms. *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710, 2715 (2009). Evidence from the time

of the statute's enactment, the Court's prior cases, and application of the normal principles of statutory construction to the FPA may define those outer limits. *See id.* As in *Clearing House*, it is unnecessary to invoke a presumption against pre-emption in "giving force to the plain terms of the" FPA, but FERC's incursion "upon traditional state powers" still should not be minimized. *Id.* at 2720; *see Rapanos v. U.S. Army Corps of Eng'rs*, 547 U.S. 715, 738 (2006) ("[w]e ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority"). Congress did not intend for FERC to intrude on the States' traditional responsibility for determining the amount of electrical production facilities that will be adequate or sufficient.

The text of the FPA itself refutes any supposed Congressional intention that FERC assume the States' role in regulating generation facilities or the need for electric production. Sections 201(b)(1), 202(b), and 207 each preclude FERC authority to compel the enlargement of generation facilities to assure adequate or sufficient service. 16 U.S.C. §§ 824(b)(1), 824a(b), 824f; *supra* at 2-4. Congress spoke most recently in the Energy Policy Act of 2005, when it added Section 215 but expressly prohibited FERC from setting or enforcing standards for the adequacy of generation facilities or ordering "additional generation . . . capacity" and preserved State authority "to take action to ensure the . . . adequacy, and reliability of electric service within

that State . . . ." 16 U.S.C. § 824o(i)(2)-(3). Congress would not have taken these categorical steps in 2005 to confine FERC's powers if it had actually intended for FERC to assume precisely those same powers through its expansive reading of the statute.

This Court and FERC have acknowledged States' traditional hegemony "in the regulation of electricity production," "regulating electrical utilities for determining questions of need," determining the "[n]eed for new power facilities," "plant-need questions," "the need for additional generating capacity," and "regulation of most power production." *Pac. Gas & Elec.*, 461 U.S. at 194, 205, 208, 212; *New York v. FERC*, 535 U.S. at 12 n.9. Virtually every State has statutes like Connecticut and the other New England States requiring State regulators to conduct long-term planning to assure adequate capacity resources to meet projected needs. *Supra* at 11-12. Nothing in the FPA displaced that traditional authority, and FERC may not do so by administrative decree. The Court should grant Connecticut's petition to address this crucial question of federalism.

II. The Court Of Appeals' Decision Granting FERC Jurisdiction To Set ICR As A "Practice Affecting . . . Rates" Conflicts With This Court's Precedent And With The FPA's Unambiguous Reservation Of Jurisdiction To The States.

A. This Court Has Rejected The Court Of Appeals' Expansive And Improper Interpretation Of "Practices Affecting . . . Rates" To Grant Jurisdiction That The FPA Otherwise Prohibits.

Even if there were some ambiguity in the FPA's prohibitions on FERC jurisdiction to dictate the amount of capacity resources that States must provide, FERC seeks to transform clear statutory constraints into broad bureaucratic discretion, and its groundless interpretations are unreasonable, unpersuasive, and do not merit deference. FERC – now with the Court of Appeals' sanction – construes the "practices . . . affecting" rates language in Section 205 as condoning its appropriation of jurisdiction over the sufficiency of generation facilities, notwithstanding the statute's explicit bar on FERC orders that set adequacy standards for State-regulated electricity production facilities. *See* Pet. App. 15. This Court has never given such sweeping import to that common phrase. Indeed, applying the canon of construction *noscitur a sociis*, *see Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) ("a word is known by the company it keeps"), "practices" should be interpreted consistently with the series to which it

belongs – "classifications, practices, and regulations affecting . . . rates and charges, together with all contracts which in any manner affect or relate to such rates . . . ," 16 U.S.C. § 824d(c) – not as authorizing a sea change in federal jurisdiction at the expense of the States' historical powers. This Court has never endorsed such a leap.

For instance, in *Northwest Central*, the Court, interpreting comparable language in the Natural Gas Act ("NGA"), 15 U.S.C. § 717c(a), (c), concluded that

> [t]o find field pre-emption of [a State's] regulation [of production facilities] merely because purchasers' costs and hence rates might be affected would be largely to nullify that part of NGA § 1(b) [15 U.S.C. § 717(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. Congress has drawn a brighter line, and one considerably more favorable to the States' retention of their traditional powers to regulate rates of production . . . .

Northwest Central, 489 U.S. at 514; *see also FPC v. Panhandle*, 337 U.S. at 513-14 ("we should not by an extravagant, even if abstractly possible, mode of interpretation push powers granted over transportation and rates so as to include production").

As this Court made clear in *Conway*, Sections 205 and 206 do not provide an independent basis for jurisdiction at all. In that case, the Federal Power Commission refused to consider the potential discriminatory or anticompetitive effects of retail electric rates on proposed wholesale rates because Section 201(b)(1) excludes retail rates from federal jurisdiction in the same way that it excludes generation facilities. *Conway*, 426 U.S. at 276-77. The Court held that the phrase "subject to the jurisdiction of the Commission" in Sections 205 and 206 "necessarily implicate[s]" a jurisdictional sale under Section 201(b)(1) and, therefore, does not supplant express exclusions from federal jurisdiction. *Id.* While the Commission may "consider" the effects of retail rates in setting jurisdictional wholesale rates and may adjust the wholesale rates accordingly, it may not order changes to non-jurisdictional retail rates. *Id.* at 279-80. The same analysis applies here to permit FERC to "consider" ICR in setting wholesale capacity charges, but FERC may not set the amount of production facilities States must provide, even assuming that this amount is a "practice affecting" wholesale rates.

Moreover, the nebulous reference to "practices" in Section 205 does not "specifically provide" for FERC jurisdiction over the need for generation facilities, as would be required if it were to fit within the exception in Section 201(b)(1). "Specifically," as understood in 1935, means "[w]ith exactness and precision; in a

definite manner" or "precisely formulated or restricted; specifying; definite, or making definite; explicit; of an exact or particular nature; as, a *specific* statement." *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2414-15 (2d ed. 1934) (emphasis in original). The FPA contains several examples of such "specific provision" for federal jurisdiction over generation facilities. *Supra* at 4-5. "Practices affecting" rates, however, is not a definite, explicit, exact, or precise reference to generation facilities and may not support FERC's administrative appropriation of reserved State authority. *See MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994) (finding it "highly unlikely" that Congress would change the essential characteristics of a rate-regulated industry "through such a subtle device as permission to 'modify' rate filing requirements"); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (holding that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes"). Indeed, to the extent that "practices affecting . . . rates" is ambiguous, requiring FERC's interpretative gloss to derive meaning, it could not be a "specific provision" sufficient to override the Congressional prohibition on jurisdiction over generation facilities. The Court should grant certiorari to clarify the limits on FERC's assumption of authority over "practices affecting . . . rates" to commandeer the States' reserved responsibilities.

B. The Court Of Appeals' Interpretation Of "Practices Affecting ... Rates" As A Basis For Jurisdiction Would Require A Case-By-Case Determination Of FERC's Authority And Risks An Unbounded Expansion Of Federal Powers.

The Court of Appeals' "practices affecting ... rates" jurisdictional test creates an untenable conundrum. If unchecked, the Court of Appeals' logic leaves FERC free to assert far-reaching authority to control any conduct that impacts wholesale electric rates, regardless of whether those areas have traditionally been regulated by the States and are, therefore, protected by Congress in the FPA's plain language. The revolutionary extent of this new paradigm is breathtaking. As this Court warned 60 years ago when construing comparable language in the NGA, "[t]o accept these arguments springing from power to allow interstate service [and] fix rates ... would establish wide control by the Federal Power Commission over the production [of electricity]. It would invite expansion of power into other phases of the forbidden area." *FPC v. Panhandle*, 337 U.S. at 509.

Indeed, FERC has already seized on the opening that the Court of Appeals afforded, asserting its jurisdiction – despite States' objections – to require rules for aggregators of retail customers to bid demand response directly into wholesale electric energy markets, thereby compelling States to adopt laws and regulations on end-use customer aggregation

and thereby usurping State regulation of retail customers. *Wholesale Competition in Regions with Organized Electric Markets*, 128 FERC ¶ 61,059 (2009) at P 45 n.67, 74 Fed. Reg. 37,776, 37,782 (July 29, 2009), citing Pet. App. 16-19. The factors that "affect" the costs of electricity production and, therefore, wholesale rates are legion, many with a much more direct and consequential impact than the ICR – *e.g.*, State emission control rules that specify smokestack scrubbers and other expensive equipment, zoning ordinances that dictate the location of new generation at more costly sites, or worker safety regulations that increase the costs of constructing and operating generation facilities. If "practices affecting . . . rates" is the test, FERC's expansive construction of its jurisdictional umbrella may soon cover all of those "practices," contrary to Congress' expressed intent in the FPA's plain language.

The only alternative to prevent runaway FERC power would be a case-by-case determination of whether a particular "practice affecting . . . rates" is within the FPA's Section 205 penumbra. This approach fails on two counts. First, the Court of Appeals' only suggestion of some constraint is its reference to FERC's declaration that "ICRs have a *significant and direct* effect on jurisdictional rates . . . ." Pet. App. 8 (emphasis added). This is no constraint at all, particularly when FERC determines whether a practice is sufficiently "significant and direct," and its judgments may command *Chevron* deference. Second, Congress adopted a bright-line

jurisdictional test precisely to avoid such a case-by-case approach. *See S. Cal. Edison*, 376 U.S. at 215-16. The Court of Appeals' test will invite endless litigation to discern the exact boundary of FERC's new jurisdiction. This Court should grant the petition to consider the validity and viability of a jurisdictional standard derived only from the "practices affecting . . . rates" provision in Sections 205 and 206.

III. The Court Of Appeals' Decision Raises An Issue Of Exceptional Importance Because It Threatens The States' Ability To Control Electricity Production Facilities Within Their Borders And Thereby To Protect Their Citizens' Health, Public Safety, And Welfare.

States have a vital interest in assuring sufficient electric production facilities to provide adequate service. Local police and fire departments, hospitals, schools, manufacturers, retailers, and governments could not function effectively without a secure, reasonably uninterrupted flow of electric energy. Few commodities are more essential for a community's health, public safety, and welfare than electricity. No State official could remain in office if she or he permitted the State's electric production resources to fall below the levels necessary for and demanded by its citizens.

The difficulty comes in deciding how many of those resources will be just "enough," but not too much. No commercial-scale, practical technology

exists to store electricity. Thus, an accessible generation facility must be available and running to meet the demand at any moment. Of course, generation facilities that provide capacity but that may only be called into use on a rare, sweltering August afternoon add substantially to the costs of electricity even though they produce very little energy. While curtailing electric consumption when demand is greatest may be an option for some retail customers, most users cannot or will not tolerate such service interruptions or may lack the technology to reduce usage whenever the regional system operator requests. State regulators, who are directly accountable to their constituents, must weigh the very local interests of maintaining the right amount of generation capacity to assure reasonable reliability but not so much that the costs become unacceptable. State regulators must also weigh the "need and necessity" for generation facilities at particular sites that may face intensive community opposition. Finally, States have implemented emission control programs that often dictate the number and technology of acceptable generation facilities. Not surprisingly, Congress recognized all of these particularly local interests and in the FPA, broadly reserved to the States control over electricity production.

By mandating the amount of capacity that States "must provide," as it does in setting ICR, FERC assumes a role that Congress did not intend and that usurps the States' legitimate needs to regulate electricity production in its citizens' best interests.

This case raises a federalism issue of the first order and, therefore, warrants this Court's attention.

CONCLUSION

The Court should grant the writ of certiorari to determine the deference owed to FERC, if any, when it interprets the statutory boundary between federal and State jurisdiction in a Congressionally dictated dual regulatory system. The Court should also grant the petition to decide whether the phrase "practices affecting . . . rates" permits FERC to mandate the amount of electric capacity resources that each State must provide.

Respectfully submitted,

RANDALL L. SPECK
Counsel of Record
KIMBERLY B. FRANK
LISA B. KATZ
REBECCA E. GRUNFELD
KAYE SCHOLER LLP
901 15th Street, NW
Washington, DC 20005
Telephone: (202) 682-3510
Facsimile: (202) 682-3580
Counsel for Petitioner
Connecticut Department
of Public Utility Control

JOHN S. WRIGHT
MICHAEL C. WERTHEIMER
Assistant Attorneys General
OFFICE OF THE
ATTORNEY GENERAL
10 Franklin Square
New Britain, CT 06051
Telephone: (860) 827-2684
Facsimile: (860) 827-2893
Counsel for Petitioner
Richard Blumenthal,
Attorney General for the
State of Connecticut

Dated: September 3, 2009

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