

**To: New Jersey Law Revision Commission**  
**From: Mark J. Leszczyszak**  
**Re: Long-Term Capacity Pilot Project Act (LCAPP)**  
**Date: July 7, 2014**

## MEMORANDUM

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### I. INTRODUCTION

This potential project results from of Staff's review of the United States District Court of New Jersey's decision in *PPL EnergyPlus, LLC v. Hanna*<sup>1</sup>, which arose out of the enactment of the Long-Term Capacity Pilot Project Act<sup>2</sup> ("LCAPP") whereby the State's actions allegedly "intrude[d] upon and interfere[d] with the authority delegated to the Federal Energy Regulatory Commission ("FERC" or "Commission") by the Federal Power Act."<sup>3</sup> The Court ultimately decided that the LCAPP was unconstitutional pursuant to field and conflict preemption as well as the Supremacy Clause rendering the LCAPP "null and void."<sup>4</sup>

### II. REGULATION OF THE ELECTRIC ENERGY INDUSTRY

*PPL EnergyPlus, LLC v. Hanna* involved particularly "the scope of the Commission's jurisdiction in regulating the sale of electric capacity in the wholesale market, and whether such jurisdiction is exclusive or concurrent with the [New Jersey Board of Public Utilities's (herein "Board")] jurisdiction."<sup>5</sup> Electric capacity here is defined as "the ability to produce electricity when called upon ... [or] to produce sufficient energy to meet demand."<sup>6</sup> Before the federal government had "a role in regulating interstate energy transactions,"<sup>7</sup> the States and local governments had the exclusive authority to regulate energy transactions within "a defined territory."<sup>8</sup> "State commissions permitted rates that would reimburse utilities for their costs incurred in providing service and debt incurred in financing the construction of power plants and other equipment."<sup>9</sup> Investors were also allowed to issue stocks or sell debts in order to get a reasonable rate of return which also helped "the utility to expand its facilities."<sup>10</sup> In the landmark case, *Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*,<sup>11</sup> the Supreme Court held that the Public Utilities Commission of Rhode Island's attempt to regulate an interstate energy transaction between a Rhode Island company and a Massachusetts company "placed a direct burden on interstate commerce."<sup>12</sup>

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<sup>1</sup> 977 F.Supp.2d 372 (D.N.J.,2013)

<sup>2</sup> 48:3-98.3. Long-term capacity agreement pilot program (LCAPP); time to initiate and complete proceedings for commencement of the program; appointment of agent and scope of duties; board order, NJ ST 48:3-98.3

<sup>3</sup> *Id.* at 375.

<sup>4</sup> *Id.* at 412.

<sup>5</sup> *Id.* at 378.

<sup>6</sup> *Id.* at 381.

<sup>7</sup> *Id.* at 383.

<sup>8</sup> *Id.* at 382.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 273 U.S. 83 (1927)

<sup>12</sup> *PPL EnergyPlus ,LLC*, 977 F.Supp.2d at 383 (citing *Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)).

### III. THE FEDERAL POWER ACT

Following the *Pub. Utils. Comm'n of R.I.* case, Congress enacted the Federal Power Act (“the Act”) giving “the Commission exclusive regulatory authority over ‘the transmission of electric energy in interstate commerce’ and ‘the sale of electric energy at wholesale in interstate commerce.’”<sup>13</sup> In relevant part, the Act states, “[t]he provisions of this subchapter shall apply to the transmission of electric energy in interstate and to the sale of electric energy at wholesale in interstate commerce ... The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy ...”<sup>14</sup>

Further, pursuant to the Act “electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.”<sup>15</sup> However, the Act also reserved regulatory authority to the States over “local utilities’ construction of new power plants, operations, and rates charged for retail service to customers’ including ‘the costs incurred by local utilities in constructing and operating the power plants they used to generate electricity to service their retail customers.’”<sup>16</sup>

As the demand for electric energy grew over time, the electric energy industry “adjusted their strategy;”<sup>17</sup> since electric energy cannot be stored and “has no shelf life ... energy generally must be produced when it is needed, and at the rate at which it is consumed ... so supply and demand have to be matched instantaneously in real time.”<sup>18</sup> In order to prevent power outages, companies constructed more power plants, but too many power plants were being built and many of them were only being used to provide energy for up to about 50 hours per year.<sup>19</sup> Companies then “began to sell power or standby capacity to each other ... traditional utilities would buy and sell capacity from one another for future years, so that they could be assured they would have sufficient supply when operating contingencies arose, without having to develop more power plants.”<sup>20</sup>

#### A. PJM Interconnection, LLC (“PJM”)

PJM Interconnection, LLC (“PJM”) was created as a result of the electric industry’s strategy adjustment and the need to manage the stand-by capacity sales.<sup>21</sup> PJM is a regional transmission organization and “a voluntary association of different energy stakeholders,” which was formed in 1927 to “easily accommodate sharing of electric capacity more efficiently ... drastically drop[ping] consumer costs by limiting the number of electrical generation facilities required for peak hour production,” which operates and is subject to Commission regulation through a tariff.<sup>22</sup> “PJM was created to ensure reliability by managing interstate transmission lines and, in more recent years, by designing and operating wholesale auctions.”<sup>23</sup> Three types of wholesale markets were later instituted by PJM: “[the] capacity market, the energy markets and the ancillary services markets.”<sup>24</sup> Each market had a specific function; the capacity

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<sup>13</sup> *Id.*

<sup>14</sup> § 824. Declaration of policy; application of subchapter, 16 USCA § 824

<sup>15</sup> *Id.*

<sup>16</sup> *PPL EnergyPlus, LLC*, 977 F.Supp.2d at 383.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 381.

<sup>19</sup> *Id.* at 383.

<sup>20</sup> *Id.* at 384.

<sup>21</sup> *Id.* at 383.

<sup>22</sup> *Id.* at 378.

<sup>23</sup> *Id.* at 384.

<sup>24</sup> *Id.* at 385.

market known as the “reliability pricing model (RPM), annually sets the price of capacity’ three years forward;” “the energy markets price the cost of energy produced by the generators and used by consumers;” and “the ancillary services markets price the sale of ‘ancillary services’ such as ‘spinning reserves and load-following services’ to improve reliability.”<sup>25</sup> Lastly, “PJM is responsible for ‘managing a regional transmission grid encompassing all or part of thirteen states and the District of Columbia.’”<sup>26</sup>

## **B. THE RELIABILITY PRICING MODEL (“RPM”)**

The Reliability Pricing Model is the market primarily focused on in *PPL EnergyPlus, LLC v. Hanna*.<sup>27</sup> PJM awards “procurements of capacity ... to secure the capacity that will be needed three years in the future” following the “RPM Auction” (“the Auction”) which is held annually each May.<sup>28</sup> “New Jersey is a voluntary member of PJM and is a part of the RPM market. RPM is a provision of the PJM tariff which is approved by the Commission.”<sup>29</sup> This provision’s purpose and design was to “commit the least-cost set of capacity resources to ensure that Commission-established resource adequacy targets are met in the PJM footprint on a three-year forward basis.”<sup>30</sup>

The Auction consisted of capacity resources where each “bid to supply capacity to PJM for one year beginning three years in the future” by “offering to supply a particular quantity of capacity at an offer price.”<sup>31</sup> A capacity supplier “clears,” or wins, the Auction when its bid matches or falls below the clearing price.<sup>32</sup> The clearing price is “[t]he price of capacity in the RPM Auction” which is “set by the intersection of supply and demand.”<sup>33</sup> Further, “[t]he clearing prices for capacity sold in the RPM are the Commission approved rates for capacity sales made in PJM territory.”<sup>34</sup> Ultimately, the winning capacity supplier “receives the clearing price for that capacity[,] ... commits itself to make any investments necessary to fulfill its obligation[,] ... [and] obligates itself to bid into the PJM energy and ancillary services markets.”<sup>35</sup> This type of auction with a “single clearing price encourages capacity resources to operate more efficiently while keeping prices low.”<sup>36</sup>

Given that PJM covers a large region, concerns about the Auction process surfaced throughout the length of its operation. Prices vary throughout the PJM region due to differences in demand since, logically speaking, no sub-region within the PJM region is the same, and thus “separate capacity prices are necessary to reflect the differences in costs and capacity needs among the locations.”<sup>37</sup> RPM was approved by the Commission notwithstanding New Jersey’s objections that RPM “will raise prices without improving reliability.”<sup>38</sup> RPM also included the minimum offer price rule (“MOPR”) addressing “who may enter into the RPM market and how each generator may bid.”<sup>39</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 379.

<sup>27</sup> *Id.* at 387.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 388.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 389.

<sup>38</sup> *Id.* at 390.

<sup>39</sup> *Id.*

➤ **MINIMUM OFFER PRICE RULE (“MOPR”)**

Since “[t]he RPM Auction is not based on a pure open bidding process” concerns were raised about what currently-existing generators were able to bid and how to prevent new generators from placing bids “below the benchmark price in order to be accepted into the capacity market.”<sup>40</sup> PJM answered this issue with developing the Minimum Offer Price Rule, or MOPR.<sup>41</sup> The benchmark price is a calculation converted by PJM from the net cost of new entry (“net cone”), an amount derived from the administrative calculation of “each spring from costs associated with the entry of a new generator.”<sup>42</sup> Existing generators, also called a “price-taker,” that operated “longer than projected so capital costs have been recaptured” are permitted to place bids at zero, however they still accept “the net cone benchmark price in the RPM Auction.”<sup>43</sup> These generators could opt to retire the plant and not place a bid if it predicted “that the benchmark price would fall below its projected cost.”<sup>44</sup>

With regard to new generators, sometimes referred to as new resources, the MOPR “ensur[ed] that all new resources are offered into PJM’s Reliability Price Model[] on a competitive basis.” PJM applied the MOPR screen (“the Screen”) “to determine the competitiveness of a new generator.”<sup>45</sup> The Screen consisted of several components and exemptions, including the New Entry Price Adjustment (“NEPA”) which “assures developers of projects in local deliverable areas (“LDAs”) that after their facilities become operational they will continue to receive, for a period of [3] subsequent years, the capacity price of the RPM Auction that prevailed at their time of their entry” in order to provide assurance to investors of new generators.<sup>46</sup> Despite these adjustments New Jersey was still hit “with higher electricity prices due to associated transmission costs” among other issues.<sup>47</sup>

**IV. THE LONG-TERM CAPACITY PILOT PROJECT ACT (“LCAPP”)**

Additional issues arose from insufficient transmission capabilities and new environmental regulations. PJM and the transmission owners brought to the Board’s attention “that there are 23 potential electric reliability violations” which may cause “brownouts or blackouts” in the next “two or three years.”<sup>48</sup> According to PJM only two solutions existed, (1) “increased transmission through the construction of the Susquehanna–Roseland transmission line[ ] or [(2)] construction of additional generation in or near the location where the reliability violations would occur.”<sup>49</sup> Further, the new environmental regulations “partially prohibited coal-fired plants from being operated unless significant environmental modifications were made” and “limit[ed] the number of hours that certain electric generating units could operate.”<sup>50</sup>

In response, New Jersey enacted the Long-Term Capacity Pilot Project Act (“LCAPP”) which “was to provide a transaction structure that would result in new power plants being constructed in the

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 391.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 392.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

PJM territory that benefit New Jersey.”<sup>51</sup> The LCAPP “was to establish a ‘multiyear pricing supplement’ that would provide the new LCAPP generators with a premium payment or ‘RPM’ adjustment that would guarantee a LCAPP generator a payment to secure multi-year capacity revenue” and would also expand the NEPA guarantee to 15 years (instead of three) in order to attract new generators more quickly to avoid the potential reliability risks.<sup>52</sup> Pursuant to the LCAPP generators that “successfully sell the capacity from their facilities in the RPM base residual auction” get a payment that was established in the standard offer capacity agreements (“SOCAs”).<sup>53</sup> Levitan & Associates (“Levitan”), the Board appointed LCAPP agent, drafted the SOCA per generator given it passed prequalification.<sup>54</sup> The SOCAs were boilerplate in regard to the material terms, and the only terms that changed were “price, the quantity of capacity awarded, and the name of the generator.”<sup>55</sup>

## V. PREEMPTION

The Plaintiffs in this case argued that the companies “rely on the forward price signals of the RPM Auction in deciding whether to develop new generation resources or make investments in existing resources within a specific market,” but that the price written into the SOCAs “displaced and supplanted” the Auction clearing price.<sup>56</sup> For example, the Auction clearing price provided was \$167.46 whereas the written-in SOCA price was \$286.03.<sup>57</sup> Consequently, the Defendants believed “that the RPM and the SOCA are two separate and unrelated transactions ... because the SOCA is a purely financial contract not subject to Commission oversight and authority.”<sup>58</sup>

The District Court found that the LCAPP’s SOCAs “occupy the same field of regulation as the Commission and intrude upon the Commission’s authority to set wholesale energy prices through its preferred RPM Auction process.”<sup>59</sup> This is due to both the “elements of performance to which the SOCA payments are conditioned” which contradicts the Defendant’s position that the SOCA is a purely financial contract because “a purely financial arrangement is one that does not ‘involve any real performance;” and “the LCAPP Act poses as an obstacle to the Commission’s implementation of the RPM” because the different prices (RPM v. SOCA) “undermine their respective company’s ability to use those RPM price signals to make sound business decisions.”<sup>60</sup>

Field preemption occurs when “Congress has left no room for state regulation ... even if it is parallel to federal standards.”<sup>61</sup> Congress’s intent to do so must be “clear and manifest,” and following *Public Utils. Comm’n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927), “the federal government has asserted jurisdiction over wholesale sales of electricity in interstate commerce.”<sup>62</sup> The Court also referred to several cases where the Supreme Court of the United States held that the Federal Power Act “delegated to ... the Federal Energy Regulatory Commission, exclusive authority to regulate the transmission and

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<sup>51</sup> *Id.* at 393.

<sup>52</sup> *Id.* at 395.

<sup>53</sup> *Id.* at 399.

<sup>54</sup> *Id.* at 396.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 400.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 403.

<sup>59</sup> *Id.* at 406.

<sup>60</sup> *Id.* at 411.

<sup>61</sup> *Id.* at 407.

<sup>62</sup> *Id.* at 407-408.

sale at wholesale of electric energy in interstate commerce.”<sup>63</sup> The Court thus held that the LCAPP is preempted by the Federal Power Act because it intrudes upon the Commission’s exclusive jurisdiction granted by the Federal Power Act since the SOCAs created pursuant to the LCAPP were found to not be purely financial agreements in light of the performance required in order to receive the subsidy.<sup>64</sup>

“Conflict preemption occurs where there is a conflict between a state law and a federal law ... [and] the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>65</sup> The conflict between the LCAPP and the Federal Power Act arose from the prices provided in the SOCAs because those prices are inconsistent with the price of the RPM Auction causing confusion on the part of investors and companies. It has been held “by the Supreme Court and many lower courts decisions” that the Commission was given exclusive jurisdiction over wholesale energy sales.<sup>66</sup> Given the purpose of the RPM to provide a competitive clearing price to induce lower costs and higher efficiency, and the fact that it was set up by PJM and approved by the Commission, the Court held that the LCAPP is preempted under conflict preemption as well as field preemption because it conflicts with and is “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” since the SOCAs pursuant to the LCAPP provided a different price which causes confusion and uncertainty undermining the purpose of the RPM.<sup>67</sup>

➤ **DIVISION OF AUTHORITY: “Bright line distinction”**

There are a number of cases that held that there is indeed a division of authority between the FERC and the states or a state’s energy regulatory entity. Although these cases may not have strikingly similar fact patterns to *PPL EnergyPlus, LLC*, the holdings with regard to the division of authority remain consistent. The early case of *Nantahala Power and Light Co. v. Thornburg*<sup>68</sup> involved agreements with “the Utilities Commission of North Carolina (NCUC) [which] chose an allocation of entitlement and purchased power between Tapoco and Nantahala that differs from the allocation of entitlement power between Tapoco and Nantahala adopted by the Federal Energy Regulatory Commission (FERC) in a wholesale ratemaking proceeding.” The Supreme Court of the United States found that the “FERC [] has exclusive jurisdiction over interstate wholesale power rates.”<sup>69</sup>

The “‘filed rate’ doctrine [‘the Doctrine’]”, which in pertinent part holds that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates”<sup>70</sup> is essential to these cases because of its binding effect on State level utility commissions. According to the Court, the Doctrine originated in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co*<sup>71</sup> where the Court found that:

The complaining company cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission’s judgment, in which there is some

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<sup>63</sup> *Id.* at 408.

<sup>64</sup> *Id.* at 406.

<sup>65</sup> *Id.* at 410.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> 476 U.S. 953 (1986)

<sup>69</sup> *Id.* at 956.

<sup>70</sup> *Id.* at 962.

<sup>71</sup> 341 U.S. 246, 251-252 (1951)

considerable element of discretion ... [The Court held] that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the court can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one.<sup>72</sup>

Citing another case, the Court found that “[u]nder the filed rate doctrine, the FPC alone is empowered to make that judgment of reasonableness, and until it has done so, no rate other than the one on file may be charged.” The Federal Power Commission (“FPC”) was the federal regulatory entity that preceded the FERC.<sup>73</sup> The Court also recognized Congress’s intent to draw a bright line distinction “between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.”<sup>74</sup> Thus, the Court ultimately concluded that “[a] State must rather give effect to Congress’ desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.”<sup>75</sup>

In *Rochester Gas and Electric Corp. v. Public Service Commission of State of New York*<sup>76</sup> the US Court of Appeals for the Second Circuit was tasked with determining whether “the New York Public Service Commission’s (PSC) policy of including an estimate of RG & E’s [(Rochester Gas and Electric Corp.)] wholesale electric sales in RG & E’s revenue base violates the Supremacy Clause ... and Commerce Clause [] of the United States Constitution.”<sup>77</sup> The Court ultimately affirmed the district court’s decision that PSC’s policy did not violate the Supremacy Clause or the Commerce Clause by including “an estimate of incidental sales in the total revenue figure” because the Court found that the policy did not compel RG & E to make any sales, thus PSC’s policy did not regulate incidental sales of electricity which the FPA has preempted.<sup>78</sup>

In reaching this conclusion, the Court distinguished between what the FERC and the PSC in this case (state energy regulatory entity) can and cannot do. Drawing from the findings in *Panhandle Eastern Pipe Line Co. v. FPC*<sup>79</sup> this Court restated “that while the FPC ‘lacks authority to fix rates for direct industrial i.e., intrastate sales, it may take those rates into consideration when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction.’”<sup>80</sup> Further the Court reasoned that:

[T]he FPA precludes PSC from regulating incidental sales. For example, it could not set rates for incidental sales or order RG & E to build more capacity in order to expand its level of incidental sales. However, once RG & E has determined that it will make incidental sales, PSC, in fulfilling its duty to set just and reasonable retail rates, may impute

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<sup>72</sup> *Nantahala Power and Light Co.*, 476 U.S. at 963.

<sup>73</sup> *Id.* at 962.

<sup>74</sup> *Id.* at 966.

<sup>75</sup> *Id.*

<sup>76</sup> 754 F.2d 99 (1985)

<sup>77</sup> *Id.* at 100.

<sup>78</sup> *Id.* at 100-101.

<sup>79</sup> 324 U.S. 635, 646 (1945)

<sup>80</sup> *Rochester Gas and Electric Corp.* 754 F.2d at 104.

revenue from a reasonable estimate of RG & E's incidental sales into RG & E's revenue base.<sup>81</sup>

Again the division of authority was illustrated; the federal entity has exclusive jurisdiction over interstate wholesale sales and transmission while the state entity has jurisdiction over intrastate sales.

Further, *In re California Wholesale Electricity Antitrust Litigation*<sup>82</sup> is a case similar to *PPL EnergyPlus v. Hanna* and involves a deregulated California energy market similar to New Jersey's. The similarities include rates "determined through competitive auctions administered by the [California Power Exchange ("PX")]," and "non-governmental corporations [which] coordinate the transmission and sale of electricity ... organized under California law, but regulated by the Federal Energy Regulatory Commission ("FERC")."<sup>83</sup> *In re California* posed the question "whether the [filed rate] doctrine applies to the relatively new innovation of 'market based rates' governing wholesale energy trading" because the plaintiff's complaint that sought "redress for unlawful[] manipula[tion of] the market for electric energy by fixing prices and restricting supply into the markets operated by the PX and the [Independent System Operator ("ISO")], or by engaging in other conduct for the purpose of artificially inflating the price of electricity and/or charging unlawful prices for such electricity" required the application of the Doctrine.<sup>84</sup> The Court ultimately held that the Plaintiff's claims were preempted by the FPA granting the Defendant's motions.<sup>85</sup>

In reaching that conclusion, the Court found that "[t]he 'bright line' division of authority adopted by Congress precludes any attempt to inject state law into areas reserved to FERC. Where FERC has jurisdiction, that jurisdiction is exclusive."<sup>86</sup> The Court further explained its finding stating that "[s]ection 824e(a) of the FPA vests exclusive jurisdiction over interstate wholesale electricity rates and practices affecting such rates with FERC.[] FERC's exclusive jurisdiction extends not only to rates per se, but also to 'any rule, regulation, practice or contract affecting such' rates."<sup>87</sup> According to the Court judicially enforcing the Doctrine calls for enforcement of the Supremacy Clause since the Doctrine "is a product of federal regulatory jurisdiction staked out in the FederalPowerAct [sic]."<sup>88</sup> In addition, the Court found that "courts, both state and federal, are prohibited from considering any rate other than that filed with FERC to be the appropriate wholesale rate."<sup>89</sup> Thus, the Court reached its conclusion and cited to a Ninth Circuit case *County of Stanislaus v. Pacific Gas & Elec. Co.*<sup>90</sup> stating that "the filed rate doctrine bars all claims-state and federal-that attempt to challenge a rate that a federal agency has reviewed and filed."<sup>91</sup>

The US Court of Appeals for the Fourth Circuit in *Piedmont Environmental Council v. FERC*<sup>92</sup> also dealt with the division of authority between federal and state regulatory entities. This case involved "[s]ection 216 of the FPA, which was added in 2005, gives FERC jurisdiction in certain circumstances to issue permits for the construction or modification of electric transmission facilities in areas designated as

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<sup>81</sup> *Id.* at 105.

<sup>82</sup> 244 F.Supp.2d 1072 (2003)

<sup>83</sup> *Id.* at 1074.

<sup>84</sup> *Id.* at 1075-1076.

<sup>85</sup> *Id.* at 1085.

<sup>86</sup> *Id.* at 1076.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1077.

<sup>89</sup> *Id.*

<sup>90</sup> 114 F.3d 858, 863 (9th Cir.1997)

<sup>91</sup> *In re California*, 244 F.Supp.2d at 1077.

<sup>92</sup> 558 F.3d 304 (2009)



national interest corridors by the Secretary of Energy.”<sup>93</sup> Pursuant to this section the dispute emerged regarding whether an outright denial of a permit application by the State qualified as withholding for longer than one year. The Court reversed the FERC’s interpretation which included a denial giving it (the FERC) permission to essentially act on behalf of the State, and the Court concluded that the FERC’s amendment to its National Environmental Policy Act (“NEPA”) “violated Council on Environmental Quality (CEQ) regulations when it failed to consult with the CEQ” about the amendments.<sup>94</sup>

The Court provided a “list of five circumstances when FERC may preempt a state and issue a permit for the construction or modification of electric transmission facilities in a national interest corridor.”<sup>95</sup> The circumstance pertinent to the LCAPP issue provides the FERC may preempt a state when “(5) a state commission has conditioned its approval in such a manner that the proposed construction or modification is not economically feasible or will not significantly reduce transmission congestion in interstate commerce.”<sup>96</sup> The Court then further explained that “[i]f the circumstance of withholding permit approval is set aside, the remaining four circumstances allow FERC jurisdiction only when a state commission either is unable to act or acts inappropriately by including project-killing conditions in an approved permit.”

These cases provide vital information in interpreting the FPA and in defining the reach of authority between the FERC and State energy regulatory entities. It appears that there is consistency among the Courts that Congress indeed intended for a bright line division of authority whereby the FERC has exclusive jurisdiction over interstate wholesale sales and transmission of electric energy. Further, these cases also provided consistent examples of circumstances when the FERC preempts the State.

## VI. POSSIBLE ALTERNATIVES

The Court, in *PPL EnergyPlus, LLC*, identified a number of alternatives the State could have implemented in lieu of the SOCAs in order “to support and encourage the development of generation projects” without infringing upon the Commission’s jurisdiction.<sup>97</sup> Among these options were “the utilization of tax exempt bonding authority, the granting of property tax relief, the ability to enter into favorable site lease agreements on public lands, the gifting of environmentally damaged properties for brownfield development, and the relaxing or acceleration of permit approvals.”<sup>98</sup> These options were possible, and did not run afoul of the Constitution because “the Board retained authority over the siting of generation facilities.”<sup>99</sup>

## VII. COMMERCE CLAUSE

The commerce clause issue was raised due to the LCAPP’s claimed discriminatory effect and design.<sup>100</sup> The LCAPP was designed to solve the potential brownout and blackout risks posed by violations found by the PJM. The State had only two options to correct the issue; one potential solution

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<sup>93</sup> *Id.* at 309.

<sup>94</sup> *Id.* at 310.

<sup>95</sup> *Id.* at 314.

<sup>96</sup> *Id.*

<sup>97</sup> *PPL EnergyPlus, LLC*, 977 F.Supp.2d at 404.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 411.

was to build the Susquehanna Connection and the other was to acquire “additional generation in or near the location where the reliability issue will occur.”<sup>101</sup>

Pursuant to the dormant commerce clause, laws that have a discriminatory purpose or design instead of expressly discriminating against out-of-state producers are similarly subject to heightened scrutiny as laws that are facially discriminatory.<sup>102</sup> Therefore, “the State bears the burden of demonstrating ... that it has no other means to advance a legitimate local interest.”<sup>103</sup> The Court found that the State appeared to have no other means to advance its legitimate local interest which was to correct the reliability issues that would potentially cause brownouts and blackouts because the capacity prices in the region New Jersey is in are higher due to the transmission costs; building generators near or in the State would cause the transmission costs to subside.<sup>104</sup> Thus, the court held that the State, having only two options available, did not violate the commerce clause because “transmission via the Susquehanna Connection” would not lower transmission prices that are already high and the only other option was to get “additional generation in or near the location where the reliability issue will occur” which the LCAPP sought to accomplish.<sup>105</sup>

### VIII. PROPOSED ACTION

There appear to be two options to remedy the Constitutional defects in the LCAPP. The first option is amending the Act. Doing so may be feasible because only two provisions of the Act seem to result in its preemption. The Act states in relevant part:

(3) that, taking into consideration the agent's recommendation, the board approve the selected eligible generators from among the qualified eligible generators participating in the LCAPP for the award of board-approved long-term financially-settled SOCAs for a term to be determined by the board but not to exceed 15 years;

(4) that the board establish a method and the contract terms for providing for selected eligible generators to receive payments from the electric public utilities for the difference between the SOCP and the RCP multiplied by the SOCA capacity in the event the SOCP is greater than the RCP for any applicable delivery year and for providing for electric public utilities to receive refunds from the selected eligible generators for the difference between the SOCP and the RCP multiplied by the SOCA capacity in the event the RCP is greater than the SOCP for any applicable delivery year[.]<sup>106</sup>

These provisions establish the method and award that the selected eligible generators may receive if they participate in the LCAPP. They are preempted because they create an award that conflicts with the

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<sup>101</sup> *Id.* at 412.

<sup>102</sup> *Id.* at 411.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 412.

<sup>105</sup> *Id.*

<sup>106</sup> 48:3-98.3(c)(3)-(4). Long-term capacity agreement pilot program (LCAPP); time to initiate and complete proceedings for commencement of the program; appointment of agent and scope of duties; board order, NJ ST 48:3-98.3

FERC's ratemaking by providing different prices which in turn undermines the goal the auction seeks to attain. Taking into account the alternatives the Court provided in *PPL EnergyPlus, LLC*, instead of providing a contract with monetary reimbursement for an extended period the Act could provide another attractive award such as "the utilization of tax exempt bonding authority, the granting of property tax relief, the ability to enter into favorable site lease agreements on public lands, the gifting of environmentally damaged properties for brownfield development, [or] the relaxing or acceleration of permit approvals."<sup>107</sup>

The second option to address the Constitutional infirmity is recommending the repeal of the LCAPP.

## **IX. CONCLUSION**

The LCAPP was deemed by the Court unconstitutional because it is preempted under field and conflict preemption. Therefore, it is respectfully requested that the Commission authorize a project with the purpose of either substituting the statutory provisions of the LCAPP that prescribe the written-in SOCA price with the possible alternatives provided by the court, or repealing the LCAPP in the absence of any other mechanism identified by the Court that would salvage any part of those statutory provisions.

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<sup>107</sup> *PPL EnergyPlus, LLC*, 977 F.Supp.2d at 404.