

## INSIGHTS

## Third Circuit Asks U.S. Attorney General for Opinion on Federal Power Act Pre-emption of State Law

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In an unusual move, on February 21, 2014 the Court of Appeals for the Third Circuit ("Third Circuit") asked the U.S. Attorney General for his opinion as to whether the Federal Power Act ("FPA") preempts New Jersey's Long Term Capacity Pilot Program ("LCAPP"), a finding made by the United States District Court for the District of New Jersey ("District Court") in *PPL EnergyPlus, LLC v. Hanna*, which is now pending on appeal before the Third Circuit. In recent years, states including New Jersey and Maryland, through different mechanisms, have instituted requirements that the state utilities serving retail customers must purchase power from "new generation" to be located within each respective state's borders. In New Jersey, such generation would be guaranteed a long-term contractual payment so long as the generation cleared the PJM capacity market. Bidding as low as possible would best guarantee the units would clear. Because generators are not paid what they bid, but the payments are based on the clearing price of the most expensive unit to clear, having units bid at levels that do not reflect their cost recovery needs was perceived by the generation community as an effort to reduce payments made for capacity. After passage of the LCAPP, a group of wholesale, retail, and energy marketing companies brought suit before the District Court challenging the LCAPP as violating the Supremacy Clause of the Constitution. Similar challenges were brought in federal court in Maryland. Last October, the District Court agreed and found that the LCAPP impermissibly intruded into a field regulated exclusively by the federal government and conflicted with other federal law. The court explained that the contracts New Jersey required occupy the same field of regulation as the Federal Energy Regulatory Commission ("FERC") and intrude upon FERC's authority to set wholesale energy prices. After finding that field preemption applied, the court dismissed New Jersey's arguments that the contracts were financial contracts, exempt from FERC's jurisdiction. The court further suggested that conflict preemption also applied because the LCAPP created an obstacle to FERC's preferred method for regulating wholesale sales of electricity in interstate commerce. Now on appeal before the Third Circuit, the sole issue is whether the LCAPP is preempted by the Federal Power Act. In grappling with this question (with the aid of numerous amici briefs), the court has reached out to the Attorney General because "this appeal concerns the nature and extent of federal authority over the transmission and sale of electric energy . . . ." The court invited the Attorney General to submit an amicus curiae brief by March 20, 2014 in advance of oral arguments.

scheduled for March 27, 2014.