IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13-4330, 13-4394 & 13-4501 (consolidated)

PPL ENERGYPLUS, LLC, *et al*.,

v.

LEE A. SOLOMON, in his official capacity as President of the New Jersey Board of Public Utilities, *et al*.

v.

CPV POWER DEVELOPMENT, INC.; HESS NEWARK, LLC

CPV POWER DEVELOPMENT, INC.,
Appellant in No. 13-4330

HESS NEWARK, LLC,
Appellant in No. 13-4394

LEE A. SOLOMON, *et al.*,
Appellants in No. 13-4501

Appeal from Judgment of the U.S. District Court for the District of New Jersey, No. 3:11-cv-00745-PGS (Hon. Peter G. Sheridan)

OPENING BRIEF FOR CPV POWER DEVELOPMENT, INC.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because this case arises under the Constitution. The district court's judgment was filed on October 25, 2013. JA-92. CPV Power Development, Inc. ("CPV") timely filed a notice of appeal on October 31, 2013. JA-1. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

New Jersey's Long-Term Capacity Agreement Pilot Program Act ("LCAPP Act" or "Act") was enacted to encourage and obtain, through competitive procurement, the construction of new, clean and efficient power plants to satisfy New Jersey's need for nearby, reliable sources of electricity. It does so by assuring the winning bidders ("LCAPP generators") a steady fifteen-year revenue stream underwritten if necessary by New Jersey ratepayers. The district court found the Act preempted on the theories that it invaded the field of wholesale sales of electricity in interstate commerce and posed an obstacle to the Federal Energy Regulatory Commission's ("FERC's") "preferred method for the wholesale sale of electricity in interstate commerce." Therefore, two questions are presented.

1. Although the Act reflects New Jersey's exercise of a traditional authority and responsibility to support construction of new power plants, preserved to the States by federal law, and sets no price for the purchase and

sale of electricity or capacity, does the Act nonetheless improperly invade the field of wholesale rate regulation occupied by FERC?

2. Although the Act reflects New Jersey's exercise of authority and responsibility to support construction of new power plants preserved by federal law, and FERC has stated that it did not intend to displace that authority and has itself ensured that the Act does not interfere with the market that it regulates, does the Act pose an impermissible obstacle to FERC's objectives?

STATEMENT OF RELATED CASES

This case has not previously been before this Court. *New Jersey Board of Public Utilities, et al. v. FERC,* Nos. 11-4245, *et al.*, are pending review petitions of FERC orders addressed by the parties and the district court in this case.

STATEMENT OF THE CASE

The LCAPP Act was enacted in 2011 to encourage construction of new power plants, selected through a detailed, evaluative process. It seeks to induce necessary investment in new power plant construction by assuring the chosen generators a stable revenue stream, at the price they bid, sufficient to cover the enormous costs of new power plant construction.

This stable revenue stream is assured by requiring the State's regulated local electric distribution companies ("EDCs") to enter into long-term contracts, Standard Offer Capacity Agreements ("SOCAs"), with the chosen generators. JA-

57 (Dist. Ct. Mem. Op. (hereinafter, "Op.") at 33). A SOCA is a contract for differences, a form of hedge. In any given year, if the winning bidder/new generator earns less from selling capacity in the FERC-regulated capacity market than the bid price as set forth in its SOCA, then the EDCs pay that difference, and recoup the payment from New Jersey's retail ratepayers.[1] If the new generator earns more by selling in the capacity market than it bid, then it pays the EDCs that difference, and the EDCs credit their retail ratepayers. The result is a stable revenue stream, via a yearly subsidy or rebate as the case may be, with the State's ratepayers reducing the revenue risk to winning generators of yearly market price fluctuations.

Pursuant to the Act, the New Jersey Board of Public Utilities ("the Board") conducted an open solicitation and chose three projects. Each project owner promised to construct a power plant of a specified capacity. One of those companies was Appellant CPV, a builder of natural gas-fired and renewable energy power plants, Appellant in No. 13-4330.[2] Another was Hess Newark, LLC, Appellant in No. 13-4394.

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[1] The term "capacity" means a generation plant's size or its capability of producing electricity. The references to capacity sales mean that the generator agrees to use its plant to provide electricity as needed. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009) *("CDPUC").*

[2] Appellant here is the party below, CPV Power Development, Inc. A special purpose subsidiary, CPV Shore LLC, was the winning bidder for CPV's Shore project. Both entities are referred to in the brief as "CPV."

Appellees are (1) New Jersey EDCs that signed the SOCAs under protest; and (2) various entities, some affiliated with the EDCs, that own power plants that would compete with the plants to be constructed under the Act.

On February 9, 2011, Appellees brought this action in the United States District Court for the District of New Jersey against the Commissioners of the Board, asserting that the LCAPP Act was preempted by the Federal Power Act ("FPA") and FERC's actions under the FPA. JA-157-58 (Compl. ¶¶ 7-8). The case was assigned to the Honorable Peter G. Sheridan. On July 19, 2011, Judge Sheridan granted CPV's motion to intervene as of right. JA-198-205.

In September 2012, Judge Sheridan denied cross motions for summary judgment, JA-23, acknowledging that nothing in the FPA "required the state to relinquish any of its authority over the planning or generation of a sufficient supply of electricity," JA-18, but finding disputed issues as to the Act's impact on what he saw as "the federal goal of a competitive [capacity] auction." JA-23.

Judge Sheridan conducted a bench trial over thirteen days in April-May, 2013. At its conclusion, he declared the LCAPP Act preempted, and the SOCAs void *ab initio*. JA-93.

On October 31, 2013, CPV filed a timely Notice of Appeal. JA-1. The State Appellants filed a separate appeal. JA-4. Hess intervened and also filed an appeal. JA-3. On December 13, 2013, this Court consolidated the three appeals.

STATEMENT OF FACTS

A. Historical Background

For more than a century, well before Congress created the FERC and to the present, States have had the responsibility, and corresponding authority, to ensure that adequate electric generation resources are constructed to meet the present and long-term needs of their citizens, and to set retail rates to support that construction.[3] The Federal Power Act, enacted in 1920 and amended in 1935, with subsequent amendments in 1978, 1992 and 2005, preserves these crucial responsibilities for the States.

Under the classic, early twentieth century industry paradigm, power plants were constructed and maintained by vertically integrated utilities regulated by state and local governments. JA-37, 39 (Op. at 13, 15). States ensured that the utilities would be adequately compensated, and that the needed capacity would be constructed, by allowing each utility to recover from its retail ratepayers the prudently incurred costs of construction. The assurance of cost recovery allowed power companies to finance their projects while earning a reasonable return on invested capital.

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[3] *See* Everest Schmidt, *A Call for Federalism: The Role Of State Government In Federally Controlled Energy Markets*, 65 Rutgers L. Rev. 573, 577 (2013).

While many States continue to have vertically integrated utility companies, some, like New Jersey since 1999, have required their utility companies to divest their generation (or in some cases move their generation assets into separate affiliated companies). This has allowed the resulting stand-alone generation companies to participate more easily in the wholesale markets promoted by various federal initiatives.

Such divestitures have not eliminated the need, the responsibility, or the authority of the States to ensure that their citizens are provided an adequate and reliable supply of electricity. Indeed, Congress has expressly protected the States' continuing authority in this field from federal encroachment. Thus, even where generation has been functionally separated from distribution, States have continued to encourage new construction by, among other means, requiring EDCs to enter into long-term power purchase agreements with independent generators, thereby providing a stable revenue stream to the builders of new generation capacity, and ensuring stable prices to ratepayers.

The LCAPP Act echoes this model. It was enacted to avoid an impending crisis in the provision of electric service to certain New Jersey communities, and to address the State's long-term need for a reliable and environmentally friendly supply of electricity at relatively stable prices. To achieve these objectives, as under the traditional model, the Act facilitates both project financing and construction by requiring New Jersey's EDCs to enter into long-term contracts

with LCAPP generators under which their construction costs, as bid, ultimately would be borne by the ratepayers.

But the Act does not contemplate any sale of capacity or electricity to the EDCs. Instead, it meshes with recent FERC initiatives by requiring new generators to sell their capacity into the FERC-supervised forward capacity market, at the FERC-approved price, pursuant to all FERC-approved requirements. Should a SOCA-supported generator's market revenues from that sale of capacity fall short of its bid to construct its plant, as reflected in the SOCA, the EDCs will pay the difference in what amounts to a subsidy, which is then passed back on to the ratepayers. Conversely, should market revenues exceed those costs, the new generator will have to make a payment to the EDCs, providing a rebate, likewise passed on to retail ratepayers.

B. Faced With Serious Concerns About Future Availability, Reliability And Long-Term Affordability Of Electric Power, New Jersey Enacted The LCAPP Act To Encourage Construction Of New, Efficient Electric Generation Facilities.

New Jersey is among our nation's most congested States, and as such it faces pressing energy needs. Almost five years ago, the Board determined that the State had a critical need for new power plants. The need arose for a variety of reasons: anticipated retirement of older coal-fired plants; the fact that over half of New Jersey's power plants were more than thirty years old; and a perilous lack of new power plant development in the region for decades. Making matters worse, the Board was warned in 2010 that the State could experience significant reliability

issues, brownouts or blackouts, a problem that could be addressed by constructing new power plants. JA-54-55. The LCAPP Act responded to the crisis and, more broadly, was intended to "assist the State's economic development and create opportunities for employment in the energy sector while helping to reduce the cost and volatility of electricity prices in New Jersey." N.J. Stat. Ann. § 48:3-98.2(i).

The Act authorized the Board to hire an expert independent agent to run a competitive process to procure up to 2,000 megawatts of new power generation. It required the EDCs to enter into agreements with the LCAPP generators to assure them a reliable revenue stream to cover the costs of constructing the new plants. The EDCs, in turn, would be guaranteed recovery of "all costs associated with . . . [the] resulting SOCAs" from the State's ratepayers. *Id*. § 48.3-98.3(d).

In early 2011, a competitive solicitation proceeded, and the proponents of three natural gas-fired projects were awarded fifteen-year SOCAs to construct and operate their proposed projects: CPV Shore, Hess's Newark facility, and a project then under development by NRG, Inc. JA-62-63. The independent evaluation noted the benefits to New Jersey of building the selected projects, including environmental benefits and an expected reduction in the amount of wholesale power costs projected to be passed on to electricity customers over the fifteen-year period. JA-1990-92, 1997-98 (LCAPP Agent's Report, *Long-Term Capacity Agreement Pilot Program*).

C. Standard Offer Capacity Agreements

Under the LCAPP Act, SOCAs are "financially-settled" transactions. JA-58. They provide for a steady revenue stream for the LCAPP generators by requiring cash payments, in the form of the subsidy or rebate described above, in exchange for the LCAPP generators' construction of new generating capacity – *i.e.*, new power plants, at the prices stated in their respective SOCAs.

The SOCAs are *not* contracts for the sale of electricity (or capacity), but rather involve a promise to construct a facility, providing new capacity in return for a reliable revenue stream. EDCs have no obligation to purchase capacity from the winning bidder, and the winning bidder makes no sale of capacity to any EDC.

The only sales of electric power or capacity referenced in the SOCAs pertain to the generators agreeing to submit offers to sell into the forward capacity market the amounts of electric capacity set forth in the SOCA, pursuant to rules approved by FERC, at the FERC-approved price.[4] Those sales provide the baseline for measuring the SOCA subsidy or rebate. In any given year, then, the payment to the SOCA-supported generator will be the yearly fixed contract price, net of the revenues received from its sales in the forward capacity market.

The construction of the new power plant is, of course, a precondition to any SOCA payments because the very purpose of the SOCA is to ensure that the

[4] CPV Shore's rated capacity is 663.4 MW; Hess Newark's is 625.0 MW.

LCAPP generators can recover their construction costs. In addition, a new power plant that did not actually operate and sell its capacity in the regional market would provide little benefit to New Jersey ratepayers. Thus, the new generator must "use all commercially reasonable efforts to cause the [plant] to qualify under the RPM [Reliability Pricing Model] rules as a capacity resource." JA-1682 (SOCA § 2.3.1).[5]

D. FERC's Role Under The Federal Power Act

As described below, the FPA and subsequent amendments to it over the years have consistently preserved the States' traditional authority over adequate power generation and retail rates. JA-38-39. At the same time, the FPA grants FERC exclusive regulatory authority over "the sale of electric energy at wholesale in interstate commerce," 16 U.S.C. § 824(b)(1), including authority to approve the rates, terms and conditions of wholesale sales of electric power. By contrast, FERC has no authority to plan for, authorize or require construction or retirement of power plants. *See New York v. FERC*, 535 U.S. 1, 19 n.11 (2002) (quoting 16 U.S.C. § 824(b)). Indeed, FERC itself has conceded that "the [FPA] prohibit[s FERC] from directly regulating generating facilities." *Conn. Dep't of Pub. Util.*

[5] What it means to qualify under RPM rules and sell its capacity is explained below. In essence, a resource must "clear" the auction and sell its capacity to PJM – the sole buyer in that auction – at the FERC-approved price.

Control v. FERC, 569 F.3d 477, 481 (D.C. Cir. 2009) (citations omitted) *("CDPUC")*. That authority resides with the States.

To promote efficiency and coordination in wholesale markets, FERC has authorized formation of large regional entities, called regional transmission organizations, which include wholesale generators, transmission resources, and purchasers of wholesale power. JA-42-43. These organizations facilitate regional operation of electricity transmission and provide a platform for wholesale electricity markets. JA-42.

PJM Interconnection, LLC ("PJM") is the largest of these organizations, spanning most of thirteen states, New Jersey included. Under FERC supervision, PJM manages the electric grid in its territory and operates wholesale electricity and capacity markets. Like FERC, it has no authority to license, permit, or retire power plants, or to cause them to be constructed or retired. JA-45-46.

The focus in this appeal is PJM's three-year forward capacity market, operated by PJM as an auction, known as the Reliability Pricing Model ("RPM"). *See* JA-42. Under RPM, generators bid capacity – *i.e.*, capability to provide a certain amount of electricity at a certain time. RPM includes an annual auction in which bidders offer to provide capacity for one year, three years in the future. For example, the 2012 RPM auction set the price to be paid for capacity for 2015. PJM manages the auction, including rules governing who may participate and on

what terms. FERC reviews those rules, and also the resulting wholesale capacity rates, and approves them if it finds them to be "just and reasonable."

Both incumbent and new generators, as well as other eligible resources, bid specific quantities of capacity into the auction. The market clearing price is established at the highest priced bid that PJM needs to accept to meet what it projects to be the future demand. JA-221 (Stip. ¶ 29). Bids above that price are rejected. The rejected bids are said not to "clear" the auction, and no sale is made.

All resources that bid at or below the clearing price are paid the clearing price, no matter what they actually bid – *i.e.*, PJM, the only buyer in this "market," buys all the cleared capacity at the clearing price. PJM then re-sells that capacity at wholesale pursuant to PJM rules. EDCs, which are distribution companies, generally (in their role as load serving entities ("LSEs"), *see* JA-43-45; *see also* JA-217-218 (Stip. ¶¶ 6-7)) look to the RPM for their capacity needs, but the RPM is not the only means for them to purchase capacity. JA-220 (Stip. ¶ 21).

Other regional transmission organizations, established in other regions of the country, tackle the challenges of facilitating transmission, establishing markets, and selling capacity in ways different from the model embodied in PJM's RPM auction. What remains constant is that FERC supervises and approves the prices established in the variously-constituted markets administered by those entities. What also remains constant is that it is the States' responsibility to ensure that adequate generation capacity is created, a responsibility that New Jersey, and many

other States facing similar issues, have sought to address through programs such as those embodied in the LCAPP Act.

E. FERC And PJM Took Steps To Ensure That The LCAPP Act Would Not Interfere With The PJM Auctions Or Otherwise Undermine Either The PJM Capacity Market Or State Authority.

The original RPM rules, promulgated in 2006, specified that most new generators would have to bid a minimum offer price, essentially an administratively determined price derived by reference to a generic project's cost structure.[6] But the original rules granted state-supported projects an exemption from minimum offer price rules, allowing them to bid into the RPM at zero as "price takers." JA-53. This meant that, like all existing generators, they could bid zero, knowing they were certain to clear the auction and sell their capacity to PJM at whatever market clearing price the auction produced and FERC approved.

In reaction to the LCAPP Act and a similar program designed to support the construction of a power plant in Maryland, a coalition of incumbent generators filed a complaint with FERC seeking to tighten conditions under which SOCA-supported power plants could sell their capacity in RPM.[7] FERC ultimately approved a number of rules changes, a principal one being the elimination of the

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[6] *PJM Interconnection, LLC*, 117 FERC ¶ 61,331 (2006) at PP 103-04, *order on reh'g*, 119 FERC ¶ 61,318 (2007).

[7] Complaint and Request for Clarification Requesting Fast Track Processing, *PJM Power Providers Grp. v. PJM Interconnection, LLC*, FERC Docket No. EL11-20-000 (Feb. 1, 2011).

exemption from PJM's "minimum offer price" rules for state-supported projects. FERC found that with these changes, a state-supported generator could participate in the auction and, if its bid cleared, it could sell its capacity at the clearing price.[8] The new rules were applied in the May 2012 auction. Both CPV's and Hess's projects satisfied all requirements, and they bid into and cleared the 2012 auction.[9]

In other words, FERC considered whether to adopt rules that would effectively have excluded State-sponsored generators (like the LCAPP generators) from the auction – and if it had, there would have been no lawsuit by Appellees. Instead, FERC modified the RPM auction rules to ensure State-sponsored generators full participation in a fashion that would not disrupt the auction or FERC's objectives for the auction.[10] FERC explained that it had changed the rules "not to pass judgment on state and local policies and objectives with regard to the development of new capacity resources, or unreasonably interfere with those objectives," but simply to ensure that it fulfilled its own "statutory obligation to

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[8] *PJM Interconnection, LLC*, 135 FERC ¶ 61,022 (2011) at PP 124-43, 177, *order on reh'g*, 137 FERC ¶ 61,145 (2011); *see also* JA-621-22, 652, 658 (*PJM Interconnection, LLC*, 143 FERC ¶ 61,090 (2013) at PP 22, 26, 119, 141-43).

[9] The third-winning bid, NRG's project, failed to clear the auction and subsequently ceased development.

[10] *See* JA-505-09 (135 FERC ¶ 61,022 at PP 135-43); JA-538, 557, 561-62 (137 FERC at PP 4, 75, 89, 91); JA-620, 625-26, 630-33, 652-53, 658 (143 FERC at PP 19, 35, 54-62, 122, 141).

ensure the justness and reasonableness of the prices determined in the RPM."[11] FERC unequivocally concluded that if a capacity resource such as CPV's plant was able to clear the RPM auction under the modified rules, it "is a competitive resource and should be permitted to participate in the auction regardless of whether it also receives a subsidy."[12]

F. The District Court Decision

The district court found the LCAPP Act unconstitutional. The court declined to credit FERC's views that its regulation of the RPM did not interfere with existing state authority to support new power plant construction to meet the States' needs. In a cursory analysis, the district court held that the SOCAs impermissibly invaded the field of "wholesale sales of electricity" reserved for FERC. JA-82-84.

The court's conflict preemption analysis was briefer still. JA-85-86. The court did not consider the fact that under the RPM auction rules as FERC had modified them, the participation of the SOCA-supported generators has not undermined any purpose for that auction intended by FERC. Instead, the court found that the SOCAs undermine "price signals" of the RPM capacity auction that

[11] JA-537-38 (137 FERC at PP 3-4).

[12] JA-518 (135 FERC at P 177).

plaintiffs look to in making business decisions, and thus posed an obstacle to FERC's "preferred method" of wholesale sales of electricity. JA-86.[13]

STANDARD OF REVIEW

This case presents issues of federal constitutional law reviewed de novo by this Court. *Mabey Bridge & Shore, Inc. v. Schoch*, 666 F.3d 862, 867-68 (3d Cir. 2012); *Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 124 (3d Cir. 2010).

SUMMARY OF ARGUMENT

All of the issues in this appeal must be judged based on the strong presumption against preemption applicable when federal law is asserted to have displaced a State's exercise of its traditional powers. That presumption applies with special force under the Federal Power Act because with the FPA, Congress carefully preserved the States' authority in their traditional sphere. That authority includes the precise subject matters at issue here: construction of new power plants to meet a State's electricity needs, and the prerogative to call upon a State's ratepayers to support that construction.

The FPA, as enacted and amended over the years, has repeatedly confirmed and preserved the States' responsibility to ensure a reliable supply of electricity to their citizens, and to control retail rates. At the same time, the FPA created an area

[13] The court rejected Plaintiff-Appellees' Commerce Clause challenge, finding that the Act's incentives for nearby generation were necessary to achieve the Act's goal of achieving grid reliability in New Jersey. JA-87-89.

of exclusive federal authority, namely "the sale of electric energy at wholesale in interstate commerce," 16 U.S.C. § 824(b)(1), including the determination whether prices for such sales are "just and reasonable." The result of Congress' division of powers is a framework that courts have long described as one of interlocking jurisdiction, with both the States and FERC granted primary authority within their assigned spheres.

As the Supreme Court has often explained, the fact that these two fields of responsibility abut – one State, one federal – results in a continual, expected and entirely permissible interplay between federal and state authority. While States must adapt to federal initiatives, FERC must also adapt to the States'. The legal consequence of explicitly recognizing the States' central role within this framework is that it drastically limits the circumstances under which preemption may be found. Within a framework of divided responsibility, where the State acts in pursuit of its permissible objectives, the norm is federal "accommodation," not "preemption."

In this case, FERC specifically considered whether the SOCAs and the LCAPP Act were compatible with its regulation of the RPM auction, made adjustments to the auction rules, and determined that the auction could, and in fact did, function properly. At the same time, it disclaimed any intention or willingness to displace New Jersey's and other States' efforts to support the construction of new power plants.

There is no proper basis to find the Act "field preempted." Under the FPA, the fact that a state program affects matters within the control of FERC will not give rise to field preemption. To find field preemption, the State must act squarely within an area in which FERC exercises its assigned jurisdiction.

There has been no invasion of FERC's territory here. Neither FERC nor Congress has designated the RPM auction, or market forces generally, the sole source of incentives for the building of new power plants. States retain their historical authority and vital responsibility to ensure the adequacy of electricity resources for their citizens, including the prerogative to call upon the ratepayers to support new power plant construction. Moreover, FERC has made it quite clear that New Jersey's program is compatible with RPM.

The LCAPP Act does not set wholesale rates for the sale of electricity or capacity. Payments made to LCAPP generators under the SOCAs are not made by the EDCs as consideration for the EDCs' purchase of capacity; EDCs do not purchase capacity under the SOCA. The SOCAs were awarded based on accepted bids, as consideration for building and operating a power plant that benefits the State of New Jersey. The payments under the SOCAs will allow recovery of the LCAPP generators' bid price for building and operating the power plant, net of market revenues. Subsidies and rebates made to provide incentives for new construction are not rates for the sale of wholesale capacity.

If New Jersey had directly subsidized a builder's costs to construct a new power plant with new capacity to be sold into the RPM, it is untenable that such a subsidy arrangement would be subject to FERC jurisdiction. It can make no substantive difference that the funding for that arrangement under the SOCAs is by the ratepayers, not the taxpayers or the State's general funds. In either setting, the only sales of capacity are the ones that the generator will make to PJM, under the RPM rules established by FERC, at the price set by FERC.

Given the framework of interlocking jurisdiction, federal courts should be reluctant to find preemption of state programs supporting the creation of new power plants in the absence of some clear and proper exercise of authority over the subject matter by FERC itself. FERC itself has never even suggested that it has ratemaking authority over a separate state subsidy or incentive program like this.

Indeed, even were it proper for the courts to determine that the SOCAs are to be treated as setting rates for the sale of capacity properly subject to FERC jurisdiction – and they do not – the effect would not be preemption, but simply that these bilateral agreements between the EDCs and the LCAPP generators would be subject to FERC approval authority. There is no cause for finding *preemption* of state power in connection with an agreement that can be reviewed by FERC in the ordinary course.

Likewise, there has been no obstruction of any federal purpose or program. The LCAPP Act does not and could not impair FERC's regulation of the RPM.

FERC has all the tools it needs to ensure that the RPM meets its objectives. If it deemed it necessary, FERC might have approved modifications to the RPM rules that could effectively have excluded SOCA-supported entrants entirely, shielding whatever "purpose" FERC has vested in the auction from any possible "obstruction." Instead, FERC accommodated the SOCA-supported resources' entry into the RPM auction by allowing PJM to modify the conditions under which SOCA-supported generators could fully participate and sell their capacity in that market, allowing the market to operate to FERC's satisfaction, producing capacity sales at prices that FERC viewed as just and reasonable.

That New Jersey enacted LCAPP against the backdrop of the FERC-regulated forward capacity market, insisting upon compliance with the rules of that market, and FERC modified its market rules to accommodate the State's initiative, is *not* a basis for a finding of preemption. It is evidence of just the opposite, exemplifying how a "harmonious and comprehensive" division of coordinate responsibilities, as established by Congress, is supposed to work. The district court thus erred in finding the LCAPP Act preempted.

ARGUMENT

Federal preemption of state law is found when Congress has expressly preempted state law or where preemption is "implicitly contained in [a federal statute's] structure and purpose." *Gade v. Nat'l Solid Wastes Mgm't Ass'n*, 505 U.S. 88, 98 (1992) (citations omitted). Courts recognize two forms of implied

preemption: field preemption, "where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; and conflict preemption, "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citations omitted). These categories are not airtight. For example, "even within an occupied field federal regulations may tolerate or authorize some exercises of state authority." *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 346 n.13 (3d Cir. 2001). That is an important point here because, as demonstrated above, FERC has found no conflict between the LCAPP Act and the RPM auction that it supervises.

Preemption analysis rests on two "cornerstones." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Id.* (citations omitted). "[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority." *New York*, 535 U.S. at 18 (citation omitted).

Second, "[i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citations

omitted); *see also Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (same); *Farina v. Nokia, Inc.*, 625 F.3d 97, 115-16 (3d Cir. 2010).

As shown below, neither Congress nor FERC has expressed, in words or deeds, any "clear and manifest" purpose to supersede the authority of the States in the two areas implicated by the LCAPP Act: power generation and retail power rates. They have expressed the contrary. And, as FERC itself has concluded, the Act does not interfere with FERC's authority to set rates for, or otherwise pursue its authority and policies regarding, the PJM wholesale capacity market.

I. THE LCAPP ACT DOES NOT INVADE ANY FEDERALLY OCCUPIED FIELD.

"[F]or field preemption to be applicable, congressional intent to supersede state laws must be clear and manifest." *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 336 (3d Cir. 2009) (citations omitted). "[S]tate law is subject to field preemption if it regulates conduct in a field that Congress intended the federal government to occupy exclusively." *Lindsey v. Caterpillar, Inc.*, 480 F.3d 202, 205 (3d Cir. 2007). Where Congress expressly reserves jurisdiction for the States over part of a regulatory field through a savings clause, Congress cannot have intended to preempt state action within the area saved for the States. *See Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 512-13 (1989). To the contrary, a savings clause evinces the opposite "clear and manifest" intent.

Under the FPA and subsequent legislation, Congress established what it intended to be a "harmonious and comprehensive" division of responsibility and

authority between the States, on the one hand, and FERC, on the other. *See id.* at 512 (citations omitted).[14] Providing for the creation of new power plants to ensure an adequate supply of electricity is an important responsibility – and one preserved to the States. For its part, FERC was granted exclusive authority over wholesale power sales and rates. The LCAPP Act falls squarely within the powers reserved to the States, and does not intrude upon FERC's authority to set wholesale power rates.

A. Congress Expressly Preserved The States' Longstanding Responsibility To Ensure And Support Construction Of Power Plants And To Regulate Retail Electricity Rates.

1. The FPA Divides Authority Between The States And FERC, Expressly Preserving State Power.

The history of the FPA speaks directly to the issues on appeal. *See generally New York*, 535 U.S. 1. Before the FPA, regulation of public utilities resided entirely with the States. JA-215-16 (Stip. ¶ 1). Local utilities built, owned and operated power plants, and distributed electricity to their customers. *Id.* State commissions set rates sufficient to reimburse utilities for their prudently incurred costs, allowing them to recover their investment and to finance construction. JA-

[14] *Northwest Central Pipeline* construed federal-state jurisdiction under the Natural Gas Act. Because the relevant provisions of the FPA and the Natural Gas Act are "in all material respects substantially identical," there is an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981); *see also Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 211-12 (1964) ("[§] 201(b) of the [FPA] has its counterpart in [§] 1(b) of the [Natural] Gas Act").

216 (Stip. ¶ 2). The generation of electricity was deemed local in nature. *See Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 182 (1932); Everest Schmidt, *A Call for Federalism: The Role Of State Government In Federally Controlled Energy Markets*, 65 Rutgers L. Rev. 573, 575-79 (2013).

Early in the twentieth century, electric utilities began to sell power or standby capacity to each other in interstate "wholesale" transactions, allowing them to ensure that they had access to sufficient resources to meet peak demand. JA-216 (Stip. ¶ 3). In 1927, the Supreme Court held that the Commerce Clause prohibited States from regulating rates for wholesale sales of power between utilities of different states, deeming such sales "interstate." *Pub. Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89 (1927). That decision created a "regulatory gap," with no entity regulating these interstate wholesale transactions. JA-217 (Stip. ¶ 4); *see also New York*, 535 U.S. at 6. In 1935, Congress filled this gap with Title II to the Federal Power Act, Pub. L. No. 74-333, 49 Stat. 838, 847 (codified as amended at 16 U.S.C. § 824 *et seq*. (2012)). Section 201(b) of the FPA created exclusive federal jurisdiction, vested in what eventually became FERC, over "transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. §§ 824(a), (b)(1).

Under the FPA, Congress preserved the States' existing authority, declaring that federal regulation extends "only to those matters which are not subject to

regulation by the States." *Id.* § 824(a). Section 201(b) of the FPA specifically provided that FERC "*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* . . . ." *Id.* § 824(b)(1) (emphasis added). State commissions continued to regulate construction of power plants, adequacy of power generation supply, operation, and rates charged for retail service to customers – which included costs incurred by local utilities in constructing and operating power plants. JA-217 (Stip. ¶ 5).

The plain language of the FPA is confirmed by the FPA's history, which reveals a "constant purpose to protect rather than to supervise authority of the states." *Conn. Light & Power Co. v. Fed. Power Comm'n*, 324 U.S. 515, 525 (1945) *("CL&P").* Congress "plainly was trying to reconcile the claims of federal and local authorities and to apportion federal and state jurisdiction over the industry." *Id*. at 531; *see also id.* at 525-27. It is this "apportion[ment]," and its legal implications, that the district court's ruling misconceived.

2. Congress And FERC Have Consistently Preserved State Authority Over Both Generation And Retail Rates.

Federal enactments and initiatives since passage of the FPA have modified and expanded FERC authority over interstate transmission and sales of interstate power, but have not changed the pivotal reality that the crucial responsibility to support construction of new power plants still resides in the States' hands. For example, in *FERC v. Mississippi*, the Supreme Court upheld a federal energy

statute only after noting that its "program of cooperative federalism" continued to allow States "to enact and administer their own regulatory programs, structured to meet their own particular needs." 456 U.S. 742, 767 (1982) (citations omitted).

Similarly, the Supreme Court found that FERC acted within its authority when, with its seminal Order No. 888, 75 FERC ¶ 61,080 (1996), it ordered utilities to provide non-discriminatory access to unbundled transmission in interstate commerce. *New York*, 535 U.S. at 11, 23-24. The Court emphasized that "FERC has recognized that the States retain significant control over local matters," including the States' traditional authority over such areas as "utility generation and resource portfolios." *Id.* at 24 (citations omitted).

With the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, Congress *declined* to authorize FERC "to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy or safety of electricity facilities or services." 16 U.S.C. § 824o(i)(2). Conversely, the savings clause expressly preserved state authority to assure reliability and adequacy of electric service within the State:

> Nothing 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).

Finally – as addressed in more detail below (*see* Part II.B, *infra*) – FERC's own orders issued in connection with the subject of this case expressly reaffirmed

the States' continuing responsibility and authority over resource adequacy and the development of new capacity resources. To be sure, FERC preserved its own authority to ensure that the RPM auction, with participation of the SOCA-supported generators, produces just and reasonable rates. But it did so while reaffirming that its actions were not intended to impair "state and local policies and objectives with regard to the development of new capacity resources, or unreasonably interfere with those objectives."[15]

Within the historical framework, then, the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) *("PG&E")*. "State and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from [FERC]." *CDPUC*, 569 F.3d at 481; *see also* Schmidt, *supra*, at 591. FERC's authority, in contrast, is over interstate transmission, wholesale sales of electric energy and the rates for such services.

[15] JA-537-38 (*PJM*, 137 FERC ¶ 61,145 at P 3); *see also* JA-508 (*PJM*, 135 FERC ¶ 61,022 at P 141 ("[T]he MOPR does not interfere with states or localities that for policy reasons seek to provide assistance for new generation entry if they believe such expenditures are appropriate for their state.")).

In sum, federal law creates a framework of "interlocking" state and federal jurisdiction that preserves the traditional authority of the States. *Pub. Util. Comm'n of State of Cal. v. FERC*, 900 F.2d 269, 274-75 (D.C. Cir. 1990). Preemption cannot be found where the State exercises the jurisdiction reserved for it by the FPA. Preemption may be found only where "state regulation would operate '*within* [the] exclusively federal domain.'" *See id.* at 274 (citations omitted; emphasis in original).

B. Because New Jersey Acted Squarely Within Its Jurisdiction In Seeking To Encourage New Power Plant Construction, Backed By The Ratepayers, Any Indirect Effect On FERC Initiatives Does Not Give Rise To Preemption.

1. Under The FPA, A State Does Not Enter A Federal Field If Its Enactments, Exercising Its Traditional Authority, Merely Affect FERC Initiatives.

The consequence of dividing responsibility between the States and FERC is that, in considering where lines are to be drawn, federal courts must be careful not to extend federal authority in a manner that limits the prerogatives and powers of the States. *See Nw. Cent. Pipeline*, 489 U.S. at 512 (cautioning against "an extravagant . . . mode of interpretation" that extends FERC power over transportation and rates into the field of gas "production," over which States have authority). Among other things, a State's program will not be preempted merely because it indirectly impacts rates within FERC's jurisdiction. *See Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 308 (1988) ("[E]very state statute that has

some indirect effect on rates and facilities of natural gas companies is not pre-empted.").

There is a necessary and inevitable interplay between the two spheres of authority. Wholesale prices and markets supervised by FERC will necessarily impact state decisions on whether and how to sponsor and support new power plant construction. State support of new power plant construction will impact prices and transmission. Yet courts "must take seriously the lines Congress drew in establishing a dual regulatory system." *Nw. Cent. Pipeline*, 489 U.S. at 513. And, indeed, they have done so. For example, in *CDPUC*, the D.C. Circuit found that a State's policy choices over generation capacity will, "[o]f course… *affect* the pool of bidders in the [capacity] [m]arket, which in turn *affects* the market clearing price for capacity." 569 F.3d at 481 (emphasis added). "But this is all quite natural," and spillover effects onto the federal field will not transform permissible state actions into preempted ones. *See id.*; *Nw. Cent. Pipeline*, 489 U.S. at 512-13.

Northwest Central Pipeline is illustrative. There the Court addressed a state regulation intended to encourage gas production, a subject matter preserved for the States. 489 U.S. at 512-13. The issue was whether the mechanism that the State created to enforce its regulation invaded federal authority because of its impact within the federal sphere. The Court held that "[i]t would be strange indeed to hold that Congress intended to allow States to take [certain] measures … but that – because enforcement might have some effect on interstate rates – it did not intend

that the States be able to enforce these measures… ." *Id.* The Court explained that where an industry "is subject to interlocking regulation by both federal and state authorities," *id*. at 506, to find preemption where state regulation simply impacts matters subject to FERC jurisdiction would nullify the line drawn by Congress and the "States' retention of their traditional powers to regulate rates of production, conserve resources, and protect correlative rights." *Id*. at 514.

The principles outlined in *Northwest Central Pipeline* and *CDPUC* are directly applicable here. New Jersey has acted well within its authority by seeking to encourage, and, if necessary, to subsidize new generators to build new power plants to serve the States' citizens. New Jersey's efforts cannot be deemed "field preempted" merely because creation of that capacity, or the subsidy, affects markets under FERC's supervision. State law is preempted only where it seeks to regulate "matters that Congress intended FERC to regulate." *See Schneidewind*, 485 U.S. at 308-09; *see also Nw. Cent. Pipeline*, 489 U.S. at 513-14; *CDPUC*, 569 F.3d at 481 (Even in "extreme situations" in which States "utterly refuse[] to allow creation of any new capacity" despite signals from the regional transmission operator urging more capacity, States operate permissibly within their statutory grant of authority.).

In other words, beyond FERC's exercise of its jurisdiction, there is no federal penumbra that bars state actions that simply impact matters over which FERC has asserted its authority. Within the "harmonious and comprehensive"

system of complementary authority that Congress erected, States must, as a practical matter, structure their programs against the backdrop of FERC's initiatives. New Jersey has done that here, honoring FERC's own initiatives by insisting that the LCAPP generators participate in, and comply with, the FERC-supervised forward capacity market, selling their capacity in that market.

But the opposite is true as well: Because States remain responsible for ensuring the supply of adequate and reliable electric service, FERC should accommodate those state initiatives, as FERC did here with regard to the LCAPP Act. *Cf. Nw. Cent. Pipeline*, 489 U.S. at 517-18 (Federal accommodation is inappropriate only where the state program's impacts on the federal sphere are "so extensive and disruptive" that "federal accommodation must give way to federal pre-emption."). Moreover, as shown below, in considering issues at the border between state and federal authority, in the absence of an express assertion of jurisdiction by FERC itself, courts should be especially vigilant to avoid extravagant interpretations of hypothetical federal authority that would interfere with state initiatives.

2. New Jersey Acted Well Within Its Jurisdiction Over The Supply Of Generation Capacity.

The LCAPP Act readily satisfies the *Northwest Central Pipeline* standards. Its explicit purpose is to ensure New Jersey ratepayers an adequate and reliable supply of electricity by encouraging construction of new, efficient, and clean power plants. New Jersey thus acted at the very core of its historical state

mandate: the creation and regulation of generation facilities, "a field that Congress expressly left to the States." *Nw. Cent. Pipeline*, 489 U.S. at 509; *see also CDPUC*, 569 F.3d at 481. Indeed, it did so utilizing the traditional tools at its disposal, requiring its local utilities to enter into long-term contracts with LCAPP generators and to recover costs from local ratepayers in order to provide the economic incentives underlying its LCAPP program.

Moreover, the means chosen by the New Jersey legislature are – at the very least – "plausibly" directed at achieving its goals. *See Nw. Cent. Pipeline*, 489 U.S. at 513 n.10. The Act requires state ratepayers to support the construction of the new power plants by providing a stable revenue stream to the LCAPP generators, and it implements that payment structure by requiring local EDCs to enter into long-term agreements. These are traditional tools at the States' disposal. Indeed, Plaintiffs-Appellees did not seriously dispute below that the LCAPP Act creates effective financial incentives for generators to construct new generating plants. *See* JA-169 (Compl. ¶ 53) ("The intent and effect of the LCAPP is to encourage the construction of new generation in the State . . . ."). In fact, Plaintiffs-Appellees' central objection was that the new plants, advantaged by the subsidy, would compete with many of their own. Even had they disputed this fact, however, that would not be sufficient to invalidate the law. If a state regulation has a proper purpose, and that purpose is not implausibly tethered to state authority,

that is powerful evidence that the regulation is not preempted. *See Nw. Cent. Pipeline*, 489 U.S. at 513 n.10.

C. The LCAPP Act Does Not Permit New Jersey To Operate Within FERC's Jurisdiction.

As shown above, the fact that the state program affects a federal program will not be deemed an invasion of the federal field, and the fact that the state program is a legitimate exercise of state authority provides strong evidence that there has been no invasion of federal jurisdiction. *See PG&E*, 461 U.S. at 213-16.

The stakes here are high. Ensuring that new power plants are constructed sufficient to meet our Nation's needs is a responsibility entrusted to the States. The power to direct the creation of new generation facilities was specifically withheld from FERC. The notion that States cannot use all of the tools and powers at their disposal, including subsidies underwritten by the ratepayers, would circumscribe state powers in ways that Congress could not have anticipated or desired, given Congress's reliance on the States to ensure that our Nation's need for new generation capacity is met. Plaintiffs-Appellees have not met their burden of showing that preemption was intended here.

1. FERC's Supervision Of The RPM Auction Does Not Displace State Efforts To Encourage The Building Of New Power Plants.

Plaintiffs-Appellees based much of their Complaint on the notion that FERC decided to allow the PJM market, and only the PJM market, "to identify when and where in PJM new generation capacity is needed." JA-156 (Compl. ¶ 3). Of

course, FERC has no authority to order the construction of new generating plants – let alone to construct the types of power plants that would meet the States' particular environmental or economic objectives. *See New York*, 535 U.S. at 19 n.11 (quoting 16 U.S.C. § 824(b)); *see also CDPUC*, 569 F.3d at 481. Instead, Plaintiffs-Appellees suggested that FERC had taken over this responsibility indirectly by deciding "that a market-based approach is the most efficient means of determining the wholesale price of capacity and signaling when and where new generation capacity is needed in PJM." JA-157 (Compl. ¶ 8). Plaintiffs-Appellees featured this theme in both their "field preemption" and "conflict preemption/frustration of federal purpose" claims. *See* JA-181 (Compl. ¶ 89f) ("The Act conflicts with FERC's stated reliance on market forces to determine wholesale energy prices.").

In fact, there is no support at all for Plaintiffs-Appellees' thesis that FERC has determined that market forces alone – or the RPM auction market – must determine whether new capacity should be constructed, thereby rendering the State's inducements to new construction suspect. If FERC had made such a decision, one would expect it to do so explicitly, and for it to be specifically authorized by Congress. Neither has happened, and for good reason. Such a determination would fly in the face of the entire history of "cooperative federalism," whereby States have the lead responsibility for ensuring that their

citizens have an adequate and reliable supply of electricity, irrespective of market forces.

To be sure, the RPM forward capacity auction was intended, among other things, to provide useful information about whether it makes economic sense to construct new capacity. But that is far different from saying that the market alone – whether the "free market" writ large or the RPM three-year forward capacity auction market – is intended to be the exclusive source of encouragement for the creation of new power plants. In fact, many factors provide guidance as to whether to build new power plants.

Separate and apart from the RPM auction, public policy properly plays a role in the vital field of determining resource adequacy and the need for new power plant construction. States, as here, may consider a range of related matters, such as environmental issues that the market, left to its own devices, would not. *See CDPUC*, 569 F.3d at 481; *ISO New England, Inc.*, 122 FERC ¶ 61,144 (2008) at P 15. Moreover, as the LCAPP Act demonstrates, States may react more urgently than the market alone to address an impending crisis in a particular locality. And States may look farther into the future than a three-year forward capacity market to assess their citizens' long-term electricity needs.

Accordingly, the suggestion that Congress or FERC would assign responsibility for the creation of new generation capacity entirely to the RPM market, and to reactions of potential investors to its "signals," thereby displacing

the States' traditional public policy responsibility in this field, is unsupported. Even if that were a choice that Congress or FERC might make, neither has done so, and certainly neither has done so "clear[ly] and manifest[ly]." *See Holk*, 575 F.3d at 336.

2. New Jersey Did Not Set Prices For The Wholesale Purchase Or Sale Of Capacity.

The district court itself rejected the suggestion that the States have been displaced from their role of addressing resource adequacy and promoting new power plants. JA-44, 46. The court instead held that the Act invaded FERC jurisdiction by establishing "the price that LCAPP generators will receive for their sales of capacity." JA-84.

At the outset, the district court disregarded the central teaching of *Northwest Central Pipeline* and its progeny. Given the division of power in this field, the analysis must begin by focusing on whether the State is exercising powers reserved to it. "[P]aying due attention to Congress' intent that the States might continue to regulate," *Nw. Cent. Pipeline*, 489 U.S. at 513, goes a long way toward answering the question whether New Jersey has invaded FERC territory. At the margins between state and federal authority, the courts will defer to the State's exercise of its legitimate powers and find no preemption. *See PG&E*, 461 U.S. at 216. Moreover, the case law reflects that where a court is asked to examine cases at the jurisdictional margin between FERC and the States, a central question is whether FERC has actually, and properly, exercised its jurisdiction in the asserted field.

See Miss. Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 374 (1988). That FERC has *not* done so when it comes to the SOCAs – and has concluded that SOCA-supported generators may properly participate in the RPM auction and sell capacity in the PJM market – is thus significant, yet ignored in the district court's conclusion and Plaintiffs-Appellees' arguments.

In any event, the district court's characterization of the SOCAs as setting a price subject to FERC jurisdiction misconstrues the structure and purpose of the LCAPP Act and the SOCAs that implement it. SOCA payments, whether they be a subsidy or a rebate in any given year, are granted to new generators in consideration for their agreement to build a power plant beneficial to New Jersey ratepayers. The payments were promised, and will be made, as a supplement to what the new generators earn in the market, to allow the LCAPP generators to recover their sizable costs of construction. These cash subsidies or rebates are not payments *for* the sale of electric capacity. They are exactly what they purport to be: subsidies or rebates made to incentivize the construction and operation of a power plant beneficial to the State and its citizens, with the ratepayers of the State bearing ultimate financial responsibility.

Stated in the negative, the SOCA payments that the EDCs make to the LCAPP generators are *not* consideration for the sale of capacity to the EDCs. EDCs purchase no capacity or electricity from the SOCA-supported generators.[16]

The district court noted that the SOCA specifically requires that SOCA-sponsored generators will sell their capacity into the PJM forward capacity market. In the district court's view, this transforms the SOCA into a contract for delivery of capacity, subject to FERC jurisdiction. *See* JA-78-79.

The district court's delivery theory conflates two separate transactions. The sale involving "delivery" of capacity is CPV's sale to PJM, the sole buyer in the RPM auction. CPV will have to participate in that auction under rules set *not by the State,* but by FERC. The sale to PJM will be at the price established *not by the State*, but by FERC, through the RPM auction process. When PJM buys capacity from CPV, PJM will pay CPV *not a State-approved price*, but the FERC-approved price, which is precisely the same price that PJM pays to any capacity resource that clears the auction. PJM pays no subsidy.

Granted, the SOCAs refer to the price of capacity in the interstate capacity market. But they do so as a baseline, or index, for determining the differential

[16] The parties stipulated below that under the SOCAs, "the electric distribution companies do not procure any capacity or energy." JA-224 (Stip. ¶ 57). Paragraph 4.2 of the SOCA provides that "[n]othing in this Agreement shall entitle or obligate Utility to purchase, or take title to or delivery of, capacity, electric energy, or ancillary services from the Capacity Facility." JA-224 (Stip. ¶ 55).

payment. That does not make the SOCA itself a capacity sale contract subject to FERC jurisdiction. SOCA payments are not made as part of any sale of capacity in the wholesale market subject to FERC authority, but are furnished separately, as a subsidy or rebate, outside that market, by different parties, in exchange for the generator's agreement to construct a power plant. That the State and its citizens will presumably receive a variety of indirect benefits from the construction of the power plant, and from the sale of new capacity into the interstate market – which will contribute to more stable long-term prices for the ratepayers and generate energy more cleanly and efficiently – does not transform the SOCA into a sale contract for that capacity.

As Plaintiffs-Appellees themselves explained, the LCAPP Act's "guaranteed price mechanism … operates outside the auction," JA-157 (Compl. ¶ 6), not within it. The New Jersey legislature reasonably believed that it could best encourage new construction by assuring bidders that they would be able to recover the costs of developing and constructing a project, even if market prices alone were too low. If sales in the market did not do it alone, the ratepayers would make up the difference.

In short, the SOCA is a contract for differences, functioning like a hedge. It provides the winning generators with a stable yearly revenue stream, with the State's ratepayers mitigating the risk to the winning generators of yearly market revenue swings. In return, the ratepayers receive a new power plant. FERC itself

has long recognized that transactions that do not involve the actual physical purchase and sale of power or capacity, but instead are financial in character, are not subject to its jurisdiction.[17]

The district court concluded that a SOCA is not a "purely financial arrangement." JA-83-84. That is beside the point for two reasons. First, asking whether a SOCA is "purely financial" asks the wrong question. The operative question is whether it provides for a purchase or sale of capacity over which FERC has jurisdiction, not whether it meets some test of financial purity. Second, the various elements of "performance" on which the court relied as a basis for concluding that the SOCAs are not purely financial, such as the obligation to build a power plant, are also not sales of electricity or capacity subject to FERC jurisdiction. Those elements that are – for the new power plant to sell its capacity in the RPM auction – remain fully subject to FERC's authority, and will be made at the prices approved by FERC, in the market regulated by FERC.

Finally, the district court seemed swayed by the many references in CPV's SOCA to the new generators' need to comply with PJM rules and clear the PJM market. *See* JA-63-68, 79. But these references prove the opposite of the

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[17] *See Revised Public Utility Filing Requirements*, 97 FERC ¶ 61,317, at *4-*5 (2001), and *New York Mercantile Exch.*, 74 FERC ¶ 61,311, 61,987 (1996) (FERC has no jurisdiction over a futures contract that can be settled financially, but if the contract goes to delivery, involves energy to be resold in interstate commerce, and the seller is a public utility, it would have jurisdiction).

conclusion drawn by the district court. SOCA requirements that the selected generators participate in the RPM auction, and comply with its rules, reflect New Jersey's intent to *honor* FERC's initiatives and regulations, not undermine them. *See Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1981 (2011) (that a State goes "the extra mile in ensuring that its law closely tracks [the federal law] in all material respects" is evidence that the state law is *not* preempted).

If the State of New Jersey had committed to subsidize up to $1 billion of a builder's costs to construct a new environmentally-friendly power plant with new capacity to be sold into the interstate market for the ultimate benefit of New Jersey ratepayers, and conditioned the extent of its subsidy on how much revenue the builder actually obtained each year, it is far-fetched to suggest that such a subsidy arrangement would be preempted as subject to FERC jurisdiction. That the payments here are channeled through the EDCs, so that the subsidy (or rebate) is borne or enjoyed by the ratepayers, does not take this type of transaction beyond the State's traditional authority and bring it "within" any sphere of exclusive federal authority.[18]

Even if the SOCAs could be construed as bilateral contracts for the sale of capacity – as Judge Sheridan suggested – they would not be preempted. Such

[18] There is nothing unusual about state commissions recruiting EDCs to act as conduits for channeling subsidies for favored resources. Historically, States have done just this to further policy goals, such as supporting renewable energy programs, pursuant to historical state police powers that have gone unquestioned.

contracts are perfectly proper; they are merely subject to FERC jurisdiction. *See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 171 (2010) ("The [FPA] allows . . . sellers and buyers [to] agree on rates by contract."). Any challenge to the contracts would then be addressed to FERC, not the courts. *Ark. La. Gas*, 453 U.S. at 577; *see also NRG Power Mktg.*, 558 U.S. at 171 (citing 16 U.S.C. § 824e(a)). In any such challenge, FERC can judge its own jurisdiction and, if it finds that it has jurisdiction, decide whether the agreement is just and reasonable. *Id*. That determination can be made only by FERC, not by a court. *See Ark. La. Gas*, 453 U.S. at 577. Thus, if the district court were correct that the SOCAs are FERC-jurisdictional contracts for capacity sales, they would not be preempted as an intrusion on FERC authority, but rather it would simply mean that they are within FERC's jurisdiction to judge.

Indeed, at bottom, Plaintiffs-Appellees asked the district court to wade into difficult hypothetical issues concerning the scope of FERC's jurisdiction without any showing that FERC has, in fact, "properly exercised its jurisdiction" over these agreements. *Miss. Power & Light*, 487 U.S. at 374. But in addressing questions on the borderline between FERC and state authority, the Supreme Court has focused on the extent to which FERC has *actually*, and *properly*, asserted its

authority.[19] *See id.* at 380-82 (Scalia, J., concurring in the judgment). Whether FERC has actually and properly asserted its jurisdiction is far more important than whether it debatably or hypothetically could try to do so:

> Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas where FERC has *properly exercised* its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable.

Id. at 374 (emphasis added); *see also Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 388-89 (1983) (court should be reluctant to find field preemption in the absence of proper agency assertion of jurisdiction). FERC's actions are especially important in a case like this because, even accepting the doubtful proposition that FERC might have rate approval jurisdiction over a subsidy (or rebate) program like this one, FERC might decline to assert it, precisely because such an arrangement falls within the traditional authority of the

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[19] The district court cited *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), and *Miss. Power & Light*, 487 U.S. 354, in the context of field preemption. JA-82. Each addressed instances where, unlike this case, FERC had asserted jurisdiction over the subject matters at issue. The Court then applied the filed rate doctrine to hold that state action in the field, resulting in trapped costs, would have called into question the FERC rate. No suggestion has been made that the filed rate doctrine helps Appellees in this case. Moreover, this Court has explained these cases in terms that reaffirm the controlling principles here: While "states are preempted from questioning or altering the wholesale rates set by FERC," they remain free to exercise their jurisdiction over regulated utilities in ways that may have some indirect relationship to FERC rates. *Ky. W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 837 F.2d 600, 606 (3d Cir. 1988).

States. *See New York*, 535 U.S. at 22-24, 26-28 (FERC "had discretion to decline to assert such jurisdiction . . . in part because of the complicated nature of the jurisdictional issues.").

"In this as in other areas of coincident federal and state regulation, the teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 130 (1978) (citations omitted). Courts should be reluctant to conceive jurisdictional conflicts that have not yet arisen. *See CL&P*, 324 U.S. at 532 ("Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone." (citations omitted)).[20]

"There may come a time when [the agency] changes its present policy," *Ark. Elec. Coop.*, 461 U.S. at 388-89, and asserts its jurisdiction over this type of subsidy arrangement. If that time ever comes, it will provide the occasion for determining whether FERC has authority to review such an arrangement. But for now, absent an actual conflict between the LCAPP Act and "particular [FERC]

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[20] *See also Freightliner v. Myrick*, 514 U.S. 280, 286 (1995) (no preemption where there was absence of an "affirmative decision by agency officials to refrain from regulating air brakes"); *Fellner v. Tri-Union Seafoods, LLC*, 539 F.3d 237, 247 (3d Cir. 2008) (Preemption of state law turned on "whether some extant law or regulation evinced an authoritative message of federal policy that an issue is to remain free of state regulation." (citations omitted)).

regulations," or some significant obstruction of "important federal interests" (*see* Part II, *infra*), *id.*, the Court should refrain from "assum[ing] that such a hypothetical event is so likely to occur as to preclude" state action in the disputed field. *See id.*

Indeed, far from announcing that the SOCAs are "inconsistent with federal policy," FERC has determined that if the SOCA-supported generator complies with the rules of the RPM auction, it "is a competitive resource and should be permitted to participate in the auction regardless of whether it also receives a subsidy."[21] Thus, FERC has authorized the activity at the heart of the case. *See NE Hub Partners*, 239 F.3d at 346 n.13 ("[E]ven within an occupied field federal regulations may tolerate or authorize some exercises of state authority."); *id.* at 350 (Nygaard, J., dissenting) (same). If preemption does not follow from federal regulatory silence, *see Fellner*, 539 F.3d at 247, it would be strange to find preemption where the federal agency has affirmatively accommodated the State's program.

In sum, the LCAPP Act falls squarely within the range of powers and responsibilities preserved to the States under the FPA. It does not embody a transaction subject to FERC jurisdiction. FERC has considered the effect of the subsidy (or rebate) at issue and determined that it does not prevent SOCA-

[21] JA-518 (135 FERC at P 177).

supported generators from participating in the RPM auction, and selling their capacity in that market at the FERC-approved price. Thus, the mere possibility that FERC might someday attempt to assert jurisdiction over the SOCAs, or contracts like them, does not provide a basis for concluding today that either Congress, or FERC, had a "clear and manifest" intention to preempt the LCAPP Act, or otherwise for overcoming the strong presumption against preemption.

II. THE LCAPP ACT OBSTRUCTS NO FEDERAL PURPOSE OR PROGRAM.

The entirety of the district court's analysis of conflict preemption is contained in a single paragraph. JA-86. The district court identified no direct conflict between the LCAPP Act and any federal statute, or any of the FERC orders governing the RPM or any related matter. Instead, it rested its finding of conflict on the principle, correctly stated but incorrectly applied, that a state law that obstructs a federal purpose must give way.

The district court's determination that the LCAPP Act creates an "obstacle" to FERC's "preferred method for the wholesale sale of electricity in interstate commerce," JA-86, rests on the Act's perceived conflict with the RPM auction. But the district court did not clearly define what purpose ostensibly underlying the RPM it believed was obstructed; failed to consider the significance of the framework of interlocking federal-state responsibility; failed to apply the presumption against preemption; identified a conflict with the RPM auction where none exists; and ignored FERC's amendments to the RPM auction that eliminated

any possible tension – and certainly any conflict – between the LCAPP Act and the RPM auction.

A. Under The FPA, A Claim That The LCAPP Act Is Conflict-Preempted Because It Stands As An Obstacle To A Federal Program Faces Formidable Hurdles.

As explained above, the necessary interplay between FERC's powers and those reserved to the States in the field of generation and retail ratemaking militates against finding field preemption. Those same considerations militate equally strongly against finding preemption based on a claim that the LCAPP Act is an obstacle to FERC's regulation of the RPM auction.

State initiatives supporting new generating capacity will frequently affect FERC-regulated markets and rates. Such effects do not "trigger[] conflict pre-emption," for, if they did, this would "undermine precisely the division of the regulatory field that Congress went to so much trouble to establish . . . and would render Congress' specific grant of power to the States to regulate production virtually meaningless." *Nw. Cent. Pipeline*, 489 U.S. at 515. Thus, conflict preemption cannot be found if the effect on the federal program is merely an "incident of efforts to achieve a proper state purpose." *Id.* at 515-16.

The primary question then is whether the state law "lacks a proper state purpose . . . []or . . . is so weakly related to such purpose that, because of its effect on federally regulated [activities], it must be pre-empted." *See id.* at 519; *see also United Distribution Cos. v. FERC*, 88 F.3d 1105, 1157 (D.C. Cir. 1996)

("[C]onflict pre-emption analysis must be applied with particular care in those instances in which [FERC] seeks to preempt state regulation merely because it has some *effect* on the interstate transportation of natural gas." (emphasis in original)). If the State is seeking to fulfill an important objective within the State's assigned sphere of responsibility, then FERC acts most properly by *accommodating* the State's initiative. *See Nw. Cent. Pipeline*, 489 U.S. at 519. It is only when the impact of the state program on the federal program is "so extensive and disruptive … that federal accommodation must give way to federal pre-emption." *Id.* at 518.

Of course, beyond the specific admonitions against finding preemption under the FPA, there is a broader presumption against preemption "most often stated" in the context of conflict preemption. *New York*, 535 U.S. at 17-18 (citing *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985)); *see also Medtronic*, 518 U.S. at 485. The district court failed to apply that presumption as well.

Mere "tension" between federal and state law is insufficient to give rise to preemption, "particularly when the state law involves the exercise of traditional police power." *MD Mall Assocs., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 495 (3d Cir. 2013). There must be an actual conflict, not a hypothetical or potential one. *See Cipollone v. Liggett Grp., Inc.*, 789 F.2d 181, 188 (3d Cir. 1986). When the alleged conflict is said to arise from regulations as opposed to statutes, courts must be "even more reluctant to infer pre-emption." *Hillsborough Cnty.*, 471 U.S. at

717. And the burden is all the greater where Congress has expressly preserved state authority with a savings clause in the governing statute. *See Nw. Cent. Pipeline*, 489 U.S. at 512-13; *Whiting*, 131 S. Ct. at 1984-85; *Lindsey*, 480 F.3d at 210-11.

Plaintiffs-Appellees therefore faced a particularly steep climb with their claim of conflict preemption. Where, as here, FERC itself has disclaimed any intention to encroach on state authority, has the tools at hand to ensure that the state program cannot impair its own, and has already taken steps to ensure that the state program does not impair its own, such a claim faces insuperable obstacles.

B. FERC's Views And Actions Leave No Basis For Suggesting A Conflict.

The district court concluded that the LCAPP Act "poses as an obstacle" to FERC's "preferred method" of setting rates, the RPM auction. JA-86. It did so, however, without addressing FERC's contrary view – or the adjustments to the auction that FERC had already made. Rather, the district court determined that "the Court is in the best position to determine" whether the Act is an obstacle to FERC's regulation. JA-74. This was error.

The reasons to consider FERC's views and its actions in response to the LCAPP Act are eminently practical. While a reviewing court may not defer to a federal agency's legal conclusion on preemption, it may properly "attend[] to an agency's explanation of how state law affects the regulatory scheme." *Wyeth*, 555 U.S. at 576. Moreover, the "obstacle" concept presupposes an understanding of

the agency's purposes and authority. *See City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1870-71 (2013) (agency is given deference in its interpretation of the scope of its jurisdiction); *Whiting*, 131 S. Ct. at 1986 (deferring to agency view that Arizona law did not obstruct Congress' purpose); *Miss. Power & Light*, 487 U.S. at 380-82 (Scalia, J., concurring) (deferring to FERC's interpretation of its jurisdiction in preemption setting).

"[A]gencies . . . have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' . . . The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness." *Wyeth*, 555 U.S. at 577 (citations omitted).

FERC has repeatedly, thoroughly, and persuasively addressed the interaction between the RPM auction, on the one hand, and the States' authority to support the creation of new power plants through a potential subsidy arrangement like this, on the other. FERC was explicit that its own involvement in the field, by encouraging PJM's forward capacity auction to provide "signals" about future capacity needs, was not intended to displace the State's traditional authority over the adequacy of electricity resources to meet a State's needs. But FERC has done more than spoken: It has acted, expressly, with reference to the LCAPP Act, the SOCAs, and

how SOCA-supported generators may participate in the RPM auction to ensure harmony between that auction and New Jersey's LCAPP Act.

The district court thus erred in considering the effect of the LCAPP Act on FERC's objectives in the abstract, focusing on a hypothetical conflict, rather than carefully identifying an actual one. *See Cipollone*, 789 F.2d at 188 (preemption ought not be based on a merely potential conflict). At a minimum, the district court should have examined FERC's program as it now actually exists, as modified by FERC itself to accommodate the LCAPP Act. *Cf. NE Hub Partners*, 239 F.3d at 346 n.13 (FERC can authorize state activity that would otherwise be preempted).

1. FERC Has Plainly And Repeatedly Stated That Neither Its Approval Of PJM's Capacity Market Nor The Design Or Purpose Of Such Market Displaces States' Traditional Authority Over Resource Adequacy.

In many lengthy FERC proceedings concerning the RPM, FERC has confirmed that its supervision of PJM's capacity market, and the use of the RPM auction to provide "signals" to the marketplace about whether to build new capacity, were not intended to divest the States of their traditional role in ensuring resource adequacy. Indeed, FERC has declared a policy of "defer[ring] to state and local entities' decisions when possible on resource adequacy matters," noting that "in doing so we will not shirk our congressionally-mandated responsibilities." 119 FERC ¶ 61,318 (2007) at P 40 (footnote omitted).

Markets for electricity have long existed. At the same time, States have had an independent responsibility to provide their citizens with a reliable supply of

electricity and new power plants. With its three-year forward capacity RPM auction, PJM and FERC undoubtedly sought to structure a market that would provide information to the marketplace about when to build new capacity. But a decision to create an improved market structure is far different from declaring that market supreme, displacing entirely the role of state government. Neither FERC nor Congress has suggested that intention.

In light of the interlocking responsibilities of FERC and the States, FERC has been consistent in its view that it should respect state initiatives in the field of resource adequacy, while fulfilling its own duty to ensure that the forward capacity markets operate properly and generate just and reasonable rates.[22] It has implemented the federal imperative to accommodate, rather than preempt.

2. FERC Approved New Market Rules So As To Avoid Any Conflict With The LCAPP Act And Pronounced Itself Satisfied With The Results.

The record clearly reflects that FERC has all the tools it needs to ensure that the LCAPP Act cannot plausibly impair the operation of the RPM, nor keep the RPM from attaining *whatever* objectives FERC has for it. Given a proper purpose, FERC could conceivably approve additional and more onerous preconditions on how SOCA-supported generators may bid that would limit their participation even further.

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[22] JA-508-09 (*PJM*, 135 FERC ¶ 61,022 at PP 141-43).

Where FERC possesses all the power it needs to protect the auction, the LCAPP Act could not meaningfully obstruct its operation.

As important as theory, however, FERC in fact implemented material modifications to the RPM in order to allow the full competitive participation of SOCA-sponsored generators in the RPM auction. The principal modification was elimination of the exemption from the minimum offer price rules heretofore granted state-sponsored projects.[23]

In 2011, FERC addressed the LCAPP Act directly, JA-468, 474-75, 492 (*PJM*, 135 FERC ¶ 61,022 at PP 2, 20, 22, 81), considering the impact on the RPM auction of bids that might be supported by subsidy payments. *See* JA-502, 518 (*id.* at PP 122-23, 177). With the revisions to the minimum offer price rule and other changes approved in FERC's 2011 order, FERC squarely held that a SOCA-supported generator that satisfied the modified rules "is a competitive resource and should be permitted to participate in the auction regardless of whether it also receives a subsidy." JA-518 (*id.* at P 177). In its order on rehearing, FERC explained that its new rules "reconcile the tension that has arisen between policies enacted by states and localities that seek to construct specific resources, and our statutory obligation to ensure the justness and reasonableness of the prices determined in the RPM." JA-538 (*PJM*, 137 FERC ¶ 61,145 at P 4).

[23] The minimum offer price is an administratively determined price, derived by reference to the project's cost structure, that PJM must approve.

In short, FERC accepted the prerogatives of the States to provide a subsidy to encourage new generation as a matter within the States' jurisdiction. It then assured itself that by approving PJM's proposed changes to the rules governing the auction, the subsidized generators could properly participate. In tightening its rules on the participation of state-supported projects, FERC confirmed the States' continued authority to assist "new capacity entry," and that its own role was more modest. It stated that its revised rule "does not interfere with states or localities that, for policy reasons, seek to provide assistance for new capacity entry if they believe such expenditures are appropriate for their state. We only seek to ensure the reasonableness of the wholesale, inter-state prices determined in the markets PJM administers." JA-561-62 (137 FERC at P 89; *see id*. at P 91). With these revisions, FERC confirmed that the PJM market would yield just and reasonable results, and that the 2012 auction *had* yielded just and reasonable results. JA-655, 658-59 (*PJM*, 143 FERC ¶ 61,090 at PP 132, 143).

C. The District Court Found Conflict Where None Exists.

The district court ignored FERC's view of the impact of the LCAPP Act on the RPM auction. Instead, the district court noted testimony by executives of various plaintiff companies who complained that they look to "price signals of the RPM auction to determine future company business plans." JA-86. The district court concluded that these "effects described by the witnesses demonstrate that the SOCA's imposition of a government imposed price creates an obstacle to

[FERC's] preferred method for the wholesale sale of electricity in interstate commerce." *Id*.

This reasoning is faulty on many levels. First, the district court's reliance on how SOCAs affect business decisions by other RPM participants is surprising because by the conclusion of the trial, in light of FERC's actions and orders, Plaintiffs-Appellees had abandoned their conflict preemption arguments based on the effect of the SOCAs on market prices, or on any general tension between FERC's intentions for the RPM process and the SOCA subsidies.[24] Instead, they insisted that they were asserting only one narrow conflict, based on FERC's initial disinclination to provide a locked-in revenue stream for new generators for any

[24] JA-355 (Plaintiffs' Post-Trial Reply Brief) ("Plaintiffs do not contend that . . . the LCAPP Act resulted in the artificial suppression of market prices. Rather, the conflict identified by the Plaintiffs stems from the *long-term (fifteen-year) revenue guarantees* that these new LCAPP generators will receive now that they *have* entered the market." (emphasis in original)); JA-356 ("Plaintiffs do not claim that the LCAPP Act conflicts with FERC's policies because it affects market prices. The LCAPP Act has certainly injured Plaintiffs by reducing market prices, but that injury simply provides Plaintiffs with standing to sue."); JA-377 ("Plaintiffs' conflict preemption claim does not arise from the LCAPP Act's indirect effects on wholesale prices."); JA-381 ("The conflict identified by Plaintiffs does not stem from the conduct of the May 2012 auction."); JA-384 ("Defendants state that 'FERC never intended to prohibit new capacity resources from entering the auction if the developer was not motivated solely by the level of PJM auction prices.' . . . Plaintiffs have never contended otherwise, and developers are regularly motivated by energy prices, ancillary services revenues, gas prices, changes in demand, and other factors.").

longer than three years.[25] *PJM Interconnection, LLC,* 128 FERC ¶ 61,157 (2009) at PP 95-104. The district court did not credit that theory.

Second, as demonstrated above, there are no "SOCA prices" that "supplant the RPM Auction price." JA-86. To the contrary, the subsidy for new generation provided by the LCAPP Act is not a price *for* capacity, or a price at all. Neither is it part of the *rate* paid by PJM for wholesale capacity. *See* Part I.C.2, *supra*.

Third, the effect of the SOCAs on business decisions of private parties is irrelevant. The issue is whether FERC's or Congress' goals have been frustrated. The district court identified no congressional goal that has been impaired. And FERC itself has determined that with the participation of the SOCA-supported generators, the RPM auction continues to function to its satisfaction. JA-655, 658-59 (143 FERC at PP 132, 143).

CONCLUSION

The judgment of the district court should be reversed.

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[25] This comment was in an order on rehearing of the 2009 order revising a number of RPM rules, in which FERC also acknowledged approving a longer period in another case. JA-442 (*PJM Interconnection, LLC,* 126 FERC ¶ 61,275 (2009) at P 150 n.65). And this 2009 order (before the LCAPP Act existed) was not FERC's last word on the subject. The issue was discussed in the very same orders, discussed above, in which FERC ultimately "reconciled" the LCAPP Act with the RPM.

Respectfully submitted,

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Dated: January 17, 2014

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COMBINED CERTIFICATIONS

1. Certification of Bar Membership

I, Larry F. Eisenstat, counsel for Appellant CPV Power Development, Inc., certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Word Count

This brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B), because this brief contains 13,911 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The "Word Count" function of Microsoft Word 2010 was used for this purpose.

This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(7) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

3. Virus Check

I further certify that a virus check of the electronic PDF version of this Brief was performed using Avast version 9.0.2011 software, and according to that program, it is free of viruses.

4. Certificate of Identical Compliance of Briefs

I hereby certify that the text within the electronic and hardcopy forms of this brief are identical.

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25 and Local Appellate Rules 25 and Misc. 113.4, I hereby certify that I have, on this 17th day of January, 2014, caused the Opening Brief for Appellant CPV Power Development, Inc. and Joint Appendix to be served upon each party identified in the attached service list, via CM/ECF. I have also caused seven paper copies of the Opening Brief and Volume 1 of the Joint Appendix to be delivered via FedEx to the clerk of this Court.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13-4330, 13-4394 & 13-4501 (consolidated)

PPL ENERGYPLUS, LLC, *et al*.,

v.

LEE A. SOLOMON, in his official capacity as President of the New Jersey Board of Public Utilities, *et al*.

v.

CPV POWER DEVELOPMENT, INC.; HESS NEWARK, LLC

CPV POWER DEVELOPMENT, INC.,
Appellant in No. 13-4330

HESS NEWARK, LLC,
Appellant in No. 13-4394

LEE A. SOLOMON, *et al.*,
Appellants in No. 13-4501

Appeal from Judgment of the U.S. District Court for the District of New Jersey, No. 3:11-cv-00745-PGS (Hon. Peter G. Sheridan)

JOINT APPENDIX, VOLUME I (PP. 1-94)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PPL Energy Plus, LLC, *et al.,* Plaintiffs, v. ROBERT M. HANNA, in his official capacity as President of the New Jersey Board of Public Utilities, *et al.,* Defendants.	No. 11-cv-00745 (PGS)(DEA) *Document Filed Electronically*

NOTICE OF APPEAL

Notice is hereby given that Defendant-Intervenor CPV Power Development, Inc. hereby appeals to the United States Court of Appeals for the Third Circuit from the final judgment entered in this action on October 25, 2013 (Dkt. No. 314).

Dated: New York, New York
October 31, 2013

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PPL EnergyPlus, LLC, *et al.*, Plaintiffs, v. LEE SOLOMON, *et al.*, Defendants.	No. 11-cv-00745 (PGS)(DEA) *Document Filed Electronically*

NOTICE OF APPEAL

Notice is hereby given that Hess Newark, LLC hereby appeals to the United States Court of Appeals for the Third Circuit from the Memorandum Opinion (Dkt. No. 305), Order (Dkt. No. 306) and the final judgment entered in this action on October 25, 2013 (Dkt. No. 314).

Dated: Woodbridge, New Jersey
November 8, 2013

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PPL EnergyPlus, LLC, *et al.*, Plaintiffs, v. ROBERT M. HANNA, Jeanne M. Fox, Joseph L. Fiordaliso, Mary-Anna Holden, and Diane Solomon, in their official capacity as Commissioners of the New Jersey Board of Public Utilities, Defendants.	Civil Action No. 3:11-cv-00745 (PGS-DEA) *Document Filed Electronically*

NOTICE OF APPEAL

Notice is hereby given that State Defendants, Robert M. Hanna, *et al.,* hereby appeals to the United States Court of Appeals for the Third Circuit from the Memorandum Opinion (Dkt. No. 305), Order (Dkt. No. 306), and the final judgment entered in this action on October 25, 2013 (Dkt. No. 314).

Dated: Trenton, New Jersey
November 20, 2013

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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PPL ENERGYPLUS, LLC, et al., Plaintiffs, v. LEE A SOLOMON, et al., Defendants.	Civil Action No.: 11-745 **MEMORANDUM AND ORDER**

SHERIDAN, U.S.D.J.

This matter comes before the Court on three motions based upon preemption: Plaintiffs' motion for summary judgment (ECF 88); a Cross-Motion for Summary Judgment by CPV Power (ECF 98); and a motion for summary judgment by Nicholas Asselta, Joseph Fiordaliso, Jeanne Fox and Lee Solomon (the Board of Public Utilities) (ECF 100). The Court has jurisdiction because the issue arises out of the Federal Power Act (codified as amended 16 U.S.C. § 824 *et seq.*).

On February 9, 2011, Plaintiffs, a consortium of utility companies and electric generator companies filed a complaint alleging that the Long-Term Capacity Agreement Pilot Program Act (P.L. 2011, c.9, approved Jan. 28, 2011, codified at N.J.S.A. 48:3-51,48:3-98.2 to -98.4)1 ("LCAPP Act") is preempted by the Supremacy Clause and the Commerce Clause of the United States Constitution. Plaintiffs' main contention is that the LCAPP Act violates Part II of the Federal Power Act, which provides the Federal Energy Regulatory Commission ("FERC") with exclusive jurisdiction to regulate wholesale electricity sales. More particularly, the federal question is whether

the Board of Public Utilities of the State of New Jersey (BPU) was jurisdictionally preempted from approving two new gas fired generators of electricity pursuant to the LCAPP Act due to FERCcontrol.

I.

The Plaintiffs are energy related companies such as PPL Energy Plus and Calpine Energy, and some are New Jersey regulated utilities such as PSE&G and Atlantic City Electric Co. The defendants are the Commissioners of the Board of Public Utilities ("BPU"). In addition to the parties, the case focuses on the actions of two major entities – FERC and PJM Interconnection, LLC. For reasons unknown, neither entity is participating in this suit.

About forty years ago, Congress and leaders of corporate and governmental energy providers foresaw the need for utilities to purchase wholesale electric capacity. Evidently, purchase of future energy capacity hedges against unexpected circumstances such as extreme weather or breakdown of power plants. In this context, "capacity" is similar to energy "deposits" or "reserves." Generally, "capacity" includes commitments by generators to produce electricity when electricity is needed to meet demand. Complaint, ¶ 32. Capacity is an important concept in the energy market due to the substantial deviations between maximum energy demand and minimum energy demand. *See* U.S. Dept. of Energy, *A Primer on Electric Utilities, Deregulation, and Restructuring of U.S. Electricity Markets*, at A.4 (May 2002), http://www1.eere.energy.gov/femp/pdfs/primer.pdf. Additionally, utilities are required by federal regulation to maintain a certain amount of capacity. Complaint, ¶ 32. As explained at oral argument, generators are " interconnected into a grid, and they generate power that goes onto the grid. And they also make their excess capacity available, so that at times of peak demand, capacity needs to be called on. It can be called on to deliver energy on the PJM grid." (T.

29, 24 through T. 30, 4).

To accomplish this, regional wholesale electric markets were established coordinating between different states. New Jersey is part of a regional wholesale electricity market that includes thirteen states. This market is administered by PJM Interconnection, LLC (PJM). At oral argument, PJM was defined as "a private corporation . . . it operates pursuant to a tariff . . . which is filed and approved by FERC. " (T. 29, 12-24). The FERC controls the cost of energy and wholesale capacity and some other services on the grid, which includes wholesale energy auction of PJM that is a critical part of the issue here. (T. 29, 11-16).

More particularly, the PJM market is based on the demand of retail electricity customers (residential, business and government) as calculated by PJM and load serving entities (LSE).[1] In order to serve the consumers, the LSEs purchase capacity and energy from PJM through the PJM interstate grids, and PJM is paid the capacity price. Generators sell their energy and capacity to PJM. The generators have no idea which LSE used the energy produced. As explained at oral argument "you just put it (energy) into PJM and the electrons go wherever and nobody traces them, the same thing is true with capacity." (T. 31, 19-21)[2].

In order to determine the price of wholesale electric capacity, PJM conducts a base rate capacity auction (sometimes referred to as BRA herein) using the "reliability pricing model" (RPM). Under this model, the LSEs and generators buy and sell capacity three years in advance at the lowest

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[1] It is unclear how many plaintiffs are LSEs, but there are at least two, PSE&G and Atlantic City Electric.

[2] Mr. Kleinman, attorney for Defendant CPV Power Development, acknowledged that if the LCAPP Act developed generators, only "some" of the energy produced would be returned to New Jersey in the event of a transmission failure. The point is no one knows where the energy is utilized.

competitive price.

In PJM capacity auctions, demand for capacity is determined by the amount of electricity LSEs are expected to require in three years. The supply of capacity is determined by the bids of electric generators, with each generator bidding an amount of capacity it is willing to sell at the price it bids. The price of capacity is set by the intersection of supply and demand and is referred to as the "clearing price." That is, any generator that bids at or below the clearing price "clears" the auction and receives the clearing price for its capacity. Any generator that bids above the clearing price fails to "clear" the auction, and its capacity does not sell in the auction. The determination of whether generators were above the clearing price is established by PJM and is called the MOPR screen (minimum offer price rule). A generator must clear the MOPR screen in order to enter the auction where wholesale energy capacity is sold. Once the capacity is sold to PJM, and hypothetically PJM does not need a generator's capacity, the generator "still get[s] the price for having your plant standing by ready to go." (T. 31, 1-2)

After the auction occurs, then PJM submits its wholesale electric capacity price to FERC for approval as part of its tariff. For the most part, over the years FERC has approved the auction process and implementation of the RPM model as an appropriate tool to determine wholesale capacity price.

Although RPM, on its face, appears to be a simple point where price meets demand, it is more complex in that there are some variables or scenarios which may impact the process. One variable is that many generation plants are very old and/or antiquated and may be out of service. Apparently, the BPU has determined that such an event may likely happen, and New Jersey residents are at risk that shortages and outages could occur. Since 2007, the BPU implored PJM and FERC

to change the way the auctions are conducted. As the BPU sees it, the auction price does not allow for new generation to be created because development costs can not be recouped at auction due to the MOPR screen. According to the BPU, this occurs because PJM is too inflexible, and it will not adjust the MOPR screen to factor in new development construction costs. If an unforeseen repair or upgrade becomes necessary to any one of the antiquated or old generation plants, the capacity purchased may not be available, and another generator must produce more energy. As a result, more energy must come to New Jersey from another generator, and there may be insufficient transmission equipment to convey the energy to an LSE in New Jersey. According to the BPU, such circumstances are not adequately addressed through the PJM auction, because the best method to resolve the issue is through the creation of new, more local, generators.

The lack of transmission facilities is a concern of the BPU, for which there is factual support. In a hearing before the BPU, several PJM or PSE&G representatives testified about the lack of transmission facilities. *See*, *PSE&G application for Susquehanna-Roseland Transmission Line*, BPU Docket No. EM 9010035. Esam A. F. Khadr, Director – Electric Delivery Planning of PSE&G reviewed PJM's planning studies. Mr. Khadr agreed with PJM's finding that overloaded circuits delivering energy to New Jersey beginning in 2012 would require PJM and the transmission facility owners to "reduce transmission system voltages (brown-outs) or implement rolling black-outs for network transmission service customers." *Id.* at p. 10. In addition, Mr. Herling, Vice President of Planning for PJM prepared annual reports "to analyze the electric supply needs of customers." *Id.* at 12 (this report is abbreviated RTEP). In the 2007 RTEP, there were 23 violations identified to occur to PSE&G customers. *Id* at 13. Violations are various deficiencies in service and reliability. These violations are based on a "five-year and fifteen-year baseline analysis to assess compliance

with reliability criteria. *Id*. Reliability refers to the delivery of electricity to customers in the amounts desired and within acceptability standards for frequency, duration and magnitude of outages and other adverse conditions or events . *Id*. at 14. Mr. Herling noted that "the PJM transmission system is rapidly reaching the point where short term incremental fixes will no longer be sufficient to mitigate identified reliability criteria violations." *Id*. at 13. These reliability findings were known since at least 2007. As a result, the BPU is concerned about whether sufficient energy will be delivered to New Jersey residents, and whether New Jersey utilities could obtain regulatory approval for construction of new transmission facilities if needed in the future. To resolve these predicaments, the BPU focused on construction of new generators whereby transmission infrastructure needs could be met, and not overburdened. The BPU posits that New Jersey's best course of action is to permit new development of local generation rather than struggling with transmission issues in the future. As Mr. Kleinman stated, the LCAPP Act was enacted so that New Jersey has a "predictable stream and be able to build a power plant in the State of New Jersey, which we may need if the next hurricane, the next thunderstorm, the next forest fire, the next whatever, knocks down transmission." (T. 38, 23 through T. 39, 1). The financial predicament that occurs with the BPU analysis is that new generators must finance construction costs in the amount of tens of millions of dollars. To do so, new generators can not clear the MOPR screen because their price is too high compared to older generators who do not have such finance costs. At the present time, most financial institutions will not finance new generators in New Jersey if the MOPR screen blocks new generation from competing with the other generators at the auction. PJM disagrees with the BPU assessment and argues that its auction and rules have incorporated changes which allow new generators to clear the MOPR screen when the demand exceeds capacity – but that has not yet occurred. On the other

hand, the BPU contends that as time passes, and obsolescence of older generators increases, PJM's inaction to update generation capability will become apparent.

As noted above, the State of New Jersey and the BPU became leery about meeting energy demands of the future without relief from PJM or FERC due to the lack of transmission issues, and enacted the LCAPP Act in order to overcome that issue through the development of more local generation. On January 28, 2011, the New Jersey legislature enacted the LCAPP Act to foster new electric generation, and to provide New Jersey with new generation capacity. The LCAPP Act has several purposes. It requires a competitive selection process to foster the development of 2,000 MW of new base load or mid-merit electric power generation facilities in order to "ensure sufficient generation is available to the region, and thus to the users in the State in a timely and orderly manner." N.J.S.A. §48:3-98.2(d). In addition, the statute authorized the "BPU to order New Jersey's public utilities to enter into long-term financial agreements with new generators selected by the BPU from its competitive solicitation process. N.J.S.A. 48:3-98.2 *et seq.* The law works as follows: First, the BPU selects a limited number of electric generation companies for entry into a pilot program[3]. The BPU bases its selections on criteria included in the Act. Second, these electric generation companies enter into irrevocable, long-term contracts with each of New Jersey's electric public utilities. These contracts, or standard offer capacity agreements ("SOCAs"), guarantee the state-selected electric generation companies a fixed price for electric capacity. In exchange for the price guarantee, the LCAPP Act requires the state-selected generation companies to sell their capacity at PJM auctions. The SOCA operates to insulate the state-selected generation companies from losses

[3] The use of the term "pilot program" kindles notions that the State of New Jersey may consider the development of more generators if the pilot program works. Neither party has indicated that, and nothing herein speaks to that proposition.

at the PJM auction who bid below the MOPR screen. Additionally, the utilities are also allegedly insulated from losses because any SOCA payment may be passed onto the New Jersey ratepayers through future rate increases.

Under the SOCA, a new generator is compelled to bid at the PJM auction "at the lowest commercially reasonable price under the RPM rules," i.e. clear the MOPR screen. Evidently, the SOCA sets the minimum floor capacity price, and thereafter the utilities must pay the difference between the PJM auction price and the new generator's actual costs for any applicable delivery year.

Under the LCAPP Act, LSE's (utilities) and new generators entered into SOCAs earlier this year, and each LSE signed same under protest[4]. In May, 2012, PJM held an auction in which two SOCA generators cleared the MOPR screen and bid at auction. The PJM auction price was $167.00 per megawatt/day. Under the SOCA, one selected generator will receive a guaranteed fixed price of $286.00 in its first year of operation under the SOCA (T. 13, 17-22). The difference is $119.00 (T. 24, 11-17). In addition to present SOCA payments, the guaranteed price steadily increases each year of the 15-year contract, topping off at $432.65 in the final year. Although the LCAPP Act anticipates the costs of SOCA contracts will be passed on to the utilities' ratepayer customers, the BPU acknowledges that there is no guarantee that the utilities will recover the full costs.

At oral argument, the Plaintiffs focused their presentation on wholesale capacity pricing as the main area of preempted activity; but there are other aspects of pricing over which the BPU has control and which should be mentioned. In addition to the wholesale capacity price, the BPU regulates other components of the price that consumers pay for electricity. According to Mr.

[4] The Court is uncertain what the term "under protest" means; but to the extent SOCA's are referred to as agreements, it is questionable whether there was a meeting of the minds.

Kleinman, "the utility is guaranteed that it will get from its consumers in the rates, what it needs to meet its obligations in the wholesale markets.." (T. 33, 3-7). Included in electric rates are the PJM cost (T. 33, 8), wires and connections (T. 33, 18), electrons (energy usage) (T. 33,22) and contract for differences (T. 34,1) The BPU considers all of these costs when it approves rates. The SOCA contract falls within the last category (T. 34, 6).

On November 17, 2011, FERC held hearings to review the PJM auction procedure and to determine whether any charges were required in light of the LCAPP Act. Many generators believed the LCAPP Act would undermine the competitiveness of the auction, and they requested the hearing. In light of same, FERC made some changes so that the competitiveness of the auction remained robust, displeasing the BPU. FERC concluded in paragraph 206:

> 206. We also reject the New Jersey Rate Counsel argument that the Commission lacks jurisdiction to subject new self-supply to a mitigated price determination that may prevent the resource from being used to satisfy a load serving entity's capacity. As pointed out with respect to the state exemption, the Commission is not infringing on the sovereignty of the state, but is merely regulating the wholesale prices charged in the capacity market. Load serving entities are free to contract with any generator they choose to supply power. The MOPR affects only the price that such a generator will be permitted to bid into the capacity market, which may affect the ultimate wholesale price to be paid to all resources, including generation, demand response, and energy efficiency.

See PJM Interconnection, L.L.C. PJM Power Providers Group v. PJM Interconnection, L.L.C., 2011 WL 5895396 (FERC). The adversity and tension between the BPU and FERC is shown within the quoted paragraph as they quarrel over whose action should take precedence when determining whether a competitive market (federal concern) or the planning for sufficient supply of generation (state concern) are at issue.

II.

The issue presented is whether the LCAPP Act is void due to the doctrine of preemption. Preemption arises when a state "is deprived of their power to act" because "it is in direct conflict with federal law." *O'Reilly*, *Federal Preemption of State and Local Law*, American Bar Association, p. 1 (2006). The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992). It states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2.

In other words, preemption concerns the allocation of power between state and federal action, that is, whether state law conflicts with valid federal law. *City Of Charleston, South Carolina v. A Fisherman's Best, Inc.*, 310 F. 3d 155, 168 (4th Cir. 2002). Federal law that raises preemption may be the Constitution itself or a valid Act of Congress. *Id.* at 168-69. Regulations of a federal agency may have the same effect. *Id.* "The ultimate touchstone of preemption analysis is the intent of Congress." *Id*. at 169. The issue is not whether the Court favors a particular state or federal policy, but rather, the Court must determine whether the state action (enactment of the LCAPP Act), "interferes with or is contrary to the laws of Congress . . ." *Id*. at 169, citing *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 604, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991). As Justice Blackmun summed up the law:

> The circumstances in which federal law pre-empts state regulation are familiar. A pre-emption question requires an examination of congressional intent. Of course, Congress explicitly may define the extent to which its enactments pre-empt state law. In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." Finally, even where Congress has not entirely displaced state regulation in a particular field, state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found "'when it is impossible to comply with both state and federal law, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U. S. 132, 142-143 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, Hines v. Davidowitz, 312 U. S. 52, 67 (1941).'"

Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299 (U.S. 1988) (citations omitted).

Here, the LCAPP Act is alleged to be in conflict with PJM's auction of wholesale capacity. That is, the LCAPP Act requires the SOCA generators to bid the lowest commercially reasonable price when utilities are reimbursing SOCA generators through the terms of the SOCA. In turn, the SOCA requires utilities to pay the difference between the PJM price and the gas powered generators' actual costs, if any. As a result, the question is whether the LCAPP Act, which allows the SOCA generator to bid below cost due to SOCA reimbursement, artificially lowers auction prices, defeating federal competitiveness concerns.

Plaintiffs allege that the LCAPP Act is preempted because it (1) intrudes on FERC's exclusive jurisdiction to regulate wholesale electricity transactions (field preemption), and (2) erects obstacles to the FERC's achievement of its regulatory goals in the wholesale electricity markets

(conflict preemption). Complaint, ¶¶ 88-89. "Under the Supremacy Clause, federal law may supersede state law in several different ways." *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). Generally it is subdivided into express or implied preemption. According to Plaintiffs, the primary issue revolves around a subcategory of implied preemption known as field preemption. Despite Plaintiffs' contention, preemption is often difficult to characterize, and the different categories of preemption are not "rigidly distinct". *N.E. Hub Partners, L.P. v. CNG Transmission Corporation*, 239 F. 3d 333, 348 (3d Cir. 2001). *See e.g., Chamber of Commerce v. Brown*, 554 U.S. 60 (2008) (field preemption); *Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967). Field preemption and conflict preemption involve similar, but not identical, inquiries. Field preemption exists when either "the nature of the regulated subject matter permits no other conclusion," or when "Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). Conflict preemption exists when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Either finding requires a determination of the record and context of the challenged state and federal laws. *See e.g., Pacific Gas & Elec. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-23 (1983); *Perez v. Campbell*, 402 U.S. 637, 644-48 (1971).

Regarding preemption, both Plaintiffs and Defendants agree that Congress, by enacting the Federal Power Act, delegated exclusive authority to FERC concerning regulation of the transmission and sale at wholesale of electric energy in interstate commerce. The open question is whether the LCAPP Act intrudes on the FERC's exclusive authority, or if it is an obstacle to achieving federal objectives. In evaluating such situations, the Court must consider a number of factors. Professor

O'Reilly enumerated the factors, as:

a. Is this a traditional area of authority exercised by the federal government?

b. Has congress expressed an intent that federal law be exclusive?

c. Is there an important traditional state interest served?

d. Do the state regulations interfere with comprehensive federal regulatory authority? and

e. Is the state regulation an obstacle to a federal goal, or what aspects of the state law directly conflict with or frustrate the accomplishment of the federal statutory objectives?

See *O'Reilly*, p. 65-75. In considering these factors, the ultimate goal is to determine Congress's intent on whether Congress sought to preempt all state action. Reviewing the factors lends some, but not conclusive, insight as to the issue.

A. Is there a traditional area of authority exercised by the federal government?

Congress granted federal authority to FERC to regulate wholesale energy capacity. The Federal Power Act reads "federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter 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 . . ." 16 U.S.C. § 824(a). Since enactment of the Federal Power Act, FERC has exercised control of pricing of wholesale energy capacity.

B. Has Congress expressed an intent that Federal law be exclusive?

Congress has never declared that the federal government would be the exclusive regulator of the transmission of electric energy. The Federal Power Act limits federal authority "to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824. Here, one of

those areas is state regulation of planning and/or generation of energy to supply to meet the needs of New Jersey residents. Although Plaintiffs seek to limit this matter to pricing, there is a concomitant power to make certain there is a sufficient supply of energy for New Jersey residents[5]. It appears to be a right reserved to the State in many instances.

C. Is there an important traditional State interest being served?

For years, the New Jersey legislature delegated to the BPU authority over "all services necessary for the transmission and distribution of electricity . . . including but not limited to safety, reliability . . . shall remain the jurisdiction of the BPU. The BPU shall also maintain the necessary jurisdiction with regard to the production of electricity . . . to assure the reliability of electricity . . . supply to retail customers in the State." N.J.S.A. 48:2-13(d). The declaration of state policy was most likely (in some form) operative at the time of enactment of the Federal Power Act. There is little or nothing in the Federal Power Act which required the state to relinquish any of its authority over the planning or generation of a sufficient supply of electricity to either FERC or PJM. Moreover, the BPU's rationale to act is somewhat understandable in light of the statements made by PJM officials at the BPU hearing in 2007 indicating that brownouts or blackouts may result due to transmission failures by the year 2012. Although PJM's and FERC's position has changed about such violations of reliability for various reasons, the BPU's position has not. Here, there may be an important state interest similar to the regulation of production of gas. *See Northwest Central Pipeline Corporation v. State Corporation Commission of Kansas,* 489 U.S. 493 (1989).

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[5] In addition, (and the record is not clear) PJM may consider itself as chief of planning/generation through the wholesale energy auction. My review of federal and state statutes does not show that regulation of planning is delegated to PJM. The issue has not been briefed.

In addition to the long term power of BPU to regulate generation planning, it also has some authority in setting the price of energy. Although PJM may set wholesale capacity price by an annual auction. The second part of the costs are set by the BPU. These costs include but are not limited to "wires and interconnections," and contracts for alternatives (SOCA). Hence, when it comes to pricing, federal and state regulators in some ways share or have concurrent authority.

The Plaintiffs argue that the doctrine of field preemption applies. "Field preemption may occur when the federal scheme of regulation of a defined field is so persuasive that Congress must have intended to have no room in that field for the state to supplement it with their own rules." *O'Reilly* at p. 70. Plaintiffs argue field preemption applies due to a federal statutory mandate for a wholesale capacity auction. *See Pacific Gas v. State Energy Resources Conserv. & Dev. Comm 'n*, 461 U.S. 190 (1983). *See also N.E. Hub Partners, L.P. v. CNG Transmission Corporation*, 239 F. 3d 333 (3d Cir. 2001). It appears to the Court, from looking at the powers vested with FERC and with those vested in the BPU, that both have the authority to act in a manner to carry out their responsibilities to the ratepayers.

In *N.E. Hub*, FERC issued a certificate of public convenience for the construction of a natural gas storage facility in which it examined "numerous technical, safety, and environmental issues." *Id*. at 336. Pennsylvania authorities sought to revisit the issues considered by FERC. Evidently, FERC had reviewed about thirty separate issues over a long period of time concerning the construction process. Due to Pennsylvania's rehashing of FERC's previously decided issues, N.E. Hub filed suit requesting declaratory judgment that the Natural Gas Act preempted Pennsylvania's review process. One of the issues was whether the state regulatory process is susceptible of preemption by conflict or by field occupation. *Id*. at 346. That issue was remanded for review to the

District Court. The Third Circuit noted:

> different categories of preemption are not rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation.

Id. at 348 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 n. 5, 110 S.Ct. 2270, 2275 n. 5, 110 L.Ed.2d 65 (1990). As Judge Greenberg noted, "our ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole." *N.E. Hub.* at 348, quoting *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992). For certain, "the dichotomy between the two types of preemption [conflict and field] is not so sharp in practical terms as the legal categorization makes it appear...." *Id.* This lack of sharpness arises here. In *N.E. Hub*, there were thirty substantive issues decided by FERC through its review process which illustrate the comprehensive nature of FERC's dominion over the construction process. In contrast, here there is one annual auction of wholesale capacity by PJM with FERC's approval of a tariff, and there are a host of other regulatory matters handled by the BPU on a daily basis including planning of generation supply. As a result, *N.E. Hub* is similar since it was remanded to District Court so it could find the legitimate balance of state/federal authority in the construction process.

D. Do the state regulations interfere with comprehensive federal regulatory authority and Is the State Regulation an Obstacle to Reaching a Federal Goal?

Here, the use of the word "obstacle" raises issues of fact. Generally, summary judgment is appropriate under Fed. R. Civ. P. 56(c) when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a

matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Here, where there are three motions for summary judgment, and the parties dispute the facts of whether the LCAPP Act is an obstacle to a competitive auction.

Here, the facts determining what constitutes an obstacle required careful consideration. Some of the facts are disputed, and some other facts are derived from the opinions of experts whose conclusions have not been subject to cross-examination. The disputed facts are contained within Defendants' Statement of Material Facts (ECF No. 100-1), and Plaintiffs' Statement of Material Facts Precluding Judgment (ECF 124-1). Since there are disputed facts in determining whether an obstacle exists, summary judgment is inappropriate. Several examples of disputed facts are set forth below:

* Compare Paragraph 7 of Plaintiff statement which concludes "the LCAPP Act will suppress energy prices by more than $1.5 billion (ECF 124-1) with Paragraph 20 of defendants' statement which concludes "Assuming that the SOCA units engage the FERC-authorized MOPR exception process, their capacity could clear the BRA in a manner that has no adverse effect upon the competitive price produced by the auction." (ECF 100-1).

* Compare Paragraph 8 of Plaintiffs' statement which declares that "The actual effects of the LCAPP Act have already begun to distort the PJM energy and capacity market, thus interfering with FERC's market-based-rate policies. The LCAPP Act influenced Calpine's decision to forego new generation at its Edgemoor, Delaware facility" (ECF 124-1, para. 8) with Paragraph 17 of Defendants' statement where it asserts in pertinent part:

> The treatment of SOCA capacity will therefore be identical to the treatment afforded all other new generation capacity offered into the BRA (base rate auction), with no distinction between state-sponsored and privately developed generation capacity.

* Compare Paragraph 12 of Plaintiffs' statement wherein it claims: "the MOPR screen applies only until the generator clears one auction, after which the screen is removed entirely" with Paragraph 16 of Defendants' statement which asserts "this price mitigation will now subject SOCA capacity to the prospect of not clearing the BRA, since the increased mitigated price could likely exceed the BRA clearing price." And again in paragraph 20, when discussing "the unit-specific exception process" within the BRA it states "the generator could offer into the BRA and clear, or not clear, depending upon the final resource clearing price emerging from the auction". (emphasis added). At any rate, how the MOPR screen actually works is an important issue to clarify; despite the fact that the evidence presented is contradictory. A factual dispute is genuine if it would affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Here all three of the above facts could affect the outcome, i.e. any one of the facts could represent an obstacle.

In addition to the above questions of fact, there are also the opinions of experts which must be evaluated on the basis of credibility and reliability. For instance, in paragraphs 9 and 10 of Plaintiffs' Statement of Material Facts (ECF 124-1), the testimony of Mr. Cregg is relied upon. He states:

> The LCAPP Act was a very important factor in PS Power's decision-making regarding its investments in units in PJM and that "we had a much worse market construct given LCAPP than not having LCAPP," and "current market signals suggest that it was uneconomical to build generation in New Jersey before LCAPP . . . and the LCAPP Act made this situation worse.

Mr. Cregg's conclusion is broad, and any conscientious trier of fact must assess the scope of Mr. Cregg's statement to determine its trustworthiness. To assess Mr. Cregg's statement in a summary judgment motion is inadequate. In conclusion, there are disputed facts and a need to access the trustworthiness of expert testimony. As such, all motions for summary judgment on preemption are denied. Most notably, there is an issue of fact as to whether the LCAPP Act is an obstacle to the achievement of the federal goal of a competitive auction; and expert testimony must be thoroughly evaluated. This is an important matter of governmental delegation of state and federal authority. The disputed facts must be resolved and the opinions of experts must be thoroughly reviewed. This is best accomplished at trial.

ORDER

For the reasons set forth in the above memorandum;

IT IS on this 28th day of September, 2012;

ORDERED that by Plaintiffs motion for summary judgment (ECF 88) is denied; and it is further

ORDERED that the Cross-Motion for Summary Judgment by CPV Power (ECF 98) is denied; and it is further

ORDERED that the motion for summary judgment by Nicholas Asselta, Joseph Fiordaliso, Jeanne Fox and Lee Solomon (the Board of Public Utilities) (ECF No. 100) is denied.

s/Peter G. Sheridan
PETER G. SHERIDAN, U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PPL ENERGYPLUS, LLC, et al., Plaintiffs, v. LEE A SOLOMON, et al., Defendants.	Civil Action No.: 11-745 ORDER

This matter is before the Court on a motion for summary judgment based upon the dormant commerce clause by Defendant CPV Power Development, Inc. (ECF 98). The Court having reviewed the moving papers, and further time for discovery having been granted by an Order dated September 18, 2012 by Magistrate Judge Arpert, and accordingly the motion is premature in light of the ongoing discovery.

IT IS on this 28th day of September, 2012

ORDERED that the motion for summary judgment based upon the Commerce Clause is denied.

PETER G. SHERIDAN, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PPL ENERGYPLUS, LLC, et al., Plaintiffs, v. ROBERT M. HANNA, in his official capacity as President of the New Jersey Board of Public Utilities, et al., Defendants.	Civil Action No.: 11-745 MEMORANDUM

SHERIDAN, U.S.D.J.

This non-jury case was tried before the Court over thirteen separate days in April and May, 2013. After trial, the parties submitted proposed findings of fact and conclusions of law as well as briefs, and thereafter, summations were heard. The Court, having considered the parties' submissions and having deliberated over the facts and the law, submits this memorandum as its decision.

In broad terms, the issue before the Court is whether the New Jersey Long-Term Capacity Pilot Project Act, P.L. 2001, c. 9, approved Jan. 28, 2011, codified at N.J.S.A. §§ 48:3-51, 48:3-98.2-.4 ("LCAPP" or "Act"), should be declared unconstitutional as violating the Supremacy Clause, and whether the New Jersey Board of Public Utilities ("NJBPU", "BPU", or as referred to herein as the "Board") should be enjoined from engaging in activities in furtherance of the Act because the LCAPP is preempted by the Federal Power Act, 16 U.S.C. § 824 *et seq.*. That is, whether actions by the State of New Jersey taken pursuant to the LCAPP

intrude upon and interfere with the authority delegated to the Federal Energy Regulatory Commission (as referred to herein, "FERC" or "Commission") by the Federal Power Act.

Before proceeding to the substance of this case, the Court provides two cautionary observations regarding writing style and organization and a general reservation as to the presentation and scope of the findings within this decision. First, on writing style. The electric energy industry has its own jargon which makes great use of acronyms. With so many acronyms being used, the testimony and briefs become like alphabet soup where all the letters swirl around and may confuse the reader. As such, a list of acronyms which have been substantially agreed upon by the parties is attached as Rider A. The Court minimizes use of these acronyms in this decision. By way of reservation, the first part of the trial reviewed the extensive history of how the electric energy industry has developed into its present state. This opinion includes an overview of the relevant background for the purpose of providing sufficient information to decide the issues, however, it does not purport to be a historical work. And lastly on organization, there are many non-controversial facts presented within the Court's overview of the relevant background, and a new term may present itself without prior introduction. In this case, the term will be explained later in the Court's decision. After sifting through a confluence of facts, the Court has gleaned a set of manageable facts with which to evaluate the preemption issue. The decision is subdivided into several sections: (A) an identification of the parties to the action; (B) an identification of important non-parties; (C) an identification of witnesses who testified at trial; (D) a description of some basic facts regarding electricity; (E) background information on the electric energy industry; (F) a description of the "Reliability Price Model" ("RPM") process; (G) a description of the LCAPP statute; (H) an explanation of the impacts of the LCAPP; (I) a description of the credibility of witness; (J) analysis; and (K) a conclusion.

A. PARTIES TO THE ACTION

1. Defendants

New Jersey Board of Public Utilities. The defendants are Robert M. Hanna[1], Jeanne M. Fox, Joseph L. Fiordaliso, and Nicholas Asselta, all of whom are current or former commissioners of the New Jersey Board of Public Utilities[2]. Each is named in his official capacity against whom declaratory and injunctive relief is sought. Since each currently serves or formerly served as a commissioner on the Board, this opinion collectively refers to them as the "Board." The Board has broad statutory authority over the activities of public utilities within the State of New Jersey. *See In re Centex Homes, LLC*, 411 N.J. Super. 244, 254 (App. Div. 2009). Specifically, Title 48 of the New Jersey Statutes provides that the Board has "general supervision and regulation of and jurisdiction and control over all public utilities." N.J.S.A. § 48:2-13(a). As part of that authority, the BPU is authorized to require any public utility operating within the State to furnish safe, adequate, and proper service to consumer ratepayers at "just and reasonable" rates. N.J.S.A. § 48:2-21.

CPV Power Development, Inc. CPV Power Development, Inc. ("CPV") is an Intervenor/Defendant. CPV is a Delaware corporation that, through its subsidiaries, is engaged in the development, ownership, and management of natural gas-fired facilities in North America (T. 1587, 10-24). CPV owns and manages a natural gas-fired generation facility in Riverside County, California, and has taken steps to develop other natural gas-fired facilities, including

[1] Mr. Hanna was named as President of the Board on December 21, 2011. At the time of the underlying facts, Lee A. Solomon served as Board President.

[2] In New Jersey, the Board has always been a distinguished public entity known for its practical and professional decision making. Over the years, many prominent New Jersey leaders have served on the Board. For example, Mr. Solomon and Mr. Asselta served in the New Jersey State Assembly. Both Governor Byrne and Governor Whitman have served as Board President. Moreover, William Hyland, a former New Jersey Attorney General who has served the State of New Jersey in many esteemed capacities, was a former Board President. In reviewing this matter, the Court has considered the Board and its members, their sound judgment, and their professionalism in furtherance of the public good.

projects in Maryland, New York and New Jersey. CPV began to develop its Shore Project in New Jersey prior to implementation of the LCAPP Act. (T. 1588, 6 through T. 1589, 17). Most importantly for purposes of this case, CPV was named an eligible generator under the LCAPP by the Board and cleared the RPM Auction on its 2012 bid (T. 1588, 15-22).

2. Plaintiffs

The Plaintiffs are a group of wholesale, retail, and marketing companies who produce and sell energy and are located within the PJM market[3]. Several Plaintiffs are identified below.

Plaintiff Calpine Corporation is an electric generation and marketing corporation with a number of subsidiaries. It is a publicly traded, independent power producer based in Houston, Texas which operates ninety-one (91) power plants throughout the United States and Canada. The Calpine generation companies are physically located in the PJM market and participate in the PJM wholesale energy and capacity markets.

Plaintiff Exelon Generation Company, LLC is a Pennsylvania corporation headquartered in Kennett Square, Pennsylvania. Exelon Generation is a wholly-owned subsidiary of Exelon Corporation. Exelon Generation's business consists of owning and operating electric generating facilities, wholesale power marketing operations, and competitive retail supply operations. Exelon Generation sells energy and capacity in the PJM interstate market and competes in PJM's wholesale capacity auctions.

The PPL Parties are a group of related companies principally located in Allentown, Pennsylvania which are market and generation subsidiaries of PPL Corporation. They are physically located in the PJM market and participate in the PJM wholesale energy and capacity

[3] Plaintiffs GenOnEnergy, NAEO Ocean Peaking Power, and Essential Power were never substantively discussed during trial and no injury was presented.

markets. Together they control or own about 19,000 megawatts of generating capacity in the United States, some of which is located within the PJM market.

Plaintiff PSEG Power, LLC is a Delaware limited liability company, headquartered in Newark, New Jersey. PSEG Power is a wholly-owned subsidiary of Public Service Enterprise Group, Inc.. PSEG Power owns approximately 11,850 megawatts of generating capacity within the PJM area, approximately 9,950 megawatts of which is located in New Jersey. PSEG Power sells energy and capacity at wholesale in interstate commerce, including in PJM's capacity and energy markets.

Plaintiff Public Service Electric and Gas Company ("PSE&G"), a subsidiary of Public Service Enterprise Group, is located in New Jersey and is one of the largest combined electric and gas companies in the United States. It is also New Jersey's oldest and largest publicly owned utility. PSE&G currently serves nearly three quarters of New Jersey's population from Bergen to Gloucester Counties.

Plaintiff Atlantic City Electric Company, based in New Jersey, is a subsidiary of Pepco Holdings, Inc., which provides electric service to approximately 547,000 customers in southern New Jersey. Pepco Holdings, Inc. is one of the largest energy delivery companies in the Mid-Atlantic region, serving about 1.9 million customers in Delaware, the District of Columbia, Maryland and New Jersey.

B. OTHER IMPORTANT NON-PARTIES

The Federal Energy Regulatory Commission ("Commission" or "FERC") and PJM Interconnection, LLC ("PJM") are two entities that are key players in the sale and delivery of energy. The Commission and PJM are not parties to this action, but are discussed throughout this memorandum.

Pursuant to the Federal Power Act, 16 U.S.C. § 824 *et seq.*, the Commission has federal statutory authority to regulate the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. (Stipulated Facts ¶ 5). In this case, 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 Board's jurisdiction, is at issue. The applicable federal statute from which the Commission derives its authority reads:

> (b) Use or sale of electric energy in interstate commerce.
>
> > (1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, 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 or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter. 16 U.S.C. § 824(b)(1).

PJM Interconnection, LLC is a voluntary association of different energy stakeholders which includes administrative bodies and electric generators.[4] (Stipulated Facts ¶ 13). PJM is primarily subject to Commission regulation through a tariff. It operates a regional wholesale

[4] PJM was not well defined at trial. The issue of how these competing companies and regulatory bodies interact in terms of governance and voting procedures was not adequately addressed by any of the litigants.

market that includes all or part of thirteen states including New Jersey. In addition, PJM is a regional transmission organization ("RTO"). (T. 47, 17 through T. 48, 11).

PJM was originally founded in 1927. The name "PJM" is the brainchild of its earliest members who were from the states of "Pennsylvania (P), New Jersey (J), Maryland (M)". (T. 410, 22 through T. 411, 8). It was formed as a "power pool" for traditional utilities which recognized that a regional transmission organization could easily accommodate sharing of electric capacity more efficiently (T. 39, 5-10). The sharing of electrical capacity through such arrangements drastically drops consumer costs by limiting the number of electrical generation facilities required for peak hour production. As noted above, PJM operates pursuant to a tariff filed by PJM with the Commission called the "Open Access Transmission Tariff." (Stipulated Facts ¶ 23).

PJM has been a relatively successful operation. For instance, today, PJM is the "largest centrally dispatched power market . . . in the world," covering 60 million customers and 185,000 megawatts. (T. 69, 20 through T. 70, 1). Within PJM there are over 1,300 power plants and approximately 56,000 miles of transmission lines. (T. 406, 24 through T. 407, 11). Mr. Massey testified that PJM is the most sophisticated of all of the regional transmission organizations. In fact, "there are government officials and market participants from around the world that regularly travel to PJM for briefings about how the markets work. So [it is] considered state of the art." (T. 70, 1-8).

Gradually, the traditional utilities within PJM transferred operational control of all their transmission to PJM. Currently, PJM is responsible for "[m]anaging a regional transmission grid encompassing all or part of thirteen states and the District of Columbia." (Stipulated Facts ¶ 11).

PJM, under the supervision of the Commission, is "responsible for planning the electric system to preserve the reliability of the electricity supply" in New Jersey. (Pl.'s Ex. 45, at 27). That is, PJM "plan[s] expansions to transmission to improve the ability to transmit energy from where it is generated to serve load." (Stipulated Facts ¶ 11). Most importantly, PJM is also responsible for the "dispatching" of generation in real time. It does this from "a very sophisticated control room in Valley Forge, Pennsylvania . . . which looks like an air traffic control system." (T. 50, 6-13). From this control room, PJM "direct[s] this generator[], to ramp up [and] . . . to ramp down all in real time. Because over this 13 state area they must insure that supply and demand are matched almost perfectly in real time." (T. 50, 12-13). Despite these functions, PJM has no authority to construct or build a power plant, and likewise it has no authority to retire antiquated power plants. (Def.'s Ex. 183).

C. TESTIFYING WITNESSES

There were a number of witnesses who testified at trial, each of whom is identified below. All of these witnesses were very professional and proficient in their careers, and the Court weighed their credibility in light of these qualifications.

1. Plaintiffs' Witnesses

William L. Massey obtained his Law Degree from the University of Arkansas School of Law in 1973, and later earned an LLM from Georgetown University Law Center in 1985. Upon his law school graduation, he clerked for the U.S. Circuit Court of Appeals for the Eighth Circuit. He later became Chief Counsel for U.S. Senator Dale Bumpers of Arkansas, where he focused on energy matters before the Senate Committee on Energy and Natural Resources. President Clinton later appointed Mr. Massey to be a Commissioner of the Commission where he served for over ten years. Mr. Massey currently serves as a partner in the Washington, DC office

of the law firm Covington and Burling and is an Adjunct Professor at the Georgetown University Law Center. Mr. Massey was qualified as an expert "in the history and evolution of the electricity industry." (T. 23, 12-15).

Joseph Dominguez is the Senior Vice-President for Governmental and Regulatory Affairs and Public Policy for Exelon Corporation. He obtained a Bachelor of Science Degree in Mechanical Engineering from the New Jersey Institute of Technology and a Law Degree from Rutgers University School of Law. He previously worked at the law firm of White & Williams in Philadelphia, Pennsylvania and served as an Assistant United States Attorney in the Eastern District of Pennsylvania.

Robert D. Willig, Ph.D. is a Professor of Economics and Public Affairs at Princeton University. Professor Willig studied mathematics at Harvard College and later obtained a Masters of Arts in Operations Research and Statistics, and a Doctorate in Economics from Stanford University. Professor Willig previously worked at Bell Labs performing research on the theory of economic regulation of regulated industries. After working there for five years, he became a Professor of Economics and Public Affairs at Princeton in 1978. Professor Willig's specialty is industrial organization which involves the interrelationships between business, technology, the marketplace, and government. He was qualified as an expert in the fields of economics and regulatory policy with particular expertise in electric energy. (T. 623, 21-25).

Michael Cudwadie is employed by PPL Energy Plus as Vice-President of Trading East. In that role, he is responsible for the hedging and trading activities of 9,000 megawatts of generation in the PJM markets. He has a Bachelor's Degree in Accounting from Pennsylvania State University, and an MBA from Lehigh University.

Zamir Rauf has been employed by Calpine Corporation as its Chief Financial Officer since 2008. In that role, he is responsible for the accounting and treasury functions of Calpine which include project finance, investor relations and risk management.

Daniel Cregg is the Vice-President of Finance for PSEG Power within PSEG Services Corporation. In this role, he develops business plans and near term earnings forecasts, prepares forecasts of market direction and analyzes elements of major investment decisions. He has a Bachelor's Degree in Accounting from Lehigh University and an MBA from the University of Pennsylvania's Wharton School of Business.

Anthony Robinson is employed by PSE&G as Director of Basic Generation Service and Basic Gas Supply Service. He has a Bachelor's Degree in Economics, Applied Math and Statistics from Stoney Brook University. (T. 939, 14-17).

2. Defendants' Witnesses

James P. Giuliano is Director of the New Jersey Board of Public Utilities' Division of Reliability and Security. He is responsible for natural gas pipeline safety, underground damage prevention and emergency management and security. He has a Bachelor's Degree in Communications, and has completed many state certifications in courses related to his job.

Oden Sherman Knight is the Senior Vice President of Marketing and Organization at CPV where he manages power sales and gas purchases. (T. 1584, 16). He has a Bachelor's Degree in Mechanical Engineering from Stanford University and a Masters in Business from Columbia University (T. 1584, 4-7).

Craig R. Roach is a principal of Boston Pacific Company, a consulting firm which focuses on power plant development. He has a Bachelor's Degree in Economics from John Carroll University and a Doctorate in Economics from the University of Wisconsin. Mr. Roach

was qualified as an expert in the design and implementation of competitive procurements and competitive markets for electricity.

Mr. Richard L. Levitan was the Board's advisor for implementation of the LCAPP. He has served as President of the consulting firm Levitan & Associates since its founding in 1989. The firm provides management consulting and analytic expertise to regional transmission organizations and short form independent system operators. He is a graduate of Cornell University and received a Masters with a specialization in Energy Economics from Harvard University.

D. BASIC FACTS REGARDING ELECTRICITY

Energy is "the actual electricity" that electric generators produce and which residential and business consumers ultimately use[5]. (Stipulated Facts ¶ 20). It cannot be stored in quantities large enough to supply customers during times of peak demand. (*Id.*). That is, energy cannot be canned or placed in a battery for a long period of time. It has no shelf life. As a result, "energy generally must be produced when it is needed, and at the rate at which it is consumed." (*Id.*) As Mr. Massey stated during his testimony, "[o]ne of the things about electricity is that it cannot be easily stored, and so supply and demand have to be matched instantaneously in real time." (T. 35, 4-6).

Energy is a product in interstate commerce. Regardless of which generator dispenses the energy, it ordinarily travels through interstate commerce to reach its destination. In 1927, the Supreme Court held that the interstate commerce clause prohibits states from regulating the rates for wholesale energy sales between utilities in different states because those sales are interstate transactions. *Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927); (Stipulated Facts ¶ 4). Surprisingly, no witness precisely described the logistics of an energy

[5] Residential and business customers are often referred to as "consumers" or "ratepayers".

delivery transaction (i.e., how energy is transmitted from a generator to a consumer) except to say that the delivery of energy is overseen by PJM and PJM routes energy through its transmission system. (T. 50, 6-13)

Amount of Energy. Energy is usually measured in megawatts. One megawatt of electricity powers approximately 1,000 households. Usually, megawatts are associated with lengths of time such as "per day" or "per hour." (Stipulated Facts ¶ 18).

Capacity. "Capacity" is defined as "the ability to produce electricity when called upon." (Stipulated Facts ¶ 17). In essence, capacity is the ability to produce sufficient energy to meet demand. At certain times, such as during the summer months when temperatures increase, demand for energy increases. Regardless of fluctuations, there must be sufficient capacity to meet the demand of high energy use at all times.

Capacity Resources. "Capacity resources include electric generation facilities (e.g., nuclear, natural gas, coal, wind, or solar), demand resources (i.e., the ability to call upon consumers to reduce their electricity demand), and energy efficiency resources (measures that reduce demand)." (Stipulated Facts ¶ 19).

Reliability. "Reliability" is the delivery of electricity to customers in the amounts desired and within acceptable standards for frequency, duration and magnitude of outages and other adverse conditions or events. (T. 81, 23 through T. 83, 12). According to Mr. Levitan, electric reliability means being able to "keep consumers' lights on" under duress and maintaining the power system when operating contingencies arise. (T. 1549, 8-11); *see also* I/M/O the Petition of Public Service Gas and Electric Company for a Determination Pursuant to the Provisions of N.J.S.A. 40:55D-19 (Susquehanna-Roseland Transmission Line). Resource adequacy is a key component of reliability. (T. 1549, 6-14). The key factor in meeting the

reliability standard is having sufficient generators and transmission lines available to deliver energy as required by the circumstances.

Generation Plants. Generation plants are categorized into three types – base load, mid-merit, and peaking plants. The parties agree on the definition of base load and mid-merit. A base load plant is a plant that operates all or most of the time. A mid-merit plant, such as a combined-cycle gas turbine, is a plant that operates less than a base load plant but more than a peaking plant. The parties disagree on the definition of a peaking plant; but generally, a peaking plant is "a gas turbine, a simple cycle unit, a unit that is typically run sparingly, a unit that has certain technology characteristics that allow it to get started from a cold stand-by mode, and achieve full operation in just a few minutes." (T. 1289, 12-16).

E. BACKGROUND OF THE ELECTRIC ENERGY INDUSTRY

In the beginning of the twentieth century, the New Jersey Legislature, like many other state legislatures at the time, enacted a statute creating a public utility to oversee the operation of electric and gas utilities. During the early stages of utility regulation, states had exclusive authority over such utilities. During this time, the energy industry "was dominated by vertically integrated utility companies" (hereinafter, referred to as "traditional utilities")[6]. (T. 24, 24 through T. 25, 1); (Stipulated Facts ¶ 1).

Typically, the traditional utility was granted an exclusive right by state and local governments to provide electric service to all consumers located in a defined territory. The traditional utility also had other powers, such as eminent domain authority, that would allow it to construct and operate power plants and local distribution networks to connect those power plants to local customers. In return, the traditional utility obligated itself to operate as a "common

[6] The parties refer to the traditional utility as a "vertically integrated utility." For purposes of minimizing confusion, this memorandum uses the term "traditional utility" because the word "utility" is now associated with an electric distribution company (EDC).

carrier" with the duty to provide service on a non-discriminatory basis, and to subject its rates to regulation by a state public utility commission. The regulatory standards adopted by 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. The standards were also meant to afford investors in these utilities a reasonable rate of return. This structure enabled the traditional utility to raise capital through the issuance of stock or selling of debt, which, in turn, would allow the utility to expand its facilities. Recovery of and on an investment in a traditional utility, however, was always subject to a "prudence review" by the Board in New Jersey. (Stipulated Facts ¶ 2).

In 1927, the Supreme Court of the United States decided the landmark case *Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). In that case, the Public Utilities Commission of Rhode Island attempted to regulate the sale of electricity from the Narragansett Electric Lighting Company to the Attleboro Steam & Electric Company located in Massachusetts. The Court struck down the Public Utilities Commission of Rhode Island's efforts deeming that its regulation had placed a direct burden on interstate commerce. The Court's decision ultimately created a regulatory gap wherein no regulator had the authority to oversee interstate transactions made by traditional utilities.

In 1935, envisioning that the federal government should have a role in regulating interstate energy transactions, Congress enacted the Federal Power Act, which gave 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. 16 U.S.C. § 824(b). While the statute vested this authority in the Commission, it also "reserved to the States certain . . . regulatory authority, including that over generation facilities." (Stipulated Facts ¶ 5).

Under the statute, state commissions "continued to regulate 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. (*Id.*) From 1920 until the late 1980s, utilities operated under the concurrent supervision of both federal and state regulations. During that time, the Board and Commission acted cooperatively and respected their jurisdictional limits.

Before the advent of federal authority in the electric power industry, a traditional utility "performed three main operational tasks: it built, owned, and operated electric power plants; it transmitted electricity from the power plants to the area of service in which it enjoyed a monopoly; and it distributed the electricity to its customers in that area of service using its local distribution network, that is, the poles and wires that it owned and maintained." (Stipulated Facts ¶ 1). Each traditional utility was, in essence, a "single company" that "generated power, transmitted that power, and distributed that power to its own customers, the homes and businesses that it serves". (T. 2008, 13-18). In these early years, there was little to no relationship among the traditional utility companies, so each company generally only produced sufficient capacity to service its own customers' needs. Each traditional utility had a service territory established by state regulation, a monopoly for electricity service within that territory, and an obligation to serve all customers in that service territory. "[I]n return for fulfilling that obligation to serve all customers, [traditional utilities] were given an assurance of a reasonable rate of return." (T. 27, 16-21); (Stipulated Facts ¶ 2). As a result, a traditional utility's sales of electricity to residential and business users within its service territory were considered retail sales to consumers and "largely regulated at the state level." (T. 25, 5-6); (T. 30, 12-13); (Stipulated Facts ¶ 5).

Often the lack of interaction among traditional utilities created inefficiencies because each utility would construct its own power plants to meet peak electric demand; that is, each traditional utility "was insuring that it had enough capacity to serve its own load." (T. 37, 16-18). Because electricity demand peaks at limited times throughout the year, a utility may have needed to build a power plant that runs only "10, 15, 20, 50 hours a year." (T. 35, 3-13). As a result, each traditional utility tended to have "plants that [were] sitting idle most of the time, because they [were] needed for a few hours." (T. 37, 16-24). "[T]hat created some inefficiencies in the sense [that] . . . too many power plants to provide this capability were being built." (T. 37, 16-24).

In the early twentieth century, some electric utilities smartened up, adjusted their strategy, and "began to sell power or standby capacity to each other." (Stipulated Facts ¶ 3). In order to accomplish this, the traditional utilities "built high voltage transmission lines among them in order to transact such 'wholesale' purchases and sales. This allowed utilities to lower costs because they no longer had to maintain sufficient capacity to supply peak demand at all times; instead, they could contract bilaterally in the interstate wholesale market to ensure that they had access to sufficient resources to supply peak demand when it was needed." (Stipulated Facts ¶ 3). Thereafter, to protect against outages, 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.

As the traditional utilities engaged in increased wholesale sales and capacity purchases, the need for federal regulation became more obvious. In order to manage stand-by capacity sales, PJM was created to ensure reliability by managing interstate transmission lines and, in more recent years, by designing and operating wholesale auctions.

Deregulation of Wholesale Energy Sales by the Commission

In the 1980s, when governmental deregulation of business entities was a prevalent feature of federal policymaking, some federal legislators brainstormed that the structure for sales of energy and energy capacity could be modified from one in which sales were made at a governmentally imposed rate to one that was more economically efficient, competitive and based on the economic theory of supply and demand. This idea ultimately culminated in several initiatives during the 1990s.

In 1992, Congress enacted the Energy Policy Act of 1992 ("EPAct"), Pub. L. No. 102-486, 106 Stat. 2776, which authorized the Commission to ease restrictions on access to interstate transmission wires. This allowed more electric generators to provide energy to a broader area, and recognized the concept of separating generation facilities from other parts of traditional utilities. That is, the generation segment of a traditional utility could operate separately from the other segments of the utility. A key objective of the Energy Policy Act was to "encourage[e] the development of independent generators" – sometimes referred to as "independent power producers" – "that could sell into the marketplace." (T. 44, 11 through T. 46, 25).

In 1996, the Commission issued Order Number 888 which required "transmission owners in the United States . . . to offer access to their transmission wires to third-parties . . . on a non-discriminatory basis." (T. 45, 12-19). "Order 888 opened the transmission grid, and competition began to develop, and . . . . wholesale markets were actually emerging regionally." (T. 47, 12-16). In 1996, through Orders 888 and 889, the Commission "established national open-access rules that required all transmission-owning utilities under its jurisdiction- i.e., those utilities that 'own, control, or operate transmission facilities used for transmitting electric energy in interstate transmission' - to provide non-discriminatory transmission access under

standardized tariffs. One significant impact of Orders 888 and 889 was to increase the opportunity for non-utility generators to sell their power to additional markets." (Stipulated Facts ¶ 8).

In December 1999, the Commission issued Order 2000 which encouraged industry participants to organize themselves into large regional entities called regional transmission organizations ("RTO"). The creation of such organizations "allow[ed] for regional operation of the transmission system and provide[d], among other things, a platform for regional wholesale electricity markets." (Stipulated Facts ¶ 9). Notably, PJM is an RTO.

PJM adapted some of its functions to meet the requirements of these statutes and regulatory directives. Most importantly, PJM instituted three types of wholesale markets: "[the] capacity market, the energy markets and the ancillary services markets." (T. 74, 21 through T. 75, 23). Each of these markets has a special function:

(a) the "regional capacity market, called the reliability pricing model (RPM), annually sets the price of capacity" three years forward. The controversy in this case involves the regional capacity market. (T. 74, 23-24).

(b) the energy markets price the cost of energy produced by the generators and used by consumers. (Stipulated Facts ¶ 20). PJM operates a "day ahead" energy market, meaning "generators offer to supply power into the market a day ahead of real time." The day ahead market is a "planning tool that PJM uses to [e]nsure that it knows a day ahead of time what resources are going to be available 24 hours thereafter, when the generation is actually dispatched to keep the lights on." PJM also operates a "real time energy market, which is an hourly market that is close to the time of operation. And capacity resources bid into that market, and offer to supply . . . the actual electricity." (T. 74, 21 through T. 75, 23); and

(c) the ancillary services markets price the sale of "ancillary services" such as "spinning reserves and load-following services" to improve reliability. (T. 74, 21 through T. 75, 23).

Deregulation of Electric Generators by the Board

Following the federal lead, many traditional utilities chose to restructure by separating their generation functions from their transmission and distribution functions. (Stipulated Facts ¶ 6). According to Mr. Massey, there were two methods to accomplish this. First, the traditional utilities could sell or transfer their power plants to a competitive generation company. Second, the traditional utilities could "create an affiliate corporation . . . within a holding company to own the generation." (T. 53, 13-21). During the 1990s, many states restructured their electric industries to promote competitive markets in wholesale power generation. "Typically, the [s]tate-ordered restructuring resulted in the unbundling of [traditional] utilities into separate generation, transmission, and distribution companies. The distribution entities came to be known as 'Electric Distribution Companies' or 'EDCs[.]'" (Stipulated Facts ¶ 6). In some cases, "restructuring also enabled third parties with no distribution assets to compete in the sale of electricity at retail." (*Id*.) These entities are referred to as "Load Serving Entities" ("LSEs") (*Id*.).

In 1999, New Jersey followed suit. It restructured its utilities in a slightly different format than described above, but with the same result. In enacting the Electric Discount and Energy Competition Act ("NJ Energy Competition Act"), N.J.S.A. § 48:3-49 *et seq.*, the New Jersey legislature unbundled the sale of energy to retail customers. The consumer could choose to be served by one of several load serving entities which would compete to provide service. These LSEs would deliver the energy through an electric distribution company ("EDC"). (T. 59, 2-9). As Mr. Dominguez explained in his testimony, the driving force behind the NJ Energy

Competition Act was "customer choice" – that customers would have the right to choose their electricity suppliers or LSE. (*Id.*) Although the New Jersey Legislature focused on the benefit to the consumer, the NJ Energy Competition Act also "required the State's [traditional] electric utilities to divest themselves of electricity generation assets." (Stipulated Facts ¶ 7). Once the generation component was stripped, the word "utilities" became associated with the term "electric distribution companies" because EDCs were responsible for distributing electricity over local distribution networks to consumers in monopolistic service areas and were required to act as common carriers.[7] "The electricity itself was supplied by retail electric suppliers, that is, LSEs." (Stipulated Facts ¶¶ 7, 9).

At the time of enactment, the New Jersey Legislature recognized the magnitude of this fundamental change by declaring that "this bill would effectively end the system of government regulation of the electricity generation industry, which has existed in New Jersey since the years when Woodrow Wilson served as Governor." Electric Discount and Energy Competition Act, P.L. 1999, c.23. eff. Jan. 25, 1999. Hence, the NJ Energy Competition Act recognized the demise of the traditional utility and the transformation of the electric energy industry into a more market driven system. Further, although the federal and state statutory amendments opened new competitive markets through restructuring, the State retained its authority over the siting and construction of power plants. (T. 167, 9 through T. 169, 6). So, after restructuring by the federal and New Jersey governments, the electric energy industry operates in the following manner:

(a) generators may sell energy and capacity at wholesale prices to PJM or negotiate power supply agreements (T. 64, 11 through T. 65, 4);

(b) PJM transmits and sells energy to load serving entities ("LSEs"); and

[7] The electric distribution company is referred to as a utility, but its operation is not as expansive as a traditional utility.

(c) LSEs sell to consumers and distribute the energy through electric distribution companies ("EDCs") which have monopolistic service areas and operate as common carriers. Since the EDC transmits the electric to consumers within its monopolistic area, it receives a delivery fee from the LSE.

In New Jersey, there are four EDCs: Rockland Electric Company, Public Service Electric & Gas Company ("PSE&G"), Jersey Central Power & Light Company ("JCP&L"), and Atlantic City Electric. (Pl.'s Ex. 45, at 16-17). Each EDC owns and operates the local distribution wires located within its service territory. (T. 66, 17-22). After the restructuring, the State's utilities "became more commonly known as 'electric distribution companies' ('EDCs') because they were responsible for distributing electricity over local distribution networks." (Stipulated Facts ¶ 7). An EDC is sometimes referred to as the "local utility," but "the term EDC, electric distribution company, is intended to convey that this company is in the business of delivering electricity." (T. 56, 6-12). The electricity sold to retail customers by LSEs is delivered by the EDC within their local distribution networks.

The 2008 New Jersey Energy Master Plan authorized by the Board summarized the importance of the NJ Energy Competition Act:

> The owners of New Jersey power plants now have no legal expectation that they can recover all of their costs or a guaranteed return from retail customers. Hence, the plant owners (and their financiers) make their own decisions to invest in existing or new power plants, without [Board] oversight. They also make their own decisions about the price, using market signals, at which they are willing to sell their electricity, without traditional [Board] oversight. (Pl.'s Ex. 45, at 16).
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> PJM, under the supervision of [the Commission], is responsible for planning the electric transmission system to preserve the reliability of the electricity supply in its territory. Electric generation companies and their financiers make decisions about how much generating capacity will be

> built, what types of power plants will provide that new capacity, and where the new plants will be located; those companies also decide what plants will be kept in service and what plants will be retired. Those decisions are informed by economic signals from the wholesale electricity markets that PJM designs and administers, again under the supervision of the [Commission]. (*Id*. at 27).

Despite deregulation which provided generators with more decision making powers, the Commission and PJM do not have substantial authority to require construction of power plants, prevent retirement of generation, select the generation technologies that will be constructed, or require demand resource or energy efficiency programs as a means of addressing resource adequacy. (Def.'s Ex. 563). However, as previously noted, the restructuring of the traditional utilities required PJM and the Commission to institute three competitive markets which effect energy and capacity prices. The market of primary interest in this case is the regional capacity market called the reliability pricing model ("RPM").

F. THE RELIABILITY PRICING MODEL ("RPM")

The RPM is intended to "secure sufficient capacity resources to meet standards for serving the highest aggregate demand of the region's electric customers." (Stipulated Facts ¶ 12). To meet that objective, the RPM "establishes an annual Base Residual Auction ('BRA') [or "RPM Auction"] through which PJM administers procurements of capacity." (*Id*.)

The RPM conducts the RPM Auction each May to secure the capacity that will be needed three years in the future. (T. 419, 3-8); (Stipulated Facts ¶ 25). New Jersey is a voluntary member of PJM and is a part of the RPM market. (Stipulated Facts ¶ 13). RPM is a provision of the PJM tariff which is approved by the Commission. (Stipulated Facts ¶ 23); (T. 80, 25 through T. 81, 4); (Def.'s Ex. 184). As the parties stipulated:

> Through the [RPM Auction] PJM seeks to procure . . . the amount of capacity that it has determined . . . will be needed to meet the system (or in some cases, the Locational Deliverability Area ('LDA')) peak three years in the future, plus a reserve margin. PJM then bills each participating load serving entity for its load-ratio share of the costs incurred by PJM to secure that capacity through the [RPM Auction]. (Stipulated Facts ¶ 26).

Generally, "The [RPM Auction] is a 'forward market,' meaning capacity is sold three years in advance of when it is needed. For example, the auction held in May 2012 [which is the subject of this lawsuit] concerned offers to sell capacity to be 'delivered' beginning June 1, 2015, through May 31, 2016." (Stipulated Facts ¶ 27).

RPM was designed to provide price signals for both new and existing generation. PJM Interconnection, LLC, 132 F.E.R.C. ¶ 61,173, 61,870 (2010). The Commission has emphasized that "RPM was designed to provide long-term forward price signals, and not necessarily long-term revenue assurance for "generators and developers." (Pl.'s Ex. 55, at 55-56). As Mr. Dominguez stated, "the RPM is a market-based mechanism that uses economic price signals to indicate scarcity and need for capacity," and generators will decide from the price signal whether or not to expand or create new generation. (T. 413, 1-8).

"In the [RPM Auction] capacity resources . . . bid to supply capacity to PJM for one year beginning three years in the future, each offering to supply a particular quantity of capacity at an offer price." (Stipulated Facts ¶ 28). The bids of capacity resources are "stacked" from lowest-cost bids to highest-cost bids to construct a supply curve. (T. 92, 19-25). PJM also constructs a demand curve that is based on a forecast of peak electricity demand ("peak load"), plus a reserve margin. (T. 661, 13 through T. 662, 19). The PJM "reserve margin" is typically around 15 percent or more. The reserve margin addresses the possibility that "some plants might fail, might not be able to meet their obligation," or that there could be a "transmission outage." (T. 89, 25 through T. 90, 13). As Mr. Massey indicated, "[i]t also takes into account the fact that . . . [it is]

hard to forecast electricity usage perfectly." (T. 90, 2-3). "And so this reserve margin is an insurance policy." (T. 90, 7). "The price of capacity in the [RPM Auction] is set by the intersection of supply and demand and is referred to as the 'clearing price.' That is, any capacity supplier that bids at or below the clearing price 'clears' the [RPM] auction and receives the clearing price for that capacity. Any capacity supplier that bids above the clearing price fails to 'clear' the [RPM] auction, and its capacity does not sell in the auction." (Stipulated Facts ¶ 29). The clearing prices for capacity sold in the RPM are the Commission approved rates for capacity sales made in PJM territory. (Pl.'s Ex. 26). When a generation resource has cleared the auction, it obligates itself to run through the delivery year. (T. 473, 22 through T. 474, 7). Thus, a capacity resource that clears the RPM Auction commits itself to make any investments necessary to fulfill its obligation. It also obligates itself to bid into the PJM energy and ancillary services markets. (T. 426, 1 through T. 473, 17).

As Mr. Dominguez testified, RPM is designed to procure the least expensive mix of resources that are necessary to keep the lights on for that one year period, three years hence. (T. 414, 14-18). Generally, the RPM Auction says to market participants "I am willing to serve capacity for one entire year three years forward." (T. 414, 14-18). "The purpose" of RPM was to "guarantee[] that the reliability target in PJM is met in the least cost possible way." (T. 763, 13-23). As PJM has explained to the Board, its "RPM Capacity Market is designed 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." (Pl.'s Ex. 230, at 10).

Generally, the single clearing price encourages capacity resources to operate more efficiently while keeping prices low. "[A] competitive market with a single, market-clearing price creates incentives for sellers to minimize their costs, because cost-reductions increase a

seller's profits. And when many sellers work to minimize their costs, competition among them keeps prices as low as possible. . . . This market result benefits customers, because over time it results in an industry with more efficient sellers and lower prices." PJM Interconnection, LLC, 117 F.E.R.C. ¶ 61.331, 62678 (2006); (Pl.'s Ex. 19, at 57); (T. 436, 8-24). As Mr. Massey indicated, since there is a single price for the commodity, "the person who can provide the [capacity] cheapest will do the best in that market; [and the] person who cannot provide the [capacity] competitively is either going to go out of business or figure out how to do better." (T. 436, 19-24). Mr. Massey explained "economists would say it's the law of one price. . . . It [does not] matter whether the electric energy's produced by an old generator [or] new generator, [it is] electric energy, it has the same value in the marketplace. And that [is] why pursuant to [Commission] rules that single clearing price model is used." (T. 92, 19 through T. 93, 23).

Despite the goal of reaching a highly competitive price through the RPM Auction, price varies in certain areas of the PJM market. For example, in New Jersey the price is higher than that in western Pennsylvania because the transmission costs associated with delivering the energy in New Jersey are more costly. (Def.'s Ex. 204). "For purposes of the RPM, PJM is divided into regions known as [Locational Deliverability Areas, or] LDAs." (Stipulated Facts ¶ 30). "New Jersey is located in a Locational Deliverability Area called 'EMAAC,' which also includes parts of Maryland, Pennsylvania, and Delaware. EMAAC is located within a wider [LDA] called 'MAAC,' which includes EMAAC, additional parts of Pennsylvania and Maryland, and the District of Columbia." (Stipulated Facts ¶ 31). According to the parties, within EMAAC, "there are smaller LDAs, including (within New Jersey), one called 'PSEG', and within the PSEG LDA, another one called 'PSEG North.'" (Stipulated Facts ¶ 33). As the parties explained:

> When constraints on the transmission lines limit the amount of electricity that can be imported into an LDA, RPM capacity prices can be higher in the constrained LDA - reflecting the fact that the LDA must rely on more expensive capacity resources located within the LDA rather than cheaper capacity resources located elsewhere. (Stipulated Facts ¶ 33).

Prices are often different among the LDAs leading to "price separation." As the Commission has explained, "[c]apacity market prices must be locational in order to be fully effective. Because of transmission constraints, capacity in one location is not always deliverable to loads in other locations[.]" (Pl.'s Ex. 26, at 34). As such, separate capacity prices are necessary to reflect the differences in costs and capacity needs among the locations. "Further, if a single capacity price is set for the entire region, capacity prices do not reflect the need for generation" in those particular locations. (*Id*.) For instance, as Mr. Dominguez stated "higher price for capacity gives a signal to those in the generation industry to consider developing a new plant or resource within the LDA because a better profit could be realized." (T. 445, 24 through T. 446, 12). "[T]his price differential is reflective of the transmission constraints in moving power from west to east into New Jersey and [signals] the need for resources to be located inside New Jersey." (Pl.'s Ex. 75, at 7).

From its initial inception in the early 2000s, the Board did not accept the RPM theory. Rather, the Board predicted that RPM would curtail development of new generation into New Jersey. The Board recommended that new generators should be given assurances to overcome fears regarding the risk of long term financing packages of potential financiers. The Board also complained that the RPM functions unfairly against new generators. First, the Board argued that the long term price signals of the RPM Auction were insufficient to attract new generators in New Jersey since little development had occurred. (Pl.'s Ex. 197). Second, the Board argued that financial institutions were reluctant to loan money for development because of uncertainty. That

is, capacity prices fluctuate and the clearing price of the RPM Auction only lasts a year ultimately rendering a long term loan very speculative. In reality, these variables caused energy prices to increase in New Jersey. As then-Board Commissioner Frederick Butler advised the Commission in February 2006:

> RPM, in its current form, will not have the intended effects on investment and will not result in the most cost effective means of solving future reliability problems. Thus, we are concerned that RPM, in its current form, will not ensure adequate electricity supply within New Jersey, and will lead to increased costs to our consumers. (Pl.'s Ex. 13, at 1).

Mr. Butler requested that the Commission undertake "additional dialogue . . . to shape the short term and long term needs of [the] wholesale electricity market[,]" rather than adopting the RPM. (*Id*. at 6). Notwithstanding New Jersey's policy objections, the Commission approved RPM because it disagreed with New Jersey's argument that "the [RPM] Settlement will raise prices without improving reliability." (Pl.'s Ex. 19, at 30); (T. 103, 11, through T. 104, 5).

In 2007, despite the Board's objections, the RPM rule was adopted which included the minimum offer price rule ("MOPR"). PJM subsequently adopted new rules on how the RPM would operate. These rules contemplated, among other things, who may enter into the RPM market and how each generator may bid (T. 2653, 2-8). Most notably, the MOPR governed biddings by new capacity resources. Over the last several years, the MOPR has been modified several times by PJM in 2011 and 2013. Some of these modifications occurred based on the facts of this case.

The RPM Auction is not based on a pure open bidding process. For instance, an existing generator which previously operated as a part of a traditional utility is permitted to bid at zero. (T. 1652, 23 through T. 1653, 2). The rationale for permitting such bids is that these generation facilities have been operating longer than projected so capital costs have been recaptured. As

such, the capital costs are deemed to be zero.[8] The ability of these long time generators to bid at zero when they may have sufficient capacity to provide to PJM raises a question as to whether the RPM Auction is actually necessary. In response to this question, PJM developed the MOPR, which it administratively calculates each spring from costs associated with the entry of a new generator; and then it lists administratively determined amount as the net cost of new entry ("net cone"). PJM converts that net cone into a price of megawatts per day ("benchmark price") (T. 1662, 17-19). While existing generators still bid at zero, they are accepting the net cone benchmark price in the RPM Auction. Hence, an existing generator became commonly known within the industry as a "price-taker." If such a generator forecasted that the benchmark price would fall below its projected cost, that generator may choose not to bid and retire the plant. (Def.'s Ex. 235). However, PJM was also concerned that new generators would bid below the benchmark price in order to be accepted into the capacity market. Hence, MOPR was also a "mechanism that s[ought] to prevent the exercise of buyer market power in the forward capacity market by ensuring that all new resources are offered into PJM's Reliability Price Model (RPM) on a competitive basis." (Def.'s Ex. 331, at 4). In order to determine the competitiveness of a new generator, PJM applies a "MOPR screen." The MOPR screen has several components:

(i) a conduct screen (i.e., a benchmark price used to determine whether a sell offer may be competitively low and thus warrants mitigation upward (described below); (ii) an impact screen test that compares the capacity clearing price with and without mitigation; and (iii) an incentive test, or net-short requirement (designed to distinguish between sellers who are net buyers and may have incentives to depress market clearing prices below competitive levels and

[8] Peculiarly, if a long time generator added more capacity to an existing plant, it may still bid at zero despite the development costs.

sellers of planned generation who may have incentives to increase market clearing prices above competitive levels. (Def.'s Ex. 331).

Several exemptions applied to the MOPR's application including the "state mandated" and the "unit-specific" exemptions. When the MOPR was initially adopted, there was an exemption from the MOPR requirements if the project was undertaken pursuant to a state regulation or mandate (T. 1654, 12-15). According to Mr. Knight, a state mandated entrant could bid as an existing generator – price taker, and "bid whatever they wanted to bid." (T. 1654, 18). In addition, there was a unit-specific exemption applying to new gas-fired generation. Such unit-specific exemptions permitted bids down to 80% of the benchmark price upon a showing that the net cone costs were at that level. Such a bid may be lower than the administrative benchmark price.

As noted above, the MOPR was changed through tariff modifications in 2011 (MOPR II) and 2013 (MOPR III). MOPR II eliminated the exemption that previously permitted developers of certain state-sponsored projects from bidding as "price takers." It also raised the "price floor" for new entrants' bids from 80% to 90% of PJM's benchmark price. (Def.'s Ex., at ¶¶ 24, 43, 66). According to Mr. Knight's testimony, in May 2013, the Commission further ruled that: (1) state-sponsored projects should be subject to the MOPR (which led the Commission to eliminate the "state exemption"); (2) the default MOPR level should be 100% of net cone; and (3) new projects should be allowed to demonstrate that their own projected costs will be lower than the benchmark price and should be able to pass a MOPR screen based on those projected costs. (MOPR III). (T. 1679, 20 through T. 1680, 3).

In addition to the MOPR screens, there was another accommodation for new entrants called the New Entry Price Adjustment ("NEPA.") (Def.'s Ex. 238). The NEPA provision was

intended to make investments in new generation less risky. The NEPA assures developers of projects in local deliverable areas ("LDAs") that after their facilities become operational they will continue to receive, for a period of subsequent years, the capacity price of the RPM Auction that prevailed at their time of their entry. In 2006, concerns regarding how long the NEPA guarantee should operate were addressed by PJM and the Commission. PJM and FERC ultimately settled on a period of three years. (Def.'s Ex. 238). Despite the MOPR and NEPA adjustments, the RPM costs left New Jersey residents with higher electricity prices due to associated transmission costs. These higher costs displeased the Board.

In addition to the RPM, two other energy issues arose in New Jersey at this time which adversely affected the industry and its regulations. First, PJM forecasted that the amount of energy required for New Jersey would be greater than the state's transmission capabilities potentially leading to outages. Notably, PJM identified twenty-three (23) power transmission violations which were likely to threaten PSE&G customers. Generally, these violations were deficiencies in service and reliability. (Def.'s Ex. 563, at 24-30); (Def.'s Ex. 567, at 20). The other adverse issue which arose was the adoption of new environmental regulations requiring that coal-fired plants be retired unless renovations substantially reducing emissions were made. As a result of these new environmental regulations, the Board projected that the amount of capacity within the PJM territory, particularly the amount of capacity in New Jersey, would be significantly reduced. Both of these adverse issues are discussed below.

Lack of Adequate Transmission Capabilities

In 2010, PJM disclosed to the Board that reliability issues may arise due to insufficient transmission capabilities in New Jersey. According to the PJM: "Based on the latest studies performed by PJM and the transmission owners, PJM, PPL and PSE&G concluded that there are

23 potential electric reliability violations that are expected to occur beginning in 2012, and extending out through PJM's 15-year planning horizon of 2022." (Def.'s Ex. 565, at 12). These violations had the potential to cause brownouts or blackouts. Since the violations were projected to occur within two or three years, the Board became concerned about whether transmission capabilities could be improved in such a short period of time. PJM found that this reliability issue could only be addressed in one of two ways — increased transmission through the construction of the Susquehanna-Roseland transmission line ("Susquehanna Connection") or construction of additional generation in or near the location where the reliability violations would occur. (Def.'s Ex. 563, at 33). Given the difficulties associated with implementing either of these contingency plans in such a short period of time, from the Board's perspective, New Jersey was at risk. As Mr. Roach summarized, "this is really, to put it mildly [an issue that] . . . [got] their attention." (T. 1893, 22 through T. 1894, 2).

Environmental Issues

In 2008, newly imposed environmental regulations cast their shadow over the New Jersey energy industry when the federal and state governments partially prohibited coal-fired plants from being operated unless significant environmental modifications were made. At that time, federal environmental rules required 12 to 19 gigawatts of capacity in the PJM territory, which amounted to about 7 to 11 percent of all PJM generation, be retired or renovated. (T. 1612, 7 through T. 1613, 15). In addition, about a year later, New Jersey adopted the High Energy Demand Day Rule ("HEDD") which created a potential reliability issue by limiting the number of hours that certain electric generating units could operate. (T. 1897, 9-24). In short, from a resource adequacy or capacity perspective, the Board believed that New Jersey was vulnerable to the shutdown of 11,000 megawatts of coal-fired generation. (Pl.'s Ex. 127); (T. 1289, 22 through

T. 1290, 9);(T. 1896, 21 through T. 1898, 10). As Mr. Roach explained it, the Board thought, "I've got to put iron in the ground[.] I've got to get a new power plant locally to protect against these things." (T. 1894, 12-16).

G. INTRODUCTION OF THE LCAPP STATUTE

The Board undertook several measurers to address its concerns. First, the Board appealed the Commission's decision implementing the RPM and MOPR rules. Second, the Board worked with the New Jersey Legislature to develop a bill that would create new capacity resources closer to or within the State.

The Board's petition of review of the Commission's decision was summarily denied by the United States Court of Appeals for the District of Columbia. In its decision, the Circuit Court concluded "that the Commission had a substantial basis on which to conclude that the RPM was an appropriate tool for increasing reliability in electricity markets, that the RPM did precisely what it was intended to do, even during the transition period before the three-year lag could take effect, and that the price hikes in its wake were attributable to legitimate causes." *Md. PSC v. FERC*, 632 F. 3d 1283, 1286 (D.C. Cir. 2011). The Court did not specifically address the Board's or the State of Maryland's contentions regarding lack of reliability, the regional nature of increased capacity prices, or the impact of the newly implemented environmental regulations governing coal-fired plants. Rather, the court seemed to accept the Commission's determination that the "rates were just and reasonable" at face value. *Id*. at 1285.

On January 28, 2011**,** the New Jersey Legislature, with the Board's support, enacted the LCAPP Act which authorized the construction of several gas-fired generators in or near New Jersey. (Stipulated Facts ¶ 35). The purpose of LCAPP was "[t]o address the lack of incentives under the reliability pricing model" by fostering the "construction of new, efficient generation . .

. [to] ensure[] sufficient generation is available to the region, and thus the users in the State in a timely and orderly manner[.]" N.J.S.A. § 48:3-98(d)(2); (Stipulated Fact ¶ 36). In general terms, the LCAPP Act established a "pilot program," overseen by the Board, to issue "Standard Offer Capacity Agreements" ("SOCAs") to selected eligible generators. N.J.S.A. § 48:3-98.3. The statute requires New Jersey's four electric distribution companies ("EDCs") to enter such contracts with eligible generators and obligates these EDCs to pay any difference between the RPM Auction price and their actual development costs approved by the Board. N.J.S.A. § 48:3-98.3(c)(9). The LCAPP contemplated the awarding of SOCAs for 2,000 megawatts of generation capacity. It further directed that the selected LCAPP generators were to "participate in and clear the annual base residual auction [RPM Auction] conducted by the PJM . . . for each delivery year of the entire term of the agreement." N.J.S.A. § 48:3-98.3(c)(12). In addition, the statute directed the Board to conduct a competitive solicitation of capacity and required winning bidders to enter into SOCAs lasting no longer than fifteen years with the State's electric distribution companies (EDCs). N.J.S.A. § 48:3-98.3(c)(1)-(4); *see also* (T. 121, 7 through T. 122, 24). The main purpose of the legislation was to provide a transaction structure that would result in new power plants being constructed in the PJM territory that benefit New Jersey. The New Jersey Legislature was ultimately interested in ensuring that new resources were constructed in time to help mitigate the reliability risks discussed above. N.J.S.A. § 48:3-98.2(b); *see also* (T. 1368, 17 through T. 1377, 1)

More specifically, the LCAPP statute required:

- that the Board hire an agent to: (1) "assist the Board with the establishment of the LCAPP program; (2) prequalify eligible generators for participation in LCAPP; and (3) recommend to the Board the selection of winning eligible generators based on the net

benefit to ratepayers of each eligible generator's offer price and term." N.J.S.A. § 48:3-98.3(b)(1)-(3);

- that the Board "establish criteria associated with the prequalification of eligible generators in the LCAPP through a showing of environmental, economic, and community benefits, and through a demonstration of reasonable certainty of completion of development, construction, and permitting activities necessary to meet the desired in-service date" N.J.S.A. § 48:3-93.3(c)(6); (Stipulated Facts ¶ 39);
- that an "eligible generator" be "a developer of a base load or mid-merit electric power generation facility . . . that qualifies as a capacity resource under PJM criteria and that commences construction after the effective date" of the LCAPP. N.J.S.A. § 48:3-51; (Stipulated Facts ¶ 40);
- that a "Standard Offer Capacity Price ("SOCP") mean "the capacity price that is fixed for the term of the SOCA and which is the price to be received by eligible generators under a [B]oard-approved SOCA[.]" N.J.S.A. § 48:3-51. This price represents the development costs of the new generation as approved by the Board.
- that selected eligible generators "participate in and clear the annual base residual auction" (RPM auction) for the sale of their capacity to PJM." N.J.S.A. § 48:3-98.3(c)(12); and
- that the Board order that New Jersey's four electric distribution companies (EDCs) – Public Service Electric and Gas, Atlantic City Electric, Jersey Central Power & Light and Rockland Electric Company "procure 2,000 megawatts of financially-settled SOCAs from eligible generation" for a period up to 15 years. N.J.S.A. § 48:3-98.3(c)(1),(9). The Board was further obligated to "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." N.J.S.A. § 48:3-98.3(c)(4).

With the LCAPP, the New Jersey Legislature and the Board concluded that they would have to act to increase electric generation in the State due to the fact that the Commission's policies were not creating new capacity. As Dr. Roach noted in his testimony, the LCAPP created "some tension" between the Commission and the Board. (T. 2034, 25 through T. 2035, 1). One area of tension is summarized in the LCAPP. Within the statement of findings, the Legislature noted that the New Entry Price Adjustment was insufficient. It stated:

> The PJM reliability pricing model could, through structural changes, provide necessary incentives, such as the expansion of the "New Entry Price Adjustment" mechanism for the construction of new capacity, including new intermediate and base load plants, by allowing new resources to qualify and receive a guaranteed capacity price for a longer period of time. However, the implementation of similar structural changes was previously denied by FERC and any future implementation is uncertain at this time. N.J.S.A. § 48:3-98.2(c).

More specifically, the legislative findings declared that the Board would "allow new resources to qualify and receive a guaranteed capacity price for a longer period of time" than the RPM permitted. *Id*.

In addition, Board President Lee Solomon, in a September 16, 2010 memorandum to Governor Christie, affirmed that the purpose of 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." (Pl. Ex. 84, at 2). President Solomon also emphasized that the three year NEPA guarantee would be expanded to 15 years.

Moreover, LCAPP mirrors or overlaps the RPM Auction procedure. For instance, LCAPP requires that the price within a SOCA must be expressed in a "price per megawatt day" which is the same standard used in the RPM. *Compare* N.J.SA. § 48:3-98.3(c)(2) *with* (Stipulated Facts ¶ 8) (stating that "the price of capacity in RPM is generally measured in dollars per megawatt-day ("$/MW-day")).

Between 2008 and 2012, the transmission, reliability and environmental issues evolved. That is, many of the Board's concerns had subsided through the deliberate actions of PJM stakeholders and/or economic circumstances. As Mr. Roach characterized it, New Jersey "dodged a bullet." (T. 1894, 23 through 1895, 7). For example, PJM's reliability forecasts failed to predict the 2009 recession, and therefore overstated the amount of capacity required. (Pl.'s Exs. 34, 65, 116, 275, 362). Accordingly, PJM reissued forecasts with lower usage estimates which minimized PJM's reliability concerns. During the trial, there was little to no evidence that this revised usage data proved to be false.

In addition, PJM recommended the construction of the Susquehanna Connection, a new 145-mile high voltage transmission line to move electricity from Berwick, Pennsylvania to Roseland, New Jersey. Presently, officials of PJM and PSE&G anticipate that construction on the project should be completed in 2014 or 2015. This project has the potential to solve the reliability violations that PJM projected. (Def.'s Ex. 563). Despite its ongoing construction, the Board argues that the length of time needed to complete the Susquehanna Connection project has left New Jersey vulnerable to outages. As such, according to the Board, new generation within New Jersey is needed to alleviate future reliability issues.

Lastly, the retirement of coal-fired plants has been an ongoing process. Despite the Board's concerns, PJM has found that within its territory the RPM had sufficient bidders to

cushion or absorb the impact of these shutdowns. In addition, through the RPM Auction, PJM has acquired more than sufficient capacity to serve its territory. As PJM reported, although changes in environmental rules have led to significant retirements, "[t]he announced generation retirements sen[t] a strong signal that there would be a need for new resources, and [the 2012] auction witnessed a record number of new generation offers." (Def.'s Ex. 204, at 2); (T. 1084, 15-22). In fact, the 2012 RPM Auction cleared enough capacity to have a 20.2% reserve margin – significantly above the 15.4% reserve margin usually reserved. It is noteworthy that one of the Board's witnesses confirmed that sufficient generation exists. Specifically, Mr. James Giuliano, Director of Reliability and Security of the Board, testified that he could not recall any power outages caused by insufficient generation. (T. 1104, 15-19).

Appointment of LCAPP Agent and MOPR Rules Revisited

In the first quarter of 2011, following enactment of the LCAPP, two significant events occurred. First, the Board appointed Levitan & Associates to be the LCAPP agent. (Pl.'s Ex. 136). Immediately after its appointment, Levitan began an exhaustive but expeditious selection process to identify generators capable of fulfilling both the requirements of the LCAPP statute and the policy objectives of the Board. Secondly, certain PJM stakeholders complained to PJM and the Commission that the state mandated exemption under MOPR should be prohibited because, under the exemption, the Board was unilaterally changing the price of capacity by imposing its own approved costs rather than relying on the competitive price of the RPM.

Levitan's evaluation of generators' proposals through the eligibility, prequalification and commercial proposal stages was based on an evaluation process "consistent with the LCAPP Law that [was] centered on the maximization of economic, environmental and community benefits from the standpoint of ratepayers in New Jersey." (Pl.'s Ex. 178, at 11). Specifically,

"[a]pplicants were first reviewed in light of the requirements in the LCAPP Law to be an eligible generator. Eligible generators were then further reviewed to determine whether they should be prequalified on the basis of showing environmental, economic and community benefits, and the demonstration of meeting the proposed in-service date with reasonable certainty." (*Id.*). Furthermore, "[t]he evaluation of commercial proposals was completed in parallel with the prequalification review." (*Id.*).

According to Mr. Levitan, the "community benefits" aspect of the prequalification assessment concerned "the developer's ability to drum up support in the community to achieve the [LCAPP Act's] aggressive [construction] milestones." (T. 1313, 7-15). The benefit sought was the timely construction of a qualifying new generation facility within the PJM territory. In evaluating the economic benefit of potential projects, Levitan "look[ed] at the completeness of the technology and operating data forms . . . [to] facilitate [its] analysis in the next phase." (T. 1312, 22 through T. 1313, 3).

In total, thirty-four (34) generation projects submitted prequalification applications to Levitan. (Stipulated Facts ¶ 43). Many of these projects were disqualified for various reasons. Notably, Levitan eliminated twenty-one (21) of the projects because they "were tied to existing generation units and therefore did not meet the condition of being a new generation facility." (Stipulated Facts ¶ 45). The Board and Levitan also eliminated four (4) projects because they "were characterized as peaking units, rather than base load or mid-merit units as required by the LCAPP." (Stipulated Facts ¶ 46). After three (3) generators withdrew their applications, only six (6) generators were prequalified. (Stipulated Facts ¶ 48). Of the six generation facilities that prequalified, Levitan recommended, and the Board later approved, that three be awarded SOCAs. These generators were Hess (625.0 MW of capacity), NRG (680.1 MW of capacity),

and CPV (663.4 MW of capacity). (Stipulated Facts ¶ 54). All three of these generator projects are located in New Jersey. (Stipulated Facts ¶ 52).

After the prequalification stage was completed, Levitan drafted the SOCA for each generator. The material terms of the three SOCAs are identical; they differ only with respect to the SOCA price, the quantity of capacity awarded, and the name of the generator. (T. 1368, 7-11). Herein the Court utilizes the SOCA of CPV as an example.

The Board awarded CPV a SOCA with a fifteen-year term. (Pl.'s Ex. 203). Each SOCA contains an Attachment F, which provides the schedule of Standard Offer Capacity Prices for the LCAPP generator for the fifteen-year term. CPV received the following price schedule:

Delivery Year (ending May 31st)	Standard Offer Capacity Price ($MW-day)
2016	286.03
2017	294.61
2018	303.45
2019	312.55
2020	321.93
2021	331.59
2022	341.54
2023	351.79
2024	362.34
2025	373.21
2026	384.41
2027	395.94
2028	407.82
2029	420.05
2030	432.65

Notably, CPV's SOCA has provisions which relate to PJM activity. For instance, the SOCA refers to the RPM, the RPM Auction and/or other actions that occur within PJM. (Pl.'s Ex. 203). The SOCA responsibilities which correlate to PJM activities are listed below:

> "Available Capacity Amount" means the lesser of: (i) the quantity of Unforced Capacity from the Capacity Facility that is offered by Generator and cleared by PJM in the relevant Base Residual Auction [RPM Auction], and (ii) the Awarded Capacity Amount.
>
> "Base Residual Auction" means the primary auction conducted by PJM as part of PJM's Reliability Pricing Model [RPM] to secure electrical capacity as necessary to satisfy the capacity requirements imposed under the PJM reliability assurance agreement for the Delivery Year.
>
> "Locational Deliverability Area" or "LDA" means the PJM sub-regions used to calculate Resource Clearing Prices as part of the Reliability Pricing Model.
>
> "PJM Interconnection, L.L.C." or "PJM" means the Regional Transmission Organization that manages the regional, high-voltage electricity grid serving New Jersey and all or parts of other states and, among other things, administers the Reliability Pricing Model, and any successor.
>
> "Reliability Pricing Model" or "RPM" means PJM's capacity-market model that secures capacity on behalf of electric load serving entities to satisfy load obligations not satisfied through
> the output of electric generation facilities owned by those entities or otherwise secured by those entities through bilateral contracts.
>
> "Resource Clearing Price" or "RCP" means the clearing price expressed in $/MW-day for Unforced Capacity established by the Base Residual Auction for the LDA in which the Capacity facility is located and the applicable Delivery Year as posted by PJM.
>
> "RPM Rules" means the provisions of PJM's tariffs and agreements accepted by the Federal Energy Regulatory Commission and the provisions of PJM's manuals governing the Reliability Pricing Model, as in effect from time to time during the term of this Agreement. (Pl.'s Ex. 203).

In addition to these terms, the term "delivery year" corresponds to the RPM availability requirement. Specifically, "Delivery Year" means "each 12-month period from June 1st through May 31st numbered according to the calendar year." (Pl.'s Ex. 203). The term is the same under

the SOCA. The SOCA obligates the generator to qualify within the RPM by clearing the RPM Auction and acting in accordance with PJM rules. The SOCA dictates the procedure:

> 2.3.1. Generator shall use all commercially reasonable efforts to cause the Capacity Facility to qualify under the RPM Rules as a capacity resource in an amount no less than the Awarded Capacity Amount for the Base Residual Auction associated with each Delivery Year during the term of this Agreement, commencing upon the Awarded Commencement Date.
>
> 2.3.3. Throughout the Delivery Term, Generator shall:
>
> (a) Cause the Capacity Facility to comply with all obligations of a capacity resource under the RPM Rules, including without limitation the obligations relating to the submission of offers to supply electric energy and ancillary services in PJM markets, and Generator shall bear all costs associated with such compliance, including without limitation all fees and penalties imposed by PJM;
>
> (b) Submit supply offers for an amount of Unforced Capacity no less than the Awarded Capacity Amount from the Capacity Facility in accordance with the RPM Rules in the Base Residual Auction associated with each Delivery Year during the term of this Agreement, such that the Unforced Capacity shall be offered at the lowest commercially reasonable price under the RPM rules;
>
> (c) Submit supply offers from the Capacity Facility for the maximum amount of Associated Energy that the Capacity Facility can provide in the PJM day-ahead energy market in accordance with PJM Market Rules throughout the Delivery Term, such that the Associated Energy shall be offered at the lowest commercially reasonable price under PJM's Market Rules;
>
> (d) Submit supply offers from the Capacity Facility for the maximum amount of Associated Ancillary Services that the Capacity Facility can provide in the PJM ancillary services markets in accordance with PJM Market Rules throughout the Delivery Term, such that the Associated Ancillary Services shall be offered at the lowest commercially reasonable price under PJM's Market Rules;
>
> (e) Neither physically nor financially withhold any Unforced Capacity up to the amount of Awarded Capacity, or Associated Energy and Associated Ancillary Services, from the Capacity Facility;
>
> (f) Provide on a timely basis . . . (i) documentation provided to Generator by PJM after the conclusion of each Base Residual Auction

> showing the amount of Unforced Capacity offered from the Capacity Facility and cleared by PJM in such Base Residual Auction; (ii) documentation provided to Generator by PJM in advance of each Delivery Year showing all EFORd measurements for the Capacity Facility for the Delivery Year; (iii) the result of any capability test for the Capacity Facility conducted by PJM; (iv) documentation provided to Generator by PJM in advance of each Delivery Year showing the showing the Availability Capacity Amount for the Delivery Year or required to calculate the Available Capacity Amount for the Delivery Year; and (v) documentation notifying Generator of any correction to an input to a calculation." (Pl.'s Ex. 203).

The electric distribution companies have one broad obligation to the Board under the SOCA. (Pl.'s Ex. 203). That is, they must report their compliance with the abovementioned obligations to the Board. The SOCA reads, in relevant part:

> 2.4. Obligations of the Utility. The Utility shall prepare and file an annual report to the Board within thirty (30) calendar days after the end of each Delivery Year describing (i) the status of this Agreement, (ii) the amount of Unforced Capacity and cost of associated Transactions made under this Agreement, (iii) the performance of the Generator in supplying Unforced Capacity and Associated Energy and Associated Ancillary Services under this Agreement, and (iv) any material actions taken by the Generator or the Utility under this Agreement. Nothing in this Agreement imposes upon Utility the obligation to monitor, enforce, or declare an Event of Default with respect to the price of Unforced Capacity, or the price or amount of Associated Energy or Associated Ancillary Services, which Generator offers in or supplies to any PJM Market. (Pl.'s Ex. 203).

In addition, the SOCA sets forth a formula to make payments or receive refunds based on the SOCA amount and the clearing price at the RPM auction. The SOCA states:

> 4.1.1. If, for a Delivery Year, the SOCP is greater than the [Recourse Capacity Price] then, subject to Section 2.5, Utility will pay Generator each Month during the Delivery Year one-twelfth of the product of (i) the difference between the SOCP and the [Resource Capacity Price], (ii) the Available Capacity Amount, (iii) the number of days in the Delivery Year; and (iv) Utility Load Ratio, each for the applicable Delivery Year.
>
> 4.1.2. If, for a Delivery Year, the [Resource Capacity Price] is greater than the SOCP then, subject to Section 2.5, Generator will pay Utility each Month an amount equal to one-twelfth of the product of (i) the difference

> between the RCP and the SOCP, (ii) the Available Capacity Amount, (iii) the number of days in the Delivery Year, and (iv) Utility Load Ratio, each for the applicable Delivery Year.
>
> 4.2. Structure of Transaction. Nothing in this Agreement shall entitle or obligate Utility to purchase, or take title to or delivery of, capacity, electric energy, or ancillary services from the Capacity Facility.

Under the SOCAs, "the LCAPP generators receive the payment set forth in the SOCAs only if they successfully sell the capacity from their facilities in the RPM base residual auction." (Stipulated Facts ¶ 56). The SOCAs also require the winning bidder to use all commercially reasonable efforts to construct an electric generation facility prior to the "commencement date" of its RPM obligation. (Stipulated Facts ¶ 58).

Finally, the SOCA requires that eligible generators maintain all approvals they have with PJM, and to "comply with Commission and RPM rules." The agreement sets forth:

> 6.2. Maintain Authorizations. Each party will use all reasonable efforts, including the maintenance of records and provision of notices, to maintain in full force and effect all consents, licenses or approvals of PJM and of any Governmental Authority or other authority that are required to be obtained by it with respect to this Agreement, the Construction Period Security, and the Delivery Term Security and its obligations hereunder and thereunder and will use all reasonable efforts to obtain any that may become necessary in the future.
>
> 6.3. Comply with Laws and RPM Rules. Each party will comply in all material respects with all Applicable Laws and orders and all RPM Rules to which it may be subject if failure so to comply would materially impair its ability to perform its obligations hereunder or under the Construction Period Security or Delivery Term Security.

In accordance with the terms of its SOCA, CPV (as well as the other two eligible generators) sought admission into the RPM Auction. According to Mr. Knight, as part of CPV's admissions process, representatives of CPV met with PJM to discuss the impacts of the MOPR II revisions and what information CPV would be required to submit. In response to a request for information issued by PJM, CPV sent an application consisting of more than 600 pages of

materials. Within its application, CPV claimed it was exempt under the unit-specific exemption of MOPR II adopted in 2011, not the state mandated exemption provided for in the original MOPR. Under MOPR II, CPV could bid into the RPM auction at less than the minimum offer price floor (90 percent of net cone) if it could demonstrate that its actual costs were less than the benchmark price. (T. 1661:21 through T. 1673, 23); (Def.'s Ex. 51).

In determining whether CPV qualified for a unit-specific exemption pursuant to MOPR II, PJM did not consider any out-of-market payments that CPV would receive through New Jersey's LCAPP program. (Def.'s Ex. 183, 751); (T. 1674, 14 through T. 1675). Pursuant to its practice under the MOPR screen, PJM advised CPV that it would accept a bid of no less than $151.24 / MW-day, which is the level at which CPV bid. (T. 1678, 18-20). The May 2012 RPM Auction cleared at $167.46 / MW-day. (Def.'s Ex. 204); (Stipulated Facts ¶ 59). According to Mr. Knight, the RPM Auction price was different than the Board's approved costs due to "a difference in timing, and then secondarily a difference in the view on energy." (T. 1677, 12). With regard to the other eligible generator projects, Hess Corp's project cleared the auction while NRG's proposed project did not. Adamantly opposed, the four electric distribution companies signed the SOCAs under protest.

H. IMPACT OF THE LCAPP STATUTE ON GENERATORS

Plaintiffs' witnesses testified that their respective 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. According to these witnesses, the LCAPP makes it more difficult for these companies to make such business decisions because they can no longer rely on the RPM Auction price signals to evaluate their future costs and predict future revenue streams. In the view of the plaintiffs, the RPM Auction clearing price

($167.46) was essentially displaced and supplanted by the SOCA price written into the SOCA contracts ($286.03), causing less predictability in the energy capacity markets.

Zamir Rauf, Plaintiff Calpine's Chief Financial Officer, testified that the RPM Auction price signals play a "huge role" in Calpine's assessment as to whether an investment should be made because those prices are the basis for "projections as to where [Calpine] think[s] the market is going to be." (T. 1112, 3-14); (Def.'s Ex. 289, at 1). He expressed Calpine's reluctance to proceed with expansion plans in light of the LCAPP's enactment. In fact, according to Mr. Rauf, the LCAPP was a "very strong factor" in Calpine's decision to construct only half of its Garrison project as opposed to completing the project as originally planned. (T. 1121, 15 through T. 1130, 15). Mr. Rauf noted that Calpine was initially attracted to invest in the PJM region because it was a competitive market "where you can put your capital at risk, and compete based on your efficiency[.]" (T. 1114, 15-18 through T. 1115, 6-21). While Calpine "would love to invest more money into PJM[,]" as a result of the LCAPP, the company is now "taking a step back and just holding up from putting too much money into PJM . . . pending this uncertainty." (T. 1134, 8-12). Mr. Rauf summarized the conundrum for energy developers after the LCAPP's enactment:

> [T]he PJM market was designed with certain rules, and everyone has to play by the same rules. . . . [H]ow do you know the state two months from now or six months from now, a year from now, two years from now suddenly decides we need to create jobs let's build another power plant, or whatever political reason they may have for doing so. And all of a sudden they decide to build another plant, whereas you may have been in -- in the process of building one anyway or you may have started building one and now your capital's at risk because the price signals that were in the marketplace are no longer there because of this new plant, so it really just disrupts the whole marketplace, it just in my mind creates enough chaos to where you've got to be very cautious about putting money in a market where you don't know what the rules are, especially when the rules are being manipulated by the politicians. (T. 1130, 20 through T. 1131, 14).

As Mr. Rauf plainly stated, in light of the LCAPP, Calpine would "put[] less money in PJM than [the company] otherwise would have, and [Calpine] would probably either be reinvesting that money in other regions, or buying back [its] stock." (T. 1132, 6-12).

PSEG Power also had similar concerns regarding the impact of the LCAPP. According to Daniel Cregg, the LCAPP Act "dramatically change[d] how we look at what the market is." (T. 888, 20 through T. 889, 8). He noted that PSEG Power "shifted entirely away from . . . looking at it as a merchant opportunity" and began rationalizing that the "opportunity [was] not going to be there for [them] this year". (T. 879, 2-7). In the May 2012 RPM Auction, PSEG Power bid its Essex County project "at a fairly high level" in order to serve "as a backstop to the extent that the LCAPP units [did not] bid." (T. 886, 22 through 888, 12). In other words, "absent the LCAPP Act . . . there might have been a price signal that would have been there" for the Essex County project, but instead, "the LCAPP units did bid in, and as a result [PSEG Power's Essex] unit did not clear." (T. 887, 4-8).

The LCAPP also had an impact on the operations of Exelon, as discussed by Mr. Dominguez during his testimony. Specifically, he testified that the RPM price signal "tells [Exelon] whether to make investments in existing plants; whether to increase the capacity of existing plants; whether to do environmental retrofits; [and] whether to keep plants open." (T. 527, 2-10). Mr. Dominguez further testified that, given its impact on Exelon's business strategies, the RPM is "fundamental to the way [Exelon] operate[s] [its] business." (T. 527, 8-10). In addition, Mr. Dominguez stated that the LCAPP Act has "fundamentally chang[ed] [Exelon's] ability to predict revenue streams for existing megawatts." (T. 564, 3-16). The LCAPP has also been a factor in Exelon's decision to place its nuclear uprate program on hold. (T. 564, 16).

PPL has also had to modify its business strategies in light of the requirements imposed by the LCAPP. Michael Cudwadie, Vice President for PPL EnergyPlus, testified that PPL relies on capacity forward market prices and energy forward market prices to make decisions regarding investments in new and existing generation, including whether to upgrade units, add pollution control equipment, or retire specific units. (T. 1041, 18-24).

The effects of the LCAPP described by these witnesses were echoed at trial by Plaintiffs' experts Mr. Massey and Professor Willig. For example, Mr. Massey declared that "[t]he entire fabric of the contract in my judgment makes it a price for capacity. It so happens that the contract calls it a standard offer capacity price, I . . . can hypothesize about a lot of things, but I don't know what can be clearer than that." (T. 296, 19-23). Mr. Massey elaborated by stating that "[t]he price is measured in terms of the netting of revenues, is measured in terms of comparing the standard offer capacity price, with the price determined in the PJM capacity market. It's all about capacity pricing." (T. 298:2-10). Furthermore, the payments under the SOCA are "inextricably linked to the sale of wholesale capacity." (T. 298, 2-10).

Similarly, Professor Willig described the effect of the LCAPP as "wiping out the pricing mechanism of PJM . . . [and] taking it away and putting this alterative, the SOCA price, in the place of the market price." (T. 638, 22 through T. 639, 1). Professor Willig opined that the "architecture" of the RPM Auction was appropriately designed to address concerns in the energy capacity market (T. 763, 19-23) and that the RPM clearing price "is being displaced, . . . overridden, [or] supplanted, by the SOCA price through this mechanism which is written into the SOCA contract and governed by the LCAPP." (T. 637, 15-18).

Professor Willig further stated that the LCAPP would actually undermine new generation projects because all future investors would insist on receiving similar government assistance. He explained:

> Even though this is supposed to be an interstate market, the kinds of freedoms for the states, which they may have political incentives to act on, favoring their own development projects, will lead in a contagious way to other states taking measures that they think are only there in self-protection but are really their own reaction to the beginnings of this movement if the Court allows it, so that it's truly a contagion. We could very well be seeing a rash of programs of this kind, only furthering the rational insecurity of new investors who are not going to be part of these programs, fearing that the market will just be full of unfair competition for them, and thereby discourage their own investment activities. (T. 698, 11-23).

Defendants' Perspective

The defendants have a completely different view concerning the impact and effects of the LCAPP based on two factual disagreements with the plaintiffs. First, the defendants contend that the RPM and the SOCA are two separate and unrelated transactions. The fact that each provides a different price does not, according to the defendants, frustrate the purpose or goals of the RPM Auction because, in their view, the SOCA is a purely financial contract not subject to Commission oversight and authority. Second, the defendants argue that any jurisdictional conflicts between the Board and the Commission were resolved by the Commission's 2013 MOPR revisions. Both of these arguments are addressed below.

According to the defendants, the RPM and the SOCA are unrelated. As Mr. Knight of CPV testified, the SOCA is "something separate and distinct." (T. 1646, 6-13). In describing this distinction, Mr. Knight elaborated that the "SOCA is between CPV and the EDCs, and does not go through PJM or have to do with PJM." (T. 1646, 6-13). He further pointed out that "[CPV] sell[s] physical capacity and energy to PJM," and does "not sell any physical capacity to

anybody else." (T. 1644, 12-22). Mr. Knight distinguished the SOCA price from the RPM Auction clearing price by stating:

> The SOCA -- I mean the general terms of the SOCA are relatively simple and straightforward, but the obligation is for us to build a power plant, and to bid into, connect into PJM, and sell all our energy and capacity into PJM. And then in return for that we receive a financial payment from the EDCs, that is based upon a formula we're all . . . familiar with. It's a fixed price for a floating price, the floating price being the index in the PJM capacity market. (T. 1644, 12-22).

Defendants further contend that because the SOCA is a purely financial contract, it is not subject to Commission oversight. (T. 1911, 13-16). In fact, Defendants liken the SOCA to other financial contracts such as swaps, collars, or contracts for differences. (T. 682,2 through T. 683, 7). While the latter term (contract for differences) was mentioned frequently throughout trial, it was not fully defined except as an instrument that is routinely used to manage commodity price risks. (T. 1347, 1-15). For example, Mr. Levitan explained that a contract for differences is a "financially settled mechanism that provides revenue assurance for the seller and risk management benefits for the buyer." (T. 1282: 10-18). In the view of the defendants, because the SOCAs do not involve the sale of actual physical energy capacity, they fall outside the jurisdictional authority of the Commission. (T. 1282, 10-18). Mr. Knight agreed with this analysis and likened the SOCAs to insurance policies indemnifying against forced power outages. He testified:

> Because the payment mechanism is contingent upon something, it doesn't mean that we're delivering capacity . . . . [A]n example would be we have forced outage insurance in which we get paid by someone under a derivative contract if we are forced out. That doesn't mean that that's forced outages . . . it's just a contingency within the contract by which you get paid, it's not [like] you're actually delivering some good. T. 1648, 20 through T. 1649, 3).

So, under the defendants' analysis, the SOCAs are ultimately just financial risk management tools through which no capacity or energy is bought or sold. (T. 1283, 17-24); (T. 1360, 9 through T. 1369, 10); (T. 1644, 9 through T. 1645, 9).

With the adoption of the MOPR III revisions, the defendants argue that issues between the Board and the Commission concerning participation of new generators in the RPM Auction are resolved; and since there is no controversy between the Board and the Commission, there is no need for the Court to impose any remedy. The Court, however, rejects this argument for several reasons. Although the Board and the Commission may now have a more cooperative relationship, the Court is in the best position to determine whether the LCAPP and the related policies implemented by the Board violate the Supremacy Clause. In addition, despite the increased cooperation between the Board and the Commission, this remains a controversy between the plaintiffs (generators and distributors of electricity) and the Board.

Other Alternatives

Since the Board retained authority over the siting of generation facilities, a question arose as to whether the Board had any alternative means to incentivize construction of new generation facilities besides enacting a statute like the LCAPP. The parties agree that the Board had a number of ways to support and encourage the development of generation projects. These include 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. (T. 266, 25-26 through T. 267, 6); (T. 1313-14 through T. 1316, 2).

I. CREDIBILITY OF WITNESSES AND WEIGHING OF THE EVIDENCE

As opposed to the facts set forth above, to which the Court has given considerable weight, the trial record reveals an extensive number of other facts which were given little weight in this decision. Those facts, and the reasons they were given little weight, are discussed below.

First, Defendants presented a plethora of facts about initiatives in Maryland and Connecticut which they believe present issues similar to those being considered in this case. The Maryland initiative is subject to a separate ongoing lawsuit. As Mr. Roach testified, it is based upon reimbursement of 400 megawatts of new demand response as opposed to a capacity requirement. (T. 2066, 20-24). Any analysis of the Maryland proposal would necessarily require this Court to review a set of facts as substantial as those presented herein. Based on the facts presented at trial, the Court is not able to discern whether Maryland's proposal is sufficiently similar to the LCAPP. As such, the Court considers the value in comparing and contrasting the Maryland initiative and the LCAPP to be minimal for purposes of this opinion.

In regards to the Connecticut proposal, the defendants contend that a Connecticut peaking facility has a very similar financial structure as a New Jersey peaking facility under the LCAPP. (T. 1377, 24 through T. 1379, 11). Evidently, PSEG Power or one of its subsidiaries previously accounted for SOCA-like payments to a New Haven generator as financial contracts. According to the defendants, the payments in question were not listed as energy or capacity contracts required to be filed with the Commission. (Def.'s Ex. 630). The defendants argue that this supports their proposition that SOCAs are purely financial instruments. The Court, however, did not have sufficient information to fully analyze the Connecticut payments and, therefore, gave the defendants argument little weight. In the Court's view, the most compelling evidence regarding how the SOCAs should be defined under the law was adduced by the witnesses at trial.

Therefore, in terms of credibility, the evidence regarding the Connecticut contracts was of little value.[9]

The Plaintiffs argue that certain written and oral statements allegedly made by Board staff and CPV executives are admissions against interest supporting the plaintiffs' case. Examples of these alleged admissions include:

a. Comments to President Solomon made by Frank Perrotti, Assistant Director of the Board, in which he stated that the LCAPP has the "potential to drive out other forms of investment or, at least, cause future developers to demand the same premiums before deploying capital." (Pl.'s Exs. 70, 406).

b. Comments made by President Solomon's aide Kristi Miller in which she stated that the LCAPP "could encourage future developers to demand identical premiums before deploying capital." (Pl.'s Ex. 406, at 20).

c. Comments made by CPV Chief Executive Officer Douglas Egan in which he indicated that in order to develop generation in New Jersey, a generator may need "out-of-market pricing" (Pl.'s Ex. 61) or "pricing that was higher than what was available at that point in time." (Pl.'s Ex. 409).

d. Comments made by the Board's Fed. R. Civ. P. 30(b)(6) designated witness, Mr. Dembia, in which he indicated that the LCAPP is a "guaranteed payout." (Pl.'s Ex. 406).

The Court gave little weight to these alleged admissions which occurred during the lobbying effort to enact the LCAPP. *See Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 615 (3d Cir. 1988). The Court found that the witnesses at trial presented

[9] On a motion *in limine* prior to trial, the Court ruled that the Connecticut initiative was not relevant because it involved a different state. During trial, the Court reopened that decision since the plaintiff's presented evidence involving initiatives in other states. The Court determined fairness required an evaluation of the Connecticut evidence.

the facts and issues in a forthright manner. Since the statements were not subject to cross-examination, and could not be assessed for credibility, the Court believes the constitutionality of the New Jersey statute and program is best determined by reviewing the merits of the case rather than relying on isolated statements.

Plaintiffs also introduced a report prepared by the Brattle Group for purposes of showing the successes of the RPM. The Brattle Group is a consulting firm hired by PJM to evaluate the RPM. (Pl.'s Ex. 49). No one from the Brattle Group testified at trial. As a result, the Brattle Group's report on the RPM Auction was not subject to cross-examination. As such, the Court gave the report little weight.

J. ANALYSIS

"Preemption is a doctrine of American constitutional law under which state and local governments are deprived of their power to act in a given area, whether or not the state or local law, rule or action is in direct conflict with federal law . . . . The analysis of a preemption dispute focuses upon statutory construction . . . in the context of a constitutional framework of sovereignty, commerce regulation, or other predicate for federal powers."[10] More specifically, preemption doctrine is rooted in the Supremacy Clause of the United States Constitution. Article VI declares that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. In order to determine whether the LCAPP is preempted under federal law, the first factual issue to resolve is whether the Board-ordered SOCAs occupy the same field of regulation as the Commission and intrude upon the Commission's authority to set prices for wholesale energy sales.

[10] JAMES T. O'REILLY, FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION AND LITIGATION 1 (2006).

According to the defendants, the Commission's oversight authority is "limited to sales of the actual physical electricity (or capacity) to a buyer." (Def.'s Post-Trial Br. at 11). Furthermore, the defendants contend that "[c]ontracts that do not effect a physical sale of electricity . . . are not subject to [Commission] jurisdiction." (*Id.*). In the defendants' view, the SOCAs are purely financial contracts that do not involve physical sales of electricity.[11] As such, according to the defendants, the SOCAs are separate and unrelated to the RPM Auction process and free from Commission oversight. Plaintiffs argue, in opposition, that the "State, through the LCAPP Act and Board-ordered SOCAs, has set a price to be received for the wholesale sale of capacity to PJM." (Pl.'s Post-Trial Br. at 3). In the plaintiffs' view, the LCAPP ultimately "award[s] an impermissible price supplement for an interstate wholesale sale of electricity" and replaces the RPM price with the Board-ordered SOCA price. (*Id.* at 1). In doing so, according to the plaintiffs, the Board essentially sets a price for wholesale energy sales and, therefore, "regulat[es] in a field that is reserved exclusively" for the Commission. (*Id.*).

The Court finds that the 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. As previously discussed, many of the terms defined in the SOCAs make substantial use of RPM terminology. In addition, the SOCAs obligate eligible generators to:

(1) "qualify under the RPM rules as a capacity resource in an amount no less that the Awarded Capacity Amount for the [RPM Auction]" (Pl.'s Ex. 203, at 9);

(2) "comply with all obligations of a capacity resource under the RPM Rules" (*Id.*);

(3) "[s]ubmit supply offers . . . in accordance with the RPM Rules" (*Id.*); and

[11] The Commission has previously held that "electricity price risk management transactions (futures, options, swaps, and the like)" that do not result in the actual delivery of electricity are "purely financial" and need not be reported to the Commission." *Morgan Stanley Capital Group, Inc.*, 69 F.E.R.C. ¶ 61,175, 61,696 (1995).

(4) "[s]ubmit supply offers . . . in accordance with PJM Market Rules[.]" (*Id*. at 9-10). The LCAPP Act itself defines the SOCA as a "capacity price . . . to be received by eligible generators under a Board-approved SOCA." (Pl.'s Ex. 127, at 10). Furthermore, payment of the SOCA price is made only if the LCAPP generators successfully sell and deliver wholesale capacity to PJM. Given the fact that the SOCAs require eligible generators' to satisfy certain RPM rules and mandate that the generators undertake certain performance under those rules, the Court finds that the performance of the SOCAs is contingent upon clearing the RPM Auction. As such, the SOCAs are not separate from, and to the contrary, occupy the same field as the RPM Auction.

"Under the Supremacy Clause, federal law may supersede state law in several different ways." *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). Specifically, the Supreme Court has recognized three types of preemption: express preemption, implied conflict preemption, and field preemption. *Id*. In this case, Plaintiffs argue that the Federal Power Act supersedes the LCAPP under both the field and conflict preemption theories.

Courts must begin their analysis of preemption questions by applying a presumption against preemption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). "In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" *Bates v. Dow AgroSciences* 544 U.S. 341, 449 (2005) (citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). "That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). Thus, when the "text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-

emption.'" *Id.* (citing *Bates*, 544 U.S. at 449). *See also Cipollone*, 505 U.S. at 518. Nonetheless, in the face of clear evidence, the presumption against preemption can be overcome. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). ("Assuming, *arguendo*, that some presumption against preemption is appropriate, we conclude . . . that the state Act presents a sufficient obstacle to the full accomplishment of Congress's objectives under the federal Act to find it preempted."). While applying the presumption against the preemption, the Court reviews whether the Federal Power Act preempts the LCAPP under either the field preemption or conflict preemption theories.

Field Preemption

Field preemption arises by implication when state law occupies a "field reserved for federal regulation." *United States v. Locke*, 529 U.S. 89, 111 (2000). The Supreme Court has explained that "[f]ield preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012). This occurs when "Congress has left no room for state regulation of these matters." *Locke*, 529 U.S. at 111 (citing *Fidelity Fed. Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982). The Supreme Court has explained that a congressional intent to occupy a field can be inferred when "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). It may also be inferred where "an Act of Congress 'touches a field in which [the] federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *English v. General Elec. Co.*, 496 U.S. 72, 79 (quoting *Rice*, 331 U.S. at 230). Nonetheless, because field preemption typically arises in areas traditionally regulated by states under their police powers,

"congressional intent to supersede state laws must be 'clear and manifest.'" *English*, 496 U.S. at 79 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Generally, "[t]he factors used to determine if the field has been fully occupied by federal power include the dominant federal interest, the expression of congressional purpose, and the pervasiveness of the federal regulatory system." O'Reilly, *supra* note 10, at 70.

Since the Supreme Court's 1927 decision in *Public Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927), there has been a dominant federal interest over wholesale sales of electricity in interstate commerce. In that case, the Supreme Court invalidated an attempt by Rhode Island to regulate the rates charged by a Rhode Island plant selling electricity to a Massachusetts company, which resold the electricity to the City of Attleboro, Massachusetts. The Court found that the State's attempt to regulate rates "place[d] a direct burden upon interstate commerce" and, as a result, the "State [was] restrained by the force of the Commerce Clause." *Id.* at 89. Ever since the Court's ruling, the federal government has asserted jurisdiction over wholesale sales of electricity in interstate commerce. As noted in Section E of this memorandum, in the absence of any federal regulatory body, interstate wholesale electricity pricing was left entirely unregulated after the *Attleboro* decision. In order to fill that regulatory gap, Congress enacted the Federal Power Act which provided that the Commission shall have jurisdiction over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). *See New York v. FERC*, 535 U.S. 1, 20-21 (2002) ("It is clear that the enactment of the FPA in 1935 closed the '*Attleboro gap*' by authorizing federal regulation of interstate, wholesale sales of electricity – the precise subject matter beyond the jurisdiction of the States in *Attleboro*. . . . It is, however, perfectly clear that the original FPA did a good deal more than close the gap in state power

identified in *Attleboro*. The FPA authorized federal regulation not only of wholesale sales that had been beyond the reach of state power, but also the regulation of wholesale sales that had been *previously subject* to state regulation.").

Plaintiffs contend that in enacting the Federal Power Act, Congress "chose to occupy the field of wholesale electricity sales, including the price at which electricity is sold at wholesale, and the terms and conditions under which such electricity is sold." (Pl.'s Post-Trial Br. at 12). Such a contention is supported by previous decisions in which courts have held that the Commission has the exclusive authority to regulate wholesale electricity sales and the transmission of energy in interstate commerce. As stated by Justice Scalia, "It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject." *Miss. Power & Light Co. v. Miss. Ex rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring in the judgment). The Supreme Court has held that the Federal Power Act "left no power in the states to regulate licensees' sales for resale in interstate commerce." *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964). Moreover, the Court has repeatedly held that the federal statute "delegated to . . . the Federal Energy Regulatory Commission, exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) (citing *United States v. Pub. Utils. Comm'n of Ca.*, 345 U.S. 295, 311 (1953). *See also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956 (1986) (stating that the Commission "has exclusive jurisdiction over interstate wholesale power rates."). The Third Circuit has similarly found that the "wholesale market for electrical energy is regulated by [the Commission]" and "[o]ne of [the Commission's] duties is to set 'just and reasonable' wholesale electric rates." *Utilimax.com v. PPL Energy Plus LLC*, 338 F.3d 303, 305 (3d Cir. 2004). The

Commission's decision to exercise its exclusive authority to regulate wholesale electricity sales through the RPM Auction process indicates both a dominant federal interest in the RPM and a pervasive federal regulatory structure to ensure its proper implementation.

To support their proposition that the SOCAs are not "[c]ontracts . . . effect[ing] a physical sale of electricity" and, therefore, "not subject to [Commission] jurisdiction[,]" the defendants rely on the case of *New York Mercantile Exch.*, 74 F.E.R.C. ¶ 61, 311, 1996 F.E.R.C. LEXIS 454 (1996) ("*NYMEX*"); (Def.'s Post-Trial Br. at 12). In *NYMEX*, the Commission held that the Federal Power Act and its reporting requirements did not apply to an electricity futures contract that was approved for trading by the Commodity Futures Trading Commission ("CFTC") except if the "contract goes to delivery, the electric energy sold under the contract will be resold in interstate commerce, and the seller is a public utility." *NYMEX*, 74 F.E.R.C. at 61,984. Without reviewing all of the facts of *NYMEX*, the Court finds the case distinguishable for several reasons. First, no evidence was presented to indicate that the SOCAs have been approved for trading by a separate federal regulator. Second, there is a caveat in *NYMEX* that if a contract "goes to delivery" it may give rise to Commission jurisdiction. Here, the SOCA agreements are contingent upon the LCAPP generators' successful sale of capacity to PJM. Such capacity sales may constitute delivery within the meaning of *NYMEX* and, therefore, give rise to Commission jurisdiction.

The most credible testimony presented at trial confirming that the SOCA contracts are not purely financial contracts, and that they, therefore, intrude upon the exclusive jurisdiction of the Commission, was that of Professor Willig. He explained that, in economics, a purely financial arrangement is one that does not "involve any real performance." (T. 681, 5-6). He elaborated that "[a] financial deal does not involve any performance of a real side activity as part

of the deal. So that's really the dividing line, and I think it's quite clear, it goes back to what we mean by price in economics, payment for performance." (T. 681, 21-24). Here, the SOCAs expressly condition payment on physical performance. As Professor Willig explained, under the SOCAs, the LCAPP generator has "got to build a plant, it's got to provide capacity, the capacity has to be available, had to be bid into RPM and into the auction, it has to clear the auction; there are all these elements of performance to which the SOCA payments are conditioned. So it's payment for performance." (T. 684, 10-15). Here, the LCAPP supplants the federal statute, and intrudes upon the exclusive jurisdiction of the Commission, by establishing the price that LCAPP generators will receive for their sales of capacity. The Court finds that in doing so, the LCAPP "places a direct burden upon interstate commerce" within the meaning of the *Attleboro* decision. Accordingly, the LCAPP Act invades the field occupied by Congress and is preempted by the Federal Power Act.

Defendants argue against preemption by stating that "Congress expressly reserved to the States exclusive jurisdiction to regulate generation." (Def.'s Post-Trial Br. at 23). According to the defendants, "State regulation of generation will not be pre-empted if the regulation's impacts on wholesale rates are merely 'incident of efforts to achieve a proper state purpose.'" (*Id.* (quoting *Nw. Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 515-16 (1989). Although the State of New Jersey and the Board retained the responsibility for the siting and construction of power plants, they are required to exercise this responsibility without interfering with the Commission's exclusive authority to regulate wholesale sales of electricity in interstate commerce. As discussed in Section H of this memorandum, there were other alternative measures which New Jersey could have employed to incentivize the development of new generation. While New Jersey retained the authority to take a wide range of actions to

ensure reliable electric service for its citizens and encourage the construction of new electric generation facilities, it chose to advance those goals through a mechanism that intrudes upon the authority of the Commission and violates federal law.

The defendants also contend that preemption analysis "does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives." (Def.'s Post-Trial Br. at 23) (quoting *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (2011). Here, however, the Commission's exclusive authority over wholesale energy sales has existed since *Attleboro* and been confirmed by the Supreme Court and many lower courts decisions. An application of these prior decisions acknowledging the exclusive authority of the Commission to regulate wholesale electricity sales to the facts in this case certainly does not constitute "freewheeling."

Conflict Preemption

Conflict preemption occurs where there is a conflict between a state law and a federal law. *See Crosby*, 530 U.S. at 372 ("[E]ven if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute."). Such a conflict occurs when "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 132 S. Ct. at 2501. When confronting arguments that a law stands as an obstacle to Congressional objectives, a court must use its judgment: "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." Crosby, 530 U.S. at 373. The court must look to "'the entire scheme of the statute'" and determine "'[i]f the purpose of the [federal] act cannot otherwise be accomplished--if its operation with its chosen field [would] be frustrated and

its provisions be refused their natural effect.'" *Id*. (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)).

Where a state law conflicts with a federal law, the Court does not balance the competing federal and state interests. In fact, the Supreme Court has held that "[u]nder the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)); *see also Gade v.Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) ("[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation." (quoting *De Canas v. Bica*, 424 U.S. 351, 357 (1976)).

From reviewing the entire scheme of the RPM process, it is clear that the LCAPP Act poses as an obstacle to the Commission's implementation of the RPM. The testimonies of Messrs. Dominguez, Rauf and Cudwadie indicated that their companies rely on the competitive price signals of the RPM Auction to determine future company business plans. Each testified that the SOCA prices undermine their respective company's ability to use those RPM price signals to make sound business decisions. Each also contended that the future expansion of their respective companies would be contingent on whether the SOCA price continues to supplant the RPM Auction price. The effects described by the witnesses demonstrate that the SOCA's imposition of a government imposed price creates an obstacle to the Commission's preferred method for the wholesale sale of electricity in interstate commerce.

Commerce Clause

The Plaintiffs argue that the LCAPP Act also must be invalidated under the Commerce Clause. This argument concerns the procurement of the capacity wherein Plaintiffs argue that Board discriminated against out-of-state generators in its solicitation of bids to become eligible generators under the LCAPP. The "dormant" aspect of the Commerce Clause prohibits states from using their regulatory power to discriminate in favor of in-state producers at the expense of those out-of-state. *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389-90 (1994); *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994); *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992). The Supreme Court has defined forbidden discrimination as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers Ass 'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (quotation marks omitted): *W. Lynn Creamery*, 512 U.S. at 192.

When a law discriminates against out-of-state producers on its face, the State bears the burden of demonstrating, "under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C&A Carbone*, 511 U.S. at 392. "Statutes that discriminate by 'practical effect and design,' rather than explicitly on the face of the regulation, are similarly subjected to heightened scrutiny." *Tri-M Group, LLC v. Sharp*, 638 F.3d 406, 427 n.28 (3d Cir. 2011).

The plaintiffs argue that the "community benefit" points awarded to generators in New Jersey effectively prohibited out-of-state generators from competing to be eligible generators under the LCAPP Act. According to the plaintiff's, the LCAPP Act – through its express consideration of economic and community benefits – favored in-state enterprises over out-of-state enterprises." (Pl.'s Post-Trial Br. at 48). To demonstrate this, the plaintiffs rely on the

following evidence: (1) President Solomon's letter to Governor Christie that mentions a preference for in-state generators (Pl.'s Ex. 84); (2) the initial draft of the LCAPP legislation that promoted construction of qualified in-state electric generators (even though such language was deleted prior to enactment) (Pl.'s Ex. 94); (3) language in the LCAPP which required the Board to consider the "economic[] and community benefits" of a project (Pl.'s Ex. 127); and (4) language in the 2011 New Jersey Energy Master Plan which discussed fostering the commercialization of new generation plants in New Jersey. (Pl.'s Ex. 270).

Despite the abovementioned evidence, the plaintiffs fail to overcome the most persuasive evidence that substantiates the reasons the State is seeking in-state development. A significant portion of the trial focused on locational deliverability areas (LDAs). (Stipulated Fact ¶ 30). As previously noted, New Jersey is located in such an area that is known as EMAAC. In addition, there are two other locational deliverability areas within New Jersey known as PSEG and PS North (T. 1529, 3-13). Generally, these LDAs have higher capacity prices than other PJM areas due to transmission costs. Even the Plaintiffs agree that a capacity price cannot be set for an entire region. (Pl.'s Ex. 26, at 34). As a result, there is separation in price which is authorized by PJM and the Commission. The record as a whole supports the proposition that the closer the generation facility is to the delivery area, transmission costs will subside. As Mr. Herling concluded when discussing the reliability crisis, reliability issues could only be resolved in one of two ways – transmission via the Susquehanna Connection or additional *generation in or near the location where the reliability issue will occur.* (Def.'s Ex. 563, at 33) (emphasis added). As such, it appears reasonable that the Board would incentivize construction in areas where reliability concerns are in flux. As such, the Board has the authority to incentivize construction within New Jersey. What is good for the goose is good for the gander. As such, the incentive for

community benefits to generators in New Jersey appears reasonable. Since Plaintiffs have not briefed or argued the commerce clause in such a fashion, the Court finds that Plaintiff has not met its burden of proof.

K. CONCLUSION

Based on the foregoing facts and law, the Court declares that the Long Term Capacity Agreement Pilot Program Act (LCAPP) is preempted by the Federal Power Act and in violation of the Supremacy Clause of the United States Constitution; and is therefore null and void.

s/Peter G. Sheridan
PETER G. SHERIDAN, U.S.D.J.

October 11, 2013

GLOSSARY OF ACRONYMS

BGS	Basic Generation Service
BPU OR NJBPU	The Board of Public Utilities of the State of New Jersey; also referred to as "the Board"
BRA	Base Residual Auction
CC	Combined cycle
COD	Commercial Operation Date
CONE	Cost of New Entry
CT	Combustion Turbine
DAM	Day Ahead Market
DG	Distributed Generation
DR	Demand Response
EDC	Electric Distribution Company
EDECA	Electric Discount and Energy Competition Act
EE	Energy Efficiency
EMAAC	Easter Mid-Atlantic Area Council
EMP	Energy Master Plan
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
FRR	Fixed Resource Requirement
GT	Gas turbine
GW	Gigawatt
GWh	Gigawatt hour
HEDD	High Energy Demand Day
ICAP	Installed Capacity
ISO	Independent System Operator
KW	Kilowatt
KWh	Kilowatt hour
LCAPP	Long Term Capacity Agreement Pilot Program
LDA	Locational Deliverability Area
LMP	Locational Marginal Price
LSE	Load Serving Entity
MAAC	Mid-Atlantic Area Council
MAAP	Mid-Atlantic Power Pathway
MOPR	Minimum Offer Price Rule
MW	Megawatt
MWh	Megawatt Hour
NEPA	New Entry Price Adjustment
NERC	North American Electric Reliability Corporation
NRC	Nuclear Regulatory Commission
P3	PJM Power Providers Group

PATH	Potomac-Appalachian Transmission Highline
PJM	PJM Interconnection, LLC
PPA	Power Purchase Agreement
RCP	Resource Clearing Price
RMR	Reliability Must Run
RPM	Reliability Pricing Model
RPS	Renewable Portfolio Standard
RTEP	Regional Transmission Expansion Plan
RTM	Real Time Market
RTO	Regional Transmission Organization
SIS	System Impact Study
SOCA	Standard Offer Capacity Agreement
TO	Transmission Owner
TRAIL	Trans-Allegheny Interstate Line
TRC	Total Resource Cost
UCAP	Unforced Capacity
VRR	Variable Resource Requirement

CLOSED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PPL ENERGY PLUS, LLC, *et al.*, Plaintiffs, v. ROBERT M. HANNA, in his official capacity as President of the New Jersey Board of Public Utilities, *et al.*, Defendants.	Civil Action No. 11-0745 (PGS) (DEA) **JUDGMENT**

THIS MATTER, having been opened by way of Complaint for Declaratory Judgment and Injunctive Relief filed by Plaintiffs The PPL Parties[1], The Calpine Companies[2], Exelon Generation Company, LLC, Essential Power, LLC, Atlantic City Electric Company, PSEG Power, LLC, and Public Service Electric and Gas Company, and the Court, having heard testimony and otherwise received evidence at a bench trial held on April 2-4, 8-12, 18-19, May 6-9, and June 17, 2013, and having considered the submissions of the parties and the arguments of counsel, and for the reasons stated in the Court's Memorandum dated October 11, 2013, and good cause having been shown:

IT IS, this 25th day of October 2013;

[1] The "PPL Parties" include Plaintiffs PPL EnergyPlus, LLC; PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; Lower Mount Bethel Energy, LLC; PPL New Jersey Solar, LLC; PPL New Jersey Biogas, LLC; and PPL Renewable Energy, LLC, which are marketing and generation subsidiaries of PPL Corporation.

[2] The "Calpine Companies" include Plaintiffs Calpine Mid-Atlantic Generation, LLC, Calpine New Jersey Generation, LLC, Calpine Bethlehem, LLC, Calpine Mid-Merit, LLC, Calpine Vineland Solar, LLC, Calpine Energy Services L.P., Calpine Mid-Atlantic Marketing, LLC, and Calpine Newark, LLC, which are generation and marketing subsidiaries of Calpine Corporation.

ORDERED that, pursuant to this Court's Memorandum dated October 11, 2013, **JUDGMENT** is hereby entered in favor of Plaintiffs The PPL Parties, The Calpine Companies, Exelon Generation Company, LLC, Essential Power, LLC, Atlantic City Electric Company, PSEG Power, LLC, and Public Service Electric and Gas Company; and it is further

ORDERED that, pursuant to 28 U.S.C. § 2201(a), 28 U.S.C. § 2202, and 42 U.S.C. § 1983, this Court hereby declares that the Long-Term Capacity Agreement Pilot Program ("LCAPP") Act, P.L. 2011, c. 9 (Jan. 28, 2011) (codified at N.J.S.A. 48:3-51, 48:3-98.2 - 98.4), other than Section 5 thereof (codified at N.J.S.A. 48:3-60.1), violates the Supremacy Clause of the United States Constitution, U.S. Const., art. VI, cl. 2; and it is further

ORDERED that the Commissioners of the New Jersey Board of Public Utilities ("BPU") in their official capacities, and the employees and agents of the BPU, be and hereby are enjoined from enforcing or otherwise putting into effect any part of the LCAPP Act other than Section 5 thereof; and it is further

ORDERED that the Standard Offer Capacity Agreements ("SOCAs") that Public Service Electric and Gas Company, Atlantic City Electric Company, Jersey Central Power & Light Company, and Rockland Electric Company signed under protest pursuant to BPU Order with Hess Newark Energy Center ("Hess"), NRG/NJPD Old Bridge Clean Energy Center ("NRG"), and CPV Woodbridge Energy Center ("CPV"), are void *ab initio*, invalid and unenforceable except for the termination provisions which any party may implement or defend; and it is further

ORDERED that Plaintiffs are entitled to costs pursuant to Federal Rule of Civil Procedure 54(d)(1) and Local Civil Rule 54.1; and it is further

ORDERED that Plaintiffs shall, in accordance with Local Civil Rule 54.1, file with the Clerk a Bill of Costs and Disbursements, together with a notice of motion when application will be

made to the Clerk to tax the same, within thirty (30) days of the date of this Judgment; and it is further

ORDERED that Plaintiffs have withdrawn their request for attorney's fees in connection with the preemption claims in Count I of their Complaint and, as such, Plaintiffs' request for attorney's fees based on these claims is **DENIED WITH PREJUDICE**; and it if further

ORDERED that Defendants' Joint Motion to Stay Final Judgment Pending Appeal (ECF No. 311) is **DENIED**.

Date: October 25, 2013

PETER G. SHERIDAN, U.S.D.J.