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

In the United States Court of Appeals for the Third Circuit

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; PPL RENEWABLE ENERGY, LLC; CALPINE ENERGY SERVICES L.P.; CALPINE MID-ATLANTIC GENERATION, LLC; CALPINE NEW JERSEY GENERATION, LLC; CALPINE BETHLEHEM, LLC; CALPINE MID-MERIT, LLC; CALPINE VINELAND SOLAR, LLC; CALPINE MID-ATLANTIC MARKETING, LLC; CALPINE NEWARK, LLC; EXELON GENERATION COMPANY, LLC; GENON ENERGY, INC.; NAEA OCEAN PEAKING POWER, LLC; PSEG POWER, LLC; ATLANTIC CITY ELECTRIC COMPANY; PUBLIC SERVICE ELECTRIC & GAS COMPANY,

v.

LEE A. SOLOMON, in his official capacity as President of the New Jersey Board of Public Utilities; JEANNE M. FOX, in her official capacity as Commissioner of the New Jersey Board of Public Utilities; JOSEPH L. FIORDALISO, in his official capacity as Commissioner of the New Jersey Board of Public Utilities; NICHOLAS V. ASSELTA, in his official capacity as Commissioner of the New Jersey Board of Public Utilities,

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, JEANNE M. FOX, JOSEPH FIORDALISO, NICHOLAS ASSELTA,
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)

BRIEF OF THE PRESIDENT AND COMMISSIONERS OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES, APPELLANTS

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DATED: January 17, 2014

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GLOSSARY OF ACRONYMS

EDC	Electric Distribution Company (often called a "utility")
LSE	Load-Serving Entity
RTO	Regional Transmission Organization (PJM is an RTO)
PJM	FERC-regulated regional transmission organization encompassing all or part of thirteen states, including New Jersey, and the District of Columbia
RPM	Reliability Pricing Model, the FERC-approved capacity market model in PJM
BRA	Base Residual Auction, the annual PJM capacity auction employing RPM
MOPR	Minimum Offer Price Rule
Energy	Electrical energy passing through wires
Capacity	The ability to produce energy when needed
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
BPU	New Jersey Board of Public Utilities
LCAPP	Long-Term Capacity Agreement Pilot Program, the Act being challenged
SOCA	Standard Offer Capacity Agreement, the contract mandated by the LCAPP Act

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The Complaint below sought declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201, 2202, and FED.R.CIV.P. 57, 65.

This case is before this Court on appeal from the Opinion (JA-25 through JA-26) and Judgment of the District Court (JA-92 through JA-94), a final judgment disposing of all of the parties' claims, entered on October 25, 2013.

On October 31, 2013, Appellant CPV Power Development, Inc. ("CPV") timely filed a Notice of Appeal (No. 13-4330). On November 8, 2013, Hess Newark LLC ("Hess Newark") moved to intervene in No. 13-4330. Hess Newark and CPV both filed motions for a stay. On November 14, 2013, this Court entered an Order granting Hess Newark's motion to intervene in No. 13-4330, and denying the motions for a stay. On November 20, 2013, this Court entered an Order clarifying that Hess Newark had been granted permission to intervene "for all purposes" and not merely related to the stay.

Hess Newark timely filed a Notice of Appeal on November 8, 2013 (No. 13-4394). Plaintiffs moved to dismiss Hess Newark's appeal, arguing that Hess Newark did not have standing to appeal. On November 26, 2013, this Court entered an Order referring that motion to the merits panel.

Robert M. Hanna, and Jeanne M. Fox, Joseph L. Fiordaliso, Mary-Anna Holden, and Dianne Solomon, in their official capacities as President and Commissioners of the New Jersey Board of Public Utilities ("State Defendants-Appellants" or "BPU"), respectively, timely filed a Notice of Appeal on November 20, 2013 (No. 13-4501).

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The Federal Power Act, 16 U.S.C. § 824, *et seq.* ("FPA")[1] reserves to the State of New Jersey responsibility to regulate power generation (including regulating, and providing incentives for, the construction of power plants) and local distribution of electricity, while limiting the field of federal regulation to interstate transmission of electricity and the wholesale markets for electricity and electric capacity. 16 U.S.C. § 824(b)(1).

Acting within the area reserved to the State, New Jersey enacted the Long Term Capacity Pilot Program Act, N.J. Stat. Ann. §§ 48:3-51, 48:3-98.2-.4 ("LCAPP") to encourage the construction of new, efficient generation to ensure sufficient generation availability to the region. LCAPP offers developers selected through a competitive process (who thus became "LCAPP Generators") the

[1] A Glossary of acronyms used in this brief may be found after the Table of Authorities.

opportunity to enter into Standard Offer Capacity Agreements ("SOCAs") with local electric distribution companies ("EDCs"). SOCAs are a form of "contracts for differences." If the price that an LCAPP Generator receives when it sells electric capacity is below the SOCA contract price, the EDCs make payments to the LCAPP Generator equal to the difference; if the price that an LCAPP Generator receives when it sells electric capacity is above the SOCA contract price, the LCAPP Generator makes payments to the EDCs equal to the difference. The cost or benefit of the SOCAs are passed through the EDCs to ratepayers. No sales of electricity or electric capacity are made under the SOCAs, and neither LCAPP nor the SOCAs regulate (or purport to regulate) such sales. Thus, the issues in this appeal are:

1. Is LCAPP preempted by the FPA under principles of field preemption?

2. Is LCAPP preempted by the FPA under principles of conflict preemption?

STATEMENT OF RELATED CASES AND PROCEEDINGS

Appeals taken by CPV (No. 13-4330), Hess Newark (No. 13-4394) and the BPU (13-4501) from the Opinion and Judgment have been consolidated.

There is pending in this Court a petition for review of final Orders of FERC, which is discussed in the District Court's Opinion in this case, and is relevant to this appeal. *New Jersey Board of Public Utilities v. Federal Energy Regulatory*

Commission, No. 11-4245 (argued Sept. 10, 2013; Rendell, Jordan, Greenaway, Circuit Judges; *sub judice*).

An appeal involving an issue that is substantially the same, similar or related to an issue in this appeal has been filed in:

PPL EnergyPlus, LLC, et al. v. Douglas R.M. Nazarian, et al.

Appellants: Douglas R.M. Nazarian, Harold Williams, Lawrence Brenner, Kelly Speakes-Backman, Kevin Hughes, and CPV Maryland, LLC.

Fourth Circuit Court of Appeals No.: 13-2419(L) and 13-2424 (consolidated under 13-2419(L)).

STATEMENT OF THE CASE

State Appellants refer the Court to the Statements of the Case in the Briefs of Appellant CPV and Appellant-Intervenor Hess Newark LLC.

This action was filed against the BPU by several power generation companies that are not LCAPP Generators and by two of the State's four EDCs (Public Service Electric and Gas Company ("PSE&G") and Atlantic City Electric Company). (JA-153). The Complaint alleged that LCAPP is unconstitutional under both the Supremacy Clause and the dormant Commerce Clause. (JA-1958 through JA-1960).

After a bench trial, the District Court for the District of New Jersey (Sheridan, U.S.D.J.) issued an Opinion holding that LCAPP is preempted by the

FPA, under principles of field preemption (JA-80 through JA-85) and conflict preemption, and that the SOCAs, entered into pursuant to LCAPP, are void, *ab initio,* and can be terminated. (JA-85 through JA-86). The District Court rejected Plaintiffs' Commerce Clause argument, finding that Plaintiffs had not met the burden to show that LCAPP's goal to provide an incentive for community benefits to generators in New Jersey discriminated against out-of-state producers. (JA-87 through JA-89). *PPL EnergyPlus, LLC v. Hanna,* --- F.Supp.2d ---, 2013 WL 5603896 (D.N.J., Oct. 11, 2013), 2013 U.S. Dist. LEXIS 147273 (D.N.J. Oct. 11, 2013).

The District Court entered Judgment declaring LCAPP unconstitutional, as preempted by the FPA, and holding that the SOCAs are void *ab initio*, and can be terminated. (JA-92 through JA-94). This appeal is from the District Court's Opinion (JA-25 through JA-91) and Judgment (JA-92 through JA-94).

STATEMENT OF FACTS

A. LCAPP and the SOCAs

The New Jersey Legislature enacted LCAPP on January 28, 2011 to encourage the construction of new, efficient generation to ensure sufficient generation availability to the region and 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.

LCAPP established a competitive selection process to foster the development of up to 2,000 megawatts of new baseload and mid-merit electric power generation facilities. The Act authorized the designated independent agent of the BPU to assess power project proposals offered in response to a Request for Proposals ("RFP"). N.J. Stat. Ann. § 48:3-98.3(b). The Act also authorized the BPU to order New Jersey's local electric distribution companies ("EDCs," commonly referred to as utilities) to execute 15-year SOCAs with the winning bidders to support the construction of these power plants.

Thirty-four proposals for power plant construction were filed with the BPU in response to its RFP. Following a thorough evaluation process by the BPU's independent agent, the BPU selected three applicants, CPV, Hess Newark, and NRG Energy, Inc. ("NRG"), as "LCAPP Generators." (JA-2145). CPV and Hess Newark are each developing power plants. (JA-27 through JA-28; JA-1672; JA-2160). Hess Newark's plant, the Newark Energy Center, is a 625 megawatt ("MW") natural gas-fired combined-cycle generating facility in Newark, New

Jersey. CPV's Woodbridge Energy Center is a 700 MW natural gas fired combined-cycle plant in Woodbridge, New Jersey.[2]

CPV, Hess Newark, and NRG each entered into SOCAs with each of the State's four EDCs. (JA1674 through JA-1736; JA-2162 through JA-2224; JA-68). The EDCs executed the SOCAs under protest. (JA-1673; JA-2161; JA-68). Under the SOCAs:

- The LCAPP Generator agrees to build a power plant and to use all commercially reasonable efforts so that its plant will qualify to sell electric capacity in the reliability price model ("RPM") auction in the federally-regulated wholesale market (the "PJM Market") operated by PJM Interconnection, LLC. ("PJM"). The LCAPP Generator must act in accordance with PJM Market rules. All terms for the sale of capacity, including price, are determined by PJM Market rules, and not by LCAPP or the SOCA.
- The SOCA only comes into effect, in any given year, if the LCAPP Generator's offer to sell capacity "clears" the PJM Market pursuant to PJM Market rules.

[2] NRG cancelled its project after failing to clear the PJM capacity market for a second time. (JA-729).

- Each SOCA establishes a Standard Offer Capacity Price ("SOCA Price"), based upon the development costs of the new power plant. If the PJM Market clearing price for capacity is less than the SOCA Price, the EDCs must pay the LCAPP Generator the difference. N.J. Stat. Ann. 48:3-98.3(c)(4). If the market clearing price for capacity is more than the SOCA Price, the LCAPP Generator must pay the EDC the difference. (*Ibid.*)
- No sales of electricity or electric capacity take place under the SOCAs. The amount of payments made by the EDCs under the SOCAs, or the payments received by the EDCs under the SOCAs, are passed through to ratepayers who are the EDCs' retail distribution customers.

B. LCAPP Was Enacted to Address New Jersey's Growing Need for Reliable Electric Service

LCAPP was enacted to address New Jersey's increasing need for electric service. People are using more electricity to power everything from big-screen TVs to mobile devices and computers to new kitchen appliances. As demand for safe, reliable electricity grows, additional generation is needed to keep pace. Load forecasts for New Jersey for 2008 and 2010 reflected a 1.7% average annual energy growth rate. Notwithstanding a reduction in load forecasts due to economic factors following the 2008 recession, the 2011 forecast assessed a 1.6% average annual energy demand growth rate for New Jersey. (JA-2274). Moreover, as

PSEG's representative observed, an economic-driven slow-down in energy usage "may not produce a corresponding reduction in peak load demand during extreme weather conditions . . . ." (JA-1576).

Not only is demand increasing, but New Jersey has among the most expensive electricity rates in the nation. Residential and industrial rates are the sixth most expensive, and commercial rates are the seventh most expensive. (JA-2258). These high prices largely are the result of limits on the ability to import electricity into New Jersey (so-called transmission constraints). New Jersey is part of PJM, the largest regional electricity market in the United States, encompassing all or part of 13 states and the District of Columbia. PJM is a federally-regulated Regional Transmission Organization ("RTO") that manages the electric transmission system, operates wholesale electricity markets in the region, and conducts a regional planning process for the expansion of the transmission system within the region.[3]

As part of its responsibilities, PJM administers the markets for the sale of energy and ancillary services, and capacity. Capacity is the ability to generate electricity when needed. As explained in *Conn. Dept. of Public Utility Control*, 569 F.3d 477, 479 (D. D.C. 2009):

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[3] PJM, as noted, is a regional transmission organization, or RTO. As an RTO, PJM is regulated by FERC rather than state public utility commissions.

> [Capacity] amounts to a kind of call option that electricity transmitters purchase from parties—generally, generators—who can either produce more or consume less when required. The penultimate and most proximate buyers of capacity (before consumers who ultimately shoulder the costs in their utility bills) are called "load serving entities" or LSEs—the public utilities that deliver electricity to end users. The goal is for LSEs to purchase sufficient capacity to easily meet expected peaks in electricity demand on their transmission systems.

PJM administers procurements of capacity through the Reliability Pricing Model, which establishes an annual Base Residual Auction ("BRA") for capacity. Capacity prices are determined by using an offer-based supply curve and a simulated downward-sloping demand curve. (JA-2290 through JA-2291). All resources that bid at or below the clearing price are paid the clearing price, no matter what they actually bid. (JA-1086; JA-221). Although there may be multiple auctions of capacity, most capacity is procured in the BRA, held every May to procure capacity three years in advance of the year in which the capacity will be provided (the "Delivery Year"). Both the energy and capacity markets are locational, meaning they reflect the limitations of the transmission system's ability to deliver electricity into an area and the differing need for capacity in various areas of PJM. Within PJM, New Jersey is located in the Eastern Mid-Atlantic Area Council ("EMAAC") service area. Depending on market conditions and local and regional transmission constraints, New Jersey ratepayers may pay a capacity price for EMAAC, MAAC or PJM as a whole, or sometimes for individual EMAAC load zones. (JA-1126; JA-2261). EMAAC is a relatively

dense load region that has continually exhibited relatively high energy and capacity prices, and along with New Jersey utility service areas of PSE&G, is a "load deliverability" region of concern for PJM's transmission planners. (JA-1569 through JA-1570).

The 2010 RPM auction produced significant price disparities in the 2013-2014 capacity clearing prices within PJM, with New Jersey ratepayers and other nearby regions paying $245 per MW-day for capacity as compared to $27.73 per MW-day in the rest of PJM. The chart below shows how capacity prices in the constrained regions of MAAC (the eastern region of PJM that includes New Jersey) have fluctuated since implementation of the RPM.[4]

Resource Clearing Prices ($/MW Day)	RTO	MAAC	EMAAC	PSEG	PS-NORTH
2007/2008	40.80		197.67		
2008/2009	111.92		148.80		
2009/2010	102.04	191.32	191.32		
2010/2011	174.29		174.29		
2011/2012	110.00				
2012/2013	16.46	133.37	139.73	139.73	185.00
2013/2014	27.73	226.15	245.00	245.00	245.00
2014/2015	125.99	136.50	136.50	136.50	225.00
2015/2016	136.00				

Generation resources are paid for capacity obligations when they commit to being available to PJM to generate electricity (as in the case of power plants) or to reduce load (so-called demand response resources) when called on. All generation

[4] BRA results are available from PJM's website, which publishes results from each annual auction. These results are part of the record below.

resources participating in the BRA and clearing the auction receive these capacity revenues. Under the RPM, capacity prices are set for each Delivery Year (starting June 1). Capacity thus is a short-term product, and under existing rules, capacity resources can lock in capacity prices only for one year at a time.

According to the theory underlying these markets, price outcomes by locational zone in PJM will produce market signals resulting in new generation being built where it is needed most. In other words, the theory is that the higher the energy prices in an area, the greater the demand for additional power development and the more likely that power plant developers will build new power plants. New Jersey, however, found that the high energy prices within the EMAAC region did not result in the construction of new generation resources. *See* N.J. Stat. Ann. § 48:3-98.2(b). Among other things, generators proposing new projects have had difficulty obtaining financing at reasonable rates due to uncertain and volatile capacity revenues (see the wide fluctuations in the chart above) of insufficient term which, as noted, allow new resources to lock-in capacity prices for only one year. (JA-758 through JA-760; JA-923 through JA-924; JA-797; JA-826).

From the time the PJM Reliability Pricing Model became operational in 2007, until the enactment of LCAPP, no new intermediate or baseload power plants were built in New Jersey or made available to New Jersey residents. N.J.

Stat. Ann. § 48:3-98.2(b). Not only has there been a dearth of construction of new generation resources, but PJM anticipated that 3,100 MW of New Jersey generating capacity would retire by mid-2015 (18% of all existing New Jersey generation), and that over 11,000 MW of coal-fired capacity in the greater PJM area was at risk of retiring. N.J. Stat. Ann. § 48:3-98.2(g); (JA-882 through JA-883). Most of the units shut down or planned to be shut down in New Jersey are so-called High Energy Demand Day ("HEDD") units, which typically are old diesel, oil or gas-fired peaking units with restricted operating hours because of poor environmental performance. The shut-down of these units potentially created a further local reliability issue since, as their name suggests, HEDD units are only used on high energy demand days, generally hot days during the summer months. (JA-889). Generator retirements are expected to continue as a result of age, low natural gas prices, and stricter environmental regulations. (PJM 2012 RTEP, Book 1, at p. 15; JA-751 through JA-753). *www.**pjm**.com/documents/reports/**rtep**-documents/**2012-rtep**.aspx.*

Generator retirements within PJM are significant because New Jersey relies heavily on power imports to meet its energy needs. In 2009, New Jersey imported approximately 25% of the power consumed within the state. (JA-2270; JA-749). New Jersey thus is heavily dependent on power transmitted via high voltage transmission lines, including the 500kV Susquehanna-Roseland transmission line

under construction in northern New Jersey. Citing the testimony of Steven Herling, PJM's Vice President of Planning, the District Court pointed out that reliability issues can only be resolved in one of two ways: transmission via the Susquehanna-Roseland transmission line, or additional generation in or near the location where the reliability issue will occur. But, as the District Court also recognized, increased reliance on transmission lines adds to the cost of power, and the closer the generation facility is to the delivery area, the lower the transmission costs. Opinion at 64. Transmission infrastructure is costly, and utilities generally receive lucrative financial incentives--paid by ratepayers—to construct transmission lines. (JA-2263). Thus, the cost of importing power results in higher electricity costs.

In addition to siting and cost issues, the approval of new transmission lines depends on a range of regulatory approvals, and such lines can take years to construct. Susquehanna-Roseland illustrates the delays that can occur in constructing high voltage transmission lines. The BPU approved construction of the New Jersey portion of the Susquehanna-Roseland line in 2010, with completion expected in 2012, the year in which PJM originally projected that it would have to implement emergency operating procedures to prevent overload of bulk transmission lines if the line were not built. PSE&G officials raised the possibility of brown-outs or rolling black-outs if the lines were not completed on time. (JA-1571). The in-service date of the western portion of the line has since

been delayed to at least 2015, in part because the National Park Service's environmental review and approval were required.[5] (JA-737; JA-750 thruogh JA-751; JA-877; JA-881). In the meantime, PJM's prediction that violations[6] on bulk power lines would occur turned out to be accurate and, in fact, necessitated implementing emergency operating procedures during the summer of 2012. This included scaling back the load on various transmission lines to account for potential contingencies, such as power lines or plants going down. (JA-880 through JA-881).

With all of the above in mind, as well as the mandate to ensure the availability of safe, adequate service, the New Jersey Legislature enacted LCAPP in January 2011. LCAPP was designed to promote the development of up to 2,000 MW of new baseload or mid-merit generation facilities for the benefit of New Jersey and other electric consumers in the region. Through an independent agent, BPU conducted a competitive RFP process that resulted in 34 submitted

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[5] Several environmental groups filed an action to block construction of the projct through the Delaware Water Gap National Recreation Area. In August 2013, a federal judge dismissed the action. *National Parks Conservation Assoc. v. Jewell*, --F.Supp.2d—(D. D.C. 2013); 2013 WL 4616972 (D. D.C. Aug. 30, 2013); 2013 U.S. Dist. LEXIS 124231 (D. D.C. Aug. 30, 2013).

[6] A violation occurs when a specific system condition is not in compliance with established NERC (North American Electric Reliability Corporation) or PJM reliability criteria. See PJM 2012 RTEP, Book 1, p. 2 and Glossary, p. 102. www.**pjm**.com/documents/reports/**rtep**-documents/**2012-rtep**.aspx.

projects, including several from plaintiffs/appellees Exelon and PSEG Power.[7] (JA-1958). Of these, the LCAPP agent recommended selection of three gas-fired combustion turbine projects in New Jersey. The BPU approved the selection of these three projects and the form of the SOCA to be executed between each project developer and each of the four New Jersey EDCs. The SOCA is a contract for differences, with a up to a 15-year term, under which a LCAPP generator will in each year either receive payments from or make payments to the EDCs, based on the difference in that year between the SOCA price, and the RPM auction clearing price. N.J. Stat. Ann. § 48:3-98.3(b)(3)-(4). This arrangement is intended to prevent windfalls, while ensuring stable long-term revenues to eligible generators.

STANDARD OF REVIEW

This Court "review[s] the District Court's conclusions of law *de novo* and [reviews] its findings of fact for clear error." *Doe ex rel. Doe v. Lower Merion School Dist.*, 665 F.3d 524 (3d Cir. 2011), citing *Lozano v. City of Hazleton*, 620 F.3d 170, 181 (3d Cir. 2010) and *McCutcheon v. Am.'s Servicing Co.*, 560 F.3d 143, 147 (3d Cir. 2009). All of the issues raised by the BPU involve errors of law, and are thus subject to *de novo* review.

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[7] Although the LCAPP agent determined that one of PSEG Power's proposed projects met all eligibility requirements, PSEG subsequently withdrew the project (Sewaren) from consideration. (JA-1960).

SUMMARY OF ARGUMENT

In enacting LCAPP, the New Jersey Legislature recognized that high energy prices in the State had not resulted in the development of new power plants. To address this, the Legislature, consistent with the authority reserved to the States by the FPA, sought to regulate power generation and the local distribution of electricity to create incentives for the development of new generation resources, and thus ensure reliable power for the citizens of the State. Far from invading the federal field, New Jersey did exactly what it is authorized to do, in a manner completely consistent with the FPA.

LCAPP operates within the state field by promoting the construction of new generation resources through subsidies payable by New Jersey ratepayers via the SOCAs, which are structured as contracts for differences, and is not subject to field preemption. The District Court erred by finding that the SOCA's performance standards invaded the federal field and that SOCA prices displaced and supplanted the RPM capacity price. The carefully-delineated SOCA performance standards—which require the LCAPP Generators to build a power plant and sell the resulting power into the PJM Markets pursuant to PJM Market rules—recognize that federal regulation applies to setting wholesale capacity prices. And because no capacity is sold under the SOCAs, SOCA prices do not displace the PJM Market capacity prices.

Under the District Court's flawed analysis, numerous state programs to promote renewable and other sources of energy deemed necessary to meet a public need would be subject to challenge. But, FERC's regulation of wholesale electricity sales does not mean that States must rely exclusively on the competitive market to maintain reliability and serve other public policy goals.

The District Court's analysis of LCAPP under conflict preemption was equally flawed. It found that it posed an obstacle to FERC's implementation of the RPM. The Court's ruling ignores that FERC itself implemented measures in response to LCAPP to ensure that there was no interference with the RPM capacity market and that FERC found that such measures protect the market from uneconomic entry of new generation resources that would distort market supply curves and depress market clearing prices below a competitive level. At the same time, FERC refused to implement measures that would effectively preclude any entity with a SOCA contract from being able to sell capacity in the RPM market. Together these actions demonstrate that FERC recognizes that the FPA contemplates that the states can and will provide economic incentives for power plant construction without running afoul of FERC's jurisdiction over the operation of competitive wholesale markets.

For these reasons, the District Court's Judgment that LCAPP is preempted by the FPA, and that the SOCAs are void, *ab initio*, should be reversed.

ARGUMENT

I. LCAPP REGULATES WITHIN THE FIELD RESERVED FOR STATE REGULATION BY THE FEDERAL POWER ACT, AND THUS IS NOT SUBJECT TO FIELD PREEMPTION

The United States Constitution establishes a system of dual sovereignty between the states and the Federal Government designed to "reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Under this system, the states' power is "concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). The Supremacy Clause provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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. Pursuant to the Supremacy Clause, federal law may sometimes preempt otherwise permissible state laws, rendering the state law without effect. *Altria Group., Inc. v. Good*, 555 U.S. 70, 76 (2008).

In determining whether preemption exists, the court must "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." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotation marks omitted). "This assumption provides assurance that the federal-state balance will not be

disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (internal citation and quotation marks omitted). "[O]ur task is to ascertain Congress' intent in enacting the federal statue at issue." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). As the Supreme Court has observed, "the purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cippollone v. Liggett Group., Inc.*, 505 U.S. 504, 516 (1992) (internal quotation marks omitted). The Court must "give full effect to evidence that Congress considered, and sought to preserve, the States' co-ordinate regulatory role in our federal scheme." *California v. FERC*, 495 U.S. 490, 497 (1990).

Courts have historically recognized both "express preemption" and "implied preemption." Express preemption occurs when Congress expressly states that it is preempting state authority. Implied preemption may occur where compliance with both federal and state regulations is a physical impossibility, or where state law impedes the "execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). This is generally known as "conflict" preemption. In the absence of such explicit or functionally overt preemption, Congress' intent to supersede state law may be found from a "scheme of federal regulation . . . 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) (internal citations omitted). This last category is known as field preemption.

When the FPA was enacted in 1935, most electricity in the United States was sold by "utilities that had constructed their own power plants, transmission lines, and local delivery systems." *New York v. FERC*, 535 U.S. 1, 5 (2002). While there was some interconnection among utilities, "most operated as separate, local monopolies subject to state or local regulation." *Id.* States had broad authority to regulate utilities, but the Supreme Court limited that power in *Public Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 86 (1927) ("Attleboro"). The Court there held that a state could not regulate rates for electricity sold to purchasers in other states because that is a "direct burden on interstate commerce." *Id.*

As a "direct result" of the Court's decision in *Attleboro*, Congress passed the FPA to "fill the gap" and establish exclusive federal jurisdiction over the interstate sale of electricity. *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) (citations and quotations omitted). The FPA charged the Federal Energy Regulatory Commission ("FERC") with "provid[ing] effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *New York*, *supra*, 535 U.S. at 6 (citation omitted); *see also* 16 U.S.C. § 824(a) (granting FERC the responsibilities of regulating "the transmission of

electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce").

Under the FPA, then, the federal government and States are accorded different rights and responsibilities. The FPA does not contain an express preemption clause. Indeed, the Supreme Court has recognized that under the FPA, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction." *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964). Under the FPA, the federal government regulates the transmission and sale of electric energy at wholesale in interstate commerce, but such Federal regulation "extend[s] only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). More specifically, the FPA provides that FERC does not have jurisdiction "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).

States thus retain certain authority to regulate electric energy under the FPA. In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, for example, the Supreme Court stated that "[s]tates retain their traditional responsibility in the field of regulating electrical utilities for

determining questions of need, reliability, cost and other related state concerns." 461 U.S. 190, 205 (1983). A state also retains authority to determine which generation resources are used within its borders. *See id.* FERC's authority does "not affect or encroach upon state authority in such traditional areas as . . . administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM [demand side management]; [and] authority over utility generation and resource portfolios . . . ." FERC Order 888, 75 FERC ¶ 61,080 (April 24, 1996), at 434 n. 544.

Under these guiding principles, LCAPP offends no principle of preemption. It makes no incursion into the areas the FPA reserves for federal regulation and instead falls within the bounds of authority reserved to the States.

A. Congress did not Intend to Curb the States' Authority to Ensure Reliable Electric Service by Promoting the Development of Generation Resources – An Authority that Falls Within the States' Traditional Powers – and LCAPP is an Exercise of Such Authority.

The text, structure and history of the FPA reveals no evidence that Congress intended to curb the states' authority to ensure reliable electric service by promoting the development of generation resources to serve retail consumers in the region. Indeed, the Supreme Court and FERC have reiterated throughout the years that states retain authority to ensure an adequate and diversified portfolio of resources, and that states may choose to incentivise various generation resources

without overstepping the demarcation between federal and state jurisdiction. As noted, the Supreme Court recognized that "[s]tates retain their traditional responsibility to determine "questions of need, reliability, cost, and other related state concerns." *Pacific Gas & Electric Co., supra,* 461 U.S. at 205. States are also authorized to decide which generation resources are used within their borders. *See also So. Cal. Edison Co. San Diego Gas & Electric Co.*, 71 FERC ¶ 61,269, 62,080 ("As a general matter, states have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction. * * * States also may seek to encourage renewable or other types of resources through their tax structure, or by giving direct subsidies.") (emphasis added). FERC's authority does "not affect or encroach upon state authority in such traditional areas as . . . authority over utility generation and resource portfolios . . . ." FERC Order 888, *supra*, 75 FERC ¶ 61,080 at 434 n. 544.

States' responsibility to ensure safe and adequate power for their residents derives from the fact that electricity is a basic need and can have significant environmental impacts. Decisions about electricity thus are imbued with policy questions about how best to serve the public interest. *See* N.J. Stat. Ann. § 48:3-23. The FPA reflects Congress's judgment that states are in the best position to make these policy choices about generation, and that consumer-constituents "will appropriately bear the costs of [these] decisions." *Connecticut Dept. of Public*

Utility Control v. FERC, 569 F.3d 477, 481 (D.C. Cir. 2009). As the court there observed:

> 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 the Commission.

Id. Long-term resource planning also is left to states because states may differ in their assessment of the uncertainties they face in terms of resource needs and in their resource preferences. (JA-878 through JA-879; JA-908 through JA-909; JA-922 through JA-923; JA-935 through JA-936, JA-941 through JA-942). *See also* N.J. Stat. Ann. § 52:27F-14 (New Jersey's Energy Master Plan ("EMP") statute, which requires the EMP to include long-term objectives and to give due consideration to the energy needs and supplies in the "several geographic" areas of New Jersey).

New Jersey takes seriously its obligation to ensure both that New Jersey citizens have safe, reliable power and that power plants within its borders are efficient and environmentally clean. LCAPP capitalizes on the state's authority to regulate local distribution as a means to incentivize power generation. This statute, carefully crafted to assure New Jersey exercised only that authority the FPA reserves to the States, respects the boundary between the federal and State regulation.

LCAPP is structured so that it does not intrude on the federal government's exclusive responsibility to regulate wholesale energy and capacity prices. LCAPP follows the same policy structure used by many states to ensure a full range of supply-side and demand-side resources. That policy structure is that: (1) states want more of a particular resource, *e.g.*, efficient and environmentally friendly generation resources, (2) states will guarantee a price for the resource over time or provide some other financial guarantee (thereby shielding the supplier from the volatility of the RTO markets) so as to assure that the resource gets built, and (3) the states in return expect the resource owner to sell into the RTO markets, abiding by the federally-regulated rules of those markets, and to directly or indirectly credit excess revenues to ratepayers.

This same policy structure has been used for renewables, for demand-side and energy efficiency resources, and for traditional power plants. For example, 28 States and the District of Columbia have renewable portfolio standards. Under these programs, states dictate the specific technologies to be used and how much output must be purchased by LSEs, that is, the companies that sell electricity, at retail, to consumers.[8] Typically, the state mandates that a certain portion of a

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[8] LSEs include both (a) utilities that perform both the LSE function of selling electricity at retail to consumers and the EDC function of distributing that electricity, and (b) third-party suppliers that perform the LSE function of selling electricity at retail to consumers, which electricity is distributed by the EDCs with responsibility for distribution in that locality.

LSE's power must come from renewables. For example, in New Jersey renewables must provide 12.527% of a LSE's supply in 2013/2014. By the end of 2021, New Jersey mandates a 23.38% share for renewables, and a 4.1% share for solar by 2028.[9] N.J. Stat. Ann. § 48:3-87. (JA-899). The LSE demonstrates that it has met this requirement by buying renewable energy certificates (RECs) from renewable generators over the life of the contract (typically 10-15 years). The REC price is in addition to the RTO market price received by the renewable supplier for energy, capacity and ancillary services, so the State in effect has established a mechanism whereby the renewable generator receives an above-market price for renewable energy. And by establishing a requirement that renewables must provide some percentage of a LSE's supply, the State effectively creates market demand that guarantees subsidies for renewables both in good and bad economic times.

In addition to RECs, many states, including New Jersey, have established long-term procurements for renewable energy that provide long-term price guarantees. An example of this type of renewable program in New Jersey is the PSE&G Solar 4 All and related PSE&G solar loan program. Under these programs,

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[9] New Jersey in 2010 also enacted the Offshore Wind Economic Development Act ("OWEDA") to promote offshore wind development. N.J. Stat. Ann. 48:3-49, *et seq.* OWEDA calls for at least 1,100 MW of offshore wind generation to be subsidized by an Offshore Renewable Energy Certificate (OREC) program.

PSE&G receives a guaranteed Rate of Return (10%), payable by ratepayers, on its investment over a 20-year period for constructing approximately 142.5 MW of solar capacity, plus recovery of expenses from ratepayers. The Solar 4 All cost is offset by the energy and capacity revenues PSE&G receives (provided transmission is available), as well as money PSE&G receives from the sale of Solar RECs ("SRECs"). (JA-1481 through JA-1492; JA-903 through JA-905).

Similar structures have been used to incentivise the construction of generating resources in other states. In 2008, the State of Connecticut Department of Public Utility Control entered into a portfolio of contracts with peaking generators for gas-fired peaking capacity, including 130 MW of new peaking units PSEG Power LLC agreed to construct at its existing New Haven plant. The Connecticut program provides a long-term (30 year) price guarantee with a "floor" Rate of Return of at least 9.75% through a contract for differences, and requires the resource to bid into the ISO-New England (ISO-NE) capacity, energy and ancillary services markets.[10] The Connecticut program also requires that the resource credit ratepayers with all revenues obtained pursuant to sales into the ISO-NE markets, with revenues netted against the cost of service compensation paid by ratepayers. (JA-1011 through JA-1083; JA-1127 through JA-1189; JA-813 through JA-814;

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[10] ISO-NE is the Independent System Operator (ISO) for the New England area that includes Connecticut. *See* www.iso-ne.com. ISOs typically perform the same functions as RTOs, but cover a smaller geographic area.

JA-819 through JA-821; JA-896 through JA-899; JA-947 through JA-949). PSEG was the successful bidder for approximately 130 MW of the RFP.

New Jersey also adopted programs for load management and demand response. To attain the State's goal of reducing peak electric load, the BPU developed an incentive program that required the State's EDCs to seek up to 600 MW of new demand response resources, with suppliers receiving both PJM Market revenues for capacity sales plus a premium payment of $22.50 per Megawatt-Day for a one-year period. This premium was funded by New Jersey ratepayers. (JA-894 through JA-895). Participants could provide load reductions either through curtailing electricity use or operating on-site generation (generators) consistent with environmental regulations and permits.

The common element to all of these programs: states want to encourage certain types of generation and use ratepayer monies to do so. In return, RTO revenues are credited in some fashion back to ratepayers. Similar to RPS and other programs, LCAPP generators are guaranteed a fixed amount of money, against which revenues earned by the LCAPP generators in the RPM capacity market are to be netted. (JA-919; JA-928 through JA-929). There is no practical distinction between resource generators receiving a guaranteed rate of return, with RPM revenues being credited to ratepayers, and the SOCA payment mechanism under LCAPP, with a direct subsidy payment by ratepayers. Ratepayers at the end of the

day pay supplemental compensation to ensure a particular type of resource gets built, either for diversity, environmental or reliability purposes or for some combination of the three. All of these programs are within the state field, and are not preempted.

B. Congress Did Not Intend to Curb States' Authority to Promote Generation Resources by Limiting the Revenues Available to Such Resources to Those Obtained in the Federally-Run Wholesale Electricity Markets

FERC has never taken the position that its structured markets, like the RPM, are the only allowable source of revenues available to new generation resources or that the "FERC market" prohibits payments or incentives to generators beyond those obtained in the wholesale energy and capacity markets. Rather, FERC has acknowledged the propriety of state action to incentivize new generation, stating that if a capacity resource is able to clear the RPM auction under the FERC market rules (as discussed below) "it is a competitive resource and should be permitted to participate in the auction regardless of whether it also receives a subsidy." (JA-518). Nor is such an intent reflected in the text or history of the FPA. The federal government itself provides various subsidies to the energy sector, with wind receiving the largest subsidy by far. *See* U.S. Energy Information Admin., Direct Federal Financial Interventions and Subsidies in Energy in Fiscal Year 2010, at xiii, available at http://www.eia.gov/analysis/requests/subsidy/pdf/subsidy-pdf.

The District Court nonetheless determined that because the SOCA-based subsidies are tied to the price of capacity in the RPM market and because the SOCAs condition payment upon performance tied to the RPM market, the SOCAs impede FERC's policy of establishing a market-based approach to setting wholesale rates. The District Court held that the SOCA payment and performance mechanisms "set" the price that LCAPP Generators will receive for their sales of capacity, thereby placing a direct burden on interstate commerce within the meaning of *Attleboro, supra*. They do not.

The SOCAs do not intrude upon FERC's exclusive jurisdiction to regulate the wholesale energy market by conditioning payment upon performance, *i.e.*, by requiring that generators build a plant and bid and clear the RPM capacity market in order to receive the SOCA payment. These performance standards are designed to protect the ratepayers' exposure: the plants must be built and must sell capacity before ratepayers' obligation to subsidize kicks in. As part of the states' authority to incentivise the development of generation resources, states necessarily have the authority to craft programs to ensure that the incentives actually work, and that ratepayers ultimately receive the benefits of those incentives. It is illogical to conclude that states may create incentives to develop new generation resources but cannot require, as part of the incentive program, that the resources actually get built.

Similar requirements that generators actually sell capacity (and/or electricity) in the federally-regulated market exist in the PSE&G Solar 4 All program, the Connecticut gas-fired peaking program, and various RPS programs. All require the resource to sell power into the RTO market and credit ratepayers with monies received from sales into that market. In order to do so, the generation developer must actually construct, operate and maintain the generating facility.

Nor do the SOCAs "set" wholesale energy prices, as the District Court concluded, because the amount of the SOCA payment is derived from the RPM capacity clearing price. This payment mechanism simply reflects the mechanism used in all contracts for differences: a contract for differences has a "fixed" strike price that is compared to some price that varies over time, i.e., a "floating" price, usually based on a specific index. For the SOCAs, the floating price is the RPM capacity clearing price. JA-1686-JA-1687. The contract for differences structure allows New Jersey and generation developers to mitigate price risk, control costs, and build a generation resource.

The contract for differences – i.e., the SOCA – is not a contract to buy capacity or electricity. When LCAPP generators sell capacity in the PJM Market, it is sold to the PJM grid. LSEs – including third party suppliers (such as Basic Generation Service) as well as LSEs that also serve as EDCs (such as PSE&G) – purchase capacity from the PJM grid. The wholesale price is determined entirely

by federally-regulated market rules. The settlement of the SOCA contract for differences takes place outside of the PJM Market, and does not determine the PJM Market price. Indeed, LSEs, which purchase capacity, neither make nor receive any SOCA payments as LSEs. Instead, SOCA payments are made (or received by) EDCs, and are then passed through to ratepayers. SOCA payments are not part of wholesale capacity prices paid by LSEs, and neither LCAPP nor SOCAs determine wholesale capacity prices. LSEs remain free to purchase capacity and electricity from any supplier of their choice.

LCAPP stands in sharp contrast to the Connecticut statute at issue in *Conn. Light & Power Co.*, 70 FERC ¶ 61,012 (1995), which required utilities to buy wholesale power from certain facilities at a state-set price, which FERC found did intrude upon its exclusive jurisdiction. Here, the EDCs are not required to purchase power generated by LCAPP generators, nor are the EDCs required to purchase power at a state-set price. The *LSEs* buy capacity at the RPM auction clearing price. Separately from the *LSEs'* purchase of capacity, the *EDCs* either make, or receive, payments under the SOCAs – which are either passed through, or credited, to the ratepayers. While the amount of the subsidy is based on the amount of capacity sold by SOCA generators and the RPM auction clearing price, the LSEs themselves pay the FERC (RPM) rate for all capacity they purchase.

In sum, contrary to the District Court's ruling, LCAPP and the SOCAs do not play any role in setting the RPM market price but rather operate within the authority accorded the State to ensure safe and reliable power for New Jersey residents by incentivizing the construction of new generation.

II. LCAPP AND THE SOCAs DO NOT CONFLICT WITH FEDERAL REGULATION

The District Court's determination that LCAPP poses as an obstacle to FERC's implementation of the RPM is directly at odds with FERC's own position. FERC has addressed this contention in at least two proceedings following enactment of LCAPP and has stated that state-subsidized generation does not distort competitive markets so long as PJM Market design rules are followed. FERC's position is clear: LCAPP and the SOCAs do not interfere with the proper functioning of the federally-regulated markets. Wholesale prices for electricity and capacity are set by those markets, not by LCAPP or the SOCAs.

The District Court accepted plaintiff's claim that the SOCAs undermine power generators' ability to rely on the RPM market to make future business decisions and therefore impede FERC's policy of establishing a market-based approach to setting wholesale energy rates. That neither LCAPP nor the SOCAs interfere with the federally-regulated PJM Market is readily apparent, given FERC's response to LCAPP and from the terms of the SOCAs themselves. FERC has expressly rejected the Plaintiff Generators' position that LCAPP Generators

should be excluded from the PJM Market. And the SOCAs specifically provide that LCAPP Generators must abide by the federally-regulated market rules.

The FERC-approved PJM Market design and rules ensure that generators only offer to sell capacity at an economically rational price, and the SOCAs in no way undermine this market design. In creating the RPM and the BRA in 2006, PJM implemented the Minimum Offer Price Rule ("MOPR") for new entrants. The MOPR includes a minimum offer screen designed to prevent the exercise of buyer market power by requiring certain new resources (gas-fired turbines and combustion turbines) to offer capacity at competitive and economic prices. The MOPR allows PJM to mitigate a bid, i.e., revise it upward, if the MOPR analysis shows the bid is uneconomically low.

Under the MOPR, new resources cannot bid into the RPM market at some artificially low price. Since implementation of the RPM market, the MOPR has protected incumbent generators from uneconomic new entry by preventing new resources from bidding capacity at a price lower than 80% (now revised to 100%) of PJM's administratively determined "Net Cost of New Entry," or "Net CONE." (JA-550; JA-620). PJM estimates Gross CONE--the levelized capital cost and fixed operating expenses for a postulated gas turbine unit—by location prior to each BRA. Net CONE is equal to Gross CONE, adjusted for inflation and an

offset for energy and ancillary services revenues. (JA-481; JA-1966 through JA-1967).

Alternatively, new gas-fired generation can utilize the "unit specific exemption" to bid below the minimum offer price floor upon demonstrating to FERC that its actual costs were below Net CONE. Under the unit specific exemption a new generation resource must show that its actual costs, less expected revenues from PJM Market sales, justify a lower bid. The formula includes only revenues from PJM energy, ancillary services, and capacity sales.

Following enactment of LCAPP, the PJM Power Providers Group (P3), of which all incumbent generator plaintiffs/appellees are members, filed a complaint with FERC arguing that the LCAPP program would cause PJM auction prices to be "artificially low" and thus "signal" the need for "uneconomic new generation." (JA-474; JA-486; JA-503). Under the MOPR then in existence, state-sponsored natural gas-fired projects were allowed to bid into the PJM Market as "price takers," i.e., to offer each unit of capacity for zero dollars ($0).[11] In addition, PJM previously applied the MOPR only for the resource's first delivery year. Thus, a participating generator's bid could fail to clear its first capacity auction (i.e., the MOPR price screen could mitigate its bid to a level above the clearing price), but

[11] A number of resources are exempt from the MOPR in PJM and can offer a price below these thresholds (allowing zero-price offers) for nuclear, coal, integrated gasification combined cycle (IGCC), hydroelectric, wind and solar. (JA-90).

then could bid zero and clear the auction the next year. P3 members objected to this as well, arguing that after one year of mitigation, new resources could use zero dollar bids to clear the capacity market for its second and subsequent years without economic justification under the RPM construct.

Having considered P3's complaint, FERC concluded that the MOPR must be applied to new generation until it clears a capacity auction at least once on its own economic merits. According to FERC, this approach avoids the situation where a new resource, after its first eligible capacity delivery year, submits uneconomic bids not subject to the MOPR, thereby depressing capacity revenues for other market participants. (JA-573 through JA-574). FERC found that clearing in one auction "reasonably demonstrates that a new resource is needed by the market at a price near its full cost of entry" and so it is reasonable not to apply the MOPR in subsequent auctions to such a resource. (JA-573 through JA-574). FERC also eliminated the state-sponsored exemption from the minimum offer price floor, and raised the price floor from 80% to 90% Net CONE. FERC made clear, however, that it was changing the rules applicable to bidders with previously exempt State-sponsored contracts like CPV's and Hess's "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 " to reconcile the tension that has arisen between policies enacted by states and

localities that seek to construct specific resources and [FERC's] statutory obligation to ensure the justness and reasonableness of the prices determined in the RPM." (JA-537 through JA-538).

After the 2012 BRA, P3 complained again to FERC. This time, P3 argued that CPV's and Hess's successful use of the unit-specific exemption process prior to the May 2012 BRA highlighted a problem with that procedure. FERC rejected P3's proposal to eliminate or replace the unit-specific exemption, noting that while it would be "forced to act" if state-subsidized generation could disrupt "competitive price signals that PJM's RPM is designed to produce," the PJM tariff is "designed" to "ensure that subsidized entry supported at the state level does not have the effect of disrupting the competitive price signals . . . ." (JA-630 through JA-631). As noted, in determining whether new gas-fired generation qualifies for the unit specific exemption, only revenues from PJM energy, ancillary services, and capacity sales are included. The viability of the Hess and CPV units thus was based solely on PJM Market revenues, not any SOCA payments, so all units are treated the same way under MOPR. (JA-765 through JA-766; JA-772 through JA-773; JA-921).

Thus, as FERC explicitly acknowledged, state-subsidized generation that follows PJM design market rules, including the MOPR, does not disrupt competitive price signals set by PJM's market structure. And the SOCAs leave no

doubt that LCAPP Generators must abide by the RPM rules in the PJM Market. In Section 2.3, which sets forth the "Obligations of Generator," each SOCA provides, among other things:

> 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 .... .
>
> 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*** ....
>
> (b) Submit supply offers for an amount of Unforced Capacity no less than the Awarded Capacity Amount from the Capacity Facility ***in accordance with RPM Rules*** ,,,,
>
> (emphasis added). (JA-2170).

So, far from conflicting with federal regulation, LCAPP and the SOCAs are in harmony with federal regulation, because (a) the federally-regulated market rules explicitly provide how LCAPP Generators may participate in the market, and (b) the SOCAs mandate compliance with those rules.

CONCLUSION

New Jersey's LCAPP Act operates within the State's authority to ensure safe and reliable electric power for New Jersey residents by encouraging the construction of new generation. LCAPP does not intrude on FERC's exclusive jurisdiction to regulate the wholesale markets for electricity and capacity.

Nor does LCAPP erect an obstacle to FERC's achievement of its regulatory goals in the wholesale electricity market. LCAPP does not impede FERC's policy of establishing a market-based approach to setting wholesale energy rates because the MOPR precludes generators from offering uneconomic bids in order to clear the market. The wholesale price determination for capacity remains within FERC's exclusive authority. FERC itself saw no "conflict" between its policy objectives and those of the LCAPP Act, and the Court should reject Appellees' conflict preemption claim.

The judgment of the District Court accordingly should be reversed.

Respectfully submitted,

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COMBINED CERTIFICATIONS

CERTIFICATION OF ADMISSION TO BAR

I, Richard F. Engel, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

By: s/ Richard F. Engel
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Dated: January 17, 2014

I, Lisa Morelli, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

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I, Jennifer S. Hsia, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

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1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

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CERTIFICATION OF BAR MEMBERSHIP

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CERTIFICATION OF COMPLIANCE WITH RULE 32(a)(7)(B)

I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). The number of words in the brief is 8966, excluding parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

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CERTIFICATION OF COMPLIANCE WITH LOCAL RULE31.1(c)

I certify that this brief complies with L.A.R. 31.1(c) in that prior to it being e-mailed to the Court today it was scanned by the following virus detection software and found to be free from computer viruses:

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CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 31.1(c)

I certify that the text of the paper copies of this brief and the text of the PDF version of this brief filed electronically with the Court today are identical.

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CERTIFICATION OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the typeface requirements of Rule 32(a)(5) of Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2010 Microsoft Word in 14 point Times New Roman font.

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Dated: January 17, 2014

ADDENDUM

Effective: January 28, 2011

New Jersey Statutes Annotated Currentness
Title 48. Public Utilities (Refs & Annos)
Chapter 3. Public Utilities in General (Refs & Annos)
Article 7. Energy Rate Competition
→→ 48:3-98.2. Legislative findings and declarations; local electrical system reliability and power generation

The Legislature finds and declares:

a. In 2007, PJM Interconnection, L.L.C., the firm that manages the regional electric power grid, changed the method of procuring capacity in the wholesale electricity market with the implementation of the reliability pricing model;

b. The PJM reliability pricing model sought to create enhancements to the previously ineffective capacity procurement mechanism which had resulted in projected capacity deficiencies in New Jersey and other areas of the regional power grid. While the reliability pricing model has resulted in significant capacity additions in the form of new demand response resources, new energy efficiency resources, reversals of generation unit retirements, upgrades of existing generating units and certain new peaking facilities available to the region and the State, the reliability pricing model has not resulted in large additions of peaking facilities or any additions of intermediate or base load resources available to the region and the State;

c. 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;

d. To address the lack of incentives under the reliability pricing model, the construction of new, efficient generation must be fostered by State policy that ensures sufficient generation is available to the region, and thus the users in the State in a timely and orderly manner;

e. Due to PJM's lack of authority to order new generation as a means to mitigate local electrical system reliability concerns and solve other issues related to the lack of local generation, and since only PJM has the authority to order transmission system upgrades and expansions to mitigate electrical system reliability concerns caused by transmission

system overloads or the lack of local generation being developed, New Jersey is experiencing an electric power capacity deficit and high power prices that may result in the loss of jobs and investment due to the necessity for the upgrade of the transmission system to the west of New Jersey to ensure a reliable supply of electricity and capacity from generators located outside of New Jersey;

f. As a result of a lack of new, efficient electric generation facilities, New Jersey has become more reliant on coal-fired power plants;

g. The PJM State of the Market Report for 2009 by the PJM Independent Market Monitor states that there are over 11,000 megawatts ("MW") of coal-fired units at risk of retirement due to their inability to cover their avoided costs;

h. New Jersey's in-State fleet of electric generation facilities is aging, with over 50 percent of these facilities being more than 30 years old and over 70 percent being more than 20 years old; and

i. Fostering and incentivizing the development of a limited program for new electric generation facilities will help ensure sufficient capacity to stabilize power prices 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.

CREDIT(S)

L.2011, c. 9, § 1, eff. Jan. 28, 2011.

CROSS REFERENCES

Long-term capacity agreement pilot program (LCAPP), defined, see N.J.S.A. § 48:3-51.
Reliability pricing model, defined, see N.J.S.A. § 48:3-51.

NOTES OF DECISIONS

In general 1

1. In general

New Jersey Long-Term Capacity Pilot Project (LCAPP) Act was preempted by the Federal Power Act (FPA) and in violation of the Supremacy Clause under the doctrine of field preemption; Federal Energy Regulatory Commission's (FERC) decision to exercise its exclusive authority under the FPA to regulate wholesale electricity sales through the reliability price model (RPM) auction indicated both a dominant federal interest in the RPM and a pervasive federal regulatory structure to ensure its proper implementation, and the LCAPP Act intruded upon FERC's exclusive jurisdiction by establishing the price that LCAPP generators would receive for their sales of capacity. PPL EnergyPlus, LLC v. Hanna, D.N.J.2013, 2013 WL 5603896. Electricity 1; States 18.73

N.J.S.A. 48:3-98.2

N. J. S. A. 48:3-98.2, NJ ST 48:3-98.2

Current with laws effective through L.2013, c. 170 and J.R. No. 13.

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Effective: January 28, 2011

New Jersey Statutes Annotated Currentness
Title 48. Public Utilities (Refs & Annos)
Chapter 3. Public Utilities in General (Refs & Annos)
Article 7. Energy Rate Competition

→→ 48:3-98.3. Long-term capacity agreement pilot program (LCAPP); time to initiate and complete proceedings for commencement of the program; appointment of agent and scope of duties; board order

Notwithstanding any provisions of the "Administrative Procedure Act," P.L. 1968, c. 410 (C.52:14B-1 et seq.) to the contrary, the board shall initiate and complete a proceeding in accordance with the schedule set forth in this section to support the commencement of the LCAPP:

a. The board shall initiate and allow such proceeding to be completed no later than 60 days after the effective date of P.L.2011, c. 9 (C.48:3-98.2 et al.) to allow for the commencement of the LCAPP. The SOCA or SOCAs resulting from that proceeding shall be awarded and executed no later than 30 days after the approval of the form of the SOCA or SOCAs. The LCAPP shall require selected eligible generators with board approved and executed SOCAs to participate and be accepted as a capacity resource in the base residual auction conducted by PJM.

b. The board shall require that the electric public utilities within the State retain an agent, with the approval of the board, to administer the LCAPP. The agent retained in accordance with this section shall, on behalf of the board, be responsible for:

(1) assisting the board with the establishment of the LCAPP that allows for offering financially-settled SOCAs for the purpose of facilitating the development of eligible generators;

(2) prequalifying eligible generators for participation in the LCAPP through a showing of environmental, economic, and community benefits, and through demonstration of reasonable certainty of completion of development, construction and permitting activities necessary to meet the desired in-service date; and

(3) recommending to the board the selection of winning eligible generators based on the net benefit to ratepayers of each prequalified eligible generator's offer price and term. Eligible generators that can enter commercial operation for delivery year 2015 are to be provided with a weighted preference in addition to the net benefit ratepayer test. Eligible generators shall also indicate the amount of capacity they are offering in the LCAPP.

c. In the proceeding initiated by the board pursuant to this section, the board shall adopt, after notice, the opportunity for comment, and public hearing, an order addressing the following requirements for the LCAPP:

(1) that electric public utilities shall procure 2,000 megawatts of financially-settled SOCAs from eligible generators, which shall include new generation capacity;

(2) that eligible generators participating in the LCAPP shall be required to offer a quantity, in megawatts, offer a price per megawatt-day, and a term of the SOCA to be evaluated by the agent and approved by the board;

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

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

(5) that no single eligible generator or its affiliate may enter into more than 700 megawatts of financially-settled standard offer capacity agreements;

(6) that the board establish criteria associated with the prequalification of eligible generators for participation in the LCAPP through a showing of environmental, economic, and community benefits, and through demonstration of reasonable certainty of completion of development, construction and permitting activities necessary to meet the desired in-service date;

(7) that the board establish a method for evaluating and comparing the net value to ratepayers of each eligible generator's offer price and term;

(8) that the board establish a method for providing a weighted preference for eligible generators that can enter commercial operation for delivery year 2015;

(9) that eligible generators approved by the board, enter into a SOCA with each of the State's four electric public utilities provided that each electric public utility shall pay or receive refunds pursuant to an annually calculated load-ratio share of the capacity of the SOCA based upon each electric public utility's annual forecasted peak demand as determined by PJM;

(10) that the resulting SOCA shall bind the electric public utilities to the board approved SOCAs with selected eligible generators for the term of the SOCA;

(11) that the selected eligible generators with executed SOCAs shall offer the capacity, electricity, and ancillary services into the PJM wholesale markets as required by the PJM market rules; and

(12) that selected eligible generators with executed SOCAs shall participate in and clear the annual base residual auction conducted by the PJM as part of its reliability pricing model for each delivery year of the entire term of the agreement.

d. The board shall order the full recovery of all costs associated with the electric public utilities' resulting SOCAs, and the costs of the agent retained pursuant to subsection b. of this section, from ratepayers through a non-bypassable, irrevocable charge.

e. Notwithstanding any other provision of law, each SOCA shall become irrevocable upon the issuance of such order approving a SOCA.

f. Neither the board or any other governmental entity shall have the authority, directly or indirectly, legally or equitably, to rescind, alter, repeal, modify or amend a SOCA or an LCAPP cost rate order, to revalue, re-evaluate, or revise the amount of LCAPP costs, or to determine that the LCAPP charges or the revenues to recover the LCAPP charges for such SOCAs are unjust or unreasonable.

CREDIT(S)

L.2011, c. 9, § 3, eff. Jan. 28, 2011.

CROSS REFERENCES

Long-term capacity agreement pilot program (LCAPP), defined, see N.J.S.A. § 48:3-51.
Standard offer capacity agreement (SOCA), defined, see N.J.S.A. § 48:3-51.

NOTES OF DECISIONS

In general 1

1. In general

New Jersey Long-Term Capacity Pilot Project (LCAPP) Act was preempted by the Federal Power Act (FPA) and in violation of the Supremacy Clause under the doctrine of field preemption; Federal Energy Regulatory Commission's (FERC) decision to exercise its exclusive authority under the FPA to regulate wholesale electricity sales through the reliability price model (RPM) auction indicated both a dominant federal interest in the RPM and a pervasive federal regulatory structure to ensure its proper implementation, and the LCAPP Act intruded upon FERC's exclusive jurisdiction by establishing the price that LCAPP generators would receive for their sales of capacity. PPL EnergyPlus,

LLC v. Hanna, D.N.J.2013, 2013 WL 5603896. Electricity 1; States 18.73

N. J. S. A. 48:3-98.3, NJ ST 48:3-98.3

Current with laws effective through L.2013, c. 170 and J.R. No. 13.

END OF DOCUMENT

Effective: January 28, 2011

New Jersey Statutes Annotated Currentness
Title 48. Public Utilities (Refs & Annos)
Chapter 3. Public Utilities in General (Refs & Annos)
Article 7. Energy Rate Competition
→→ 48:3-98.4. Administrative or judicial challenges to pilot program; suspension and effect of challenge

If one or more provisions in P.L.2011, c. 9 (C.48:3-98.2 et al.) are challenged in an administrative or judicial proceeding, the board may suspend the applicability of the challenged provision or provisions during the pendency of those proceedings until final resolution of the challenge and any appeals, and shall issue such orders and take such other actions as it deems appropriate to ensure that the provisions that are not challenged are implemented expeditiously to achieve the public purposes of P.L.2011, c. 9 (C.48:3-98.2 et al.).

CREDIT(S)

L.2011, c. 9, § 4, eff. Jan. 28, 2011.

CROSS REFERENCES

Long-term capacity agreement pilot program (LCAPP), defined, see N.J.S.A. § 48:3-51.
Standard offer capacity agreement (SOCA), defined, see N.J.S.A. § 48:3-51.

RESEARCH REFERENCES

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80 ALR 6th 1, Special Commentary: Recovery of "Stranded Costs" by Utilities.

NOTES OF DECISIONS

In general 1

1. In general

New Jersey Long-Term Capacity Pilot Project (LCAPP) Act was preempted by the Federal Power Act (FPA) and in violation of the Supremacy Clause under the doctrine of field preemption; Federal Energy Regulatory Commission's (FERC) decision to exercise its exclusive authority under the FPA to regulate wholesale electricity sales through the reliability price model (RPM) auction indicated both a dominant federal interest in the RPM and a pervasive federal regulatory structure to ensure its proper implementation, and the LCAPP Act intruded upon FERC's exclusive jurisdiction by establishing the price that LCAPP generators would receive for their sales of capacity. PPL EnergyPlus, LLC v. Hanna, D.N.J.2013, 2013 WL 5603896. Electricity 1; States 18.73

N. J. S. A. 48:3-98.4, NJ ST 48:3-98.4

Current with laws effective through L.2013, c. 170 and J.R. No. 13.

END OF DOCUMENT

N.J.S.A. 48:3-51

Effective: July 23, 2012

New Jersey Statutes Annotated Currentness
Title 48. Public Utilities (Refs & Annos)
Chapter 3. Public Utilities in General (Refs & Annos)
Article 7. Energy Rate Competition
→→ 48:3-51. Definitions

As used in P.L.1999, c. 23 (C.48:3-49 et al.):

"Assignee" means a person to which an electric public utility or another assignee assigns, sells or transfers, other than as security, all or a portion of its right to or interest in bondable transition property. Except as specifically provided in P.L.1999, c. 23 (C.48:3-49 et al.), an assignee shall not be subject to the public utility requirements of Title 48 or any rules or regulations adopted pursuant thereto;

"Base load electric power generation facility" means an electric power generation facility intended to be operated at a greater than 50 percent capacity factor including, but not limited to, a combined cycle power facility and a combined heat and power facility;

"Base residual auction" means the auction conducted by PJM, as part of PJM's reliability pricing model, three years prior to the start of the delivery year to secure electrical capacity as necessary to satisfy the capacity requirements for that delivery year;

"Basic gas supply service" means gas supply service that is provided to any customer that has not chosen an alternative gas supplier, whether or not the customer has received offers as to competitive supply options, including, but not limited to, any customer that cannot obtain such service for any reason, including non-payment for services. Basic gas supply service is not a competitive service and shall be fully regulated by the board;

"Basic generation service" or "BGS" means electric generation service that is provided, to any customer that has not chosen an alternative electric power supplier, whether or not the customer has received offers for competitive supply options, including, but not limited to, any customer that cannot obtain such service from an electric power supplier for any reason, including non-payment for services. Basic generation service is not a competitive service and shall be fully regulated by the board;

"Basic generation service provider" or "provider" means a provider of basic generation service;

"Basic generation service transition costs" means the amount by which the payments by an electric public utility for the procurement of power for basic generation service and related ancillary and administrative costs exceeds the net revenues from the basic generation service charge established by the board pursuant to section 9 of P.L.1999, c. 23 (C.48:3-57) during the transition period, together with interest on the balance at the board-approved rate, that is reflected in a deferred balance account approved by the board in an order addressing the electric public utility's unbundled rates, stranded costs, and restructuring filings pursuant to P.L.1999, c. 23 (C.48:3-49 et al.). Basic generation service transition costs shall include, but are not limited to, costs of purchases from the spot market, bilateral contracts, contracts with non-utility generators, parting contracts with the purchaser of the electric public utility's divested generation assets, short-term advance purchases, and financial instruments such as hedging, forward contracts, and options. Basic generation service transition costs shall also include the payments by an electric public utility pursuant to a competitive procurement process for basic generation service supply during the transition period, and costs of any such process used to procure the basic generation service supply;

"Board" means the New Jersey Board of Public Utilities or any successor agency;

"Bondable stranded costs" means any stranded costs or basic generation service transition costs of an electric public utility approved by the board for recovery pursuant to the provisions of P.L.1999, c. 23 (C.48:3-49 et al.), together with, as approved by the board: (1) the cost of retiring existing debt or equity capital of the electric public utility, including accrued interest, premium and other fees, costs and charges relating thereto, with the proceeds of the financing of bondable transition property; (2) if requested by an electric public utility in its application for a bondable stranded costs rate order, federal, State and local tax liabilities associated with stranded costs recovery or basic generation service transition cost recovery or the transfer or financing of such property or both, including taxes, whose recovery period is modified by the effect of a stranded costs recovery order, a bondable stranded costs rate order or both; and (3) the costs incurred to issue, service or refinance transition bonds, including interest, acquisition or redemption premium, and other financing costs, whether paid upon issuance or over the life of the transition bonds, including, but not limited to, credit enhancements, service charges, overcollateralization, interest rate cap, swap or collar, yield maintenance, maturity guarantee or other hedging agreements, equity investments, operating costs and other related fees, costs and charges, or to assign, sell or otherwise transfer bondable transition property;

"Bondable stranded costs rate order" means one or more irrevocable written orders issued by the board pursuant to P.L.1999, c. 23 (C.48:3-49 et al.) which determines the amount of bondable stranded costs and the initial amount of transition bond charges authorized to be imposed to recover such bondable stranded costs, including the costs to be financed from the proceeds of the transition bonds, as well as on-going costs associated with servicing and credit enhancing the transition bonds, and provides the electric public utility specific authority to issue or cause to be issued, directly or indirectly, transition bonds through a financing entity and related matters as provided in P.L.1999, c. 23(C.48:3-49 et al.), which order shall become effective immediately upon the written consent of the related electric public utility to such order as provided in P.L.1999, c. 23(C.48:3-49 et al.);

"Bondable transition property" means the property consisting of the irrevocable right to charge, collect and receive, and be paid from collections of, transition bond charges in the amount necessary to provide for the full recovery of bondable stranded costs which are determined to be recoverable in a bondable stranded costs rate order, all rights of

the related electric public utility under such bondable stranded costs rate order including, without limitation, all rights to obtain periodic adjustments of the related transition bond charges pursuant to subsection b. of section 15 of P.L.1999, c. 23 (C.48:3-64), and all revenues, collections, payments, money and proceeds arising under, or with respect to, all of the foregoing;

"British thermal unit" or "Btu" means the amount of heat required to increase the temperature of one pound of water by one degree Fahrenheit;

"Broker" means a duly licensed electric power supplier that assumes the contractual and legal responsibility for the sale of electric generation service, transmission or other services to end-use retail customers, but does not take title to any of the power sold, or a duly licensed gas supplier that assumes the contractual and legal obligation to provide gas supply service to end-use retail customers, but does not take title to the gas;

"Brownfield" means any former or current commercial or industrial site that is currently vacant or underutilized and on which there has been, or there is suspected to have been, a discharge of a contaminant;

"Buydown" means an arrangement or arrangements involving the buyer and seller in a given power purchase contract and, in some cases third parties, for consideration to be given by the buyer in order to effectuate a reduction in the pricing, or the restructuring of other terms to reduce the overall cost of the power contract, for the remaining succeeding period of the purchased power arrangement or arrangements;

"Buyout" means an arrangement or arrangements involving the buyer and seller in a given power purchase contract and, in some cases third parties, for consideration to be given by the buyer in order to effectuate a termination of such power purchase contract;

"Class I renewable energy" means electric energy produced from solar technologies, photovoltaic technologies, wind energy, fuel cells, geothermal technologies, wave or tidal action, small scale hydropower facilities with a capacity of three megawatts or less and put into service after the effective date of P.L.2012, c. 24, and methane gas from landfills or a biomass facility, provided that the biomass is cultivated and harvested in a sustainable manner;

"Class II renewable energy" means electric energy produced at a hydropower facility with a capacity of greater than three megawatts or a resource recovery facility, provided that such facility is located where retail competition is permitted and provided further that the Commissioner of Environmental Protection has determined that such facility meets the highest environmental standards and minimizes any impacts to the environment and local communities;

"Co-generation" means the sequential production of electricity and steam or other forms of useful energy used for industrial or commercial heating and cooling purposes;

"Combined cycle power facility" means a generation facility that combines two or more thermodynamic cycles, by producing electric power via the combustion of fuel and then routing the resulting waste heat by-product to a conventional boiler or to a heat recovery steam generator for use by a steam turbine to produce electric power, thereby

increasing the overall efficiency of the generating facility;

"Combined heat and power facility" or "co-generation facility" means a generation facility which produces electric energy and steam or other forms of useful energy such as heat, which are used for industrial or commercial heating or cooling purposes. A combined heat and power facility or co-generation facility shall not be considered a public utility;

"Competitive service" means any service offered by an electric public utility or a gas public utility that the board determines to be competitive pursuant to section 8 or section 10 of P.L.1999, c. 23 (C.48:3-56 or C.48:3-58) or that is not regulated by the board;

"Commercial and industrial energy pricing class customer" or "CIEP class customer" means that group of non-residential customers with high peak demand, as determined by periodic board order, which either is eligible or which would be eligible, as determined by periodic board order, to receive funds from the Retail Margin Fund established pursuant to section 9 of P.L.1999, c. 23 (C.48:3-57) and for which basic generation service is hourly-priced;

"Comprehensive resource analysis" means an analysis including, but not limited to, an assessment of existing market barriers to the implementation of energy efficiency and renewable technologies that are not or cannot be delivered to customers through a competitive marketplace;

"Connected to the distribution system" means, for a solar electric power generation facility, that the facility is: (1) connected to a net metering customer's side of a meter, regardless of the voltage at which that customer connects to the electric grid, (2) an on-site generation facility, (3) qualified for net metering aggregation as provided pursuant to paragraph (4) of subsection e. of section 38 of P.L.1999, c. 23 (C.48:3-87), (4) owned or operated by an electric public utility and approved by the board pursuant to section 13 of P.L.2007, c. 340 (C.48:3-98.1), (5) directly connected to the electric grid at 69 kilovolts or less, regardless of how an electric public utility classifies that portion of its electric grid, and is designated as "connected to the distribution system" by the board pursuant to subsections q. through s. of section 38 of P.L.1999, c. 23 (C.48:3-87), or (6) is certified by the board, in consultation with the Department of Environmental Protection, as being located on a brownfield, on an area of historic fill, or on a properly closed sanitary landfill facility. Any solar electric power generation facility, other than that of a net metering customer on the customer's side of the meter, connected above 69 kilovolts shall not be considered connected to the distribution system;

"Customer" means any person that is an end user and is connected to any part of the transmission and distribution system within an electric public utility's service territory or a gas public utility's service territory within this State;

"Customer account service" means metering, billing, or such other administrative activity associated with maintaining a customer account;

"Delivery year" or "DY" means the 12-month period from June 1st through May 31st, numbered according to the calendar year in which it ends;

"Demand side management" means the management of customer demand for energy service through the implemen-

tation of cost-effective energy efficiency technologies, including, but not limited to, installed conservation, load management and energy efficiency measures on and in the residential, commercial, industrial, institutional and governmental premises and facilities in this State;

"Electric generation service" means the provision of retail electric energy and capacity which is generated off-site from the location at which the consumption of such electric energy and capacity is metered for retail billing purposes, including agreements and arrangements related thereto;

"Electric power generator" means an entity that proposes to construct, own, lease or operate, or currently owns, leases or operates, an electric power production facility that will sell or does sell at least 90 percent of its output, either directly or through a marketer, to a customer or customers located at sites that are not on or contiguous to the site on which the facility will be located or is located. The designation of an entity as an electric power generator for the purposes of P.L.1999, c. 23 (C.48:3-49 et al.) shall not, in and of itself, affect the entity's status as an exempt wholesale generator under the Public Utility Holding Company Act of 1935, 15 U.S.C. s.79 et seq., or its successor;

"Electric power supplier" means a person or entity that is duly licensed pursuant to the provisions of P.L.1999, c. 23 (C.48:3-49 et al.) to offer and to assume the contractual and legal responsibility to provide electric generation service to retail customers, and includes load serving entities, marketers and brokers that offer or provide electric generation service to retail customers. The term excludes an electric public utility that provides electric generation service only as a basic generation service pursuant to section 9 of P.L.1999, c. 23 (C.48:3-57);

"Electric public utility" means a public utility, as that term is defined in R.S.48:2-13, that transmits and distributes electricity to end users within this State;

"Electric related service" means a service that is directly related to the consumption of electricity by an end user, including, but not limited to, the installation of demand side management measures at the end user's premises, the maintenance, repair or replacement of appliances, lighting, motors or other energy-consuming devices at the end user's premises, and the provision of energy consumption measurement and billing services;

"Electronic signature" means an electronic sound, symbol or process, attached to, or logically associated with, a contract or other record, and executed or adopted by a person with the intent to sign the record;

"Eligible generator" means a developer of a base load or mid-merit electric power generation facility including, but not limited to, an on-site generation facility that qualifies as a capacity resource under PJM criteria and that commences construction after the effective date of P.L.2011, c. 9 (C.48:3-98.2 et al.);

"Energy agent" means a person that is duly registered pursuant to the provisions of P.L.1999, c. 23 (C.48:3-49 et al.), that arranges the sale of retail electricity or electric related services or retail gas supply or gas related services between government aggregators or private aggregators and electric power suppliers or gas suppliers, but does not take title to the electric or gas sold;

"Energy consumer" means a business or residential consumer of electric generation service or gas supply service located within the territorial jurisdiction of a government aggregator;

"Energy efficiency portfolio standard" means a requirement to procure a specified amount of energy efficiency or demand side management resources as a means of managing and reducing energy usage and demand by customers;

"Energy year" or "EY" means the 12-month period from June 1st through May 31st, numbered according to the calendar year in which it ends;

"Farmland" means land actively devoted to agricultural or horticultural use that is valued, assessed, and taxed pursuant to the "Farmland Assessment Act of 1964," P.L.1964, c. 48 (C.54:4-23.1 et seq.);

"Federal Energy Regulatory Commission" or "FERC" means the federal agency established pursuant to 42 U.S.C. s.7171 et seq. to regulate the interstate transmission of electricity, natural gas, and oil;

"Final remediation document" shall have the same meaning as provided in section 3 of P.L.1976, c. 141 (C.58:10-23.11b);

"Financing entity" means an electric public utility, a special purpose entity, or any other assignee of bondable transition property, which issues transition bonds. Except as specifically provided in P.L.1999, c. 23 (C.48:3-49 et al.), a financing entity which is not itself an electric public utility shall not be subject to the public utility requirements of Title 48 or any rules or regulations adopted pursuant thereto;

"Gas public utility" means a public utility, as that term is defined in R.S.48:2-13, that distributes gas to end users within this State;

"Gas related service" means a service that is directly related to the consumption of gas by an end user, including, but not limited to, the installation of demand side management measures at the end user's premises, the maintenance, repair or replacement of appliances or other energy-consuming devices at the end user's premises, and the provision of energy consumption measurement and billing services;

"Gas supplier" means a person that is duly licensed pursuant to the provisions of P.L.1999, c. 23 (C.48:3-49 et al.) to offer and assume the contractual and legal obligation to provide gas supply service to retail customers, and includes, but is not limited to, marketers and brokers. A non-public utility affiliate of a public utility holding company may be a gas supplier, but a gas public utility or any subsidiary of a gas utility is not a gas supplier. In the event that a gas public utility is not part of a holding company legal structure, a related competitive business segment of that gas public utility may be a gas supplier, provided that related competitive business segment is structurally separated from the gas public utility, and provided that the interactions between the gas public utility and the related competitive business segment are subject to the affiliate relations standards adopted by the board pursuant to subsection k. of section 10 of P.L.1999, c. 23 (C.48:3-58);

"Gas supply service" means the provision to customers of the retail commodity of gas, but does not include any regulated distribution service;

"Government aggregator" means any government entity subject to the requirements of the "Local Public Contracts Law," P.L.1971, c. 198 (C.40A:11-1 et seq.), the "Public School Contracts Law," N.J.S.18A:18A-1 et seq., or the "County College Contracts Law," P.L.1982, c. 189 (C.18A:64A-25.1 et seq.), that enters into a written contract with a licensed electric power supplier or a licensed gas supplier for: (1) the provision of electric generation service, electric related service, gas supply service, or gas related service for its own use or the use of other government aggregators; or (2) if a municipal or county government, the provision of electric generation service or gas supply service on behalf of business or residential customers within its territorial jurisdiction;

"Government energy aggregation program" means a program and procedure pursuant to which a government aggregator enters into a written contract for the provision of electric generation service or gas supply service on behalf of business or residential customers within its territorial jurisdiction;

"Governmental entity" means any federal, state, municipal, local or other governmental department, commission, board, agency, court, authority or instrumentality having competent jurisdiction;

"Greenhouse gas emissions portfolio standard" means a requirement that addresses or limits the amount of carbon dioxide emissions indirectly resulting from the use of electricity as applied to any electric power suppliers and basic generation service providers of electricity;

"Historic fill" means generally large volumes of non-indigenous material, no matter what date they were emplaced on the site, used to raise the topographic elevation of a site, which were contaminated prior to emplacement and are in no way connected with the operations at the location of emplacement and which include, but are not limited to, construction debris, dredge spoils, incinerator residue, demolition debris, fly ash, and non-hazardous solid waste. "Historic fill" shall not include any material which is substantially chromate chemical production waste or any other chemical production waste or waste from processing of metal or mineral ores, residues, slags, or tailings;

"Incremental auction" means an auction conducted by PJM, as part of PJM's reliability pricing model, prior to the start of the delivery year to secure electric capacity as necessary to satisfy the capacity requirements for that delivery year, that is not otherwise provided for in the base residual auction;

"Leakage" means an increase in greenhouse gas emissions related to generation sources located outside of the State that are not subject to a state, interstate or regional greenhouse gas emissions cap or standard that applies to generation sources located within the State;

"Locational deliverability area" or "LDA" means one or more of the zones within the PJM region which are used to evaluate area transmission constraints and reliability issues including electric public utility company zones, sub-zones, and combinations of zones;

"Long-term capacity agreement pilot program" or "LCAPP" means a pilot program established by the board that includes participation by eligible generators, to seek offers for financially-settled standard offer capacity agreements with eligible generators pursuant to the provisions of P.L.2011, c. 9 (C.48:3-98.2 et al.);

"Market transition charge" means a charge imposed pursuant to section 13 of P.L.1999, c. 23 (C.48:3-61) by an electric public utility, at a level determined by the board, on the electric public utility customers for a limited duration transition period to recover stranded costs created as a result of the introduction of electric power supply competition pursuant to the provisions of P.L.1999, c. 23 (C.48:3-49 et al.);

"Marketer" means a duly licensed electric power supplier that takes title to electric energy and capacity, transmission and other services from electric power generators and other wholesale suppliers and then assumes the contractual and legal obligation to provide electric generation service, and may include transmission and other services, to an end-use retail customer or customers, or a duly licensed gas supplier that takes title to gas and then assumes the contractual and legal obligation to provide gas supply service to an end-use customer or customers;

"Mid-merit electric power generation facility" means a generation facility that operates at a capacity factor between baseload generation facilities and peaker generation facilities;

"Net metering aggregation" means a procedure for calculating the combination of the annual energy usage for all facilities owned by a single customer where such customer is a State entity, school district, county, county agency, county authority, municipality, municipal agency, or municipal authority, and which are served by a solar electric power generating facility as provided pursuant to paragraph (4) of subsection e. of section 38 of P.L.1999, c. 23 (C.48:3-87);

"Net proceeds" means proceeds less transaction and other related costs as determined by the board;

"Net revenues" means revenues less related expenses, including applicable taxes, as determined by the board;

"Offshore wind energy" means electric energy produced by a qualified offshore wind project;

"Offshore wind renewable energy certificate" or "OREC" means a certificate, issued by the board or its designee, representing the environmental attributes of one megawatt hour of electric generation from a qualified offshore wind project;

"Off-site end use thermal energy services customer" means an end use customer that purchases thermal energy services from an on-site generation facility, combined heat and power facility, or co-generation facility, and that is located on property that is separated from the property on which the on-site generation facility, combined heat and power facility, or co-generation facility is located by more than one easement, public thoroughfare, or transportation or utility-owned right-of-way;

"On-site generation facility" means a generation facility, including, but not limited to, a generation facility that pro-

duces Class I or Class II renewable energy, and equipment and services appurtenant to electric sales by such facility to the end use customer located on the property or on property contiguous to the property on which the end user is located. An on-site generation facility shall not be considered a public utility. The property of the end use customer and the property on which the on-site generation facility is located shall be considered contiguous if they are geographically located next to each other, but may be otherwise separated by an easement, public thoroughfare, transportation or utility-owned right-of-way, or if the end use customer is purchasing thermal energy services produced by the on-site generation facility, for use for heating or cooling, or both, regardless of whether the customer is located on property that is separated from the property on which the on-site generation facility is located by more than one easement, public thoroughfare, or transportation or utility-owned right-of-way;

"Person" means an individual, partnership, corporation, association, trust, limited liability company, governmental entity or other legal entity;

"PJM Interconnection, L.L.C." or "PJM" means the privately-held, limited liability corporation that is a FERC-approved Regional Transmission Organization, or its successor, that manages the regional, high-voltage electricity grid serving all or parts of 13 states including New Jersey and the District of Columbia, operates the regional competitive wholesale electric market, manages the regional transmission planning process, and establishes systems and rules to ensure that the regional and in-State energy markets operate fairly and efficiently;

"Preliminary assessment" shall have the same meaning as provided in section 3 of P.L.1976, c. 141 (C.58:10-23.11b);

"Private aggregator" means a non-government aggregator that is a duly-organized business or non-profit organization authorized to do business in this State that enters into a contract with a duly licensed electric power supplier for the purchase of electric energy and capacity, or with a duly licensed gas supplier for the purchase of gas supply service, on behalf of multiple end-use customers by combining the loads of those customers;

"Properly closed sanitary landfill facility" means a sanitary landfill facility, or a portion of a sanitary landfill facility, for which performance is complete with respect to all activities associated with the design, installation, purchase, or construction of all measures, structures, or equipment required by the Department of Environmental Protection, pursuant to law, in order to prevent, minimize, or monitor pollution or health hazards resulting from a sanitary landfill facility subsequent to the termination of operations at any portion thereof, including, but not necessarily limited to, the placement of earthen or vegetative cover, and the installation of methane gas vents or monitors and leachate monitoring wells or collection systems at the site of any sanitary landfill facility;

"Public utility holding company" means: (1) any company that, directly or indirectly, owns, controls, or holds with power to vote, ten percent or more of the outstanding voting securities of an electric public utility or a gas public utility or of a company which is a public utility holding company by virtue of this definition, unless the Securities and Exchange Commission, or its successor, by order declares such company not to be a public utility holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. s.79 et seq., or its successor; or (2) any person that the Securities and Exchange Commission, or its successor, determines, after notice and opportunity for hearing, directly or indirectly, to exercise, either alone or pursuant to an arrangement or understanding with one or more other persons, such a controlling influence over the management or policies of an electric public utility or a gas public utility

or public utility holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in the Public Utility Holding Company Act of 1935 or its successor;

"Qualified offshore wind project" means a wind turbine electricity generation facility in the Atlantic Ocean and connected to the electric transmission system in this State, and includes the associated transmission-related interconnection facilities and equipment, and approved by the board pursuant to section 3 of P.L.2010, c. 57 (C.48:3-87.1);

"Registration program" means an administrative process developed by the board pursuant to subsection u. of section 38 of P.L.1999, c. 23 (C.48:3-87) that requires all owners of solar electric power generation facilities connected to the distribution system that intend to generate SRECs, to file with the board documents detailing the size, location, interconnection plan, land use, and other project information as required by the board;

"Regulatory asset" means an asset recorded on the books of an electric public utility or gas public utility pursuant to the Statement of Financial Accounting Standards, No. 71, entitled "Accounting for the Effects of Certain Types of Regulation," or any successor standard and as deemed recoverable by the board;

"Related competitive business segment of an electric public utility or gas public utility" means any business venture of an electric public utility or gas public utility including, but not limited to, functionally separate business units, joint ventures, and partnerships, that offers to provide or provides competitive services;

"Related competitive business segment of a public utility holding company" means any business venture of a public utility holding company, including, but not limited to, functionally separate business units, joint ventures, and partnerships and subsidiaries, that offers to provide or provides competitive services, but does not include any related competitive business segments of an electric public utility or gas public utility;

"Reliability pricing model" or "RPM" means PJM's capacity-market model, and its successors, 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;

"Renewable energy certificate" or "REC" means a certificate representing the environmental benefits or attributes of one megawatt-hour of generation from a generating facility that produces Class I or Class II renewable energy, but shall not include a solar renewable energy certificate or an offshore wind renewable energy certificate;

"Resource clearing price" or "RCP" means the clearing price established for the applicable locational deliverability area by the base residual auction or incremental auction, as determined by the optimization algorithm for each auction, conducted by PJM as part of PJM's reliability pricing model;

"Resource recovery facility" means a solid waste facility constructed and operated for the incineration of solid waste for energy production and the recovery of metals and other materials for reuse, which the Department of Environmental Protection has determined to be in compliance with current environmental standards, including, but not limited

to, all applicable requirements of the federal "Clean Air Act" (42 U.S.C. s.7401 et seq.);

"Restructuring related costs" means reasonably incurred costs directly related to the restructuring of the electric power industry, including the closure, sale, functional separation and divestiture of generation and other competitive utility assets by a public utility, or the provision of competitive services as such costs are determined by the board, and which are not stranded costs as defined in P.L.1999, c. 23 (C.48:3-49 et al.) but may include, but not be limited to, investments in management information systems, and which shall include expenses related to employees affected by restructuring which result in efficiencies and which result in benefits to ratepayers, such as training or retraining at the level equivalent to one year's training at a vocational or technical school or county community college, the provision of severance pay of two weeks of base pay for each year of full-time employment, and a maximum of 24 months' continued health care coverage. Except as to expenses related to employees affected by restructuring, "restructuring related costs" shall not include going forward costs;

"Retail choice" means the ability of retail customers to shop for electric generation or gas supply service from electric power or gas suppliers, or opt to receive basic generation service or basic gas service, and the ability of an electric power or gas supplier to offer electric generation service or gas supply service to retail customers, consistent with the provisions of P.L.1999, c. 23 (C.48:3-49 et al.);

"Retail margin" means an amount, reflecting differences in prices that electric power suppliers and electric public utilities may charge in providing electric generation service and basic generation service, respectively, to retail customers, excluding residential customers, which the board may authorize to be charged to categories of basic generation service customers of electric public utilities in this State, other than residential customers, under the board's continuing regulation of basic generation service pursuant to sections 3 and 9 of P.L.1999, c. 23 (C.48:3-51 and 48:3-57), for the purpose of promoting a competitive retail market for the supply of electricity;

"Sanitary landfill facility" shall have the same meaning as provided in section 3 of P.L.1970, c. 39 (C.13:1E-3);

"School district" means a local or regional school district established pursuant to chapter 8 or chapter 13 of Title 18A of the New Jersey Statutes, a county special services school district established pursuant to article 8 of chapter 46 of Title 18A of the New Jersey Statutes, a county vocational school district established pursuant to article 3 of chapter 54 of Title 18A of the New Jersey Statutes, and a district under full State intervention pursuant to P.L.1987, c. 399 (C.18A:7A-34 et al.);

"Shopping credit" means an amount deducted from the bill of an electric public utility customer to reflect the fact that such customer has switched to an electric power supplier and no longer takes basic generation service from the electric public utility;

"Site investigation" shall have the same meaning as provided in section 3 of P.L.1976, c. 141 (C.58:10-23.11b);

"Small scale hydropower facility" means a facility located within this State that is connected to the distribution system, and that meets the requirements of, and has been certified by, a nationally recognized low-impact hydropower organization that has established low-impact hydropower certification criteria applicable to: (1) river flows; (2) water

quality; (3) fish passage and protection; (4) watershed protection; (5) threatened and endangered species protection; (6) cultural resource protection; (7) recreation; and (8) facilities recommended for removal;

"Social program" means a program implemented with board approval to provide assistance to a group of disadvantaged customers, to provide protection to consumers, or to accomplish a particular societal goal, and includes, but is not limited to, the winter moratorium program, utility practices concerning "bad debt" customers, low income assistance, deferred payment plans, weatherization programs, and late payment and deposit policies, but does not include any demand side management program or any environmental requirements or controls;

"Societal benefits charge" means a charge imposed by an electric public utility, at a level determined by the board, pursuant to, and in accordance with, section 12 of P.L.1999, c. 23 (C.48:3-60);

"Solar alternative compliance payment" or "SACP" means a payment of a certain dollar amount per megawatt hour (MWh) which an electric power supplier or provider may submit to the board in order to comply with the solar electric generation requirements under section 38 of P.L.1999, c. 23 (C.48:3-87);

"Solar renewable energy certificate" or "SREC" means a certificate issued by the board or its designee, representing one megawatt hour (MWh) of solar energy that is generated by a facility connected to the distribution system in this State and has value based upon, and driven by, the energy market;

"Standard offer capacity agreement" or "SOCA" means a financially-settled transaction agreement, approved by board order, that provides for eligible generators to receive payments from the electric public utilities for a defined amount of electric capacity for a term to be determined by the board but not to exceed 15 years, and for such payments to be a fully non-bypassable charge, with such an order, once issued, being irrevocable;

"Standard offer capacity price" or "SOCP" means 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 board-approved SOCA;

"State entity" means a department, agency, or office of State government, a State university or college, or an authority created by the State;

"Stranded cost" means the amount by which the net cost of an electric public utility's electric generating assets or electric power purchase commitments, as determined by the board consistent with the provisions of P.L.1999, c. 23 (C.48:3-49 et al.), exceeds the market value of those assets or contractual commitments in a competitive supply marketplace and the costs of buydowns or buyouts of power purchase contracts;

"Stranded costs recovery order" means each order issued by the board in accordance with subsection c. of section 13 of P.L.1999, c. 23 (C.48:3-61) which sets forth the amount of stranded costs, if any, the board has determined an electric public utility is eligible to recover and collect in accordance with the standards set forth in section 13 of P.L.1999, c. 23 (C.48:3-61) and the recovery mechanisms therefor;

"Thermal efficiency" means the useful electric energy output of a facility, plus the useful thermal energy output of the facility, expressed as a percentage of the total energy input to the facility;

"Transition bond charge" means a charge, expressed as an amount per kilowatt hour, that is authorized by and imposed on electric public utility ratepayers pursuant to a bondable stranded costs rate order, as modified at any time pursuant to the provisions of P.L.1999, c. 23 (C.48:3-49 et al.);

"Transition bonds" means bonds, notes, certificates of participation or beneficial interest or other evidences of indebtedness or ownership issued pursuant to an indenture, contract or other agreement of an electric public utility or a financing entity, the proceeds of which are used, directly or indirectly, to recover, finance or refinance bondable stranded costs and which are, directly or indirectly, secured by or payable from bondable transition property. References in P.L.1999, c. 23 (C.48:3-49 et al.) to principal, interest, and acquisition or redemption premium with respect to transition bonds which are issued in the form of certificates of participation or beneficial interest or other evidences of ownership shall refer to the comparable payments on such securities;

"Transition period" means the period from August 1, 1999 through July 31, 2003;

"Transmission and distribution system" means, with respect to an electric public utility, any facility or equipment that is used for the transmission, distribution or delivery of electricity to the customers of the electric public utility including, but not limited to, the land, structures, meters, lines, switches and all other appurtenances thereof and thereto, owned or controlled by the electric public utility within this State; and

"Universal service" means any service approved by the board with the purpose of assisting low-income residential customers in obtaining or retaining electric generation or delivery service.

CREDIT(S)

L.1999, c. 23, § 3, eff. Feb. 9, 1999. Amended by L.2001, c. 242, § 1, eff. Sept. 6, 2001; L.2002, c. 84, § 1, eff. Sept. 9, 2002; L.2009, c. 34, § 1, eff. March 31, 2009; L.2009, c. 240, § 1, eff. Jan. 16, 2010; L.2009, c. 289, § 1, eff. July 1, 2010; L.2010, c. 57, § 1, eff. Aug. 19, 2010; L.2011, c. 9, § 2, eff. Jan. 28, 2011; L.2012, c. 24, § 1, eff. July 23, 2012.

HISTORICAL AND STATUTORY NOTES

For severability provision and effective date of L.1999, c. 23, see Historical and Statutory Notes under N.J.S.A. § 48:3-49.

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2009 Legislation

L.2009, c. 289, § 3, approved Jan. 16, 2010, provides:

"[Section] 3. This act shall take effect on the first day of the sixth month following enactment, except that the board may take such action in advance of the effective date as shall be necessary to implement the provisions of this act."

L.2009, c. 289, § 1, was corrected by the Legislative Counsel with the concurrence of the Attorney General under the authority of N.J.S.A. § 1:3-1 to incorporate the inadvertently omitted provisions of the amendment of this section by L.2009, c. 240, § 1, by inserting the definition of "co-generation", "off-site end use thermal energy services customer" and making amendments to the definitions of "combined heat and power facility" and "on-site generation facility".

CROSS REFERENCES

Commencement of long-term capacity agreement pilot program (LCAPP), board authority, see N.J.S.A. § 48:3-98.3.
Compliance entity, greenhouse gas, air pollution, see N.J.S.A. § 26:2C-46.
Greenhouse gas emissions allowance trading program, air pollution, see N.J.S.A. § 26:2C-47.
Urban Transit Hub Tax Credit, credit for approved qualified wind energy facilities, see N.J.S.A. § 34:1B-209.4.

LAW REVIEW AND JOURNAL COMMENTARIES

Harnessing the Wind. Development of Wind Energy Projects in New Jersey. Marshall McLean, Henry King and Matthey Thomas, 270 N.J. Law. 26 (Mag.)(June, 2011).

Land Use Laws Affecting the Development of Solar Energy Facilities in New Jersey. Richard M. Hluchan, 270 N.J. Law. 31 (Mag.)(June, 2011).

Lights out for New Jersey: the August 2003 blackout and the end of electricity regulation in New Jersey. Scott V. Heck, 29 Seton Hall Legis. J. 279 (2004).

New Jersey Legislature Seeks to Encourage Green Technology. James Laskey & Christopher Stevenson, 270 N.J. Law. 9 (Mag.)(June, 2011).

Savings from the Sun. Guiding Clients Through the Solar Contracting Process. Hesser G. McBride, 270 N.J. Law. 41 (Mag.)(June, 2011).

RESEARCH REFERENCES

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ALR Library

N.J.S.A. 48:3-51

150 ALR 1311, Computation of Sales Tax.

NOTES OF DECISIONS

Receipts 1

1. Receipts

Electric public utility's customer service charges, assessed for customer account services, including "metering, billing or such other administrative activity associated with maintaining a customer account," are properly included in "receipts" for utility services when calculating sales tax. Atlantic City Showboat, Inc. v. Director, Div. of Taxation, 26 N.J.Tax 234 (2012). Taxation ⚷3677

Electric public utility's market transition charges, authorized charges recouping losses related to electric public utilities' prior investments in the electric generation infrastructure and power supply contracts made when the electric public utilities had monopoly control of the electricity market, are properly included in "receipts" for utility services when calculating sales tax. Atlantic City Showboat, Inc. v. Director, Div. of Taxation, 26 N.J.Tax 234 (2012). Taxation ⚷3674

N. J. S. A. 48:3-51, NJ ST 48:3-51

Current with laws effective through L.2013, c. 170 and J.R. No. 13.

END OF DOCUMENT

CERTIFICATE OF SERVICE

Pursuant to FED.R.APP.P. 25, 3RD CIR. L.A.R. 25, and 3rd CIR. MISC. R. 113.4, I hereby certify that, on January 17, 2014, I served a copy of the foregoing brief on all counsel in these consolidated cases that are "Filing Users" of this Court's electronic filing system, and such counsel were served, pursuant to 3RD CIR. MISC. R. 113.4, when this brief was filed through the Court's electronic filing system, by the Notice of Docket Activity generated by the Court's electronic filing system.

JOHN JAY HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: s/Richard F. Engel
Richard F. Engel

Dated: January 17, 2014