April 20, 2016

Supreme Court Rules Maryland Subsidy Program Infringes on FERC Authority

On Tuesday, April 19, a unanimous Supreme Court ruled that Maryland's incentive program, which subsidized the participation of a new power plant in the PJM Interconnection (PJM) wholesale energy market, was preempted by the Federal Power Act.

The Maryland incentive program was put in place to encourage new in-state generation proposed by CPV Maryland LLC (CPV) by contractually committing Maryland's regulated load serving entities (LSEs) to guarantee a fixed 20-year revenue stream for CPV. The revenue stream was assured through a "contract for differences," under which the new generator would pay or be paid the difference between the contract price and the price the generator received in the FERC-regulated wholesale power market.

Justice Ginsburg's majority opinion, joined by six Justices, held that "Maryland's program invades FERC's regulatory turf" by impermissibly infringing on the FERC "exclusive jurisdiction over 'rates and charges . . . received . . . for or in connection with' interstate wholesale rates."[1] Elaborating, the Court noted that "FERC has approved the PJM capacity auction as the sole ratesetting mechanism for sales of capacity to PJM," and that Maryland's efforts to set a different rate for CPV impermissibly "intrude on FERC's authority over interstate wholesale rates."[2]

The Court was deliberate in distinguishing the facts and limiting its rationale, observing that it "need not and do[es] not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector."[3] Further, the Court clarified that it was not calling into question contracts for differences that are entered into voluntarily by LSEs without the compulsory state action that existed in Maryland. Justice Sotomayor wrote a concurring opinion also stressing the limited nature of the Court's ruling and emphasizing that the Maryland program impermissibly infringed on the existing federal-state relationship envisioned by the Federal Power Act.[4] Justice Thomas wrote a concurring opinion, joining in the opinion of the Court" only to the extent that it rests on the text and structure of the Federal Power Act" and not on "principles of implied pre-emption."[5]

While this ruling involves widely different circumstances and regulatory schemes than the Court's January decision in *FERC v. Electric Power Supply Association*, the two cases together help clarify the evolving roles of state and federal regulators in the development and management of state public energy policy and their intersection with regulated wholesale power markets.

---

[1] *Hughes v. Talen Energy Marketing LLC*, 578 U.S. ___, 12 (2016) (*citing* Federal Power Act Section 205, 16 U.S.C. §824(d)).

[2] *Id.* at 13.

[3] *Id.* at 15.

[4] *Hughes v. Talen Energy Marketing LLC*, 578 U.S. ___ (Sotomayor, J., concurring).

[5] *Hughes v. Talen Energy Marketing LLC*, 578 U.S. ___ (Thomas, J., concurring in part).

Authors



David T. Doot
Of Counsel

Hartford, CT | (860) 275-0102

dtdoot@daypitney.com



Joseph H. Fagan
Partner

Washington, D.C. | (202) 218-3901

jfagan@daypitney.com