

Spiegel Partner Jeffrey A. Schwarz to Speak at Energy in the Northeast Conference on Pending Cases Drawing Jurisdictional Lines Between FERC and the States

When it comes to regulating power sales, the Federal Power Act is supposed to draw a bright line between retail power sales (and physical generation facilities) under state jurisdiction and wholesale power sales subject to Federal Energy Regulatory Commission (“FERC”) authority. Lately, though, the line between state and federal jurisdiction has become less clear and more dangerous to approach. And neither FERC nor the states decides who wins or loses the ensuing battles. Courts do.

So far, each side has suffered unexpected early losses. In *EPSA v. FERC*¹, the D.C. Circuit held that FERC lacks jurisdiction to establish just and reasonable compensation for demand-response resources offered in wholesale energy markets. The court viewed demand response as a commitment not to consume electric energy, rather than a sale of energy for resale. And since only end-users consume power or refrain from consuming it, the court reasoned that demand response must be a *retail* product subject to state jurisdiction and thus beyond FERC’s reach. FERC appealed, and convinced the Supreme Court to review the case. The Court will hear arguments in mid-October.

Meanwhile, two other appellate courts struck down state efforts to use their authority over retail rates and resource adequacy to induce investment in needed generation capacity. The cases involved a New Jersey statute and an order of the Maryland Public Service Commission. In each case, the state determined that it was relying too heavily on aging coal-fired facilities at risk of retirement. They further found that PJM’s capacity auctions had not induced needed investments in baseload or intermediate generation facilities. The states directed their distribution utilities to solicit proposals for new natural-gas-fired generation facilities, and instructed their distribution utilities to enter “contracts for differences” with the winning bidders. Under the contracts, the developers would build the facilities and offer the associated capacity in PJM’s annual capacity auctions for the duration of the contracts (fifteen or twenty years). If the resources cleared, the distribution utilities would pay the seller a fixed contract price, while the seller would pass through to the distribution utilities whatever it received from PJM. The effect was to pass through the market-price risk to the distribution utilities (and retail ratepayers) in order to facilitate financing the new plants.

¹ *Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), *reh'g en banc denied*, No. 11-1486 (D.C. Cir. Sept. 17, 2014), *certiorari granted*, 135 S. Ct. 2049 (2015) (No. 14-840).

The winning bidders applied for and obtained market-based rate authority allowing them to sell at negotiated or market rates in PJM, and they offered their resources into PJM's capacity auction in compliance with its minimum-offer price rule. All but one of the resources cleared on the basis.

The courts nonetheless held the state procurements preempted. Both appellate courts—the Third Circuit² and Fourth Circuit³—held that the states impermissibly intruded into FERC's field by setting the rates the new generators receive for sales to PJM. The Fourth Circuit also held that Maryland's program conflicted with FERC's regulation of wholesale markets by suppressing prices in the PJM capacity auction and providing new generators with more stable prices for a longer period than FERC deemed appropriate.

The states and one of the affected developers sought *certiorari*. Those requests remain pending. The Supreme Court invited the Solicitor General to file a brief expressing the views of the United States. That brief has not yet been filed.

Spiegel & McDiarmid LLP attorneys have been on the front lines of both sets of cases. On September 29, 2015, partner Jeffrey Schwarz—a member of Spiegel's team defending the Maryland Public Service Commission—will speak about these cases at the Law Seminars International *Energy in the Northeast* conference in Boston. Information about the conference can be found [here](#). The firm's certiorari petition and briefs in *Nazarian* can be found [here](#).

² *PPL EnergyPlus LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), *petition for a writ of certiorari filed sub nom. CPV Power Dev., Inc. v. PPL EnergyPlus, LLC*, No. 14-634 (U.S. docketed Nov. 26, 2014).

³ *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), *petition for a writ of certiorari pending*, No. 14-614 (U.S. docketed Nov. 26, 2014).