

## Courts Slamming Brakes On State Power Plant Plans

By **Keith Goldberg**

*Law360, New York (September 12, 2014, 8:03 PM ET)* -- The Third Circuit's Thursday ruling that a New Jersey subsidy program for new power plant construction usurps Federal Energy Regulatory Commission jurisdiction over electricity markets is the latest decision to suggest that states may have to scale back their own ambitions in a regionalized U.S. power system, experts say.

New Jersey's so-called Long Term Capacity Agreement Pilot Program was designed to provide subsidies for new power plants in the form of a long-term floor price for new generation capacity. However, the federal government — namely, FERC — has exclusive control over interstate rates for wholesales of electric capacity under the Federal Power Act, a three-judge panel said Thursday in upholding a lower court decision that nixed the program.

The ruling comes just three months after the Fourth Circuit concluded that Maryland's program subsidizing new gas-fired power development stepped into FERC territory, upholding a lower court decision. And in February, the Third Circuit concluded FERC didn't act arbitrarily when it accepted regional grid operator PJM Interconnection's decision to eliminate the exemption from fixed price floors for state-mandated gas-fired power plants — in this case, referring to the subsidies offered by New Jersey and Maryland — from the tariff that helps govern the wholesale electricity markets it operates.

“What the circuit courts are doing is following pretty strong Supreme Court doctrine that when the federal agency occupies a field, like jurisdiction over wholesale capacity markets, states cannot independently do decision-making in that area,” said Clint Vince, who chairs Dentons' energy practice.

That doesn't mean the door is shut on states being able to coax new power development within their borders. The Third Circuit may have said New Jersey's pilot program program intruded on FERC territory, but it wouldn't go so far as to say that field preemption will occur whenever a state's legislation indirectly affects matters within FERC's jurisdiction.

The appeals court also said that New Jersey could offer other incentives to developers such as tax breaks for developers and favorable lease terms for state-owned property. The state could even “directly subsidize generators so long as the subsidies do not essentially set wholesale prices,” the panel said.

“This last sentence, for me, suggests that states can be creative — it's not just bonding authority or property tax relief,” said Chip Cannon, an Akin Gump Strauss Hauer & Feld LLP energy regulatory partner. “Potentially, there are other opportunities out there for states to incentivize the development of generation without stepping on FERC's jurisdictional toes.”

But finding those opportunities won't be easy, and the courts haven't exactly crystallized what incentive programs would pass constitutional muster, experts say.

"It's very clear that states can regulate, or not regulate, the mechanics of siting power plants within their boundaries, and that incentives around the margins to make it less expensive to operate, they have that jurisdiction," Cannon said. "To really go to the heart of the question of whether a generator is economic and can generate sufficient revenue, it's not clear to me how a state can resolve that issue without coming pretty close to having an impact on the wholesale market. The plants participate in the wholesale market."

States may have to tailor their incentive programs more narrowly, or focus on smaller, intrastate projects that aren't subject to FERC jurisdiction, experts say. They could run more ambitious programs by the regional transmission organizations that operate the wholesale electricity markets that FERC oversees. But states are in a bind if RTOs say the incentives would impact their wholesale markets and FERC backs those findings, according to Vince.

"They'd have to convince regional authorities that more needs to be done to incentivize new generation and transmission, and convince FERC," Vince said. "It's very hard under this construct of energy federalism for the states to venture beyond their own borders."

That's a consequence of the move from a fully regulated electric market that stopped at state borders to a deregulated, regional model in many parts of the U.S. However, Arnold & Porter LLP energy regulatory partner Sandy Rizzo wonders if state incentives for new generation are even necessary within regional markets.

In New Jersey and Maryland's case, PJM has a well-established forward capacity market, and the prices that clear in that market have been sending signals, Rizzo said.

"I think there's not as much legitimate need to exercise the authority because there is now a construct that is taking care of this issue," Rizzo said. "The proof is in the pudding: This [New Jersey] litigation was ongoing and CPV [Power Development Inc.] still built its plant and Hess [Newark LLC] built its plant, even though they're not going to get this [subsidy] money."

FERC isn't about to turn the clock back 20 years, before rules establishing open-access transmission and RTOs spurred the development of U.S. wholesale electricity markets. That's why the decisions by the Third and Fourth circuits are vital to maintaining the integrity of those markets, according to Rizzo — because subsidies like the ones offered by New Jersey and Maryland would artificially suppress prices and discourage both new and existing generators from making investments.

"They uphold the competitive electric market system and they say, 'This is how the federal government has decided we're going to have these electricity markets,'" Rizzo said. "If the states had been successful, the competitive market would eventually decompose."

Circuit Judges Julio M. Fuentes and Patty Shwartz and U.S. District Judge Lee H. Rosenthal sat on the panel for the Third Circuit.

The case was argued for the appellees by Paul Clement of Bancroft PLLC.

The case was argued for the BPU by Richard Engel of the New Jersey Office of the Attorney General.

The case was argued for CPV Power Development Inc., which intervened on behalf of the BPU, by Larry Eisenstat of Crowell & Moring LLP and for a Hess Corp. subsidiary, which also intervened on behalf of the BPU, by Richard Zuckerman of Dentons US.

The case is PPL EnergyPlus LLC et al. v. Lee Solomon, case numbers 13-4330 and 13-4501, before the U.S. Court of Appeals for the Third Circuit.

--Editing by Jeremy Barker.

---

All Content © 2003-2014, Portfolio Media, Inc.