

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

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;)
and PUBLIC SERVICE ELECTRIC AND)
GAS COMPANY,)

Document electronically filed.

Civil Action No. _____

Plaintiffs,

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; and NICHOLAS V. ASSELTA,)
in his official capacity as Commissioner of the)
New Jersey Board of Public Utilities,)

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs and their principal places of business are as follows: Calpine companies (717 Texas Avenue, Suite 1000, Houston, TX 77002);¹ Exelon Generation Company, LLC (300 Exelon Way, Kennett Square, PA 19103); GenOn Energy, Inc. (1000 Main Street, Houston, TX 77002); NAEA Ocean Peaking Power, LLC (123 Energy Way, Lakewood, NJ 08701); PPL Parties (2 North Ninth Street, Allentown, PA 18101);² and PSEG Power, LLC (80 Park Plaza – T25, Newark, New Jersey 07102-4194) (collectively, “Generator Plaintiffs”); and Plaintiffs Atlantic City Electric Company (800 King Street, Wilmington, Delaware 19899); and Public Service Electric and Gas Company (80 Park Plaza, P.O. Box 570, Newark, New Jersey 07101-0570) (collectively, “Utility Plaintiffs”).

Plaintiffs, by their attorneys, hereby file this action for declaratory and injunctive relief against defendants Lee A. Solomon (in his official capacity as President of the New Jersey Board of Public Utilities, and not individually), and Jeanne M. Fox, Joseph L. Fiordaliso, and Nicholas V. Asselta (in their official capacities as Commissioners of the New Jersey Board of Public Utilities, and not individually). The Board of Public Utilities’ principal place of business is Two Gateway Center, 8th Floor, Suite 801, Newark, NJ 07102. In support of their complaint, Plaintiffs state as follows:

¹ The “Calpine companies” include Plaintiffs Calpine Mid-Atlantic Generation, LLC, Calpine New Jersey Generation, LLC, Calpine Bethlehem, LLC, Calpine Mid-Merit, LLC, Calpine Vineland Solar, LLC, Calpine Energy Services L.P., Calpine Mid-Atlantic Marketing, LLC, and Calpine Newark, LLC, which are generation and marketing subsidiaries of Calpine Corporation.

² The “PPL Parties” include Plaintiffs PPL EnergyPlus, LLC; PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; Lower Mount Bethel Energy, LLC; PPL New Jersey Solar, LLC; PPL New Jersey Biogas, LLC; and PPL Renewable Energy, LLC, which are marketing and generation subsidiaries of PPL Corporation.

NATURE OF THE ACTION

1. Wholesale electricity markets are complex, interstate, and regulated by the Federal Energy Regulatory Commission (“FERC”) under Part II of the Federal Power Act (“FPA”), 16 U.S.C. § 824. This case concerns a recently enacted New Jersey law that provides certain New Jersey-selected electric generation facilities a special guaranteed price for wholesale electricity transactions in a market governed by a FERC-approved tariff. P.L. 2011, Chapter 9, Senate No. 2381, approved Jan. 28, 2011 (“the Act”). The Act seeks to impose regulatory policies that New Jersey has not been able to persuade FERC to adopt and that favor in-state generation over out-of-state generation. Because the statute violates well-established principles under the Supremacy Clause and the Commerce Clause of the United States Constitution, Plaintiffs – a group of electricity generators and utilities – are entitled to declaratory and injunctive relief barring implementation of the new law.

2. The Federal Power Act gives FERC exclusive jurisdiction to regulate wholesale electricity sales, and thereby establishes a bright line barring states from purporting to regulate in that area. The State of New Jersey, however, has long been dissatisfied with the market-based regulatory approach adopted by FERC to govern the wholesale market for electric generating “capacity.” In that market, which is administered by FERC-supervised PJM Interconnection (“PJM”), local utilities purchase commitments from generators of electricity to make wholesale generation capacity available if it is needed in the event of unforeseen contingencies or to meet peak demand. In that way, local utilities ensure that they will have electricity to deliver to their customers at all times.

3. Over the past several years, in a series of FERC proceedings, New Jersey has challenged PJM’s FERC-approved rules governing the wholesale capacity market on the ground

that they have failed to stimulate the addition of new capacity in the State. FERC has consistently rejected those challenges and has approved PJM's rules, which rely on market forces to set the price of capacity and to identify when and where in PJM new generation capacity is needed.

4. Having failed to persuade FERC to see matters its way, New Jersey has now enacted a law that interferes with and undermines the PJM wholesale capacity market exclusively regulated by FERC. The Act is intended to supplant FERC's policy choices and to impose New Jersey's preferred regulatory approach on the PJM capacity market. In addition, by using artificial price guarantees in that market to skew the development of new generation facilities sought by New Jersey, the Act also will affect PJM's separate wholesale "energy" market, in which utilities purchase on a daily basis the electricity that their customers actually consume.

5. In order to encourage the development of new generating capacity in New Jersey that market forces have deemed uneconomical, the Act requires New Jersey's local utilities to enter into irrevocable, long-term contracts with certain generation companies that guarantee those companies a fixed price for electric capacity. The New Jersey Board of Public Utilities ("BPU" or "Board") will select a limited number of generators to receive these special price guarantees. Other generators in the interstate wholesale capacity market will not receive these special contracts.

6. In exchange for the price guarantee, the Act requires the favored generators chosen by the BPU to bid their new capacity into the PJM interstate wholesale capacity auction below the market price for capacity – no matter how low that market price may be, and regardless of the actual costs of the new capacity. The favored generators are not at risk,

however, because of the Act's guaranteed price mechanism, which operates outside the auction. Thus, the Act requires the favored generators to bid into the PJM interstate wholesale capacity auction at an artificially low price, thereby skewing the PJM auction, in exchange for receiving a price guarantee that the State has required local utilities to provide. The Act thus attempts to secure the advantages of the interstate wholesale market approved by FERC, while simultaneously distorting that market's federally governed pricing mechanism.

7. Under the Supremacy Clause of the United States Constitution, a state law is preempted when Congress intends federal law to occupy the field or when state regulation stands as an obstacle to the accomplishment of Congress's goals. Under Part II of the FPA, 16 U.S.C. § 824(b), Congress has granted FERC the exclusive authority to regulate in the wholesale electricity field. Only FERC may set wholesale rates and regulate wholesale markets. The Act invades this exclusive domain by requiring New Jersey utilities to provide a guaranteed fixed price for capacity to favored generators, and by dictating to the new generators how they must interact with the FERC-regulated wholesale capacity auction.

8. The Act also contravenes and thus stands as an obstacle to FERC's regulatory policy choices. FERC has determined that a market-based approach is the most efficient means of determining the wholesale price of capacity and signaling when and where new generation capacity is needed in PJM. Yet the Act requires New Jersey utilities to provide a guaranteed fixed price for capacity to favored generators, which directly contravenes FERC's decision to use market forces to determine wholesale capacity rates. The Act also assures that certain new generators will receive an artificially high and guaranteed price for capacity that is not available to existing generators, in derogation of FERC's determination that new generation units should

not enjoy preferential compensation. The Act also invades FERC's exclusive jurisdiction, and stands as an obstacle to its policy choices, in numerous other respects.

9. In addition, the Act violates the Commerce Clause of the United States Constitution. The intent and effect of the Act is to favor in-state producers over out-of-state competitors in order to create jobs and investment in the State. The Act was conceived as a blatant and explicit effort to promote the construction of new generation facilities in New Jersey. In particular, it originally was intended to enable LS Power Development LLC ("LS Power"), which has offices in New Jersey, to build a generation facility in the State. In subsequent revisions, the New Jersey Legislature attempted to disguise its in-state preferences. But the Act continues to impose requirements designed to reserve a portion of the local market for in-state generation, and deny these opportunities to out-of-state generation. The Commerce Clause forbids such in-state favoritism.

10. In tacit recognition of the Act's illegality, the New Jersey Legislature has purported to insulate the Act from judicial challenge, providing that the special price guarantee contracts available only to the favored generators chosen by the BPU cannot be reviewed by FERC or by any court.

11. In a separate proceeding, PJM Power Providers Group (a nonprofit association with twelve member companies, several of whom are also Plaintiffs in the instant case) has filed a complaint with FERC, seeking to clarify the rules of the PJM capacity auction to prevent the below-cost capacity bids required by the Act. Even if accepted by FERC, those clarifications would not eliminate the Act's constitutional violations or all of its detrimental effects. Although FERC has power over PJM's tariff and can blunt the Act's impact on the PJM capacity auction,

FERC does not have power to enjoin implementation of the Act. Thus, the constitutional issues raised in this Complaint are separate from the regulatory issues pending before FERC.

12. For these reasons, explained further below, Plaintiffs are entitled to declaratory and injunctive relief barring the implementation of the Act, except for Section 5.³

PARTIES

13. Plaintiffs Calpine Mid-Atlantic Generation, LLC, Calpine New Jersey Generation, LLC, Calpine Bethlehem, LLC, Calpine Mid-Merit, LLC, Calpine Vineland Solar, LLC, Calpine Energy Services, L.P., Calpine Mid-Atlantic Marketing, LLC, and Calpine Newark, LLC (collectively, “the Calpine companies”) are generation and marketing subsidiaries of Calpine Corporation. The Calpine generation companies are physically located in the PJM market and participate in PJM wholesale energy and capacity markets. Calpine Corporation is a publicly-traded independent power producer based in Houston, Texas. It operates 91 power plants that are capable of delivering approximately 27,500 megawatts of clean, reliable electricity to customers and communities in 20 U.S. states and Canada.

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

³ Plaintiffs are not challenging the constitutionality of or seeking relief barring implementation of Section 5 of the Act which prohibits gas public utilities from imposing “a societal benefits charge pursuant to section 12 of P.L. 1999, c.23 (C.48:3-60), or any other charge designed to recover the costs for social, energy efficiency, conservation, environmental or renewable energy programs, on natural gas delivery service or commodity that is used to generate electricity that is sold for resale.” Where used herein, references to the “Act” are to the Sections of the Act other than Section 5.

15. Plaintiff GenOn Energy, Inc., headquartered in Houston, is a generator of wholesale electricity with power generation facilities located in key regions of the country and a generation portfolio of approximately 24,600 megawatts, which includes approximately 12,150 megawatts in the PJM market. GenOn's portfolio of power generation facilities includes baseload, intermediate, and peaking units using coal, natural gas and oil to generate electricity. It operates plants in twelve states, including New Jersey.

16. Plaintiff NAEA Ocean Peaking Power, LLC is a subsidiary of North American Energy Alliance, LLC ("NAEA"), which is headquartered in Iselin, New Jersey and owned by Industry Funds Management, one of the largest global investors in infrastructure. NAEA owns a portfolio of 1,755 megawatts of clean and efficient power stations located in the Northeastern United States. The fleet, which is comprised of hydro-electric and fossil fuel burning facilities, is located in two energy markets, PJM and New England ISO.

17. Plaintiffs PPL EnergyPlus, LLC; PPL Brunner Island, LLC; PPL Holtwood, LLC; PPL Martins Creek, LLC; PPL Montour, LLC; PPL Susquehanna, LLC; Lower Mount Bethel Energy, LLC; PPL New Jersey Solar, LLC; PPL New Jersey Biogas, LLC; and PPL Renewable Energy, LLC (collectively, the "PPL Parties") are marketing and generation subsidiaries of PPL Corporation that are physically located in the PJM market and participate in PJM wholesale energy and capacity markets. PPL Corporation, headquartered in Allentown, Pennsylvania, controls or owns about 19,000 megawatts of generating capacity in the United States, including the PJM market.

18. Plaintiff PSEG Power, LLC is a Delaware limited liability company, headquartered in Newark, New Jersey. PSEG Power is a wholly-owned subsidiary of Public Service Enterprise Group, Inc. PSEG Power owns approximately 11,850 megawatts of

generating capacity in PJM, approximately 9,950 megawatts of which is located in New Jersey. PSEG Power sells energy and capacity at wholesale in interstate commerce, including in PJM's capacity and energy markets.

19. Plaintiff Atlantic City Electric Company, based in New Jersey, is a subsidiary of Pepco Holdings, Inc. that provides electric service to 547,000 customers in southern New Jersey. Pepco Holdings, Inc. is one of the largest energy delivery companies in the Mid-Atlantic region, serving about 1.9 million customers in Delaware, the District of Columbia, Maryland and New Jersey. Because Atlantic City Electric is a New Jersey utility, the Act requires it to enter into contracts to provide eligible generation companies with a fixed price for capacity and to pass any costs on to New Jersey's ratepayers.

20. Plaintiff Public Service Electric and Gas Company ("PSE&G"), located in New Jersey, is one of the largest combined electric and gas companies in the United States and is also New Jersey's oldest and largest publicly owned utility. PSE&G is the largest subsidiary of Public Service Enterprise Group, Inc. PSE&G currently serves nearly three quarters of New Jersey's population in a service area consisting of a 2,600-square-mile diagonal corridor across the state from Bergen to Gloucester Counties. It is the largest provider of gas and electric service, servicing 1.7 million gas customers and 2.1 million electric customers in more than 300 urban, suburban and rural communities, including New Jersey's six largest cities. Because PSE&G is a New Jersey utility, the Act requires it to enter into contracts to provide eligible generation companies with a fixed price for capacity and to pass any costs on to New Jersey's ratepayers.

21. Defendant Lee A. Solomon is the President of the BPU. President Solomon is sued in his official capacity for declaratory and injunctive relief only.

22. Defendant Jeanne M. Fox is a Commissioner of the BPU. Commissioner Fox is sued in her official capacity for declaratory and injunctive relief only.

23. Defendant Joseph L. Fiordaliso is a Commissioner of the BPU. Commissioner Fiordaliso is sued in his official capacity for declaratory and injunctive relief only.

24. Defendant Nicholas V. Asselta is a Commissioner of the BPU. Commissioner Asselta is sued in his official capacity for declaratory and injunctive relief only.

25. Defendants have been, are presently, and will be acting under color of authority and law of the State of New Jersey.

JURISDICTION AND VENUE

26. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the action brings claims under the United States Constitution and federal law.

27. The Court is empowered to grant declaratory relief by 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

28. This Court is empowered to grant preliminary and permanent injunctive relief by, *inter alia*, 28 U.S.C § 2202 and Rule 65 of the Federal Rules of Civil Procedure.

29. This Court has personal jurisdiction over Defendants because each Defendant conducts a substantial portion of his or her duties as an officer of the BPU in the District of New Jersey. The BPU's main office is located in Newark, New Jersey.

30. Venue is proper in this District under 28 U.S.C. § 1391(b)(1) and (2) because a substantial part of the events giving rise to this action occurred in the District of New Jersey.

FACTUAL ALLEGATIONS

A. The FERC-Regulated Wholesale Market for Capacity.

31. FERC has approved PJM, a regional transmission organization, to coordinate and administer the wholesale markets for electricity and for transmission in New Jersey and in all or part of thirteen other states, ranging from Illinois to the Eastern Seaboard, and from New Jersey to North Carolina.

32. Generators of electricity in PJM's territory, including in New Jersey, participate in a PJM-administered markets for energy, that is, electricity that is actually consumed by factories, homes, and businesses, as well as for a wholesale electricity product called "capacity," which is essentially a commitment by generators to produce electricity if it is needed to meet demand. In PJM, utilities purchase capacity from generators to ensure a supply of electricity at all times, including periods of peak demand. The amount of capacity that utilities must purchase at wholesale is set by the PJM tariff approved by FERC.

33. A FERC tariff governs the PJM-administered markets for energy and capacity, and any entity may petition FERC to require changes and improvements to the tariff. The tariff provides for auctions that determine the respective rates for energy and capacity.

34. PJM's capacity market is governed by the "Reliability Pricing Model," or RPM. The primary component of the RPM is an annual "Base Residual Auction," through which PJM administers procurements of capacity for a delivery year that starts three years after the time of the auction.

35. Subject to a FERC-imposed mitigation plan, generators state the price at which they are willing to offer their capacity, and PJM uses those offers to create a supply curve. Using an administratively determined demand curve based primarily on the marginal cost of new entry,

PJM determines the price at which demand is fully supplied. That price is called the “market clearing price.”

36. Generators which offer to provide capacity at or below the market clearing price successfully sell their capacity in the auction – or “clear” the auction – and they receive the market clearing price for that capacity. If generators are awarded sales of capacity in the RPM auction, PJM rules require that they also offer to sell the electricity they generate in the separate PJM market for energy.

37. The PJM capacity auction is designed to provide the marketplace with incentives to add capacity in PJM when, but only when, it is economical to do so. When the price for capacity rises above the cost of new entry, generators have an incentive to increase supply by building additional generation capacity or by upgrading (or “uprating”) existing plants, and purchasers have an incentive to curtail their use of electricity at times of peak demand. When the price for capacity falls below the cost of new entry, generators have an incentive to reduce supply by retiring inefficient plants. The capacity auction is designed so that, in the long run and on average, the price for capacity will reflect the cost of new entry.

38. In addition, the RPM has a locational element, designed to take into account locational differences in the value of capacity caused by constraints on the transmission system. The locational element enables generation resources located in more constrained areas with less supply to receive a higher price for their capacity than generation resources located in other regions. The RPM thereby provides potential generation developers with price signals that reflect not only the cost of new entry, but also the areas in which new entry is needed the most.

39. The FERC-approved PJM tariff treats new capacity no differently than existing capacity, and FERC has previously rejected efforts to afford special treatment to new generation facilities.

40. The PJM capacity and energy auctions reflect a policy choice made by FERC to encourage a market-based approach as the most efficient and beneficial method for setting wholesale rates and regulating the wholesale electricity market. FERC has chosen to harness market forces to create incentives for generators to supply an economically rational amount of generating capacity. In doing so, FERC has encouraged an alternative to the traditional model in which vertically-integrated local utilities with monopolies over service areas constructed generation facilities in response to regulatory directives and recouped the costs from ratepayers in cost-based rates. FERC found that the traditional model had led in the 1970s and 1980s to significant overbuilding of generation, with the result that electricity rates dramatically increased as ratepayers were forced to pay for unneeded plants.

41. New Jersey has followed FERC's lead and has adopted a market-based approach to regulating the retail electricity market in the State. The 1999 Electric Discount and Energy Competition Act, N.J. Stat. Ann. § 48:3-49 et seq., and its implementing regulations, led to the divestiture or functional separation of utilities' generation facilities from their local distribution facilities, and allowed retail customers to purchase power from their choice of competitive generators, rather than being held captive to a local utility with a monopoly over a given territory.

B. New Jersey's Repeated Attempts to Change RPM Rules.

42. Over a period of years, New Jersey repeatedly has petitioned FERC to change RPM, because in New Jersey's view market forces have not produced enough new generation capacity in the State. In particular, New Jersey has petitioned FERC to change PJM's tariff to allow new generation facilities to receive a fixed price for capacity for a seven-year term – similar to what the Act seeks to accomplish. FERC has consistently rejected the State's challenges and proposals.

43. Among numerous examples of these efforts, the BPU participated in FERC proceedings in 2006 to express the view that "RPM, in its current form, will not ensure adequate electricity supply within New Jersey, and will lead to increased costs to our consumers."⁴ In 2008, BPU again expressed the view that "we expect that the first four years of RPM will produce minimal new generation in the areas of PJM where new generation is most urgently needed."⁵

44. As Commissioner Frederick Butler of the BPU explained in testimony in the 2008 proceeding: "The NJBPU has made its view of RPM clear to the Commission. We opposed the RPM settlement; we sought rehearing of the Commission's approval of the settlement; and we have taken our challenge to the federal appellate courts after the Commission denied rehearing. For the same reasons we have continued to oppose RPM, we expect the Commission to reach the same conclusions we have about RPM."⁶ Nonetheless, FERC rejected New Jersey's position.

⁴ *PJM Interconnection, LLC*, FERC Docket Numbers ER05-1410-000 and EL05-148-000, Statement of Commissioner Frederick Butler, New Jersey Board of Public Utilities, at 1 (Feb. 3, 2006).

⁵ *Capacity Markets in Regions with Organized Electric Markets*, FERC Docket No. AD08-4-000, Testimony of Commissioner Frederick F. Butler, New Jersey Board of Public Utilities, at 6.

⁶ *Id.* at 5.

45. The BPU's opposition to the RPM capacity pricing mechanism also was incorporated in New Jersey's statutorily mandated 2008 Energy Master Plan. The plan criticizes RPM as an inefficient, poorly targeted method of encouraging new generation.⁷ Among the specific goals of the Plan were to "[w]ork with PJM and the FERC to modify or replace the RPM, with a mechanism that focuses incentives on new generation capacity."⁸

46. In 2009, the BPU sought changes to PJM's tariff that would allow a new capacity resource to lock in a "new entry price" for seven years. Although FERC "recognize[d] that a longer commitment period may aid the developer in financing a project," it nonetheless rejected the BPU's proposed changes. It reasoned that the proposal would "result in further price discrimination between existing resources, including demand response, and new generation suppliers." It also noted that RPM was already "designed to provide long-term forward price signals," and that a seven-year guaranteed "new entry price" would impose unjustifiable costs on utilities and other load-serving entities who would be forced to make "uplift payments in excess of auction clearing prices."⁹

47. In September 2009, the BPU again urged FERC and PJM to explore "needed revisions to RPM" including "the possibility of longer-term certainty of revenues for new generating capacity."¹⁰ FERC, however, declined to adopt that approach.¹¹

48. In December 2009, LS Power – which has been seeking the State's assistance in funding a new generation facility in New Jersey – proposed to the BPU that it alter the process

⁷ *New Jersey Energy Master Plan*, at 8, 32 (Oct. 2008).

⁸ *Id.* at 93.

⁹ *PJM Interconnection LLC*, 126 FERC ¶ 61,275 at ¶ 62,563 (2009).

¹⁰ *PJM Interconnection, LLC*, FERC Docket No. ER-09-1673-000, New Jersey Board of Public Utilities Notice of Intervention and Comments, at 4 (Sept. 22, 2009).

¹¹ *PJM Interconnection, LLC*, 129 FERC ¶ 61,081, Slip Op. at 7 (Oct. 29, 2009).

by which New Jersey utilities purchase electricity from generators. LS Power’s proposal was similar to the program now embodied in the Act.¹²

49. Prompted in part by LS Power’s comments, the BPU commenced a “technical conference” among interested parties to address “the State’s power and capacity needs” and to examine LS Power’s proposal in particular.¹³ LS Power and the State’s Division of Rate Counsel criticized RPM as ineffective in stimulating the development of new generation capacity within New Jersey.¹⁴ The BPU, for its part, reiterated one month later in proceedings before FERC that it “continues to object to the RPM process and scheme in its entirety.”¹⁵

50. Having repeatedly failed to persuade FERC to change RPM, New Jersey has now taken matters into its own hands. The Act seeks to supplant FERC’s market-based regulatory scheme and to ensure the construction of new generation facilities in New Jersey.

C. The Act.

51. The legislative findings in the Act criticize the RPM for failing to bring about the construction of new generation resources in “the region and the State,” Act, § 1(b), and assert that incentives other than those deemed adequate by FERC and PJM are needed to foster the development of additional resources and to ensure reliability of service. Act, § 1(d).

52. The findings further declare that with certain changes, RPM auctions could “provide necessary incentives . . . for the construction of new capacity . . . by allowing new

¹² *In the Matter of the Provision Of Basic Generation Service For The Period Beginning June 1, 2010*, BPU Docket No. EO09050351 (Dec. 1, 2004).

¹³ *In the Matter of the New Jersey BPU’s Review of the State’s Electric Power and Capacity Needs*, BPU Docket No. EO09110920 (Notice served June 14, 2010).

¹⁴ *In the Matter of the New Jersey BPU’s Review of the State’s Electric Power and Capacity Needs*, BPU Docket No. EO09110920, Office of Rate Council Comments, at 16 (July 2, 2010); LS Power Comments.

¹⁵ *PJM Interconnection LLC*, FERC Docket No. ER09-1064-004, Comments of the New Jersey Board of Public Utilities, at 2 (July 30, 2010).

resources to qualify and receive a guaranteed capacity price for a longer period of time.” But such changes were “previously denied by FERC” and future changes are “uncertain at this time.” Act, § 1(c). As a result, the findings declare that “New Jersey is experiencing an electric power capacity deficit and high power prices” caused by the failure to upgrade transmission systems to ensure a reliable supply of “electricity and capacity from generators located outside of New Jersey.” Act, § 1(e).

53. To create incentives for the development of new, in-state electric generation facilities, the Act implements a “long-term capacity agreement pilot program” (“LCAPP”). The Act forces New Jersey utilities to provide a guaranteed fixed price for capacity, imposed by the BPU, to certain new generators participating in PJM, with the immediate costs of that guarantee to be borne by New Jersey ratepayers. The intent and effect of the LCAPP is to encourage the construction of new generation in the State even when, under the FERC-approved PJM economic model, such new generation would not be economical.

54. From the outset, the Act was conceived to benefit LS Power. The Act’s price guarantee was intended to ensure that LS Power could obtain the financing it needed to build the plant, and the Act was designed to bring jobs to the legislative district in which LS Power’s plant would be located. Indeed, in response to the claim that the original version of the legislation was designed to benefit LS Power, the legislator in whose district the plant would be built reportedly said, “I’m not hiding that.”¹⁶ Out-of-state enterprises were expressly forbidden from participating in the LCAPP.

¹⁶ See http://blog.nj.com/njv_tom_moran/2010/11/a_big_subsidy_a_quick_vote_and.html.

55. During the legislative process, the Act was amended to increase the amount of capacity that utilities are required to procure from generators eligible to participate in the LCAPP from 1,000 megawatts to 2,000 megawatts. The purpose of this amendment reportedly was to benefit a second company, Competitive Power Ventures (“CPV”), which seeks to build a plant in Woodbridge, New Jersey. Thus, the amendment aims to ensure that at least two new plants will be built in New Jersey.¹⁷

56. On information and belief, other companies are also vying to construct new generation facilities in the State, and are potential beneficiaries of the Act.

57. Despite amendments to the Act, its intent remains the same: to encourage the construction of new generation plants in New Jersey while simultaneously undermining the federally regulated wholesale capacity market. The Act forces New Jersey utilities to provide new in-state generation plants with a guaranteed price for their capacity and dictates the manner in which that new generation must participate in the wholesale capacity market. In so doing, the Act impedes other resources, including those outside the State, from competing with these new generation plants to serve a portion of New Jersey’s capacity needs and damages the competitive wholesale marketplace.

58. The Act’s legislative findings further make clear that the State was motivated to pass the Act by a desire to create jobs and investment in New Jersey. They state that New Jersey’s alleged capacity deficit and high power prices “may result in the loss of jobs and investment,” Act, § 1(e), and that the Act will “create opportunities for employment in the energy sector.” Act, § 1(i).

¹⁷ See <http://www.politickernj.com/44142/christie-keeps-sweeney-and-mccormac-happy-power-plant-bill-awaits-his-signature>.

59. The Act’s goal of fostering job creation and investment in New Jersey was reinforced by testimony during the legislative process. Witnesses at the November 15, 2010 Senate Environment and Energy Committee Hearing on the Act testified that the Act was “essentially a jobs bill”¹⁸ and that it would “mak[e] New Jersey more attractive to new business” and “help[] reduce dependency on out-of-state generation.”¹⁹ The New Jersey Division of Rate Counsel submitted testimony that supported the Legislature’s “interest in promoting more electric generation to be built in the state”²⁰

The LCAPP Process

60. The Act provides for an expedited schedule. The BPU must initiate and complete a proceeding to establish the LCAPP within 60 days of the Act’s effective date. Act, § 3(a).

61. Generators that wish to participate in the LCAPP must submit bids for an offer price, capacity quantity, and term of no more than fifteen years. Act, § 3(c)(2) & (3), § 2 (definition of “standard offer capacity agreement”).

62. The Act directs the BPU to select the winning bidders from among the qualified “eligible generators.” Act, § 3(c)(3). The Act defines an “eligible generator” as follows: “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 [the Act].” This provision is most logically read to limit eligibility to new capacity resources developed after the Act’s effective date.

¹⁸ Testimony of James B. Kehoe, President of New Jersey State Association of Pipe Trades, *New Jersey Senate Environment and Energy Committee Hearing* (Nov. 15, 2010).

¹⁹ Testimony of Tom Hoatson, Director of Development and Regulatory Affairs, LS Power, *New Jersey Senate Environment and Energy Committee Hearing* (Nov. 15, 2010).

²⁰ Letter of Stephanie A. Brand, Director, N.J. Division of Rate Counsel, to Sen. Bob Smith for consideration during November 15 *New Jersey Senate Environment and Energy Committee Hearing*, at 2 (Nov. 12, 2010).

63. In selecting the winning bidders, the BPU must evaluate the bidders based on the “net benefit to ratepayers of each prequalified eligible generator’s offer price and term.” Act, §§ 3(b)(3), (c)(7).

64. The Act discriminates in favor of eligible generators whose facilities will be located within the boundaries of New Jersey. It provides a preference for bidders “that can enter commercial operation for delivery year 2015,” Act, §§ 3(b)(3), (c)(8), and requires that eligible generators demonstrate a “reasonable certainty of completion of development, construction and permitting necessary to meet the desired in-service date.” Act, §§ 3(b)(2), (c)(6). To enter commercial operation for delivery year 2015, a facility must be in service by June 1, 2014.

65. These provisions are largely intended to benefit LS Power, which has already obtained permits from the State and thus would enjoy a significant advantage in qualifying for the preference for bidders that can enter commercial operation for delivery year 2015 (that is, by June 1, 2014).

66. The Act also discriminates in favor of in-state generation by requiring eligible generators to “prequalify” through a “showing of environmental, economic, and community benefits.” Act, § 3(b)(2). This provision will understandably be interpreted and applied by the BPU to skew its choice in favor of generators providing such benefits in New Jersey, rather than in other states. The President of the BPU has already stated his intention to bring about the construction of new generation plants in New Jersey.²¹

67. After selecting the winning bidders, the BPU must award them “standard offer capacity agreements” (“SOCAs”). Act, § 3(a). The SOCAs are “agreements” in name only,

²¹ New Jersey Board of Public Utilities News Release (Dec. 21, 2010).

however, and are in fact mandates imposed on New Jersey utilities and generators. Under the SOCAs, New Jersey's utilities are required to procure 2,000 megawatts of capacity from the winning bidders at a fixed price approved by the BPU. Act, § 3(c)(1), § 2 (definition of "standard offer capacity price"). New Jersey's utilities are required to guarantee this fixed price, regardless of the market clearing price set by the PJM wholesale capacity auction.

68. The Act binds public utilities to the guaranteed prices set in the SOCAs for the length of the SOCAs' terms, which may be as long as fifteen years, as determined by the BPU. Act, § 3(c)(10).

69. The Act mandates that no single eligible generator may enter into a SOCA for more than 700 megawatts of capacity. Act, § 3(c)(5).

70. The Act states that the SOCAs resulting from the LCAPP proceeding must be awarded and executed within "30 days after the approval of the form of the SOCA or SOCAs," though it does not explain what is meant by "approval of the form." Act, § 3(a).

Market Effect

71. For each delivery year, if the fixed price in a winning bidder's SOCA is higher than the resource clearing price set in the annual PJM capacity auction, New Jersey's utilities must make payments to the winning bidders equal to the difference between the SOCA price and the auction clearing price, multiplied by the winners' SOCA capacity. Act, § 3(c)(4).

72. The Act mandates that New Jersey's public utilities recoup all costs associated with their guarantee of a capacity price through a "non-bypassable, irrevocable charge" assessed on ratepayers. Act, § 3(d). The Act thereby harms New Jersey public utilities by imposing on them substantial costs that they must recover in rates, reducing their available credit, increasing

their cost of debt, and placing them at a disadvantage in retaining customers within their service territories compared to suppliers that do not bear the cost of the subsidies.

73. In the unlikely event that the PJM market price is higher than a winning bidder's fixed SOCA price, then the winning bidder must pay refunds to the public utilities to make up the difference. Act, § 3(c)(4).

74. The FERC-approved PJM tariff does not require new generators to offer their capacity into the RPM auctions, let alone "clear" their capacity in those auctions. Instead, it is designed so that market forces control bidding behavior and thus the market-clearing price for capacity in the auction. In contravention of the tariff, the Act seeks to influence both bidding behavior and the outcome of the auction, by requiring that the generators who win SOCA "participate in and clear the annual base residual auction conducted by the PJM . . . for each delivery year of the entire term of the agreement." Act, §§ 3(c)(11) & (12).

75. The obligation to "clear" the RPM auction – that is, sell all of their capacity – dictates that the selected generators offer to sell their capacity below the prevailing market price. The only way generators can ensure that they will "clear" is by offering to sell at a price at or below whatever "market clearing" price is established by the auction (in other words, to bid as a so-called "price-taker"). Since the market clearing price cannot be known before the auction takes place, an obligation to "clear" the auction as a practical matter requires the generator to offer capacity at uncompetitively low levels, for example, at a price of zero, in order to ensure that the offer will always be at or below the market clearing price.

76. By bidding in substantial excess capacity at uncompetitively low levels, the selected generators will artificially suppress the overall market clearing price for capacity in the

RPM Base Residual Auctions. But the selected generators will still receive a fixed, above-market price for their capacity, as provided for in the SOCAs mandated by the Act.

77. The expected effects of the Act are that market forces will no longer determine the prices of wholesale capacity and energy in PJM and that New Jersey ratepayers will pay substantial subsidies to the winning in-state bidders. Some proponents of the Act have suggested that, by artificially suppressing the overall market clearing price for capacity, New Jersey ratepayers will recoup the cost of the subsidies. Thus, an immediate effect of the Act will be a subsidy for favored in-state generation at the expense of out-of-state generation.

78. By distorting the pricing signals sent in the RPM auction, however, the Act will in the longer run bring about precisely the harms that FERC sought to avoid by instituting market-based regulation. New Jersey ratepayers are likely to bear the significant costs of paying for generation facilities that are not needed. Additional subsidies will be needed in the future to encourage the further construction of new capacity in PJM. And other states may promote similar schemes to encourage the construction of new generation facilities in their territories, resulting in the overbuilding of new capacity.

79. The Independent Market Monitor for the PJM region has expressed concerns about the Act. The Market Monitor released a report on January 6, 2011, stating that the Act “would affect the investment decisions of current owners of capacity and potential investors in capacity both in New Jersey and in areas outside of New Jersey.” He warned of “perhaps significant unintended consequences for the business and residential customers who would have to pay the mandatory subsidy” and an increased “probability that additional subsidies by New Jersey ratepayers will be required for any future capacity additions, either in the form of generation or demand side resources, needed to maintain reliability in New Jersey.” He further

stated that the Act may “increase the probability that subsidies by ratepayers in other states will be required for any future capacity additions, either in the form of generation or demand side resources, needed to maintain reliability in that area.”²²

80. In addition, PJM itself has expressed concern. In a letter dated December 3, 2010, PJM informed the BPU that the Act facilitates bidding behavior that is “not consistent with the intent” of the RPM rules set forth in the PJM tariff, which are designed to “prevent market participants from submitting uneconomic offers based on the receipt of out of market payments to artificially depress RPM auction prices.”²³

81. By artificially depressing wholesale prices for capacity and energy in PJM in the short run, and by excluding Generator Plaintiffs’ out-of-state generation from competing to serve part of New Jersey’s capacity needs, Generator Plaintiffs allege that the Act will cost them a substantial amount of money each year, which could easily be in the tens, or even hundreds, of millions of dollars. PJM’s Independent Market Monitor has estimated that the Act would cost out-of-state generators collectively more than \$1.5 *billion*.

82. By forcing Utility Plaintiffs to enter into long-term, irrevocable, costly contracts to pay subsidies that will impose substantial costs on them that they must recover in rates, reduce their available credit, increase their cost of debt, and undermine their ability to retain customers vis-à-vis suppliers that do not bear the cost of the subsidies, Utility Plaintiffs allege that the Act will cost them a substantial amount of money each year.

²² Independent Market Monitor for PJM, *Impact of New Jersey Assembly Bill 3442 on the PJM Capacity Market*, at 1-2 (Jan. 6, 2011).

²³ Letter of Andrew L. Ott, Senior Vice President for Markets, PJM Interconnection, to Lee Solomon, President, New Jersey Board of Public Utilities, at 1 (Dec. 3, 2010).

Limits on Review

83. Despite the fact that the RPM auction is a FERC-regulated market, and that sales of capacity through PJM are wholesale sales subject to exclusive FERC jurisdiction, the Act expressly prohibits FERC from reviewing the SOCAs that it requires New Jersey utilities to enter with winning bidders. It also purports to strip the courts of their authority to review the legality of such agreements. The Act provides: “Neither the [BPU] or any other governmental entity” – which is defined to mean “any federal, state, municipal, local or other governmental department, commission, board, agency, court, authority or instrumentality having competent jurisdiction,” Act, § 2 – “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.” Act, § 3(f).

84. The Act provides that if any of its provisions are challenged in an administrative or judicial proceeding, the BPU may suspend application of those provisions until final resolution of the challenge and take actions to implement the non-challenged provisions. Act, § 4.

CLAIMS FOR RELIEF

COUNT I

(Violation of the Supremacy Clause, U.S. Constitution, art. VI, cl. 2)

85. Plaintiffs restate and incorporate by reference each and every allegation in Paragraphs 1 through 84 as if fully set forth herein.

86. Under the Supremacy Clause of the United States Constitution, a state law is preempted when Congress intends federal law to occupy the field, as well as in cases where the

state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

87. In passing the FPA, Congress intended FERC to have exclusive jurisdiction over the field of wholesale electricity regulation. Section 201(b) of the FPA, codified at 16 U.S.C. § 824(b), sets out the scope of federal regulatory power and draws a bright line between mutually exclusive spheres of state and federal authority. The FPA left no power to the States to regulate wholesale electricity transactions, including wholesale sales of capacity, in interstate commerce.

88. The Act is preempted because it intrudes on FERC's exclusive jurisdiction to regulate wholesale transactions for capacity and energy. That is so in numerous respects:

- a. By guaranteeing selected generators a particular price for their capacity sold through the RPM auction – a price which will be paid by local utilities – the Act invades FERC's exclusive jurisdiction to set wholesale rates. Under the Act, the BPU approves a guaranteed price to be paid to selected generators for their sales of capacity in the FERC-regulated RPM. However, only FERC has authority to set or approve wholesale rates.
- b. The Act purports to preclude FERC, as well as any court, from reviewing the justness and reasonableness of that price guarantee. The Act prohibits any “governmental entity,” which includes FERC, from reviewing the BPU's order requiring the public utilities to guarantee a minimum capacity price for the selected generators. Act, § 3(f). Because the FPA provides that FERC has exclusive jurisdiction to review wholesale transactions for justness and reasonableness, this provision impermissibly strips FERC of its jurisdiction.

- c. The Act treads on FERC’s exclusive jurisdiction because it purports to control how the new generators behave in the wholesale capacity market, and indeed dictates the price at which they must offer their capacity into the RPM auction. In order to ensure that they clear their capacity, as required by the Act, the new generators must bid at the RPM auctions as “price takers,” that is, bidders who accept whatever the market clearing price turns out to be. Under the FPA, however, a State has no authority to control a generator’s market behavior, or dictate a generator’s offer price, in a FERC-regulated wholesale transaction. FERC has exclusive jurisdiction over wholesale rates and wholesale transactions.

89. The Act is preempted because it erects obstacles to FERC’s achievement of its regulatory goals in the wholesale capacity and energy markets.

- a. The Act interferes with FERC’s decision to have capacity prices in PJM set by market forces. By requiring generators to bid in the PJM auction as “price takers,” even as those generators receive a guaranteed price for their capacity from New Jersey utilities, the Act will distort the clearing price for capacity, which is a critical component of the FERC-regulated wholesale capacity market.
- b. The Act interferes with FERC’s decision to structure the wholesale markets for capacity and energy on market-based principles in order to encourage the entry of new generating capacity in PJM only when and where such entry is economical – that is, when its revenues will equal or exceed its costs. The Act’s legislative findings make plain that the Legislature disagrees with the rules FERC and PJM have chosen to govern the capacity auction. The Act seeks to circumvent those rules in order to foster new generation in New Jersey even though the FERC-

approved RPM has signaled that such new generation would not be economical. The Act allows certain in-state generators to turn a profit even when selling capacity in the RPM auction at far below cost, by giving them a price guarantee outside of the auction. The consequence will be that construction of new generation facilities will take place in New Jersey in contravention of the economic signals sent by the RPM, and the construction of future needed facilities throughout PJM will be discouraged.

- c. The Act discriminates in favor of new generation and against existing generation, by guaranteeing a price for capacity sold by new generation facilities, but not by existing facilities. However, FERC has made clear that the issue of price discrimination based upon the age of a generating facility is an issue within its jurisdiction, and the Act therefore intrudes on FERC's jurisdiction.
- d. The Act interferes with the intent of the FERC-approved PJM market to provide incentives to add capacity when and where it is economical to do so, by permanently chilling *private* investment in new generation. Private investors may be reluctant to construct any new generation, even when market signals indicate that such investment will be profitable, if new plants could lose expected market share to comparatively inefficient facilities that can sell capacity at artificially low prices owing to a state-ordered subsidy. Private investors also may be reluctant to construct new generating facilities without first receiving the kind of price guarantee the Act provides.
- e. If the Act is upheld, FERC may find it impossible to conduct market-based regulation of PJM's wholesale capacity market. Following New Jersey's

example, other States may be encouraged to promote the construction of new generation within their territories to bring jobs to the state, regardless of whether such generation is needed or economical. The result will be to unravel the market-based approach FERC has chosen to adopt.

- f. The Act conflicts with FERC's stated reliance on market forces to determine wholesale energy prices. FERC has determined that rates for wholesale energy should be determined by market forces so that the rates are neither too high nor too low to meet the FPA's requirement that wholesale energy rates be just and reasonable. By subsidizing otherwise uneconomical energy suppliers and requiring those suppliers to offer their energy in PJM's markets, the Act prevents true market forces from setting energy prices, thus undermining FERC's implementation of the FPA.

90. If New Jersey believes that the RPM does not create sufficient incentives to provide adequate capacity in New Jersey, the appropriate course is for it to petition FERC to change RPM rules, or to require its local utilities to opt out of RPM altogether and instead meet their capacity needs through PJM's FERC-approved Fixed Resource Requirement Alternative ("FRR"). The FRR would require New Jersey's utilities to obtain sufficient dedicated capacity resources to meet their needs, and would impose stringent limits on the ability of those utilities to participate in PJM capacity and energy markets. But New Jersey has not proceeded down this path, no doubt because it wishes to take advantage of the many efficiencies created by FERC-regulated energy and capacity markets.

91. Having allowed its utilities to participate in that FERC-regulated wholesale capacity market, and having benefitted from RPM's interstate model, New Jersey now has

decided that it does not like the outcomes and has attempted to override those outcomes by intervening in the RPM auction. The consequence is that RPM will no longer function as FERC intended it. The State cannot pursue its own regulatory program at cross-purposes with PJM whenever the State determines that it is dissatisfied with market outcomes.

92. Plaintiffs have no adequate remedy at law and no opportunity for compensation for the Act's violation of the Supremacy Clause.

93. Plaintiffs will suffer irreparable harm by the violation of the Supremacy Clause, because New Jersey's interference with the wholesale interstate capacity market will cause Plaintiffs to suffer substantial economic losses, but New Jersey is immune from suit for retrospective relief.

94. The public interest will be harmed by the violation of the Supremacy Clause because the Act frustrates Congress' desire to place wholesale capacity markets under the exclusive purview of FERC and, by interfering with the workings of RPM, will undermine FERC's policy choice to rely on market forces to signal the need for investment in additional capacity. Additionally, New Jersey ratepayers will be required to pay for the long-term, fixed-price contracts which the Act requires New Jersey utilities to enter into with favored in-state generators, and bear the risk of paying substantial subsidies.

95. Plaintiffs are entitled to judgment under 28 U.S.C. §§ 2201(a) and 2202, declaring that the Act violates the Supremacy Clause (Article VI, Clause 2) of the United States Constitution.

96. Plaintiffs also are entitled for this reason to preliminary and permanent injunctive relief preventing the BPU from putting any part of the Act into effect.

97. Granting the requested declaratory and injunctive relief will harm the BPU and the State less (if at all) than denying the relief would harm Plaintiffs.

COUNT II

(Violation of the Commerce Clause, U.S. Constitution, art. I, § 8, c. 3)

98. Plaintiffs restate and incorporate by reference each and every allegation in Paragraphs 1 through 84 as if fully set forth herein.

99. The negative aspect of the Commerce Clause (known as the “Dormant Commerce Clause”) erects a nearly *per se* rule against state laws favoring in-state economic interests over out-of-state economic interests. States may not use their regulatory power to give in-state producers an advantage over producers located in other States.

100. The Act violates the Dormant Commerce Clause because its intent and effect are to discriminate in favor of in-state generation and against out-of-state generation.

101. First, while amendments sought to obscure the Act’s blatant in-state favoritism, they did not eliminate it. The Act’s legislative findings continue to state that a major purpose of the Act is to “create opportunities for employment in the energy sector” and to “to assist the State’s economic development.” Moreover, they emphasize that New Jersey’s alleged “capacity deficit and high power prices” “may result in a 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.” Promoting in-state jobs and investment are not legitimate local purposes that justify a discriminatory law under the Dormant Commerce Clause.

102. Second, the Act provides that the BPU shall assign a weighted preference to eligible generators capable of entering commercial operation for delivery year 2015, and it

requires eligible generators to demonstrate reasonable certainty of completion of development, construction and permitting necessary to meet the desired in-service date. The purpose and effect of that preference and requirement is to favor in-state generation, such as LS Power's, that is sufficiently advanced in the planning and permitting process to qualify for the preference.

103. Third, the Act's intent and effect is thus to reserve a portion of the New Jersey capacity for certain in-state generation by mandating that New Jersey utilities procure a portion of their capacity from plants located in New Jersey, thereby precluding out-of-state generation from competing to supply that portion of the State's capacity needs. The Act will have the intended effect of making capacity generated in the State constitute a larger share, and capacity generated outside the State a smaller share, of the total capacity market, in violation of the Dormant Commerce Clause.

104. Fourth, the discriminatory intent and effect of the Act is further demonstrated by two other provisions intended to favor in-state generation facilities: (i) generators bidding for SOCAs must prequalify by showing how they will provide environmental, economic, and community benefits; and (ii) utilities must pass on to New Jersey ratepayers the cost of their forced subsidy of the winning generators. These provisions are intended to favor in-state interests. The Act requires New Jersey ratepayers to subsidize the plants that will be built because the Legislature intends for those plants to be built in New Jersey. Neither the Legislature nor the BPU would force New Jersey ratepayers to subsidize a plant that is located outside New Jersey, that provided no economic opportunities to New Jersey workers, and that had no environmental, economic, or community benefits for New Jersey residents.

105. The Act pairs that in-state preference with a requirement that subsidized generators bid into the RPM auction in a manner that is intended artificially to depress wholesale

capacity prices and thus shift the costs of the subsidy to non-subsidized generators with facilities located out-of-state.

106. Because the Act is discriminatory in its intent and effect, it is subject to the strictest scrutiny. The Act does not survive that rigorous scrutiny because it does not advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.

107. Plaintiffs have no adequate remedy at law and no opportunity for compensation for the Act's violation of the Commerce Clause.

108. Plaintiffs will suffer irreparable harm by the violation of the Commerce Clause, because such a violation by itself constitutes irreparable injury, and additionally because that irreparable injury is compounded by the significant but incalculable economic loss to Plaintiffs caused by New Jersey's scheme to reserve a portion of the State's capacity needs for in-state generation.

109. The public interest will be harmed by the violation of the Commerce Clause, because New Jersey ratepayers will ultimately be required to pay for the long-term, fixed-price contracts which the Act requires New Jersey utilities to enter into with favored in-state generators, and bear the risk of paying substantial subsidies.

110. Plaintiffs are entitled to a judgment under 28 U.S.C. §§ 2201(a), 2202 and 42 U.S.C. § 1983, declaring that the Act violates the Commerce Clause (Article I, Section 8, Clause 3) of the United States Constitution.

111. Plaintiffs also are entitled for this reason to preliminary and permanent injunctive relief preventing the BPU from putting any part of the Act into effect.

112. Granting the requested declaratory and injunctive relief will harm the BPU and the State less (if at all) than denying the relief would harm Plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court enter an order:

- a. Declaring that the Act, other than Section 5, violates the Supremacy Clause and the Commerce Clause of the United States Constitution.
- b. Enjoining the BPU from enforcing or otherwise putting into effect any part of the Act other than Section 5.
- c. Awarding Plaintiffs their reasonable attorneys' fees under 42 U.S.C. §§ 1983 and 1988.
- d. Awarding Plaintiffs such further relief as the Court may deem just and equitable.

Dated: February 9, 2011

Respectfully submitted,

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