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U.S. Supreme Court Invalidates Maryland Power Generation Incentive Program On Preemption Grounds.

On April 19, 2016, the U.S. Supreme Court decided *Hughes v. Talen Energy Marketing, LLC*. In its opinion, authored by Justice Ginsburg, the Court rejected the attempt by the State of Maryland to incentivize the construction of new power plants through the use of a contract for differences. A contract for differences would guarantee the price paid to a developer for capacity in the PJM capacity market. The Court found that such action by a state is preempted by the Federal Power Act (FPA) and implied preemption. Duane Morris previously referenced the pendency of this case in the February 19, 2016, Alert, "What Does U.S. Supreme Court Decision Upholding FERC's Authority Over Demand Response Mean for the Future of FERC's Jurisdiction?"

In so ruling, the Court further supported FERC's authority to regulate competitive wholesale markets for electricity, including the interstate wholesale rate FERC requires. The effect of a contract for differences is to set a different capacity price for power from the plant than paid by other participants in FERC's capacity auction. Although Maryland's intent was to encourage construction of new in-state generation, the Court found that Maryland's program, by adjusting the interstate wholesale rate for power sold by a plant holding a contract for differences but selling into the FERC auction, contravenes FPA's division of authority between federal and state regulators.

The Court left open whether there may be other means available to the states to encourage the construction of generation in transmission constrained areas. The Court limited its holding to Maryland's program because that program disregarded FERC's required wholesale rate. The Court specifically stated that its opinion does not rule on the permissibility of other measures that a state might employ to encourage the development of generation, such as tax incentives, land grants, direct subsidies, construction of state-owned generation or re-regulation of the energy sector. It remains to be seen how incentives can be crafted by states so that they do not impermissibly affect wholesale market prices.

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