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# Hughes Hubbard & Reed

## Hughes Hubbard Joins Supreme Court Battle Over Energy Pricing

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Hughes Hubbard & Reed has joined a high-stakes fight on how federal and state governments divide authority over regulation of electric power generation and pricing.

On Dec. 15, Hughes Hubbard filed a brief for amici curiae with the U.S. Supreme Court on behalf of the National Governors Association, National Conference of State Legislatures and the Council of State Governments. The firm was retained by the State and Local Legal Center, an organization that advocates the interests of the states before the Supreme Court.

The case presents the question of whether a state regulation requiring in-state electric utilities to enter into long-term contracts that assure stable revenues for new power generators constitutes rate setting that is preempted by federal law.

Maryland determined that its long-term energy and environmental needs required a new gas-fired generation facility. In order to attract development of the new power plant, Maryland required the new generator to agree to a long-term price level that would allow it to recoup costs over 20 years. The new generator would sell electric power capacity in the interstate auction supervised by the Federal Energy Regulatory Commission (FERC), and either would receive a top-up payment from local utilities (if the market price is below the agreed price) or pay a rebate back to local utilities (if the market price is above the agreed price).

This arrangement would guarantee the revenue stream necessary to attract the investment in the new plant, at the lowest cost to the local utilities and, ultimately, their ratepayers. Nevertheless, the FERC concluded that this practice was preempted by the Federal Power Act.

Hughes Hubbard's brief argues that federal law does not preempt Maryland's actions under the doctrines of "field preemption" and "conflict preemption." Like many regulatory schemes, the Federal Power Act adopts a "cooperative federalism" approach in which federal and state governments share regulatory authority over a particular field.

Hughes Hubbard argued that, under the principle of cooperative federalism, courts should not use the preemption doctrine to upset the carefully orchestrated relationship among federal and state energy regulators created by Congress. As the brief explained, the overreaching arguments of the federal government, which had been adopted by the U.S. Court of Appeals for the Fourth Circuit, "would prove toxic to the operation of statutes and regulations modeled on cooperative federalism."

Counsel for petitioners (which Hughes Hubbard's brief supported) noted that after reading "a lot of amicus briefs" filed on their behalf, Hughes Hubbard's "is really excellent" and "the best both for its writing style and the coherence and importance of its message." In appreciation for the Hughes Hubbard team's efforts, the client sent pints of ice cream in flavors named "Cooperative Federalism," "Field Preemption," "Conflict Preemption" and "Gas-fired Power Plant."

The consolidated cases are *Hughes v. PPL EnergyPlus* and *CPV Maryland v. PPL Energyplus*, scheduled for oral argument on Feb. 24, 2016.

William Stein, Scott Christensen, Eric Parnes and Elizabeth Solander appear on the brief. Kristin Millay, Eleanor Erney, Walter Song and Sarah Hansen assisted in research and drafting.

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**William R. Stein**



**Eric S. Parnes**



**Elizabeth Solander**



**Kristin Millay**

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