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# Changing Perspectives on Federalism: Protecting State Environmental-Energy Policy in the Trump-Era

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# Why Does This Matter to Public Power?

- Your municipal authority derives from state law.
- State efforts to control state resource portfolios may well include you and will certainly shape the resource landscape.
- State efforts to subsidize generation and control state resource portfolios are causing consternation at FERC.

*Pub. Util. Comm'n of R.I. v. Attleboro  
Steam & Elec. Co., 273 U.S. 83 (1927).*

South Street Station, Providence, R.I.

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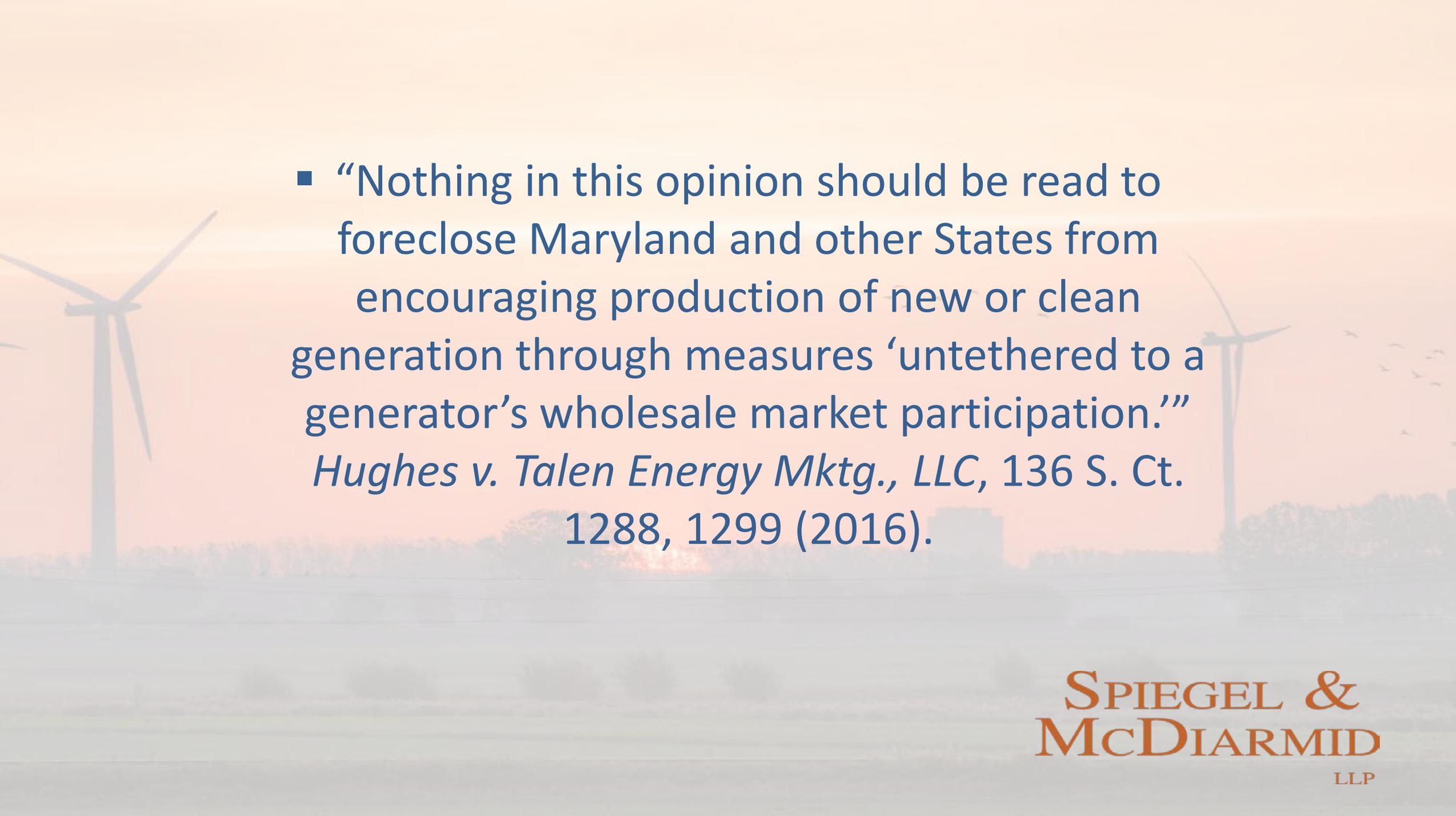
***Utah Power & Light Co. v. Pfost*, 286  
U.S. 165 (1932).**

- States can regulate electric generation because “the process of generation” is “essentially local” even when the electricity produced is transmitted in interstate commerce.

- “The physical inseparability of generation and transmission, the fact that one cannot take place without the other, makes regulation of transmission impossible unless generation is also controlled.” S. Rep. No. 74-621, at 48-49 (1935).

- FERC has jurisdiction to exercise authority under the provisions of Part II over “the transmission of electric energy in interstate commerce and [] the sale of electric energy at wholesale in interstate commerce” – but with limited specific exception the states have jurisdiction “over facilities used for the generation of electric energy.” 16 U.S.C. § 824(b)(1).

- FERC's Mandatory Capacity Markets are in tension with state efforts to subsidize generation.
- Capacity is not generation— capacity is an attribute— the ability to produce electricity.
- Generation is physical plant that varies in kind by fuel, environmental, locational, and other characteristics.
- FERC has disclaimed jurisdiction to regulate environmental concerns incident to its regulation of wholesale sales. *Grand Council of Crees (of Quebec) v. FERC*, 198 F.3d 950 (D.C. Cir. 2000).

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- “Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures ‘untethered to a generator’s wholesale market participation.’”  
*Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016).

- “So long as a State does not condition payment of funds on capacity clearing the auction, the State’s program would not suffer from the fatal defect that renders Maryland’s program unacceptable.” *Hughes v. Talen*, 136 S. Ct. at 1299.

***Coalition for Competitive Elec. v.  
Zibelman, 906 F.3d 41, 54 (2d Cir. 2018).***

- “ZECs are created when electricity is produced in a statutorily-defined manner, regardless of whether or how the electricity is ultimately sold.”
- “They are defined as ‘the zero-emissions attributes of one megawatt-hour of electricity *production* by an eligible Zero Carbon Electric Generating Facility.’”

***Coalition for Competitive Elec. v. Zibelman, 906 F.3d 41, 52 (2d Cir. 2018).***

- “[T]he only transactions New York compels are ZEC sales, and ZECs are sold separately from wholesale sales. Because there is no wholesale sale when ZECs change hands, FERC lacks jurisdiction to decide whether the ZEC transactions are just and reasonable.”

***Coalition for Competitive Elec. v.  
Zibelman, 906 F.3d 41, 54 (2d Cir. 2018).***

- “Accordingly, Northwest Central defeats Plaintiffs’ argument premised on practical effect: even though the ZEC program exerts downward pressure on wholesale electricity rates, that incidental effect is insufficient to state a claim for field preemption under the FPA.”