UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,	
Plaintiffs,	No. 17 CV 1164
v.	Judge Manish S. Shah
ANTHONY M. STAR, *et al.*,	Magistrate Judge Susan E. Cox
Defendants.	

EPSA PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This case presents a federal preemption and dormant Commerce Clause challenge to the Zero Emissions Credits ("ZEC") provisions of the Future Energy Jobs Act ("FEJA"), an Illinois law bestowing $3 billion in subsidies on a single politically powerful corporation to protect its power plants from less expensive competitors in the electric power generation market. These subsidies aim directly at reversing wholesale energy market outcomes regulated exclusively by the Federal Energy Regulatory Commission ("FERC") and directly frustrate the operation of the auction-based market structure FERC put in place. The subsidies also discriminate against interstate commerce, and unnecessarily increase the price of electricity for Illinois consumers. The subsidies have a disruptive effect on energy auctions and will cause irreparable harm, and they are in direct conflict with the Supreme Court's recent decision in *Hughes v. Talen* on similar facts. A preliminary injunction to preserve the status quo is amply warranted.

Plaintiff Electric Power Supply Association, Inc. ("EPSA") is the national industry association for competitive electric power producers in the United States. Plaintiffs Calpine Corp., Dynegy Inc., Eastern Generation, LLC, and NRG Energy, Inc. (collectively, with EPSA, "Plaintiffs") are independent power producers that operate generating facilities throughout the country and provide wholesale electricity to utilities in Illinois. FEJA's subsidy provisions begin implementation as of June 1, 2017. Even before then they will impact the auctions for capacity and energy, imposing irreparable harm on Plaintiffs. Accordingly, Plaintiffs respectfully seek to maintain the status quo and avoid the irreparable harm that they—and the marketplace—will otherwise bear.

FACTS

As the Supreme Court explained last year in striking down a program comparable to FEJA, the Federal Power Act ("FPA") grants FERC exclusive regulatory jurisdiction over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). *See Hughes v. Talen Energy Mktg.*, LLC, 136 S. Ct. 1288, 1292 (2016). This exclusive authority includes imposing any charges "in connection with" wholesale rates and enacting any "rules and regulations affecting or pertaining to such rates or charges" prior to those charges going into effect. 16 U.S.C. §§ 824d(a), 824e(a). FERC is obligated to ensure that any rates and charges for wholesale electricity are "just and reasonable" and to reject any charges that do not meet the statutory requirements. *Id.*

In exercising this authority, FERC has turned to competitive market-based auctions to establish "just and reasonable" rates. Declaration of David W. DeRamus, Ph.D. (Ex. A). ¶¶ 10-11. In other words, the prices set by the auction according to the formula laid out in the FERC-approved tariffs are the "just and reasonable" rate and have preemptive effect over any state conclusions to the contrary. FERC authorizes regional entities, known as "independent system operators" ("ISOs") or "regional transmission organizations" ("RTOs"), to administer and oversee wholesale electricity auctions. *Id.* ¶ 11. Illinois falls within the boundaries of two of these organizations: central and southern Illinois is served by the Midcontinent Independent System Operator, Inc. ("MISO"), an organization that encompasses all or parts of fifteen states and the Canadian province of Manitoba; and northern Illinois, including Chicago, is served by PJM Interconnection, L.L.C. ("PJM"), an entity encompassing all or parts of thirteen states and the District of Columbia. *Id.* ¶¶ 3, 14.

MISO and PJM conduct two main types of wholesale electricity auctions: energy and capacity. *Id.* ¶¶ 14, 22, 29. In order to meet FERC's mandate to ensure just and reasonable rates, both markets utilize competitive market principles to ensure that ratepayers pay only what it costs to actually operate the electric grid in a reliable manner. In practice, this means that low-cost resources are selected by the market, while higher-cost resources (such as those subsidized by FEJA) are encouraged to retire. Energy markets, which include both "day ahead" and "real time" auctions, ensure that generators produce and supply sufficient energy to meet consumer demand for electricity ("load"). *Id.* ¶¶ 23, 30. Generators offer the price they will accept to generate a particular quantity of electrical energy. *Id.* ¶ 23. In energy markets, such as those operated by MISO and PJM, it is generally profit-maximizing for a generator to offer to supply energy at its marginal cost of producing that energy. *See id.* ¶ 17.

By contrast, capacity auctions concern the future reliability of the electricity grid. *Id.* ¶ 18. Every year, MISO and PJM calculate how much generating capacity is needed to reliably satisfy forecasted peak demand at some point in the future. *Id.* ¶¶ 26, 32. MISO and PJM in turn establish an amount of capacity that retail suppliers, or "load serving entities" ("LSEs"), must acquire to reliably provide electricity for the locations they serve. *Id.* ¶¶ 27, 32. Capacity, in other words, reflects a future obligation for the generator to produce electricity (as opposed to the actual electrical energy itself). Purchased in sufficient quantities, capacity preserves system reliability by ensuring that the electric grid has sufficient capability to supply electricity on even the hottest or coldest days when demand is at its maximum. Indeed, both MISO and PJM utilize a predictive model that procures sufficient capacity so that demand will outstrip supply of available generating capacity at most one time in any ten-year period. LSEs can meet their capacity obligations through bilateral contracts with generators or through capacity auction markets. *Id.* ¶¶ 26, 32. A generator that sells capacity (via auction or contract) promises that it has the ability to produce a certain quantity of electricity at a certain point in the future. *Id.* ¶ 28. MISO's capacity auctions look one year ahead; PJM's occur three years ahead. *Id.* ¶ 32.

Both types of auctions employ bid "stacking." *Id.* ¶¶ 23, 28, 30, 32. Generators offer to provide a certain quantity of energy or capacity at a certain price. *Id.* These offers are then "stacked" from lowest to highest until the requisite (energy or capacity) demand is met. *Id.* The price of the highest-stacked successful offer sets the "market clearing price" or "locational-based marginal price" for that auction. *Id.* All successful offerors receive that price, regardless of the offer they placed. *Id.* The total compensation a generator receives is the sum of its energy and capacity revenues (along with a small amount earned through the sale of "ancillary services"). *Id.* ¶ 20.

FERC-approved auction markets ensure that system reliability is preserved at the least total cost to ratepayers by sending price signals to current and potential market participants. In energy markets, rising or falling prices signal generators to produce more or less electricity. *See id.* ¶¶ 12, 16-17. Rising prices in the capacity market induce existing generators to invest in additional infrastructure or signal to new generators to enter the market. *Id.* ¶¶ 12, 26, 32. Conversely, falling capacity prices indicate that more costly generators should leave the marketplace. *Id.*

Over the past decade, greater quantities of inexpensive natural gas have become available due to advances in drilling technology; this has driven down electricity market prices and rendered certain nuclear generators uneconomical. *Id.* ¶ 25, 31, 54. In Illinois, Intervenor-Defendant Exelon claims that two nuclear plants, Clinton and Quad Cities, operate unprofitably, having lost approximately $800 million over the last seven years. *Id.* ¶ 55; Exelon Press Release (June 2, 2016) (Ex. B). Exelon is the majority owner of both plants.[1] It announced that it would close these plants unless the state provided subsidies. Ex. B; DeRamus Decl. ¶ 102. Consequently, Illinois passed FEJA, DeRamus Decl. ¶ 102, the legislation containing the unconstitutional provisions at issue in this case.

FEJA purports to use ZECs to compensate nuclear generators for their alleged lack of carbon emissions. Act of Dec. 7, 2016, sec. 1.5, 2016 Ill. Legis. Serv. P.A. 99-906 (S.B. 2814) (West). FEJA provides that eligibility for ZECs will be determined through an Illinois Power Agency ("IPA") procurement process, with winners determined by "public interest criteria" which effectively ensure that only specific Illinois assets will be selected. 20 ILCS 3855/1-75(d-5)(1)(C). But the procurement process is a sham: the eligibility of Clinton and Quad Cities has already been pre-determined. DeRamus Decl. ¶¶101-102. Governor Rauner has publicly stated that FEJA "ensures the Clinton and Quad Cities power facilities remain open for another 10 years."[2] Governors' Press Release (Dec. 7, 2016) (Ex. C). Indeed, on the very day FEJA was signed into law, Exelon reversed its decision to close those two plants, it has already accounted for ZEC revenue in its earnings projections, and it has announced new hiring and capital improvements at those facilities. *Id.* ¶ 102 & nn. 69-72.

[1] Mid-American owns 25% of Quad Cities. Our understanding is that no ZECs will be issued for Mid-American's share of Quad Cities production.

Exelon's receipt of ZECs depends on Clinton and Quad Cities producing and selling electricity (*i.e.*, "clearing" in energy parlance) in the FERC-approved wholesale auctions. *Id.* ¶ 34. Because nuclear plants operate continuously at maximum output and cannot store their electricity, they have no alternative but to offer into the MISO and PJM energy auctions. *Id.* ¶¶ 25, 34-35. Indeed, as a designated "Exempt Wholesale Generator" under the Public Utility Holding Company Act, 42 U.S.C. §§ 16451, *et seq.*, Clinton can sell its electricity only in the wholesale marketplace. *Am. Energy Co.*, 91 FERC ¶ 62, 049 (2000). Quad Cities similarly sells all or virtually all of its electricity in the wholesale market. *See* 2016 Q3 and Q4 Electric Quarterly Reports filed with FERC by Exelon Generation; *see also* Exelon Press Release (Sept. 10, 2015) (Ex. D).

For each MWh (megawatt-hour) of electricity that Clinton and Quad Cities produce and that clears in the energy auction run by MISO and PJM, those plants will receive from local utilities a ZEC payment on top of the market price set by the FERC-jurisdictional market. DeRamus Decl. ¶¶ 39-40; 20 ILCS 3855/1-75(d-5). The utilities pass the full amount of their ZEC payments to their customers, the Illinois ratepayers, on their electricity bills. *Id.* The amount of that ZEC payment is impermissibly tethered to wholesale market prices. DeRamus Decl. ¶¶ 39-45. Specifically, the ZEC payment is adjusted according to a statutory formula that includes, as inputs, the FERC-jurisdictional capacity market payments for the Illinois region as well as the FERC-jurisdictional energy market payments applicable to the power plants in question. 20 ILCS 3855/1-75(d-5)(1)(B). The capacity prices used in the ZEC formula are actual prices, because they are determined in advance of the delivery year. *Id.* ¶ 44.

Under this formula, ZEC payments are reduced when wholesale market prices rise. *See* 20 ILCS 3855/1-75(d-5)(1)(B); DeRamus Decl. ¶ 39. There is a price collar then established by reference to wholesale market prices, and indeed, the ZEC price is sufficiently high to keep the generator's expected revenues constant at $47.90 /MWh over a wide range of expected market prices. DeRamus Decl. ¶ 40. The program "aims" to keep these wholesale participants in the market, despite their failing economic health.

The distorting impact of the subsidies will be significant. For example, the Quad Cities plant can supply up to 1,880 megawatts of capacity, which is approximately one-quarter of all the energy needed to power the Chicago area on an average day. In total, Exelon's nuclear fleet constitutes over 8,000 MW of generation. Thus, the subsidization of Quad Cities, by itself, puts 20% of the relevant *wholesale* market under the State of Illinois's control, depriving FERC of its role in setting prices for the region.

Not only does the FEJA oust FERC from a major part of the wholesale market when measured by *quantity* of power produced, but it also has a major impact on wholesale *rates*. In 2017, the ZEC price will be as high as $16.50 / MWh. 20 ILCS 3855/1-75(d-5)(1)(B)(i). Current energy market prices are $18 / MWh and $25 / MWh in the areas serviced by Quad Cities and Clinton, respectively. As a result of the legislation and the ZEC subsidy, Quad Cities will receive $34.50 / MWh and Clinton will receive $41.50 / MWh, plus capacity market revenue, while their competitors who are providing the same wholesale market service, such as Plaintiffs, will receive only the prevailing market price. DeRamus Decl. ¶ 40. Not only that, but the prevailing market prices will also be suppressed, further harming the integrity of the market and disturbing FERC's preferred market structure. *Id.* ¶¶ 84-89. The entirety of the bonus to the two nuclear generators will be paid by Illinois ratepayers in the form of a surcharge to their electricity bills.

These artificially created low prices run headlong into FERC's system for establishing prices based on competitive market forces. *Id.* ¶¶ 84-89. The State of Illinois has essentially substituted its judgment about what constitutes a "just and reasonable" wholesale nuclear electricity rate in place of FERC's. *See id.* ¶ 40. The longer-term loss of efficient generators and a competitive market will potentially cost consumers $2.8 billion to $3.1 billion per year. *See* DeRamus Decl. ¶ 94; PJM, *Value Proposition* 1 (2015) (Ex. E).

By distorting market price signals, these lower prices also threaten the viability of more efficient generators, including those plaintiffs' own, that have made capital investments based on the untainted FERC markets. They further discourage investment in new, efficient, and flexible generators—including renewable and other low-carbon technologies. DeRamus Decl. ¶¶ 81-89; *see also* PJM Market Monitor Report (Ex. F).

Exelon itself acknowledges the ZEC program will impose a cost to Illinois customers that will be as high as $235 million per year for the duration of the ten-year program. *See* DeRamus Decl. ¶ 102 (citing Q4 2016 Exelon Corp Earnings Conference Call Presentation (February 8, 2017)). Moreover, the ZEC program "will also undermine the faith and confidence of market participants in the integrity and sustainability of the market mechanisms established by FERC and the RTOs," as well as "reduce[] confidence . . . in the established regulatory processes (subject to FERC oversight) that exist for parties to propose changes to those markets." *Id.* ¶¶ 8, 88. These results, in turn, "reduce[] the willingness of actual or potential future market participants to participate in those markets – to the ultimate detriment of all electricity customers in the affected regions." *Id.* ¶ 88. The State's electricity customers will thus suffer significant economic harm in both the short and long terms.

LEGAL STANDARD

The party seeking a preliminary injunction must show that it (1) is likely to succeed on the merits, (2) has no adequate remedy at law, and (3) will suffer irreparable harm. *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't. of Health*, 699 F.3d 962, 972 (7th Cir. 2012). Following this threshold showing, the court weighs the equities, balancing each party's potential harms if the injunction is granted or denied. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008). This balancing is evaluated on a sliding scale against the likelihood of success: the more likely the moving party is to win, the less the balance of harms must weigh in that party's favor. *Id.*; *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015). "The sliding scale approach is not mathematical in nature, rather it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief." *Stuller, Inc. v. Steak N Shake Enters., Inc.*, 695 F.3d 676, 678 (7th Cir. 2012) (internal quotations and citations omitted).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS, AS THE ZEC PROGRAM PLAINLY VIOLATES THE SUPREMACY CLAUSE AND THE COMMERCE CLAUSE

A. Plaintiffs Will Likely Succeed on Their Claim That the ZEC Program Is Field-Preempted Because the FPA Voids State Regulations That "Directly Affect" Wholesale Prices

Under the FPA, FERC has exclusive regulatory authority over "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). *Hughes*, 136 S. Ct. at 1298-99. This exclusive authority extends to the imposition of any charges "in connection with" wholesale rates, and the enacting of any "rules and regulations affecting or pertaining to such rates or charges." 16 U.S.C. §§ 824d(a), 824e(a); *see Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374 (1988) ("Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates."). The ZEC program is preempted by FERC's exclusive regulatory authority if, under the facts alleged, the program "affects," "pertains to," or is "connected with" wholesale electricity rates. The ZEC program clearly does so, and is thus field-preempted.

1. <u>The ZEC Program "Directly Affects" Wholesale Electricity Prices Under Standards Reconfirmed Repeatedly by the Supreme Court</u>

For decades, courts and FERC have construed the FPA terms "affects," "pertains to," and "connected with," and the Supreme Court has reconfirmed these longstanding interpretations in a trio of recent cases: *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016) ("*EPSA*"); and *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015). In *EPSA*, the Court made clear that FERC's authority preempts state "rules or practices that *directly* affect the [wholesale] rate." 136 S. Ct. at 774 (emphasis in original) (internal quotation marks omitted). In *Oneok*, the Court held that whether a state regulation "directly" affects wholesale rates depends on "the *target* at which the state law *aims*." 135 S. Ct. at 1599 (emphasis in original); *see also EPSA*, 136 S. Ct. at 776-77 (citing *Oneok*). Thus, "measures *aimed directly at* interstate purchasers and wholesalers for resale" are field-preempted. *Oneok*, 136 S. Ct. at 1600 (quoting *N. Nat. Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 94 (1963)). But those aimed at "subjects left to the States to regulate," such as generally applicable state antitrust laws, blue sky laws, tax laws, and recycling laws, are not field-preempted because their impact on interstate wholesale rates is incidental or indirect. *Id.* at 1600-01. Although not field-preempted, even these types of indirect state regulations may be conflict preempted. *Id*. at 1602.

Under this precedent, the ZEC program is field-preempted because the existence and amount of the ZEC subsidies are aimed at and tethered directly to wholesale prices. Indeed, it is hard to imagine a program more "aimed at" wholesale market outcomes: absent the ZEC program, these two nuclear generators would retire. In *Hughes*, the Supreme Court's most recent pronouncement, the Court applied the principles of *EPSA* and *Oneok* and held that a Maryland program that subsidized the cost of building a new in-state electric generating unit was field-preempted. Even though the subsidy was for the legitimate purpose of "encourag[ing] construction of new in-state generation," it was "*aimed directly* at interstate purchasers and wholesalers for resale" and thus constituted an invalid "intru[sion] on FERC's authority over interstate wholesale rates." 136 S. Ct. at 1298-99 (emphasis in original) (citing *Oneok*, 135 S. Ct. at 1600). Accordingly, a "legitimate purpose" does not excuse the direct intrusion on FERC's authority, as states are prohibited from "adjusting an interstate wholesale rate." *Id.* at 1297.

While the *Hughes* Court stated that "[n]othing in this opinion should be read to *foreclose* Maryland and other States from encouraging production of new or clean generation," it specified that was through measures "*untethered to a generator's wholesale market participation*." *Id.* at 1299 (emphasis added, quotation omitted). The Court stressed:

> *[A] State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable*. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority. . . . *States interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and*

> *reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation*.

Id. at 1298-99 (emphasis added) (quoting *Miss. Power & Light*, 487 U.S. at 373); *see id*. at 1300 (Sotomayor, J., concurring) (Maryland's actions "must be preempted" because it "has acted to guarantee CPV a rate different from FERC's 'just and reasonable' rate and has thus contravened the goals of the Federal Power Act"); *id*. at 1301 (Thomas, J., concurring) ("By 'fiddling with the effective . . . price' that CPV receives for its wholesale sales, Maryland has 'regulate[d]' wholesale sales.").

As much as the subsidies in *Hughes*, if not more, the ZECs are "tethered" to the favored generators' wholesale market participation. The ZEC price is subject to an annual adjustment explicitly and firmly tethered to forecast wholesale prices—as forecast prices go up, the ZEC price goes down. 20 ILCS 3855/1-75(d-5)(1)(B).[3] "The amount of the ZEC payment received by a generator will thus fluctuate between $0 and $16.50 / MWh, depending on future wholesale energy and capacity prices in Illinois." DeRamus Decl. ¶ 39. "In effect, the ZEC price formula establishes a 'price collar' (or 'revenue collar') for subsidized nuclear plants at $47.90 / MWh, which largely eliminates their risks from changes in wholesale market prices." *Id.* ¶ 40. The 'price collar' operates very similarly to the contract-for-differences structure in *Hughes* in that it guarantees that the nuclear units will receive sufficient revenues to justify their continued operations. Thus, the ZEC value, which is based on actual capacity prices, *id.* ¶ 44, is inherently tethered to wholesale market outcomes and establishes that the State was "aiming at" wholesale market outcomes in creating the program. Illinois has "fiddled with the effective price," by guaranteeing the nuclear generators a higher price than the auction prices under FERC regulation has allowed, and thus has impermissibly "interfere[d] with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable." *Hughes*, 136 S. Ct. at 1299.

[3] The price adjustment formula is determined by the amount "by which the market price index for the applicable delivery year exceeds the baseline market price index for the consecutive 12-month period ending May 31, 2016." 20 ILCS 3855/1-75(d-5)(1)(B). Both the "market price index" and the "baseline market price index" are based on the sum of specified PJM and MISO forecast energy and capacity prices. *Id*. The formula is reprinted in full as Exhibit A of the Complaint.

Additionally, the key factor in the award of ZECs to a "zero emissions facility" (a nuclear generator) depends on a determination that the plant would "cease to exist" without the subsidy, *i.e.*, that wholesale prices are too low to keep the plant in business. 20 ILCS 3855/1-75(d-5)(1)(C). Where the ZECs are thus the causal agent of the nuclear generators continuing to sell power into the FERC-jurisdictional markets, as a supplement or adder to market prices in an amount dependent on market prices, they are unavoidably "tethered" to those markets. These nuclear plants as a matter of fact and/or as an Exempt Wholesale Generator in the case of Clinton, sell their electricity into the PJM and MISO wholesale markets. They also do so as "price takers" ensuring they "clear" the auctions. DeRamus Decl. ¶¶ 25, 36, 79.

As Exelon itself argued in a previous case, state-mandated price adders "bring about precisely the harms that FERC sought to avoid by instituting market-based regulation" and "prevent[] true market forces from setting energy prices, thus undermining FERC's implementation of the FPA." Complaint ¶¶ 78, 89f, *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp. 2d 372 (D.N.J. 2013) (Civil Action No. 11-745) ("N.J. Complaint") (Ex. G).

Maryland unsuccessfully argued in *Hughes* that a similar subsidy was something other than an "adjustment" of the interstate wholesale rate. The Maryland program involved a state-mandated "contract for differences" requiring that LSEs pay the favored generator a supplement to the FERC auction price. *See Hughes*, 136 S. Ct. at 1294-95. The state argued that the contract did not change the auction price and was analogous to a "traditional bilateral contract" or a "hedging contract" and was merely "compensation for construction of a plant." The Supreme Court, like the lower courts in the case, rejected these arguments. *Id.* at 1299 & n.12 (Maryland's program "mandates that LSEs and CPV exchange money based on the cost of CPV's capacity sales to PJM" and "compels private actors (LSEs) to enter into contracts for differences—like it or not—with a generator that must sell its capacity to PJM through the auction"); *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476-77 (4th Cir. 2014) ("*Nazarian II*") ("The scheme thus effectively supplants the rate generated by the auction with an alternative rate preferred by the state. . . . The fact that it does not formally upset the terms of a federal transaction is no defense, since the functional results are precisely the same."); *id.* at 475 ("[S]tates are barred from relying on mere formal distinctions in 'an attempt' to evade preemption."); *PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 840 (D. Md. 2013) ("*Nazarian I*") (holding the Maryland program field-preempted because it "dictat[ed] the ultimate price received by the generation facility for its actual wholesale energy and capacity sales"); *accord PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 254 (3d Cir. 2014) (New Jersey program preempted even though it "artfully steps around" the auctions and does not "formally upset the terms of a federal transaction" (quoting *Nazarian II*)); *see also* Brief of Exelon, *et al.*, in Opposition to Petition for Writ of Certiorari at 26, *Fiordaliso v. Talen Energy Mktg., LLC*, 136 S. Ct. 1728 (2016) (No. 14-694) ("Exelon Cert. Opposition") (Ex. H) ("[N]o creative refashioning can change the fact that the [New Jersey subsidy] by both design and intent supplants FERC-approved rates.").

The same is true here: Illinois seeks to compel private actors (LSEs) to enter into ZEC purchase contracts for the benefit of two generators that must sell their output through the auctions, thus increasing the total wholesale revenues received by the favored generating facilities. The price collar enacted by the FEJA acts similarly to the contract for differences the Supreme Court struck down in *Hughes* by ensuring that ratepayers see their bailout of the nuclear units decrease if wholesale market prices increase, and increase their contribution (up to a cap) if wholesale market prices decrease. The decisions reached unanimously by sixteen judges and Justices in the Maryland and New Jersey subsidy cases will require a similar result here.

2. <u>The Effects of the ZEC Program on Wholesale Prices Are Far Greater Than Those of a Wide Variety of State Measures That Have Been Held Preempted</u>

The Supreme Court did not write *Hughes* on a blank slate. The decision followed a long litany of cases ruling that state laws were preempted, even in situations where their effects on price were much less direct than the impact of Illinois' ZEC program. In *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), for example, the Court unanimously struck down a Michigan statute requiring natural gas companies to obtain state approval before issuing securities. 485 U.S. at 296-97, 310. While *Schneidewind* involved regulation of natural gas companies under the Natural Gas Act, courts have "routinely relied on [Natural Gas Act] cases in determining the scope of the [Federal Power Act], and vice versa." *Hughes*, 136 S. Ct. at 1298 n.10. Although this statute did not change the terms of wholesale sale agreements, explicitly deal with pricing, or require any payments, it was preempted as "amount[ing] to a regulation of rates and facilities" and thus "an attempt to regulate matters within FERC's exclusive jurisdiction." *Schneidewind*, 485 U.S. at 307-08. Unlike generally applicable blue sky laws, the preempted provision applied "only to utilities" and was directed at "matters within FERC's exclusive jurisdiction"—specifically, "the control of rates and facilities of natural gas companies." *Id.* at 308 & n.11. As even a state law that merely requires approval of a gas company's issuance of securities is an unconstitutional "regulation of rates and facilities," it follows *a fortiori* that the ZEC program cannot stand: it has a far greater direct and substantial effect on wholesale prices than the Michigan statute invalidated in *Schneidewind*.

As *Schneidewind* demonstrates, *Hughes* broke no new ground, but instead applied established FERC field-preemption principles. The *Hughes* Court also relied upon *Mississippi Power & Light* and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), both of which upheld preemption of state efforts to deny utilities' recovery of costs required by FERC-directed power allocations. Because power allocations affect rates, the FPA barred states from making a "*de facto* reallocation" by "substituting their own determinations of what would be just and fair." *Miss. Power & Light*, 487 U.S. at 371; *accord Nantahala Power & Light*, 476 U.S. at 966. The same applies here: Illinois cannot give the nuclear generators a *de facto* higher wholesale price than what FERC has determined to be just and reasonable. Here, the ZEC program replaces the FERC-approved rate with a rate of the State's own devising, reversing the effects of FERC's economic incentive-based system and allowing inefficient resources to continue operating profitably, whereas FERC's regulatory scheme would have them operate at a loss, and presumably, eventually retire.

Similarly, in *Northern Natural Gas Co. v. State Corporation Commission*, the Court struck down two Kansas regulatory orders requiring interstate pipeline companies to purchase gas "ratably" (i.e., on an equal basis) from all wells connected with its pipeline system. 372 U.S. at 88-89. The Kansas Supreme Court found that the statute "in no way involves the price of gas," and thus rejected preemption, but the Supreme Court reversed:

> *[O]ur inquiry is not at an end because the orders do not deal in terms with prices or volumes of purchases. . . .*
>
> . . . These state orders necessarily deal with matters which directly affect the ability of [FERC's predecessor] to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act. They therefore invalidly invade the federal agency's exclusive domain.

Id. at 90-92 (emphasis added) (citations omitted). This, by contrast, is far easier case, since the FEJA deals explicitly "in terms with prices or volumes of purchases." Even if this Court looks past the obvious regulation of quantity and price, the ZEC program still is preempted. Even though a state may act "to conserve its natural resources," the Supremacy Clause does not permit "the particular means chosen by Kansas to exercise the conceded power," because "those means threaten effectuation of the federal regulatory scheme." *Id*. at 93. The orders "could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers." *Id*. at 92. By the same logic, the ZEC program is field-preempted because it directly subverts FERC's ability to regulate the wholesale markets comprehensively, effectively, and uniformly. Indeed, the entire purpose of the law is aimed at subverting market outcomes by keeping these aging plants alive and participating in the market. The ZEC program would seriously impair FERC's regulatory scheme. DeRamus Decl. ¶¶ 52-89.

The decisions in *Hughes*, *Schneidewind*, *Mississippi Power*, *Nantahala*, and *Northern Natural Gas* make clear that a state regulation "directly affecting," "aimed at" or "targeting" wholesale rates is field-preempted even if (i) its purpose is laudable; (ii) it is within an area of traditional state jurisdiction; and (iii) it does not expressly alter wholesale rates. Under these and many other cases,[4] the Illinois ZEC program is field-preempted.

3. ZECs Are Not Similar to Renewable Energy Credits

ZECs are different from Renewable Energy Credits ("RECs"), which are state-created and state-issued instruments certifying that electric energy was generated pursuant to certain requirements and standards. Unlike ZECs, RECs are not dependent upon or priced with respect to the wholesale price of electricity. DeRamus Decl. ¶¶ 47-49. RECs are available to all renewable energy producers irrespective of whether the plants are receiving sufficient amounts from wholesale electric sales to remain viable; ZECs are only available to specifically selected, unviable nuclear plants as determined by an instrumentality of the State of Illinois. *Id.* In addition, the REC price is determined by a competitive market for renewable energy credits, not by a state dictate based on how much the generator will receive from wholesale electric market sales. *See id.* ¶ 49, Table 1. "REC programs do not limit eligibility to suppliers whose wholesale market revenues are less than their costs; nor do states use REC price formulas that change the value of RECs based on wholesale market prices." *Id.* ¶ 47. Further, RECs involve subsidies for renewable generating facilities which produce relatively small amounts of electricity compared to nuclear facilities which are among the largest factories for producing electricity in the nation. Nuclear facilities also operate nearly continuously, whereas RECs are awarded to renewable facilities that are by their very nature "intermittent," given that they are dependent on wind or solar insolation conditions. Thus, RECs make up a far less significant

[4] *See, e.g.*, *New England Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 290 (D.C. Cir. 2014) (FERC has exclusive jurisdiction over resources, "whether self-supplied, state-sponsored, or otherwise," that "directly impact" auction clearing prices); *Appalachian Power Co. v. Pub. Serv. Comm'n*, 812 F.2d 898, 902 (4th Cir. 1987) (preempting state attempt to regulate FERC-approved transmission agreement because, "[a]lthough the [agreement] does not explicitly set a dollar rate for the transmission and sale of electricity in commerce, it has the same effect as if it did in that *it creates the obligations owed by or payable to utility companies for the privilege of exchanging interstate electricity*" (emphasis added)); *Municipality of Groton v. FERC*, 587 F.2d 1296, 1302 (D.C. Cir. 1978) (FERC has exclusive jurisdiction over any charge that "affects the fee that a participant pays for power and reserve service, irrespective of the objective underlying that charge").

portion of the wholesale market than do the nuclear facilities the State now purports to regulate, which are the dominant source of electricity in the State.

In *WSPP Inc.*, 139 FERC ¶ 61,061, 61,426 (2012), FERC plainly stated that a REC-type transaction is within federal jurisdiction if it "affects" or is "connected with" jurisdictional rates or charges:

> Nevertheless, although a transaction may not directly involve the transmission or sale of electric energy, the transaction could still fall under the Commission's jurisdiction because it is "in connection with" or "affects" jurisdictional rates or charges.

WSPP Inc., 139 FERC ¶ 61,061, 61,426 (2012). This standard echoes the Supreme Court's statements that state actions are preempted when they are "tethered" or "aimed at" wholesale markets. *See also Midwest Power Sys., Inc.*, 78 FERC ¶ 61,067, 61,248 (1997) (Iowa could require LSE to "purchase a certain amount of generation from the alternative facilities," but federal law preempted Iowa's attempt to "set rates for wholesale sales by FPA jurisdictional public utilities"). Given that Illinois' nuclear subsidies would allow the State to distort the entire wholesale market, the obvious conclusion is that ZECs "affect" the wholesale market and are thus subject to FERC's exclusive jurisdiction.

Moreover, the *WSPP* order specifically states that FERC had undertaken a fact-specific determination in reaching the conclusion that the REC agreements at issue in that case did not rise to the level of "affecting" or "pertaining" to the wholesale market. *Id.* ("[W]e conclude, based on available information, that the unbundled REC transaction does not affect wholesale electricity rates, and the charge for the unbundled RECs is not a charge in connection with a wholesale sale of electricity.") Again, the evidence in this proceeding clearly shows the profound impact that ZECs have on the wholesale marketplace.

Third, FERC in *WSPP* cautioned against state programs that attempt to circumvent FERC's jurisdiction by artificially separating the REC from the underlying energy transaction, as the State of Illinois has attempted to do here with ZECs. *Id*. ("Contract interpretation rules permit that where multiple instruments, executed contemporaneously or at different times, pertain to the same transaction, they will be read together, even if they do not expressly refer to each other.")

Accordingly, the ZEC program is field preempted.

B. The ZEC Program is Conflict Preempted Because It Stands as an Obstacle to FERC's Regulatory Goals

Independent from field preemption, a state measure is preempted by federal law if "compliance with both state and federal law is impossible" or if "the state law stands as an obstacle to the accomplishment and execution of" congressional objectives. *Oneok*, 135 S. Ct. at 1595 (internal quotation marks and citation omitted); *accord Hilmann v. Maretta*, 133 S. Ct. 1943, 1949-50 (2013); *Nazarian II*, 753 F.3d at 478; *Hanna*, 977 F. Supp. 2d at 410; *see also Aux Sable Liquid Prods. v. Murphy*, 526 F.3d 1028, 1033 (7th Cir. 2008). Going beyond field preemption, two of the decisions in the Maryland and New Jersey cases also invalidated the state programs on the independent basis of conflict preemption. *See Nazarian II*, 753 F.3d at 478-80; *Hanna*, 977 F. Supp. 2d at 410-11. The other decisions did not reach the conflict preemption question.

A state law is conflict-preempted if it "would undermine the purpose" of a federal law. *Boggs v. Boggs*, 520 U.S. 833, 844 (1997). For example, states may enact environmental protection measures, but any such law must yield "if it interferes with the methods" prescribed by federal law. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). *Ouellette* held that when federal law prohibits states from regulating out-of-state pollution sources and sets up a permit system to deal with such pollution, state measures that "have the potential to undermine this [federal] regulatory structure" are preempted, as states cannot "do indirectly what they could not do directly." *Id.* at 494-97 (preempting Vermont nuisance law as an obstacle to full implementation of the Clean Water Act).

As in *Ouellette*, the ZEC program will fundamentally undermine FERC's goal of free and fair energy markets, in which competitive forces set "just and reasonable" electricity prices. FERC's designated PJM Independent Market Monitor, the entity charged with protecting consumers and the integrity of the PJM market, explained in its memorandum in support of intervention in this action that "[t]he ZEC Subsidies Program is incompatible with the PJM market design, threatens the foundations of the PJM market and interferes with the federal regulatory scheme." Motion to Intervene, ECF No. 30 ¶ 6. In fact Exelon has acknowledged (in a proceeding in which it was not attempting to preserve the State of Illinois's $3 billion subsidy to it) that a state subsidy "erects obstacles to FERC's achievement of its regulatory goals in the wholesale capacity and energy markets" by "chilling private investment in new generation," because investors will fear losing "expected market share to comparatively inefficient facilities that can sell capacity at artificially low prices owing to a state-ordered subsidy." N.J. Complaint ¶¶ 89, 89d (Ex. G).

In *Hanna*, the court explained that "[t]he effects described by the witnesses demonstrate that the . . . imposition of a government imposed price creates an obstacle to the Commission's preferred method for the wholesale sale of electricity in interstate commerce." 977 F. Supp. 2d at 411. Citing *Hanna*, the Fourth Circuit reached the same conclusion in *Nazarian II*, reasoning that the Maryland subsidy program "has the potential to seriously distort the PJM auction's price signals," which serve a variety of objectives and on which market participants rely, such that "Maryland's initiative disrupts this scheme by substituting the state's preferred incentive structure for that approved by FERC." 753 F.3d at 478-79 (internal quotation marks and citations omitted); *see also Aux Sable*, 526 F.3d at 1036-37 (local road weight restriction conflict-preempted as an obstacle to Congress' goal of "uniform standards for commercial motor vehicles utilizing the Interstate and other federal highways"). Even the means of setting prices – a contract for differences in *Hughes* and a price collar in the FEJA – are effectively identical in their impact on the market. The only distinction between this situation and *Hughes* is that the desire in *Hughes* was to bring new capacity to market, while ZECs are designed to keep alive existing resources.

Similarly, the ZEC program will fundamentally distort the operations of FERC-regulated wholesale energy and capacity markets, conservatively costing unsubsidized generators an estimated $386 million to $529 million in PJM capacity auction revenue just for the 2020/21 delivery year. DeRamus Decl. ¶¶ 60, 73. The ZEC program interferes with FERC's regulatory objective because it keeps inefficient nuclear generating units in the wholesale markets, allowing them to ignore the financial losses they realize as a result of their participation in the FERC-jurisdictional markets. These mounting losses convinced Exelon to retire Quad Cities and Clinton – which it in fact committed to do before being bailed out. Through their continued participation in the FERC-jurisdictional markets, the units will artificially depress prices in the wholesale energy and capacity markets below the level established by FERC. *Id.* ¶¶ 81, 84, 87.

C. The ZEC Program Violates the Commerce Clause Because It Unduly Burdens Interstate Commerce and Discriminates Against Out-of-State Generators

1. Under the Dormant Commerce Clause, Protectionist State Regulations Like the ZEC Program Are *Per Se* Invalid

The Commerce Clause empowers Congress to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause has long been understood to have a "negative" aspect that "directly limits the power of the States to discriminate against or burden interstate commerce." *Alliant Energy Corp. v. Bie*, 330 F.3d 904, 911 (7th Cir. 2003) (citing *Gov't Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267, 1276 (7th Cir. 1992), and *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994)). This "dormant" component of the Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *W. Lynn Creamery v. Healy*, 512 U.S. 186, 192 (1994) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."). "[R]egulating interstate commerce in such a way as to give those who handle domestic articles of commerce a cost advantage over their competitors handling similar items produced elsewhere constitutes such protectionism." *Or. Waste*, 511 U.S. at 106.

Even if acting for legitimate environmental purposes (which we dispute), a state must follow the dictates of the Commerce Clause. For example, a state cannot fail to give utilities equal credit for RECs acquired from out-of-state sources. *Illinois Commerce Comm'n v. FERC*, 721 F.3d 764, 776 (7th Cir. 2013) ("Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy").

When state law amounts to discriminatory economic protectionism, a "virtually *per se* rule of invalidity" applies. *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). As Exelon argued in the New Jersey case, contrary to its position here, a regulation violates the dormant Commerce Clause where "its intent and effect are to discriminate in favor of in-state generation and against out-of-state generation," N.J. Complaint ¶ 100 (Ex. G); such regulations must be "subject to the strictest scrutiny," *id.* ¶ 106; and "state laws favoring in-state economic interests over out-of-state economic interests" are "nearly *per se*" invalid, *id.* ¶ 99. Three situations trigger *per se* invalidity: (1) the rule discriminates against interstate commerce on its face, *see, e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997); (2) the rule has the effect of favoring in-state economic interests over out-of-state interests, *see, e.g.*, *Anheuser-Busch, Inc. v. Schnorf*, 738 F. Supp. 2d 793, 802 (N.D. Ill. 2010); or (3) the rule harbors a discriminatory purpose, *see, e.g.*, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984). If a rule runs afoul of any of these tests, it is invalid as a *per se* violation unless the State demonstrates that the rule "advances a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives." *Alliant Energy*, 330 F.3d at 911 (quoting *Or. Waste*, 511 U.S. at 100-01).

2. <u>FEJA Discriminates Against Interstate Commerce</u>

FEJA awards ZEC subsidies to the in-state Clinton and Quad Cities to the exclusion of out-of-state generators. DeRamus Decl.¶ 112. The clear and actual purpose of FEJA was to save jobs and local tax revenues associated with these plants, as demonstrated by the very name of the law—Future Energy *Jobs* Act. Under FEJA, only nuclear plants specifically selected through an IPA "procurement process" are eligible to receive the ZEC subsidies. 20 ILCS 3855/1-75(d-5)(1)(C). Although the law purports to direct the IPA to award ZEC contracts to the procurement process "winners" that are supposedly determined on the basis of "public interest criteria," *id*., the process is a sham: Clinton and Quad Cities have been pre-determined to be the "winners" of the ZEC contracts.[5] DeRamus Decl. ¶¶ 101, 114-115.

This predetermined outcome is obvious. Exelon itself has boasted that FEJA "ensures the continued operations of Clinton and Quad Cities for at least 10 years."[6] This is in fact a requirement of the FEJA as it maintains that a nuclear plant awarded a contract to supply ZECs must continue to operate for the ten-year term of the contract, absent the occurrence of specified extraordinary events. 20 ILCS 3855/1-75(d-5)(1)(A)(iv) and 1-75(d-5)(1)(E). Exelon reversed its decision to close these two plants on the very day the governor signed the law, and within days it announced plans to fast-track multiple capital projects at these plants.[7] In an earnings call on February 8, 2017, Exelon stated that it had already recognized anticipated Illinois ZEC revenue in its financial statements.[8] These facts show that Exelon's plants were the pre-determined winners of the so-called "competitive procurement process."

Once the ZEC subsidy is taken into account, Clinton and Quad Cities will receive a higher level of wholesale market compensation than out-of-state generators. These generators

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[5] FEJA directs the IPA to consider reports under House Resolution 1146. One report under House Resolution 1146 titled "Potential Nuclear Power Plant Closings," specifically identifies Exelon's Quad Cities and Clinton's nuclear units. The report concludes that the facilities needed higher prices to cover their costs. FEJA provides that "the selection of winning bids shall take into account the incremental environmental benefits resulting from the procurement, such as any existing environmental benefits that are preserved by the procurement . . . and would cease to exist if the procurements were not held, including the preservation of zero emission facilities." 20 ILCS 3855/1-75(d-5)(1)(C). As "preservation of zero emission facilities" is to be the key factor in the "public interest" determination, all other facilities are effectively excluded, as no other Illinois nuclear plant is in danger of closing.

[6] Exelon Press Release (Dec. 14, 2016) (Ex. L).

[7] Ex. I.

[8] Exelon (EXC) Q4 2016 Results – Earnings Call Transcript (Ex. M).

include other nuclear plants (DeRamus Decl. ¶¶ 108-112), including at least one nuclear plant owned by a member of Plaintiff EPSA. *Id.* ¶ 115 & n.89. FEJA thus serves to maintain the uneconomic capacity and energy from the Clinton and Quad Cities units in the FERC-regulated wholesale markets, notwithstanding the wholesale market price signals that indicate that these units should be retired.

Nor does it matter that only some in-state actors are benefitted. *See Bacchus Imports*, 468 U.S. at 271 ("[T]he effect of the exemption is clearly discriminatory, in that it applies only to locally produced beverages, even though it does not apply to all such products. Consequently, as long as there is some competition between the locally produced exempt products and non-exempt products from outside the State, there is a discriminatory effect."). As Exelon itself argued in the New Jersey case, it is not even a close question "whether a state may avowedly provide in-state generators a different and more stable wholesale rate than prevails on the federally regulated wholesale market." Exelon Cert. Opposition at 16 (Ex. H).

Second, FEJA has the clear *effect* of favoring in-state economic interests over out-of-state interests. Even if it were facially neutral, FEJA provides a subsidy that alters the wholesale market price to *two* in-state plants. As detailed above, no out-of-state providers can meet the criteria for ZEC eligibility. DeRamus Decl. ¶¶ 112-115. Under the ZEC program, out-of-state generators of renewable energy are severely disadvantaged—as they will only receive the FERC-determined energy price but would not qualify for ZECs—substantially burdening interstate (and international) commerce. *Id.* ¶¶ 99-121. The subsidies will effectively allow the in-state plants to sell electricity far below their costs both in Illinois and out-of-state markets. This will, in turn, create downward pricing pressure and drive out-of-state competitors out of the wholesale market. *Id.* ¶¶ 61-63.

Third, FEJA was intended to be protectionist legislation. Indeed, when he signed the bill into law, Governor Rauner announced: "The Future Energy Jobs bill protects taxpayers, ratepayers, and *the good-paying jobs at the Clinton and Quad Cities' plants*." Exelon Press Release (Dec. 7, 2016) (Ex. I) (emphasis added). The legislation is thus classic protectionism—

an effort to save in-state jobs at the expense of out-of-state generators that would otherwise participate in the FERC-regulated market without such interference. ZEC recipients are unviable plants that had previously been announced as impending closure. The State and Exelon have acted to protect in-state tax revenues and jobs that would have been lost if the failing plants were closed. DeRamus Decl. ¶¶ 101-105. FEJA seeks to prop up those in-state interests by protecting the uneconomic businesses from interstate competition. *Id.* ¶¶ 120-121. Those objectives are constitutionally impermissible. *See Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928) (invalidating a law that sought to preserve the shrimp packing and canning industries within the state); *Bacchus Imports*, 468 U.S. at 270 (invalidating a law meant to stimulate the local fruit wine industry).

The Seventh Circuit has made clear that such measures transgress constitutional limitations. In *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995), the court struck down a protectionist energy measure rejecting several defenses similar to those at issue here, and explaining:

- The law was an impermissible "non-too-subtle attempt to prevent Illinois electric utilities from switching" to lower-cost out-of-state options for coal. *Id.* at 595.

- "[T]he Illinois Coal Act, like the milk-pricing order in *West Lynn*, has the same effect as a 'tariff or customs duty—neutralizing the advantage possessed by lower cost out of state producers.'" Such measures are plainly "repugnant to the Commerce Clause and the principle of a unitary national economy which that clause was intended to establish." *Id.* (quoting *W. Lynn Creamery*, 512 U.S. at 194).

- Illinois' effort to "save the Act by claiming that it merely 'encourages' the local coal industry and does not in fact discriminate" was meritless. *Id.* at 596. The law "cannot continue to exist merely because it does not facially compel the use of Illinois coal or forbid the use of out-of-state coal." *Id.* Citing *West Lynn Creamery*, the court held that "even ingenious discrimination is forbidden by the Commerce Clause." *Id.*

Accord Illinois Commerce Comm'n, 721 F.3d at 776 ("Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy").

Finally, any legitimate goals underlying the FEJA, such as a reduction of carbon emissions, can be achieved through other means without the ZEC Program's discriminatory effects. DeRamus Decl. ¶ 51. "Nondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose more effectively." *Hughes v. Oklahoma*, 441 U.S. 322, 338 (1979); *see Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980) ("There is thus no reason to believe that the State's interest in local control, to the extent it legitimately exists, has been significantly or evenhandedly advanced by the statutory means that have been employed.").

II. PLAINTIFFS WILL BE IRREPARABLY HARMED UNLESS PRELIMINARY RELIEF IS GRANTED BECAUSE THE STATE DEFENDANTS HAVE IMMUNITY AND THE AUCTIONS CANNOT BE LATER UNDONE

"If allowed to proceed, the Illinois ZEC program will cause immediate and long-term harm to wholesale market participants." DeRamus Decl. ¶ 81. Those effects on plaintiffs and other competitors include:

- The retirement of cost-effective generating units in PJM and MISO that otherwise would have continued to participate in the wholesale markets;
- The decision of other existing generating units that require capital expenditures to not make those investments, and of other prospective market participants not to participate in the market at all;
- The long-term distortionary effects of the ZEC program on the forward capacity markets, particularly the upcoming three-year forward capacity auctions in PJM, which cannot be "undone" after the fact;
- The undermining of the bilateral market structure relied upon in the MISO market to ensure sufficient generation resources; and
- The 10-year contractual commitment mandated by the statutory ZEC program to continue to operate the nonviable nuclear plants, which is already affecting the capital investment decisions of both Exelon and other market participants.

DeRamus Decl. ¶¶ 81-98. Declaration of Dean Ellis (Ex. J) ¶¶ 3-10, 13; Declaration of Brad Kranz (Ex. K) ¶¶ 6, 9-13.

Thus, "the ZEC program will distort wholesale market prices both immediately and in the long run. The program obligates uneconomic nuclear generating units to continue to generate, and thus to continue to bid into the wholesale markets, over the entire 10-year duration of the program." DeRamus Decl.¶ 82. This threatens Plaintiffs' "ability to earn sufficient revenue for operations, maintenance and capital costs necessary to support the continued safe and reliable operation" of their facilities, in Illinois and out of state. Kranz Decl. ¶¶ 9-10.

These conclusions are supported by a January 2015 report that Illinois's own Commerce Commission, Power Agency, and Department of Commerce and Economic Opportunity issued at the direction of the Illinois House of Representatives on the prospect of Exelon's Clinton and Quad Cities nuclear plants closing. DeRamus Decl. ¶¶ 52-59. They are also based on a study that the Illinois Commerce Commission asked PJM, the Illinois Institute of Technology, and PJM's independent market monitor to undertake regarding the short-term impacts of the closure of these plants on wholesale-market prices. The independent FERC-appointed market monitor confirms that the "ZEC Subsidies Program is incompatible with the PJM market design, threatens the foundations of the PJM market and interferes with the federal regulatory scheme." Motion to Intervene, ECF No. 30 ¶ 6.

Under the economic principles that inform these conclusions, in addition to the economic effects on the PJM and MISO wholesale markets summarized above, the ZEC program will undermine the integrity of the market mechanisms that FERC and the RTOs have established, as well as the federal regulatory process and rule-making procedures for proposed changes to wholesale markets. DeRamus ¶ 88. The Illinois ZEC program will reduce the willingness of actual or potential future market actors to participate in those markets. *Id.* ¶ 86. This will ultimately harm all residential, commercial, and industrial electricity customers in the affected regions. And electricity consumers will be immediately harmed by higher electric bills.

David DeRamus, Plaintiff's expert, estimates the ZEC program will reduce net revenue for suppliers in the PJM energy market (both generators and those exporting into the market) by approximately $244 million. DeRamus Decl. ¶ 60. In addition, the ZEC program will reduce net revenue in the PJM capacity market, for the 2020-1 Base Residual Auction, for the delivery year for the ComEd zone alone, by approximately $386 million to $529 million. *Id.* ¶ 73. As a result of the ZEC, plaintiff's bids, such as NRG's, "will likely not clear the formal capacity auction" and this may result in permanent shuttering of facilities and the loss of jobs. Kranz Decl. ¶ 4. Plaintiffs are directly harmed. Dynergy, for example, indicates that it "will have to retire more cost-effective units in PJM and/or MSO that otherwise would have continued to participate in the wholesale markets." Ellis Decl. ¶ 9. Plaintiffs will receive less revenue in auctions which they do clear and as there is no damage remedy (because the State defendants have Eleventh-Amendment sovereign immunity), there is no adequate remedy at law for any of these substantial impacts.

III. THE BALANCE OF EQUITIES SUPPORTS THE GRANTING OF PRELIMINARY RELIEF

The "balance of equities" prong of the preliminary injunction standard asks whether an injunction will "do more good than harm." *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009). This inquiry turns on balancing the irreparable harm to the plaintiff, any harm to the defendant, and "the public interest, or the effect that granting or denying the injunction would have on third parties." *MacDonald v. Chicago Park Dist.*, 132 F.3d 355, 357 (7th Cir. 1997); *see also Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999). The outcome of this balance is then weighted by the merit of the case. *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007). If the claim is strong on the merits, and irreparable harm likely, then an injunction should issue even if the equities are in equipoise. By the same token, if the "balance of harms . . . weigh heavily" for the plaintiff, the chance of success need only be "negligible" to support preliminary injunctive relief. *D.U. v. Rhoades*, 825 F.3d 331, 338 (7th Cir. 2016) (quoting *Curtis v. Thompson*, 840 F.2d 1291, 1296 (7th Cir. 1988)); *see also Hoosier Energy*, 582 F.3d at 725 ("[T]he more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief.").

The harm to Plaintiffs of allowing the ZEC program to proceed is substantial and irreparable. *See* Part II, above. The public interest belongs on the same side of the ledger as Plaintiffs' irreparable injury—it strongly favors injunctive relief.

Illinois long has recognized that "the lower costs for electricity that result from retail and wholesale competition" is in the public interest. 220 ILCS 5/16-101A(e). This interest is reflected in Illinois' express public policy to foster and support competitive electricity markets. The Public Utilities Act thus directs "the Illinois Commerce Commission [to] promote the development of an effectively competitive retail electricity market." 220 ILCS 5/20-102(d). And the Illinois Power Agency Act ("IPAA")—the statute that now includes the ZEC program—previously included legislative findings and declarations asserting that "[e]scalating prices for electricity in Illinois pose a serious threat to the economic well-being, health, and safety of the residents of and the commerce and industry of the State." 20 ILCS 3855/1-5(3) (effective until May 31, 2017). In recognition of this finding, the IPAA previously included express support for the development of "*cost-effective* renewable resources" to balance environmental and consumer interests. *Id.* § 1-5(6) (effective until May 31, 2017) (emphasis added).

The ZEC program undermines the public benefits that Illinois has long advanced. It openly and indisputably increases monthly retail electricity bills and interferes with the competitive market in which power generators compete. 20 ILCS 3855/1-75(d-5)(1)(B)(i-ii), (1)(C), (6). The statute puts a $340 million thumb on the scale in favor of two Exelon nuclear plants every year, directly harming all other power generators contributing to PJM and MISO wholesale markets. DeRamus Decl. ¶ 4. The ZEC program thus subsidizes generating resources that are admittedly *not* "cost-effective" and whose subsidies will contribute to "escalating prices" for all Illinois retail consumers of electricity.[9]

[9] As a matter of economics, the consequences of the ZEC program's interference with competitive markets are too well-established to dispute: subsidizing inefficient enterprises costs more than it provides in consumer benefits. Andrew Gillespie, *Business Economics* 199-203 (2d ed. 2013). The ZEC program itself quantifies the cost of inefficiency at $2.35 billion over ten years, DeRamus Decl. ¶ 4, all of which

As Exelon itself acknowledges, moreover, the ZEC program will impose an enormous collective burden on the State's electricity customers. Exelon estimates that the cost to Illinois customers for the ZEC program will be as high as $235 million per year for the duration of the ten-year program. *See* DeRamus Decl. ¶ 102 (citing Q4 2016 Exelon Corp Earnings Conference Call Presentation (February 8, 2017)). In addition, the ZEC program "reduces the willingness of actual or potential future market participants to participate in those markets – to the ultimate detriment of all electricity customers in the affected regions." *Id.* ¶ 88.

FERC has plenary power to establish "just and reasonable" rates. 16 U.S.C. § 824e(a). It has exercised this power by authorizing "market-based auctions" where competitive forces can be marshalled "to bring more efficient, lower cost power to the Nation's electricity consumers." *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.*, FERC Order No. 888, 61 Fed. Reg. 21,540, 21,541 (May 10, 1996). Federal policy thus supports market-based competition in the wholesale electricity market, and federal policy reflects the public interest here. *Planned Parenthood of Ind.*, 699 F.3d at 981 (public interest supported injunction where state statute interfered with right authorized by federal program). The ZEC program runs counter to this public interest, interfering with the market-based mechanisms for pricing and allocating wholesale power that FERC promotes.

Further, the public interest in competition has a constitutional corollary embodied in the "dormant" component of the Commerce Clause, which "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *W. Lynn Creamery*, 512 U.S. at 192. In particular, the dormant commerce clause guards against "statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970). This public interest in competitive markets, related but distinct from FERC's policy,

will be borne by Illinois' electricity users. 20 ILCS 3855/1-75(d-5)(6). This "dead weight loss" is distinctly contrary to the public interest.

also is undermined by the ZEC program, which is designed to favor two, specific in-state generators at the expense of more efficient, out-of-state competitors. "Simple economic protectionism is subject to a virtually per se rule of invalidity." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338–39 (2007) (internal quotation marks omitted)).

In short, as a matter of economic theory, state law, federal policy, and constitutional command, competitive interstate wholesale electricity markets are in the public interest. By contrast, the State and Exelon's interest in undermining these markets is minimal, particularly at this stage of the proceedings, where a preliminary injunction will merely preserve the status quo. *Cavel Int'l*, 500 F.3d at 546, 549 (noting that order temporarily staying enforcement of a statute pending resolution of the merits "will not create a perceptible harm" to the state). The mere "incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." *Id.* at 548 (*quoting Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981)). Where, as here, the statute had never been enforced, the State cannot show that "returning to procedures that were in use for years would cause hardship substantial enough to outweigh the potential harm to plaintiffs." *Cooper*, 196 F.3d at 817; *see also Darryl H. v. Coler*, 801 F.2d 893, 904 (7th Cir. 1986) ("[I]n ruling on a preliminary injunction, the judge must try to avoid the error that is most costly in the circumstances.").

Accordingly, the balance of harms would justify preliminary injunctive relief *even if* Plaintiffs' legal claims were weak. In light of Plaintiffs' likelihood of success on the merits, *see* Part I, above, and risk of irreparable injury, *see* Part II, above, the standards for a preliminary injunction are easily met.

CONCLUSION

For all of the foregoing reasons, the Court should grant Plaintiffs' motion and preliminarily enjoin the Illinois ZEC program.

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Respectfully submitted,

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