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

VILLAGE OF OLD MILL CREEK, FERRITE INTERNATIONAL COMPANY, GOT IT MAID, INC., NAFISCA ZOTOS, ROBERT DILLON, RICHARD OWENS, and ROBIN HAWKINS, both individually and d/b/a ROBIN'S NEST, a sole proprietorship,

Plaintiffs,

v.

ANTHONY STAR, in his official capacity as Director of the Illinois Power Agency,

Defendant.

No. 17-cv-1163
Judge Manish Shah
Magistrate Judge Susan Cox

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs VILLAGE OF OLD MILL CREEK, FERRITE INTERNATIONAL COMPANY, GOT IT MAID, INC., NAFISCA ZOTOS, ROBERT DILLON, RICHARD OWENS and ROBIN HAWKINS, both individually and d/b/a ROBIN'S NEST, respectfully file this Memorandum of Law In Support of Their Motion for Preliminary Injunction [Dkt. 28].

I. INTRODUCTION

Illinois Public Act 99-0906 ("P.A. 99-0906") becomes effective June 1, 2017. *See* P.A. 99-0906, Section 97. The Zero Emission Standard in subsection (d-5) of P.A. 99-0906 provides that the Illinois Power Agency ("IPA") must procure contracts for purchases of zero emission credits ("ZECs") for Illinois utilities Commonwealth Edison Company ("ComEd") and Ameren Illinois Company ("Ameren Illinois") from certain nuclear-fueled electricity generating plants

"beginning with the delivery year June 1, 2017." 20 ILCS 3855 1-75(d-5)(1) (hereafter, the "ZEC Procurement Law").

If this Court does not preliminarily enjoin implementation of the ZEC Procurement Law, Plaintiffs will be required to pay charges for ZECs established by the ZEC Procurement Law, charges which ComEd and Ameren Illinois will pass through to Plaintiffs and other Illinois electricity consumers through automatic adjustment tariffs provided for in the law. *See* 20 ILCS 3855/1-75 (d-5)(1)(B) and (d-5)(6). Such charges will result in substantial increases in electricity bills for Plaintiffs and other Illinois electricity consumers.

Every electricity consumer would be forced to pay an additional $2.64 per megawatt-hour ("MWh") based on the initial price for ZECs set forth in the ZEC Procurement Law. (See Affidavit of Roger Turner attached as Exhibit A hereto). For example, such charges would result in Plaintiff Ferrite International Company ("Ferrite") paying an additional monthly charge of $860, based on its average electricity usage for the past twenty-four months. (See Affidavit of Scott Fraser attached hereto as Exhibit B).

Total estimated ZEC charges to all Illinois consumers during the ten years (June 1, 2017 – May 31, 2027) of the ZEC purchase requirement are $3.3 billion based on the initial ZEC price. (See Exhibit A). Total additional charges for Plaintiff Ferrite are estimated to be $103,240. (See Exhibit B).

These ZEC charges will cause irreparable harm to Plaintiffs and there is no adequate remedy at law because the State of Illinois and Anthony Star, in his official capacity as Director of the IPA, are immune from a damages claim for refunds of the ZEC charges. *Quern v. Jordan,* 440 U.S. 332, 338-45 (1979).

A preliminary injunction may be granted prior to a trial on the merits to prevent a threatened wrong and to preserve the status quo. *Roland v. Air Line Employees Ass'n. Internat'l.*, 753 F. 2d

1385, 1391 (7th Cir. 1985). To obtain a preliminary injunction, Plaintiffs must establish that irreparable harm will occur, that there is a lack of an adequate remedy at law, that Plaintiffs have a likelihood of success on the merits, and that the balance of equities favor an injunction. *Reinders Bros., Inc. v. Rain Bird Eastern Sales Corp.*, 627 F.2d 44, 48–49 (7th Cir. 1980).

All of these elements are present here. Plaintiffs have a likelihood of succeeding on each of their four independent claims that the ZEC Procurement Law

(a) violates the U.S. Constitution's Supremacy Clause because the Federal Power Act establishes a federal regulatory scheme that preempts state law in this field ("Field Preemption");

(b) violates the Supremacy Clause because the state law at issue conflicts with the Federal Power Act and frustrates the purpose of that law ("Conflict Preemption");

(c) violates the U.S. Constitution's dormant Commerce Clause because it discriminates against and unduly burdens interstate commerce ("Commerce Clause Burden"); and

(d) violates the U.S. Constitution's Fourteenth Amendment Equal Protection Clause because it imposes on Plaintiffs and other Illinois electricity consumers charges for ZECs not imposed on electricity consumers in other states who, like Plaintiffs, are within either the PJM Interconnection, LLC ("PJM") or Midcontinent Independent System Operator ("MISO") electricity markets and are supplied electricity generated by Illinois-based nuclear plants or other nuclear plants ("Equal Protection Violation").

For these reasons and those stated below, this Court may and should issue a preliminary injunction in order to preserve the status quo and prevent the threatened wrong, a wrong which is not subject to a remedy at law. Plaintiffs therefore respectfully request this Court to grant their Motion for Preliminary Injunction.

II. ARGUMENT

A. Plaintiffs Are Likely to Prevail on the Merits of Their Field Preemption Claim.

Under the Federal Power Act, Congress has given the Federal Energy Regulatory Commission ("FERC") the exclusive authority to regulate "the sale of electric energy at wholesale in interstate commerce," to the exclusion of state and local governments. 16 U.S.C. 824(b)(1); *Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288, 1292 (2016). Instead of directly setting wholesale electricity rates, FERC has opted to utilize competitive wholesale markets to establish the "just and reasonable rates" required by the Federal Power Act. 16 U.S.C. 824d(a); *see, e.g.*, FERC Orders 888 and 889, 61 Fed. Reg. 21,540 (May 10, 1996) (issued concurrently); *Consumers Energy Co. v. FERC*, 376 F. 3d 915, 923 (D.C. Cir. 2004) (FERC may rely on market-based prices in lieu of cost-of-service regulation to ensure a just and reasonable result).

The ZEC Procurement Law is designed so that the Quad Cities and Clinton nuclear plants, owned by Exelon Corp. subsidiary Exelon Generation Company, LLC ("Exelon Generation"), will receive a state-established extra payment per MWh of electricity (for ZECs) in addition to the market price per MWh the plants receive in the competitive wholesale electricity market. This state-established extra charge is not provided to any other electricity generator, nuclear or non-nuclear, selling electricity to Illinois utilities and other wholesale electricity purchasers for resale to Illinois customers.

Although the ZEC Procurement Law states that the IPA can procure the ZECs for the utilities ComEd and Ameren Illinois from any nuclear-fueled electricity generator interconnected with PJM or MISO (20 ILCS 3855/ 1-10 and 1-75 (d-5)(1)), the procurement process *creates only the façade of a competitive procurement process.* In fact, the procurement process *is designed to result and will result* in the ZECs being purchased just from Exelon Generation's Clinton and Quad Cities plants. Moreover, rather than determining ZEC prices through a competitive procurement process, the ZEC Procurement Law establishes the method of determining the price

that will be paid for ZECs each year during the entire ten year period (June 1, 2017 – May 31, 2027) for which ComEd and Ameren Illinois must purchase ZECs. 20 ILCS 3855/1-75(d-5)(1)(B)(i).

According to Illinois Governor Bruce Rauner, the ZEC Procurement Law will provide extra revenues to Exelon Generation's Quad Cities and Clinton nuclear plants and prevent Exelon Generation from carrying out its threat to close these plants. On December 7, 2016, the date Governor Rauner signed the bill, he issued a Press Release stating, "Senate Bill 2814 [P.A. 99-0906] ensures that the Clinton and Quad Cities power facilities remain open for another ten years." December 7, 2016 Office of the Governor Press Release (Exhibit C).

Under the ZEC Procurement Law, all ComEd and Ameren Illinois electricity delivery services customers will be required to pay the ZEC subsidies to the Clinton and Quad Cities plants. "All" even includes customers who only use the ComEd and Ameren Illinois' wires to deliver electricity provided by *competitive suppliers* (rather than the utilities) from *other electricity generators*. 220 ILS 5/16-108(k). These targeted subsidies contradict FERC's determination that competitive wholesale prices are the just and reasonable rates for resources participating in the wholesale markets. 16 U.S.C. 824d(a).

Exelon Corp. subsidiary utility ComEd voluntarily transferred the Quad Cities nuclear plant and five other nuclear plants to a non-utility affiliate, Exelon Genco (subsequently known as Exelon Generation), in the year 2000 and thereby made the prices charged by the plants entirely subject to federal rather than state regulation. *See Illinois Commerce Commission v. Commonwealth Edison Co.*, Ill. C.C. Docket No. 00-0244 (2000). At a later date, Exelon Generation acquired the Clinton nuclear plant and its prices also are subject to federal rather than state regulation.

After those changes were made, Exelon Corp. CEO Christopher Crane made the following comments in 2014 about its nuclear plants: "[w]e don't want to be subsidized and no one should be subsidized in the competitive markets, so there are a few [generating plants] that may not make it." Crain's Chicago Business article (Exhibit D).

Despite this clear statement of Exelon Corp.'s intent, it now wants the exactly the opposite – state subsidies for its Quad Cities and Clinton nuclear plants. *See* Declaration of Jeanne Jones, Vice President of Finance, Exelon Nuclear at Exelon Corp. (Dkt. 13-2) (Exhibit E). Exelon Corp. specifically made the need for such subsidies part of its pitch to the legislature. Indeed, the General Assembly's legislative findings that the ZEC Procurement Law was necessary specifically cited to a report by the IPA and three other state agencies entitled "Potential Nuclear Power Plant Closings in Illinois" (the "IPA Report") (http://www.ilga.gov/reports/special/Report_Potential%20Nuclear%20Power%20Plant%20Closings%20in%20IL.pdf). *See* P.A. 99-0906, Section 1.5. Zero Emission Standard legislative findings.

The problem, however, is that the IPA Report was issued on January 5, 2015. In June 2015, FERC approved the inclusion of a capacity performance product in PJM's capacity auction. *Essential Power Rock Springs, LLC, et al. v. PJM Interconnection, LLC*, 151 Par. 61, 208 (June 9, 2015). The capacity performance product resulted in much higher capacity payments to nuclear generating plants and other generating plans which met the capacity performance standard. (See Exhibit A). In fact, the Quad Cities plant and other Exelon nuclear plants in Illinois received substantial additional capacity payments as a result of the new product in 2016 and 2017 from the utility ComEd and competitive electricity suppliers which were passed onto Illinois electricity consumers. (See Exhibit A). Therefore, by the time the Illinois General Assembly passed the ZEC Procurement Law on December 1, 2016, it was relying on an IPA Report that had been rendered obsolete by the PJM change to the capacity auction.

Most importantly, regardless of whether the ZEC subsidies are "necessary" for the nuclear plants' profitability, the state-mandated ZEC subsidies violate the Supremacy Clause of the U.S. Constitution because the ZEC Procurement Law regulates electricity in an area in which federal law has preempted the field. *FPC v. Southern Cal. Edison Co.*, 376 U.S. 2015 (1964); *Maine Yankee Atomic Power Co. v. Maine PUC*, 501 U.S. 1250 (1990).

The U.S. Supreme Court's holding in *Hughes v. Talen Energy Marketing*, 136 S. Ct. 1288 (2016), controls this case. In *Hughes*, the Court held Maryland's power plant "contract for differences" ("CFD") unconstitutionally regulated in a field preempted by the Federal Power Act. In *Hughes*, the Maryland Public Service Commission's CFD mechanism annually changed the amount that an electric utility had to pay to an electricity generator over the life of a twenty-year contract based on the clearing price in PJM's capacity auction. Each year the generator would receive the amount for capacity it received from participating in the PJM capacity auction and whatever additional subsidy was necessary from the utility for the generator to receive a specific amount for capacity each year. 136 S. Ct. at 1294-95.

Like the CFD mechanism in *Hughes*, the ZEC pricing mechanism here annually reduces the initial ZEC price of $16.50 per MWh to the extent a projected wholesale electricity market index is greater than a baseline price of $31.40 per MWh. 20 ILCS 3855/1-75(d-5)(1)(B). The legislative scheme is designed to annually provide the amount necessary to give the Clinton and Quad Cities nuclear plants what the State of Illinois has determined is a "sufficient" subsidy in the ZEC Procurement Law. 20 ILCS 3855/1-75 (d-5)(1).

In *Hughes*, the U.S. Supreme Court rejected "Maryland's program only because it disregards an interstate wholesale rate required by FERC." 136 S. Ct. at 1299. So too here. In enacting the ZEC Procurement Law, the State of Illinois disregarded the wholesale rates for energy

and capacity established by the competitive markets under FERC's jurisdiction. This approach violates the Federal Power Act. 16 U.S.C. 824(b)(1).

It does not matter whether a state believed that generators were not receiving sufficient revenues from the wholesale market, as in *Hughes and the instant case*, or that a state believed the wholesale rate was too low, as the States of Mississippi and North Carolina did in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and *Nantahala Power & Light v. Thornburg*, 476 U.S. 953 (1986), respectively. A state simply cannot transgress the federal government's authority over wholesale rates. State laws are preempted when "they deny full effect to the rates set by FERC, even though [they do] not seek to tamper with the actual terms of an interstate transaction." *PPL Energyplus, LLC v. Nazarian*, 753 F. 3d 467, 476 (2014). The Federal Power Act '"leaves no room either for direct state regulation of the prices' or for regulation that 'would indirectly achieve the same result.'" *FERC v. Electric Power Supply Association* 136 S.Ct. 760, 780, quoting *Northern Natural Gas Co. v. State Corporation Comm. of Kansas* 372 U.S. 84, 91 (1963).

Clearly, Plaintiffs have a likelihood of succeeding on their claim that the ZEC purchase requirement is field preempted. Therefore, Plaintiffs' Motion for Preliminary Injunction should be granted.

B. Plaintiffs are Likely to Prevail on Their Conflict Preemption Claim.

Even in the absence of field preemption, any state law or regulation is "conflict preempted" and thus invalid if it conflicts with federal law or frustrates the purpose of a federal law. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594-96 (2015). The ZEC purchase requirement of the ZEC Procurement Law is conflict preempted by the Federal Power Act for the reasons stated in EPSA Plaintiffs' Memorandum in Support of Their Motion for Preliminary Injunction in Case No. 17-

cv-1164, which the Village of Old Mill Creek Plaintiffs adopt by reference, as well as for the additional reasons stated in this section.

FERC, the agency charged with implementing the Federal Power Act, has determined that market-based processes — approved and overseen by FERC — are the best way to bring more efficient, lower cost power to the nation's electricity consumers. *See e.g.*, FERC Orders 888 and 889, 61 Fed. Reg. 21,540 (May 10, 1996) (issued concurrently).

The ZEC Procurement Law requires Illinois utilities to pass through to all of their retail customers the costs of purchasing ZECs from favored nuclear generators. 20 ILCS 3855/1-75(d-5)(2), 20 ILCS 5/16-108(k). These retail customers include customers who don't purchase electricity supply from a utility and only use the utility to deliver electricity supply to them from competitive suppliers. 220 ILCS 5/16-102. The ZEC purchase requirement makes a mockery of the competitive wholesale electricity market under FERC jurisdiction and violates federal law.

The Illinois law directly contravenes FERC's determination that competitive markets justly and reasonably determine the wholesale price for electricity within PJM and MISO. This contravention violates Section 824 of the Federal Power Act. 16 U.S.C. 824.

Significantly, if Illinois truly believes that nuclear generators should get higher payments for their electricity, *it is entitled to petition FERC to adopt market rule changes designed to accomplish this goal*. Indeed, in 2014, at the urging of Exelon Generation, PJM did exactly this when it asked FERC to approve the change to PJM's capacity auction to include the new capacity performance product discussed previously in this Memorandum. *Essential Rock Springs v. PJM Interconnection, LLC*, 151 FERC Par. 61,208 (June 9, 2015) and 155 FERC Par. 61,157 (May 10, 2016) (Order on Rehearing and Compliance). After FERC approved this approach, nuclear generators obtained enhanced capacity charges through PJM's capacity auction. (See Exhibit A)

(Note these are the same enhanced capacity rates that rendered obsolete the "save our power plants" IPA Report on which the General Assembly relied).

Instead of petitioning FERC for changes designed to address any pricing issues that nuclear generators may have confronted in the wholesale electricity market, the State of Illinois disregarded FERC's exclusive jurisdiction over wholesale electricity rates. The ZEC Procurement Law obstructs FERC's regulatory scheme, which depends upon fair competition and the functioning of competitive markets without interference from out-of-market subsidies. Under the Supremacy Clause, the State of Illinois may not supplant FERC's scheme with its own preferred approach**.** *California ex rel. Lockyer v. Dynegy,* 375 F. 3d 831 848 (9th Cir. 2004), *cert. den.,* 544 U.S. 974 (2005); *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977).

Plaintiffs have a likelihood of succeeding on their claim that the ZEC purchase requirement is conflict preempted. Therefore, Plaintiff's Motion for Preliminary Injunction should be granted.

C. Plaintiffs Are Likely to Succeed on Their Dormant Commerce Clause Claim.

The ZEC Procurement Law is invalid under the dormant Commerce Clause of the U.S. Constitution, Article I, Section 8. Under this provision, states cannot discriminate against interstate commerce, nor can they unduly burden interstate commerce, even in the absence of federal legislation regulating the activity. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). Any state action that burdens interstate commerce is invalid if it does not regulate evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are more than incidental. *E.g., State of Missouri ex rel. Barrett v Kansas Natural Gas Co.*, 265 U.S. 298, 306-07 (1924).

Although states have the right to regulate retail sales of electricity within their own borders, the wholesale sale of electricity involves interstate commerce, which a state may not regulate.

PJM's and MISO's wholesale markets are interstate and international in nature, as they involve the sale and transmission of energy and capacity from generators located in other states and Canada.

The ZEC charges to all Illinois electricity consumers harm and discriminate against Plaintiffs and other Illinois electricity consumers who all either purchase or are eligible to purchase electricity supply from competitive retail suppliers, who, in turn, purchase their electricity from interstate wholesale suppliers adversely affected by the ZEC program. The ZEC program unduly burdens interstate commerce, does not regulate evenhandedly to effectuate a local public interest and its effects on interstate commerce are substantial. Implementation of the ZEC charges would violate the Commerce Clause and deprive Plaintiffs of "rights, privileges, or immunities" within the meaning of the Commerce Clause. Plaintiffs will be injured by these deprivations and are entitled to redress under 42 U.S.C. 1983. *Dennis v. Higgins*, 498 U.S. 439 (1991).

Plaintiffs have a likelihood of succeeding on their claim that the ZEC Procurement Law violates the dormant Commerce Clause of the U.S. Constitution. Therefore, Plaintiffs' Motion for Preliminary Injunction should be granted.

D. Plaintiffs Are Likely to Succeed on Equal Protection Clause Claim.

Under the U.S Constitution's Fourteenth Amendment, Plaintiffs are entitled to the equal protection of United States laws, including the Federal Power Act. 16 U.S.C. 791a, *et seq.*; *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 890 n.9 (1985). The Fourteenth Amendment provides in relevant part that: "[N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" U.S. Constitution, Amendment XIV (emphasis added).

Under the Federal Power Act, FERC regulates wholesale electricity markets in PJM and MISO. In addition to northern Illinois, the PJM regional transmission organization footprint

covers parts or all of twelve other states and the District of Columbia. Likewise, in addition to central and southern Illinois, the MISO independent system operator footprint covers all or parts of fourteen other states. The ZEC Procurement Law imposes on Plaintiffs certain electricity costs not imposed on electricity consumers of other states in the PJM and MISO footprints who purchase electricity supply generated by the Quad Cities and Clinton nuclear plants, or from other nuclear generating plants, without paying any ZEC charges.

The imposition of ZEC charges would be actions taken under color of state law, i.e. the ZEC Procurement Law. Implementation of the ZEC Procurement Law will deny to Plaintiffs the equal protection of the federal laws governing the electricity markets in violation of the Fourteenth Amendment. Plaintiffs have been injured by these deprivations of their rights to equal protection of the laws and are entitled to redress under 42 U.S.C. 1983. *Dennis v. Higgins*, 498 U.S. 439 (1991).

Plaintiffs have a likelihood of succeeding on their claim that the ZEC Procurement Law violates the Equal Protection Clause. Therefore, Plaintiffs' Motion for Preliminary Injunction should be granted.

E. Plaintiffs Will Suffer Irreparable Harm if the ZEC Procurement Law Is Not Enjoined.

To obtain preliminary relief, Plaintiffs must show irreparable harm. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of America, Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). This test is clearly met in this instance. Irreparable harm is harm "for which there is no adequate legal remedy, such as an award of damages." *Ariz. Dream Act Coal. v. Brewer*, 757 F. 3d 1053, 1068 (9th Cir. 2014). In the instant case, the State of Illinois and Defendant Anthony Star, in his official capacity as Director of the IPA, are immune from any claim for damages. *Quern v. Jordan*, 440 U.S. 332, 338-45 (1979).

The ZEC Procurement Law provides that the IPA must procure contracts for ComEd and Ameren Illinois for purchase of ZECs from nuclear-fueled generating plants "beginning with the delivery year June 1, 2017." 20 ILCS 3855/ 1-75 (d-5)(1). Under the ZEC Procurement Law, Illinois utilities ComEd and Ameren Illinois are entitled to pass through all of the costs of the ZEC purchases to their consumers through automatic adjustment tariffs. 220 ILCS 5/16-108(k). Since the ZEC charges are *nonrefundable charges* not susceptible to a claim for damages at law, Plaintiffs will suffer irreparable harm even if their requested declaratory and permanent injunctive relief is ultimately granted by this Court. Therefore, Plaintiffs' Motion for a Preliminary Injunction should be granted.

F. The Balance of Equities and The Public Interest Sharply Favor Preliminary Relief.

A court asked to issue a preliminary injunction must consider which party will suffer the greater harm as a result of a ruling for or against issuance. *In re Aimster Copyright Litigation,* 334 F.3d 643, 655 (7th Cir. 2003). The balance of equities and public interest always favor "prevent[ing] the violation of a party's constitutional rights." *Melendres v. Arpaio,* 695 F. 3d 990, 1002 (9th Cir. 2012).

Clearly, the balance of equities and public interest demands that Plaintiffs not be charged unconstitutional electricity charges they would never get back even if their constitutional claims are later found to be valid by this Court. Moreover, Plaintiffs' Complaint and requested relief is narrowly tailored to challenge only subsection (d-5) Zero Emission Standard of P.A. 99-0906. Therefore, the remainder of the 503-page legislation can still be implemented even if the preliminary injunction is granted because the provisions of the Act are severable under the Section 1.31 of the Illinois Statute on Statutes. P.A. 99-0906, Section 97; 5 ILCS 70/1.31.

III. Conclusion

WHEREFORE, for the above stated reasons Plaintiffs ask this Court to preliminarily enjoin Defendant Anthony Star's implementation of subsection (d-5) Zero Emission Standard of P.A. 99-0906 until this Court renders its decision on the merits in this case.

Dated: March 31, 2017

Respectfully submitted,

_/s/_ Patrick N. Giordano_____

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