No. 17-2433 (Consolidated with 17-2445)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

VILLAGE OF OLD MILL CREEK, *et al.*,
Plaintiffs-Appellants,
v.
ANTHONY STAR, in his official capacity as Director of the Illinois Power Agency, *et al.*,
Defendant-Appellee,
and
EXELON GENERATION COMPANY, LLC,
Intervenor-Appellee.

ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,
Plaintiffs-Appellants,
v.
ANTHONY STAR, in his official capacity as Director of the Illinois Power Agency, *et al.*,
Defendants-Appellees,
and
EXELON GENERATION COMPANY, LLC,
Intervenor-Appellee.

On Appeals from the United States District Court for the Northern District of Illinois, Nos. 1:17-cv-01163 & 1:17-cv-01164, Hon. Manish S. Shah, District Judge

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MOTION OF INTERVENOR-APPELLEE FOR LEAVE TO FILE A RESPONSE TO PLAINTIFFS-APPELLANTS' RESPONSE TO AMICUS BRIEF OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

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Intervenor-Appellee Exelon Generation Company, LLC ("Exelon") respectfully moves for leave to file a response to the Plaintiffs-Appellants' Response to Amicus Brief of the United States and the Federal Energy Regulatory Commission filed on June 11, 2018 (the "Response").

In moving for leave to file, the Electric Power Supply Association ("EPSA") explained that the "ordinary operation of the Federal Rules of Appellate Procedure provides an opportunity for a party to respond to ... briefs submitted in support of the other side," including "at oral argument." Mot. 1, Doc. 136. Had the United States and the Federal Energy Regulatory Commission submitted their brief on the normal schedule, then EPSA—presumably—would have responded in its reply brief, and in turn, Exelon could have addressed EPSA's arguments at oral argument. Here, oral argument has occurred, and Exelon respectfully suggests that it should still have an opportunity to respond. Recognizing that the Court has already received many pages of briefing, Exelon has limited its response to 487 words. Exelon has attached its proposed response.

A response is especially warranted in light of EPSA's 5-page discussion of the United States' brief in *Virginia Uranium v. Warren*, No. 16-1275, a case concerning the Atomic Energy Act ("AEA"). The *Virginia Uranium* brief is based on decades-old AEA principles, which EPSA could have

discussed in its opening or reply briefs, but did not. Exelon respectfully suggests that it is appropriate to allow a concise further response to the new statute EPSA has invoked.

Exelon therefore asks the Court to grant Exelon leave to file the attached response to EPSA's Response.

Dated: June 18, 2018

Respectfully submitted,

By: /s/ Matthew E. Price

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CERTIFICATE OF SERVICE

I, Matthew E. Price, an attorney, hereby certify that on June 18, 2018, I caused the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

/s/ Matthew E. Price
Matthew E. Price

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INTERVENOR-APPELLEE'S RESPONSE TO PLAINTIFFS-APPELLANTS' RESPONSE TO AMICUS BRIEF OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

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ARGUMENT

EPSA's response to the United States' brief largely rehashes its claim that the ZEC Program is preempted because Exelon's facilities allegedly sell all their output at wholesale—even though the State does not require them to do so. The only novelty is EPSA's claim that the U.S. Brief "contradicts [the U.S.'s] position" in *Virginia Uranium*, an Atomic Energy Act ("AEA") preemption case currently before the Supreme Court. EPSA Resp. 6.

EPSA is wrong. The United States took two different positions because the AEA and the Federal Power Act ("FPA") are two very different statutes. The AEA "occupie[s] the entire field of nuclear safety concerns," and so state regulation of *any* activity—even one that is not federally regulated—is preempted if the state's *purpose* is to regulate nuclear safety. Br. for U.S., *Va. Uranium*, 2018 WL 1733124, at *11-12 (U.S. Apr. 9, 2018) ("*Va. Uranium* U.S. Br.") (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 84 (1990)); *see id.* (Supreme Court interprets AEA to "define[] the pre-empted field ... by reference to ... motivation." *Id.* (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 84 (1990)). The FPA, by contrast, divides the regulation of two activities—electric generation, and wholesale sales—that cannot be "hermetically sealed from each other." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 775 (2016). Hence, the Supreme Court has interpreted FPA

preemption to turn on *what* is being regulated, not *why*. *See Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 (2016) (focusing on means, not ends); *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015) (focusing on the "target" of state regulation).

With these statutes so different, it is no wonder EPSA never cited AEA caselaw until now. The *Virginia Uranium* brief says nothing new; it simply repeats decades-old AEA principles. Indeed, even if the AEA's purpose-based theory had some FPA analog, it would not help EPSA. First, as the District Court noted, EPSA's "complaint [did] not allege that the statute's true aim or purpose was to adjust or disregard wholesale rates"; rather, EPSA "allege[d] that its actual purpose was to save jobs and generate local tax revenues." Op. 26 n.27. And on appeal, EPSA disavowed any purpose-based argument, affirming that "field preemption" under the FPA "does not turn on ... Illinois's true goal." EPSA Br. 53, Doc. 34-1. Second, even under the AEA, state laws are upheld if supported by a permissible "nonsafety rationale." *Va. Uranium* U.S. Br. 13. The *Virginia Uranium* plaintiffs alleged plausibly that the state banned uranium mining *only* to avoid unsafe processing. Here, there is no dispute that the ZEC Program furthers environmental goals, separate from the wholesale market, by preserving the benefits of emission-free generation. SB2814 §1.5 (SA.2-5). While EPSA

alleges that Illinois' environmental goals can be "achieved more effectively," Compl. ¶ 89, it does not deny the Program's environmental benefits.

CONCLUSION

The judgments should be affirmed.

Dated: June 18, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief contains 487 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14 point Georgia font for the main text and 12 point Georgia font for footnotes.

Dated: June 18, 2018

/s/ Matthew E. Price
Matthew E. Price

CERTIFICATE OF SERVICE

I, Matthew E. Price, an attorney, hereby certify that on June 18, 2018, I caused the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

/s/ Matthew E. Price
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