Nos. 17-2433, 17-2445

IN THE
UNITED STATES COURT OF APPEALS
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, Defendant-Appellee, and EXELON GENERATION COMPANY, LLC, Intervening Defendant-Appellee.	)	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
	)	Nos. 17-cv-1163, 17-cv-1164
ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*, v. ANTHONY STAR, in his official capacity as Director of the Illinois Power Agency, *et al.*, and EXELON GENERATION COMPANY, LLC, Intervening Defendant-Appellee.	)	The Honorable MANISH S. SHAH, Judge Presiding.

STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' RESPONSES TO AMICUS BRIEF OF UNITED STATES AND FEDERAL ENERGY REGULATORY COMMISSION

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Plaintiffs' responses to the United States' brief are revealing, initially, for what they do not dispute: (1) the FPA establishes a system of dual sovereignty over electricity in which States regulate, and may subsidize, generation facilities (U.S. Br. 7-8, 16-17); (2) state-created interests in the environmental attributes of emission-free power are distinct from electricity and are outside FERC's regulatory jurisdiction unless they are "bundled" with the sale of wholesale electricity (i.e., sold "as part of the same transaction"), which is not the case for ZECs under Illinois' ZEC Program (*id.* 10, 23-25); and (3) FERC, in implementing its authority under the FPA, has traditionally accommodated state environmental policies (*id.* 8, 22, 26-27). Plaintiffs' challenges to the United States' other points are unconvincing.

I. FERC Can Address Any Negative Effect of ZEC Payments on Wholesale Electricity Markets.

The United States asserts that FERC, pursuant to its statutory jurisdiction over wholesale electricity prices, can address any detrimental effects of the ZEC Program on those prices, including in the pending FERC proceeding brought by several EPSA plaintiffs. (*Id.* 4-6, 7-8, 19-22.) In response, the Retail Plaintiffs implausibly contend that, with the ZEC Program in place, it is impossible for FERC to establish market rules that ensure "just and reasonable" wholesale rates, so the courts must declare the ZEC Program preempted. (Retail Pl. Br. 3, 7-8.) But they offer no intelligible explanation of why FERC cannot fulfill that responsibility. They also complain that the United States has not "indicate[d] what actions [FERC] can or will take to try to maintain just and reasonable wholesale rates in response to the ZEC subsidies." (*Id.* 3; see also EPSA Br. 12, asserting that FERC "has not shown" whether, or how, it can mitigate any adverse

effects of the ZEC Program.) But the place for FERC to determine what action to take, if any, is not in an amicus brief filed with this Court, but in an administrative proceeding under the FPA, after factfinding, and subject to judicial review. Thus, as the United States explains, if there is a problem, under the FPA "the solution lies with the Commission, not with courts." (U.S. Br. 20.)

II. Indirect Effects of the ZEC Program on Wholesale Prices Do Not Prove Plaintiffs' Conflict Preemption Claim.

In response to the United States' assertion that the ZEC Program's incidental effects on wholesale electricity prices do not render the program preempted by the FPA (*id.* 7, 16, 18-19), the EPSA Plaintiffs maintain that the mere prospect that FERC may need to address the ZEC Program's effects on wholesale prices supports their conflict preemption claim. For this, they selectively quote a single phrase in *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), *aff'd sub nom. Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016): "The fact that FERC was forced to mitigate the Generation Order's distorting effects using the MOPR, however, tends to confirm rather than refute the existence of a conflict." (EPSA Br. 11, quoting *PPL EnergyPlus*, 753 F.3d at 479.) But the facts and reasoning in *PPL EnergyPlus* refute the EPSA Plaintiffs' sweeping characterization of it. The Fourth Circuit emphasized that "[t]he Generation Order represents an effort by the state to directly override [FERC's] explicit policy choice" not to give the generator a ten-year fixed-price guarantee for capacity sales. 753 F.3d at 479. It then explained:

> [O]ur conflict preemption ruling is narrow and focused upon the program before us. Obviously, not every state regulation

> that incidentally affects federal markets is preempted. Such an outcome "would thoroughly undermine precisely the division of the regulatory field that Congress went to so much trouble to establish . . . , and would render Congress' specific grant of power to the States to regulate production virtually meaningless."

Id. at 479-80 (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 515 (1989)). Here, FERC has not adopted any "explicit policy choice" that the ZEC Program seeks to "directly override." And given the FPA's intentional division of regulatory authority, *PPL EnergyPlus*'s reasoning reinforces the United States' position that the ZEC Program's impact on wholesale prices is a matter for FERC to address, subject to judicial review.

III. Plaintiffs Fail to Show that the ZEC Program Constitutes Wholesale Ratesetting.

The EPSA Plaintiffs' reliance on the United States' amicus brief supporting the petition for certiorari in *Virginia Uranium v. Warren*, No. 16-1275 (EPSA Br. 6-10) is misplaced. The statute at issue there, unlike the FPA, expressly preempts state laws that have a safety-related purpose. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 210, 212 (1983). The EPSA Plaintiffs nonetheless insist that "in reality [the ZEC Program's] purpose . . . is to target . . . wholesale energy auctions." (EPSA Br. 8.) But as the district court noted (Op. 26 n.27), Plaintiffs did not allege — nor, in light of the ZEC Program's declared purpose, structure, and evident environmental benefits, could they plausibly allege — that the Program's purpose was to invade FERC's jurisdiction over prices for wholesale electricity transactions.

Finally, Plaintiffs unconvincingly try to portray the ZEC Program as the legal equivalent of the Maryland program the Supreme Court found preempted in *Hughes*. The Maryland program set the price for individual sales of electric capacity by first requiring the generator to "clear" the capacity auction, and then replacing the auction price for that capacity with the price determined by the program's "contracts for differences." *Hughes*, 136 S. Ct. at 1295-99; see also *PPL EnergyPlus*, 753 F.3d at 476 ("The [contract-for-differences] payments, which are conditioned on [the generator] clearing the federal market, plainly qualify as compensation for interstate sales at wholesale"). By contrast, the ZEC Program, like the REC programs Plaintiffs accept, rewards the positive environmental attributes of emission-free nuclear power, not electricity, with payments that are independent of the sale of electricity and are made regardless of how, and at what price, that electricity is sold. The United States brief gets this difference precisely right. (U.S. Br. 7, 9-19.)

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Respectfully submitted,

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