

September 11, 2017

AMICUS BRIEFS SUPPORT EPSA'S POSITIONS IN FEDERAL LITIGATION OVER ILLINOIS SUBSIDIES

EPSA is the lead plaintiff in litigation now on appeal to the U.S. Court of Appeals for the 7th Circuit that seeks to block implementation of the Illinois subsidy program for only two nuclear plants owned by a single company. EPSA and other plaintiffs argue that the subsidies invade exclusive federal jurisdiction over wholesale power markets and discriminate against competing sources of power generation. On September 5, 2017, five amicus briefs supporting [the appeal](#) were filed. Key excerpts are below. The full text of each amicus brief is posted at www.epsa.org.

AMICI AGREE THE ILLINOIS ZERO EMISSIONS CREDIT PROGRAM SHOULD BE PREEMPTED

➤ [PJM INDEPENDENT MARKET MONITOR, MONITORING ANALYTICS](#)

“There is an explicit tether between the ZEC subsidy and federally regulated wholesale energy prices. The tether is the core factual issue in this case. The question of whether there is targeting of wholesale market prices and a tether to wholesale market prices is a matter of fact that must be conceded to EPSA in deciding on a motion to dismiss.” (p. 5)

“The explicit purpose of the ZECs Subsidies Program is to reverse the outcome of the PJM wholesale power market. Competition in the PJM wholesale power market has resulted in lower prices. The identified nuclear power plant received a clear signal from the PJM wholesale power market, per Exelon, that it was no longer economic at the lower, competitive wholesale power prices. The ZECs Subsidies Program is designed to reverse the outcome of the wholesale power markets, guarantee a payment equal to the subsidy amount plus the current market price, and require the identified nuclear power plant to continue to operate. The tether is clear and unambiguous.” (p.6)

“The facts and circumstances in Hughes are like and in some cases identical to the facts and circumstances here. Hughes specifically concerns federal regulation as it affects the PJM wholesale power market. Hughes concerns the same fundamental issue that this case presents: whether a state program that disregards wholesale rates required by FERC (including in PJM) and is tethered to the FERC regulated markets is preempted. Hughes found that such state programs are preempted. The ZEC Subsidies Program should be found preempted consistent with Hughes because the holding in Hughes squarely applies. Even if it did not, the ZEC Subsidies Program should still be found preempted consistent with the fundamental rationale in Hughes.” (p. 7)

➤ [AMERICAN PETROLEUM INSTITUTE AND NATURAL GAS SUPPLY ASSOCIATION](#)

“The District Court misunderstood the ZEC price-setting mechanism – and therefore its closely-tethered relationship with rates for wholesale sales of electricity – resulting in misapplication of the law. Specifically, the Court failed to recognize that the Illinois’ ZEC program impermissibly interferes with the “single clearing price” structure of organized electricity markets and FERC’s ratemaking jurisdiction and is therefore preempted under Hughes, 136 S. Ct. 1288, 1292.” (p. 11)

“[E]stablishment of precedent that would allow a patchwork of differing state subsidy programs tethered to wholesale markets, each designed to promote state-specific goals, would disrupt the wholesale energy markets and undermine FERC’s ability to carry out its statutory function.” (p. 14)

“Illinois’ ZEC program is preempted by the FPA as interpreted by Hughes. The District Court’s decision, based on a misunderstanding of the ZEC program and its impact on the organized wholesale electricity markets, is illogical and if allowed to stand would not only disrupt those markets, but also the upstream natural gas markets which provide the fuel used to produce over a third of the nation’s electricity. Therefore, the District Court’s decision should be reversed.” (p. 11)

➤ [ENERGY ECONOMISTS](#)

“[T]he ZEC program has impacts on the FERC-regulated MISO and PJM auction-based markets that the district court failed to consider based on the incorrect assumption that receipt of ZEC program credits does not require participation in the energy market... That assumption fails to take into consideration that, in the real world – as a matter of both physics and tariff requirements – nuclear generators such as the ZEC recipients must inject the power they generate into the electric grid. This injection constitutes a sale into the relevant ISO’s or RTO’s energy market. In this context, there is no difference between the production and injection of energy by a generator interconnected with an ISO or RTO grid and the sale of that energy into that ISO’s or RTO’s FERC-regulated market.” (p. 6)

➤ [ILLINOIS CHAMBER OF COMMERCE AND ILLINOIS INDUSTRIAL ENERGY CONSUMERS](#)

“The ZEC program exists to subsidize Exelon’s troubled nuclear power fleet. Whether this goal is constructive, it should not be achieved by subverting the FERC-established process for assuring adequate energy supplies at just and reasonable rates through reliance on market forces, by undermining the competitive market in Illinois, or by imposing large and unnecessary costs on Illinois’ business community and residents.” (pp. 8-9)

AMICI AGREE PRIVATE PARTIES SHOULD BE ABLE TO SUE UNDER THE FEDERAL POWER ACT

➤ [NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES \(NASUCA\)](#)

“NASUCA and its members have long litigated issues affecting wholesale rates without any serious challenge to their standing on behalf of the retail ratepayers they represent. By finding otherwise, the court below has erected such a barrier for the first time and has done so in contravention of the language and purpose of the FPA”. (p. 4)

“The district court in this case misapplied the Supreme Court’s jurisprudence on prudential standing and the zone of interests in at least three ways. First, it ignored language in the FPA that demonstrates a legislative intent to allow broad standing and negate the need to apply the zone of interest’s test. Second, the court failed to recognize that the language of the FPA supports a standing requirement consistent with Article III standing. Although acknowledging that the ZEC statute impacts retail customers through additional charges on their bills and that this impact would be redressed if the charges were prohibited under the FPA, the court did not properly account for this constitutional Article III standing. Third, the court misapplied the zone of interest’s test, ignoring the well-established jurisprudence that calls for a liberal application of the test, as well as the fact that the retail consumer plaintiffs clearly do fall within the zone of interests of the FPA. For these reasons, the decision below finding that the consumer plaintiffs lack prudential standing should be overturned.” (p. 7)

➤ [ILLINOIS CHAMBER OF COMMERCE AND ILLINOIS INDUSTRIAL ENERGY CONSUMERS](#)

“The Amici respectfully submit that therefore it is so important for the Court to recognize the standing of the appellants in this matter and to conclude that their claims are not precluded. Illinois businesses and residents must can challenge this corrosive subsidy directly in court and thereby to defend their substantial financial interests if they are to continue to thrive.” (p. 8)

➤ [AMERICAN PETROLEUM INSTITUTE AND NATURAL GAS SUPPLY ASSOCIATION](#)

“Preclusion of a private right of action at equity under the FPA would invite more state legislatures to test — or outright ignore — FERC’s exclusive ratemaking jurisdiction under the FPA, and by extension, the NGA. It therefore is not surprising that FERC has taken the position that the FPA allows such suits.” (p. 18)

“The District Court committed reversible error when it failed to properly apply the two-part test in Armstrong and did not distinguish the FPA from the Medicaid Act – Spending Clause Legislation, under which third-party enforcement rights must be unambiguously conferred.” (p. 19)

Celebrating its 20th Anniversary, EPSA is the national trade association representing leading independent power producers and marketers. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. EPSA seeks to bring the benefits of competition to all power customers.