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Ms. Catherine O'Hagan Wolfe  
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New York, NY 10007

Re: *Coalition for Competitive Electricity v. Zibelman*  
Case No. 17-2654-cv

Dear Ms. O'Hagan Wolfe:

Plaintiffs-Appellants Coalition for Competitive Electricity, et al., hereby respond to Defendants-Appellees' letter of September 14, 2018, regarding *Electric Power Supply Association v. Star*.

That decision rests on a basic procedural mistake: the Seventh Circuit reasoned from the incorrect premise that the trial court had "granted summary judgment to the defendants" (slip op. 3) and then improperly accepted the defendants' factual assertions as if they were undisputed summary-judgment evidence (e.g., slip op. 6 (accepting defendants' assertion that subsidized nuclear plants could "sell power through bilateral contracts with users (such as industrial

MUNGER, TOLLES & OLSON LLP

Ms. Catherine O'Hagan Wolfe  
Clerk of Court  
September 21, 2018  
Page 2

plants).”) Actually, as here, *a dismissal* was on appeal, *Vill. of Old Mill Creek v. Star*, 2017 WL 3008289, at \*18 (N.D. Ill. July 14, 2017), so the Court was bound to accept as true the complaint’s well-pleaded allegations, including the allegations establishing that, to receive ZECs, nuclear plants inevitably must sell into the wholesale market.

The decision also failed to address the argument that *Wos v. E.M.A.*, 568 U.S. 627 (2013), and *Nat’l Meat Ass’n v. Harris*, 565 U.S. 452 (2012), hold that a state law can be preempted for its *functional operation* irrespective of its formal terms. The Court simply decided that because the ZEC program did not *expressly* require generators to sell their electricity in the wholesale market, it survived *Hughes*. (Slip op. 5-6.) The Court did not address the argument that, functionally, the complaint’s well-pleaded allegations established a scenario indistinguishable from *Hughes*.

The preemption argument was also misunderstood at the level of specifics. There, as here, the appellants argued that, by providing a per-Mwh subsidy tethered to the wholesale price of energy, the ZEC program modified the wholesale rate *received by the favored nuclear plants*. The Court never addressed that point. Instead, it concluded that the ZEC subsidy did not change the *market price for all participants* any more than other, permissible forms of state generation incentives. (See slip op. 6.) Although the ZEC’s price suppression *harms* non-favored generators, the subsidy is *preempted* because it raises the wholesale rate received by the favored in-state nuclear plants through a “make-whole” payment like the “contract-for-differences” subsidy in *Hughes*.

Very truly yours,

/s/ Donald B. Verrilli, Jr.

Donald B. Verrilli, Jr.