

**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 ZOTOZ, and ROBIN HAWKINS, both individually and d/b/a/ ROBINS NEST

Plaintiffs,

v.

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

Defendant.

Case No. 1:17-cv-01163

District Judge Manish S. Shah

**PROPOSED BRIEF OF AMICUS CURIAE
AMERICAN WIND ENERGY ASSOCIATION IN
SUPPORT OF NEITHER PARTY**

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BACKGROUND AND INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the American Wind Energy Association (“AWEA”), is a non-profit national trade association representing a broad range of entities with the common purpose of encouraging the expansion and facilitation of both onshore and offshore wind energy resources in the United States. *Amicus Curiae* represent the interests of wind turbine manufacturers, component suppliers, project developers, project owners and operators, financiers, researchers, renewable energy supporters, utilities, marketers, customers, and their advocates. Through, among other things, participation as *amicus curiae* in state and federal courts, *Amicus Curiae* seek to promote wind energy as a renewable, low-cost source of electricity for consumers. This case raises issues that could have a profound and direct impact on the interests of the wind industry.

Amicus curiae believe that the arguments within this brief present unique information and a broader perspective regarding the issues raised by this case that should serve as a useful supplement to the submissions presented by the parties. Although *Amicus Curiae* takes no position as to the merits of this case, we respectfully submit this brief to apprise this Court of issues in which the wind industry has a significant interest apart from the immediate interests of the parties to this litigation and provide the unique perspective of the wind industry, while also supporting states’ legitimate rights and interests to incentivize renewable energy within their borders.

Amicus Curiae has an interest in this case because state-conducted resource procurement efforts for renewable energy could be called into question if this Court issues an overly broad rationale in reaching a verdict in this case that strikes down the zero-emission credit (“ZEC”) program. Indeed, an unduly broad decision in favor of Petitioners in this case could substantially interfere with the implementation of on-going, as well as the creation of future, state programs designed to meet important environmental and public policy goals through renewable energy

deployment.

SUMMARY OF ARGUMENT

States must maintain diverse generation resource options through, among other things, directing long-term resource planning. Pursuant to such planning, states commonly seek to meet policies that encourage the deployment of renewable energy technologies, including wind. An overly broad decision in this case would put in jeopardy Illinois', as well as other states', ability to meet renewable energy policy goals.

Both Plaintiffs and Defendant in this litigation have addressed the issue of the legitimacy and comparability of commonly traded renewable energy credits ("RECs")¹ and ZECs. ZECs are not comparable to RECs; in fact, the two concepts are more dissimilar than similar. As such, the Illinois ZEC program is readily distinguishable from the REC programs enacted in many states. Under typical REC constructs, credits are traded through market-based systems (similar to commodity markets) and awarded to generators with certain environmental attributes as an incentive to develop and produce certain types of new energy resources. Specifically, most REC programs are market-based, not tied to the wholesale price of electricity, not tied to the economic viability of a resource, and allow credits to be traded across state lines. In contrast, ZECs are not market-based, are directly tied to wholesale energy prices, are only available to otherwise uneconomic resources, and are only available to certain in-state resources.

The structure of the Federal Power Act ("FPA") and the relevant case law—including, and especially, the Supreme Court's recent ruling in *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288

¹ RECs are used to help achieve renewable energy goals or renewable portfolio standards ("RPSs"). REC programs are established through state legislation requiring that a certain percentage of retail customers' load is supplied by renewable resources, often termed "eligible technologies." While the definition of eligible technologies varies from state to state, most states allow suppliers to satisfy their RPS commitments by procuring RECs (representing the environmental attributes from one megawatt-hour of generation) delivered from wind, solar photovoltaic, solar thermal, ocean, tidal, biomass, low-impact hydro, and geothermal resources.

(U.S. 2016)—leave no doubt that the Illinois REC program is a permissible exercise of traditional state authority to oversee utilities’ resource mix. RECs do not disturb the Federal Energy Regulatory Commission’s (“FERC”) exclusive federal jurisdiction over wholesale rates. Indeed, RECs have long been found to be creatures of state law and outside of FERC’s jurisdiction, as long as they are sold separately from energy.

The Illinois REC program is a state-created program designed to encourage the development of renewable energy and does not impede or affect any national market; instead, it creates environmental compliance instruments to further legitimate state environmental, public health, and energy policy goals. It is a valid exercise of the state’s authority to direct the resource mix of its regulated utilities and does not improperly permit the state to set or fix wholesale electric rates, which are areas within the exclusive jurisdiction of FERC. Moreover, Illinois is but one of many states and localities that have adopted valid REC programs pursuant to their authority over utility planning.

If this Court issues an unduly broad rationale for striking down the Illinois ZEC program in this case, numerous other state efforts to regulate their electricity resource and supply portfolio, especially with respect to REC policies that encourage the deployment of renewable energy, could be called into question. As such, an overly broad decision could have negative consequences for the ability of states to meet their renewable energy goals through RECs. Therefore, if this Court should agree with Petitioners that ZECs are unconstitutional, AWEA urges the Court to narrowly tailor its decision to the specific facts presented in the case and provide clear guidance in its opinion so that it does not unnecessarily call into question state-mandated renewable procurements that are lawful exercises of state authority.

ARGUMENT

States' well-established authority over utility resource adequacy is explicitly recognized as part of state jurisdiction under the Federal Power Act ("FPA"). 16 U.S.C. §791 *et seq.* The structure of the FPA and the relevant case law—including, and especially, the Supreme Court's recent ruling in *Hughes*—leave no doubt that the Illinois REC program is, as other such state programs are, a permissible exercise of traditional state authority to oversee utilities' resource mix. Although the FPA does not permit states to actually set rates for wholesale energy or capacity and then compel FERC to accommodate such an encroachment, *see Hughes*, 136 S. Ct. at 1298, states have always carried out regulations within their own sphere of jurisdiction that indirectly impact wholesale rates. Parties representing both Plaintiffs and Defendant in this litigation have addressed the issue of the legitimacy of ZECs and, in doing so, have compared them to RECs, and whether they both or singly disrupt market signals and interfere with FERC's structuring of markets.² For the reasons discussed below, to the extent this Court finds that the Illinois ZEC program infringes on FERC's exclusive jurisdiction to set wholesale energy rates, the decision should not bear on REC programs that Illinois and many states have enacted as they are distinguishable from the ZEC program.

I. RECs Are Distinct from ZECs and Thus Their Constitutionality Should Not Be Implicated By a Ruling in Favor of Petitioners.

A. FERC has specifically disclaimed jurisdiction over RECs.

FERC's authority to determine just and reasonable wholesale rates exists alongside states' "traditional" authority over "the regulation of utilities" within their jurisdiction. *See Ark. Elec. Coop. Corp.*, 461 U.S. at 377. States' authority includes the power "to direct the planning and resource

² For instance, supporters of the ZEC programs note that the concept of ZECs was based on RECs, which they characterize as "a tested tool whose legality is well-established." Memorandum of Law in Support of Motion to Dismiss of Movant-Intervenors Constellation Energy Nuclear Group, *et al.*, page 1. On the other hand, the Illinois plaintiffs assert that the "price of RECs [in contrast to ZECs] is not fixed by the state and is not tethered in any way to wholesale electricity prices." Complaint of Electric Power Supply Association, page 23.

decisions of utilities under [the state's] jurisdiction,” such as by “order[ing] utilities to . . . purchase renewable generation.” *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) (internal quotation marks omitted); *Pac. Gas & Elec. Co. v. state Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 205 (1983) (observing that under the Atomic Energy Act, passed after the Federal Power Act, “[s]tates retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns”).

FERC views state resource planning decisions, including mandates that require local utilities to supply energy to retail customers from renewable energy resources in furtherance of local environmental goals, as outside of its jurisdictional purview. *See, S. Cal Edison Co.*, 71 FERC 61,269 at 62,076 (1995); *see also, Midwest Power Sys. Inc.*, 78 FERC 61,067 at 61,246 (1997). FERC has also concluded that states can direct utilities to procure RECs where the value of the environmental attributes associated with the REC are both valued and traded separately from the underlying energy itself. *S. Cal. Edison Co. I*, 70 FERC ¶ 61,215, at 61,676 (states may “diversify their generation mix to meet environmental goals in a variety of ways,” including by “requir[ing] a utility . . . to purchase power from the supplier of a particular type of resource”). When those credits are “unbundled” (*i.e.*, sold separately from the electricity itself), FERC has held that they are subject to regulation by states, not FERC. *See WSP*, 139 FERC ¶ 61,061, at 61,426; *see also Wheelabrator Lisbon, Inc. v. Conn. Dep’t of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008) (noting that “RECs are inventions of state property law”); *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004, at 61,007 (2003) (“states, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded”). Indeed, FERC’s purview related to RECs extends only to bundled sales of energy and RECs together as the value of bundled RECs “directly affects” wholesale rates. *See Southern Cal Edison Co.*, 71 FERC ¶ 61,269 at 62,076 (1995); *see also Midwest Power Sys. Inc.*, 78 FERC ¶ 61,067 at 61,246 (1997).

In short, unlike the ZEC program, FERC has specifically disclaimed jurisdiction over RECs and the state instruments that create them. *See WSPP*, 139 FERC ¶ 61,061, at 61,426.

B. REC Programs Use Market-Based Mechanisms to Determine Prices through Competitive Bidding.

REC programs use market-based mechanisms (*i.e.*, mechanisms with actual price competition between alternative suppliers of renewable energy) to incentivize new entry and innovation at the least cost.³ RECs are awarded to generators with certain environmental attributes as an incentive to develop and produce certain types of new energy resources. The fact that RECs can generally be traded (often on exchanges) allows utilities to meet their renewable obligations more cost-effectively.

The percentage of retail load specified in a state's RPS legislation establishes market size for RECs; as such, the higher the percentage, the greater the amount of RECs which must be purchased. Suppliers that are unable to procure enough RECs to meet the RPS pay a penalty, generally termed an "Alternative Compliance Payment." The RPS effectively sets the size of the REC market. Supply and demand fundamentals in the state's REC market then establish the resulting REC price.

The price of RECs is not tied in any way to wholesale electricity prices, as discussed further below. In other words, states do not use REC price formulas that directly change the value of RECs based on estimates of wholesale market prices. Rather, RECs are typically competitively traded outside of wholesale energy markets, so that their value varies based on market dynamics for RECs, not electricity. REC programs also generally are not linked to the economic viability of a resource, can usually be traded across state lines, and

³ The U.S. Circuit Court of Appeals for the Tenth Circuit has previously determined that the states are permitted to establish these local markets for renewable energy through RPS standards. *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169 (2015).

do not limit eligibility to suppliers whose wholesale market revenues are less than their costs. Because REC prices are market driven, renewable energy owners are still exposed to market risks.

Like the majority of states with RPS programs, Illinois has adopted RPS requirements that mandate a minimum quantity of the retail sales that must be provided by renewable energy resources. The Illinois Power Agency (“IPA”) administers competitive solicitations for RECs on behalf of the state’s retail utilities. Alternative retail electric suppliers (“ARES”) meet fifty percent of their RPS obligation by procuring RECs. The remaining portion of the obligation is satisfied by Alternative Compliance Payments, which capitalize the IPA’s Renewable Energy Resource Fund (“RERF”) that is used to fund REC purchases. In short, the price for RECs procured by the IPA is established by the prices competitive suppliers offer for a specified quantity of energy delivered from renewable resources.

On the other hand, the ZEC program is not market-based. Moreover, the ZEC program is tied to the cost of wholesale energy prices, only available to existing resources that through their market participation have proven to be uneconomic, and only available to certain in-state resources. ZEC prices are not market prices and are not determined by competitive bidding of alternative suppliers for electricity generated with zero emissions. Indeed, ZEC program participants do not submit supply offers based on price, but rather they submit detailed cost information. The ZEC program also insulates the selected uneconomic nuclear owner from market risks via “make-whole” payments. In other words, ZECs restrict participation to a single owner of a single technology in a single state, who can demonstrate that its costs are greater than its expected wholesale market revenues.

C. RECs are not tied to wholesale electricity market prices.

Unlike RECs that are procured through competitive retail processes, the ZEC holder is

guaranteed a minimum payment for its wholesale energy irrespective of the rate established by FERC that is contingent upon delivering energy to the wholesale market. The ZEC price is set relative to wholesale power prices in a manner that amounts to a wholesale power price floor for the selected nuclear generators. The fact that ZEC prices are a function of wholesale power price forecasts is a critical distinction between ZECs and RECs.

Specifically, where REC prices are established by unrelated market outcomes, the price of ZECs under the Future Energy Jobs Act (“FEJA”) is established prospectively by a formula that rises and falls relative to wholesale power prices. The value of the ZEC decreases when the average wholesale power price forecasts in MISO and PJM exceed a specified baseline defined in FEJA. Pursuant to this calculation, ZECs ensure that the holder receives at least a specified floor for each megawatt-hour of energy delivered to the wholesale market from the state unless wholesale prices are expected to exceed levels that the state has determined are necessary to sustain the contracted nuclear asset.

In contrast to the ZEC program, REC prices do not have an explicit or direct tie to wholesale power price forecasts, as is the case of the ZEC price setting mechanism. As discussed, REC prices are established by a wide range of REC market dynamics.⁴ In addition, whereas the price of ZECs is established by the change in forward wholesale power prices relative to a historic test year, competition for RPS market-share among REC suppliers determines REC prices. Prices generally rise when the quantity of RECs is scarce relative to RPS demand and vice versa, irrespective of the prices for wholesale power. This is fundamentally different than the ZEC pricing mechanism.

⁴ These include: (1) the level of REC demand (*i.e.*, the RPS percentage of retail load as established by the state legislature); (2) the Alternative Compliance Payment set by the state legislature or state regulatory authority; and (3) the level of REC supply, which is determined by the number and performance of renewable resources in a state or region.

D. The REC Programs Are Short-Term and Do Not Provide Any Guarantee of Return.

As competitive wholesale market conditions are no longer conducive to the profitability of the nuclear units at issue, the ZEC program in effect would allow these units to fully recover their costs, up to certain limits. In particular, the Illinois legislature includes a true-up provision in the ZEC program where the total quantity of the ZECs procured from the contracted nuclear assets is adjusted based upon the total quantity of megawatt-hours delivered to the wholesale power markets during the contract period relative to the utility customers' energy usage. In contrast, RECs are short-term – annual or shorter – and do not provide any such guarantee of return.

E. RECs Are Created by All Qualified Renewable Generators and Intended to Stimulate New Investment.

RECs are created by all qualified renewable generators, without regard to economic need, and thus the program encourages many participants. On the other hand, only nuclear plants that would cease to operate without the subsidy are eligible to receive ZECs. In fact, the Illinois ZEC program provides subsidies to just one company for the next 10 years.

REC programs are also designed to help states in implementing their RPS programs in furtherance of achieving environmental objectives by stimulating new investment or the development of new technologies, like renewable energy. *See* Thomas White International, *The Green Report* (Jan. 5, 2011), *available at* www.thomaswhite.com/global-perspectives/promote-renewable-energy-buy-an-rec/. To that end, REC programs have been successful in encouraging early adoption of new technologies, thereby enabling subsequent cost reductions and efficiencies with increased scale and innovations. *Id.* In other words, RECs support nascent renewable energy technologies and their entry into the market.

In contrast, the ZEC program is aimed at preserving older in-state nuclear generating units

even though those units have long been in the market. The ZEC payments are designed to protect the nuclear facilities from their wholesale revenues falling below the level that Illinois believes is necessary to sustain the nuclear asset. The ZEC legislation is intentionally designed to supplement wholesale prices signals only when those prices would otherwise indicate that the nuclear resources should retire. The ZEC is indexed to wholesale power price forecasts, and (using first year levels) the ZEC structure keeps assets that otherwise would have retired in service by guaranteeing that the assets receive no less than \$16.50 per megawatt-hour (subject to a ZEC Program cap of approximately \$235 million per year) and providing extra revenues when wholesale prices are expected to be less than \$47.90 per megawatt-hour. All other wholesale market participants do not receive the price stability created by the FEJA.

II. An Overly Broad Ruling Is Unnecessary and Could Jeopardize Dozens of state Renewable Energy Laws and the Public Policy Goals Dependent upon Them.

An overly broad decision by this Court that would affect REC programs in the course of ruling against the Illinois ZEC program is unnecessary because of the distinctions between RECs and ZECs as set forth in this brief. Such a ruling could threaten existing state actions to incentivize renewables and chill the adoption of new ones, which would impede the ability of states to meet their environmental goals, to the country's great and lasting harm.

The Illinois REC program is not alone: numerous other states employ similar mechanisms to incentivize the development of specific energy resources. For instance, twenty-nine states and the District of Columbia have enacted enforceable RPSs or similar laws, often tailoring the requirements to best fit the state's particular resource base or local preferences.⁵ Many states also conduct some form of long-term procurement planning to meet renewable energy needs, including mandated purchases. Therefore, numerous state policies could be endangered by an overly broad decision in

⁵ American Wind Energy Association, AWEA state RPS Market Assessment 2016 (Sept. 14, 2016).

this case, which underscores the need for this Court to provide clear guidance in its opinion so that it does not unnecessarily call into question renewable electricity programs that are lawful exercises of state authority.

The following state programs exemplify just a handful of the important state actions that could be put in jeopardy by an unduly sweeping ruling in this case:

- Rhode Island's Affordable Clean Energy Security Act authorizes its utility to participate in multi-state or regional efforts to procure clean energy resources using long-term contracts.⁶
- Massachusetts' recently enacted Energy Diversity Act requires state utilities to solicit proposals for long-term contracts from clean energy resources.⁷
- Nevada has required electric utilities serving densely-populated counties to retire at least 800 megawatts of coal-fired generation and to construct, acquire, or contract for replacement capacity, including at least 350 megawatts of renewable-energy facilities.⁸
- Regulators required Georgia Power to procure 525 megawatts of new solar generation by competitive solicitation, using an independent bid evaluator per Commission rules.⁹

CONCLUSION

For the foregoing reasons, if this Court finds the ZEC program to be unconstitutional, it is critical to draw a bright-line distinction between the ZEC program and a state ordering utilities to

⁶ 39 R.I. Gen. Laws § 39-31-1 et. seq. (2015).

⁷ Ch. 188 of the Mass. Acts of 2016.

⁸ Nev. Rev. Stat. § 704.7316 (2013).

⁹ Final Order, *In re Ga. Power Co.'s 2013 Integrated Resource Plan*, No. 36498, slip op. at 18 (Ga. Pub. Serv. Comm'n July 11, 2013), available at <http://goo.gl/trbZkA>.

purchase energy from renewable energy resources to prevent unintended consequences to state efforts to promote renewable generating resources for achieving environmental objectives—none of which disturb FERC’s exclusive federal jurisdiction over wholesale rates.

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