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Clerk of Court  
United States Court of Appeal for the Seventh Circuit  
Everett McKinley Dirksen United States Courthouse  
219 S. Dearborn Street, Room 2722  
Chicago, IL 60604

Re: *Electric Power Supply Ass'n v. Star*  
Case No. 17-2445 (consolidated with No. 17-2433)  
Notice of New Authority Pursuant to Federal Rule of Appellate  
Procedure 28(j):

FERC Order Rejecting Proposed Tariff Revisions,  
Granting in Part and Denying in Part Complaint, and  
Instituting Proceeding Under Section 206 of the Federal  
Power Act (June 29, 2018)

Dear Mr. Agnello:

FERC just issued an Order that begins:

[T]he integrity and effectiveness of the capacity market administered  
by [PJM] have become untenably threatened by out-of-market

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payments provided or required by certain states [to support] ... continued operation of preferred generation resources that may not otherwise be able to succeed in a competitive wholesale capacity market. ... [L]imited support primarily for relatively small renewable resources has evolved into support for thousands of megawatts (MWs) of resources [like] large nuclear plants.

(Order 3.)

The Order explains that “the integrity of competition in the wholesale capacity market” is undermined by “out-of-market support to ... existing uneconomic resources.” (Order 64.) Such subsidies “significantly impact the capacity market clearing prices and the integrity of the resulting price signals on which investors and consumers rely to guide the orderly entry and exit of capacity resources. We cannot rely on such a construct to harness competitive market forces and produce just and reasonable rates.” (Order 68.) Indeed, by “allow[ing] resources to suppress capacity market clearing prices,” these subsidies “render[] the rate *unjust* and *unreasonable*.” (Order 63, emphasis added.)

“[O]ut-of-market support, such as ZEC programs, has changed the circumstances in PJM,” requiring FERC to retool its capacity markets. (Order 76.) Two years in, FERC is still searching for a capacity market fix, and has not even started mitigating the harm to the energy market. Because a State cannot “require FERC to accommodate [such] intrusion,” *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1298 n.11 (2016), “[t]he fact that FERC [is] forced to mitigate the[se] ... distorting effects ... confirm[s] ... the existence of a conflict,” *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 479 (4th Cir. 2014), *aff’d by Hughes*. That is particularly so here, where mitigating the ZEC program’s intrusion will require “sweeping changes to the PJM capacity construct.” (LaFleur, Commissioner, dissenting 3.) This disruption of FERC, PJM, and the whole energy market is exactly why states are preempted from meddling with the wholesale market.

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The SG's *Virginia Uranium* brief refuted the FERC amicus brief's legal analysis; this Order refutes its market analysis.

Very truly yours,

*/s/ Donald B. Verrilli, Jr.*

Donald B. Verrilli, Jr.

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on July 3, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will effect service on the other participants in the case, all of whom are registered CM/ECF users.

/s/ Donald B. Verrilli Jr.  
Donald B. Verrilli Jr.