IN THE 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 ZOTOS, ROBERT DILLON, RICHARD OWENS, And ROBIN HAWKINS, both individually and d/b/a ROBIN'S NEST,	)	
Plaintiffs,	)	Case No. 1:17-cv-01163
v.	)	District Judge Thomas M. Durkin
ANTHONY M. STAR, in his official capacity as Director of the Illinois Power Agency,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF
UNOPPOSED MOTION TO INTERVENE
OF EXELON GENERATION COMPANY, LLC

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Exelon Generation Company, LLC ("Exelon") respectfully submits this memorandum of law in support of its unopposed motion for leave to intervene as a party in this action pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure or, in the alternative, pursuant to Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure.

A proposed Answer is attached to Exelon's motion (*see* Exhibit A) pursuant to Rule 24(c) to allow the Court to ascertain the claims and defenses Exelon would raise. However, should this court grant leave to intervene, Exelon intends to file a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) on or before Defendant's deadline for filing a Rule 12 motion or responsive pleading. Accordingly, Exelon requests that this Court defer filing of the proposed Answer until after resolution of its forthcoming motion to dismiss.

Counsel for Exelon consulted with counsel for Plaintiffs and Defendant regarding this motion. Plaintiffs and Defendant do not oppose this motion.

INTRODUCTION

Exelon is entitled to intervene in this action to protect its substantial economic interest in the zero emission credit ("ZEC") program that is the subject of Plaintiffs' Complaint—an interest that otherwise may not be adequately protected by any parties to this case. Exelon is the owner of nuclear generating plants that are eligible to participate in the ZEC Program, including the Clinton and Quad Cities plants that are the focus of Plaintiff's complaint. *See* Ex. B to Mot. to Intervene (Declaration of Jeanne Jones ("Jones Decl.")) ¶ 2. Exelon also owns a significant number of other nuclear plants that satisfy the eligibility criteria for ZEC payments. *See id.* Thus, Exelon has a direct and substantial interest in this litigation that could be impaired by the Court's disposition of the action.

To be clear, because the ZEC Program has yet to go into effect, no plants have been selected. Plaintiffs' Complaint nonetheless makes clear that they view this case as being all about Exelon. Plaintiffs contend that the ZEC Program will "result in the transfer from consumers to Exelon Corp. of as much as $3.3 billion over the 10-year contract term [of the ZEC Program]." Compl. ¶ 10. The Complaint characterizes the bidding behavior of nuclear facilities like Exelon's and the operation of the wholesale markets in which Exelon's plants participate. *Id.* ¶¶ 32-46. Plaintiffs spend a full three paragraphs of their Complaint discussing only Exelon's plants: their profitability, their legal status under federal law, how and to whom they sell energy and capacity, and their history of participation in the wholesale markets. *Id.* ¶¶ 53-55. Plaintiffs even allege the specific prices that they claim Exelon's plants—Clinton and Quad Cities—will purportedly receive in future wholesale transactions. *Id.* ¶ 14.

Only Exelon can address these allegations, and only Exelon will be able to provide the type of adversarial presentation on these issues necessary for this Court to assess their validity. Accordingly, the Court should grant Exelon intervention as of right. Alternatively, the Court should exercise its discretion to grant Exelon's request for permissive intervention.

FACTS

I. The ZEC Program.

Plaintiffs challenge a portion of the Future Energy Jobs Act ("FEJA"), which adopts a zero-emissions standard ("ZEC Program") in Illinois as part of a comprehensive energy legislation package. *See* SB 2814, Public Act 099-0906, 99th Gen. Assemb. (Ill. 2016), http://www.ilga.gov/legislation/99/SB/PDF/09900SB2814enr.pdf ("SB 2814"). The ZEC Program ensures that Illinois can "achieve the State's environmental objectives and reduce the adverse impact of emitted air pollutants on the health and welfare of the State's citizens." SB 2814

§ 1.5. A ZEC is a "tradable credit that represents the environmental attributes of one megawatt hour of energy produced from" a nuclear facility. 20 ILCS 3855/1-10 (defining a ZEC).[1] Under the ZEC Program, the ICC will approve the procurement of contracts for ZECs from nuclear facilities, aiming to procure an amount of ZECs approximately equal to 16% of electricity used in Illinois in 2014. 20 ILCS 3855/1-75(d-5).

The Illinois Power Agency ("IPA") and Illinois Commerce Commission ("ICC") will engage in a multi-step process to select nuclear facilities to receive ZECs and then procure those ZECs on behalf of the State's utilities. *Id.* § (d-5)(1). That process will begin on June 1, 2017, the legislation's effective date. *See* 5 ILCS 75/2. First, nuclear plants seeking to participate in the program will submit bids to the IPA. 20 ILCS 3855/1-75(d-5)(1)(A). The IPA will review the bids and, based on certain public interest factors, recommend to the ICC that certain facilities receive ZECs. *Id.* § (d-5)(1)(C). The public interest criteria include "minimizing carbon dioxide emissions that result from electricity consumed in Illinois," "minimizing sulfur dioxide, nitrogen dioxide, and particulate matter emissions that adversely affect the citizens" of Illinois, and "any existing environmental benefits that are preserved by the" selection of the winning facilities. *Id.* The ICC makes the final determination as to which facilities will be selected to receive ZECs, based on the air-pollution public interest criteria identified above. *Id.* § (d-5)(1)(C-5). Then the winning facilities contract to sell their ZECs. *Id.*

The ZEC price is based on the social cost of carbon, which is an economic estimate of the damage inflicted by carbon emissions that was prepared by a federal interagency working group. *See id.* § (d-5)(1)(B); *Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 677-78 (7th Cir.

[1] Citations are to the locations within the Illinois Compiled Statutes where each provision of SB 2814 will be codified. The legislation is not yet effective.

2016). The Illinois legislature found that value to be "an appropriate valuation of the environmental benefits provided by zero emission facilities." SB 2814 § 1.5. However, "to ensure that the procurement remains affordable to retail customers in this State if electricity prices increase," the ZEC price can be reduced in future years if forecasted energy prices in Northern Illinois plus the average of capacity prices in the two regions that constitute Illinois exceed a benchmark of $31.40/MWh. 20 ILCS 3855/1-75(d-5)(1)(B).

II. Exelon's Interests in the ZEC Program.

A number of the nuclear plants owned by Exelon, including the Clinton and Quad Cities nuclear plants, are located within the footprint of either PJM Interconnection, LLC ("PJM"), a regional transmission organization, or the Midcontinent Independent System Operator, Inc. ("MISO"), and are thus eligible to submit information to the IPA in order to demonstrate their eligibility for ZEC payments. *See* Jones Decl. ¶ 2; Compl. ¶ 5. Exelon thus has a strong interest in the continued viability of the ZEC Program, given its plants' opportunity to bid into the program and, if selected, to receive ZEC payments. Indeed, Plaintiffs themselves allege that Exelon will be the beneficiary of the ZEC Program. *See* Compl. ¶¶ 3, 57, 59. This substantial economic interest in potential ZEC payments is sufficient to justify Exelon's intervention in this litigation.

ARGUMENT

I. Exelon Is Entitled to Intervene as of Right.

Under Rule 24(a)(2), a party may intervene as of right if it "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

Courts in the Seventh Circuit apply a four-part test to assess whether parties are entitled to intervene under Rule 24(a). Such intervention is proper where the parties can establish that: "(1) their motions to intervene were timely; (2) they possess an interest related to the subject matter of the . . . action; (3) disposition of the action threatens to impair that interest; and (4) the [parties to the litigation] fail to represent adequately their interest." *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 773 (7th Cir. 2007) (quoting *United States v. BDO Siedman*, 337 F.3d 802, 808 (7th Cir. 2003) (ellipses in original)). An intervening party must demonstrate a "direct, significant, legally protectable" interest. *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380 (7th Cir.1995) (quotation marks omitted). Exelon satisfies each of these criteria.

A. The Motion to Intervene is Timely.

The Seventh Circuit has described the question of a potential intervenor's timeliness as "essentially a reasonableness inquiry, requiring potential intervenors to be reasonably diligent in learning of a suit that might affect their rights, and upon learning of such a suit, to act to intervene reasonably promptly." *People Who Care v. Rockford Bd. of Educ.*, 68 F.3d 172, 175 (7th Cir. 1995). In conducting this inquiry, courts in this Circuit consider four factors: "(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; [and] (4) any other unusual circumstances." *Heartwood, Inc. v. U.S. Forest Serv., Inc.*, 316 F.3d 694, 701 (7th Cir. 2003) (quoting *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000) (alterations in original)).

Exelon's motion to intervene is timely, as this motion was filed at the earliest possible stage of the case. This action was commenced on February 14, 2017. *See* Compl. The initial pre-trial conference has not yet been held, Defendant has yet to file his answer, and no discovery deadlines

have passed. As a result, granting the motion will not cause any disruption or delay to the proceedings. Nor will any of the existing parties—none of which oppose the motion—be prejudiced. Therefore, the motion is clearly timely. *See, e.g.*, *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995) (finding that a delay of 19 months from the time the suit was filed to the time intervention was sought was not untimely); *Hoffman v. Coleman*, No. 16-cv-190-JVB-SLC, 2017 WL 536302, at *2 (N.D. Ind. Feb. 9, 2017) (finding motion timely when filed "eight months after Plaintiff filed her complaint"); *Williams v. Am. Equip. & Fabricating, Corp.*, No. 09-1168, 2010 WL 1881998, at *2-3 (C.D. Ill. May 10, 2010) (finding motion timely even after discovery had commenced when it was filed prior to the deadlines to seek leave to amend the pleadings and a significant amount of time remained within the discovery period).

B. Exelon Has Significant Interests in the Outcome of the Litigation.

In order to intervene as of right, the movant must also demonstrate "an interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2). As the Seventh Circuit has noted, this interest must be a "direct, significant, legally protectable" one. *Schipporeit, Inc.*, 69 F.3d at 1380 (quotation marks omitted); *Am. Nat'l Bank & Trust Co. of Chicago v. City of Chicago*, 865 F.2d 144, 146-47 (7th Cir. 1989); *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982) (per curiam). Courts in this district have found that "substantial economic interests are sufficient to satisfy the second prong of the test for intervention as of right." *Michigan v. U.S. Army Corps of Eng'rs*, No. 10-CV-4457, 2010 WL 3324698, at *5 (N.D. Ill. Aug. 20, 2010).

Exelon has a clear and substantial "interest relating to" the ZEC Program that is the subject of Plaintiffs' Complaint. Exelon's interest is in protecting the ability of its units in PJM and MISO to apply for ZEC payments when the program becomes effective. Plaintiffs, of course, allege that Exelon's plants will be selected and will ultimately receive payments totaling $235 million per year over ten years as a result of the ZEC Program. *See* Compl. ¶ 3. If Plaintiffs' allegations are

correct, therefore, Exelon plainly has a significant economic interest in the validity of the program. *See FDIC v. FBOP Corp.*, No. 14 C 4307, 2014 WL 4344655, at *3 (N.D. Ill. Sept. 2, 2014).

Other courts have granted facility owners leave to intervene in cases where state energy programs that could benefit those facilities have been challenged on preemption and Commerce Clause grounds—precisely because of the owners' substantial interest in the financial benefits those state programs might provide. *See* Order Granting Unopposed Motion to Intervene of CPV Maryland, LLC, *PPL EnergyPlus, LLC v. Nazarian*, No. 12-cv-1286 (D. Md. May 18, 2012), ECF No. 20 (granting intervention as of right); Memorandum and Order, *PPL EnergyPlus, LLC v. Solomon*, No. 11-cv-745 (D.N.J. July 19, 2011), ECF No. 63 (granting intervention as of right); Text Order, *Entergy Nuclear FitzPatrick, LLC v. Zibelman*, No. 15-cv-230 (N.D.N.Y. June 1, 2015), ECF No. 32 (granting intervention without specifying if it was as of right or permissive). Indeed, just three months ago, a district court in New York granted Exelon's motion to intervene in a nearly identical suit brought by these plaintiffs and concerning a similarly structured ZEC program in New York. *See* Order, *Coalition for Competitive Electricity v. Zibelman*, 16-cv-08164-VEC (S.D.N.Y. Dec. 14, 2016), ECF No. 68. The same result is warranted here.

C. Exelon's Interests May Be Impaired by These Proceedings.

Courts have concluded that a proposed intervenor's interests would be impaired when the intervenor points to significant potential economic ramifications it would face as the result of the invalidation of a government program or permit. *See, e.g.*, *Michigan*, 2010 WL 3324698, at *5 (granting intervention as of right to a coalition whose interest was in "preserving the viability of the economic investments in businesses" that would "at a minimum, lose significant business, if not cease operations entirely," if the relief sought by plaintiff was granted); *Builders Ass'n of Greater Chicago v. City of Chicago*, 170 F.R.D. 435, 440 (N.D. Ill. 1996) (finding a sufficient

interest under Rule 24(a)(2) when intervenors "will suffer significant financial losses should the ordinance be invalidated"); *Hoosier Envtl. Council, Inc. v. U.S. Army Corps of Eng'rs*, No. IP 98-0606-C M/S, 2000 WL 1428664, at *3 (S.D. Ind. May 4, 2000) ("Given Caesars' investment of time and money in developing the site, which has been in operation since November of 1998, and the obligations it has assumed with respect to employees, vendors, and governmental units, the Court is satisfied that Caesars has a significant interest in the subject matter of this suit and that its interests will be affected by the outcome."). Here, Plaintiffs seek a permanent injunction preventing the IPA and ICC from implementing the ZEC Program. As described above, such an injunction would impair Exelon's financial interests and could result in the loss of substantial ZEC payments if Exelon's facilities are selected for the ZEC Program. A permanent injunction could also lead Exelon to decide to retire the Clinton and Quad Cities plants. Jones Decl. ¶ 4.

D. The Existing Parties Do Not Adequately Represent Exelon's Interests.

Finally, Exelon's interests are not adequately represented by the existing parties. A proposed intervenor's "burden" of showing its interests are not adequately represented by the existing parties is "minimal." *See Lake Inv'rs. Dev. Grp., Inc. v. Egidi Dev. Grp.*, 715 F.2d 1256, 1261 (7th Cir. 1983) (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)); *Ligas*, 478 F.3d at 774. Even when an intervenor's interest is *aligned* with one of the parties, courts have granted intervention when those interests are not the *same* as those of the intervenor. For example, and particularly pertinent here, in *Citizens Opposing Pollution v. Jewell*, No. 14-1107-DRH, 2015 WL 4594167 (S.D. Ill. July 30, 2015), the Court granted ExxonMobil's motion to intervene after the court concluded that the company had private interests in permits and property that were not adequately represented by the other parties, who were litigating "to advance and protect interests of the public." *Id.* at *7. The same divergence of interests arises here.

Exelon's interests are rooted in its economic interests in the nuclear facilities that are eligible to participate in the ZEC Program and could be the recipients of billions of dollars of ZEC payments. Exelon's business operations, property interests, and financial success will be impacted by the outcome of this litigation. Defendant's interests, by contrast, are distinct and are focused on protecting the scope of its regulatory authority and the achievement of the State's environmental goals. Defendant is charged with representing the public interest, not Exelon's private economic interests. *See, e.g.*, *JLS, Inc. v. Pub. Serv. Comm'n of W. Va.*, 321 F. App'x 286, 290 (4th Cir. 2009) ("[E]ven when a governmental agency's interests appear aligned with those of a particular private group at a particular moment in time, 'the government's position is defined by the public interest, [not simply] the interests of a particular group of citizens.'" (alteration in original) (citation omitted)); *Dimond v. District of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986) (government entity "charged by law with representing the public interest of its citizens … would be shirking its duty were it to advance" the "more narrow and 'parochial' financial interest" of a private business).

These diverging interests create a real risk that the Defendant may not adequately represent Exelon's interests during this litigation. Defendant is charged with defending the public's interest, namely, the environmental benefits of reduced carbon emissions. Exelon's economic interests in the continued operations of its nuclear plants, although consistent with Illinois's environmental goals, are distinct. Exelon should therefore be permitted to represent its own interests in this matter. *See Gaylor v. Lew*, No. 16-CV-215-BBC, 2017 WL 222550, at *3 (W.D. Wis. Jan. 19, 2017) ("No other group of people has the potential to be more significantly affected by this case than ministers such as the proposed intervenors and those they represent."); *N.Y. Pub. Interest Research Grp., Inc. v. Regents of Univ. of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975) (per curiam)

("[W]e are satisfied that there is a likelihood that the pharmacists will make a more vigorous presentation of the economic side of the argument than would the Regents.").

II. Exelon Should Be Granted Permissive Intervention.

For the reasons set forth above, Exelon should be allowed to intervene as of right. However, in the alternative, the Court should exercise its discretion to grant permissive intervention. Rule 24(b) provides, "[o]n timely motion, the court may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). *See Jessup v. Luther*, 227 F.3d 993, 998 (7th Cir. 2000) (recognizing the purpose of Rule 24(b) as "bringing before the court, in orderly fashion, those whose legal interests will be directly and substantially affected by the course of the litigation").

As Courts in this Circuit have recognized, only two things are "required for permissive intervention." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 509 (7th Cir. 1996). First, "the applicant [must] have a claim or defense in common with a claim or defense in the suit." *Id.* The "inquiry into whether a common claim or defense exists is a broad one." *Joe Sanfelippo Cabs Inc. v. City of Milwaukee*, No. 14-CV-1036, 2015 WL 1728123, at *2 (E.D. Wis. Apr. 15, 2015). As demonstrated in its accompanying proposed Answer, Exelon's defenses regarding the legality of the ZEC Program are "in common with [the] . . . defense[s]" that will be presented by Defendant "in the suit." *Solid Waste Agency*, 101 F.3d at 509. Second, the defenses asserted by the intervenor must be ones that "could . . . have been asserted had the intervenor been an original plaintiff or defendant." *Reedsburg Bank v. Apollo*, 508 F.2d 995, 1000 (7th Cir. 1975). There is no question that this requirement is met here; Exelon could have presented its defenses to Plaintiffs' claims "had [it] been an original . . . defendant" in the suit.

Beyond those two requirements, the Court has broad discretion in permitting intervention. *See Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949-50 (7th Cir. 2000); *United States v. 36.96 Acres of Land*, 754 F.2d 855, 860 (7th Cir. 1985). In exercising that discretion, courts "should consider such factors as undue prejudice; delay; whether the intervenors' interests are adequately represented by the other parties; and 'whether [the intervenors] will significantly contribute to the full development of the underlying factual issues in the action and to just and equitable adjudication of the legal questions presented.'" *Lantz v. Am. Honda Motor Co.*, No. 06 C 5932, 2007 WL 2875239, at *4 (N.D. Ill. Sept. 27, 2007) (quoting *Riverstone Grp., Inc. v. Big Island River Conservancy Dist.*, No. Civ. A. 05-4020, 2005 WL 2001154, at *5 (C.D. Ill. Aug.11, 2005)).

These factors strongly favor permissive intervention. As discussed in Part I, Exelon's motion is timely, its interests in this matter are significant, and those interests are not adequately represented by the existing parties in this proceeding. *See supra*, at 5-10. Exelon's participation will also not delay these proceedings or prejudice any of the existing parties to the lawsuit. *See supra*, at 5. As the Seventh Circuit has noted, a plaintiff "can hardly be said to be prejudiced by having to prove a lawsuit it chose to initiate." *Schipporeit, Inc.*, 69 F.3d at 1381. That is evidenced by the fact that plaintiffs do not oppose Exelon's intervention.

Finally, Exelon would "significantly contribute to the full development of the underlying factual issues in the action and to the just and equitable adjudication of the legal questions presented." *Lantz*, 2007 WL 2875239, at *4 (quotation marks omitted); *see also Allco Fin. Ltd. v. Etsy*, 300 F.R.D. 83, 88 (D. Conn. 2014) (granting permissive intervention because movants' "involvement . . . in the process being challenged and their specialized knowledge of the legal issues presented . . . will assist the Court in reaching a just and speedy adjudication of this matter").

Many of Plaintiffs' allegations concern the mechanics of the wholesale markets, the operation and bidding behavior of nuclear facilities, the particular legal and financial status of Clinton and Quad Cities, and predictions about what those plants would do absent or as a result of the ZEC Program. *See, e.g.*, Compl. ¶¶ 29-42, 54-57. Exelon has specialized knowledge of each of those areas—knowledge that the existing parties lack. Exelon has access to information on the financial viability and operations of its facilities and those facilities' bidding behavior, and can inform this court regarding how nuclear plants and the wholesale markets in PJM and MISO—where Exelon owns a substantial number of power plants—operate. Exelon's specialized knowledge in these areas will allow defendants to supplement or correct Plaintiffs' submissions on these points. As a party, therefore, it will significantly contribute to the development of the legal issues and any factual record, to the extent one is needed.

Accordingly, if the Court determines that Exelon is not entitled to intervene as of right, the Court should exercise its discretion to allow it to intervene under Rule 24(b)(1)(B).[2]

[2] Exelon's Article III standing presents no issue. If this Court agrees that Exelon has a sufficient "interest" to intervene as of right, then the Seventh Circuit has held that Exelon necessarily has Article III standing—because "[a]ny interest of such magnitude is sufficient to satisfy the Article III standing requirement as well." *Transamerica Ins. Co. v. South*, 125 F.3d 392, 396 (7th Cir. 1997). As to permissive intervention, Exelon need not show standing. When "a third party," like Exelon, "wants to join a lawsuit to advocate for the same outcome as one of the existing parties," the Seventh Circuit has explained that the "permissive intervenor may not need to show standing for the same reason that not every plaintiff in a lawsuit is required to show standing": Because a justiciable controversy exists among the existing parties, the "intervenor's standing is irrelevant to the court's power to decide the case." *Bond v. Utreras*, 585 F.3d 1061, 1070 (7th Cir. 2009). And if Exelon had to show standing, it could readily to so. For defendant-intervenors like Exelon, "it is enough that a plaintiff seeks relief, which, if granted, would injure the prospective intervenor." *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 318 (D.C. Cir. 2015). Here, Plaintiffs' requested relief, if granted, would plainly injure Exelon for the same reasons explained above. *See supra* at 6-8.

CONCLUSION

For the foregoing reasons, Exelon Generation Company, LLC respectfully requests the Court grant its unopposed motion to intervene.

March 15, 2017

Respectfully submitted,

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