UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VILLAGE OF OLD MILL CREEK, *et al.*,	
Plaintiffs,	No. 17 CV 1163
v.	Judge Manish Shah
ANTHONY M. STAR, in his official capacity as Director of the Illinois Power Agency,	Magistrate Judge Susan Cox
Defendant.	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS

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Dated: April 24, 2017

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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS

Plaintiffs 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 (collectively, "Consumer Plaintiffs"), respectfully file this Memorandum in Opposition to the Motions to Dismiss of Defendant Illinois Power Agency ("IPA") and Intervenor Exelon Generation Company, LLC ("Exelon Generation"). To avoid duplication of arguments, Consumer Plaintiffs adopt the arguments of the EPSA Plaintiffs Memorandum in Opposition to Motions to Dismiss in Case no. 17-cv-1164 on the following areas of law:

a) Plaintiffs Have Stated Claims for Field and Conflict Preemption.

b) This Court Has Equitable Jurisdiction to Adjudicate The Preemption Claims.

c) Plaintiffs Have Stated Claims Under The Dormant Commerce Clause.

d) Primary Jurisdiction Does Not Apply to this Case.

Therefore, in this opposition memorandum, Consumer Plaintiffs focus on the following specific arguments:

I. CONSUMER PLAINTIFFS HAVE PRUDENTIAL STANDING TO BRING THEIR FIELD PREEMPTION AND CONFLICT PREEMPTION CLAIMS.

II. CONSUMER PLAINTIFFS' COMPLAINT HAVE PRUDENTIAL STANDING TO RAISE THEIR DORMANT COMMERCE CLAUSE CLAIM.

III. CONSUMER PLAINTIFFS' COMPLAINT STATES A CLAIM UNDER THE EQUAL PROTECTION CLAUSE.

INTRODUCTION

Subsection (d-5) of Public Act 99-0906 (the "ZEC Procurement Law") requires Consumer Plaintiffs and other Illinois electricity consumers to unconstitutionally subsidize Exelon Generation's Illinois-based Quad Cities and Clinton nuclear plants (the "Quad Cities and Clinton Plants") to the tune of $3.3 billion. Consumer Plaintiffs' Complaint clearly alleges this is a subsidy program targeted at the Quad Cities and Clinton Plants at the expense of all other nuclear (and non-nuclear) generating plants. Both Consumer Plaintiffs' Complaint and the EPSA Plaintiffs' Complaint in Case No. 17-cv-1164 also clearly allege how these subsidies profoundly disrupt the wholesale electricity markets and unconstitutionally transgress the Federal Energy Regulatory Commission's jurisdiction over these markets. For these reasons, the Court should deny Movants' motions to dismiss.

The ZEC Procurement Law on its face is designed to provide subsidies, under the environmentally-friendly name of zero emission credits ("ZECs"), only to the Quad Cities and Clinton Plants. The ZEC Procurement Law requires the IPA to procure contracts for the Illinois utilities Commonwealth Edison Company ("ComEd") and Ameren Illinois Company ("Ameren

Illinois") to purchase ZECs in an amount approximately equal to 16% of the actual amount of electricity delivered by ComEd and Ameren Illinois to Illinois retail electricity customers during calendar year 2014. 20 ILCS 3855/1-75(d-5)(1). This amount is approximately equal to Exelon Generation's annual output from the Clinton and Quad Cities Plants. See *EPSA, et al. v. Star, et al.*, 17-cv-1164, Dkt. 38-3 (DeRamus Declaration at 46, ¶ 115).

The ZEC Procurement Law also requires the utilities to purchase ZECs equivalent to all MWhs produced by the facilities owned by the winning supplier if it buys any ZECs from the facility. 20 ILCS 3855/1-75 (d-5)(1). The upshot of the requirements of the ZEC Procurement Law is that if any ZECs are purchased from the Quad Cities and Clinton Plants all ZECs will be purchased only from those plants, which will be the result of the ZEC Procurement Law as alleged in Consumer Plaintiffs' Complaint.

Exelon Generation attempts to disguise that the ZEC program is not merely a subsidy program for its Quad Cities and Clinton Plants with a factual statement at the beginning of its memorandum. Dkt. 37-1, at 1. Specifically, Exelon Generation asserts that if its nuclear plants retired their output would largely be replaced by fossil based fuel-burning plants that emit large quantities of harmful pollutants. *Id.* The implication of the statement is that the ZEC program is an environmental program rather than a subsidy program, but the statement is both inappropriate on a motion to dismiss and, in any event, totally unsupported.

Exelon Generation also argues that ZECs, like Renewable Energy Credits ("RECs") available to solar and wind generating plants, merely compensate nuclear plants for their environmental attributes and therefore can be adopted by states without interfering with wholesale competitive electricity markets. Dkt. 37-1, at 1-2. IPA makes the same argument. Dkt. 36, at 11-12.

The problem with this argument, however, is that the ZEC program is not designed to compensate for the environmental attributes of nuclear plants. Rather, it is designed in a way that:

(a) the ZEC payments will be made only to the Quad Cities and Clinton Plants, and

(b) the ZEC subsidy is tethered to the wholesale electricity market price.

Put simply, the ZEC program is designed in a way that only the Quad Cities and Clinton Plants will receive a guaranteed amount per MWh of electricity. This is because the initial ZEC subsidy of $16.50 per MWh is adjusted to the extent that the projected electricity market price for a particular delivery year is greater than a baseline market price of $31.40 per MWh. 20 ILCS 3855/1-75 (d-5)(1)(B)(i). Only the Quad Cities and Clinton Plants benefit from such a formula, not any Illinois nuclear (or non-nuclear) generating plant and, for that matter, not any other state's nuclear (or non-nuclear) generating plant within the PJM Interconnection, L.L.C. ("PJM") and Midcontinent System Operator ("MISO") regional transmission organizations.

In stark contrast, REC programs specifically compensate renewable generators for their environmental attributes through market-determined prices which reflect only the value of the renewable generators' environmental attributes. See Amicus Curiae Brief of American Wind Energy Association, Dkt. 48. REC prices are not connected to wholesale power prices in any respect and are traded through market-based systems similar to commodity markets. *Id*. Therefore, the basic premise of the Motions to Dismiss that the ZEC program can be implemented by the State of Illinois because it compensates for nuclear plants' environmental attributes, in the same manner as RECs, is fatally flawed.

Since the basic premise of the Motions to Dismiss fails, this Court should deny the motion.

STANDARD OF REVIEW

Under Rule 12(b)(6) motions, the Court accepts as true all well-pled facts set forth in Consumer Plaintiffs' Complaint, draws all reasonable inferences in Consumer Plaintiffs' favor and does not consider any facts Movants assert outside of Consumer Plaintiffs' Complaint. *Ashcroft v. lqbal*. 556 U.S. 662 (2009). The motion to dismiss must be denied if the complaint states any plausible claim to relief. *Id.* at 678 (2009).

FACTS

The ZEC Procurement Law enacted a zero emission standard requiring the Illinois Power Agency to procure contracts for purchases of ZECs by electric utilities which serve at least 100,000 customers. By definition, this applies solely to ComEd and Ameren Illinois. The ZEC Procurement Law *requires* that the duration of the ZEC contracts be from June 1, 2017 through May 31, 2027. 20 ILCS 3855/1-75(d-5)(1). The ZEC Procurement Law is specifically designed so that the Quad Cities and Clinton Plants will sell all of the ZECs to ComEd and Ameren Illinois. Dkt. 1, ¶ 53.

Exelon Generation is an Exempt Wholesale Generator ("EWG") under the Public Utility Holding Company Act (42 U.S.C. 16451 *et seq.). Id.* Exelon Generation's Quad Cities and Clinton Plants can only produce electricity to sell in wholesale markets. *Id*. Prior to the Illinois Customer Choice and Rate Relief Law of 1997 ("ICCRRL"), the Quad Cities and Clinton Plants were owned by electric utilities. Dkt. 1, ¶ 55; See 220 ILCS 5/16-101 *et seq.* The ICCRRL allowed the utilities to divest the plants to non-utilities. 220 ILCS 5/16-111(g). After the nuclear plants were divested to non-utilities and entered the wholesale markets, prices charged by the plants were subject to FERC rather than State of Illinois jurisdiction. Dkt. 1, ¶ 55.

The ICCRRL also allowed competitive suppliers to sell electricity to Illinois retail customers and required the utilities to deliver the competitive electricity to these customers on a

non-discriminatory basis. Dkt. 1, ¶ 55. ; 220 ILCS 5/16-115, 5/16-118. This Illinois law specifically found that: "All consumers must benefit in an equitable and timely fashion from the lower costs for electricity that result from retail and wholesale competition…." 220 ILCS 5/16-101A(e).

Under the ZEC Procurement Law, the electric utilities ComEd and Ameren Illinois will each charge all of their retail customers through their delivery service charges, including those customers who purchase electricity supply from competitive suppliers rather than the electric utility, for the cost of the ZECs sold to the electric utility under its contract with the provider of the ZECs. Dkt. 1, ¶ 52; 20 ILCS 3855/1-75(d-5)(2); 220 ILCS 5/16-108(k). Furthermore, the state law authorizes each utility to recover these costs from all of its retail customers through an "automatic adjustment clause tariff." *Id.*

A typical residential customer using 1 MWh (1,000 KWh) per month would pay an additional $2.64 per month based on the initial ZEC price of $16.50 per MWh set forth in the ZEC Procurement Law. Dkt. 1, ¶ 12. A commercial customer using 10,000 MWh per month would pay $26,400 more per month based on the initial ZEC price. *Id*. Total additional charges to Illinois consumers will be as much as $3.3 billion during the ten year ZEC program. Dkt. 1, ¶ 10.

The ZEC Procurement Law establishes a new state-created electricity price "adder" that will inure solely to the benefit of Exelon Generation's Illinois-based Quad Cities and Clinton Plants. Dkt. 1, ¶ 56. The amount of the adder is directly tied to electricity prices in the FERC-regulated PJM and MISO wholesale markets. Dkt.1, ¶ 57. That is, the initial ZEC price of $16.50 per MWh will be reduced by the amount by which the projected wholesale market electricity price index for the applicable delivery year (i.e., June 1 – May 31) exceeds a baseline wholesale electricity market price index of $31.40 per MWh. Dkt. 1, ¶ 57. In other words, if wholesale electricity prices

increase, the ZEC subsidies directly decrease. For example, if the projected electricity market price index for delivery year 2 is $38.40 per MWh, the ZEC price for that year will be $9.50 per MWh. Dkt. 1, ¶ 57. But if the projected electricity market price index for delivery year 3 is $39.40 per MWh, the ZEC price for that year will be $8.50 per MWh. *Id*.

Rather than asking the Illinois legislature for ZEC subsidies, Exelon Generation could have achieved higher payments in the wholesale electricity market for its Quad Cities and Clinton Plants by petitioning FERC for wholesale market rule changes designed to achieve this objective. Dkt. 1, ¶ 78. In fact, capacity payments to Exelon Generation for its nuclear generation increased dramatically after FERC approved changes to the rules of PJM's capacity auction in 2015 to add a capacity performance product for which the nuclear plants were eligible. Dkt. 1, ¶ 78; 151 FERC ¶ 61, 208 (June 9, 2015) and 155 FERC ¶ 61, 157 (May 10, 2016) (Order on Rehearing and Compliance).

ARGUMENT

I. CONSUMER PLAINTIFFS HAVE STATED A CLAIM FOR BOTH FIELD PREEMPTION AND CONFLICT PREEMPTION

Consumer Plaintiffs have properly stated claims for both Field Preemption and Conflict Preemption. Nevertheless, Exelon Generation wrongly contends that: (a) Consumer Plaintiffs do not have prudential standing to pursue their preemption claims; (b) FERC, in effect, has primary jurisdiction over Consumer Plaintiffs' Conflict Preemption claim; and (c) this Court does not have equitable jurisdiction to adjudicate Consumer Plaintiffs' preemption claims. Exelon Generation and IPA also wrongly argue that Consumer Plaintiffs have failed to state claims for field preemption and conflict preemption.

A. Consumer Plaintiffs Have Prudential Standing To Bring Their Field Preemption And Conflict Preemption Claims

Exelon Generation first relies on *Association of Data Processing Services Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), to assert that Consumer Plaintiffs' preemption claims are outside the zone of interests protected by the Federal Power Act. Dkt. 37-1, at 38-39. To the contrary, however, *Data Processing* supports the Consumer Plaintiffs' prudential standing argument because the Supreme Court held in *Data Processing* that the data-processor plaintiffs - which were not themselves banks - were still within the zone of interests protected by a federal banking statute. 397 U.S. at 157. Supreme Court cases since *Data Processing* support this conclusion.

In *Valley Forge Christian College v Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), the Supreme Court made it clear that the zone of interests test is a prudential standing doctrine, not a constitutional one, and therefore does not impose limits on judicial power. 454 U.S. at 474-75. Five years later, in *Clarke v Securities Industry Association*, 479 U.S. 388 (1987), the Supreme Court pronounced that the zone of interests is very broad even if the plaintiff is not itself the subject of the regulatory action, concluding:

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the [zone of interests] test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. *The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.*

479 U.S. at 399-400 (emphasis added); See also, e.g., *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, et al.*, 567 U.S. 209 132 S.Ct. 2199, 2210-12 (2012) (owner of property near land acquired for tribe under federal statute relating to native American matters had prudential standing to challenge the validity of the acquisition under that statute).

Review of Consumer Plaintiffs' preemption claims under the zone of interests test shows that they unquestionably have prudential standing to bring these claims. In applying the "zone of interests" test, courts discern the "interests arguably to be protected" by the relevant statutory provision and inquire whether the plaintiffs' interest affected by the action in question are among them. *Data Processing*, 397 U.S. 150, 152-53 (1970). As ultimate consumers of electricity, Consumer Plaintiffs clearly fall within the zone of interests of the Federal Power Act and are directly affected by the ZEC Procurement Law's harmful effect on competition in the PJM and MISO electricity markets.

As one of the cases cited by Exelon Generation in its vain attempt to challenge Consumer Plaintiffs' standing states: "ultimate consumers of energy plainly stand to benefit from open access and increased competition in energy markets." *Northwest Requirements Utils. v. FERC*, 798 F.3d 796, 809 (9th Cir. 2015). But in citing *Nw. Requirements*, Exelon Generation ignores this statement of the court and also mistakenly equates the Consumer Plaintiffs, who are retail end-users, with wholesale energy purchasers whom the Court found lacked standing in that case. 798 F. 3d at 809. In its Opinion in *Nw Requirements*, the court clearly distinguishes between ultimate (i.e., retail) consumers and wholesale purchasers, stating that "… the interests of wholesale energy customers are different [than those of ultimate energy consumers]." *Id.*

Exelon Generation also stands the Court's language in *Grand Council Crees (of Quebec) v. FERC*, 198 F.3d 950 (D.C. Cir. 2000) on its head. In citing *Grand Council*, Exelon Generation references a quote in the case from the U.S. Supreme Court's Opinion in *Bennett, et al. v. Spear, et al.*, 520 U.S. 154, 175-76 (1997), to attempt to support its contention that Plaintiffs do not have prudential standing because Plaintiffs invoke only sections 201 and 205 of the Federal Power Act rather than the entire Act. Dkt. 37-1, at 39. But *Bennett v. Spear*, citing *Data Processing*, actually

stated that a plaintiff does not have to vindicate the overall purpose of a statute and it was sufficient that the plaintiff's interest was protected by the specific provisions alleged to be violated in order to be within the "zone of interests" protected by the statute. 520 U.S. at 176. In other words, the *Bennett* case was cited by the *Crees* court to show the broadness of the zone of interests standard. In the instant case, Consumer Plaintiffs have clearly alleged that the ZEC Procurement Law interferes with their interests in being protected by the just and reasonable rate standard of the Federal Power Act, which FERC has implemented by adopting effectively functionally wholesale electricity markets.

In its attempt to knock Consumer Plaintiffs out of the case, Exelon Generation even argues that "states are free to impose whatever charges on retail bills they wish" and that "the ZEC surcharge falls within the state's authority and is not valid under any theory of preemption." Dkt. 37-1, at 29. These conclusory statements are in fact wrong if the statute is indeed preempted, so they do not further Exelon Generation's arguments. Exelon Generation simply assumes away preemption altogether as a basis to deny the Consumer Plaintiffs prudential standing.

The bottom line is that Consumer Plaintiffs clearly meet the broad "zone of interests" standard first set forth by the U.S. Supreme Court in *Data Processing*, the companion case of *Barlow v. Collins*, 397 U.S. 159 (1970), and the line of cases such as *Valley Forge*, *Clarke*, and *Match-E-Be-Nash-She-Wish* that followed. See also *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479 (1998); *and Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). Respectfully, this Court should hold that Plaintiffs have standing to pursue their field preemption and conflict preemption claims because their alleged injury is within the zone of interests protected by the Federal Power Act. 16 U.S.C. 824 *et seq.*

B. Primary Jurisdiction Does Not Apply To Consumer Plaintiffs' Conflict Preemption Claim

Consumer Plaintiffs adopt by reference the primary jurisdiction arguments set forth in EPSA Plaintiffs' Memorandum in Opposition to the Motions to Dismiss.

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C. This Court Has Equitable Jurisdiction To Adjudicate Plaintiffs' Preemption Claims

Consumer Plaintiffs adopt by reference the equitable jurisdiction arguments set forth in EPSA Plaintiffs' Memorandum in Opposition to the Motions to Dismiss.

D. Consumer Plaintiffs' Complaint States Claims For Field Preemption And Conflict Preemption

Consumer Plaintiffs adopt by reference the preemption arguments set forth in EPSA Plaintiffs' Memorandum in Opposition to the Motions to Dismiss.

II. CONSUMER PLAINTIFFS' COMPLAINT STATES A DORMANT COMMERCE CLAUSE CLAIM

Intervenor Exelon Generation incorrectly asserts that Consumer Plaintiffs do not have prudential standing to raise their dormant Commerce Clause claim. Intervenor Exelon Generation and Defendant IPA also wrongly contend that Consumer Plaintiffs do not state a claim under the dormant Commerce Clause.

A. Consumer Plaintiffs Have Prudential Standing To Raise Their Dormant Commerce Clause Claims

Exelon Generation contends that Consumer Plaintiffs lack prudential standing for their dormant Commerce Clause claim under the "zone of interests test" on grounds that Consumer Plaintiffs' own activity in interstate commerce is unaffected by the ZEC program and Consumer Plaintiffs' alleged injury would be the same regardless of whether the ZEC program were discriminatory. According to Exelon Generation itself, the underlying basis for this argument is that Consumer Plaintiffs would pay the ZEC surcharge even if it was shown that the ZEC program discriminated against interstate commerce. Dkt. 37-1, at 40. In other words, Exelon Generation appears to be arguing that a ruling that the ZEC program was discriminatory would result in consumers in other states within PJM and MISO being required to pay for ZECs rather than Plaintiffs not paying ZEC charges. But this argument collapses because it presupposes that Exelon Generation could impose ZEC charges for its Clinton and Quad Cities plants across all the other states in the PJM and MISO footprints.

The discriminatory aspect of the ZEC program on Consumer Plaintiffs' participation in interstate commerce is that Consumer Plaintiffs must pay for ZEC purchases from Exelon Generation's Illinois-based Quad Cities and Clinton generating plants even if Consumer Plaintiffs are purchasing electricity from competitive suppliers providing electricity 100% from out-of-state generating plants. Dkt. 1, ¶ 15. On the other hand, consumers in other states in PJM and MISO can buy electricity without paying ZEC charges even if the electricity is generated by the Illinois-based Quad Cities or Clinton plants.

The U.S. Supreme Court case of *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), made it clear that unconstitutional discrimination against interstate commerce does not stop at out-of-

state companies against whom a state discriminates. 519 U.S. 278, 286. In fact, the Supreme Court stated in *General Motors* that customers buying products from the companies being discriminated against also may be injured because they are clearly within the zone of interests protected by the Commerce Clause. *Id*.; See also *Lujan v. Defenders of Wildlife* 504 U.S. 555, 560-561 (1992). In the instant case, competitive suppliers who provide electricity to Consumer Plaintiffs purchased from out-of-state generating plants are discriminated against by the ZEC Procurement Law and Consumer Plaintiffs are injured as a result.

Although Exelon Generation cites cases which state that consumers do not have standing to challenge on dormant Commerce Clause grounds costs passed on by a regulated party, these cases are distinguishable from the instant case because the regulated party in those cases had standing to sue and the party paying "pass-through" costs therefore did not have "third party" standing to sue. *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County, 115 F.3d 1372 (8th Cir. 1997)*; *Individuals for Responsible Gov't., v. Washoe Cty*., 110 F.3d 699 (9th Cir. 1997). Moreover, the regulated party in those cases could mark up the costs being passed through to the third party.

In contrast, the regulated parties in this case (i.e., the utilities ComEd and Ameren Illinois) are not harmed and would not have standing because they are mere conduits. The ZEC Procurement Law provides for an automatic pass through of all of the costs to the ultimate consumer (i.e., the Consumer Plaintiffs), who thus has standing as the "injured party." 20 ILCS 3855/1-75(d-5)(2). Clearly, Consumer Plaintiffs are not a "third party" that does not have prudential standing. Therefore, Plaintiffs have prudential standing to pursue their dormant Commerce Clause claim.

B. Consumer Plaintiffs' Complaint States Cause of Action Under The Dormant Commerce Clause

Consumer Plaintiffs' adopt by reference the dormant Commerce Clause arguments set forth in EPSA Plaintiffs' Memorandum in Opposition to Motions to Dismiss.

III. CONSUMER PLAINTIFFS' COMPLAINT STATES A CLAIM UNDER THE EQUAL PROTECTION CLAUSE

Intervenor Exelon Generation argues that Consumer Plaintiffs have not met the burden of meeting the "rational basis test" for the classification applicable to Consumer Plaintiffs' Equal Protection claim because the claim was based only on paragraph 90 of Consumer Plaintiffs' Complaint. Dkt. 37-1, at 39-40. Defendant IPA also argues that Consumer Plaintiffs' Equal Protection claim should be dismissed on grounds it does not meet the "rational basis test." Dkt. 36, at 24. Despite these arguments, the Equal Protection Count of Consumer Plaintiffs' Complaint, which incorporates all of Consumer Plaintiffs' previous allegations, clearly establishes that there is no rational basis for a classification that requires Consumer Plaintiffs and other Illinois consumers to pay ZEC subsidies for Exelon Generation's Quad Cities and Clinton nuclear plants when consumers in other states within PJM and MISO do not pay ZEC charges even if they buy electricity generated by Quad Cities or Clinton.

The Fourteenth Amendment's Equal Protection Clause prohibits states from "deny[ing] to any person within [their] jurisdiction the equal protection of the laws." *U.S. Const. Amend. XIV*. Stated another way, "…all persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 76 (1971). Here, the relevant "similarly circumstanced" persons are all retail (i.e.,

end-user) customers of electricity within the respective footprints of PJM and MISO, which together encompass the entire State of Illinois and many other states.

All United States persons in PJM and MISO, whether in Illinois or another state, are entitled to the equal protection of the laws. Those laws include the Federal Power Act. 16 U.S.C. 824 *et seq.* The ZEC Procurement Law invades FERC's jurisdiction by modifying the results of competitive wholesale electricity markets. Because all ZEC charges will be passed through 100% to Illinois retail electricity consumers only, the ZEC Procurement Law implicitly creates the following classification of retail electricity customers: those in Illinois and those outside Illinois but within either of the two relevant regional transmission organizations.

Consumer Plaintiffs do not dispute that the classification wrought by the ZEC Procurement Law is subject to "rational basis" review, meaning that it must be rationally related to a legitimate government purpose. *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981). But review of Supreme Court decisions which found that statutes did not pass the rational basis test illuminate why the ZEC Procurement Law does not pass this test.

Zobel v. Williams, 457 U.S. 55 (1982), dealt with an Alaska statute that distributed oil revenues among state residents based on length of residency. 457 U.S. at 56. Alaska claimed that its purposes were to create financial incentives to promote permanent residency and encourage prudent management of the oil revenue fund. 457 U.S. at 61-63. The Supreme Court invalidated the law on equal protection grounds under the rational basis test. The Court found the law could not "pass even the most minimal test" *because* its unequal distribution of benefits created "fixed, permanent distinctions between…classes of concededly bona fide residents." 457 U.S. at 59.

In *Williams v. Vermont*, 472 U.S. 14 (1985), the Supreme Court reinstated an equal protection challenge to a state tax scheme that provided a use tax credit on out-of-state automobile

purchases, provided that the purchaser was a Vermont resident at the time of the purchase. 472 U.S. at 15-16. In *Williams*, appellants had purchased their cars before becoming Vermont residents and were ineligible for the tax credit. 472 U.S. at 15-16. Citing *Zobel*, the Court found that distinguishing among Vermont auto registrants for tax purposes on the basis of residency at the time of their car purchase was wholly arbitrary and bore no relation to the relevant statutory purposes. 472 U.S.. at 24-25.

Finally, in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), the plaintiff met all requirements for a property tax exemption available to veterans, except timing, because he became a New Mexico resident in 1981 and the tax exemption was only provided to veterans who became state residents prior to May 1976. 47 U.S. at 612-13. The Supreme Court found the statute invalid under the rational basis test for the same reasons used in *Zobel* and *Williams, i.e.*, "it created fixed, permanent distinctions between…classes of bona fide residents." *Id*. at 618.

Extrapolating these cases to Illinois' ZEC Procurement Law, Illinois electricity consumers are concededly bona fide residents of states within either PJM or MISO and are similarly situated with respect to their relevant electricity market. Nevertheless, an additional ZEC charge will be added to the bills of Illinois electricity consumers, but not to bills of electricity consumers in other states in PJM or MISO *even if they purchase electricity generated by Clinton or Quad Cities*, for the wholly arbitrary reason that Clinton and Quad Cities are located in Illinois. Like the invalidated state laws in *Zobel*, *Williams* and *Hooper*, the ZEC Procurement Law does not pass the rational basis test because it turns Illinois electricity consumers into second-class consumers within their respective regional transmission organization for the ten years of the ZEC program. The ZEC program is therefore as offensive to the Equal Protection Clause as any of the state laws invalidated by the Supreme Court in *Zobel*, *Williams* and *Hooper*.

Moreover, the ZEC Procurement Law also does not pass the rational basis test because its purpose is not legitimate. The ZEC Procurement Law's stated purpose is an environmental kabuki dance stage-managed by Exelon Generation to mask the illegitimacy of its real purpose, which is to subsidize its Clinton and Quad Cities plants and thereby alter the results of wholesale electricity markets outside the state's jurisdiction.

Ultra vires and unlawful purposes can never be legitimate government purposes. Facts that show the illegitimacy of the law's purpose are alleged in the Complaint, and the Complaint therefore contains more than enough factual matter, accepted as true, to state an equal protection claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Accordingly, the court should not dismiss Consumer Plaintiffs' equal protection claim.

CONCLUSION

WHEREFORE, for the above stated reasons Plaintiffs ask this Court to deny the Motions to Dismiss of Defendant Illinois Power Agency and Intervenor Exelon Generation Company, LLC.

Dated: April 24, 2017

Respectfully submitted,

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