

July 6, 2018

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Catherine O'Hagan Wolfe
Clerk of the Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: *Coalition for Competitive Electricity v. Zibelman*
Case No. 17-2654-cv
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 Ms. O'Hagan Wolfe:

FERC's Order, which modifies the PJM capacity market (located in the mid-Atlantic), is the final blow to Plaintiffs. It repeatedly recognizes states' authority to subsidize, and rejects Plaintiffs' preferred tariff changes in favor of "accommodat[ing]" such subsidies. Specifically, subsidized plants would not participate in the capacity market, but states' capacity-purchase requirements would be correspondingly reduced, so that subsidized plants can "remain online." Order PP.8, 149, 157-58, 160-61. FERC concluded this would respect state authority while ensuring just and reasonable wholesale rates.

The Order underscores the flaws in Plaintiffs' case.

First, while Plaintiffs try to resuscitate a conflict-preemption theory, FERC's amicus brief made clear that the ZEC Program "poses no obstacle to the Commission exercising its regulatory authority," U.S. Br. 22, precisely because FERC retains the final word on how plants participate in wholesale markets. The Order confirms the point.

Plaintiffs' submission further confirms that their arguments would invalidate longstanding renewable subsidies, which Plaintiffs have denied. The Order applies to both renewable and nuclear subsidies; distinguishing them, FERC found, would be unduly discriminatory. Order PP.3, 105. If nuclear subsidies were conflict-preempted as a result of the Order, so too would *all* state subsidies.

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Indeed, it is Plaintiffs' suit that conflicts with FERC's policy. It would upset the balance of interests FERC has struck by preventing FERC from regulating cooperatively with states. If anything, Plaintiffs' attempt to use a private preemption suit to override FERC's judgment only illustrates why the Federal Power Act does not permit such suits by bystander plaintiffs.

Second, the Order confirms that Plaintiffs' field-preemption theory was properly dismissed. It recognizes states' authority to subsidize generation and proposes a market design that complements states' choices. Order PP.157-58, 160-61. It also proves that ZEC payments, in contrast to the payments in *Hughes*, are not conditioned on clearing the capacity auction. Under FERC's construct, subsidized plants in PJM would no longer participate in capacity auctions. But ZEC plants in PJM will still receive ZECs when they produce electricity, confirming that the state is paying for emissions-free electricity *production*, not wholesale transactions.

Sincerely,

/s/Matthew E. Price

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cc: All counsel of record via CM/ECF