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July 6, 2018

Ms. 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: Response to FRAP Rule 28(j) letter in *Coalition for Competitive Electricity v. Zibelman*, Case No. 17-2654-cv

Dear Ms. O'Hagan Wolfe:

New York responds to Plaintiffs' second recent Rule 28(j) letter.[1] The cited order,[2] which decides how state-subsidized resources participate in PJM (not New York) capacity auctions, proves New York's case—not Plaintiffs'.

FERC's order comports with the United States' *amicus* brief filed in May. Both that brief (U.S. Br. 23, 26) and FERC's order support New York's position that zero-emission credits (ZECs) are within states' reserved authority under the Federal Power Act.[3] FERC's order starts from the premise that ZECs are valid exercises of state generation authority, and "emphasize[s]" that states "may continue

[1] ECF No. 210-1.

[2] ECF No. 210-2 (Order).

[3] Plaintiffs distinguish ZECs from renewable energy credits, but FERC rejects treating them differently. Order PP 105-106 & n.1.

to support their preferred ... resources" and that its decision "in no way" divests states of "jurisdiction over generation facilities." Order, P 158.

While ZECs compensate state-jurisdictional generation attributes, FERC "ameliorate[s], as needed" any "spillover" effects on FERC-jurisdictional markets. U.S. Br. 7. The FERC order determines how ZECs will affect auction prices by deciding how subsidized resources participate in PJM auctions. Order, P 158 (allowing participation if resource offers exclude subsidies).

Citing a Fourth Circuit holding no other court endorsed,[4] Plaintiffs suggest (Letter at 2) that FERC's regulation of how ZECs affect PJM auctions "confirm[s] . . . a conflict" requiring preemption. But FERC's order is part of the "congressionally designed interplay between state and federal regulation" that the United States brief describes and the Supreme Court protects. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 518 (1989). Although states cannot "require FERC to accommodate ... intrusion[s]" into the federal field, *Hughes*, 136 S. Ct. at 1298 n.11, where, as here, states regulate in their own field, accommodation of a state is required unless "clear damage" to federal goals would result. *Nw. Central*, 489 U.S. at 522.

Sincerely,

/s/ Scott H. Strauss

Scott H. Strauss

cc: All parties via CM/ECF

[4] *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 479 (4th Cir. 2014). Plaintiffs' initial brief (at 47), unlike its Letter, correctly cites *Nazarian* on this point as affirmed "*on other grounds*" in *Hughes v. Talen Energy Mktg. LLC*, 136 S.Ct. 1288 (2016).