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VIA CM/ECF
Hon. Thérèse Wiley Dancks
U. S. Magistrate Judge
U.S. District Court for the Northern District of New York
100 South Clinton Street
Syracuse, New York 13261

Re: *Entergy Nuclear FitzPatrick, LLC v. Zibelman*
No. 15-cv-230 (DNH/TWD)

Dear Judge Dancks:

In accordance with the Court's request during the parties' last status conference on April 20, 2016 (see April 21, 2016 Text Minute Entry), Dunkirk Power LLC ("Dunkirk") submits this letter brief discussing the impacts of the recent decision by the United States Supreme Court, *Hughes v. Talen Energy Marketing, LLC*, No. 14-614, 578 U.S. ____ (Apr. 19, 2016), on this case, including its impact on discovery, and the propriety of a continued the stay in the case.

Simply put, the *Hughes* decision establishes the standard by which Plaintiffs Entergy Nuclear Fitzpatrick, LLC, Entergy Nuclear Power Marketing, LLC and Entergy Nuclear Operations' (collectively, "Entergy") preemption claim must be decided. *Hughes* calls into question the validity of Entergy's entire preemption claim and confirms that Entergy's preemption claim, to the extent Entergy has any private right of action under the Supremacy Clause, can be fully decided without discovery. Furthermore, Entergy's commerce clause claim is also ripe for summary judgment as it can be decided based on the proceedings before the Public Service Commission ("PSC") underlying its June 14, 2014 Order that Entergy is challenging (the "PSC Order"), including the Term Sheet and agreement between Dunkirk-and National Grid (d/b/a National Grid) ("DNG Agreement"). Any purported need for discovery by Entergy is baseless; all *material* facts are undisputed. Entergy's discovery demands are a mere fishing expedition meant to force the PSC Defendants, Dunkirk and the non-parties (National Grid and the New York Independent Systems Operator ["NYISO"]) through a protracted and burdensome discovery process that is expected to be contentious and result in significant motion practice.

Accordingly, for the reasons set forth herein, this case can now be decided without discovery such that the current stay should be maintained to permit Dunkirk to move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

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Hughes v. Talen Energy Marketing, LLC

A. The Federal Power Act ("FPA") Arguably Provides No Private Right of Action Under the Supremacy Clause

At the outset, separate and apart from its importance as to the merits of Entergy's preemption claim, the Supreme Court's *Hughes* decision questions whether a valid cause of action for preemption even exists under the Supremacy Clause. Although the issue was not argued below in *Hughes* because the controlling Supreme Court case, *Armstrong v. Exceptional Child Care Center, Inc.*, 135 S. Ct. 1378, 1389 (2015), was not decided until after the proceedings before the district and circuit courts concluded, the Supreme Court still felt strongly enough about the issue to identify it. *See Hughes*, Slip. Op. at p. 9, fn. 6 ("Because neither CPV nor Maryland has challenged whether plaintiffs may seek declaratory relief under the Supremacy Clause, the Court assumes without deciding that they may.").

In *Armstrong*, the Supreme Court squarely held that the Supremacy Clause does not confer a private right of action where Congress created a statute that "implicitly precludes private enforcement[.]" *Armstrong*, 135 S. Ct. at 1385. There, state officials were sued based on allegations that they violated the Medicaid Act by reimbursing providers of habilitation services at rates lower than the Act permits. The issue before the Supreme Court in *Armstrong* was whether the Supremacy Clause gives Medicaid providers a private right of action to enforce the Medicaid Act against state Medicaid officials in the absence of a congressionally-created right of action. Reversing the Ninth Circuit, the Supreme Court held that the Supremacy Clause does not provide an implied cause of action. Permitting a private right of action under the Supremacy Clause would require Congress to permit private parties to enforce federal law and curtail Congress' ability to guide the implementation of federal law. *Id*. at 1383-84. As such, a court may only grant relief against a state officer for violating federal law when it does so using its equitable powers. *Id*. at 1384. However, such equitable powers are subject to both express and implied limits of the federal law sought to be enforced, particularly when "Congress wanted to make the agency remedy that it provided exclusive, thereby achieving the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking, and avoiding the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action." *Armstrong* at 1385 (citations omitted). Justice Scalia for the majority concluded that, "[t]he sheer complexity associated with enforcing [the relevant provision of the Medicaid Act], coupled with the express provision of an administrative remedy, shows that the [statute] precludes private enforcement . . . in the courts." *Id.* Indeed, a timely law review article in preparation argues that "[t]he FPA exhibits many of the characteristics that the Court has concluded weigh against such an exercise of courts' equitable jurisdiction."[1]

The key take-away of *Armstrong* is that the Supreme Court has cautioned against federal courts exercising their equitable powers to hear Supremacy Clause claims without conducting a detailed examination of the nature of the underlying statute. The fact that such an analysis did not take place during the *Hughes* litigation was simply an accident of timing.

[1] Matthew R. Christiansen, *The FPA and the Private Right to Preempt*, 84 The George Washington Law Review Arguendo (Forthcoming, 2016) at p. 3,

Tellingly, Entergy itself acknowledges *Armstrong* and seeks to evade its bar by asserting that its preemption claim "invokes the Court's equitable powers to enjoin a federally preempted action by state officials." Dkt. No. 58, p. 15. It is also no accident, however, that *Hughes* noted the possibility that the claim before it, and on which Entergy has modeled its preemption claim, may not state a valid cause of action for relief under the Supremacy Clause. A motion for summary judgment, therefore, will allow this Court to evaluate *Armstrong* and whether Entergy's preemption claim can stand. As this is a pure legal question, it can and should be resolved without the need for discovery. This is particularly true when Entergy's purported need for discovery is premised on a non-existent cause of action.

B. New Legal Standard

Substantively, in *Hughes*, the Supreme Court affirmed the Fourth Circuit's decision in *PPL Energyplus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014) that a Maryland "contract for differences" subsidy program for a new generation facility was preempted by Federal Energy Regulatory Commission's ("FERC") regulation of generation capacity markets under the FPA. In doing so, the Court established the legal standard by which the PSC Order challenged here is to be evaluated.

Hughes involved a Maryland program that provided subsidies to a new generator, CPV Maryland, LLC ("CPV"). Under this program, CPV received such subsidies through contracts that were mandated by Maryland where actual receipt of the subsidies was contingent on CPV selling capacity into a wholesale auction regulated by FERC. Importantly, in the program before the Supreme Court in *Hughes*, CPV was guaranteed the contract price for its capacity sales rather than the auction clearing price. *Hughes*, Slip Op. at p. 7. In other words, regardless of what the auction clearing price was, CPV would receive the contract price whether it be more or less than the auction clearing price. Moreover, the contract price was dictated by the State of Maryland and was not the result of any negotiation or choice of the other contracting party. *Id.*

Based on these facts, none of which appear to have been developed through discovery but rather were founded on the undisputed facts of the Maryland program, the Supreme Court held that Maryland's program impermissibly set a rate for capacity sales by CPV in contravention of FERC's exclusive jurisdiction over rates and charges for wholesale sales of electricity. *Hughes*, Slip. Op. at p. 12 ("We agree with the Fourth Circuit's judgment that Maryland's program sets an interstate wholesale rate, contravening the FPA's division of authority between state and federal regulators.").

Tellingly, the *Hughes* Court did not opine that all efforts by a state to encourage generation or, as here, address reliability concerns, was preempted. Rather, its holding was narrowly drafted:

> We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC. We therefore need not and do not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector. Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures "untethered to a generator's wholesale market

> participation." So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable.

Hughes, Slip. Op. at p. 5 (internal citations omitted).

The end result is that *Hughes* draws the line as to what is and is not permissible by a State. In doing so, it sets the framework for which Entergy's preemption claim is to be evaluated. In this regard, it is notable that the Supreme Court decided *Hughes* as a matter of law based on the undisputed aspects of Maryland's program and the manner in which CPV's subsidies were tied to its selling capacity into the wholesale market (i.e., its receipt of the contract rather than auction price). Any factual development that had occurred in the lower court, including many of the areas sought for discovery here by Entergy, were irrelevant to the Supreme Court's ultimate holding.

In this case, the The DNG Agreement does not mandate any negotiated price as between Dunkirk and National Grid. National Grid is simply paying Dunkirk to add gas fueling capability to its existing generation facility. Dunkirk will continue to bid into the NYISO capacity markets as it sees fit, and keep any revenue it earns in that market (subject to a claw-back if prices exceed a pre-defined level). By authorizing National Grid to recover its costs from retail ratepayers, the PSC Defendants did not set, directly or indirectly, the rate for any wholesale sales regulated by FERC. Thus, the DNG Agreement is "untethered to a generator's wholesale market participation."

Moreover, PSC Defendants did not compel National Grid to enter into the DNG Agreement with Dunkirk, another key flaw identified in the *Hughes* decision. *Compare Hughes*, Slip. Op. p. 15, n. 12. The DNG Agreement merely ensures the availability of the Dunkirk generating facility for the next ten years and allows National Grid to continue to provide reliable electric service, while yielding positive economic and environmental benefits. All these facts about the DNG Agreement, as well as the underlying Term Sheet are readily available to Entergy, such that there are no issue of material fact in dispute that warrants extensive and cumbersome discovery.[2] Assuming that Entergy even has a cause of action under the Supremacy Clause, *Hughes* confirms that its preemption claims are ripe for summary judgment.

Stay

Given the *Hughes* decision, which both calls into question Entergy's preemption claim and confirms that it can be decided as a matter of law, a continuation of the current stay is warranted. Dunkirk intends to file a motion for summary judgment, which will likely dispose of the entire case. As stated above, *Hughes* highlights the issue of whether Entergy has private right of action to claim preemption under the FPA. And, assuming that Entergy can even allege a claim for preemption, *Hughes* sets the legal standard by which the PSC Order and DNG Agreement is to be evaluated – a standard that does not necessitate discovery. At the very least, summary judgment will dramatically narrow the scope of permissible discovery in this case.

As for Entergy's Dormant Commerce Clause brought under Section 1983, admittedly the *Hughes* Decision does not discuss this type of claim but only because it was rejected by the

[2] As part of summary judgment, Dunkirk is prepared to submit sworn affidavits that will resolve any other purported dispute of material fact.

lower court. *See Hughes*, Slip. Op. at p. 10, fn. 7 ("Respondents also raised arguments under the Dormant Commerce Clause and 42 U. S. C. §1983. The District Court rejected those arguments, . . . the Fourth Circuit did not address them, and they are irrelevant at this stage."); *PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 854 (D. Md. 2013) (finding no discrimination against interstate commerce or undue burden; also finding that Maryland had a legitimate interest in ensuring an adequate and reliable supply of electric energy). Here, Dunkirk submits that Entergy's Dormant Commerce Clause claim is equally unavailing and will move for summary judgment on this claim as well. While Entergy will likely assert that summary judgment is premature until discovery relative to its Dormant Commerce Clause moves forward, its assertions are misplaced. While there are certain facts central to this claim, they are already available to Entergy in the underlying administrative record supporting the PSC Order. Any other claimed material facts can and will be addressed in Dunkirk's summary judgment motion through sworn testimony. As such, burdensome discovery relative to Entergy's Dormant Commerce Clause claim will not only be at odds with Federal Rule 56(f) and jeopardize judicial economy, it will also fail to uncover any disputes of material fact.

Finally, continuation of the stay will not harm Entergy. The Dunkirk Facility has been mothballed since January 2016 and Dunkirk has no immediate plans to add natural gas firing capability at the facility under the DNG Agreement without notifying the Court. Furthermore, Entergy has announced its plans to mothball its James A. FitzPatrick Nuclear Generating Facility serving in NYISO's energy and capacity markets raising the question of whether Entergy would even be harmed by the restart of Dunkirk on natural gas or have the requisite injury in fact to continue this action.

In contrast, allowing discovery to proceed while Dunkirk's motion for summary judgment is pending substantially harms Dunkirk, the PSC Defendants and the two non-parties who have been served non-party subpoenas, National Grid and the NYISO. This is because, as has been repeatedly reported to the Court, Entergy's discovery demands are extensive and excessively overbroad. Importantly, Entergy's discovery demands seek highly confidential information, many of which go directly to the inter-workings of NYISO's energy and capacity markets. This is compounded by the irrefutable fact that Entergy and Dunkirk are direct competitors in these very same markets. Continuing the stay during motion practice will also be in the interests of efficiency and judicial economy and will avoid unnecessary discovery disputes amongst the parties. In short, a stay of discovery pending summary judgment will translate into economy of time, effort, a reduction of costs to all of the participants including the Court and the protection of highly sensitive market information.

For the foregoing reasons, Dunkirk respectfully requests that the Court continue the stay of discovery in this matter.

Very truly yours,

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Attorney for Intervenor-Defendant
Dunkirk Power LLC.

cc: Counsel of Record via ECF