

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VILLAGE OF OLD MILL CREEK, et al.,)

Plaintiffs,)

vs.)

No. 17 C 1163

ANTHONY M. STAR, in his official
capacity as Director of the
Illinois Power Agency, et al.,)

Defendants.)

ELECTRIC POWER SUPPLY ASSOCIATION,
et al.,)

Plaintiffs,)

vs.)

No. 17 C 1164

ANTHONY M. STAR, in his official
capacity as Director of the
Illinois Power Agency, et al.,)

Defendants.)

Chicago, Illinois
May 22, 2017
10:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MANISH S. SHAH

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1 (Proceedings heard in open court:)

2 THE CLERK: 17 C 1163, Village of Old Mill Creek
3 versus Star; and 17 C 1164, Electric Power Supply Association
4 versus Star.

5 THE COURT: Good morning, everyone. If counsel of
6 record could step up and get appearances on the record, please.

7 MR. SINGER: Good morning, Your Honor. Stuart
8 Singer, Boies, Schiller & Flexner, on behalf of the Electric
9 Power Supply Association and other plaintiffs in 1174.

10 MR. GIORDANO: Good morning, Your Honor. Patrick
11 Giordano, Giordano & Associates, for Village of Old Mill Creek
12 and other plaintiffs in 11 C 1163.

13 MR. NEILAN: Good morning, Your Honor. Paul Neilan,
14 Law Offices of Paul G. Neilan, for Village of Old Mill Creek,
15 et al.

16 MR. IOPPOLO: Thomas Ioppolo on behalf of the State
17 defendants in both cases. Good morning, Your Honor.

18 MR. HUSZAGH: Richard Huszagh also with the Illinois
19 Attorney General's Office for the State defendants.

20 MR. MASSEY: Jonathan Massey from Massey & Gail on
21 behalf of the Electric Power Supply Association.

22 MR. PRICE: Good morning, Your Honor. Matthew Price
23 for the intervenor defendants of Jenner & Block.

24 MR. DeBRUIN: And good morning, Your Honor. David
25 DeBruin, also Jenner & Block, for the intervenor.

1 MR. DOUGLASS: Good morning, Your Honor. Richard
2 Douglass on behalf of PJM, amicus.

3 THE COURT: Okay. As everyone predicted, FERC has
4 nothing to say to me at this time, so -- I tried, but okay.

5 (Laughter.)

6 THE COURT: I have spent some time with the briefs on
7 the motions to dismiss, and I don't really have any questions
8 about them. I need a little more time. But I do think it
9 makes the most sense for me to resolve the motions to dismiss
10 first before we dig in to the preliminary injunction.

11 I appreciate the plaintiffs' time sensitivity, but
12 based on everything I have read so far, I think the best way to
13 manage this moving forward would be to resolve the motions to
14 dismiss. And I have made a fair amount of progress on that, so
15 I don't think it will be months before you hear from me again,
16 but -- and I will endeavor to get it out as soon as I can, but
17 I think it will -- the ruling on those motions will clarify how
18 the case should move forward, if at all, at least in this
19 court.

20 So that's what we're going to do. What I wanted to
21 do this morning is first ask the plaintiffs if there's anything
22 in particular from the replies that the defendants and the
23 intervenors filed in support of their motion that you wanted to
24 make sure you had something to say about.

25 MR. SINGER: Thank you, Your Honor. There are a few

1 things which fall into that category.

2 THE COURT REPORTER: Name again, please.

3 MR. SINGER: My name is Stuart Singer on behalf of
4 the plaintiffs in 1174.

5 First of all, with respect to field preemption, it
6 appears that the defendants concede that if there was a
7 requirement in the law that the subsidy be awarded to nuclear
8 plants that have to participate in and clear the auction, then
9 *Hughes* would be controlling.

10 And they're arguing in their reply that there just is
11 no requirement in the statute to that effect, and our counter
12 to that is it doesn't need to be in a situation such as this
13 where they have to participate in the auction, both because of
14 the PJM tariff rules and because at least one of the plants is
15 an exempt wholesale generator which is required to participate
16 in the auction -- that we've alleged, as a matter of fact, in
17 our complaint they must participate in the auctions -- and that
18 as price-takers, they would clear the auction; and that that,
19 even under the narrowest view of *Hughes*, would be sufficient to
20 create preemption in the defendants' own interpretation of the
21 *Hughes* case, which we think isn't so narrow.

22 THE COURT: Although, I think they would probably say
23 that's not quite their argument because there's also a
24 first-level issue of whether it's tied to the actual price of
25 the sale at the auction as opposed to a separate transaction

1 that may have some factual connection to the auction, but not
2 quite the same connection that the most narrow reading of
3 *Hughes* would suggest.

4 MR. SINGER: Well, in *Hughes*, it was not a -- what
5 they've referred to as a bundled transaction. It was
6 unbundled. The contract for differences would be separate from
7 and added to the actual sale of electricities.

8 And with respect to the effect on price, while the
9 Court doesn't have FERC's views in front of it, and the
10 defendants in their reply have said what's really important is
11 participating and clearing the auction, not the effect on the
12 price, I think the Court can take a look at the brief which was
13 filed by the United States and FERC in the *Hughes* case.

14 And in that brief, the United States said: States
15 may incentivize construction of new facilities, et cetera, but
16 may not employ methods, quote, directly aimed at the
17 commission-approved wholesale auction by providing a subsidy
18 tied to the auction price for sales made to PJM.

19 And that would apply here. Those views apply
20 because, as we pointed out, as Mr. DeRamus has pointed out in
21 his declaration, this is tied to the price. It provides -- and
22 we think the defendants are wrong when they say it just
23 provides a ceiling, because within that ceiling, the price of
24 the subsidy may go up or down based on what the price of
25 electricity would be and determined by a number of PJM and MISO

1 markets. So we think you do have the link that -- on the view
2 that FERC expressed in the *Hughes* case would tie together those
3 two items.

4 On the issue of conflict preemption, Your Honor, the
5 one point I'd like to make is this; that to accept the
6 defendants' motions to dismiss would be to say no matter how
7 extreme the distortion, no matter how significant the effect on
8 prices the subsidy would have in distorting the auction
9 process, which is recognized to be a goal of federal policy --
10 Exelon acknowledged that in its claim against the New Jersey
11 program -- you'd have to say that doesn't matter. It can be as
12 extreme and as distortive, and there's still no potential
13 claim, as a matter of law, for conflict preemption. We don't
14 think there's any legal argument that gets there, and that we
15 need and have the right for an opportunity to develop factually
16 that the level of distortion here is extreme and conflicts with
17 federal policy in that regard.

18 Your Honor, on the *Armstrong* arguments, there was one
19 point I'd want to add to the briefing which has been made, and
20 that is this is not a situation where an administrative agency
21 simply could make a decision and it never winds up in the
22 courts.

23 If FERC were to decide that this was something they
24 believed was preempted, that the state law was preempted, they,
25 in turn, would have to come to a District Court and ask for a

1 finding of preemption. So the courts are going to be involved
2 in making that decision. This is unlike the situation in
3 *Armstrong* where the issue of whether or not what rates are
4 reasonable under that provision of the Medicaid statute that
5 provided for equal access could be solely dealt with really in
6 the administrative processes. And I wanted to make that point
7 because I think that, along with the other items in our brief,
8 shows how this is different than *Armstrong*.

9 Finally, on the commerce clause, Your Honor, we think
10 that the issue there that's really being promoted as a stand --
11 as a legal argument is the standing argument. And there are
12 cases cited in our brief which indicate that parties have been
13 able to raise commerce clause arguments even when they have not
14 been an out-of-state competitor. And those are cited in our
15 brief. They're -- include *Clover Leaf* and -- the Hawaii case,
16 the *Bacchus Imports* case. And we think that that indicates, at
17 a minimum, we have standing.

18 Now, one additional gloss on that, which is mentioned
19 in our reply -- in our opposition brief, and we don't think's
20 really responded to in the reply, is that there are distorting
21 effects on our clients outside of Illinois because now you've
22 subsidized Illinois producers who are competing in these other
23 states where our clients also do business. They are competing
24 with a subsidized provider. And that, too, gives rise to a
25 commerce clause claim.

1 So, Your Honor, I appreciate the opportunity to raise
2 those additional issues.

3 THE COURT: While I have you -- and you raised this
4 issue of the standing arguments on the dormant commerce
5 clause -- the plaintiffs had a footnote in which they said that
6 the defendants were not challenging dormant commerce clause
7 standing for the *Pike*-based arguments, but I'm not so sure that
8 that's right, because, as I understand the defendants'
9 arguments, they are making an Article III standing argument.

10 So I just wanted to --

11 MR. SINGER: Okay.

12 THE COURT: -- say that that's how I'm reading it,
13 since you dropped that footnote that they made a concession,
14 and I didn't see that concession on their end.

15 MR. SINGER: We think that was implicit from what
16 they argued. But we think the arguments on burden of
17 interstate commerce are ones that -- we think all the arguments
18 are properly raised by us as plaintiffs, but that a burden
19 argument, in particular, shouldn't be one that requires that
20 you have an out-of-state nuclear plant that's trying to get
21 into the auction in order to say that interstate commerce as a
22 whole is being burdened.

23 THE COURT: Do you want to say anything about
24 *Johnson*, the defendants' use of *Johnson* as a standing point,
25 the more recent Seventh Circuit case about whether -- if the

1 injury is going to happen no matter what happens to this
2 program, then maybe there isn't standing that's traceable to
3 this program?

4 MR. SINGER: I think that's raised in connection with
5 their argument that you can separate out one aspect of the
6 program.

7 And, as we argued in our opposition, we don't think
8 you can dice up a program that way and say that just because
9 it's possible to conceive of a state subsidy program that would
10 be even worse, that wouldn't have, for example, a ceiling on it
11 and would vary entirely with the movement in prices, that that
12 would make our claim not justiciable about a program that does
13 have that limit. You -- that I think in the *Johnson* case, you
14 had a separate program that was at issue as opposed to two
15 features of an integrated program, which is the Illinois ZEC
16 statute.

17 THE COURT: Okay. Thank you.

18 MR. SINGER: Thank you.

19 THE COURT: Anyone else on the plaintiffs' side want
20 to raise anything?

21 MR. GIORDANO: Yeah, Your Honor. Thank you. Pat
22 Giordano. A few comments.

23 The -- in the Illinois Power Agency brief, they're
24 saying in the commerce clause section that the Act does not
25 discriminate in favor of in-state interests; and that any

1 nuclear power plant, whether one of Exelon's Illinois plants or
2 a competitor's plant in another state, can apply to sell RECs.
3 To us, that is the key to this case.

4 This is designed specifically -- and it's alleged by
5 our complaint and also the EPSA plaintiffs' complaint that this
6 is a subsidy program directed to Quad Cities and Clinton.
7 That's what this program is. It is -- and so they can bend
8 over backwards to try to say that others can apply, but the
9 reality is -- this is alleged in our complaint and needs to be
10 accepted for purposes of the motion to dismiss -- that this is
11 a subsidy program for Quad Cities and Clinton.

12 We will prove that at trial. This is alleged in the
13 complaint. The law requires the Illinois Power Agency to
14 procure contracts for ComEd and Ameren to purchase ZECs in an
15 amount approximately equal to 16% of the actual amount of
16 electricity delivered by ComEd and Ameren Illinois to Illinois
17 retail consumers during calendar year 2014. This amount is
18 approximately equal to Exelon Generation's annual output from
19 the Clinton and Quad Cities plants.

20 The ZEC procurement law also requires the utilities
21 to purchase ZECs equivalent to all megawatt hours produced by
22 the facilities owned by the winning supplier if it buys any
23 ZECs from the facilities. The upshot of the requirements of
24 the law is that if any ZECs are purchased from the Quad Cities
25 and Clinton plants, all ZECs will be purchased only from those

1 plants, which will be the result of the ZEC procurement law as
2 alleged in consumer plaintiffs' complaint.

3 This is -- this is the key. This is the key. This
4 is a subsidy program. It's not an environmental program. It's
5 a subsidy program that is tethered to the wholesale market
6 price to assure that those two plants get a certain price, a
7 certain subsidy per year -- as you know, per delivery year --
8 and those subsidies vary every year.

9 I thought it was very interesting that Exelon
10 Generation did not respond in any way to our allegations about
11 this in their reply memorandum. They don't try to say --

12 THE COURT: Well, so what I'm interested in is if
13 there's anything they did say in their reply that you want to
14 make sure doesn't get unresponded to.

15 MR. GIORDANO: Yeah. I guess they call --

16 THE COURT: Because I have read your briefs and --

17 MR. GIORDANO: I guess they call that negative space,
18 but --

19 THE COURT: Okay.

20 MR. GIORDANO: -- you don't want any comments on the
21 negative space, but -- so -- yes. So that was my main point on
22 the reply memorandum of Illinois Power Agency.

23 With respect to Exelon's brief -- reply brief,
24 they're arguing on our equal protection claim that -- and it
25 should be dismissed because there is no -- there is a rational

1 basis. And their argument is that the -- that it treats all
2 Illinois persons equal -- within its jurisdiction equally.
3 That's true, but what it does is discriminate against Illinois
4 residents in violation of the Federal Power Act, and that's a
5 violation of fed -- of equal protection against residents of
6 other states throughout the PJM and MISO regional transmission
7 organizations.

8 We have to pay for the -- regardless of whether we
9 buy power generated by Clinton or Quad Cities, every consumer
10 in the state has to pay. Meanwhile -- for the subsidy to those
11 two plants. Meanwhile, other consumers in other states can buy
12 from power generated by those plants brought to them by a
13 competitive supplier without paying any subsidy. That's
14 discriminatory.

15 THE COURT: So you would say that a state program
16 that somehow affected the price that in-state retail consumers
17 pay in a way that made energy cheaper in -- for retail
18 consumers in another state violates the equal protection
19 clause?

20 MR. GIORDANO: Correct, because you're violating the
21 Federal Power Act.

22 It -- the way -- this all gets messed up, Your Honor,
23 if you don't put a price on carbon that applies throughout the
24 service territories or even in Illinois. This is clearly not a
25 price on carbon in Illinois. So you're -- if -- and that

1 violates the Federal Power Act.

2 This is not a price on carbon. This is a subsidy
3 program to ensure that a certain amount is collected. I mean,
4 we just saw that ComEd has already made their filing for -- to
5 start collecting these rates even though they haven't started
6 the procurement process. They're going to start charging
7 consumers on June 1st.

8 THE COURT: What I didn't hear in your opening
9 remarks, and this is shifting to what you started with, was
10 that you -- what I didn't hear is that you dispute that another
11 nuclear power plant could apply.

12 I appreciate the argument that this is targeted to
13 benefit the Quad Cities and that the allegations are such that
14 it's pretty clear who's going to get the benefit, but --

15 MR. GIORDANO: They --

16 THE COURT: -- I don't think you ever say that the
17 program explicitly prohibits an out-of-state nuclear plant from
18 applying.

19 MR. GIORDANO: Technically, they can apply.

20 THE COURT: Okay.

21 MR. GIORDANO: But the reality is --

22 THE COURT: No, and I understand that. And it's an
23 important reality. And so I am not cutting you off because I
24 don't appreciate the argument, but I just wanted to make sure I
25 understood it, and I do.

1 MR. GIORDANO: Right. And we'd like the opportunity
2 to prove that, and we think --

3 THE COURT: Sure.

4 MR. GIORDANO: -- we can prove that.

5 THE COURT: Okay. Anything else?

6 MR. GIORDANO: Paul?

7 MR. NEILAN: Yeah, just on that. Excuse me. Paul
8 Neilan for Old Mill Creek.

9 Just on that last point. One of the criteria in the
10 statute is the social benefit of this program for in-state
11 nuclear plants, such as job creation, the maintenance of
12 generating plants in Illinois and the like. And that's not an
13 economic consideration. That's an in-state consideration.

14 THE COURT: Okay. Okay. I'll -- why don't I ask the
15 AG defendant to comment, if you want at all, on just what was
16 raised this morning. I don't want to reiterate what's in the
17 briefs. That I have a handle on.

18 MR. HUSZAGH: Your Honor, we disagree with -- Richard
19 Huszagh. We disagree with the characterizations of the State
20 defendants' so-called concessions. We think that the attempt
21 to shoehorn this case into the *Hughes* paradigm doesn't fit,
22 like Cinderella's foot in the slipper.

23 That case involved sales of capacity and a
24 transaction that was geared to change the price for those
25 transactions. This program is not for sales of capacity or for

1 energy. It is for a different commodity, as FERC itself has
2 recognized, and that is for the environmental benefits.

3 I think the *Hughes* opinion is probably a better
4 source of the law than the briefs that were filed on that case
5 by non-parties to this proceeding.

6 I would offer only one other comment with respect to
7 Mr. Giordano's characterizations here.

8 THE COURT: Well, before you do that, why don't you
9 respond to the point about their distinction of *Armstrong* in
10 that in our situation, if FERC wanted to do something about
11 this, they would end up going to court, and it wouldn't be just
12 an internal agency decision.

13 MR. HUSZAGH: Yeah, I don't know that there's any
14 case law with respect to the equitable cause of action for
15 injunction that veers off into discussion of what might be
16 primary-jurisdiction-type principles. Ultimately, either you
17 do have that cause of action, you're a proper plaintiff to
18 bring that cause of action, or not. I think our briefs address
19 that issue on both points with respect to whether you are
20 bringing an anticipatory defense to an enforcement
21 proceeding -- neither of the plaintiffs have contended that
22 they are in that category -- and likewise, with respect to the
23 criteria that the judge would apply if we tried to pretermite a
24 FERC process related to any issues that would potentially
25 overlap this type of case.

1 Certainly with the conflict preemption analysis where
2 the Court would be trying to divine what is just and reasonable
3 with respect to practices affecting wholesale rates is exactly
4 the type of thing that *Armstrong* was referring to. So I think
5 we really mostly just rely on our briefs and don't agree that
6 that distinction moves the needle on that analysis.

7 The -- with respect to Mr. Giordano's comments on
8 behalf of the Village of Old Mill Creek, he said that this is a
9 subsidy program, it's not an environmental program, and I would
10 suggest that is a false choice.

11 This program is a subsidy program that is an
12 environmental program. And like many other programs that FERC
13 and other courts have recognized are permissible under the
14 relevant constitutional doctrines that the plaintiffs have
15 identified, it can be an environmental program that operates
16 through subsidies, and that is essentially the question for the
17 Court to decide.

18 I think they're right that that goes somewhat to the
19 core issues in this case. And we think that there is no doubt
20 that this is an environmental program. There are indisputable
21 elements of the program that clearly qualify it as promoting
22 those environmental benefits.

23 And attempts to say that it can't be done unless it's
24 done on a multistate carbon-tax-equivalent-type mechanism is,
25 of course, to put blinders on to political reality. I don't

1 think Illinois in the middle of the midwest with Wisconsin,
2 Michigan, Indiana, Missouri is going to be anytime soon putting
3 together a regional carbon tax to try and pursue these
4 environmental objectives.

5 Thank you, Your Honor.

6 THE COURT: Thank you. For Exelon?

7 MR. PRICE: Matthew Price on behalf of Exelon. Thank
8 you, Your Honor.

9 Let me just quickly address the points that were
10 raised.

11 First, with respect to field preemption and
12 Mr. Singer's argument that there's this effective connection
13 because of the fact that certain FERC rules require certain
14 plants to bid into the FERC auction, I think it's important
15 that preemption looks at what the State has done. The State
16 has not made that requirement whatsoever. The State is
17 indifferent to whatever rules FERC decides to adopt for any of
18 its regions. And that's all that matters for preemption.

19 But I think it's also important just to be clear
20 about what the facts are that are really undisputed, and I
21 think that there's some -- well, with respect to Quad Cities,
22 first of all, it's located in PJM, that's true, but it didn't
23 clear the capacity market in 2018-'19. That's -- the
24 plaintiffs acknowledge that. Or '19-'20. And so it has no
25 obligation to sell in the capacity markets -- that's in PJM's

1 brief, and the plaintiffs say that as well -- but it can still
2 get ZECs.

3 PJM could change its rules, as PJM in its brief says
4 it's considering doing, just no longer require a "must offer"
5 into the market. So that's at page 11, note 6 of its brief.
6 If it does, units can still get ZECs in PJM.

7 Third, the program applies to units in MISO as well.
8 MISO doesn't require anyone to bid into their auctions, but
9 those units can still get ZECs.

10 And fourth, vertically-integrated utilities don't
11 even sell their output at wholesale. They sell at retail. But
12 nothing in the statute prohibits them from getting ZECs.

13 So I just -- I think that the premise of the argument
14 is wrong. And even if the premise were right, it wouldn't
15 matter as a matter of law.

16 Now, with respect to the idea that there's a subsidy
17 tied to the auction price. First of all, I think standing
18 disposes of this argument. *Johnson* is quite clear about what
19 it requires. And I would just identify for the Court the
20 passage on page 663 of the case that: "A plaintiff's injury
21 must match the legal problem he alleges. A plaintiff cannot
22 attack" --

23 THE COURT REPORTER: Slower, slower.

24 MR. PRICE: Sorry.

25 "A plaintiff cannot attack a perceived problem that

1 does not cause him injury, regardless of its organizational
2 relationship to other provisions (illegal or not) that do cause
3 him injury."

4 And the fact that the plaintiffs are asking for a
5 vacatur of the entire law or an overturning of the entire law,
6 even if that were the only possible remedy, *Johnson* makes clear
7 that that wouldn't provide them standing. So they don't have
8 standing to challenge that aspect of the program, but all it
9 does is potentially reduce their harm.

10 But, in any event, if we're talking about FERC's
11 position, FERC's position was expressed clearly at oral
12 argument in the court. We identified the quote in our brief
13 where the FERC attorney said: If we are just talking about a
14 contract for differences, this would be fine. The problem is
15 the bid-and-clear requirement in the law. That is what the
16 Supreme Court picked up in requiring a formal conditioning by
17 the State of clearing in exchange for payment, and we don't
18 have that in this case, and so *Hughes* doesn't apply.

19 And the last point I would make about this issue,
20 Your Honor, is that the prices here are not tied to the auction
21 of price. They're tied to energy forecasts, which are not FERC
22 jurisdictional, and they're tied to an amalgam of capacity
23 prices that no generator will agree to --

24 THE COURT: I get that point.

25 MR. PRICE: You got that, great.

1 On conflict preemption, the key point, I think,
2 here -- and in this sense, conflict preemption is really
3 related to *Armstrong* -- is that FERC could do a wide variety of
4 things in response to this program. The plaintiffs' preemption
5 suit preterms that entire process and essentially preempts
6 FERC from acting in a way FERC thinks is most appropriate.

7 Now, with respect to the issue of this going to court
8 eventually. Well, that's no reason not to apply *Armstrong* and
9 it's no reason to find conflict preemption because it could end
10 up in court in a number of ways. But no matter how it ends up
11 in court, you'll have FERC having canvassed the possible
12 solutions to the problem the plaintiffs identify; you'll have
13 FERC having determined whether there is even a problem to
14 solve, and if there is, what problem -- what the best solution
15 is; and then plaintiffs could challenge that under the APA in
16 the D.C. circuit or some other circuit if they wish.

17 With respect to the field preemption issue, if it
18 goes to FERC first, a court that's ultimately reviewing this,
19 again, under the APA would have the benefit of FERC's view
20 about what its own jurisdiction is, and that's a view that,
21 under the *City of Arlington*, deserves some deference under APA
22 principles, and that's valuable in its own right.

23 We think it's pretty clear that Congress intended to
24 foreclose equitable suits of this kind by bystanders who are
25 not subjected to illegal action by the State themselves.

1 Finally, on the commerce clause, I think Your Honor
2 is right, we don't concede that we're not pursuing a standing
3 argument with respect to *Pike*. As we pointed out in the
4 *Pike* -- in our reply brief, *Pike* also requires a showing of at
5 least mild discrimination. And in this case, the state statute
6 on its face is not discriminatory at all. And we think that
7 resolves the commerce clause issue, both on the merits and as a
8 matter of standing.

9 THE COURT: On the merits, though, you would
10 acknowledge, I imagine, that many of the cases are on a more
11 complete record with respect to effects and purposes and how
12 commerce is actually affected and what the real purposes were
13 behind the action. Like *Alexandria Scrap*, for example, a case
14 you rely pretty heavily on, was a summary judgment case.

15 MR. PRICE: Sure. So I think it is true that many
16 *Pike* cases do proceed to summary judgment, but I would say two
17 things here about why that's inappropriate. The first is that
18 there are some threshold requirements that need to be met, and
19 the first -- under this circuit's case law, the *Cavel* case and
20 the *National Paint* case, there needs to be mild discrimination
21 at the least, and they don't have standing to bring a
22 discrimination challenge of any kind. So I don't think we even
23 get to the merits.

24 But second, even under *Pike*, there needs to be a
25 burden on commerce before you get to the stage of weighing the

1 benefits and the burdens, and it's the weighing process that
2 ordinarily requires some sort of factual development. But the
3 burden needs to be alleged. And a burden typically is, for
4 example, you have to install mud flaps on trucks going through
5 territory or you have to pack all your cantaloupes in our
6 state. There's something -- some burden that is placed on
7 parties that prevents them from engaging in commerce.

8 Here, we don't have any burden imposed at all. All
9 we have is the State essentially offering a payment, and
10 everyone is free to participate in commerce as they would like
11 before. There may be an effect on contenders, yes, but there's
12 not a burden on commerce, and that distinction is critical in
13 explaining why the *Pike* claim should be dismissed.

14 THE COURT: Okay.

15 MR. PRICE: Thank you.

16 MR. SINGER: May I briefly --

17 THE COURT: Go, go ahead.

18 MR. SINGER: -- respond, Your Honor?

19 THE COURT: And I will give -- you know, technically,
20 I should give the defendants the last word on the -- because
21 it's their motion to dismiss, so -- but I'll let you go. But I
22 probably -- so just keep in mind that I may then let them talk
23 again, but I'm not going to give you the last word.

24 MR. SINGER: Understood.

25 THE COURT: So go ahead.

1 MR. SINGER: There was a question about how to --
2 does this affect other potential applicants for the subsidy. I
3 wanted to draw the Court's attention to the fact that the
4 statute limits this to 16% of electricity needs, which happens
5 to be the amounts that the Clinton and Quad Cities plants
6 provide. So it's not like this is an open-ended program where
7 other plants can get that above the level of Clinton and Quad
8 Cities.

9 On field preemption, Your Honor, there is no case
10 that we are aware of that supports the idea that if the State
11 acts in an area where by virtue of the way in which the field
12 is organized, it has to expressly require that the State take
13 the action in order for preemption to occur -- and we have
14 cited several cases in our opposition saying that ingenious
15 attempts to get around federal exclusive jurisdiction are
16 preempted as well as straightforward attempts. If Maryland --
17 it's not so easy to just say that you can avoid certain magical
18 words and regulate within an area of exclusive federal
19 jurisdiction.

20 And I wanted to refer the Court specifically to part
21 of PJM's brief, which is page 13 of their amicus filing, where
22 PJM points out I think something that's very important, that:
23 "Maryland, in the program addressed in *Hughes*, had to condition
24 state financial support on a requirement that the proposed new
25 generator offer and clear in PJM's market because PJM's

1 'must-offer' rule does not apply to new resources. But that
2 rule does apply to existing resources," which are the ones
3 involved here. So it's a difference also in that circumstance.

4 But we don't even think that is legally dispositive.
5 What is legally dispositive is the fact that we have alleged
6 that these nuclear plants must participate in the auction in
7 order to sell electricity and that, as a factual matter,
8 they're doing that.

9 To say that PJM may change its rules, that may have
10 other companies that are utilities, all of those are, first of
11 all, factual points and are not appropriate in response to a
12 complaint unless we get into discovery; but second, don't deal
13 with the actual realities that for -- overwhelmingly
14 PJM-required plants and EWGs have to participate in these
15 auctions, and the State doesn't have to make that an express
16 requirement if it legislates in an area where those are the
17 background facts.

18 THE COURT: Do you want to say anything about their
19 point about the MISO?

20 MR. SINGER: Well, on MISO, I think they said that
21 that isn't required, but I believe that the plant, which is in
22 MISO, is an exempt wholesale generator, which is, by those
23 rules, required to participate in an auction process. So I
24 believe that's Quad Cities.

25 And then, you know, with respect -- you know,

1 basically, you have two sets of restraints, one that affects
2 PJM in the tariff saying they have to participate; second, you
3 have the requirement as an exempt wholesale generator. And the
4 hypothetical fact they may change that status in the future
5 doesn't change the facts as they operate today.

6 And even if the Court were to find that only PJM and
7 not MISO is affected, or only part of the energy in Illinois is
8 affected, but not some hypothetical vertically-integrated
9 plant, that does not end the preemption inquiry with respect to
10 those which are affected as a result of the state subsidy which
11 do participate, as a matter of fact and as a matter of these
12 requirements, in wholesale auctions. In other words, that
13 preemption occurs even if the State hasn't legislated in a way
14 that captures 100% of the market. You still can't act in an
15 exclusive federal area.

16 There is the argument by Exelon that *Armstrong* is
17 somehow related to conflict preemption, and we don't see that.
18 And that's really the only thing they've said in response to
19 the fact; that their argument would mean substantively, that no
20 matter how distorted the law is, as a matter of law, you don't
21 go forward beyond a motion to dismiss, and there's just no
22 support for that.

23 And I think, as Your Honor recognized, these cases
24 have never been dealt with on a motion to dismiss. I mean,
25 virtually all the cases have been resolved in plaintiffs'

1 favor. And cases have been dealt with on summary judgment and
2 usually on full trial records. And a lot of this is very
3 factual in nature.

4 But when Mr. Price says that FERC has authority here,
5 that authority relates to the MOPR requirements that our
6 clients sought to extend to existing plants. That's the
7 ability of FERC to put a "minimum off-price rule" into effect
8 to try to mitigate some of the effects of the subsidy.

9 If this Court were to hold that this is entirely
10 outside of federal jurisdiction, that this is not captured by
11 directly affecting rates, then they could not, as a matter of
12 practice, go into court or to decide themselves that federal
13 jurisdiction preempts, as a matter of field preemption, these
14 measures. But there's also footnote --

15 THE COURT: Right. But would that necessarily mean
16 that they can't act? I mean, those are two different things,
17 right?

18 MR. SINGER: That's correct. They could try to act
19 around the state law, then, to try to accommodate federal
20 policy. But as the Supreme Court, Your Honor, pointed out -- I
21 believe it was footnote 11 in the *Hughes* case -- that a state
22 can't act in an area of federal jurisdiction and then say,
23 well, the Federal Government has ways to accommodate itself to
24 that and, therefore, it's not preempted. That's not the way it
25 works. If it acts -- if the State acts in an area reserved for

1 federal jurisdiction, that's preempted irrespective of whether
2 the Federal Government could take offsetting measures to
3 mitigate some of those effects.

4 And we don't think that conflict preemption is any
5 different in that respect. Exelon themselves had indicated in
6 a New Jersey suit that subsidies would conflict with the
7 federal policy in favor of competitive auction markets. That's
8 an established policy. FERC doesn't have to do anything
9 further in order for us to have a ripe conflict preemption
10 claim, saying that this subsidy, because of how it operates, is
11 right in the teeth of that federal policy, a position that
12 Exelon itself took when they weren't a party on the receiving
13 end of the subsidies.

14 And, Your Honor, I think that unless there's further
15 questions, that covers the additional points I wanted to raise.

16 THE COURT: Thank you.

17 MR. GIORDANO: Just a couple points, Your Honor.

18 THE COURT: Go ahead.

19 MR. GIORDANO: The first is related to this notion
20 that because the plants did -- the Quad Cities plants did not
21 clear the auction, that that somehow helps the Exelon case.

22 The reality is the subsidy creates a way that Exelon
23 can do whatever it wants in the auction with those plants. If
24 it wants to bid high, it can bid high. If it wants to bid
25 low -- it can do those things anyway, but now it's getting

1 those subsidies, okay, so that if it wants to bid high in the
2 auction, it's going to get the subsidies anyway. If it wants
3 to bid low in the auction, it's going to get the subsidies
4 anyway. It clearly affects the analysis of Exelon and how
5 they're going to bid into the auction.

6 And the reality is any of these effects that PJM or
7 FERC is being adopted will actually have an adverse effect on
8 consumers. So it will be an additional adverse effect and
9 drive up consumers even more. If the auction results -- if the
10 subsidies are adopted and then the auction rules are adjusted
11 to react to the fact that the subsidies are there, that will
12 drive up rates in the auction. So you'll have higher capacity
13 rates, plus the subsidies.

14 This is a serious problem. It's a violation of the
15 Federal Power Act. It's a basic violation of the Federal Power
16 Act on both conflict preemption and field preemption.

17 The other point that I wanted to make was about the
18 State's issue that this is an environmental program -- could be
19 both a subsidy program and an environmental program.

20 I'm glad they acknowledge that it is a subsidy
21 program. They have not gone as far as acknowledging yet that
22 it's a subsidy program for Quad Cities and Clinton, but it
23 clearly is. As Mr. Singer pointed out and I pointed out, that
24 16% of -- is the amount that's generated by those two plants.

25 If this was an environmental program -- let's just

1 look at Illinois. They tried to turn the attention to other
2 states. But if we look just at Illinois, they could make this
3 an environmental program, like the Renewable Energy Credit
4 program, in this statute, which I looked at over the weekend.
5 That's designed so that any eligible solar or wind generator
6 can get Renewable Energy Credits, and they're going to bid
7 competitively to get those credits.

8 Here, you could have done the same thing and had all
9 nuclear plants within the state eligible to get a certain
10 amount of ZECs based on the total output of the nuclear plants
11 in the state. That's not what was done. What was done was
12 they targeted those two plants and their 16% with a high-enough
13 subsidy to subsidize those plants rather than calculate an
14 environmental -- an amount which was -- is best determined --
15 as the American Wind Energy Association suggests very well,
16 best determined by a competitive process that actually
17 determines what those environmental amounts would be.

18 So even if you accept -- even if you limit it to
19 Illinois, this doesn't make sense. It's a -- Governor Rauner
20 was very proud of the fact that this was a subsidy for those
21 two specific plants, and he's very proud of that. We think
22 he's very wrong on this issue. But the reality is that's what
23 this program is.

24 Thank you.

25 THE COURT: For the State?

1 MR. HUSZAGH: We appreciate your taking the time,
2 Your Honor, to entertain these comments.

3 With respect to Mr. Singer's observations, we believe
4 that he is, again, confusing the difference between primary
5 jurisdiction -- excuse me, field preemption and conflict
6 preemption. As we've indicated, he's characterized field
7 preemption as being everything that directly affects wholesale
8 rates. That's not what *Hughes* says. That's not what the case
9 law says. That's not what the *ONEOK* case says. He's vastly
10 exaggerated that.

11 They have tried to shepherd the fact that these --
12 that the subsidy payments are adjusted according to wholesale
13 market future indexes as a way to fit it within that
14 characterization, but that characterization doesn't fit because
15 the commodity that is being exchanged in the *Hughes* case was
16 electric capacity; and in this case, the commodity that is
17 being exchanged for those ZECs is not capacity or energy at
18 all. It's, as the statute indicates, just generation.

19 Now, they've said, in essence, that this could have
20 been done differently, that it could have been done like the
21 REC program, but they have been unable to articulate any
22 distinction between what they say is valid in the REC program
23 and then the model that they advocate for this preemption
24 analysis, under which if there is an effect upon wholesale
25 rates, that's enough to exclude it.

1 And even in the conflict preemption area, they have
2 also failed to take into account that it requires that there be
3 an actual conflict.

4 We don't dispute that if the federal agency, FERC,
5 acts within its federal authority in a way that actually
6 conflicts with a state statute that the federal law is supreme.
7 In that case, they have acted, and it eclipses state law, and
8 there is an actual conflict and conflict preemption applies.

9 What we disagree with is the notion that before they
10 act, that merely because they have jurisdiction over things
11 that directly affect rates -- and it's sort of hard to -- you
12 know, it's hard to dispute that FERC could take action in this
13 area if they wanted to. But before they decide whether they
14 should take such action and what action to take, that the mere
15 possibility of such action triggers a conflict preemption
16 analysis.

17 The -- with respect to Mr. Giordano's comments, very
18 briefly. Again, he tries to say that the REC program is ideal
19 and that could be the model that the State follows. Again, I
20 don't think that we have a choice where the Court must decide
21 which is the wisest of the various programs that the State
22 could adopt. That's not the legal question before the Court.

23 And the fact that the ZEC program is designed in a
24 manner somewhat different than the REC program isn't enough to
25 condemn it under the relevant analysis.

1 And, again, they fail to identify something unique
2 about the ZEC program which, under their analysis,
3 differentiates it from the REC program. They seem to be trying
4 to avoid having the Court declare the REC program's invalid
5 without articulating any reason why, if they agree with our
6 arguments against the ZEC program, it would not be required to
7 do so.

8 They then add that the ideal program would be one in
9 which payments are made to all nuclear power plants in
10 Illinois, regardless of whether they're at risk of shutting
11 down, and that seems to be an argument that there should be a
12 greater impact on ratepayers than this program is designed to
13 achieve; that we should waste ratepayers' subsidies for
14 environmental purposes by sending subsidies to nuclear power
15 plants that don't need them to survive and, hence, would be
16 creating those environmental positive externalities without
17 those subsidies. That would be a wrong-headed way to do this.

18 And I think that this is one of those "no good deed
19 goes unpunished" type arguments where the State has designed
20 this to minimize the impact on ratepayers while maximizing the
21 environmental benefits, and they shouldn't be molting for having
22 chosen that type of model.

23 I could compare it quickly to talk in the press about
24 the supposed infrastructure proposals in Washington where
25 they're saying: We're going to give subsidies for companies

1 that finance public works infrastructure, but we'll do so
2 without regard to whether those projects would have gone
3 forward anyway without that financing that the government
4 subsidized.

5 Why waste public monies and throw them out into a
6 field, you know, indiscriminately rather than target them
7 specifically to where they'd get the most bang for the buck?
8 That's what the Illinois program is doing, and it shouldn't be
9 faulted for having done so, or found to be unconstitutional on
10 that ground.

11 Thank you, Your Honor.

12 THE COURT: Thank you. Go ahead.

13 MR. PRICE: Thank you, Your Honor. Just a few quick
14 points.

15 First, on the MISO "must offer"/PJM "must offer"
16 issue. I think it's important just to step back for a moment
17 to first principles. The states under the statute have the
18 authority to regulate generation facilities. That's their
19 power. And what I understand plaintiffs' argument to be is
20 basically that FERC, by approving a tariff that requires a
21 "must offer" in wholesale markets, essentially overwrites or
22 preempts states' power to regulate generation facilities. If
23 they hadn't imposed that, plaintiffs seem to say everything
24 would be fine; but because FERC has imposed that, now states
25 can't do something that they could have otherwise done under

1 their authority to regulate generation facilities.

2 So a couple of responses. The first is that the *EPSA*
3 case makes clear that that fails as a matter of law. That case
4 makes clear that FERC cannot preempt state authority over
5 generation facilities. That is authority that Congress has
6 reserved to the states to exercise as the states see fit.

7 And the second point is that their theory essentially
8 would make illegal any state subsidy in any market where FERC
9 has imposed that requirement because -- and if you're bidding
10 into the wholesale market, by FERC's rule, then if you're
11 receiving any money, you're effectively adjusting the amount of
12 money that the units would otherwise be making under their
13 theory, and that isn't the law.

14 And you can see that in the *Connecticut Department of*
15 *Public Utilities* case where it's very clear FERC regulates its
16 markets, but the states regulate generation facilities. And
17 one thing affects the other thing, but the two co-exist
18 together.

19 And it's clear from the *New England Power Generators*
20 case, which the plaintiffs themselves cite, and it's clear from
21 *WSPP*, where the whole question in *WSPP* arose because you have
22 renewable generators selling in the wholesale market, and
23 people came to FERC and said, "Hey, they're selling in the
24 wholesale market and they're also selling these RECs. Is that
25 a problem?" And FERC said, "Well, that's not our business. If

1 they want to sell the RECs -- that's for separate product -- we
2 don't have jurisdiction over those sales."

3 And so the entire premise of plaintiffs' effective
4 tether through the "must offer" requirement is just rejected by
5 the cases and rejected by their own example of a carbon tax,
6 which is just a negative payment. By their own theory, that
7 should be equally illegal in the PJM states, but they seem to
8 think that it would be perfectly fine. So at the end of the
9 day, I think plaintiffs just don't have a coherent theory.

10 The last point I want to make concerns conflict
11 preemption. Mr. Singer said, you know, are we saying no matter
12 how distorted the market is, the Court can't hear this matter
13 past a motion to dismiss? Well, in this case, plaintiffs
14 themselves went to FERC and said: You can solve the problem by
15 adopting these bidding requirements that are obviously a less
16 intrusive manner of regulation than taking away state sovereign
17 authority to regulate generation facilities.

18 So plaintiffs concede that this can be solved in a
19 less intrusive manner, the problem they identify, and I think
20 it's up to FERC, in the first instance, to even decide whether
21 the patient is sick and, if so, then what medicine is
22 appropriate to prescribe.

23 Thank you.

24 THE COURT: Okay. I appreciate everyone's comments
25 and I appreciate the briefing, which is excellent on all fronts

1 and much appreciated on my end.

2 What I will do is take everything under advisement.
3 I don't want to brief the preliminary injunction just yet. I
4 want to take a little more time with the motions to dismiss,
5 issue something.

6 If I think that I need to speed things up on the
7 preliminary injunction front, I'll let everybody know and we'll
8 reconvene. I do think I can resolve the arguments raised in
9 the motions to dismiss in a timely-enough way that it won't
10 cause too much concern on everybody's front about the
11 preliminary injunction, but I'm sensitive to everybody's
12 interest in the case.

13 So I'll take it under advisement and I'll issue
14 something in writing. Okay.

15 MR. SINGER: Thank you, Your Honor.

16 THE COURT: Thank you.

17 MR. GIORDANO: Thank you, Your Honor.

18 (Proceedings concluded.)

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C E R T I F I C A T E

I, Colleen M. Conway, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the HONORABLE MANISH S. SHAH, one of the Judges of said Court, at Chicago, Illinois, on May 22, 2017.

/s/ Colleen M. Conway, CSR, RMR, CRR

05/23/17

Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

Date