

RONALD L. OLSON
ROBERT E. DENHAM
JEFFREY I. WEINBERGER
CARY B. LERMAN
GREGORY P. STONE
BRAD D. BRIAN
BRADLEY S. PHILLIPS
GEORGE M. GARVEY
WILLIAM D. TEMKO
JOHN W. SPIEGEL
DONALD B. VERRILLI, JR.*
TERRY E. SANCHEZ
STEVEN M. PERRY
MARK B. HELM
JOSEPH D. LEE
MICHAEL R. DOYEN
MICHAEL E. SOLOFF
GREGORY D. PHILLIPS
KATHLEEN M. McDOWELL
GLENN D. POMERANTZ
THOMAS B. WALPER
SANDRA A. SEVILLE-JONES
HENRY WEISSMANN
KEVIN S. ALLRED
JEFFREY A. HEINTZ
JUDITH T. KITANO
JEROME C. ROTH
GARTH T. VINCENT
TED DANE
STUART N. SENATOR
MARTIN D. BERN
DANIEL P. COLLINS
ROBERT L. DELL ANGELO
BRUCE A. ABBOTT
JONATHAN E. ALTMAN
KELLY M. KLAUS
DAVID B. GOLDMAN
DAVID H. FRY
LISA J. DEMSKY
MALCOLM A. HEINCKE
TAMERLIN J. GODLEY
JAMES C. RUTTEN
RICHARD ST. JOHN
ROHIT K. SINGLA
LUIS LI
MICHAEL B. DESANCTIS*
CAROLYN HOECKER LUEDTKE
C. DAVID LEE
MARK H. KIM
FRED A. ROWLEY, JR.
KATHERINE M. FORSTER

BLANCA FROMM YOUNG
RANDALL G. SOMMER
ROSEMARIE T. RING
MELINDA EADES LEMOINE
SETH GOLDMAN
GRANT A. DAVIS-DENNY
JONATHAN H. BLAVIN
DANIEL B. LEVIN
MIRIAM KIM
MISTY M. SANFORD
HAILYN J. CHEN
BETHANY W. KRISTOVICH
JACOB S. KREILKAMP
JEFFREY Y. WU
LAURA D. SMOLOWE
ANJAN CHOUDHURY
KYLE W. MACH
HEATHER E. TAKAHASHI
ERIN J. COX
BENJAMIN J. HORWICH
E. MARTIN ESTRADA
MATTHEW A. MACDONALD
BRYAN H. HECKENLIVELY
SAMUEL T. GREENBERG
ELAINE J. GOLDENBERG*
MARK R. YOHALEM
CHAD GOLDRER*
GINGER D. ANDERS*
MARGARET G. MARASCHINO
JOHN M. GILDERSLEEVE
ADAM B. WEISS
GEORGE CLAYTON FATHEREE, III
ADAM R. LAWTON
JESLYN A. EVERITT
MARK R. SAYSON
JEREMY A. LAWRENCE
CHRISTOPHER M. LYNCH
ADAM I. KAPLAN
KENNETH M. TRUJILLO-JAMISON
LAURA K. LIN
GREGORY M. SERGI
ACHYUT J. PHADKE
MARI OVERBECK
ZACHARY M. BRIERS
JENNIFER M. BRODER
ELLEN MEDLIN RICHMOND
JORDAN D. SEGALL
WESLEY T.L. BURRELL

1155 F STREET N.W.
SEVENTH FLOOR
WASHINGTON, D.C. 20004-1361
TELEPHONE (202) 220-1100
FACSIMILE (202) 220-2300

350 SOUTH GRAND AVENUE
FIFTIETH FLOOR
LOS ANGELES, CALIFORNIA 90071-3426
TELEPHONE (213) 683-9100
FACSIMILE (213) 683-3702

560 MISSION STREET
SAN FRANCISCO, CALIFORNIA 94105-3089
TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

July 3, 2018

CHRISTA L. CULVER
KAREN A. LEBLANC
KURUVILLA J. OLASA
JUSTIN P. RAPHAEL
CRAIG A. LAVOIE
ELIA HERRERA
JOSHUA PATASHNIK
JOSHUA S. MELTZER
ROSE LEDA EHLER
MARIA JHAI
ADAM P. BARRY
JENNIFER L. BRYANT
ANDREW CATH RUBENSTEIN
JEFFREY A. PAYNE
HANNAH L. DUBINA
ADAM GOTTESFELD
NICHOLAS D. FRAM
JOHN L. SCHWAB
ALEXANDER D. TEREPIKA
PETER E. BOOS
ANKUR MANDHANIA
J'ME K. FORREST
ASHLEY D. KAPLAN
JESSICA REICH BARIL
JULIANA M. YEE
JEREMY K. BEECHER
MATTHEW K. DONOHUE
ALLYSON R. BENNETT
ARIEL C. GREEN
ELIZABETH A. LAUGHTON
EMILY CURRAN-HUBERTY
TIMOTHY J. MOON
JORDAN X. NAVARETTE
JOHN B. MAJOR
LAUREN C. BARNETT
NICHOLAS R. SIDNEY
C. HUNTER HAYES
KIMBERLY D. OMENS
AARON D. PENNEKAMP
TREVOR N. TEMPLETON
STEPHEN T. MAYER
SKYLAR D. BROOKS
ELIZABETH R. DYER
ELIZABETH A. KIM
SUSAN S. HAR
THOMAS RUBINSKY
NICHOLAS DUFAU
LAURA M. LOPEZ
MICHAEL C. BAKER
NAJEE K. THORNTON
SARAH G. BOYCE*
MOLLY K. FRIEDMAN
BENJAMIN WOODSIDE SCHRIER
WILLIAM LARSEN
CELIA R. CHOY*
ADELE M. EL-KHOURI*
COLIN A. DEVINE
DANE P. SHIKMAN
LEXI PEACOCK
MAGGIE THOMPSON
SAMUEL H. ALLEN
ALLISON M. DAY
MARKUS A. BRAZILL
GIOVANNI S. SAARMAN GONZÁLEZ
JONATHAN S. MELTZER*
SAMUEL JOSÉ DÍAZ
LAUREN M. HARDING
NEFI D. ACOSTA
STEPHANIE G. HERREIRA
TERESA A. REED
GRANT R. ARNOW
DANIEL BENYAMIN
SARA A. MCDERMOTT
J. MAX ROSEN
M. ELIZA HANEY
RACHEL G. MILLER-ZIEGLER*
ALISON F. KAROL
ANNE K. CONLEY
OF COUNSEL
ROBERT K. JOHNSON
ALAN V. FRIEDMAN
PATRICK J. CAFFERTY, JR.
PETER A. DETRE
ALLISON B. STEIN
BRAD SCHNEIDER
ERIC P. TUTTLE
PETER E. GRATZINGER
JENNY H. HONG
KIMBERLY A. CHI
DAVID S. HONG
E. LEROY TOLLES
(1922-2008)
*ADMITTED IN DC.
ALL OTHERS ADMITTED IN CA

Writer's Direct Contact
(202) 220-1101
(213) 683-4007 FAX
Donald.Verrilli@mto.com

Mr. Gino G. Agnello
Clerk of Court
United States Court of Appeal for the Seventh Circuit
Everett McKinley Dirksen United States Courthouse
219 S. Dearborn Street, Room 2722
Chicago, IL 60604

Re: *Electric Power Supply Ass'n v. Star*
Case No. 17-2445 (consolidated with No. 17-2433)
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 Mr. Agnello:

FERC just issued an Order that begins:

[T]he integrity and effectiveness of the capacity market administered
by [PJM] have become untenably threatened by out-of-market

July 3, 2018

Page 2

payments provided or required by certain states [to support] ... continued operation of preferred generation resources that may not otherwise be able to succeed in a competitive wholesale capacity market. ... [L]imited support primarily for relatively small renewable resources has evolved into support for thousands of megawatts (MWs) of resources [like] large nuclear plants.

(Order 3.)

The Order explains that “the integrity of competition in the wholesale capacity market” is undermined by “out-of-market support to ... existing uneconomic resources.” (Order 64.) Such subsidies “significantly impact the capacity market clearing prices and the integrity of the resulting price signals on which investors and consumers rely to guide the orderly entry and exit of capacity resources. We cannot rely on such a construct to harness competitive market forces and produce just and reasonable rates.” (Order 68.) Indeed, by “allow[ing] resources to suppress capacity market clearing prices,” these subsidies “render[] the rate *unjust* and *unreasonable*.” (Order 63, emphasis added.)

“[O]ut-of-market support, such as ZEC programs, has changed the circumstances in PJM,” requiring FERC to retool its capacity markets. (Order 76.) Two years in, FERC is still searching for a capacity market fix, and has not even started mitigating the harm to the energy market. Because a State cannot “require FERC to accommodate [such] intrusion,” *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1298 n.11 (2016), “[t]he fact that FERC [is] forced to mitigate the[se] ... distorting effects ... confirm[s] ... the existence of a conflict,” *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 479 (4th Cir. 2014), *aff’d by Hughes*. That is particularly so here, where mitigating the ZEC program’s intrusion will require “sweeping changes to the PJM capacity construct.” (LaFleur, Commissioner, dissenting 3.) This disruption of FERC, PJM, and the whole energy market is exactly why states are preempted from meddling with the wholesale market.

July 3, 2018

Page 3

The SG's *Virginia Uranium* brief refuted the FERC amicus brief's legal analysis; this Order refutes its market analysis.

Very truly yours,

/s/ Donald B. Verrilli, Jr.

Donald B. Verrilli, Jr.