No. 17-2445

In the
United States Court of Appeals
for the Seventh Circuit

ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,

Plaintiffs-Appellants,

v.

ANTHONY M. STAR, *et al.*

Defendants-Respondents.

On Appeal from the United States District Court
for the Northern District of Illinois, No. 17 CV 1164

BRIEF OF *AMICI CURIAE* THE ILLINOIS CHAMBER OF COMMERCE & THE ILLINOIS INDUSTRIAL ENERGY CONSUMERS IN SUPPORT OF THE PLAINTIFFS-APPELLANTS AND FOR REVERSAL OF THE DISTRICT COURT ORDER

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Appellate Court No: 17-2445

Short Caption: Electric Power Supply Association, et al. v. Anthony M. Star, et al.

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The Illinois Chamber of Commerce

The Illinois Industrial Energy Consumers

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Taft Stettinius & Hollister LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: s/ Jonathan B. Amarilio Date: September 5, 2017

Attorney's Printed Name: Jonathan B. Amarilio

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INTEREST OF THE *AMICI*

The Illinois Chamber of Commerce (the "Chamber") is an association that zealously advocates on behalf of Illinois businesses to achieve a competitive business environment that will enhance job creation, job retention, and sustained economic growth. The Chamber is often referred to as the unifying voice of the business community in Illinois. The association consists of manufacturers, railroads, insurers, retailer and banks, in addition to a host of other industrial and commercial concerns. Just as the Chamber provides its members with benefits, these businesses, in turn, provide the State of Illinois with jobs, income, profits, and taxes that allow the State of Illinois and its residents to flourish. Combined, the Chamber's members are accountable for a significant portion of Illinois' electric consumption.

The Illinois Industrial Energy Consumers (the "IIEC") is an Illinois-based trade association comprised of 25-30 large industrial companies with operations in Illinois. IIEC members have employed approximately 90,000 people in Illinois and consumed approximately 13 billion kilowatt-hours of electricity a year. IIEC members are end-users of electric utility delivery service, buyers of electric supply from third party providers and, in some cases, certified suppliers of their own electricity needs. Depending on their electric supply arrangements, some IIEC members participate directly in the wholesale energy market.

The interest of the Chamber and IIEC (collectively, "Amici") in this case is substantial. The answers to the questions raised in this case will have a direct and

significant impact on the wellbeing of the Amici's members, which consume large amounts of Illinois' electric supply. If the zero emissions credits ("ZECs") that are the subject of this appeal remain in effect, Illinois businesses and customers will suffer from unnecessarily high electricity prices and the degradation of a competitive electric market specifically designed to keep electricity reliable and electric prices affordable. The economic ramifications of the ZEC program are in some cases so significant that they may force businesses to close their doors or relocate to neighboring states with lower, market-based electric power purchasing regimes.

The Amici respectfully submit this brief pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29 so that the Court may better understand the significance of this subsidy to Illinois' business community and why it is so important that parties like the appellants be recognized as having standing to challenge the ZEC program in court. Pursuant to Federal Rule of Appellate Procedure 29, the Amici represent that this brief was drafted by the undersigned counsel, funding for which was provided by the Chamber.

BACKGROUND

In December 2016, the Illinois legislature enacted the Future Energy Jobs Act ("FEJA") (Ill. Pub. Act 099-0906), which, *inter alia*, created a zero emission portfolio standard to ensure the continued operation of certain qualifying nuclear generating plants through subsidies funded by the ZECs. The stated purpose of the ZEC program is to ensure improved air quality in Illinois, as the use of nuclear

power reduces airborne emissions and greenhouse gases as compared to other forms of electric generation. However, the real-world implications of the ZEC program are not so altruistic and are, in fact, deeply troubling. The ZEC program is designed to subsidize one politically-favored nuclear generating company—Exelon—at the expense of all others. This is deemed necessary because Exelon's nuclear fleet has been teetering on the edge of financial collapse for some time, losing $800 million in the last seven years. *See* http://www.exeloncorp.com/newsroom/clinton-and-quad-cities-retirement. The ZEC program permits Exelon (and in practice, only Exelon) to sell ZECs from qualifying nuclear generation facilities in Illinois and thereby save Exelon's nuclear fleet, but at great cost.

All major electric utilities are now required to purchase ZECs from Exelon pursuant to a set-price equaling the Social Cost of Carbon—initially $16.50 per megawatt hour. 220 ILCS 3855/1-75(d-5)(1)(B). This set price provides Exelon's plants with out-of-market payments that "augment" the well-established auction processes conducted by Midcontinent Independent System Operator, Inc. ("MISO") and PJM Interconnection, L.L.C. ("PJM") for electric energy and capacity. This allows Exelon to essentially alter or bypass the results of the process approved by the Federal Energy Regulatory Commission ("FERC") for establishing just and reasonable wholesale electricity prices/rates.

The extraordinary cost of this subsidy, as much as $3.3 billion over the next ten years, is ultimately passed on to Illinois customers. Dkt. #1, ¶ 10. Presented with the specter of having the cost of such an extraordinary subsidy placed on their

shoulders to benefit one politically-favored company, two sets of plaintiffs, one comprised of delivery service customers of Commonwealth Edison (the "Consumer Plaintiffs"), and the other made up of independent power producers along with a national industry association for competitive electric power producers (the "Generator Plaintiffs"), filed lawsuits (the "Lawsuits") challenging the ZEC program on constitutional and preemption grounds.

The district court dismissed the Lawsuits because it determined, among other things, that the Generator Plaintiffs lacked constitutional standing, and the Consumer Plaintiffs lacked prudential standing. The district court further concluded that these private plaintiffs are barred from maintaining an equitable cause of action on the basis of preemption. As detailed below, if the district court's dismissal of the Lawsuits is affirmed, the impact on the Amici's members, as well as all users of electricity in Illinois, will be immense.

ARGUMENT

Rather than repeat the thorough arguments on the merits made in the appellant's brief, the Amici would like to stress the real-world consequences of finding that the Generator and Consumer Plaintiffs' claims are preempted and of failing to recognize their standing to challenge the ZEC program in court.

I. The ZEC Program Will Impose a Tremendous Economic Burden on Illinois Businesses and Consumers.

It is axiomatic that the economic health of any state depends on the commercial success of its businesses. Since the opening of Illinois' electric market two decades ago, Illinois businesses have thrived in no small part because they

could rely on a competitive electric market to provide them with reliable, low-cost electricity to sustain their operations. The ZEC program is a direct assault on that market, forcing Illinois businesses and consumers to shoulder a significant economic burden in order to benefit one politically-favored company.

The negative economic ramifications of the ZEC program on Amici's members are tremendous. For example, one Chamber member, an Illinois refinery, is projected to incur an additional $1.45 million per year in increased electricity costs as a direct and sole consequence of the ZECs. Other smaller Illinois businesses with an electricity demand of, for instance, 50 megawatts per year will incur nearly $800,000 in additional annual electricity costs as a sole consequence of the ZECs. Such massive increases in electricity costs will force businesses to cut costs elsewhere to remain competitive. This will translate to fewer growth opportunities, increased layoffs, and out-of-state relocations.

By undermining FERC's jurisdiction and the well-established rate-setting process, the ZEC program puts additional and unnecessary strains on the budgets of Illinois' business community. At a time when the State is raising taxes across the board, the imposition of backdoor taxes like the ZEC program will leave Illinois businesses in a disadvantaged, anti-competitive position with their counterparts in neighboring states. Further, new businesses will be discouraged from opening or moving to Illinois when they can save vast sums by avoiding its now fixed electric "market." Businesses faced with the prospect of unnecessarily paying hundreds of

thousands and even millions of dollars for electricity in Illinois will have little choice but to avoid operating here—to the detriment of all Illinois residents.

II. The ZEC Program Undermines Illinois' Competitive Electric Market.

As discussed above, the ZEC program undermines the integrity of Illinois' heretofore very successful competitive wholesale and retail electric market. There are three fundamental processes in the electricity market: generation, the creation of electricity or its procurement from various generators/producers; transmission, the movement of electricity from generation stations to utility substations; and distribution, the local delivery of electricity from substations through a utility distribution system to end-use retail customers. Historically, public utility companies like Commonwealth Edison operated on a vertically integrated basis in Illinois, meaning they exclusively controlled the generation, transmission, and distribution of electricity as well as its retail sale to customers. Nearly 20 years ago, this model radically changed for the better.

In response to sharply rising electricity prices, the Illinois General Assembly amended the Public Utilities Act, 220 ILCS 5/1-101 *et seq.* ("PUA"), by passing the Electric Service Customer Choice and Rate Relief Law of 1997 ("Customer Choice Act"). The Customer Choice Act was designed to move away from the vertically integrated utility model and toward a competitive wholesale and retail Illinois electricity market to provide greater choice and additional value to Illinois retail customers. *See generally* 220 ILCS 5/16-101 *et seq.*; 220 ILCS 5/16-101A. Generation, transmission and distribution were made separate functions for separate companies operating in competition to drive down prices and increase

reliability. This effort was successful, making Illinois a national leader in competitive energy markets and setting conditions for significant economic growth.

The competitive wholesale electric market in Illinois has saved Illinois consumers at least $37 billion dollars since its inception, while saving Illinois industrial, commercial, governmental and nonprofit concerns at least $18 billion. *See Electricity & Natural Gas Customer Choice in Illinois – A model for effective Public Policy Solutions* (2014). Nameplate installed generating capacity also increased by more than 11,000 megawatts or 30% between 1997 and 2011 as a result of the existence of the competitive marketplace in Illinois. *Id.* Additional examples of such benefits abound, but the point is clear: Illinois has fared well with a competitive electric market.

Exelon, in fact, has publically agreed that maintaining a competitive electric market in Illinois is essential to the State's economic future. It unequivocally states on its website that "Exelon strongly supports competitive electricity markets to deliver choice, innovation and value for residential and business customers. . . . Energy competition promotes: customer choice, innovative energy technologies and services, long-term savings opportunities, economic development and job creation, energy supply reliability, improved generation performance and clean energy resources." *See* http://azstage.exeloncorp.com/newsroom/Documents/fact_BenefitsofCompetition.pdf.

The ZEC program is a direct assault on the foundations of Illinois' competitive electric market and represents a regression to the old, anticompetitive model. No longer are electrical prices set by competitive supply and demand forces

within FERC's rate limits. No longer are businesses and individual consumers entitled to a choice in where their money goes or how much they pay for electricity. Instead, the ZEC program is a command and control economy style tool invented to favor one company—Exelon—over all other interests, including those of Illinois' wider business community.

Like most command-economy tools, the ZEC subsidy purports to drive down prices (in this case, by incentivizing Exelon to bid down the auction process), but prices will fall only in the very short term, and the fall is unlikely to benefit businesses and consumers. Any short-term reduction in auction prices will be more than offset by the costs of the subsidy itself, plus the long-term cost of deterring investment in cleaner, more efficient power sources as a result of this market distortion. That is the logic of economics and the reason FERC relies on market forces to set appropriate rates.

The Amici respectfully submit that this is why it is so important for the Court to recognize the standing of the appellants in this matter and to conclude that their claims are not precluded. Illinois businesses and residents must have the ability to challenge this corrosive subsidy directly in court and thereby to defend their substantial financial interests if they are to continue to thrive.

CONCLUSION

The ZEC program exists to subsidize Exelon's troubled nuclear power fleet. Whether or not this goal is constructive, it should not be achieved by subverting the FERC-established process for assuring adequate energy supplies at just and

reasonable rates through reliance on market forces, by undermining the competitive market in Illinois, or by imposing large and unnecessary costs on Illinois' business community and residents.

WHEREFORE, and the for all the reasons stated above, *Amici Curiae* the Illinois Chamber of Commerce and the Illinois Industrial Energy Consumers, respectfully suggest that this Court should reverse the decision of the district court in this matter.

Dated: September 5, 2017

Respectfully submitted,

Illinois Chamber of Commerce and Illinois Industrial Energy Consumers, *Amici Curiae,*

By: /s/ Jonathan B. Amarilio
One of Their Attorneys

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CERTIFICATE OF COMPLIANCE

The undersigned, an attorney, certifies that Brief of *Amici Curiae* the Illinois Chamber of Commerce & the Illinois Industrial Energy Consumers in Support of the Plaintiffs-Appellants and for Reversal of the District Court Order conforms to the requirements of FRAP 29 and FRAP 32. The length of this brief, excepting those parts excluded by FRAP 32(f), is 2,024 words. The undersigned further certifies that this brief complies with the typeface requirements of 32(a)(5) and the style requirements of FRAP 32(a)(6).

Dated: September 5, 2017

/s/ Jonathan B. Amarilio

CERTIFICATE OF SERVICE

The foregoing **Brief of *Amici* Curiae he Illinois Chamber of Commerce & the Illinois Industrial Energy Consumers in Support of the Plaintiffs-Appellants and for Reversal of the District Court Order** was filed electronically on *September 5, 2017* with the Clerk of the Court using the CM/ECF system and I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/EFC system.

/s/ Jonathan B. Amarilio