7th Circuit Court of Appeals affirms Illinois subsidy for nuclear generation facilities

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On September 13, 2018, the Seventh Circuit Court of Appeals issued its long-awaited decision in the consolidated cases of Elec. Power Supply Assn. v. Anthony M. Star, 7th Cir. Nos. 17-2433, 17-2445, 2018 U.S. App. LEXIS 25980 (Sep. 13, 2018). The decision — authored by the well-known jurist, Circuit Judge Frank Easterbrook — decided an issue that is very similar to an issue also currently pending before the United States Court of Appeals for the Second Circuit, the case of Coalition For Competitive Electricity, et al. v. Zibelman, et al., 2nd Cir. No. 17-2654. The issue in question is namely whether the Federal Power Act preempts a state law that sought to subsidize some of the state's nuclear generation facilities. The Federal Power Act provision— 16 U.S.C. § 824(b)(1) — provides that the Federal Energy Regulatory Commission (FERC) is to regulate the sale of electricity in interstate commerce, whereas the states are to regulate local distribution and the facilities used to generate power.

Also at issue is 20 ILCS 3855/1-75(d-5), which subsidizes failing nuclear generation facilities by providing them a "zero emissions credit." The credit requires facilities that generate electricity using coal or gas, as opposed to nuclear, to purchase these credits at a price per megawatt as set by statute. (The current price in Illinois is $16.50 per megawatt-hour.) The adjustment is designed "to ensure that the procurement [of electricity] remains affordable to retail customers … if electricity prices increase." In the district court and on appeal, the plaintiffs asserted that Illinois's system indirectly regulates the electricity auctions held by regional organizations, such as PJM Interconnection, by using average auction prices as a component in the formula that affects the cost of the zero-emissions credit. Such a system, the plaintiffs contended, impinged on FERC's authority under the Federal Power Act and, thus, should be preempted by federal law. Importantly, following oral argument, the court requested that the United States Department of Justice (DOJ) and FERC submit a brief expressing their views as amicus curiae; DOJ and FERC both agreed with the

defendants that the state law did not interfere with FERC's authority to regulate auctions and was, therefore, not preempted by federal law.

The court, relying on the recent United States Supreme Court decision in Hughes v. Talen Energy Marketing, LLC, 136 S. Ct. 1288 (2016), held that "the exercise of powers reserved to the states under §824(b)(1) affects interstate sales. Those effects do not lead to preemption; they are instead an inevitable consequence of a system in which power is shared between the state and national governments." The Seventh Circuit reasoned that because Hughes "draws a line between state laws whose effect depends on a utility's participation in an interstate auction (forbidden) and state laws that do not so depend but that may affect auctions (allowed)" and the FERC has consistently taken Illinois' state system for granted when exercising its regulatory authority, the zero-emission credit is not preempted by federal law. Finally, Judge Easterbrook quickly disposed of the plaintiff's dormant commerce clause argument, reasoning that "the combination of §824(b)(1) and the absence of overt discrimination defeats any constitutional challenge to the state's legislation."

This case could affect gas-fired generation facilities across the country, especially if other courts agree with the Seventh Circuit's reasoning and outcome. Because of the importance of this issue within several U.S. industries, the parties are expected to apply for re-hearing en banc and will most likely appeal this decision to the United States Supreme Court.

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