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Chapman Client Alert

February 21, 2017 Current Issues Relevant to Our Clients

Two Lawsuits Challenge Constitutionality of the Zero Emissions Credits Program of Illinois' Future Energy Jobs Act

On February 14, 2017, two federal lawsuits were filed in Illinois challenging the legality of the Zero Emissions Credits program (the *"ZEC Program"*) provided for under Illinois' recently passed Future Energy Jobs Act (Public Act 99-0906). Under the ZEC Program, the Illinois Power Agency ("IPA") is required to procure zero emissions credits (i.e., credits representing the environmental attributes from one megawatt hour of energy produced from a nuclear facility connected to MISO or PJM) for each megawatt hour of retail electricity that is delivered by each electric utility in Illinois to their customers over a period of ten years. See our February 2 summary of the Future Energy Jobs Act for more information.

The first lawsuit was filed by a group of energy companies comprised of the Electric Power Supply Association (*"EPSA"*), Dynegy, Inc. (*"Dynegy"*), Eastern Generation, LLC (*"Eastern"*), NRG Energy, Inc. (*"NRG"*) and Calpine Corporation. The other lawsuit was filed by the Village of Old Mill Creek, Ferrite International Company, Got It Maid, Inc., Nafisca Zotos, Robert Dillon, Richard Owens and Robin Hawkins. Both lawsuits were filed in the U.S. District Court for the Northern District of Illinois and seek to invalidate those portions of Public Act 99-0906 that pertain to the ZEC Program.

Both lawsuits contain similar arguments challenging the constitutionality of the ZEC Program. Specifically, the plaintiffs argue that the ZEC Program violates the Supremacy Clause of the United States Constitution (Article VI, Clause 2) because it 1) intrudes on the exclusive authority granted to the Federal Energy Regulatory Commission ("*FERC"*) by the Federal Power Act to oversee the sale of electric energy at wholesale prices in interstate commerce, and 2) generally usurps federal law pertaining to the sale of wholesale energy. The plaintiffs also argue that the ZEC Program violates the dormant Commerce Clause of the United States Constitution because it benefits certain wholesale producers of nuclear energy in Illinois to the detriment of out-of-state producers of energy who compete in the same wholesale market. The plaintiffs argue that although all nuclear facilities connected to the relevant wholesale markets (i.e., MISO and PJM) are eligible to apply for the zero emission credits under the ZEC Program, the procurement criteria benefits only Illinois nuclear facilities because, at present, only the Clinton and Quad Cities plants (each of which are located in Illinois) may be selected by the IPA as the "winning bidders" under the ZEC Program.

We note that a similar lawsuit was brought in a New York U.S. District Court on October 19, 2016 by a group of plaintiffs comprised of the Coalition for Competitive Electricity, Dynegy, Eastern, EPSA, NRG, Roseton Generating LLC and Selkirk Cogen Partners, L.P. That lawsuit challenges the New York Public Service Commission's Order Adopting a Clean Energy Standard, issued on August 1, 2016 (the *"ZEC Order"*). The ZEC Order provides for a per megawatt hour payment for zero emissions credits to nuclear power generators. The New York plaintiffs challenged the ZEC Order on the same three constitutional grounds and have made many of the same arguments that are contained in the Illinois cases.

Both the Illinois and New York cases rely on a recent United States Supreme Court decision, *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016), as support for their positions. In *Hughes*, the Court considered whether a Maryland regulatory program violated the Supremacy Clause when it purported to provide subsidies to a new generator through state-mandated contracts that conditioned the receipt of those subsidies on the new generator selling capacity into a FERC regulated wholesale auction. The Supreme Court found the Maryland program unconstitutional on grounds that the program invaded FERC's "regulatory turf" by adjusting an interstate wholesale rate. The Court noted, however, that such

programs would not have the "fatal defect" found in Maryland's program so long as they 1) did not condition payment of funds on capacity clearing the wholesale market's auction, and 2) encouraged generation through measures that were "untethered to a generator's wholesale market participation." We expect that this clarification by the Court in *Hughes* will be a central issue in both Illinois cases.

Chapman and Cutler LLP will continue to follow the Illinois and New York cases discussed above and provide periodic updates as to any new developments.

For More Information

Should you have any questions or desire any additional information concerning these cases or the Future Energy Jobs Act, please contact any of the following attorneys or the Chapman attorney with whom you regularly work:

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