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FERC's Market Worries Doom Nuke Plant Subsidies, Foes Say

By **Keith Goldberg**

Law360 (July 5, 2018, 3:34 PM EDT) -- The Federal Energy Regulatory Commission's recent order that PJM Interconnection revise its electricity market rules to blunt the impact of state clean energy policies supports arguments that the Seventh and Second Circuits must invalidate nuclear plant subsidies offered by Illinois and New York, challengers of the subsidies say.

Independent power producers claim the so-called zero emission credits offered by Illinois and New York to prop up struggling Exelon Corp. nuclear plants are preempted by the Federal Power Act and usurp FERC's exclusive jurisdiction over wholesale electricity markets. District courts have previously rejected those arguments, saying the ZECs aren't sufficiently tied to the wholesale markets and are legitimate exercises of state electricity authority in order to meet environmental goals.

But in Tuesday letters to both the Seventh and Second Circuits, Munger Tolles & Olson LLP partner Donald Verrilli Jr., who represents power producers in both cases, said FERC's **order last week** that PJM's existing rules to deal with state subsidies are unjust and unreasonable because they suppress electricity capacity market prices is proof the ZECs unlawfully interfere with FERC-regulated markets.

FERC's attempts to mitigate the harms that state subsidies like ZECs impose on PJM's capacity markets — where power producers are paid for meeting future electricity demand — confirms there's a conflict between state and federal electricity authority, Verrilli wrote.

"That is particularly so here, where mitigating the ZEC program's intrusion will require 'sweeping changes to the PJM capacity construct,'" Verrilli wrote, quoting FERC Commissioner Cheryl LaFleur's dissenting statement on FERC's order. "This disruption of FERC, PJM, and the whole energy market is exactly why states are preempted from meddling with the wholesale market."

The Seventh Circuit previously **asked the feds** — namely, FERC — to weigh in on whether Illinois' ZEC program was preempted by the FPA. The government **said in a brief** that there were no preemption issues and that FERC was best-positioned to address any conflicts between state and federal electricity policies.

A divided FERC last Friday took a stab at addressing the issue, ordering PJM — which oversees the grid in 13 U.S. states and Washington, D.C. — to rewrite market rules in order to blunt the effects of state clean energy policies .

Over the fierce dissents of the commission's two Democratic commissioners, FERC's Republican majority recommended that state-subsidized electricity resources either stay out of PJM's capacity markets or be subject to an expanded version of PJM's so-called minimum offer price rule. That rule is designed to ensure that power generators don't lowball the bidding process and reduce the price of power to the point where generators have less incentive to invest in future capacity.

The FERC majority said it would look to adopt its proposal — or a PJM-crafted alternative that satisfies its concerns — in 90 days.

FERC watchers say the surprising and sweeping order will only further inflame state-federal tensions over electricity policy and threaten the future of the very markets the commission aims to protect.

A representative for New York couldn't be immediately reached for comment Thursday. The Illinois Commerce Commission, the state's utility regulator, had no immediate comment on the letter.

However, the ICC on Monday blasted FERC's order regarding PJM, saying it would force Illinois' carbon-free electricity sources out of regional markets and suggested the state's place in those markets is now at risk.

"Illinois has long benefited from regional partnerships with PJM and the generators, transmission providers, and other entities operating in PJM markets," ICC Chairman Brien Sheahan said in a statement. "The most recent actions by PJM and FERC threaten to unravel this partnership to the detriment of market participants and Illinois electricity consumers."

The power producer appellants in the Illinois case are represented by Donald B. Verrilli Jr., Henry Weissmann, Fred A. Rowley Jr. and Mark R. Yohalem of Munger Tolles & Olson LLP, Jonathan D. Schiller, David A. Barrett, Stuart H. Singer and Pascual Oliu of Boies Schiller Flexner LLP, and Leonard A. Gail, Jonathan S. Massey, Suyash Agrawal and Paul J. Berks of Massey & Gail LLP.

The energy consumer plaintiffs in the Illinois case are represented by Patrick N. Giordano of Giordano & Associates Ltd. and Paul G. Neilan of the Law Offices of Paul G. Neilan PC.

The appellants in the New York case are represented by Donald B. Verrilli Jr., Henry Weissman, Fred A. Rowley Jr. and Mark R. Yohalem of Munger Tolles & Olson LLP and Jonathan D. Schiller, Stuart H. Singer and David A. Barrett of Boies Schiller Flexner LLP.

The New York Public Service Commission is represented by general counsel Paul Agresta, deputy general counsel John Sipos and staff attorney John C. Graham, as well as by Scott H. Strauss, Peter J. Hopkins, Jeffrey A. Schwarz and Amber L. Martin of Spiegel & McDiarmid LLP.

Illinois is represented by Attorney General Lisa Madigan, Solicitor General David L. Franklin and Assistant Attorney General Richard S. Huszagh.

Exelon, which has intervened on behalf of Illinois and New York, is represented by David W. DeBruin, William K. Dreher, Matthew E. Price and Zachary C. Schauf of Jenner & Block LLP.

The Illinois cases are Electric Power Supply Association et al. v. Star et al., case number 17-2445, and Village of Old Mill Creek et al. v. Star et al., case number 17-2433, in the U.S. Court of Appeals for the Seventh Circuit.

The New York case is Coalition for Competitive Electricity et al. v. Zibelman et al., case number 17-2654, in the U.S. Court of Appeals for the Second Circuit.

--Editing by John Campbell.

Update: This story was updated with additional comment from the Illinois Commerce Commission.