

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

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ELECTRIC POWER SUPPLY ASSOCIATION,  
DYNEGY INC., EASTERN GENERATION, LLC,  
NRG ENERGY, INC., and CALPINE  
CORPORATION,

Plaintiffs,

vs.

ANTHONY M. STAR, in his official capacity as  
Director of the Illinois Power Agency, and BRIEN J.  
SHEAHAN, JOHN R. ROSALES, SADZI MARTHA  
OLIVA, MIGUEL DEL VALLE, and SHERINA  
MAYE EDWARDS, in their official capacities as  
Commissioners of the Illinois Commerce  
Commission,

Defendants

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Case No. 17-cv-01164

District Judge Manish S. Shah

**MOTION TO INTERVENE AS PLAINTIFF OF  
THE INDEPENDENT MARKET MONITOR FOR PJM**

1. Monitoring Analytics, LLC, acting in its role as the Independent Market Monitor for PJM (“Movant”), moves to intervene as plaintiff as of right pursuant to Federal Rule of Civil Procedure 24(a)(2) or, alternatively, for permissive intervention under Rule 24(b)(1).

2. Movant has no financial interest in the outcome of this proceeding. Movant represents the public interest objectively and independently of the government,

the market operator and market participants, including Plaintiffs. Movant's interest is to promote and protect the competitive wholesale electric power markets and to avoid the burden that would be imposed on its resources in efforts to avert failure of the market if Defendants prevail.

3. Plaintiffs support the motion. Defendants indicated that they are not yet in a position to determine a position on the motion.

4. The petition for review in this case concerns a complaint filed by Plaintiffs explaining that Defendants have unlawfully intruded on the exclusive authority of the Federal Energy Regulatory Commission ("FERC") over the sale of electric energy at wholesale in interstate commerce under the Federal Power Act ("FPA"), 16 U.S.C. § 824(b)(1). Defendants explain that certain amendments to the Illinois Power Agency Act ("Zero Emissions Credit ("ZEC") Subsidies Program") would allow certain financially distressed nuclear generating plants to forestall retirement and continue operating in spite of market conditions and inconsistent with the federal regulatory approach that relies on competition to ensure just and reasonable rates.

5. PJM Interconnection, L.L.C. ("PJM"), operates a centrally dispatched, competitive wholesale electric power market that, as of December 31, 2016, had installed generating capacity of 182,449 megawatts (MW) and 986 members including market buyers, sellers and traders of electricity in a region including more than 65 million people in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland,

Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia.

6. PJM is regulated by the FERC under an approach that relies on regulation through competition to ensure the lowest possible electricity prices for consumers. Competition means that decisions about whether to enter the market, to exit the market and to remain in the market are made by suppliers based on the market fundamentals. Suppliers must believe that the market fundamentals will determine the success or failure of their investment or they will not invest, the market will not sustain adequate supply, and the federal regulatory approach will fail. The ZEC Subsidies Program is incompatible with the PJM market design, threatens the foundations of the PJM market and interferes with the federal regulatory scheme.

7. The ZEC Subsidies Program originates from the fact that competitive markets result in the exit of uneconomic and uncompetitive generating units. The ZEC Subsidies Program would provide subsidies to specific generating units. Regardless of the specific rationales offered by unit owners for the subsidies, the proposed solution for the selected generating units has been to provide out of market subsidies in order to retain such units. The ZEC Subsidies Program is not designed to serve the public interest. These subsidies were requested by the owners of specific uneconomic generating units in order to improve the profitability of specific generating units. These subsidies were not requested to accomplish broader social goals. Broader social goals

can be met with market based mechanisms available to all market participants on a competitive basis and without discrimination.

8. Movant and entities like it are established by the FERC to monitor each organized electric wholesale market and to protect the public interest in regulation through competition.<sup>1</sup> Movant is responsible to independently and objectively monitor “[a]ctual or potential design flaws in the PJM Market Rules,” “[s]tructural problems in the PJM markets that may inhibit a robust and competitive market,” and “[t]he potential for a Market Participant to exercise market power or violate any of the PJM or FERC Market Rules.”<sup>2</sup> The issues raised in this case have important and direct implications for these areas of responsibility.

9. Movant has actively participated in a number of matters involving owners of units seeking subsidies to forestall retirement of financially distressed units or to enable uneconomic new entry under various pretexts.<sup>3</sup>

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<sup>1</sup> See 18 CFR § 35.28.

<sup>2</sup> See PJM Open Access Transmission Tariff (“OATT”) Attachment M § IV.B.2–4.

<sup>3</sup> See, e.g., Brief of Amicus Curiae Monitoring Analytics, LLC, Acting in Its Capacity as the Independent Market Monitor for PJM, in Support of Plaintiffs, U.S.D.C. for the Southern Dist. of N. Y. Case No. 1:16-cv-08164-VEC (Jan. 9, 2017) (opposing New York ‘s ZEC subsidized for upstate nuclear facilities, which, though external to PJM, would impact PJM markets ); Brief of Amicus Curiae Monitoring Analytics, LLC, Acting in Its Capacity as the Independent Market Monitor for PJM, in Support of Respondents, *Hughes, et al. v. Talen Energy Marketing, LLC, et al.*, U.S. S. Ct. Case No. 14-614 (January 19, 2016) (arguing that Maryland program subsidizing new natural gas units interferes with federal regulatory scheme).

10. Movant has a unique interest in and perspective on this case. No other entity specifically represents the public interest in competitive, efficient markets. Movant also has unique knowledge, expertise and interest in the operations of PJM markets. Movant has a significant, direct interest in this litigation and seeks to protect those interests by intervening in this proceeding.

11. Movant seeks to intervene as of right under Federal Rule of Civil Procedure 24(a), or, alternatively, for permissive intervention under Federal Rule of Civil Procedure 24(b).

12. Movant satisfies all the requirements for intervention of right.

13. The motion to intervene is timely because it is filed less than 30 days after Plaintiffs filed their complaint, and before this Court has ruled (or even set a briefing schedule) on any motions.

14. Movant's interest in this dispute is significant, as Defendant's actions in this case, if allowed to stand, would inhibit a robust and competitive market in PJM, and Movant's purpose is to prevent that result. Movant's interests would be harmed because it would have failed to fulfill its purpose and to protect the public interest. Movant would be required to expend significant resources to attempt to mitigate the harm inflicted on the PJM market design.

15. Plaintiffs do not adequately represent Movant's interests because the nature of their interests differs fundamentally. Plaintiffs filed their complaint seeking to

protect their financial interests. Movant exists to protect and promote robust and competitive markets and thereby serve the public interest.

16. Alternatively, Movant satisfies the standard for permissive intervention under Rule 24(b)(1). Permissive intervention lies in the discretion of this Court, which may permit anyone to intervene who has a “claim ... that shares with the main action a common question of law or fact.” Rule 24(b)(1)(B). Here, Movant is an organization that exists to protect and promote robust and competitive markets in PJM. Movant has developed unique expertise in the operation of PJM markets. Movant is uniquely qualified to illuminate the relevant facts and tie them to its legal arguments, which would assist the decision making process. Movant’s potential contribution to this proceeding warrants permissive intervention.

17. Movant has conferred with the parties to determine their positions on this motion to intervene. Plaintiffs support the motion. Defendants indicated that they are not yet in a position to determine a position on the motion.

18. Based on the foregoing facts, Movant has an interest in this proceeding that cannot be represented by any other party and offers a unique perspective to the court. Movant is therefore entitled to intervene as a matter of right, or, in the alternative, be granted permissive intervention.

## CONCLUSION

Movant respectfully requests that the court grant its motion to intervene in these proceedings.

Respectfully submitted,



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<sup>4</sup> Petition for admission to the general bar pending.

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FOR THE NORTHERN DISTRICT OF ILLINOIS  
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ELECTRIC POWER SUPPLY ASSOCIATION,  
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OLIVA, MIGUEL DEL VALLE, and SHERINA  
MAYE EDWARDS, in their official capacities as  
Commissioners of the Illinois  
Commerce Commission,

Defendants

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Case No. 17-cv-01164

Judge  
Magistrate

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE AS  
PLAINTIFF OF THE INDEPENDENT MARKET MONITOR FOR PJM**

1. Monitoring Analytics, LLC, acting in its role as the Independent Market Monitor for PJM (“Movant”), moves to intervene as plaintiff as of right pursuant to Federal Rule of Civil Procedure 24(a)(2) or, alternatively, for permissive intervention under Rule 24(b)(1).

2. Movant has no financial interest in the outcome of this proceeding. Movant represents the public interest objectively and independently of the government, the market operator and market participants, including Plaintiffs. Movant's interest is to promote and protect the competitive wholesale electricity markets and to avoid the burden that would be imposed on its resources in an effort to avert failure of the market if Defendants prevail.

3. Plaintiffs support the motion. Defendants indicated that they are not yet in a position to determine a position on the motion.

## **I. BACKGROUND**

4. The petition for review in this case concerns a complaint filed by Plaintiffs explaining that Defendants have unlawfully intruded on the exclusive authority of the Federal Energy Regulatory Commission ("FERC") over "the sale of electric energy at wholesale in interstate commerce" under the Federal Power Act ("FPA"), 16 U.S.C. § 824(b)(1). Defendants explain that certain amendments to the Illinois Power Agency Act ("Zero Emissions Credit ("ZEC") Subsidies Program") would allow two financially distressed nuclear generating plants to forestall retirement and continue operating in spite of market conditions and inconsistent with the federal regulatory approach that relies on competition to ensure just and reasonable rates.

5. PJM Interconnection, L.L.C. (“PJM”), operates a centrally dispatched, competitive wholesale electric power market that, as of December 31, 2016, had installed generating capacity of 182,449 megawatts (MW) and 986 members including market buyers, sellers and traders of electricity in a region including more than 65 million people in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia.

6. PJM is regulated by the FERC under an approach that relies on regulation through competition to ensure the lowest possible electricity prices for consumers. Competition means that decisions about whether to enter the market, to exit the market and to remain in the market are made by suppliers based on market fundamentals. Suppliers must believe that the market fundamentals will determine the success or failure of their investment or they will not invest, the market will not sustain adequate supply, and the federal regulatory approach will fail. The ZEC Subsidies Program is incompatible with the PJM market design, threatens the foundations of the PJM markets and interferes with the federal regulatory scheme.

7. The ZEC Subsidies Program originates from the fact that competitive markets result in the exit of uneconomic and uncompetitive generating units. The ZEC Subsidies Program would provide subsidies to specific generating units. Regardless of the specific rationales offered by unit owners for the subsidies, the proposed solution

for the selected generating units has been to provide out of market subsidies in order to retain such units. The ZEC Subsidies Program is not designed to serve the public interest. These subsidies were requested by the owners of specific uneconomic generating units in order to improve the profitability of those specific units. These subsidies were not requested to accomplish broader social goals. Broader social goals can all be met with market based mechanisms available to all market participants on a competitive basis and without discrimination.

8. Movant and similarly purposed entities are established by the FERC to monitor the organized electric wholesale markets and to protect the public interest in regulation through competition.<sup>5</sup> Movant is responsible to independently and objectively monitor “[a]ctual or potential design flaws in the PJM Market Rules,” “[s]tructural problems in the PJM markets that may inhibit a robust and competitive market,” and “[t]he potential for a Market Participant to exercise market power or violate any of the PJM or FERC Market Rules.”<sup>6</sup> The issues raised in this case have important and direct implications for these areas of responsibility.

9. Movant has actively participated in a number of matters involving owners of financially distressed units seeking subsidies to forestall retirement of financially

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<sup>5</sup> See 18 CFR § 35.28.

<sup>6</sup> See PJM Open Access Transmission Tariff (“OATT”) Attachment M § IV.B.2–4.

distressed units under various pretexts. Movant also participated in a number of matters involving subsidies to encourage new entry under various pretexts.

## II. ARGUMENT

### A. Movant Satisfies the Requirements for Intervention as of Right.

10. Intervention as of right under Rule 24(a)(2) must be granted if: “(1) the motion to intervene is timely filed; (2) the proposed intervenors possess an interest related to the subject matter of the action; (3) disposition of the action threatens to impair that interest; and (4) the named parties inadequately represent that interest.” *Wis. Educ. Ass’n Council v. Walker*, 705 F.3d 640, 657–58 (7<sup>th</sup> Cir. 2013). In evaluating a request to intervene, courts “must accept as true the nonconclusory allegations of the motion.” *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7<sup>th</sup> Cir. 1995). Whether intervention as of right is warranted “is a highly fact-specific determination, making comparison to other cases of limited value.” *Sec. Ins. Co. v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7<sup>th</sup> Cir. 1995). Movant satisfies its burden to show entry into this case is warranted.

#### 1. The Motion to Intervene Is Timely.

11. Timeliness turns on “(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; [and] (4) any other unusual circumstances.” *Heartwood, Inc. v. U.S. Forest Serv.*, 316 F.3d 694, 701 (7<sup>th</sup> Cir.

2003). This test is “one of reasonableness.” *Reich*, 64 F.3d at 321. Intervention here is timely. Plaintiffs filed their Complaint on February 15, 2016, only 29 days ago. Courts routinely grant intervention motions filed with similar promptness. *See, e.g., Uesugi Farms, Inc. v. Michael J. Navilio & Son, Inc.*, 2015 U.S. Dist. LEXIS 83322 (N.D. Ill. June 25, 2015) (one month after complaint), citing *In re Discovery Zone Secs. Litig.*, 181 F.R.D. 582, 594 (N.D. Ill. 1998) (finding one month reasonable); *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7<sup>th</sup> Cir. 1995) (finding thirty-three days after party learned of interest in case timely); *United States v. City of Chicago*, 870 F.2d 1256, 1263 (7<sup>th</sup> Cir. 1989) (finding six weeks timely); *Alarm Detection Sys. v. Bloomingdale Fire Prot. Dist.*, 2014 U.S. Dist. LEXIS 115470 (N.D. Ill. Aug. 20, 2014) (“[Movant] satisfies Rule 24’s timeliness requirement in that [movant] filed its motion within two months of [the] amended complaint”). The Court has not set any briefing schedule or issued any substantive decisions. *See Michigan v. U.S. Army Corps of Eng’rs*, 2010 U.S. Dist. LEXIS 85821 (N.D. Ill. Aug. 20, 2010) (motion to intervene timely when filed in “earliest stages” before court “issued any substantive decisions”).

## **2. Movant Has an Interest in the Issue to Be Resolved.**

12. Whether proposed intervenors have a sufficient connection to the action must be evaluated in terms of “the issues to be resolved by the litigation and whether the potential intervenor has an interest in those issues.” *Reich*, 64 F.3d at 322 (“In ascertaining a potential intervenor’s interest in a case, our cases focus on the issues to be

resolved by the litigation and whether the potential intervenor has an interest in those issues”) citing, *American Nat’l Bank*, 865 F.2d at 147; *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7<sup>th</sup> Cir. 1982); *WildEarth Guardians v. Nat’l Park Serv.*, 604 F.3d 1192, 1199 (10<sup>th</sup> Cir. 2010) (this requirement “presents a minimal burden”).

13. Movant’s interest in this dispute is significant, as Defendant’s actions in this case, if allowed to stand, would inhibit a robust and competitive market in PJM, and Movant’s purpose is to prevent that result and thereby serve the public interest. Movant’s interests would be harmed because it would have failed to fulfill its purpose and to protect the public interest. Movant would be required to expend significant resources to attempt to mitigate the harm inflicted on the PJM market design. An interest based on the practical impacts to an organization has been recognized as a basis for standing. *See, e.g., San Juan County v. United States*, 503 F.3d 1163, 1199 (10<sup>th</sup> Cir. Utah 2007) (“As we understand Rule 24(a)(2), the factors mentioned in the Rule are intended to capture the circumstances in which the practical effect on the prospective intervenor justifies its participation in the litigation.”). An interest may be identified based on an organization’s mission and purpose. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–563 (1992) (“[T]he desire to use or observe an animal species, even for purely [a]esthetic purposes, is undeniably a cognizable interest for purpose of standing.”); *United States v. Board of School Comm’rs*, 466 F.2d 573, 576-577 (7<sup>th</sup> Cir. Ind. 1972) (“[F]or purposes of standing ‘ . . . an organization whose members are injured may represent

those members in a proceeding for judicial review.’ [citation and footnote omitted] This is especially true when representation of the interests involved is the primary reason for the organization's existence.”), citing *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2d Cir. 1968) (“We think that the reasons for requiring an individual plaintiff in a class action to be a member of the class do not necessarily preclude an association from representing a class where its *raison d’etre* is to represent the interests of that class”).

### **3. Movant’s Interest Would Be Impaired if Defendants Prevail.**

14. Whether proposed intervenors have a sufficient connection to the action must be evaluated in terms of “the issues to be resolved by the litigation and whether the potential intervenor has an interest in those issues.” *Reich*, 64 F.3d at 322; *see also* *Reid L.*, 289 F.3d at 1017 (intervenor must show “at least potential impairment of [its] interest if the action is resolved without the intervenor”); *WildEarth Guardians v. Nat’l Park Serv.*, 604 F.3d 1192, 1199 (10th Cir. 2010) (this requirement “presents a minimal burden”).

15. This case concerns a legal challenge to ZEC Subsidies Program. If allowed to be implemented, the ZEC Subsidies Program would interfere with federal regulation of the PJM market based on the principles of competition. Movant was established by federal regulators to promote and defend the public interest in robust and competitive markets.

16. Movant's interests would be harmed because it would have failed to fulfill its purpose and to protect the public interest. Movant would be required to expend significant resources to attempt to mitigate the harm inflicted on the PJM markets.

**4. Defendants Do Not Adequately Represent Movant's Interests.**

17. An intervenor can meet the third requirement under Rule 24(a) by showing "that representation of his interest 'may be' inadequate," and that "the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972).

18. Plaintiffs do not adequately represent Movant interests because the nature of their interests fundamentally differs. Plaintiffs filed their complaint seeking to protect financial interests. Movant exists to protect and promote robust and competitive markets and thereby serve the public interest.

**B. Alternatively, Permissive Intervention Should Be Granted.**

19. Movant easily satisfies the standard for permissive intervention under Rule 24(b)(1). Permissive intervention "is wholly discretionary and will be reversed only for abuse of discretion. *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7<sup>th</sup> Cir. 2000)." Indeed, "the court may permit anyone to intervene" who has a "claim ... that shares with the main action a common question of law or fact." Rule 24(b)(1)(B).

Courts in this district have exercised their discretion liberally to grant permissive intervention.<sup>7</sup>

20. Permissive intervention is warranted in this case. It is warranted for the same reasons provided here in support of intervention by right. In addition, Movant is uniquely qualified to illuminate the relevant facts and tie them to its legal arguments. Movant's participation would enable this Court to "address important issues in this case once, with fairness and finality." *Sec. Ins. Co.*, 69 F.3d at 1381; see *United States v. Bd. of Sch. Comm'rs*, 466 F.2d 573, 576 (7<sup>th</sup> Cir. 1972) (intervention by particularly affected persons promotes "consideration of all aspects of [a] societally affected legal problem").

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<sup>7</sup> See, e.g., *Hanover Ins. Co. v. L&K Dev't*, 2013 U.S. Dist. LEXIS 43606, 9–10 (N.D. Ill. Mar. 25, 2013) (intervention "perfectly appropriate" as intervenors sought to present same defense as defendant and avoidance of separate litigation promoted judicial economy); *Select Retrieval, LLC v. ABT Elecs.*, 2013 U.S. Dist. LEXIS 174442, (N.D. Ill. Dec. 13, 2013); *FDIC v. FBOP Corp.*, 2014 U.S. Dist. LEXIS 122178 (N.D. Ill. Sept. 2, 2014); *United States v. Metro. Water Recl. Dist.*, 2012 U.S. Dist. LEXIS 111223 (N.D. Ill. Aug. 7, 2012).

### III. CONCLUSION

Movant respectfully requests that the court grant its motion to intervene in these proceedings.

Dated: March 16, 2017

Respectfully submitted,



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<sup>8</sup> Petition for admission to the general bar pending.

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Defendants

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Case No. 17-cv-01164

District Judge Manish S. Shah

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. Civ. P. 7.1 and L.R. 3.2, Movant-Intervenor Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM, states that it has no affiliates.

Dated: March 16, 2017

Respectfully submitted,



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Jeffrey W. Mayes<sup>9</sup>  
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## CERTIFICATE OF SERVICE

I hereby certify that, on March 16, 2017, the above motion was filed electronically with the United States District Court for the Northern District of Illinois, Eastern Division. Notice of this filing will be sent electronically to the parties by operation of the Court's electronic filing system.



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Jeffrey W. Mayes<sup>10</sup>

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