

IN THE  
UNITED STATES COURT OF APPEALS  
SEVENTH CIRCUIT

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ILLINOIS COMMERCE	)	Appeal from the Federal Energy
COMMISSION,	)	Regulatory Commission,
	)	
Petitioner,	)	Docket Nos.
	)	EL16-49-000,
v.	)	ER18-1314-000,
FEDERAL ENERGY	)	ER18-1314-001,
REGULATORY COMMISSION,	)	EL18-178-000
	)	
Respondent.	)	

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**Agreed Motion for Voluntary Dismissal of Appeal without Prejudice**

The Illinois Commerce Commission (the “ICC”), by its counsel, and with the agreement of the Federal Energy Regulatory Commission (“FERC”), respectfully moves for entry of an order pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure (“FRAP”) dismissing this appeal without prejudice. In support of this motion, the ICC states as follows.

**Introduction**

1. The ICC initiated the present appeal as an action for direct administrative review, pursuant to 16 U.S.C. § 825*l* and FRAP 15, of a FERC order entered on June 29, 2018 (the “2018 Order”) in Docket Nos. EL16-49-000, ER18-1314-000, ER18-1314-001, and EL18-178-000 (the “Consolidated Dockets”). As explained below, the ICC did so out of an abundance of caution concerning the appealability of the 2018 Order in light of subsequent events in the Consolidated Dockets. After further examination of the issue and communications with FERC’s counsel about it, however, the ICC now understands

that FERC has not yet ruled on the ICC'S petition for rehearing of the 2018 Order, but will do so in the future, thereby permitting the dismissal of this appeal without prejudice to later judicial review of the 2018 Order.

### **Factual Background**

2. Based on specific findings, FERC's 2018 Order set in motion a specific proceeding (the "PJM Proceeding") relating to "capacity" auctions for the generation of electricity conducted by PJM Interconnection, LLC, which operates the electrical grid in much of the northeastern United States.

3. Under 16 U.S.C. § 825*l*, FERC orders generally are not reviewable unless the party seeking review has requested rehearing within 30 days, and FERC has ruled on that request. *Fed. Power Comm'n v. Metro. Edison Co.*, 304 U.S. 375, 382–83 (1938); *N. Colo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509, 1515 (D.C. Cir. 1984); *Nw. Elec. Co. v. Fed. Power Comm'n*, 125 F.2d 882, 887 (9th Cir. 1942); see also *Rosenthal & Co. v. Commodity Futures Trading Comm'n*, 614 F.2d 1121, 1125 (7th Cir. 1980).

4. On December 19, 2019, FERC issued an order (the "2019 Order") resolving the PJM Proceeding. (The 30-day deadline under Section 825*l* to seek rehearing of that order was January 20, 2020, and several parties, including the ICC, timely filed such petitions, which are under advisement.)

5. The ICC was concerned that the 2019 Order might be deemed to have impliedly denied the ICC's petition for rehearing of the 2018 Order, in which case the ICC was required, under Section 825*l*, to seek review within 60 days. Based on that concern, the ICC filed its petition for review in this Court on December 23, 2019.

6. After the ICC initiated this review proceeding, its counsel communicated with the FERC Solicitor's Office, which agreed to the voluntary dismissal of this appeal without prejudice and made the following representations, which it authorized the ICC to include in a motion seeking such a dismissal:

FERC still has under advisement the ICC'S petition for rehearing from the 2018 Order and will issue a formal order ruling on that petition (which may be in connection with its ruling on petitions for rehearing of FERC's 2019 Order), after which the ICC may seek judicial review of the 2018 Order, provided that it satisfies the jurisdictional criteria for seeking such review.

7. In light of the foregoing circumstances, and based on these representations by the FERC Solicitor's Office, the ICC wishes to voluntarily dismiss this appeal without prejudice, reserving the right to seek review of the 2018 Order after FERC formally rules on the ICC's petition for rehearing of that order.

WHEREFORE, the ICC, with FERC's agreement, respectfully requests entry of an order granting the ICC's motion to voluntarily dismiss this appeal without prejudice.

Respectfully submitted,

**Illinois Commerce Commission**

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### **Certificate of Filing and Service**

I hereby certify that on January 24, 2020, I electronically filed the foregoing Agreed Motion for Voluntary Dismissal of Appeal without Prejudice with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will effect service on the other participants in the case, all of whom are registered CM/ECF users.

/s/ Richard S. Huszagh