No. _____

IN THE

Supreme Court of the United States

ELECTRIC POWER SUPPLY ASSOCIATION and NRG ENERGY, INC.,

Petitioners,

v.

JOHN B. RHODES, in his official capacity as Chair of the New York Public Service Commission, GREGG C. SAYRE, in his official capacity as Chair of the New York Public Service Commission, DIANE X. BURMAN, in her official capacity as Commissioner of the New York Public Service Commission, JAMES S. ALESI, in his official capacity as Commissioner of the New York Public Service Commission, and EXELON CORP., R.E. GINNA NUCLEAR POWER PLANT LLC, CONSTELLATION ENERGY NUCLEAR GROUP, LLC, NINE MILE POINT NUCLEAR STATION LLC,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

The Federal Power Act (FPA), 16 U.S.C. §§ 791a *et seq.*, vests exclusive federal jurisdiction over "[a]ll rates and charges … received by any public utility for or in connection with the transmission or sale of electric energy" at wholesale in the Federal Energy Regulatory Commission (FERC). *Id.* § 824d(a). FERC is charged with ensuring that wholesale rates are "just and reasonable," *id.*, and has determined, as a matter of federal policy, that vibrant competition in the nation's wholesale electricity markets is the best mechanism for ensuring just and reasonable rates. To achieve this goal, FERC has authorized and oversees competitive, regional market-based auctions for the purchase of wholesale electricity, and has deemed the free market prices set through those auctions just and reasonable. This Court held in *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016), that federal jurisdiction preempts state subsidies that have the effect of "guarantee[ing]" that a wholesale generator will receive "a certain rate" other than the auction rate in connection with wholesale electricity sales. *Id.* at 1298–99.

The question presented is whether the FPA preempts only state subsidies that explicitly require a wholesale generator to sell its output in FERC-approved auctions, or whether the FPA also preempts state subsidies that lack such an express requirement but that, by design, subsidize only generators that sell their entire output via such auctions, thereby achieving the same effect.

PARTIES TO THE PROCEEDING BELOW

Petitioners here, Plaintiffs-Appellants below, are Electric Power Supply Association and NRG Energy, Inc.

Respondents here, Plaintiffs-Appellants below, are Coalition for Competitive Electricity, Eastern Generation, LLC, Roseton Generating, LLC, and Selkirk Cogen Partners, L.P.

Respondents here, Defendants-Appellees below, are John B. Rhodes, In His Official Capacity As Chair Of The New York Public Service Commission (previously Audrey Zibelman, In Her Official Capacity); Gregg C. Sayre, In His Official Capacity As Chair Of The New York Public Service Commission; Diane X. Burman, In Her Official Capacity As Commissioner Of The New York Public Service Commission; and James S. Alesi, In His Official Capacity As Commissioner Of The New York Public Service Commission (previously Patricia L. Acampora, In Her Official Capacity). John B. Rhodes and James S. Alesi became parties to the case In Their Official Capacities when they attained their current offices.

Also Respondents here, and Intervenor-Defendants-Appellees below, are Exelon Corp., R.E. Ginna Nuclear Power Plant LLC, Constellation Energy Nuclear Group, LLC, and Nine Mile Point Nuclear Station LLC.

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PETITION FOR A WRIT OF CERTIORARI

Electric Power Supply Association and NRG Energy, Inc. (Petitioners) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–31a) is reported at 906 F.3d 41. The order of the district court judge (Pet. App. 34a–91a) is reported at 272 F. Supp. 3d 554.

JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 2018. On December 18. 2018, Justice Ginsburg extended the time to file the petition for certiorari to January 7, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI, clause 2 of the United States Constitution, provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land; … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 824(b)(1) of the FPA, 16 U.S.C. § 824(b)(1), provides in pertinent part:

> It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to … that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

Section 824d(a) of the FPA, 16 U.S.C. § 824d(a), provides in pertinent part:

> All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

STATEMENT OF THE CASE

The Federal Power Act invests FERC with broad authority over "the sale of electric energy at wholesale in interstate commerce," including exclusive jurisdiction to determine that wholesale rates and charges are "just and reasonable." 16 U.S.C. §§ 824(b)(1), 824d(a), 824e(a). In *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016), this Court held that a State may not "second-guess" wholesale rates that FERC has deemed reasonable, and may not establish a subsidy scheme that

compensates favored generators for wholesale sales at higher levels than FERC deems appropriate. *Id.* at 1298–99.

That is precisely what New York has done here. Concerned that certain inefficient nuclear plants could not operate profitably at the wholesale rates approved by FERC, New York established "zero emissions credits" (ZECs)—a $7 billion subsidy scheme designed to augment wholesale rates for those unprofitable plants. In a triumph of form over substance, the court of appeals nonetheless held that New York's program is not preempted because it does not explicitly condition that subsidy on the favored plants selling their output into the wholesale market. In so doing, the court brushed aside the complaint's well-pled allegations that the subsidized plants have sold, and necessarily must sell, all of their output at wholesale, rendering unnecessary an explicit statutory requirement to do so.

In *Hughes*, this Court invalidated a Maryland subsidy scheme that "guarantee[d]" a particular generator would receive compensation for its wholesale sales at levels the State thought appropriate, rather than at the market-based rate set through FERC-approved wholesale auctions. 136 S. Ct. at 1298–1299. Maryland had justified its scheme as an exercise of its "traditional authority over … in-state generation"—namely, promoting the development of additional generation. *Id*. at 1299. And Maryland's scheme did not directly prescribe a wholesale rate. *Id.* at 1297 & n.9. But the Court held that the State had impermissibly invaded FERC's exclusive sphere of authority because Maryland's scheme tethered the subsidy to the movement of

wholesale auction rates to ensure that the favored generator would receive overall revenues that the State deemed necessary for the plant to operate, thereby "disregarding interstate wholesale rates FERC has deemed just and reasonable." *Id*. at 1299.

Like Maryland, New York devised a subsidy program to ensure the profitable operation of three nuclear plants. Indeed, the only plants eligible for the subsidy are those that purportedly could not turn a profit based on the wholesale rates set through FERC-regulated market auctions. Like Maryland, New York provides a per-megawatt-hour subsidy payment that fluctuates in response to movements in wholesale auction rates. And, like Maryland's subsidy, the New York subsidy takes the form of a side payment from utilities to subsidized generators, rather than a direct prescription of the wholesale rate.

Despite these close parallels to the preempted Maryland scheme, the court of appeals held that New York had "gone as near as can be without crossing" the dividing line this Court drew in *Hughes*, Pet. App. 22a, and thus had "skirt[ed]" federal preemption, Pet. App. 16a. That was so, the court believed, because New York did not explicitly require the favored plants to bid their electricity into, and clear, the FERC-authorized wholesale auctions. Instead New York provides a subsidy payment for each unit of electricity generated. Pet. App. 17a–22a. But the court of appeals ignored a critical fact: The favored plants do (and, as a practical matter, must) sell all the electricity they generate into the wholesale markets, irrespective of any regulatory compulsion. Had New York included an express "bid and clear"

requirement, it would not have changed the operation of the subsidy scheme one iota. With or without that requirement, New York provides a per-mega-watt hour subsidy for the electricity these plants sell at wholesale. In reality, the New York scheme therefore operates in a manner indistinguishable from the Maryland scheme preempted in *Hughes*. The court of appeals concluded otherwise only because it misunderstood this Court's direction in *Hughes* as to when States "cross the line" and invade FERC's jurisdiction.

By narrowly cabining the scope of exclusive federal authority over wholesale rates, the court of appeals (along with the Seventh Circuit in a case involving a similar Illinois subsidy program, *Electric Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018) (*Star*)), has given States a green light to enact all manner of subsidies to boost the wholesale revenues of favored in-state producers. Not surprisingly, other States are already following in the footsteps of New York and Illinois. See page 30–31 & fn. 10 *infra*. Unless this Court intervenes to clarify the meaning of its decision in *Hughes*, these subsidy programs will reorder the allocation of regulatory authority between the federal government and the States, and will do so in a manner that threatens FERC's efficient-market approach both to energy pricing and to competitive entry and exit by generating facilities. At the very least, this sharp departure from settled law and regulatory practice should not occur without further consideration by this Court. Plenary review is manifestly warranted.

A. The Federal Regulatory Regime

The FPA allocates regulatory authority over the market for electricity between the federal government and the States. FERC exercises broad exclusive authority over "the sale of electric energy at wholesale in interstate commerce," including exclusive jurisdiction to regulate "rates and charges … received … for or in connection with" interstate wholesale electricity sales, and specifically to determine that particular wholesale rates are just and reasonable. 16 U.S.C. §§ 824(b)(1), 824d(a), 824e(a). The FPA reserves to States the authority to regulate "any other sale" of electricity (principally retail sales) as well as in-state "facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1).

The respective roles of the federal government and the States in regulating electric energy markets have shifted over time, as the production and sale of electricity has become an increasingly interstate enterprise. See *Hughes*, 136 S. Ct. at 1292–93; *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 768 (2016) (*EPSA*). Historically, most state energy markets were geographically confined, vertically integrated monopolies. In recent decades, however, most States restructured their energy markets so that power is now generated by networks of independent generators that deliver electricity through an "interconnected grid of near-nationwide scope." *EPSA*, 136 S. Ct. at 768 (internal quotation marks and citation omitted).

As vibrant competition has arisen in the wholesale electricity market, FERC has responded to, and fostered, this evolution by replacing traditional

monopoly cost-of-service ratemaking with market-based approaches to setting wholesale rates. *Id*. FERC now seeks to ensure "just and reasonable" rates "by enhancing competition" among multiple wholesale providers of electricity. *Id.* FERC has done so because it has concluded that competition is the most effective way "to bring more efficient, lower cost power to the Nation's electricity consumers." See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.,* FERC Order No. 888, 61 Fed. Reg. 21,540, 21,541 (May 10, 1996); see also *Apache Corp. v. FERC*, 627 F.3d 1220, 1221 (D.C. Cir. 2010) (Kavanaugh, J.) ("[FERC's] goals are to promote competition and help American consumers gain access to reliable and affordable energy."). To achieve that purpose, FERC has endeavored "to break down regulatory and economic barriers that hinder a free market in wholesale electricity," *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 536 (2008) (*Snohomish*), and has chosen to rely on market forces in competitive auctions to fulfill its statutory charge of ensuring "just and reasonable" wholesale rates, *EPSA*, 136 S. Ct. at 768.

Suppliers of retail electricity to consumers and business users, called load-serving entities (LSEs), purchase electricity at wholesale either through the FERC-authorized auctions or directly from generators through bilateral contracts. *Hughes*, 136 S. Ct. at 1292–93. Like auction sales, rates set by contract are subject to FERC's wholesale jurisdiction and review. *Snohomish*, 554 U.S. at 531–32.

In New York, the interstate wholesale auctions are operated by the New York Independent System

Operator (NYISO), under rules FERC has approved. Pet. App. 6a; *Central Hudson Gas & Electric Co. et al.*, 83 FERC ¶ 61,352 (1998), 86 FERC ¶ 61,062 (1999), *order on reh'g*, 88 FERC ¶ 61,138 (1999). NYISO operates two main types of wholesale auctions: "energy" auctions, in which generators bid the lowest price at which they will sell a specified quantity of output on a spot or short-term basis, and "capacity" auctions, in which generators bid, and NYISO purchases, options to call upon the generator to produce a specified amount of energy as needed in the future. Pet. App. 6a–7a.

These auctions set wholesale prices by "stacking" bids from lowest to highest until the requisite quantity is covered. The last and highest bid establishes the "market-clearing price." Generators that bid at or below that price "clear" the auction and receive the clearing price. This approach incentivizes wholesale providers to be more efficient; it also promotes systemic efficiency by creating price signals that encourage new generators to enter the market if they can beat the clearing price and that encourage existing generators to exit the market if they cannot. See Pet. App. 6a–7a; *Hughes*, 136 S. Ct. at 1293.

Nuclear generators typically bid into NYISO auctions as "price takers," meaning that they sell their entire output at whatever clearing price the market determines. Unlike other types of generators that can increase or decrease output depending on whether it is profitable to sell at the wholesale price, nuclear generators must run continuously at maximum output. As a result, nuclear generators sell their entire output into the auctions regardless of the price—

even if the price is below their cost of production. See Pet. App. 7a.

B. The New York ZEC Program

The New York Public Service Commission (PSC) created the ZEC program through an August 2016 order. Pet. App. 7a; Order Nos. 15-E-0302, 16-E-0270 (N.Y. PSC Aug. 1, 2016) (ZEC Order). The program provides subsidies in the form of ZECs, which are ostensibly "credit[s] for the zero-emissions attributes of one megawatt-hour of electricity production" by a participating nuclear power plant. Pet. App. 8a.

The PSC determines which nuclear generators receive ZECs based on five criteria: (1) "verifiable historic contribution . . . to the clean energy resource mix" in New York; (2) the degree to which projected wholesale revenues are "insufficient" to prevent retirement of the facility; (3) the costs and benefits of providing ZECs to the generator relative to clean-energy alternatives; (4) the impact on ratepayers; and (5) the public interest. Based on these criteria, the PSC has selected three nuclear plants—known as Fitzpatrick, Ginna, and Nine Mile Point—for inclusion in the program, all of which are owned by Respondent Exelon Corporation. Pet. App. 6a–8a.

The ZEC price is calculated on the basis of a "Base Subsidy Amount," which PSC refers to as the "social cost of carbon," adjusted for anticipated revenue from New York's participation in the Regional Greenhouse Gas Initiative and multiplied by the tons of carbon avoided per MWh of zero-emission energy. The Base Subsidy amount is then adjusted using a formula tied to wholesale market prices. For the first two years of

the program, the subsidy is fixed at $17.48/MWh. Thereafter, the subsidy is adjusted every two years based on forecasts for prices in the wholesale energy and capacity markets in certain regions of the State. Pet. App. 9a. If forecasted wholesale prices rise, the ZEC subsidy falls (because a smaller subsidy will be needed to cover the excess costs of the subsidized plants); if prices thereafter decline, the subsidy rises to cover the difference, up to the Base Subsidy Amount. See ZEC Order App. E at 5–8.[1]

The PSC requires LSEs to purchase ZECs in amounts proportional to their share of the total state electrical load.[2] The LSEs, in turn, pass on the cost of the ZEC subsidy to retail electricity consumers as part of their monthly electric bill. See Pet. App. 10a. Over the ZEC program's 12-year duration, it is estimated that New York ratepayers will be forced to pay approximately $7.6 billion in subsidies to the

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[1] The Base Subsidy Amount may also be affected by "additional renewable energy penetration," but that potential adjustment is not available until 2023 (and then only if more than 50 million MWh of renewable energy are being consumed in New York), and does not affect the formula that tethers the ZEC price to forecasted wholesale prices. ZEC Order App. E at 6.

[2] New York LSEs must also acquire Renewable Energy Credits (RECs) each year (or make an alternative compliance payment). Qualified renewable generators (such as solar, wind, and biomass) earn RECs for each MWh of electricity they generate. Pet. App. 8a. As relevant here, RECs differ from ZECs in two fundamental respects: *First*, all qualified renewable generators create RECs, regardless of economic need, whereas ZECs are available only to three nuclear plants facing financial difficulties; *second*, RECs are publicly traded, so the price of RECs varies based on supply and demand, whereas ZEC prices are set by the state and tethered to wholesale rates. Compare ZEC Order at 14–17, with *id.* at 19–20.

favored nuclear plants on top of the FERC-approved rates. Pet. App. 93a.

C. The ZEC Program in Operation: Targeted Subsidies to Unprofitable Plants

The PSC first proposed a ZEC program in January 2016, after Exelon announced that it would close some of its nuclear facilities because they could not operate profitably at FERC-approved wholesale auction rates.[3] The initial proposal provided that the subsidy amount would be calculated "based upon the difference between the anticipated operating costs of the units and forecasted wholesale prices," i.e., the amount necessary to ensure that the plants could break even at FERC-approved auction rates. See ZEC Order at 119.

After this Court's decision in *Hughes*, the PSC modified the ZEC price formula to its present form. See ZEC Order at 49, 121. But the revised program seeks the same objective as the initial plan: to steer subsidies to three favored plants to make up the difference between FERC-approved wholesale auction rates and the income they need to operate profitably. Pet. App. 26a. Indeed, eligibility for the program is expressly conditioned on "the degree to which projected wholesale revenues are insufficient" to allow the facility to operate profitably. See Pet. App.

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[3] At that time, FitzPatrick was owned by Entergy Corporation, which had announced its intent to close the plant; Exelon was in discussions to purchase FitzPatrick, but made clear that it would not invest in the plant without assurances of further financial support from the State. See ZEC Order at 122, 125, 143.

118a. The ZEC program thus subsidizes only plants that cannot operate profitably by selling power at FERC-approved wholesale rates. See ZEC Order at 125–26.

Environmental advocacy organizations opposed the ZEC program, even though New York touted it as a "clean air" initiative. The Sierra Club and other groups objected that the program was "blatant corporate favoritism" and a "consumer rip-off" to force New York's consumers to buy "dirty and dangerous nuclear power," instead of "real clean energy options [that] are available for lower cost."[4] The objectors disputed the PSC's claim that the nuclear plants must stay open to prevent "backsliding" that would increase the use of carbon-based fuel until additional renewable sources become available.[5]

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[4] *Comments of Alliance for a Green Econ., Council on Intelligent Energy & Conservation Policy, Nuclear Info. & Res. Serv., Sierra Club-Atl. Chapter*, at 5–6, N.Y. State Dep't of Pub. Svc., Matter Master: 15-01168/15-E-0302, filing no. 328, DPS.NY.GOV, http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=15-e-0302. Other groups filing objections to the ZEC program include Citizens' Environmental Coalition (Filing No. 320), Ampersand Hydro (Filing No. 331), the New York Association of Public Power (Filing No. 333), the City of New York (Filing No. 338), the Public Utility Law Project (Filing No. 343), and Promoting Health and Sustainable Energy (Filings Nos. 194 & 348).

[5] See, e.g., *id*. (Filing No. 328) (explaining that because there is "no stated policy defining backsliding" and no "targets … against which to measure whether we are backsliding or not", there is "no way for parties to propose alternative ways to meet the murky goals"); *id.* (Filing No. 348) ("voluminous literature demonstrates that nuclear power is extremely ill-suited to combating to [sic] climate change").

Other opponents—including the City of New York—echoed the Sierra Club's concerns, and objected to the ZEC program as "the largest gift of public funds to a single corporation in the State's history," coming at the expense of consumers. See ZEC Order at 55–56. Indeed, if only a fraction of the ZEC program's $7.6 billion cost were used to subsidize new, clean renewable energy sources, greater environmental benefits would be obtained.

In reality, the ZEC program undermines New York's stated environmental goals by enabling unprofitable nuclear plants to continue operating and dumping uneconomic capacity and output into the FERC-regulated auctions, thereby depressing prices and discouraging market entry by more efficient generators.

D. Proceedings Below

In October 2016, a group of plaintiffs that included Petitioners filed this action alleging that the ZEC program is preempted by the FPA.[6] Pet. App. 10a. The complaint alleged, *inter alia*, that: (1) the price of ZECs is "expressly tethered to wholesale prices" because the subsidy varies inversely with FERC-approved auction rates; (2) plants receive ZEC subsidies only if they "produc[e]" electricity; and (3) all electricity produced by participating plants must be sold in NYISO auctions because there are no alternative markets. See Pet. App. 7a–10a, 16a. Thus, the complaint alleged, the ZEC program

[6] Petitioners also challenged the ZEC program as a violation of the dormant Commerce Clause in the proceedings below, but are not seeking this Court's review of that claim.

guarantees a state-determined rate tethered to wholesale market prices—over-and-above the FERC-approved auction rate—for the electricity that three favored generators produce and sell at wholesale, just like the Maryland subsidy program this Court unanimously preempted in *Hughes*. See Pet. App. 16a.

The district court granted motions to dismiss under Federal Rule of Civil Procedure 12(b)(6).[7] Pet. App. 34a–91a. Addressing field preemption, the court interpreted *Hughes* as narrowly holding that "State measures to incentivize clean energy" are permissible "[s]o long as a State does not condition payment of funds on capacity clearing the auction." Pet. App. 55a. Although recognizing the complaint's well-pleaded allegations that "all electricity produced by [participating] nuclear generators must be sold in the NYISO energy auctions because they have no alternative way to sell their output," the district court nonetheless concluded that the New York program "does not condition or tether ZEC payments to wholesale auction participation." See Pet. App. 39a, 69a–70a. The court then addressed conflict preemption, and concluded that any damage to federal goals from the ZEC program was "indirect and incidental," and that the complaint's contrary allegations were not "plausible" in light of FERC's approval of allegedly "similar" programs. Pet. App. 70a–78a.

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[7] Applying *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), the district court first held that plaintiffs lacked a private cause of action for their preemption challenge because the FPA implicitly forecloses equity jurisdiction over such a claim. Pet. App. 41a–51a. The court nevertheless then ruled on the merits.

The Second Circuit affirmed.[8] Pet. App. 1a–31a. Like the district court, the court of appeals distinguished *Hughes* on the ground that the ZEC program does not explicitly condition subsidies on wholesale market participation. Although the court acknowledged Petitioners' allegations that the favored plants *must* participate in wholesale auctions to receive ZECs, the court held that the absence of an express regulatory participation requirement was dispositive. See Pet. App. 15a–19a. The court recognized that the New York ZEC program was designed to "skirt[]" (or "avoid[]") the line this Court drew in *Hughes* between permissible State regulation and preempted conduct, but relying heavily on a supposed "strong presumption" against preemption, concluded that New York had "gone as near as can be without crossing it." Pet. App. 11a–16a, 22a. As for conflict preemption, the court of appeals held that "[t]o the extent the ZEC program distorts an efficient wholesale market," that effect is "incidental" and "result[s] from New York's regulation of producers," which is traditionally within the States' jurisdiction. Pet. App. 25a–28a.

REASONS FOR GRANTING THE WRIT

This case presents a question of exceptional importance to the regulation and efficient functioning of wholesale energy markets in the United States. Relying on an interpretation of this Court's decision in *Hughes* that confines the decision to its facts, the

[8] The Second Circuit did not reach the question of whether plaintiffs had a cause of action under *Armstrong* because it found that the preemption claim failed on the merits. Pet. App. 12a.

court of appeals held that States may guarantee wholesale energy sellers compensation above the just and reasonable rates set by FERC-approved wholesale auctions, so long as they do not formally mandate a wholesaler's participation in those auctions. This result cannot be squared with the plain text of the FPA, a fair reading of *Hughes*, or this Court's preemption jurisprudence.

The court of appeals based its decision principally on the final substantive paragraph of *Hughes*, in which this Court stated that it "need not and do[es] not address the permissibility of" other state programs to boost energy production—such as "tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector." 136 S. Ct. at 1299. The court read that language, and the Court's characterization of Maryland's auction-participation requirement as a "fatal defect," *id.*, as holding that *only* state programs that formally require wholesale energy sellers to bid into and clear FERC-authorized auctions are preempted by Section 824d(a), freeing States to craft any other subsidy that avoids this formal requirement. The court reached that erroneous result despite language elsewhere in the *Hughes* opinion stating unambiguously that Section 824d(a) bars States from guaranteeing levels of wholesale compensation in disregard of FERC-authorized wholesale auction rates, 136 S. Ct. at 1298–99—which is precisely what New York has done.

The court of appeals was, however, correct about one thing: The proper allocation of authority between the States and the federal government depends upon identifying the correct dividing line between permis-

sible state efforts to promote energy production and impermissible state encroachment on FERC's exclusive authority over all wholesale rates and charges. See Pet. App. 16a ("New York's scheme avoids (or skirts) the *Hughes* prohibition"); *id*. at 22a ("New York has kept the line in sight, and has gone as near as can be without crossing it"). But by drawing the boundary of federal authority as narrowly as it did, the court of appeals has opened the door to all manner of parochial state schemes to augment the wholesale revenues of favored local energy generators. If left uncorrected by this Court, that ruling (and a similar one by the Seventh Circuit in *Star*) will ratify a fundamental transfer of regulatory authority to the States and away from the federal government and its policy of relying on market forces to set just and reasonable wholesale rates and send economically efficient signals regarding market entry and exit.

There is a pressing need for this Court's guidance because the economic and policy stakes are enormous. The New York ZEC program is expected to direct more than $7 billion in subsidies to Exelon over twelve years, thereby grossly distorting market outcomes. The Illinois ZEC program at issue in *Star* will produce a further multibillion dollar subsidy for Exelon. Other States will follow suit. New Jersey has already adopted a comparable subsidy scheme and others are considering similar measures. See page 30–31 & fn. 10 *infra*. Unless this Court intervenes, these subsidy schemes will impose huge costs and threaten serious distortions of the FERC-authorized mechanisms for setting wholesale rates at economically efficient levels and sending appropriate price signals to wholesale market participants. While FERC's market-based price signal could have caused

the favored inefficient plants to retire and efficient plants to enter the market in their place, New York's State-dictated price signal will, by design, keep inefficient plants in the market and almost necessarily force *efficient* plants either to leave or not to enter.

This Court should speak definitively on the scope of Section 824d(a) and the meaning of its opinion in *Hughes* before such fundamental changes in the balance between federal and state regulatory authority, and damage to efficient market-based wholesale rate-setting, become entrenched.

I. The Court of Appeals' Decision Cannot be Reconciled with This Court's Decision in *Hughes* or with This Court's Approach to Preemption

A. This Court Held in *Hughes* That the FPA Expressly Preempts State Subsidy Programs That Disregard FERC-Approved Wholesale Auction Rates

1. The FPA confers on the federal government exclusive jurisdiction over "the sale of [electric] energy at wholesale in interstate commerce." 16 U.S.C. § 824(a). By its plain terms, Section 824d(a) provides that FERC's exclusive authority extends to "all rates and charges … received by any public utility for or in connection with the … sale of electric energy" for resale. The statute is not limited to the specific rates wholesale sellers charge or wholesale buyers pay for direct wholesale purchases of electricity; rather, the text expressly extends to all amounts wholesale sellers "*receive*[]" from whatever

source "*in connection with*" with such sales. *Id.* (emphasis added). As this Court explained in *EPSA*, this broad language "leaves no room either for direct state regulation of prices of interstate wholesales or for regulation that would indirectly achieve the same result." 136 S. Ct. at 780 (quotation marks and citation omitted). Section 824d(a) thus preempts all state laws and regulations that intrude on the exclusive field of federal wholesale rate regulation.

2. In *Hughes*, this Court applied the FPA's broad preemptive language to invalidate a Maryland scheme that guaranteed a particular level of wholesale compensation to a favored producer. Concerned that the FERC-authorized capacity auctions were not creating sufficient long-term incentives for new power generation, Maryland sought to ensure that a particular new plant could count on wholesale revenues sufficient to justify entering the market. To achieve that objective, Maryland required LSEs to enter into "contract[s] for differences" with the new plant. 136 S. Ct. at 1294. If the plant cleared the capacity auction at a price below the State's target price, LSEs paid the shortfall to the plant; if the wholesale clearing price in the capacity auction rose above the target, the plant paid the overage to the LSEs. *Id.* at 1295. As long as the plant cleared the capacity auction, it was guaranteed to receive the State's target rate. See *id.* Maryland required participation in the capacity auctions because the State's goal was to increase long-term wholesale supply commitments above the levels that the price signals of the FERC-authorized auctions had produced. The subsidized plant's participation in the capacity auction was therefore necessary to achieve Maryland's objective.

This Court concluded that by "guarantee[ing] … a certain rate for [wholesale] sales … regardless of the clearing price," Maryland's program impermissibly "set[] an interstate wholesale rate, contravening the FPA's division of authority between state and federal regulators." *Id.* at 1298–99. It did not matter that Maryland's goal was the permissible one of encouraging construction of new generators: States cannot "interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable, *even when States exercise their traditional authority over … in-state generation*," and "however legitimate" their ends. *Id.* at 1298–99 (emphasis added). Likening the Maryland program to those invalidated by this Court in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), this Court emphasized that, in each case, the State had run afoul of the FPA by attempting to second-guess the reasonableness of the FERC-approved wholesale auction rates. *Id.* at 1298.

B. The Court of Appeals' Approval of the New York ZEC Program Rests on a Misreading of *Hughes*

The court of appeals upheld New York's ZEC scheme even though it is functionally identical to the Maryland program held preempted in *Hughes*. In the view of the court of appeals, the ZEC program is saved from preemption because it does not formally mandate clearing the wholesale auction as a condition of receiving the subsidy. Pet. App. 16a–18a. That reading exalts form over substance and effectively confines *Hughes* to its facts, in

contravention of the plain import of this Court's decision and the statutory policies it implements.

1. Like the Maryland program this Court held preempted in *Hughes*, New York's ZEC program intrudes on FERC's exclusive authority by guaranteeing the favored plants a level of wholesale compensation in disregard of the auction clearing price. Just as in *Hughes*, New York requires LSEs to make payments to particular State-selected wholesale sellers to make up the difference between the FERC-approved market rates and the rates that New York believes the favored plants need in order to operate profitably. Just as in *Hughes*, the subsidy amount varies inversely with FERC-approved auction rates; as market prices rise, the subsidy falls, and if market prices thereafter fall, the subsidy goes back up. And, just as in *Hughes*, the subsidy is "received" by favored producers "in connection with" the sale of electricity in wholesale markets. 16 U.S.C. §§ 824d(a), 824d(e). The favored plants receive a ZEC subsidy for every megawatt-hour of output they sell at wholesale, and the subsidy fluctuates over time in reaction to forecast wholesale rates to ensure that these favored plants will earn revenues in a range that will be sufficient to cover their costs. See *supra* pp. 9–10.

The structure of the ZEC program confirms that New York is doing exactly what *Hughes* forbids: attempting to "second-guess the reasonableness of interstate wholesale rates." *Hughes*, 136 S. Ct. at 1298. A New York nuclear plant is eligible for the ZEC subsidy only if it cannot operate profitably based on anticipated revenues from wholesale auctions. The ZEC subsidy is granted *only* to plants as to which

the State determines the FERC-authorized rate is too low, and the ZEC subsidy varies so that the FERC rate is topped up to the higher level that New York prefers for its favored plants. See *supra* pp. 9–12.

The provenance of the ZEC program underscores that its purpose is to guarantee wholesale revenues at state-determined levels. The PSC's original ZEC proposal provided that the subsidy amount would be "based upon the difference between the anticipated operating costs of the units and forecasted wholesale prices." See *supra* pp. 11; ZEC Order at 119. After this Court's decision in *Hughes* made clear that the initial ZEC proposal would not survive preemption analysis, the PSC tweaked the proposal by replacing the pricing mechanism that was explicitly based on financial need with an ostensibly "fuel-neutral carbon standard" that would achieve the same result by generating a subsidy amount comparable to the original formula. Even then, New York recognized "[t]he potential for federal preemption" because the program may impermissibly "interfere with federally supervised wholesale markets." See ZEC Order at 47, 100.

That New York gave this wholesale subsidy the fig leaf of maintaining carbon-free power generation at these plants is irrelevant. As this Court explained in *Hughes*, "States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates." 136 S. Ct. at 1298. And, "States interfere … by disregarding interstate wholesale rates FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation." *Id.* at

1298–99. Thus, the analysis does not turn on what goals New York aims to advance, or even if it is acting in an area traditionally reserved for State authority—it is the *means* New York has chosen that impermissibly intrudes on FERC's exclusive jurisdiction.

In short, New York's ZEC program is functionally indistinguishable from Maryland's program and should be preempted for the same reason: Whatever its rationale, New York cannot supplant FERC-authorized wholesale rates by guaranteeing that favored producers will receive an alternative, state-determined level of compensation in connection with their wholesale electricity sales. See 136 S. Ct. at 1298–99.

2. The court of appeals nonetheless upheld New York's ZEC program because it understood *Hughes* to hold that a subsidy program is preempted *only* if it expressly conditions receipt of the subsidy on clearing the wholesale auction. Thus, the court of appeals stated that in *Hughes* "the Maryland program was unlawful because it conditioned payment on auction sales." Pet. App. 17a. Because New York ostensibly required LSEs to pay subsidies for each unit of electricity produced at the three favored plants, rather than for each unit of electricity sold in the wholesale market, the court concluded that nothing in the ZEC Order itself "*requires* the ZEC plants to participate in the wholesale market," and that the "'fatal defect' that doomed … the program in *Hughes*" was therefore not present here. Pet. App. 18a. The court brushed aside the complaint's allegations—which must be accepted as true, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)—that the plants must, as a

practical matter, sell all their electricity into the wholesale market, speculating that some of the subsidized power might be sold directly at retail to large consumers rather than bid into the wholesale auctions.[9] Pet. App. 18a. That theoretical possibility, in the court's view, was sufficient to render a generator's decision whether to participate in the wholesale markets "a business decision that does not give rise to preemption concerns." Pet. App. 18a. The absence of an express legal requirement that plants receiving ZECs participate in the wholesale markets was thus dispositive.

That reasoning cannot be reconciled with *Hughes*. The court of appeals relied on a single sentence in *Hughes*, which states that the "fatal defect" in the Maryland scheme was that it "condition[ed] payment of funds on capacity clearing the auction." 136 S. Ct. at 1299. That sentence appears in the final substantive paragraph of the Court's opinion, which

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[9] The court of appeals also apparently believed that States may lawfully subsidize wholesale transactions made through bilateral contracts rather than through auctions. But bilateral contracts are wholesale sales within FERC's exclusive jurisdiction. See *Snohomish*, 554 U.S. at 531–32. And FERC has concluded that the privately negotiated price of such contract sales is presumptively just and reasonable under the FPA. See *Allco Finance Ltd. v. Klee*, 861 F.3d 82, 99 (2d Cir. 2017). If a State then provides for an additional payment for each unit of electricity sold in this way, it is plainly dictating its own rate in disregard of the rate that FERC has determined to be presumptively just and reasonable. Moreover, even ignoring the complaint's allegations and treating bilateral contracts as outside FERC's jurisdiction, there is no evidence and the court of appeals never suggested that bilateral sales even exist in New York and, if they do, whether they are anything but trivial in comparison to the auction sales by nuclear plants.

at the same time cautioned that the Court's ruling should not be read to signal that all State programs promoting or subsidizing power generation will be preempted by Section 824d(a). But the Court stated that it was expressing *no view* on the permissibility of "various other measures … including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector," *id.*—not that any and all such schemes were permissible. Maryland's auction-participation requirement left no doubt that its scheme was preempted. But it does not follow, and this Court was careful not to imply, that such a requirement is the only way a State could impermissibly invade FERC's exclusive jurisdiction.

As the Court made pellucid elsewhere in its opinion, whether a state subsidy scheme invades FERC's authority depends on whether it "guarantees" that favored producers will receive a state-determined rate in connection with wholesale electricity sales "regardless of the clearing price." *Id.* at 1298–99. The facts of this case amply demonstrate that a State can accomplish this prohibited result without imposing an express "bid and clear" requirement. In actual operation, the ZEC program provides a subsidy for each megawatt-hour of electricity sold on the wholesale market because *all* of the electricity that Exelon's favored plants produce must be sold at wholesale. See Pet. App. 8a. The complaint alleges—and it is a well-understood reality—that these generators "have no alternative way to sell their output" because nuclear plants cannot increase or decrease production levels in response to market demand as other types of generators do; they always run at full output. See

Pet. App. 39a. Once generated, the power cannot be stored. As a result, "[a]ll electricity produced by these nuclear generators must be sold directly or indirectly in the NYISO auctions." Pet. App. 58a.

The court of appeals also found it significant that rather than being tethered to "actual rates" in the wholesale market, the ZEC subsidy is derived from "forecast wholesale prices" after a short period of being fixed at the "social cost of carbon." Pet. App. 16a–17a. But that is simply another way of saying that New York took the formula forbidden by this Court in *Hughes* and added some obscuring noise to it. Tellingly, New York does not tether changes in the subsidy to fluctuations of, or factors that might affect, the "social cost of carbon." The subsidy is instead designed to vary inversely with FERC's rates; indeed, if it worked any other way, the subsidy might dip below the level necessary to achieve the ZEC program's purpose of keeping the favored plants afloat. That the subsidy lacks the candor or precision of the subsidy in *Hughes* does not change its purpose, function, or effect—or its encroachment on FERC's exclusive jurisdiction.

The complaint's allegations thus establish that the absence of an express mandate requiring sales in the FERC-regulated market makes no difference. The subsidized plants cannot, and in reality do not, sell electricity other than at wholesale, and the ZEC program guarantees those plants will receive an amount other than the FERC-approved rate *in connection with* those sales. That is precisely what this Court in *Hughes* said the States cannot do. The court of appeals offered no sound reason, as a matter of law or policy, why a formal "bid and clear"

requirement should mark the boundary between federal and state regulatory authority—and this case demonstrates just how arbitrary the court of appeals' boundary is.

C. The Court of Appeals' Analysis Cannot be Reconciled with This Court's Approach to Preemption

The Second Circuit's interpretation of *Hughes* is also incompatible with this Court's approach to preemption, both generally and under the FPA.

1. This Court has repeatedly rejected arguments that a state law is saved from preemption simply because it does not *expressly* regulate within the federal sphere, if the practical effect of the law is to control conduct that is subject only to federal regulation. "[A] State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect." *Wos v. E.M.A.*, 568 U.S. 627, 636–37 (2013). Preemption analysis turns on "what the state law in fact does, not how the litigant might choose to describe it." *Id*. In *National Meat Ass'n v. Harris*, 565 U.S. 452 (2012), for example, this Court held that a California statute governing what type of meat could be sold at retail had the impermissible effect of regulating slaughterhouse operations, which were exclusively governed by the Federal Meat Inspection Act, 21 U.S.C. § 601 *et seq*. *Id.* at 463–64. This Court explained that permitting States to avoid preemption by strategically "framing" their regulations would "make a mockery" of the Supremacy Clause

principles reflected in preemption doctrine. *Id.* at 464.

2. The Court has applied that same principle in interpreting the preemptive scope of the FPA in *Northern Natural Gas Co. v. State Corp. Commission of Kansas*, 372 U.S. 84 (1963). There, the Court held that a state rule requiring an interstate pipeline to purchase gas ratably from producers was preempted because its practical effect was to regulate wholesale gas prices. Although the state did not expressly regulate wholesale prices, this Court admonished that "our inquiry is not at an end because the orders do not deal in terms with prices or volumes of purchases …. The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same result." *Id*. at 90–91.

In holding that New York's ZEC subsidy is not preempted because it does not expressly require ZEC recipients to clear the wholesale auctions, the court of appeals accepted precisely the sort of form-over-substance argument that this Court has repeatedly rejected. The court distinguished *Northern Natural Gas* on the basis that the program there targeted purchasers, whereas the New York ZEC program targets producers—relying on *Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*, 489 U.S. 493 (1989) (FPA did not preempt state law regulating quantity of gas generators could produce within certain time frame). Pet. App. 20a–21a. This misses the point. *Northern Natural Gas* establishes that even if a state regulation does not formally regulate wholesale rates, it is nonetheless preempted

if that is its practical effect. See 372 U.S. at 91. The Court unequivocally reaffirmed that principle in *EPSA*, decided during the same term as *Hughes*. See 136 S. Ct. at 780 ("The FPA "'leaves no room either for direct state regulation of the prices of interstate wholesales' … or for regulations that 'would indirectly achieve the same result.'" (quoting *N. Natural Gas*, 372 U.S. at 91)). Yet the court of appeals interpreted *Hughes* as holding the opposite: that only direct regulation via an express bid and clear requirement is preempted. There is no way to square that reading of *Hughes* with this Court's longstanding preemption jurisprudence or its holding in *EPSA* during the very same term.

3. Finally, a word is warranted on the court of appeals' reliance on a "strong presumption" against preemption. Pet. App. 14a. This Court's precedent makes clear that such a presumption has no application where, as here, Congress has explicitly delineated federal and state spheres of regulatory authority. *See Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 534–35 (2009) ("invok[ing] the presumption against pre-emption" is "unnecessary … in giving force to the plain terms" of statute with explicit preemption provision); *see also United States v. Locke*, 529 U.S. 89, 108 (2000) (presumption against preemption "is not triggered when the State regulates in an area where there" is an "extensive federal statutory and regulatory scheme"). Tellingly, this Court made no mention of any such presumption against preemption in *Hughes* or *EPSA*.

II. This Court's Review is Manifestly Warranted

The decisions of the courts of appeals in this case and in *Star* have placed the judiciary's imprimatur on a fundamental shift in the balance of regulatory authority between the federal government and the States under the FPA. In design and operation, the subsidy schemes that these decisions have blessed are the very impermissible intrusion on FERC's exclusive authority over the wholesale market that *Hughes* condemned. These schemes guarantee favored producers a state-determined wholesale rate in disregard of the market-determined rates that FERC has deemed just and reasonable. 136 S. Ct. at 1298–99. Unless this Court steps in now, States will know that they have *carte blanche* to guarantee generators wholesale rates of the States' own choosing, so long as they avoid including any express auction-clearing requirement.

1. The inevitable result will be a sharp turn away from the federal policy of relying on market mechanisms to set just and reasonable wholesale rates and to provide appropriate signals to wholesale providers about market entry and exit. The New York ZEC program alone is estimated to result in a $7.6 billion subsidy to the favored plants over 12 years (and a corresponding $7.6 billion cost to New York ratepayers), on top of the revenue the plants receive from FERC-approved wholesale rates. Pet. App. 94a, 118a. The Illinois ZEC program at issue in *Star* is similarly estimated to provide those favored plants with a multibillion dollar subsidy over the life of that program. And several other States—including Connecticut, New Jersey, Ohio, and Pennsylvania—

have already enacted similar subsidy programs or are contemplating doing so.[10]

These subsidy schemes massively distort wholesale markets. They "encourage[] the favored generators to bid as price takers and thereby artificially depress market prices," and "enable[] the unprofitable plants to keep dumping substantial amounts of electricity in the FERC markets …, even though the FERC-approved price signals should cause the plants to retire." Pet. App. 26a. And the impact of ZEC subsidies will only be magnified as more States rush to adopt comparable programs in the wake of these decisions. Nor is there any reason to think that States will limit themselves to subsidizing nuclear power sold at wholesale. Some States may choose to provide wholesale revenue guarantees to renewable energy producers, while others may subsidize local producers that rely on coal or oil. There is now a real risk that the national commitment to competition and market-driven outcomes will be replaced by a patchwork of political rent-seeking, as electricity generators muster political power in their home States to seek special favors in the form of targeted subsidies that guarantee them higher wholesale revenues than FERC-authorized auctions would produce.

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[10] See Conn. Dep't of Energy & Environmental Protection and Conn. Public Util. Regulatory Auth., *Resource Assessment of Millstone Pursuant to Executive Order No. 59 and Public Act 17-3: Draft Report*, at 29-31 (Dec. 14, 2017); N.J. Stat. Ann. § 48:3-87.5 (2018); Penn. Gen. Assembly Nuclear Energy Caucus, *Bi-cameral Nuclear Energy Caucus Report: 2017-2018 Session*, at 30 (Nov. 29, 2018); Ohio S.B. 128 (proposed 2018); Ohio H.B. 381 (proposed 2018).

2. Plenary review is warranted notwithstanding that the United States did not advocate preemption of the New York ZEC program in the proceedings below or in the analogous case before the Seventh Circuit. *See Star*, 904 F.3d at 522. Although FERC apparently read this Court's decision in *Hughes* as foreclosing preemption of these ZEC subsidy programs, in the *Hughes* litigation the United States recognized that "[t]he additional payments made to the generators by the electric distribution companies are not to purchase capacity but rather are mechanisms to guarantee that generators will receive a specified price based on their wholesale sales and thereby subsidize the generators for clearing the auction and selling their capacity." Amicus Brief in Opposition to Certiorari, at 19, No. 14-614 (Sept. 16, 2015). As the United States recognized, "[t]hat arrangement is aimed directly at and distorts the Commission-approved market mechanism for setting wholesale rates and is preempted for that reason." *Id.* 19–20.

FERC has subsequently recognized that the ZEC programs are wreaking havoc on the federal policy of market-based wholesale rates, and has initiated a proceeding to explore ways to mitigate these harms. *See Calpine Corp. v. PJM Interconnection, LLC*, 163 FERC ¶ 61,236 (June 29, 2018). The order initiating that proceeding acknowledges that "the integrity of competition in the wholesale capacity market" is undermined by "out-of-market support to … existing uneconomic resources." *Id.* at 64. Such subsidies, FERC said, "significantly impact the capacity market clearing prices and the integrity of the resulting price signals on which investors and consumers rely to guide the orderly entry and exit of capacity resources.

We cannot rely on such a construct to harness competitive market forces and produce just and reasonable rates." *Id.* at 68–69. By "allow[ing] resources to suppress capacity market clearing prices," *id.* at 63, "out-of-market support, such as ZEC programs, has changed the circumstances [in the wholesale markets]," *id.* at 63, 67, requiring "sweeping changes" from FERC, *id.* at 84 (LaFleur, Commissioner, dissenting).

That FERC has felt compelled to take these steps starkly confirms that the ZEC subsidies intrude on FERC's exclusive jurisdiction and that FERC is misreading *Hughes*. See *Hughes*, 136 S. Ct. at 1298 n.11 (States "cannot regulate in a domain Congress assigned to FERC and then require FERC to accommodate [that] intrusion"). In all events, the "division of regulatory authority" under the FPA is a "role which our system assigns to Congress." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 222–23 (1983) (rejecting FERC's position on preemption question); see also *New York v. FERC*, 535 U.S. 1, 41–42 (2002) (Thomas, J., dissenting) (FERC's views on the scope of jurisdiction cannot override the "clear statutory mandate."). It is up to this Court to decide, as it did in *Hughes* and *EPSA*, how to interpret the FPA's allocation of authority between the federal government and the States.

3. This is not a situation in which further percolation in the courts of appeals is warranted. Indeed, delay risks long-term distortion of the energy markets. The emergence of massive state wholesale subsidy programs marks a critical inflection point in the evolution of energy markets and the rules that

govern them. The programs already in place are causing multibillion dollar distortions and skewing decisions about long-term investment in energy generation. Much more is sure to follow if these decisions are allowed to stand. Markets are much easier to break than to fix. As in *Hughes*, this Court has not hesitated to grant review in the absence of any circuit conflict to address fundamental questions about the proper allocation of regulatory authority between the federal government and the States under the FPA in comparable circumstances. See *Snohomish*, 554 U.S. 527; *New York*, 535 U.S. 1. The Court's review is manifestly warranted here as well.

III. This Case is a Superior Vehicle for Addressing the Question Presented

Also pending before this Court is a concurrently filed petition for a writ of certiorari seeking review of the Seventh Circuit's judgment in *Star*, *supra*. Petitioners respectfully suggest that the petition for certiorari should be granted in this case, and that the petition in *Star* should be held pending resolution of this case.

The instant petition is a superior vehicle for resolution of the question presented because the Seventh Circuit's decision is marred by errors that could complicate review. *First*, although (as in this case) the Seventh Circuit was reviewing an order granting a motion to dismiss, the court incorrectly stated that it was reviewing a grant of summary judgment, 904 F.3d at 522, where the complaint's allegations need not be taken as true. And the Seventh Circuit's decision rested on factual assumptions about the nature and operation of

energy markets that were contradicted by the complaint, unsupported by any record evidence, and wrong as a factual matter. *Second*, the Seventh Circuit's decision also rests on an erroneous understanding of the structure and operation of the Illinois ZEC program.[11] Although the Court could reach the merits despite these errors, it would add needless complications not present in instant case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[11] These factual and procedural errors were addressed in a re-hearing petition, but the court took no corrective action.

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January 7, 2019

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 17-2654-cv
August Term 2017

COALITION FOR COMPETITIVE ELECTRICITY, DYNERGY INC., EASTERN GENERATION, LLC, ELECTRIC POWER SUPPLY ASSOCIATION, NRG ENERGY, INC., ROSETON GENERATING LLC, SELKIRK COGEN PARTNERS, L.P.,

Plaintiffs-Appellants,

v.

AUDREY ZIBELMAN, in her official capacity as Chair of the New York Public Service Commission, PATRICIA L. ACAMPORA, in her official capacity as Commissioner of the New York Public Service Commission, GREGG C. SAYRE, in his official capacity as chair of the New York Public Service Commission DIANE X. BURMAN, in her official capacity as Commissioner of the New York Public Service Commission,

Defendants-Appellees,

EXELON CORP., R.E. GINNA NUCLEAR POWER PLANT LLC, CONSTELLATION ENERGY NUCLEAR GROUP, LLC, NINE MILE POINT NUCLEAR STATION LLC,

Intervenor-Defendants-Appellees.

ARGUED: MARCH 12, 2018
DECIDED: SEPTEMBER 27, 2018

Before: JACOBS, LIVINGSTON, *Circuit Judges*, CHEN, *District Judge*.[1]

Plaintiffs, a group of electrical generators and trade groups of electrical generators, appeal from a judgment of the United States District Court for the Southern District of New York (Caproni, J.) granting Defendants' Rule 12(b)(6) motions to dismiss. Plaintiffs challenge the constitutionality of New York's Zero Emissions Credit ("ZEC") program, which subsidizes qualifying nuclear power plants with "ZECs": state-created and state-issued credits certifying the zero-emission attributes of electricity produced by a participating nuclear plant.

Plaintiffs argue that the program is preempted under the Federal Power Act ("FPA") and that it violates the dormant Commerce Clause. We conclude as follows: (1) the ZEC program is not field preempted because Plaintiffs have failed to identify an impermissible "tether" under *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1293 (2016), between the ZEC program and wholesale market participation; (2) the ZEC program is not conflict preempted because Plaintiffs have failed to identify any clear damage to federal goals; and (3) Plaintiffs lack Article III standing to raise a dormant Commerce Clause claim. Affirmed.

DONALD B. VERRILLI, JR., Munger Tolles & Olson LLP, Washington, DC; Henry Weissmann, Fred A. Rowley, Jr., Mark R. Yohalem, Munger, Tolles & Olson LLP, Los Angeles, California; Jonathan D. Schiller, David A. Barrett, Boies Schiller Flexner LLP, New York, New York; Stuart H. Singer, Boies Schiller

[1] Judge Pamela K. Chen, of the United States District Court for the Eastern District of New York, sitting by designation.

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DENNIS JACOBS, *Circuit Judge*:

Plaintiffs, a group of electrical generators and trade groups of electrical generators, appeal from a judgment of the United States District Court for the Southern District of New York (Caproni, J.) granting Defendants' Rule 12(b)(6) motions to dismiss. In August 2016, the New York Public Service Commission ("PSC") adopted the Zero Emissions Credit ("ZEC") program as part of a larger energy reform plan to reduce greenhouse-gas emissions by 40 percent by 2030. The program subsidizes qualifying nuclear power plants by creating "ZECs": state-created and state-issued credits certifying the zero-emission attributes of electricity produced by a participating nuclear plant. The PSC has determined that three nuclear power plants (FitzPatrick, Ginna, and Nine Mile Point) qualify for the ZEC program; other facilities, including facilities located outside New York, may be selected in the future.

Plaintiffs allege that the ZEC program influences the prices that result from the wholesale auction system established by the Federal Energy Regulatory Commission ("FERC") and distorts the market mechanism for determining which energy generators should close. Plaintiffs challenge the program's constitutionality on two grounds: that the program is preempted under the Federal Power Act ("FPA") and that it violates the dormant Commerce Clause. Defendants, who are members of the PSC, and Intervenors, who are the nuclear generators (and their owners, including Exelon Corporation) receiving ZECs, moved to dismiss on the grounds that Plaintiffs lack a private cause of action to pursue their preemption claims

because the FPA implicitly forecloses equity jurisdiction, and that (in any event) Plaintiffs' claims fail as a matter of law.

We conclude that the ZEC program is not field preempted, because Plaintiffs have failed to identify an impermissible "tether" under *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1293 (2016) between the ZEC program and wholesale market participation; that the ZEC program is not conflict preempted, because Plaintiffs have failed to identify any clear damage to federal goals; and that Plaintiffs lack Article III standing as to the dormant Commerce Clause claim. These conclusions are consistent with the recent Seventh Circuit decision in *Elec. Power Supply Ass'n v. Star*, No. 17-2433, 2018 WL 4356683, at *1 (7th Cir. Sept. 13, 2018).

The judgment of the district court is affirmed.

I

A

The FPA establishes a collaborative scheme between the states and federal government to regulate electricity generation. States have exclusive jurisdiction over "facilities used for the generation of electric energy," including production and retail sales. 16 U.S.C. § 824(b)(1). FERC regulates electricity sales at wholesale, ensuring "rates and charges made, demanded, or received . . . for or in connection with" such sales are "just and reasonable." *Id.* § 824d(a).

FERC has determined that just and reasonable rates for wholesale electricity should be set by competitive auctions. The New York Independent System Operator ("NYISO") manages two types of wholesale auctions under FERC-approved rules and procedures:

energy and capacity. In energy auctions, generators bid the lowest price they will accept to sell a given quantity of electrical output; in capacity auctions, generators bid (and NYISO purchases) options to call upon the generator to produce a specified quantity of electricity in the future. Both types of auction employ "stacking" of bids from lowest to highest price until demand is satisfied. App'x 50, 54 (Compl. ¶¶ 33, 39-40). The price of the highest-stacked bid sets the "market clearing price." *Id.* Any generator that bids at or below the market clearing price "clears" the auction and receives the market clearing price, regardless of the price the generator actually bid. *Id.* "A high clearing price in the capacity auction encourages new generators to enter the market, increasing supply and thereby lowering the clearing price. . . . [A] low clearing price discourages new entry and encourages retirement of existing high-cost generators." *Hughes*, 136 S. Ct. at 1293.

Nuclear generators bid into the NYISO auctions as price-takers: since, unlike other types of electricity generation, they are unable to vary their output depending on price, they sell their entire output at the market clearing price, even if the price is below the cost of production.

B

In August 2016, the PSC issued the Clean Energy Standard ("CES") Order as an overall scheme to reduce greenhouse-gas emissions by 40 percent by 2030. The CES Order created two programs that bear upon this appeal: Renewable Energy Credits ("RECs") and ZECs. Plaintiffs challenge only the ZEC program, arguing that it is preempted by the FPA and violates the dormant Commerce Clause.

The REC program awards to generators one REC for each megawatt-hour (MWh) of energy that is produced from renewable sources like wind and solar. App'x 190 (CES Order at 106). The New York State Energy Research and Development Authority ("NYSERDA") purchases RECs from generators, thereby providing them a subsidy. App'x 100 (CES Order at 16). In turn, NYSERDA sells the RECs to local utilities that sell energy to consumers at retail. *Id.* The CES Order requires the utilities either to purchase RECs in an amount based on the percentage of the total load served by that utility or to make an alternative compliance payment. App'x 98-100 (CES Order at 14-16). The utilities may (and no doubt do) pass on the cost of RECs to consumers. App'x 101 (CES Order at 17).

The ZEC program aims to prevent nuclear generators that do not emit carbon dioxide from retiring until renewable sources of energy can pick up the slack. A ZEC is a subsidy: a "credit for the zero-emissions attributes of one megawatt-hour of electricity production by" a participating nuclear power plant. App'x 254. The PSC selects plants for the ZEC program based on five criteria: (1) "verifiable historic contribution . . . to the clean energy resource mix . . . in New York"; (2) the degree to which projected wholesale revenues are insufficient to prevent retirement; (3) costs and benefits of ZECs relative to clean-energy alternatives; (4) impacts on ratepayers; and (5) the public interest. App'x 208 (CES Order at 124). Based on these criteria, the PSC chose three nuclear plants for the ZEC program: FitzPatrick, Ginna, and Nine Mile Point; it is asserted that other facilities, including facilities located outside New York, may be selected in the future. App'x 209 (CES Order at 125).

The ZEC price is based on the so-called "social cost of carbon": a federal inter-agency task force's estimate of the damage from carbon emissions, which the PSC uses to measure the hypothetical environmental damage from nuclear plants' retirement. App'x 215 (CES Order at 131).[2] The PSC then subtracts the portion of that cost already captured through New York's participation in the Regional Greenhouse Gas Initiative ("RGGI"), and multiplies the result by the tons of carbon avoided per MWh of zero-emission energy. App'x 219-20 (CES Order at 135-36). The ZEC price generated for the program's first two years is $17.48. App'x 69 (Compl ¶ 70). Accordingly, "each qualifying nuclear generator will get an additional $17.48 for each MWh of electricity it generates (subject to a possible cap), in addition to the price the facility receives for the sale of the electricity and capacity in the [NYISO] market." *Id.*

Beginning in 2019, the PSC intends to calculate a new ZEC price every two years. The price may be reduced based on two considerations. First, if the New York energy market experiences "additional renewable energy penetration," App'x 221 (CES Order at 137), the price will fall, reflecting the reduced value of nuclear plants if renewable energy generation gains steam. Second, the ZEC price may be adjusted downward based on forecast wholesale prices. App'x 222 (CES Order at 138). For each two-year period, the PSC calculates a "reference price forecast" that is equal to the sum of forecast NYISO "Zone A" (i.e., Western New York) energy and capacity prices during the period. *Id.*

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[2] *See generally* Jason Bressler, Note, *Blocking Interstate Natural Gas Pipelines: How to Curb Climate Change While Strengthening the Nation's Energy System*, 44 COLUM. J. ENVTL. L. (forthcoming Jan. 2019).

The reference price forecast is not paid to the ZEC plants, but rather sets a benchmark for reducing the ZEC price: if the reference price forecast exceeds $39/MWh (a historical approximation of Zone A energy and capacity prices), the two-year ZEC price is reduced by the difference. *Id.*

As in the REC program, the NYSERDA purchases ZECs from the selected plants, and local utilities are required to purchase ZECs from NYSERDA in proportion to its share of total state electric load. App'x 70-71 (Compl. ¶ 73). Alternatively, the utilities may purchase both ZECs and energy directly from the generators. App'x 235-36 (CES Order at 151-52). The utilities may then pass along these costs to consumers.

C

The complaint, filed October 19, 2016, alleges that the ZEC program alters the prices that result from FERC's auction system and distorts the market mechanism for determining which nuclear power plants should close. The subsidized nuclear generators receive the value of the ZECs in addition to what they earn in the wholesale markets; as a result (it is alleged), New York "is using the ZEC subsidy to exert a large depressive effect on energy and capacity prices, which one group of experts estimated at $15 billion over 12 years." App'x 58-59 (Compl. ¶ 47). Plaintiffs claim that the depressive effect will cause (1) generators (such as themselves) to receive a lower price than they would have otherwise and, as a result, (2) their bids to fail to clear auctions when they otherwise would have cleared. App'x 71, 74 (Compl. ¶¶ 74, 87).

Accordingly, the complaint claims that the ZEC portion of the CES Order is both field and conflict

preempted by FERC's authority over wholesale electricity sales, and that it violates the dormant Commerce Clause because the ZECs benefit only nuclear power plants located in New York. App'x 42-43 (Compl. ¶¶ 7-8). The nuclear plants (and their owners), beneficiaries of the ZEC program, intervened as a Defendant.

The district court granted the motions by Intervenors and the state Defendants to dismiss under Rule 12(b)(6). As to the preemption claim, the court held that the FPA forecloses parties from invoking equity jurisdiction to bring a claim under the FPA, and that, in any event, Plaintiffs failed to state a plausible claim. As to the Commerce Clause claim, the court held that Plaintiffs lack a cause of action because their alleged injuries did not fall within the zone of interests protected by the dormant Commerce Clause; as to the merits, the court held the Plaintiffs' claim fails because New York was acting as a market participant, rather than a regulator, when it created ZECs.

This appeal followed.

II

We review *de novo* a district court's grant of a motion to dismiss under Rule 12(b)(6), "construing the complaint liberally, accepting all factual allegations as true, and drawing all reasonable inferences in the plaintiff's favor." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016). The complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable

for the misconduct alleged." *Id.* For Rule 12(b)(6) purposes, the complaint "include[s] any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *Allco Finance Ltd. v. Klee*, 861 F.3d 82, 97 n.13 (2d Cir. 2017) (internal quotation marks omitted).

III

Plaintiffs invoke the court's equity jurisdiction to prevent enforcement of the CES Order on the ground that it is preempted by the FPA, while Defendants argue that such jurisdiction is implicitly foreclosed by the same statute. *See Armstrong v. Exceptional Child Center*, 135 S. Ct. 1378 (2015). However, as the Seventh Circuit recognized in *Electric Power Supply Association*, this dispute does not implicate the district court's subject-matter jurisdiction, which rests securely on 18 U.S.C. § 1331 and 16 U.S.C. § 825p. *See* 2018 WL 4356683, at *1. We need not consider the parties' disagreement regarding equity jurisdiction because we conclude (as did the Seventh Circuit) that federal law does not preempt the state statute – that is, since Plaintiffs' claims fail either on the merits or for lack of standing, the question regarding equity is obviated.

IV

The laws of the United States are "the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI cl. 2. Congress therefore may preempt state law through federal legislation. "Our inquiry into the scope of a [federal] statute's preemptive effect is guided by the rule that the purpose of Congress is the ultimate touchstone in every pre-emption case." *Altria*

Group, Inc. v. Good, 555 U.S. 70, 76 (2008) (internal quotation marks omitted).

If Congress has not expressly preempted a state statute, it may do so implicitly through either "field" or "conflict" preemption. Under field preemption, a state law is preempted if "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989). Conflict preemption arises "where compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015) (internal quotation marks omitted). Plaintiffs challenge the ZEC program on both scores. We consider field preemption first and conflict preemption next.

V

The FPA divides responsibility for regulating energy between the states and the federal government. FERC has exclusive power to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C § 824(a). FERC must ensure that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable." 16 U.S.C. § 824d(a). While FERC's authority extends to "rules or practices affecting wholesale rates," this affecting jurisdiction is limited to "rules or practices that *directly* affect the [wholesale] rate" so that FERC's jurisdiction does not "assum[e] near-infinite breadth." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 774

(2016) (internal quotation marks omitted) (emphasis and alteration in original).

However, "the law places beyond FERC's power, and leaves to the States alone, the regulation of 'any other sale'—most notably, any retail sale—of electricity." *Id.* at 766 (quoting 16 U.S.C. § 824(b)). The states are thus authorized to regulate energy production, 16 U.S.C. § 824(b), and facilities used for the generation of electric energy, 16 U.S.C. § 824(b)(1). *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 205 (1983) ("Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States.").

When "coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one." *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973). Courts must avoid mistaking the "'congressionally designed interplay between state and federal regulation' for impermissible tension that requires pre-emption under the Supremacy Clause." *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (quoting *Northwest Central*, 489 U.S. at 518). In this Circuit, there is a "strong presumption against finding that the [State's] powers" are preempted by the FPA, *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 94 (2d Cir. 2012), legislation that was "drawn with meticulous regard for the continued exercise of state power," *Rochester Gas & Elec. Corp. v. PSC of N.Y.*, 754 F.2d 99, 104 (2d Cir. 1985). That presumption may be overcome only if dis-

placing state authority was Congress' "clear and manifest purpose." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

A

An FPA field preemption claim was recently considered by the Supreme Court in *Hughes v. Talen Energy Marketing, LLC,* 136 S. Ct. 1288 (2016). A Maryland program required utilities to enter into a "contract-for-differences" with a favored power plant. 135 S. Ct. at 1294. Local utilities were required to pay the shortfall if the plant cleared the capacity auction, but the clearing price fell below the state-determined contract price; if the clearing price exceeded the contract price, the plant paid the difference to the utilities. *Id.* at 1295. The Maryland program thus provided subsidies to the generator that were conditioned on the generator's sale of capacity into a FERC-regulated auction. *Id.* at 1292. By guaranteeing a rate distinct from the auction clearing price, "Maryland's program invade[d] FERC's regulatory turf," and was therefore preempted. *Id.* at 1297.

The Court cautioned, however, that "[n]othing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures *untethered to a generator's wholesale market participation*." *Id.* at 1299 (internal quotation marks omitted) (emphasis added). The Court expressly left open the viability of other measures to develop energy generation, such as "tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector." *Id.* "So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from

the fatal defect that renders Maryland's program unacceptable." *Id.*

Plaintiffs argue that the ZEC program is indistinguishable from the Maryland program preempted in *Hughes*. The program is said to be "expressly tethered to wholesale prices resulting from the NYISO auctions" because (1) "the state requires [utilities] to make up the difference between the state's rate and the FERC-approved market rates"; (2) "the subsidy varies inversely with FERC-approved auction rates"; and (3) "the subsidy is 'received' by the favored producers 'in connection with' the sale of electricity on wholesale markets." Br. of Appellants 6, 32 (quoting 16 U.S.C. § 824d(a), 824d(e)). Plaintiffs mischaracterize *Hughes* and the ZEC program.

The Maryland contract-for-differences program insulated generators from fluctuations in wholesale prices by guaranteeing that they would receive "the difference between . . . the clearing price" and the state-determined "price guaranteed in the contract for differences." *Hughes*, 135 S. Ct. at 1295. New York's scheme avoids (or skirts) the *Hughes* prohibition. Until 2019, the ZEC price cannot vary from the social cost of carbon, as determined by a federal interagency workgroup. App'x 213–14, 266. After 2019, the ZEC price is fixed for two-year periods, and does not fluctuate during those periods to match the wholesale clearing price. Because the fixed ZEC price is capped based on an independent variable (the social cost of carbon), generators are exposed to market risk in the event that energy prices fall. Moreover, the price may be fixed below the social cost of carbon, but only on the basis of *forecast* wholesale prices – forecasts based on futures prices that FERC does not regulate, *Hunter v. FERC*, 711 F.3d 155, 157 (D.C. Cir. 2013) – and there

is no true-up to reconcile forecasts with actual rates. The ZEC price also adjusts based on the amount of renewable energy generation in New York. App'x 221 (CES Order at 137). Accordingly, there is no support for Plaintiffs' contention that the "subsidy varies in almost exactly the same manner" as in *Hughes*. Br. of Appellants 38.

Plaintiffs argue that *Hughes* preempts state programs if they are tethered to "FERC-regulated wholesale electricity prices." Br. of Appellants 10; *see also id*. at 40–42, 48. But the tether in *Hughes* is tied to "wholesale market *participation*," not prices, 136 S. Ct. at 1299 (emphasis added); the Maryland program was unlawful because it conditioned payment on auction sales.

As the district court held, *Rochester Gas* forecloses Plaintiffs' price-tethering theory. It was argued in that case that the FPA preempted the PSC's policy of calculating intrastate retail rates by making a "reasonable estimate" of wholesale sales revenues. *Id.* at 100–01. We held that tying retail prices (which are under state jurisdiction) to estimates of wholesale revenues (which are under FERC's) is permissible because there is "a distinction between" a state impermissibly "regulating [wholesale] sales" and a state "reflecting the profits from a reasonable estimate of those sales" when acting within its jurisdiction. *Id.* at 105.

Plaintiffs attempt to distinguish *Rochester Gas* on two grounds. First, they argue that *Rochester Gas* addresses only retail rate-making, whereas the ZEC program addresses wholesale rate-making. But that argument mischaracterizes the ZEC program, which avoids setting wholesale prices and instead regulates the environmental attributes of energy generation and in the process considers forecasts of wholesale pricing.

Second, Plaintiffs distinguish *Rochester Gas* on the ground that the ZEC program has a direct impact on the generators' "position toward" the wholesale markets. Br. of Appellants 39. But the same was true in *Rochester Gas*: the PSC policy allowed generators to keep operating, regardless of wholesale revenue, because recovery of costs was guaranteed through retail rates. What mattered in *Rochester Gas* was whether the retail rate adjustment, which factored in expected wholesale revenues, intruded on FERC's jurisdictional turf by compelling wholesale market participation. The analogous question here would be whether ZECs compel generators to make wholesale sales. We conclude that they do not.

Plaintiffs argue that the plants' owners are "Exempt Wholesale Generators" ("EWGs"), which are "legally required to sell their output into wholesale markets." Br. of Appellants 33. Accepting the allegations of the complaint as true (and ignoring the fact that neither Exelon nor LIPA have EWG status), Plaintiffs point to nothing in the CES Order that *requires* the ZEC plants to participate in the wholesale market. EWG status affords an exemption from certain regulations; but a ZEC plant may relinquish EWG status in order to sell directly to consumers (if it deems the tradeoff worthwhile) – and still receive ZECs. As the district court concluded, a generator's decision to sell power into the wholesale markets is a business decision that does not give rise to preemption concerns. Special App'x 20-21. Accordingly, there is no support for Plaintiffs' assertion that the CES Order tethers the ZEC plants' receipt of ZECs to participation in the wholesale markets – the "fatal defect" that doomed the contract-for-differences program in *Hughes.* 136 S. Ct. at 1299.

Citing *Allco Finance Ltd. v. Klee*, 861 F.3d 82 (2d Cir. 2015), Plaintiffs argue that the absence of a statutory compulsion for generators to sell into the wholesale market does not save a state program that would otherwise be preempted. *Allco* considered a Connecticut statute that arranged for utilities to enter into bilateral wholesale electricity contracts with renewable energy generators. The plaintiff argued that the statute "[c]ompe[lled] a wholesale transaction" between the generators and utilities and thus regulated wholesale sales. *Id.* at 97. We disagreed, because generators and utilities (rather than the state) made the ultimate decision to sign the contracts. *Id.* at 98, 100.

Plaintiffs contend that *Allco* supports their argument because the Court emphasized that the contracts were subject to FERC evaluation as just and reasonable, whereas the ZEC transactions are not. *Id.* at 199. However, the evident reason that the contracts were subject to FERC review is that they were contracts for wholesale electricity sales, over which FERC has jurisdiction. Here, the only transactions New York compels are ZEC sales, and ZECs are sold separately from wholesale sales. Because there is no wholesale sale when ZECs change hands, FERC lacks jurisdiction to decide whether the ZEC transactions are just and reasonable. Allco is therefore inapposite.

B

Plaintiffs concede that the ZEC program "does not expressly mandate that the plants receiving ZEC subsidies bid into the NYISO auctions," Br. of Appellants 8; rather, they argue that the "practical effect" of the ZEC program is to regulate wholesale prices, *id.* at 35, and that a state law is preempted even if it does not formally regulate wholesale prices, if that is its

practical effect. Plaintiffs rely on *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963), in which a Kansas law requiring an interstate pipeline to purchase gas ratably from producers was preempted by the Natural Gas Act ("NGA").[3] The state rule did not expressly regulate wholesale prices, but the Court reasoned that "our inquiry is not at an end because the orders do not deal in terms with prices or volumes of purchases. . . . The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same result." *Id.* at 90-91 (citations omitted).

However, *Northern Natural* held that the Kansas law was preempted because it was "unmistakably and unambiguously directed at purchasers [i.e., interstate pipelines] who take gas in Kansas for resale after transportation in interstate commerce." *Id.* at 92. The Court emphasized that "our cases have consistently recognized a significant distinction," with "constitutional consequences, between conservation measures aimed directly at interstate purchasers and wholesales for resale, and those aimed at producers and production." *Id.* at 94.

This distinction between regulating purchasers and producers yielded the opposite result in *Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*, 489 U.S. 493 (1989). Kansas hit on another way to encourage interstate pipelines to purchase

[3] The Supreme Court has "routinely relied on NGA cases in determining the scope of the FPA." *Hughes*, 136 S. Ct. at 1298 n. 10.

additional Kansas-Hugoton gas, but did so by regulating the producers: unless they produced their allowable quantity of gas within a certain timeframe, they would lose the right to produce it later – and of course the pipelines could not purchase gas unless it was produced. *Id.* at 497, 505. Relying on *Northern Natural* for the proposition that federal law preempts state regulations that have "either a direct or indirect effect on matters within federal control," the pipelines asked the Court to invalidate the Kansas rule "because it exert[ed] pressure" on them to "increase purchases from Hugoton producers." *Id.* at 497, 507.

FERC's brief to the Court argued that while Kansas "intended to influence" the pipeline's purchasing decisions, the state did "no more than fix[] limits on when producers may produce their gas" and therefore stayed within its jurisdiction. *Northwest Central* FERC Br. at *20. Furthermore, FERC regulation of the pipelines does not "protect [them] from the effect of state regulations that form the environment in which [they] conduct[] business within the state." *Id.* at *32.

The Supreme Court agreed: it would be "strange indeed" to hold that Congress intended to allow the states to regulate production, but only if doing so did not affect interstate rates. *Northwest Central*, 489 U.S. at 512-13. In *Northern Natural*, Kansas "crossed the dividing line . . . by imposing purchasing requirements on interstate pipelines," but in *Northwest Central*, the state achieved the same end result by "regulat[ing] production," a matter "firmly on the States' side of that dividing line." *Id.* The Court concluded that "we must take seriously the lines Congress drew in establishing [this] dual regulatory system," and therefore held that the Kansas law was not preempted. *Id.*

New York has kept the line in sight, and gone as near as can be without crossing it. ZECs are created when electricity is produced in a statutorily-defined manner, regardless of whether or how the electricity is ultimately sold. They are defined as "the zero-emissions attributes of one megawatt-hour of electricity *production* by an eligible Zero Carbon Electric Generating Facility." App'x 254 (emphasis added). Accordingly, *Northwest Central* defeats Plaintiffs' argument premised on practical effect: even though the ZEC program exerts downward pressure on wholesale electricity rates, that incidental effect is insufficient to state a claim for field preemption under the FPA.

C

FERC has confirmed that REC programs fall within the jurisdiction of the states, which is telling because RECs and ZECs share many similar characteristics. *WSPP, Inc*., 139 FERC ¶ 61,061 (2012), concerned an agreement that facilitated wholesale sales among 300 Canadian and American parties. The parties asked FERC to determine if it had jurisdiction over "unbundled" REC transactions. *Id.* PP 2, 5 & 9. FERC asserted jurisdiction over *bundled* REC transactions, in which "a wholesale energy sale and a REC sale take place as part of the same transaction," but disclaimed jurisdiction over unbundled REC sales. *Id.* "RECs are state-created and state-issued instruments certifying that electric energy was generated pursuant to certain requirements." *Id.* P 21. When RECs are unbundled, the payment is "not a charge in connection with a wholesale sale," does not "affect wholesale electricity rates," and therefore "falls outside FERC jurisdiction." *Id.* P 24.

As the district court observed: "Like a REC, a ZEC is a certification of an energy *attribute* that is separate from a wholesale charge or rate. . . . Like a REC, the purchase or sale of a ZEC is independent of the purchase or sale of wholesale energy. Like a REC, payment for a ZEC is not conditioned on the generator's participation in the wholesale auction; rather, RECs and ZECs are given in exchange for the renewable energy or zero-emissions *production* of energy by generators." Special App'x 27 (emphases in original). Plaintiffs argue that ZECs and RECs are nevertheless distinguishable for the purposes of preemption analysis, for two reasons.

First, Plaintiffs argue that, unlike RECs, the ZEC subsidy is tethered to wholesale prices. For reasons explained above, Plaintiffs' price-tethering theory is foreclosed by *Hughes* and *Rochester Gas*; furthermore, it mischaracterizes the ZEC program: ZEC prices are capped by the social cost of carbon, and may adjust downwards in future years on the basis of *forecast* wholesale energy prices. *See supra* Part V.A.

Second, Plaintiffs allege that ZECs are available only to generators that sell in the NYISO auctions, thereby guaranteeing that ZEC transactions are tied to the sale of electricity at wholesale. True, ZEC plants may sell the electricity they generate into the wholesale auction, and all of them may well do so, but (as described above, *supra* at Part V.B), there is no support for Plaintiffs' argument that the CES Order *requires* ZEC plants to sell power into the wholesale market. Under the program, the production of zero-emissions energy results in the creation of ZECs; how those plants sell their electricity is a business decision that does not raise preemption concerns. Accordingly, Plaintiffs' two proposed distinctions fall flat.

Plaintiffs rely on a distortion of *WSPP's* holding. First, they assert that FERC "was careful to limit its holding to the features of the three specific REC products before it." Br. of Appellants 42. However, *WSPP* clearly disclaims FERC jurisdiction over RECs when they are sold separately from electricity: the only REC feature that was dispositive was whether the REC was "unbundled" (sold separately from electricity) or "bundled" (sold together). 139 FERC ¶ 61,064, P 24. There is no dispute that ZECs are similarly unbundled from electricity transactions. Second, Plaintiffs quote FERC's observation that REC (and therefore presumably ZEC) transactions "could still fall under [FERC's jurisdiction" if they were "in connection with" or "affect[ed]" wholesale rates. Br. of Appellants 43 (quoting 139 FERC ¶ 61,061 P 22). But when FERC applied this jurisdictional standard two paragraphs later, it held (categorically) that unbundled REC transactions are not "in connection with a wholesale sale" and "do[] not affect wholesale electricity rates." 139 FERC ¶ 61,061 P 24. Finally, Plaintiffs emphasize that the REC program had "no connection to an organized market with energy and capacity auctions." Br. of Appellants 42. But *WSPP* acknowledged that some REC recipients (like certain ZEC recipients) are EWGs, who are required to sell their output exclusively at wholesale. 139 FERC ¶ 61,061 P 9. And several states addressed in *WSPP* required renewable generators to bid into wholesale auctions. *See West-Wide Must-Offer Requirements*, 157 FERC ¶ 61,051, PP 2–5 (2016) (western states subject to must-offer capacity mandate from 2001 to 2016 to address California energy crisis). Yet *WSPP* nevertheless upheld their REC programs.

It is telling that Plaintiffs cannot persuasively explain why FERC's holding regarding RECs does not

apply equally to ZECs. We conclude that Plaintiffs have failed to state a plausible claim of field preemption.

VI

A state law may be conflict preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Oneok*, 135 S. Ct. at 1595, or "interferes with the method by which the federal statute was designed to reach this goal," *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Given the FPA's dual regulatory scheme, "conflict-pre-emption analysis must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Northwest Central*, 489 U.S. at 515. So long as a state is "regulat[ing] production or other subjects of state jurisdiction, and the means chosen [are] at least plausibly . . . related to matters of legitimate state concern," there is no conflict preemption "unless clear damage to federal goals would result." *Id.* at 518, 522.

The FPA seeks to ensure, through FERC, that rates for wholesale sales remain just and reasonable, while simultaneously preserving state authority to regulate generation facilities and retail sales. 16 U.S.C. §§ 824d(a), 824(b). As explained above, the ZEC program regulates production: its stated aspiration is to "preserve existing zero-emissions nuclear generation resources as a bridge to the clean energy future," and to "prevent backsliding" that otherwise "likely could not be avoided." App'x 85, 229. Accordingly, ZEC program is not conflict preempted unless Plaintiffs can show that it would cause clear damage to federal goals.

Plaintiffs describe "the very goal of FERC's wholesale market design" as "competition from more efficient generators." Br. of Appellants 46. ZECs, Plaintiffs argue, "enable[] the unprofitable plants to keep dumping substantial amounts of electricity in the FERC markets for over a decade, even though the FERC-approved price signals should cause the plants to retire." *Id.*

Furthermore, Plaintiffs allege that the ZEC program "distort[s] price signals to all other wholesale generators by encouraging the favored generators to bid as price takers and thereby artificially depress market prices." *Id.*

However, FERC itself has sanctioned state programs that increase capacity or affect wholesale market prices, so long as the states regulate matters within their jurisdiction. Thus, states may "grant loans, subsidies or tax credits to particular facilities on environmental or policy grounds," *Cal. PUC*, 133 FERC ¶ 61,059, P 31 n.62, including when that makes clean generation "more competitive in a cost comparison with fossil-fueled generation" or "allow[s] states to affect" the price, *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, 62,080 (1995). States may "require retirement of existing generators" or construction of "environmentally-friendly units, or . . . take any other action in their role as regulators of generation," even though it may "affect[] the market clearing price." *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009); *see also New England States Comm. on Elec. v. ISO New England Inc.*, 142 FERC ¶ 61,108, at 61,490 (2013) (LaFleur, Comm'r, concurring) ("[S]tates have the unquestioned right to make policy choices through the subsidization of capacity."); *N.Y. State PSC*, 158 FERC ¶ 61,137, 2017 WL 496267,

at *11 (2017) (Bay, Comm'r, concurring) (observing that "all energy resources" receive subsidies, and that "an idealized vision of markets free from the influence of public policies . . . does not exist"). Similarly, FERC told the Supreme Court in *Hughes* that states are "free" to adopt such programs, "even if the price signals in the regional wholesale capacity market indicate that no [such] resources are needed." *Hughes* U.S. Amicus Brief at 33.

As explained above, *Allco* considered a state initiative to raise revenue for clean energy generators via long-term bilateral contracts, thereby "increas[ing] the supply of electricity" and "plac[ing] downward pressure on" wholesale prices. 861 F.3d at 89. But the Court concluded that "[t]his incidental effect on wholesale prices does not . . . amount to a regulation of the interstate wholesale electricity market that infringes on FERC's jurisdiction." *Id.* at 101[4]; *see also Northwest Central*, 489 U.S. at 516 ("[R]egulating producers in such a way as to have some impact on the purchasing decisions and hence costs of interstate pipelines does not without more result in conflict pre-emption.").

Faced with this precedent, Plaintiffs concede New York's authority to enact "measures that may have an indirect effect on . . . price signals," but insist that "New York cannot directly distort the price signals that the auctions send by setting a higher, state-approved rate for wholesale electricity sales." Br. of Appellants 49. To the extent the ZEC program distorts an efficient wholesale market, it does so by increasing

[4] *Allco* did not explicitly state whether its holding fell under a field or conflict preemption analysis. However, as the district court notes, Special App'x 33 n.22, there is no basis to conclude that an "incidental effect" on wholesale prices withstands field preemption, but not conflict preemption.

revenues for qualifying nuclear plants, which in turn increases the supply of electricity, which in turn lowers auction clearing prices. But that is (at best) an incidental effect resulting from New York's regulation of producers. In any event, ZECs do not guarantee a certain wholesale price that displaces the NYISO auction price.

FERC uses auctions to set wholesale prices and to promote efficiency with the background assumption that the FPA establishes a dual regulatory system between the states and federal government and that the states engage in public policies that affect the wholesale markets. Accordingly, the ZEC program does not cause clear damage to federal goals, and Plaintiffs have failed to state a plausible claim for conflict preemption.

VII

The Commerce Clause authorizes Congress "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. "[T]he Clause was designed in part to prevent trade barriers that had undermined efforts of the fledgling States to form a cohesive whole following their victory in the Revolution." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 807 (1976). Accordingly, the Supreme Court has inferred a "negative or dormant implication" to the Commerce Clause, which "prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (internal quotation marks omitted).

However, the states retain "a residuum of power . . . to make laws governing matters of local concern which

nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 669 (1981) (internal quotation marks omitted). Accordingly, a state law or regulation offends the dormant Commerce Clause only if it "(1) clearly discriminates against interstate commerce in favor of intrastate commerce, (2) imposes a burden on interstate commerce incommensurate with the local benefits secured, or (3) has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question." *Selevan v. N.Y. Thruway Auth.* 584 F.3d 82, 90 (2d Cir. 2009) (internal quotation marks omitted).

Plaintiffs contend that the ZEC program violates the dormant Commerce Clause under the first two grounds: the program discriminates against interstate commerce by "deliberately propping up the in-state Exelon plants via a distortion of the interstate energy market," Br. of Appellants 52, and inflicts an undue burden on interstate commerce that outweighs any local interests by "impos[ing] market-distorting burdens that will drive out, and deter entry of, more cost-efficient, environmentally friendly out-of-state generators," *id.* at 53. We do not reach the merits of these claims because we conclude that Plaintiffs lack Article III standing.

The jurisdiction of the federal courts is limited to "Cases" and "Controversies." U.S. Const. art. III, § 2. There is no case or controversy unless a plaintiff has standing to challenge the defendant's conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Although the district court did not address whether Plaintiffs have standing on their dormant Commerce Clause claim, "[t]he doctrine of standing . . . requires

federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (internal quotation marks omitted).

Article III standing requires a plaintiff to have suffered an "injury in fact" that is "fairly traceable" to the defendant's challenged conduct and that is "likely to be redressed by a favorable decision." *Spokeo, Inc. v. Robins*, 138 S. Ct. 1540, 1547 (2016). At the pleading stage, "the plaintiff must clearly allege facts demonstrating each element." *Id.* (internal quotation marks and ellipsis omitted). Accordingly, to show standing for their dormant Commerce Clause claim, Plaintiffs must demonstrate that their alleged injuries are traceable to (i.e., "the result of," *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983), or "a consequence of," *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982)) discrimination against interstate commerce.

Plaintiffs allege that they are injured because the ZEC program allows "favored New York power plants to prevail in interstate competition against Plaintiffs" by underbidding them in the wholesale electricity markets. Br. of Appellants 49. Plaintiffs do not represent that they own any nuclear plants, in-state or out. Special App'x 40. If the PSC awarded ZECs in a non-discriminatory manner to out-of-state nuclear plants (as it may do in the future under the terms of the CES Order), there would be no abatement in the injury Plaintiffs claim to suffer from the general market-distorting effects of the ZEC program. In short, Plaintiffs' injuries "would continue to exist even if the [legislation] were cured" of the alleged discrimination.

Johnson v. U.S. Office of Pers. Mgmt., 783 F.3d 655, 662 (7th Cir. 2015). Because Plaintiffs' asserted injuries are not traceable to the alleged discrimination against out-of-state entities, but (rather) arises from their production of energy using fuels that New York disfavors, they lack Article III standing to challenge the ZEC program.

CONCLUSION

The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of September, two thousand and eighteen.

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Docket No. 17-2654

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COALITION FOR COMPETITIVE ELECTRICITY, DYNEGY INC., EASTERN GENERATION, LLC, ELECTRIC POWER SUPPLY ASSOCIATION, NRG ENERGY, INC., ROSETON GENERATING LLC, SELKIRK COGEN PARTNERS, L.P.,

Plaintiffs-Appellants,

v.

AUDREY ZIBELMAN, in her official capacity as Chair of the New York Public Service Commission, PATRICIA L. ACAMPORA, in her official capacity as Commissioner of the New York Public Service Commission, GREGG C. SAYRE, in his official capacity as Commissioner of the New York Public Service Commission, DIANE X. BURMAN, in her official capacity as Commissioner of the New York Public Service Commission,

Defendants-Appellees,

EXELON CORP., R.E. GINNA NUCLEAR POWER PLANT LLC, CONSTELLATION ENERGY NUCLEAR GROUP, LLC, NINE MILE POINT NUCLEAR STATION LLC,

Intervenor-Defendants-Appellees.

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JUDGMENT

Before:

Dennis Jacobs, Debra Ann Livingston,
Circuit Judges,

Pamela K. Chen, *District Judge.*[*]

The appeal in the above captioned case from a judgment of the United States District Court for the Southern District was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

[*] Judge Pamela K. Chen, of the United States District Court for the Eastern District of New York, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT,
S.D. NEW YORK

16-CV-8164 (VEC)

COALITION FOR COMPETITIVE ELECTRICITY, DYNEGY INC., Eastern Generation, LLC, Electric Power Supply Association, NRG Energy, Inc., Roseton Generating LLC, and Selkirk Cogen Partners, L.P.,

Plaintiffs,

v.

Audrey ZIBELMAN, in her official capacity as Chair of the New York Public Service Commission, Patricia L. Acampora, Gregg C. Sayre, and Diane X. Burman, in their official capacities as Commissioners of the New York Public Service Commission,

Defendants,

and

Constellation Energy Nuclear Group, LLC, Exelon Corporation, R.E. Ginna Nuclear Power Plant LLC, and Nine Mile Point Nuclear Station LLC,

Intervenors.

Signed 07/25/2017

David A. Barrett, Jonathan David Schiller, Boies, Schiller & Flexner LLP, New York, NY, Stuart Harold Singer, William Thomas Dzurilla, Boies, Schiller & Flexner LLP, Fort Lauderdale, FL, for Plaintiffs.

Elizabeth Austin Edmondson, Jenner & Block LLP, New York, NY, David W. DeBruin, Matthew E. Price, William K. Dreher, Zachary C. Schauf, Jenner & Block, LLP, Jeffrey Alan Schwarz, Peter Hopkins, Scott Harris Strauss, Amber

Martin, Jessica Bell, Spiegel & McDiarmid, LLP, Washington, DC, John Calvin Graham, Jonathan D. Feinberg, Salomon Tsimi Menyeng, State of New York, Department of Public Service, John J. Sipos, Office of the Attorney General New York State, Albany, NY, for Defendants.

MEMORANDUM OPINION & ORDER

VALERIE CAPRONI, United States District Judge:

Some say that human-caused global warming is a "hoax,"[1] while others accept the overwhelming scientific conclusion that human activities, and particularly carbon dioxide discharges into the atmosphere, are

[1] Multiple times before and during his presidential campaign, President Donald Trump stated that climate change is a hoax. Louis Jacobson, *Yes, Donald Trump Did Call Climate Change a Chinese Hoax*, POLITIFACT (June 3, 2016), http://www.politifact.com/truth-ometer/statements/2016/jun/03/hillary-clinton/yes-donald-trump-did-call-climate-changechinese-h/. President Trump has recently refused to confirm whether he still considers climate change to be a hoax, Peter Baker, *Does Donald Trump Still Think Climate Change Is a Hoax? No One Can Say*, NEW YORK TIMES (June 2, 2017), https://www.nytimes.com/2017/06/02/us/politics/climate-changetrump-hoax-scott-pruitt.html, and a number of senior leaders and advisers in the Executive and Legislative branches, including Scott Pruitt, the head of the Environmental Protection Agency, have been deeply skeptical of human-caused climate change, including to the point of outright denial. Coral Davenport, *Climate Change Denialists in Charge*, NEW YORK TIMES (Mar. 27, 2017), https://www.nytimes.com/2017/03/27/us/politics/climatechange-denialists-in-charge.html.

causing the planet to warm. Although no individual State can reverse the trend all by itself, New York and many other States have decided that they will do their part to reduce the emissions that contribute to global warming. The issue in this case is whether the method New York has chosen to facilitate its doing so is constitutional. For the reasons that follow, the Court concludes that the New York program is constitutional.

Plaintiffs are various electrical generators and trade groups of electrical generators. They challenge one aspect of the Clean Energy Standard ("CES") Order, adopted by the New York Public Service Commission ("PSC"), that awards credits to certain nuclear generators for their zero-emissions electricity production. Plaintiffs claim that this program is preempted under the Federal Power Act ("FPA") and that it violates the dormant Commerce Clause.

Defendants, who are PSC members, move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that there is no private right of action for Plaintiffs' preemption claims and that, even if there were, Plaintiffs' claims would fail as a matter of law. Notice of Defendants' Motion to Dismiss, Dkt. 54. Intervenors, who are the nuclear generators receiving the zero-emissions credits and their owners, also move to dismiss pursuant to Rule 12(b)(6). Notice of Motion, Dkt. 76. For the following reasons, the Court GRANTS both motions to dismiss.

BACKGROUND[2]

The Electricity Market

In New York, wholesale electricity is bought and sold through market-based auctions administered by the New York Independent System Operator ("NYISO"). Compl. ¶ 28. The NYISO, which is regulated by the Federal Energy Regulatory Commission ("FERC"), conducts two types of auctions: energy and capacity. Compl. ¶¶ 28–29. Energy auctions are for the purchase and sale of electricity itself, whereas capacity auctions are for the purchase and sale of options to purchase electricity. Compl. ¶ 36. Retail electricity suppliers, also called load-serving entities ("LSEs"), purchase electricity at wholesale from generators in these auctions. Compl. ¶ 35. Although some of the buyers are located outside New York, most of the buyers are in-state utilities that resell energy at retail to New York customers and businesses. Compl. ¶ 28. The energy suppliers in the wholesale auction include generators located inside and outside of New York. Compl. ¶ 28.

The NYISO auctions determine electricity prices in the New York wholesale market. Compl. ¶ 27. The

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[2] The facts are taken from the Complaint and the Order Adopting a Clean Energy Standard ("CES Order"), which is incorporated by reference in the Complaint. In deciding the motions to dismiss, the Court accepts as true the facts alleged in the Complaint and draws all reasonable inferences in Plaintiffs' favor. *Koch v. Christie's Intern, PLC*, 699 F.3d 141, 145 (2d Cir. 2012). The Court may rely directly on the CES Order because a complaint is "deemed to include . . . any statements or documents incorporated in it by reference." *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991). The parties do not dispute that the Complaint incorporated the CES Order by reference.

auction operates by "stacking" bids from generators for the sale of energy or capacity, beginning with the lowest bid and moving up until demand is satisfied. Compl. ¶¶ 32–33. The price of the highest-stacked bid that satisfies demand is known as the "market clearing price." Compl. ¶ 33. Any generator that bids at or below the market-clearing price "clears" the auction and is paid the market-clearing price, regardless of the price the generator actually bid.[3] Compl. ¶¶ 33, 39. This pricing mechanism incentivizes generators to be efficient and cost-effective: "it creates price signals for new capacity to enter the market if [the generator] can supply capacity at prices below the clearing price. At the same time, the market provides price signals for existing suppliers to exit the market if they are unable to beat the clearing price." Compl. ¶ 40 (citation and internal quotation marks omitted).

Nuclear generators, such as Intervenors, bid as so-called "price-takers" in the NYISO auctions, meaning that they sell their entire output at the market-clearing price. Compl. ¶ 34. Unlike other types of electricity generators that can adjust their output to produce more or less energy depending on price, nuclear generators run continuously at maximum output. Compl. ¶ 34. Nuclear generators thus sell their entire electricity output into the auctions regardless of the

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[3] An example from *Hughes v. Talen Energy Mktg., LLC*, —— U.S. ——, 136 S.Ct. 1288, 194 L.Ed.2d 414 (2016) is illustrative: "For example, if four power plants bid to sell capacity at, respectively, $10/unit, $20/unit, $30/unit, and $40/unit, and the first three plants provide enough capacity to satisfy projected demand, [the auction administrator] will purchase capacity only from those three plants, each of which will receive $30/unit, the clearing price." 136 S.Ct. at 1293.

price—even if the price is below their cost of production. Compl. ¶ 34.

Plaintiffs allege that the nuclear generators' price-taking behavior depresses market-clearing prices because the nuclear generators increase the energy supply available at auction. Compl. ¶ 34. Plaintiffs further allege that all electricity produced by these nuclear generators must be sold in the NYISO energy auctions because they have no alternative way to sell their output. Compl. ¶¶ 34, 64.

New York's ZEC Program

In order to promote the development of clean energy as part of New York's effort to stanch global warning, the PSC issued the CES Order. CES Order, Dkt. 76–1.

The CES Order created two programs: Renewable Energy Credits ("RECs") and Zero–Emission Credits ("ZECs"). CES Order at 13–14. The CES Order was adopted in furtherance of New York's goal to generate fifty percent of its electricity using renewable sources by 2030, which supports New York's broader mission to reduce greenhouse gas emissions statewide by forty percent by 2030. CES Order at 2, 12.

Tier 1 of the CES Order, which implements the REC program, requires all New York LSEs "to serve their retail customers by procuring new renewable resources." CES Order at 14; *see also* Compl. ¶ 49. Generators that produce energy from renewable sources, like wind or solar, are awarded a credit (a REC) for each megawatt-hour ("MWh") of renewable-generated electricity produced from renewable resources. Compl. ¶ 49; CES Order at 106. The New York State Energy Research and Development Authority ("NYSERDA") purchases RECs from generators, thereby subsidizing their cost of production, and, in turn, sells those RECs

to LSEs. CES Order at 16, 107–08. Each LSE is required to purchase RECs in an amount based on a percentage of the total load served by that LSE or make an alternative compliance payment. Compl. ¶ 49; CES Order at 14–16. The cost of the RECs is passed on to commodity customers. CES Order at 17.

Tier 3 of the CES Order establishes New York's ZEC program, the program challenged in this case. CES Order at 19. A ZEC is a "credit for the zero-emissions attributes of one megawatt-hour of electricity production by" an eligible nuclear facility. CES Order, App'x E, at 1. Through the ZEC program, New York aims to "encourage the preservation of the environmental values or attributes of zero-emissions nuclear-powered electric generating facilities for the benefit of the electric system, its customers and environment." CES Order, App'x E, at 1. In particular, the ZEC program ensures that New York's nuclear generators—which comprise thirty-one percent of New York's electric generation mix and collectively avoid the emission of over fifteen million tons of carbon dioxide per year continue to contribute to New York's electric generation mix pending the development of new renewable energy resources between now and 2030. CES Order at 19. According to the CES Order, losing the nuclear energy contributed by the generators before new renewable resources are developed "would undoubtedly result in significantly increased air emissions" and a "dangerously higher reliance on natural gas"; without the carbon-free attributes of the nuclear generators, New York would have to rely more heavily on existing fossil-fueled energy plants or the construction of new natural gas plants for its electricity, all of

which would significantly increase carbon emissions.[4] CES Order at 19. The CES Order cites Germany as a case in point: when Germany abruptly closed its nuclear plants following the Fukushima nuclear disaster, the electricity that had formerly been produced by nuclear generation was replaced by electricity generated by coal, causing carbon emissions to rise despite a simultaneous and "aggressive" increase in solar generation. CES Order at 19.

A nuclear generator is eligible for ZECs if it makes a showing of "public necessity," i.e., the facility's revenues "are at a level that is insufficient to provide adequate compensation to preserve the zero-emission environmental values or attributes historically provided by the facility." Compl. ¶ 67 (quoting CES Order at

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[4] *Amici* New York Public Interest Research Group, Green Education and Legal Fund, Inc., Safe Energy Rights Group, Inc., and Promoting Health and Sustainable Energy, Inc. (collectively, "PIRG *Amici*") argue that the generation of nuclear power is "neither emissions free nor 'zero-emissions,'" but instead emits radiation, waste heat, and greenhouse gases. Memorandum of Law of the Amici ("PIRG *Amici* Mem.") 5–13, Dkt. 112–3. This may be true, but PIRG *Amici* do not go so far as to argue that the generation of nuclear power produces the same amount of noxious emissions as the generation of energy from fossil fuel or natural gas. At least with respect to greenhouse gas emissions, they assert that among the various ways to generate electricity, nuclear generation falls in the middle of the spectrum (wind producing the least and coal the most greenhouse gas emissions). PIRG *Amici* Mem. 8–9. The thrust of PIRG *Amici*'s argument is that when creating the ZEC program, the PSC did not consider whether renewable energy sources could have replaced the nuclear generators or whether some nuclear power plants could be retired with no impact on electricity availability. PIRG *Amici* Mem. 8, 14–16, 18. The Court acknowledges that New York may have been able to adopt a more aggressive approach to reducing greenhouse gas emissions, but nothing requires the States to make the perfect the enemy of the good.

124). Any nuclear generator, regardless of its location, is eligible for ZECs, so long as the generator has historically contributed to the resource mix of clean energy consumed by New York retail consumers.[5] Compl. ¶ 68 (citing CES Order at 124). Pursuant to the CES Order, the nuclear generators sell their ZECs to NYSERDA at a price administratively determined by the PSC. Compl. ¶ 69. LSEs are required to purchase ZECs from NYSERDA in an amount proportional to their customers' share of the total energy consumed in New York.[6] CES Order at 20, 151; Compl. ¶ 73. The LSEs pass the costs of their ZEC purchases to their customers, the retail ratepayers. CES Order at 20; Compl. ¶ 73.

ZEC prices are calculated by the PSC using the federal estimate of the social cost of carbon and a

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[5] This year, only three nuclear generators in New York, Intervenors Robert Emmett Ginna plant ("Ginna"), James A. FitzPatrick plant ("FitzPatrick"), and Nine Mile Point plant, were deemed eligible for ZECs. CES Order at 128; *see also* Compl. ¶ 58. Plaintiffs allege that without financial support from the State, the Ginna, FitzPatrick, and Nine Mile Point nuclear generators would have gone out of business. Compl. ¶¶ 52, 54, 56–58. The Ginna and Nine Mile Point nuclear plants are indirectly owned by Intervenor Constellation Energy Nuclear Group, LLC, which is a joint venture between Intervenor Exelon and nonparty EDF Inc. Declaration of Jeanne Jones ("Jones Decl.") ¶ 2, Dkt. 40–3; *see also* Compl. ¶ 54. Exelon is in the process of purchasing the FitzPatrick nuclear plant. Jones Decl. ¶¶ 6–7.

[6] LSEs are required to purchase the percentage of ZECs "that represents the portion of the electric energy load served by all such LSEs" in a given year. CES Order at 20. Although LSEs must "enter into a contractual relationship" with NYSERDA to purchase their *pro rata* portion of ZECs, LSEs also may seek permission to purchase ZECs directly from the eligible nuclear facilities. CES Order at 151–52.

forecast of wholesale electricity prices.[7] Compl. ¶ 71 (citing CES Order at 131). Specifically, for a two-year period, the price of each ZEC is the social cost of carbon less the generator's putative value of avoided greenhouse gas emissions less the amount of the forecast energy price. Compl. ¶¶ 70–71 (citing CES Order at 131). Put differently, if the forecast wholesale price of electricity increases, the price of a ZEC decreases. Compl. ¶ 71. For the first two years of the ZEC program, from April 1, 2017, through March 31, 2019, the PSC has set the ZEC price at $17.48 per MWh. Compl. ¶ 70. Thus, "each qualifying nuclear generator will get an additional $17.48 for each MWh of electricity it generates (subject to a possible cap), in addition to the price the facility receives for the sale of the electricity and capacity in the [NYSIO] market." Compl. ¶ 70.

Plaintiffs allege that under the ZEC program, the nuclear generators eligible for ZECs effectively receive a higher price for their energy than they would have without the ZEC program and that the ZEC subsidies distort the market-clearing price in the NYISO auctions. Compl. ¶¶ 43–45. Plaintiffs allege that because the ZEC program allows the eligible nuclear generators to participate in the NYISO auctions when they otherwise would have gone out of business, New York "is using the ZEC subsidy to exert a large depressive effect on energy and capacity prices, which one group of experts estimated at $15 billion over 12 years."

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[7] The PSC noted that it established an administrative process to set ZEC prices, rather than allowing them to be set by the market, because there would not be a competitive market process to set ZEC prices. CES Order, App'x E at 4 ("[T]here are too few owners of the affected generation facilities for there to be a valid competitive process to determine the prices as the owners would have too much market power for effective competition.").

Compl. ¶ 47. According to Plaintiffs, this depressive effect will cause generators, including Plaintiffs, to receive a lower price than they otherwise would have received and will cause their bids to fail to clear the auctions when they otherwise would have cleared. Compl. ¶¶ 74, 81, 87.

Plaintiffs claim that the ZEC program is preempted under the FPA and that it violates the dormant Commerce Clause. Defendants and Intervenors move to dismiss, arguing that: Plaintiffs lack a private right of action to pursue their preemption claims in federal court; the ZEC program is not preempted; and the ZEC program does not violate the dormant Commerce Clause. For the following reasons, the Court holds that Plaintiffs may not raise their preemption claims pursuant to the Court's equity jurisdiction; that the ZEC program is neither field nor conflict preempted; and that the ZEC program does not violate the dormant Commerce Clause.

DISCUSSION[8]

In reviewing a Rule 12(b)(6) motion to dismiss, the Court accepts all of the nonmovant's factual allegations as true and draws all reasonable inferences in the nonmovant's favor. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Although all factual allegations contained in the complaint are assumed to be true, this tenet is

[8] The Court cites the parties' briefs as the following: Memorandum of Law in Support of Defendants' Motion to Dismiss, Dkt. 55, is "Defs. Mem."; Memorandum of Law in Support of Motion to Dismiss of Movant–Intervenors, Dkt. 77, is "Intervenors Mem."; Plaintiffs' Memorandum in Opposition to Motions to Dismiss, Dkt. 95, is "Opp."; Reply in Support of Defendants' Motion to Dismiss, Dkt. 105, is "Defs. Reply"; and Reply in Support of Motion to Dismiss of Intervenors, Dkt. 103, is "Intervenors Reply."

"inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *see also Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. To survive a Rule 12(b)(6) motion to dismiss, the complaint must "state a claim to relief that is plausible on its face." *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937 (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955). ""A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

I. EQUITY JURISDICTION

The Supremacy Clause does not create a cause of action for preemption claims, *Armstrong v. Exceptional Child Ctr., Inc.*, —— U.S. ——, 135 S.Ct. 1378, 1383, 191 L.Ed.2d 471 (2015), and Plaintiffs do not argue that the FPA itself creates a private right of action. Accordingly, Plaintiffs' preemption claims are dependent on this Court having equity jurisdiction over the claims.

Since *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), "the Supreme Court has consistently recognized federal [equity] jurisdiction over declaratory—and injunctive—relief actions to prohibit the enforcement of state or municipal orders alleged to violate federal law." *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 144 (2d Cir. 2016) (collecting cases). Nevertheless, federal courts' "equity [jurisdiction] to enjoin unlawful executive action is subject to express and implied statutory limitations." *Armstrong*, 135 S.Ct. at 1385. The FPA does not expressly preclude actions in equity, but the parties contest whether Congress implicitly intended to foreclose equitable relief under the FPA.

In *Armstrong*, the Supreme Court held that Congress implicitly foreclosed equitable relief under Section 30(A) of the Medicaid Act, which healthcare providers sought to enforce by enjoining state officials from reimbursing medical service providers at rates lower than the federal statute required. 135 S.Ct. at 1382, 1385. The *Armstrong* Court reasoned that Congress intended to foreclose equitable relief because (1) pursuant to the Medicaid Act, "the sole remedy" for a State's failure to comply with the Medicaid Act's requirements was the withholding of Medicaid funds by the Secretary of Health and Human Services, and (2) Section 30(A), which mandates that States provide for payments that are "consistent with efficiency, economy, and quality of care" while "safe-guard[ing] against unnecessary utilization of . . . care and services," was judicially unadministrable. *Id.* at 1385 (alteration in *Armstrong*). According to the Supreme Court, the combination of those two features means that Congress intended to preclude private enforcement in equity of Section 30(A). *Id.* ("Explicitly conferring enforcement of this judgment-laden standard upon the Secretary alone establishes . . . that Congress 'wanted to make the agency remedy that it provided exclusive,' . . . ." (quoting *Gonzaga Univ. v. Doe,* 536 U.S. 273, 292, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002) (Breyer, J., concurring))).

In *Friends of the East Hampton Airport*, the Second Circuit applied *Armstrong's* two criteria to the Airport Noise and Capacity Act ("ANCA") in considering whether Congress intended to foreclose equitable relief; the Second Circuit held that Congress did not so intend. 841 F.3d at 145–47. Under ANCA, there is no "sole remedy" because ANCA not only provides for the loss of federal funding as a penalty for violating ANCA but also grants the Secretary of Transportation author-

ity to pursue appropriate legal remedies, including injunctive relief. *Id.* at 145–46 (citing 49 U.S.C. §§ 47526, 47533). The Second Circuit reasoned that "[t]he fact that Congress conferred such broad enforcement authority on the [Federal Aviation Administration], and not on private parties, does not imply its intent to bar such parties from invoking federal jurisdiction where, as here, they do so not to enforce the federal law themselves, but to preclude a municipal entity from subjecting them to local laws enacted in violation of federal requirements."[9] *Id.* at 146. The Second Circuit also held that ANCA was judicially administrable because it set forth a simple rule—namely, that airports seeking to impose noise restrictions on certain types of aircraft must obtain the consent of aircraft operators or the approval of the Federal Aviation Administration. *Id.* at 146–47 (citing 49 U.S.C. § 47524(c)).

The FPA tacitly forecloses private parties from invoking equity jurisdiction to challenge state laws enacted in alleged violation of the FPA because Congress implicitly provided a "sole remedy" in the FPA—specifically, enforcement by FERC. Similar to ANCA, the FPA grants FERC broad enforcement authority. For

[9] The Second Circuit's caveat relative to private parties who invoke federal jurisdiction "to enforce the federal law themselves" as compared to seeking "to preclude a municipal entity from subjecting them to local laws enacted in violation of federal requirements" is not entirely clear. It would seem that the Second Circuit is raising a standing issue because a private party who seeks to enforce the federal law but does not seek to preclude the application of a local law to itself would appear to lack standing. But the Second Circuit does not mention standing in its equity jurisdiction analysis, nor is it clear how the issue of standing *vel non* should be viewed when attempting to determine whether a cause of action exists in the first instance.

example, the FPA grants FERC discretion to bring an action in federal district court to enjoin any person violating the FPA or to enforce compliance. 16 U.S.C. § 825m(a). The FPA also requires every public utility to file with FERC rates for all sales subject to FERC's jurisdiction and empowers FERC to hold hearings to examine new or changed rates, to suspend rates, and to determine rates. 16 U.S.C. §§ 824d(c)-(e), 824e(a). Finally, the FPA authorizes any person to file a complaint with FERC to challenge, *inter alia*, anything done by a regulated entity in contravention of the FPA. 16 U.S.C. §§ 824e(a), 825e. But, unlike ANCA, Congress provided for a narrow private cause of action under the FPA in the Public Utility Regulatory Policies Act ("PURPA"), which authorizes private parties to challenge state rules governing small power production facilities, after first exhausting their administrative remedies. 16 U.S.C. § 824a–3(h)(2)(B). Congress's decision to create a limited private cause of action suggests that "the omission of a general private right of action in the [FPA] should . . . be understood as intentional." *Vill. of Old Mill Creek v. Star*, No. 17 CV 1163, 2017 WL 3008289, at *9 (N.D. Ill. July 14, 2017); *see Alexander v. Sandoval*, 532 U.S. 275, 290, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985) ("[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." (citation and internal quotation marks omitted omitted)). Thus, the FPA precludes private enforcement except as provided for by PURPA, and private parties such as Plaintiffs "cannot, by invoking [the Court's] equitable

powers, circumvent Congress's exclusion of private enforcement." *Armstrong,* 135 S.Ct. at 1385.

The second indicator of congressional intent to preclude equitable relief to a private litigant, according to *Armstrong*, is the presence of a judicially unadministrable standard. The FPA's requirement that wholesale electricity rates be just and reasonable, 16 U.S.C. § 824d(a), is not judicially unadministrable.[10] The fact that courts must "afford great deference" to FERC in its determination of just and reasonable rates, *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., Wash.*, 554 U.S. 527, 532, 128 S.Ct. 2733, 171 L.Ed.2d 607 (2008), does not mean that the determination of just and reasonable rates is judicially unadministrable—courts may defer to FERC's determination, but they do not abstain from all judgment regarding what constitutes a just and reasonable rate, *see, e.g.*, *id.* at 545–46, 128 S.Ct. 2733 (the Supreme Court in *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 76 S.Ct. 368, 100 L.Ed. 388 (1956), "provided a definition of what it means for a rate to satisfy the just-and-reasonable standard in the contract context"); *Cent. Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 109–11 (2d Cir. 2015) (holding

[10] Independent of whether the FPA's requirement that wholesale electricity rates be just and reasonable is a judicially administrable standard, the parties dispute whether Plaintiffs' preemption claims require the Court to apply that standard. Plaintiffs argue that they seek only to ensure that the FERC-set rate continues to govern New York wholesale energy transactions and are not asking the Court to set rates. Opp. 16–17. Defendants, on the other hand, argue that Plaintiffs' preemption claims are rate-related requests for injunctive relief that implicate the just and reasonable rate-setting standard. Defs. Reply 11. The Court agrees with Plaintiffs but does not base its holding on this argument.

that FERC's determination of just and reasonable rates was adequately supported and not unreasonable); *Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 918 (9th Cir. 2011) ("The Supreme Court has long held that the statutory command that rates be 'just and reasonable' means that courts must balance 'the investor and the consumer interests,' and '[i]f the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry . . . is at an end.'" (quoting *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602–03, 64 S.Ct. 281, 88 L.Ed. 333 (1944))). Indeed, by allowing FERC to file federal lawsuits, 16 U.S.C. § 825m(a), Congress necessarily anticipated that courts might have to oversee the enforcement of the just and reasonable rate standard, albeit with deference to FERC.[11]

In sum, the Court finds that the first but not the second of *Armstrong's* factors indicates that Congress intended to preclude equitable relief to private parties. There is no indication in *Armstrong* that both factors

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[11] In a nearly identical case in which electricity generators challenged a ZEC program as preempted by the FPA, the District Court for the Northern District of Illinois came to the opposite conclusion, namely that determining a "just and reasonable" rate is a judicially unadministrable standard. *Vill. of Old Mill Creek*, 2017 WL 3008289, at *9. For the reasons explained *supra*, this Court disagrees with the Northern District of Illinois's conclusion that "just and reasonable" is judicially unadministrable. Moreover, unlike this Court, *see supra* note 10, that court thought that it would need to apply that standard and effectively get involved in rate-setting in order to resolve the plaintiffs' preemption claim. The Northern District of Illinois concluded that because there was "too much" distortion of the wholesale market, the court would be required to address how much states could subsidize local industry that touched the wholesale energy market before the effect of those subsidies resulted in a rate that was not just and reasonable. *Id.* at *9.

must be satisfied in order to conclude that Congress intended to foreclose equitable relief to private parties. To the contrary, the Supreme Court in *Armstrong* considered the second factor—judicial administrability—in the event the provision authorizing the Secretary of Health and Human Services to enforce the statute by withholding funds "might not, *by itself*, preclude the availability of equitable relief." 135 S.Ct. at 1385. The limited private right of action provided by PURPA is by itself sufficient to establish that Congress intended to foreclose equitable relief. Between a statute that establishes a narrow private cause of action allowing private lawsuits in some but not most cases and a statute that establishes a specific administrative remedy, the former indicates more clearly than the latter that Congress chose to eliminate general equitable relief for private parties. The issue of creating a private cause of action was squarely before Congress when it drafted and enacted the former provision, whereas Congress did not necessarily consider the possibility of a private right of action in drafting and enacting the latter provision. This Court can, therefore, more confidently infer that Congress intended to foreclose a private right of action in equity in the former scenario than in the latter. Accordingly, this Court does not have equity jurisdiction over Plaintiffs' FPA preemption claims. Nevertheless, even if the Plaintiffs could invoke the Court's equity jurisdiction, for the reasons provided below, Plaintiffs' preemption claims would fail.

II. PREEMPTION

The Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST.,

art. VI, cl. 2. In other words, "federal law preempts contrary state law." *Hughes*, 136 S.Ct. at 1297.

In considering a federal law's preemptive effect, "the ultimate touchstone" is Congress's purpose in enacting the law. *Id.* at 1297 (quoting *Altria Group, Inc. v. Good*, 555 U.S. 70, 76, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008)). Relatedly, in determining whether a state law is preempted, the Court must "consider[ ] the *target* at which the state law *aims.*" *Oneok, Inc. v. Learjet, Inc.*, —— U.S. ——, 135 S.Ct. 1591, 1599, 191 L.Ed.2d 511 (2015) (emphases in original).

State laws may be either "field" or "conflict" pre-empted. Field preemption exists where "Congress has forbidden the State to take action in the *field* that the federal statute pre-empts." *Oneok*, 135 S.Ct. at 1595. In such circumstances, "Congress may have intended to foreclose any state regulation in the *area*, irrespective of whether state law is consistent or inconsistent with federal standards." *Id.* (citation and internal quotation marks omitted). Conflict preemption, by contrast, "exists where compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citation and internal quotation marks omitted).

Plaintiffs allege that the CES Order is both field and conflict preempted by the FPA. For the reasons set forth below, the Court concludes that it is neither.[12]

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[12] The Court notes that the Northern District of Illinois also held that the Illinois ZEC program was neither field nor conflict preempted, for many of the same reasons discussed *infra*. *Vill. of Old Mill Creek*, 2017 WL 3008289, at *10–14 (granting motions to dismiss).

A. Field Preemption

The FPA is a paragon of cooperative federalism; it divides responsibility for the regulation of energy between state and federal regulators. *See Hughes*, 136 S.Ct. at 1292. For statutes such as the FPA, "where 'coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one.'" *Id.* at 1300 (Sotomayor, J., concurring) (quoting *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973)).

FERC, on behalf of the federal government, has exclusive authority "to regulate 'the transmission of electric energy in interstate commerce' and 'the sale of electric energy at wholesale in interstate commerce.'" *FERC v. Elec. Power Supply Ass'n (hereafter, "EPSA")*, —— U.S. ——, 136 S.Ct. 760, 767, 193 L.Ed.2d 661 (2016) (quoting 16 U.S.C. § 824(b)(1)).[13] Particularly relevant here, FERC also has the authority "to ensure that rules or practices 'affecting' wholesale rates are just and reasonable." *Id.* at 774 (discussing 16 U.S.C. § 824e(a)); *see also* 16 U.S.C. § 824d(a). This "affecting" jurisdiction is limited to rules or practices that "*directly* affect the wholesale rate." *EPSA*, 136 S.Ct. at 774 (internal marks and citation omitted). "Indirect or tangential impacts on wholesale electricity rates" do not suffice; otherwise, the FPA's grant of jurisdiction to FERC would "assum[e] near-infinite breadth." *Id.*

Although FERC has substantial authority over interstate wholesale energy sales, the regulation of retail rates for sales of electricity belongs to the States.

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[13] A wholesale sale is "a sale of electric energy to any person for resale." 16 U.S.C. § 824(d).

Hughes, 136 S.Ct. at 1292. Within the zone of exclusive state jurisdiction are "within-state wholesale sales" and "retail sales of electricity (i.e., sales directly to users)." *EPSA*, 136 S.Ct. at 768. States also retain jurisdiction "over facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1). As discussed *supra*, to determine whether a State is regulating retail or wholesale rates, the Court must consider the target of the state law. *Oneok*, 135 S.Ct. at 1599.[14]

1. Unconstitutional "Tethering" Under *Hughes*

The Supreme Court recently grappled with the issue of preemption under the FPA in *Hughes v. Talen Energy Marketing, LLC*, —— U.S. ——, 136 S.Ct. 1288, 194 L.Ed.2d 414 (2016). In *Hughes*, the Court concluded that a Maryland energy program was preempted because it impermissibly "set[ ] an interstate wholesale rate, contravening the FPA's division of authority between state and federal regulators." 136 S.Ct. at 1297. The Maryland program, which obliged Maryland LSEs to enter into a contract-for-differences with a favored generator, required the favored generator to participate in the wholesale capacity auction, but guaranteed that generator the more favorable contract price (rather than the market-clearing price) for its energy. *Id.* at 1294–95, 1297. Importantly, the generator's receipt of the subsidy was explicitly contingent on the generator's sale of capacity into the wholesale auction: if the generator's capacity cleared the auction, and the market-clearing price was below

[14] Although *Oneok* involved the Natural Gas Act ("NGA") rather than the FPA, the Supreme Court "has routinely relied on NGA cases in determining the scope of the FPA, and vice versa." *Hughes*, 136 S.Ct. at 1298 n.10.

the price stipulated in the contract-for differences, the LSEs paid the generator the difference between the contract price and the clearing price. *Id.* at 1295. The generator did not receive the subsidy if its capacity failed to clear the auction. *Id.* Because the Maryland program conditioned the generator's receipt of the subsidy on the generator's participation in the auction, but guaranteed the generator a rate distinct from the market-clearing price, *Hughes* concluded that the Maryland program "adjust[ed] an interstate wholesale rate" and was accordingly preempted. *Id.* at 1297.

Hughes, however, left open the possibility for States to "encourag[e] production of new or clean generation through measures 'untethered to a generator's wholesale market participation.'" *Id.* at 1299 (citation omitted). In doing so, the Supreme Court declined to address the permissibility of other State measures to incentivize clean energy, such as "tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector." *Id. Hughes* emphasized: "So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable." *Id.*

Plaintiffs argue that the ZEC program is preempted under *Hughes* because, like the challenged Maryland program, the ZEC program is "tethered" to the wholesale auction. Plaintiffs argue that there is an impermissible tether because: (1) a nuclear generator is eligible for a ZEC only if the NYISO auction rates are insufficient for the generator to stay in business; (2) ZEC prices are calculated using forecast wholesale rates; and (3) the nuclear generators receiving the ZECs sell all of their power directly into the auction markets.

Opp. 19–22; Oral Arg. Tr. (hereafter, "Tr.") 22:2–23:22, 32:16–34:14, Dkt. 141 (Mar. 29, 2017). Unsurprisingly, Defendants and Intervenors dispute all of these arguments. The Court agrees with Defendants and Intervenors.

The Court is not convinced by Plaintiffs' first argument. A whole host of measures that States might employ to encourage clean energy development—such as tax incentives or direct subsidies—involve propping up the operation of a generator that might otherwise be unprofitable. *Hughes* did not prohibit such state assistance, *see Hughes*, 136 S.Ct. at 1299, and Plaintiffs have not argued that such state subsidies are *per se* preempted.

Nor does the use of forecast wholesale rates in calculating the ZEC price create an unconstitutional tether. *Hughes* clearly stated that the impermissible tether was "to a generator's wholesale market *participation*," *id.* at 1299 (emphasis added), and nowhere stated, implied or even considered that a State program's incorporation of the wholesale market price would provide a basis for preemption.[15] Plaintiffs have

[15] For that reason, Plaintiffs' argument that *Hughes* would not have been decided differently if the Maryland program incorporated forecast prices rather than actual ones, Opp. 19, misses the mark. Plaintiffs do not cite, and the Court has not found, any language in *Hughes* indicating that the Supreme Court considered the pricing calculation for the subsidies to be constitutionally relevant. The problem with Maryland's program was that the contract-for-difference guaranteed a price and conditioned that guaranteed price on the generator's energy clearing the auction. Although the auction-clearing price was considered in calculating the amount that would be received under the contract-for-difference (because the generator received the difference between the contract price and the clearing price), the use of the auction-clearing price as a metric was not constitutionally relevant;

not provided any persuasive argument why using wholesale prices, actual or forecast, as a metric for calculating the price of a ZEC creates a tether that leads to preemption.

Rochester Gas & Electric Corp. v. PSC, 754 F.2d 99 (2d Cir. 1985) forecloses Plaintiffs' attempt to hook preemption to price. *Rochester Gas* concluded that the State's consideration of a "reasonable estimate" of wholesale sales revenue in calculating intrastate retail rates (an area of State jurisdiction) did not render the state program at issue preempted. 754 F.2d at 100–01, 105. The Second Circuit found "a distinction between, on the one hand, regulating [wholesale] sales, and on the other, reflecting the profits from a reasonable estimate of those sales in jurisdictional rates." *Id.* at 105. Plaintiffs attempt to distinguish *Rochester Gas* by noting that *Rochester Gas* involved regulation at the retail level, Tr. 31:24–32:8, 48:6–10, but that is a distinction without a difference. Regulation of retail rates, like the regulation of environmental attributes, is within the zone of state jurisdiction, and *Rochester Gas* held that merely considering or incorporating wholesale prices in rate-setting for a state-regulated activity does not intrude upon federal authority.[16] *Rochester Gas*, 754 F.2d at 105 (New York

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rather, the impermissible tether was relative to the generator's wholesale market *participation*. *Id.* at 1295, 1299. The Court finds no basis to conclude that consideration of wholesale prices (whether forecast or actual) in pricing a subsidy is material to the preemption analysis.

[16] As a policy matter, using the forecast wholesale prices in the ZEC price calculation is a rational policy decision: it creates a one-way ratchet pursuant to which the ZEC price can be adjusted only downwards, *see* Compl. ¶ 71, Tr. 40:11–13, which inures to the benefit of Plaintiffs and the ratepayers. In addition, and as noted by Intervenors, "this is an odd argument for [Plaintiffs] to

"may impute revenue from a reasonable estimate of [wholesale] sales" in considering the generator's retail revenue).

Plaintiffs also argue that the ZEC program is directly tied to the wholesale auction because "[a]ll electricity produced by these nuclear generators must be sold directly or indirectly in the NYISO auctions, as there are no alternative markets." Compl. ¶ 64; *see also* Tr. 22:7–8 ("[T]he nuclear plants[ ] have no alternative but to sell their output in the energy auction . . . ."). Plaintiffs highlight that the nuclear generators are "price takers," Tr. 22:8, and that the nuclear generators "are exempt wholesale generators under the Public Utility Holding Act [("PUHA")]," which, according to Plaintiffs, requires the generators to sell all of their power and capacity into the wholesale auction. Tr. 22:10–16.

This argument is no more than an attempt to fashion a "tether" by jamming a square peg into a round hole; Plaintiffs' argument rewrites the CES Order. The CES Order itself does not require the nuclear generators to sell into the NYISO auction. As discussed *supra*, the nuclear generators receive ZECs for their zero-emissions *production* of energy, and not for the sale of that energy into the wholesale market; the CES Order grants ZECs to eligible nuclear generators, without any mention of whether or where the generators sell their power. *See* CES Order at 124–29 (discussing criteria for generators to receive ZECs). In that respect, the ZEC program is critically different from the challenged program in *Hughes*, which specifically *conditioned* subsidy payments on the generator's

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make, because it effectively concedes the legality of the first two years of the program where the price is fixed . . . ." Tr. 46:19–21.

sale of capacity into the auction. *See Hughes*, 136 S.Ct. at 1295, 1297, 1299.

Even accepting as true Plaintiffs' allegation that the generators do, as a matter of fact, sell their entire output into the auction, *see* Compl. ¶ 64, that is a business decision; it is not a requirement imposed by New York. Plaintiffs have not cited, and the Court has not been able to find, any case in which a state program has been found to be field preempted based on a private business decision rather than a state directive. What the generators choose to do, as a matter of their business organization or as a product of their business decisions, is irrelevant from a preemption perspective. *See Vill. of Old Mill Creek*, 2017 WL 3008289, at *13 (finding the ZEC program not preempted because "the ZEC program does not *mandate* auction clearing . . . and the state, while taking advantage of these attributes to confer a benefit on nuclear power, is not imposing a condition directly on wholesale transactions").

The fact that the nuclear generators currently claim status as exempt wholesale generators under PUHA is similarly irrelevant. Intervenors note that PUHA permits generators to withdraw their wholesale generator status, 18 C.F.R. § 366.7(c)(3),[17] but even if PUHA did not permit withdrawal and did require the generators to sell entirely into the auction, the critical point is

[17] To claim status as an exempt wholesale generator, the generator may file with FERC a notice of self-certification or a petition for a declaratory order requesting such status, which FERC then reviews. 18 C.F.R. §§ 366.7(a)-(b). A generator with exempt wholesale generator status may notify FERC that it no longer seeks to maintain its status if "there is any material change in facts that may affect" that generator's status. § 366.7(c)(3). In addition, the generator's status may be revoked if it fails to conform to the criteria required for such status. § 366.7(d).

that *New York* has not required the generators to participate in the auction: nothing about the CES Order tethers the generators' receipt of ZECs to their sale of energy into the auction. Put differently, a change in PUHA would not unravel the CES Order or interfere with New York's ZEC program. That is why PUHA is a red herring. The law of preemption examines state action and considers whether state action has intruded upon the federal government's turf. It cannot be disputed that the CES Order does not *require* the generators to sell into the auction—that is, it does not tether the generators' receipt of ZECs to their participation in the auction. It is that aspect of the CES Order that saves the ZEC program from the problems faced in *Hughes*.

In summary, the Maryland program at issue in *Hughes* conditioned the generators' receipt of a favorable rate (distinct from the auction rate) on the generators' capacity clearing the auction; there was a direct and concrete tie (or tether) between the contracts-for-difference and the generator's wholesale market participation. Here, a ZEC is available based on the environmental attributes of the energy production—specifically, for the generators' production of zero-emissions energy—without consideration of the generators' participation in the auction. Like the challenged Connecticut program in *Allco Fin. Ltd. v. Klee*, 861 F.3d 82 (2d Cir. 2017), the ZEC program does not suffer from *Hughes*'s "fatal defect" because the ZEC program "does not condition capacity transfers on [the wholesale] auction." 861 F.3d at 99. Rather, the purchase or sale of ZECs, like the contracts at issue in the Connecticut program, reflect transactions that occur "independent of the auction." *Id.*

2. ZECs Do Not Directly Adjust, Alter, or Affect the Wholesale Rate

Plaintiffs argue that the ZEC program is preempted because "the ZEC payments directly alter the wholesale price paid by LSEs and received by the nuclear generators." Opp. 19. They argue that by guaranteeing nuclear generators greater total compensation (i.e., the auction clearing price plus the value of its ZECs) than what they will receive at auction (clearing price only), the ZEC program disregards interstate wholesale rates that FERC has deemed just and reasonable. In addition, Plaintiffs argue that ZECs artificially depress the auction market-clearing price by allowing the nuclear generators to continue to participate as price-takers, thus increasing the supply of energy and thereby reducing the wholesale price.

Plaintiffs' argument commits the logical fallacy of concluding that state actions that affect the wholesale price in some way are the same as state actions that set the wholesale rate. In *EPSA*, the Supreme Court stated that "[t]o set a retail electricity rate is . . . to establish the amount of money a consumer will hand over in exchange for power." *EPSA*, 136 S.Ct. at 777. Although *EPSA* was addressing retail rates, this Court sees no principled basis in the statutory text, *EPSA*'s discussion or otherwise—to conclude that the definition of "to set a rate" is different in the retail and wholesale contexts. Moreover, the *EPSA* definition is consistent with *Hughes*. *Hughes* concluded that the Maryland program did adjust and "set" an interstate wholesale rate because the program "required [the generator] to participate in the [ ]capacity auction, but guarantees [the generator] a rate distinct from the clearing price for its interstate sales of capacity." *Hughes*, 136 S.Ct. at 1297. Here, the ZEC sales and the whole-

sale sales of energy or capacity are entirely separate transactions, with the ZEC sales occurring independently of the wholesale auction and neither one conditioned on the other. Therefore, the ZEC program does not adjust or "set" the amount of money that a generator receives in exchange for the generator's sale of energy or capacity into the auction.

Nor is the ZEC program preempted because of the ZECs' effects on the wholesale auction. FERC has jurisdiction over "rules or practices that *directly* affect the [wholesale] rate," *EPSA*, 136 S.Ct. at 774 (alterations in original) (citation and quotation marks omitted), but "indirect or tangential impacts on wholesale electricity rates" fall outside FERC jurisdiction, *id.* Even if ZECs have an effect on the wholesale auction—which Plaintiffs allege and the Court must accept as true—Plaintiffs have not plausibly alleged that the ZECs directly affect wholesale rates such that they intrude upon federal jurisdiction.

In *Allco*, the Second Circuit squarely rejected the argument that the fact that the challenged contracts would "increase the supply of electricity available to Connecticut utilities," thereby exerting "downward pressure . . . that will have an effect on *wholesale* prices," meant that the Connecticut contracts "infring[ed] upon FERC's regulatory authority." *Allco*, 861 F.3d at 101. The Second Circuit concluded that any such effect on wholesale prices was "incidental" and did not "amount to a regulation of the interstate wholesale electricity market that infringes on FERC's jurisdiction." *Id.* Plaintiffs here allege that ZECs affect wholesale prices by exerting pressure on the market forces that play out in the wholesale auction, but they, too, fail to state a plausible claim that ZECs *directly* affect wholesale rates. Like the *Allco* contracts, ZECs have

only an incidental effect on wholesale rates and thus do not intrude upon FERC jurisdiction.

Fatal to Plaintiffs' argument is their failure to offer any cogent explanation why ZECs are preempted but other state incentives to generate clean energy—such as tax exemptions, land grants, or direct financial subsidies—are not. Such incentives also allow clean energy generators to be more competitive than they would otherwise be, and they therefore also affect price signals in the wholesale auction. Plaintiffs even concede that such measures "would have some of the same effects" on the market. Tr. 26:2–3.

Hughes declined to rule on the permissibility of such state-incentive measures, *see Hughes*, 136 S.Ct. at 1299 ("We . . . need not and do not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, [and] direct subsidies . . . ."), and Plaintiffs do not argue here that such incentives are *per se* impermissible, Tr. 25:22–26:4 (acknowledging that "if New York decided to just write a check to a nuclear plant, that would have some of the same effects"). *Hughes* made clear that it did not mean to discourage States from incentivizing clean energy generation so long as the measures taken are not tethered to a generator's wholesale market participation. *Hughes*, 136 S.Ct. at 1299. The Supreme Court implicitly acknowledged that state actions to encourage clean energy production may make price signals from the auction less relevant. *Id.* (citing Respondents' discussion that States may make the price signals in the auction "less relevant by subsidizing new generation," Brief for Respondents 40). Other than their theories of "tethering," which this Court has already rejected, Plaintiffs offer no

explanation for why the effects of ZECs on price signals in the auction are any different from, for example, the effects a tax incentive given to the nuclear plants would have on those same price signals. There may (or may not) be a difference in degree, but there is no difference in kind.

The death knell for Plaintiffs' field-preemption argument is their failure to distinguish ZECs from RECs. In *WSPP*, FERC concluded that RECs fall outside FERC jurisdiction because they are state-created certifications of an energy attribute that are unbundled from wholesale energy sales. *WSPP, Inc.*, 139 FERC P 61061, 2012 WL 1395532, ¶¶ 18, 21, 24 (FERC Apr. 20, 2012). *WSPP* held that these unbundled transactions did not affect wholesale rates and were not "in connection with" wholesale sales of electricity. *Id.* ¶ 24; *see also Allco*, 861 F.3d at 93 ("RECs are inventions of state property law whereby the renewable energy attributes are 'unbundled' from the energy itself and sold separately." (quoting *Wheelabrator Lisbon Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008))). Curiously, Plaintiffs argue that *WSPP* supports their position.

Plaintiffs argue that *WSPP* does not foreclose their preemption claim because *WSPP* noted that a wholesale sale that "requires the use of an emissions allowance" is subject to FERC jurisdiction because such a transaction would directly affect and be "in connection with" the wholesale rate, *WSPP* ¶¶ 22–23. Plaintiffs argue that because the ZEC program requires that LSEs purchase ZECs in proportion to the electric energy load that they serve, Compl. ¶ 73, ZECs are not "unbundled" from wholesale sales as RECs are. Opp. 28–29.

Plaintiffs' argument fails given the allegations in their own Complaint: the REC program also requires that LSEs purchase RECs in proportion to their total electricity load or to make a compliance payment. Compl. ¶ 49; CES Order at 14, 16. That LSEs may make a REC compliance payment, but no analogous ZEC compliance payment exists, is immaterial; the REC program, like the ZEC program, requires that LSEs make a proportional payment. *See* CES Order at 109–10. Like RECs, ZECs are credits for the environmental attributes of energy production. Like the sales of RECs, sales of ZECs are unbundled from wholesale sales for energy or capacity. If RECs are not preempted (and *WSPP* makes clear that they are not), then the Court fails to see how ZECs are.

Plaintiffs further argue that RECs are distinguishable from ZECs because: REC prices are not calculated using forecast wholesale prices, Opp. 30–31; RECs are available to all generators, not just a favored few, Opp. 31; and ZECs are not unbundled from or "independent of other 'attributes'" of the eligible generators because the generators receive ZECs based on their inability to remain profitable from wholesale market sales, Opp. 31. *See also* Compl. ¶¶ 50–51. For these reasons, Plaintiffs claim that "the REC is different and is not subject to the same issues." Tr. 21:6–7; *see also* Tr. 31:4–5 ("You don't have that tie for the RECs").

Although there are factual differences between ZECs and RECs, none is legally significant. As discussed above, the fact that the ZEC price is calculated using a forecast of wholesale prices does not mean that the ZEC program is preempted. Nothing in *WSPP* considered the REC pricing mechanism to be constitutionally significant; indeed, *WSPP* did not even explicitly

address how RECs were priced.[18] That RECs are available to any energy producer that uses renewable sources, whereas ZECs are available only to energy producers that satisfy certain other requirements does not pose a preemption concern.[19] Plaintiffs cite no cases supporting their theory that subsidizing only a few generators is problematic from a preemption perspective. Plaintiffs' creative rephrasing of "unbundled" as "independent of other 'attributes'" also is unavailing. *WSPP* held that the "unbundled REC transaction" was not preempted because it was "independent of a *wholesale electric energy transaction.*" *WSPP* ¶ 24 (emphasis added). *WSPP* nowhere said that RECs were not preempted because they were independent of other attributes.

Like a REC, a ZEC is a certification of an energy *attribute* that is separate from a wholesale charge or rate. Like a REC, the purchase or sale of a ZEC is the purchase or sale of this attribute, rather than the purchase or sale of wholesale energy. Like a REC, the purchase or sale of a ZEC is independent of the

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[18] WSPP Inc. proposed two structures for the purchase and sale transactions of RECs: (1) RECs that were transferred independently (or unbundled) from energy and (2) RECs that were bundled with energy in the sale transaction. *WSPP*'s only discussion of REC prices considered whether, in the context of RECs bundled with energy, to allocate the contract price between the RECs and energy or to impose a single price, subject to a cap, for both. *WSPP* ¶¶ 7, 15. *WSPP*, however, nowhere discussed how RECs themselves were to be priced, and *WSPP* did not address the price of RECs in transactions where, as here, the sales of RECs were unbundled from the sales of wholesale energy.

[19] ZECs are available only to energy producers that have historically contributed to clean energy resources in New York, produce zero-emissions electricity, and satisfy other standards. Compl. ¶¶ 67–68; CES Order at 124.

purchase or sale of wholesale energy. Like a REC, payment for a ZEC is not conditioned on the generator's participation in the wholesale auction; rather, RECs and ZECs are given in exchange for the renewable energy or zero-emissions *production* of energy by generators. Compl. ¶ 64 ("payment of ZEC subsidies occurs if, and only if, the nuclear generator 'produces' electricity"); CES Order, App'x E at 1. Because of these similarities between ZECs and RECs, the effect of ZECs on the wholesale auction is legally indistinguishable from the effect of RECs on the wholesale auction.[20] FERC has clearly held that RECs are not preempted. The Court cannot find any principled basis to hold that the ZEC program is preempted even though its sibling REC program is not.

3. Plaintiffs' Attempt to Analogize to Other Preempted State Measures Is Unpersuasive

Plaintiffs argue that the ZEC program's effect on wholesale prices is "far greater" than the effects of programs held preempted in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988), *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988), *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986), and *Northern Natural Gas Company v. State Corporation Commission of Kansas*, 372 U.S. 84,

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[20] Plaintiffs assert that "[u]nlike New York's REC program, which is not tethered to the wholesale markets (and which Plaintiffs do not challenge), the ZEC program directly affects wholesale rates." Opp. 30. Plaintiffs' distinction between ZECs and RECs hinges on their legal conclusion that ZECs, and not RECs, are "tethered to the wholesale markets." The Court rejects Plaintiffs' purported "tether" for the reasons discussed *supra*.

83 S.Ct. 646, 9 L.Ed.2d 601 (1963). The Court disagrees. Those cases all involved obvious state intrusions into the federal government's area of responsibility that are absent from the ZEC program. In *Oneok*, the Supreme Court made clear that the *Schneidewind* program was preempted because the state law was "*directed at* . . . the control of rates and facilities of natural gas companies . . . precisely the things over which FERC has comprehensive authority." *Oneok*, 135 S.Ct. at 1600 (quoting *Schneidewind*, 485 U.S. at 308, 108 S.Ct. 1145). The Court found that the *Schneidewind* program "was designed to keep a natural gas company from raising its equity levels above a certain point in order to keep the company's revenue requirement low, thereby ensuring lower *wholesale* rates." *Id.* (citing *Schneidewind*, 485 U.S. at 307–08, 108 S.Ct. 1145). As discussed *supra*, and unlike in *Schneidewind*, the ZEC program is not directed at and does not directly affect wholesale rates.

Mississippi Power and *Nantahala* also do not help Plaintiffs' case. In *Mississippi Power*, which is a conflict (not field) preemption case, the State barred the utility from recovering costs that the utility was required to pay under a FERC order mandating a certain allocation of power. *Mississippi Power*, 487 U.S. at 373–74, 108 S.Ct. 2428. The Supreme Court concluded that "Mississippi's inquiry into the reasonableness of FERC-approved purchases" was preempted by FERC. *Oneok*, 135 S.Ct. at 1601–02 (discussing *Mississippi Power*). Similarly, in *Nantahala*, which also is a conflict preemption case and a case on which *Mississippi Power* relied, a State commission prevented the utility from recovering the costs incurred in paying the wholesale rate for a FERC-mandated allocation of power. *Mississippi Power*, 487 U.S. at 370–71, 108 S.Ct. 2428 (discussing *Nantahala*). As in

Nantahala, the Supreme Court held that the State commission's action was preempted. *Id.* at 370–73, 108 S.Ct. 2428 (discussing *Nantahala*). Here, the ZEC program does not challenge or seek to re-determine the reasonableness of the wholesale rate. Rather, ZECs are payments for the environmental attributes of zero-emission energy. Unlike the challenged state laws in *Mississippi Power* and *Nantahala,* and despite Plaintiffs' protestations otherwise, the ZEC program is simply not tethered to the wholesale rate.

Lastly, *Northern Natural Gas* is simply inapposite. In that case, Kansas required the ratable purchase of gas from a particular gas field. *N. Nat. Gas*, 372 U.S. at 85–86, 83 S.Ct. 646. The Supreme Court held that Kansas' orders were preempted because they were "unambiguously directed at purchasers who take gas in Kansas for resale after transportation in interstate commerce" and thereby invaded federal jurisdiction "over the sale and transportation of natural gas in interstate commerce for resale." *Id.* at 90–92, 83 S.Ct. 646 (Kansas orders "directly affect[ed] the ability of the Federal Power Commission to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation, which was an objective of the Natural Gas Act."). Unlike in *Northern Natural Gas*, the ZEC program does not order utilities to make any purchases of energy or capacity, let alone from any particular electricity source.

In sum, the Court concludes that the ZEC program is not field preempted. By establishing a program that does not condition or tether ZEC payments to wholesale auction participation, New York has successfully threaded the needle left by *Hughes* that allows States to adopt innovative programs to encourage the produc-

tion of clean energy. *See Hughes*, 136 S.Ct. at 1299. For the foregoing reasons, the Complaint does not state a plausible claim of field preemption.

B. Conflict Preemption

Conflict preemption "exists where compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok*, 135 S.Ct. at 1595 (quotation marks and citation omitted). "State regulation of production may be pre-empted as conflicting with FERC's authority over interstate transportation and rates if it is impossible to comply with both state and federal law; if state regulation prevents attainment of FERC's goals; or if a state regulation's impact on matters within federal control is not an incident of efforts to achieve a proper state purpose." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 515–16, 109 S.Ct. 1262, 103 L.Ed.2d 509 (1989). Where, as here, conflict preemption is alleged based on the obstacle presented by state law to the federal purpose and objective, "[w]hat constitutes a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 101 (2d Cir. 2013) (internal quotation marks and citation omitted); *see also PPL Energy-Plus, LLC v. Nazarian*, 753 F.3d 467, 478 (4th Cir. 2014) (same).

In "a system of 'interlocking' [state and federal] jurisdiction" like the FPA, *Nazarian*, 753 F.3d at 478; *see also Hughes*, 136 S.Ct. at 1300 (Sotomayor, J., concurring), "conflict preemption analysis must be applied sensitively . . . so as to prevent the diminution of the role Congress reserved to the States while at the

same time preserving the federal role," *Nw. Cent. Pipeline*, 489 U.S. at 515, 109 S.Ct. 1262. When state law has an impact on matters within FERC's control, "the State's purpose must be to regulate production or other subjects of state jurisdiction, and the means chosen must at least plausibly be related to matters of legitimate state concern." *Nw. Cent. Pipeline*, 489 U.S. at 518, 109 S.Ct. 1262. A state law "creates a conflict rather than demands an accommodation" when the State is attempting to regulate a matter of federal concern in the guise of regulating a matter of state concern. *Id.* But when the State is legitimately regulating a matter of state concern, "FERC's exercise of its authority must accommodate" that state regulation "[u]nless clear damage to federal goals would result." *Id.* at 522, 109 S.Ct. 1262.

Plaintiffs argue that the ZEC program is conflict preempted because it causes "clear damage" to and "interferes with FERC's regulatory objective" of maintaining competitive energy markets. Opp. 32–33. Plaintiffs allege that the ZEC program "disrupt[s] market signals" and "interferes with FERC's decision to structure the wholesale markets . . . on market-based principles" to encourage the maintenance of efficient generators. Compl. ¶¶ 88–89. Plaintiffs further argue that conflict preemption presents a factual issue inappropriate for resolution on a motion to dismiss. Opp. 34.

Defendants and Intervenors respond that the ZEC program is consistent with FERC's policy statements and that NYI-SO, which administers FERC's markets in New York, has endorsed the ZEC program. Defs. Mem. 8–9; Intervenors Mem. 19–20. Intervenors further note that if the ZEC program were interfering with federal objectives, "FERC has abundant steps it could

take but has chosen to take none of them," Tr. 15:21–22. To the contrary, as Intervenors note, FERC has concluded that state programs that incentivize clean energy generation are consistent with FERC's policy objectives. Intervenors Mem. 19 (collecting FERC decisions).

Accepting the Complaint's factual allegations as true, as the Court must at this stage, the Complaint does not state a plausible claim of conflict preemption. The ZEC program is plainly related to a matter of legitimate state concern: the production of clean energy and the reduction of carbon emissions from the production of other energy. Thus, in the interlocking jurisdictional scheme provided by the FPA, there is no conflict preemption "[u]nless clear damage to federal goals would result." *Nw. Cent. Pipeline*, 489 U.S. at 522, 109 S.Ct. 1262.

Plaintiffs allege that the ZEC program "interferes with FERC's decision to structure the wholesale markets . . . on market-based principles" to encourage efficient generators. Compl. ¶ 89. Accepting as true that one of FERC's goals is to promote market efficiency through energy auctions, there is no conflict. The ZEC program does not run afoul of the goal of having an efficient energy market. Instead, by incentivizing clean energy production, it seeks to minimize the environmental damage that is done by generating electricity through the use of gas and fossil fuels. CES Order at 19. Far from objecting to state programs that encourage energy production with certain desirable environmental attributes, FERC has approved state programs with "renewable portfolio mandates and greenhouse reduction goals." *See, e.g.*, *Pac. Gas & Elec. Co.*, 123 FERC P 61067, 2008 WL 1780603, ¶ 34 (FERC Apr. 21, 2008). The ZEC program does not

thwart the goal of an efficient energy market; rather, it encourages through financial incentives the production of clean energy.

Plaintiffs' only remaining allegations relative to their conflict preemption claim are that ZECs "will disrupt market signals" within the auction, Compl. ¶ 88, and that "the ZECs will have market-distorting ripple effects throughout the national market and beyond New York's borders," Compl. ¶ 90. Accepting these factual allegations as true, Plaintiffs have not stated a plausible claim of conflict preemption.

Plaintiffs' core complaint is that the ZEC program will permit certain nuclear generators to continue to participate in the energy market when they otherwise would have gone out of business.[21] Compl. ¶ 58. But, as discussed *supra*, *Allco* concluded that the fact that the Connecticut program would "increase the supply of electricity,"thereby affecting wholesale prices, did not mean that the Connecticut program was preempted. *Allco*, 861 F.3d at 101 ("This incidental effect on wholesale prices does not . . . amount to a regulation of the interstate wholesale electricity market that infringes on FERC's jurisdiction.").[22]

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[21] The Court notes that Plaintiffs' alleged economic harm is that other generators were awarded ZECs while they were not and that Plaintiffs must compete against the generators receiving ZECs. *See* Compl. ¶ 74. But that harm exists because Plaintiffs do not produce energy with the environmental attributes encouraged by the ZEC program. That is, Plaintiffs fail to qualify for the ZEC program because of their business decisions about how they generate electricity.

[22] Although the Second Circuit did not explicitly discuss whether its discussion of the contracts' effects on wholesale prices was relevant to the field or conflict preemption question, the Second Circuit cited *Hughes* throughout that discussion, which

Here, too, any effects exerted by ZECs on the market auctions are indirect and incidental; those effects do not cause the sort of "clear damage to federal goals," *Nw. Cent.* 489 U.S. at 522, 109 S.Ct. 1262, that would give rise to a claim of conflict preemption. *See Nazarian*, 753 F.3d at 479–80 ("Obviously, not every state regulation that incidentally affects federal markets is preempted. Such an outcome 'would thoroughly undermine precisely the division of the regulatory field that Congress went to so much trouble to establish . . ., and would render Congress' specific grant of power to the States to regulate production virtually meaningless.'" (quoting *Nw. Cent. Pipeline*, 489 U.S. at 515, 109 S.Ct. 1262)). As discussed *supra*, other forms of state incentives give the incentive recipient this same sort of leg up in the market. If those incentives, including RECs, are not conflict preempted—and Plaintiffs do not argue that they are—then the Court fails to see how ZECs are.

Plaintiffs argue that the issue of conflict preemption is not appropriately decided on a motion to dismiss, pointing out that other district courts decided the conflict preemption question after considering factual and expert evidence in the case. *See PPL EnergyPlus, LLC v. Nazarian* (hereafter, "*Nazarian II*"), 974 F.Supp.2d 790 (D. Md. 2013); *PPL EnergyPlus, LLC v. Hanna*, 977 F.Supp.2d 372 (D.N.J. 2013). *Nazarian II* and *Hanna*, however, presented plausible claims of conflict preemption. In those cases, the programs

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was a field preemption case. Nevertheless, *Allco* concluded, as a matter of law, that the kind of effect alleged by *Allco* was an "incidental effect on wholesale prices." *Allco*, 861 F.3d at 101. The Court finds no basis to find that an effect that is "incidental" when contemplating field preemption loses its "incidental" nature when contemplating conflict preemption.

guaranteed a fixed price that displaced the wholesale auction price; that displacement resulted in clear damage to FERC's goal of setting wholesale prices at auction. *See* Mem. and Order re: Mot. to Dismiss at 11, ECF 71, *Nazarian II*, No. MJG–12–1286 (D. Md. Aug. 3, 2012) (Plaintiffs asserted a plausible claim of conflict preemption based on their allegation that the generator benefitting from the Maryland program was "guaranteed receipt of the PSC fixed price" through a contract for difference and was therefore "not appropriately market-based.");[23] *see also* Mem. and Order at 9, ECF 69, *PPL EnergyPlus, LLC v. Solomon ("Hanna")*, No. 11–745 (D.N.J. Oct. 19, 2011) (Conflict preemption claim survived the motion to dismiss because the New Jersey program, which "impermissibly guarantee[d] a wholesale capacity price," thereby "impede[d] FERC's policy of establishing a market-based approach to setting wholesale energy rates in the mid-Atlantic market." (citing allegations that New Jersey's utilities are required to procure power at a fixed price approved by the State)). Put differently, the *Nazarian II* and *Hanna* programs stood as an obstacle to FERC's policy of using market principles to set wholesale prices because those programs guaranteed a predetermined, state-approved price, rather than the market auction price, for the wholesale sale of energy or capacity.

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[23] *Nazarian II* concerned the Maryland program that was struck down in *Hughes*. The district court denied the motion to dismiss in *Nazarian II* but later concluded after a bench trial that the Maryland program was field preempted, a decision affirmed by the Fourth Circuit, *PPL Energyplus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), and the Supreme Court, *Hughes v. Talen Energy Mktg., LLC*, —— U.S. ——, 136 S.Ct. 1288, 194 L.Ed.2d 414 (2016).

No such obstacle exists for the ZEC program. Unlike *Nazarian II* and *Hanna*, the ZEC program does not guarantee a certain wholesale price that displaces the market-determined price. Recognizing FERC's goal to set wholesale prices through a market-based approach, the Court fails to see how the ZEC program causes clear damage to that goal. As discussed above, the nuclear generators receiving ZECs will receive for their energy whatever the market-clearing price is. Separately, they will be compensated for their ZECs, which are awarded based on the positive attributes of the energy they generate. Any price-distorting effects exerted by the ZECs on the market signals at the wholesale auctions are, at best, indirect and do not present the sort of "clear damage" required for a plausible conflict preemption claim. To hold otherwise would call into question RECs and all state subsidies, such as tax incentives and land grants; such subsidies, too, exert price-distorting effects on market signals and allow some generators to clear the auction when they otherwise would be priced out.

Plaintiffs cite *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987), to argue that state programs with the potential to undermine a federal regulatory structure are conflict preempted because States "cannot 'do indirectly what they could not do directly.'" Opp. 32 (quoting *Ouellette*, 479 U.S. at 495, 107 S.Ct. 805). *Ouellette* is inapposite. In *Ouellette*, the Court considered whether a Vermont nuisance law was preempted by the Clean Water Act, which established a federal permit program regulating the discharge of pollutants and assigned different state regulatory roles based on whether the State was the source of the discharge. 479 U.S. at 489–91, 107 S.Ct. 805. Because application of the Vermont law could "effectively override the permit requirements

and the policy choices made by the source State," the Court concluded that the Vermont law effectively circumvented and upset the balance of interests contemplated by the Clean Water Act. *Id.* at 494–95, 107 S.Ct. 805. Accordingly, the Court held that the Vermont law was conflict preempted. *Id.* at 487, 493–97, 107 S.Ct. 805.

Nothing about the ZEC program "effectively override[s]," *id.* at 495, 107 S.Ct. 805, the FPA. ZECs do not circumvent the FERC auction—at the risk of being redundant, ZECs, like RECs, are payments for environmental attributes that are unbundled from and involve separate transactions than those for the wholesale sales of energy or capacity. If the ZEC program were aimed at wholesale market participation or wholesale prices for sales of energy or capacity, then this would be a stronger case for conflict preemption. Unlike the Vermont law at issue in *Ouellette*, which did present a clear conflict between the state law and the federal regulatory scheme, the ZEC program does not "stand[ ] as an obstacle," *Oneok*, 135 S.Ct. at 1595 (internal quotation marks and citation omitted), to the FERC auction or the FPA.

Plaintiffs' proposed discovery highlights the implausibility of their conflict preemption claim. The only two topics of discovery proposed by Plaintiffs relevant to the conflict preemption claim are: (1) fact discovery supporting Plaintiffs' allegation that "the nuclear energy is not being sold directly to any customers at retail; it's going into the auction process"; and (2) fact and expert discovery to demonstrate that the ZEC program "will, in fact, have a substantial impact on the wholesale rate." Status Conference Tr. 29:25–30:9–10, Dkt. 90 (Dec. 16, 2016). Again, even if all of the nuclear generators' electricity is sold into the auction and the

ZECs have an impact on the wholesale rate by affecting market signals, Plaintiffs will not have stated a plausible claim of conflict preemption. No factual discovery into these topics will surmount the core problem with Plaintiffs' claim: the ZECs are not tethered to wholesale sales in a way that causes clear damage to federal goals.

Therefore, the Court concludes that the Complaint does not state a plausible claim of conflict preemption.[24]

III. DORMANT COMMERCE CLAUSE

The Commerce Clause empowers Congress "[t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. "The negative or dormant implication of the Commerce Clause prohibits state . . . regulation . . . that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (internal citations and quotation marks omitted). But "there is a residuum of

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[24] It is difficult to fathom how the ZEC program could cause "clear damage" to FERC goals inasmuch as FERC has taken no steps to oppose the ZEC program, despite having had several months to do so, and has approved REC programs, which have an identical impact on the market. *See WSPP*, 139 FERC P 61061, 2012 WL 1395532. The fact that FERC has convened a technical conference "to understand the potential for sustainable wholesale market designs that both preserve the benefits of regional markets and respect state policies" that encourage particular resource attributes would seem to indicate that FERC concurs with the Court's conclusion that there is not a conflict between federal goals regarding wholesale market auctions and state policies that incentivize the production of energy with positive environmental attributes. *See* Notice of Technical Conference at 2, Dkt. 121–1 (FERC Mar. 3, 2017).

power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 669, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981) (internal quotation marks and citation omitted). Therefore, a state law or regulation violates the dormant Commerce Clause "only if it (1) 'clearly discriminates against interstate commerce in favor of intrastate commerce,' (2) 'imposes a burden on interstate commerce incommensurate with the local benefits secured,' or (3) 'has the practical effect of "extraterritorial" control of commerce occurring entirely outside the boundaries of the state in question.'" *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 90 (2d Cir. 2009) (quoting *Freedom Holdings Inc. v. Spitzer,* 357 F.3d 205, 216 (2d Cir. 2004)).

Only the first two means of violating the dormant Commerce Clause are at issue here. Plaintiffs allege that the ZEC program violates the dormant Commerce Clause because: (1) the ZEC program facially discriminates against out-of-state energy producers, including nuclear and other carbon-free energy producers, by selecting only New York nuclear power plants to receive ZECs, Compl. ¶ 98; and (2) the ZEC program imposes an undue burden on interstate commerce by distorting market pricing and incentives, which will cause energy generators, including out-of-state energy providers, to leave the market or discourage their entry into the market, Compl. ¶ 99. Plaintiffs have no cause of action under either theory and have, in any event, failed to allege a dormant Commerce Clause claim.

A. Cause of Action

Intervenors argue that Plaintiffs lack prudential standing to bring a dormant Commerce Clause claim

because they do not allege a nexus between their injury and any discriminatory aspect of the ZEC program. Intervenors Mem. 22; Intervenors Reply 15. In other words, Intervenors argue that Plaintiffs lack prudential standing because Plaintiffs' injury does not fall within the dormant Commerce Clause's zone of interests. Courts have consistently applied the zone of interests test to dormant Commerce Clause claims to determine whether plaintiffs have prudential standing. *See, e.g.*, *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320 n.3, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977); *Selevan*, 584 F.3d at 91–92; *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 474–76 (5th Cir. 2013); *Fla. Transp. Services, Inc. v. Miami–Dade Cty.*, 703 F.3d 1230, 1255–56 (11th Cir. 2012), *cert. denied*, —— U.S. ——, 134 S.Ct. 116, 187 L.Ed.2d 35 (2013); *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 932–33 (9th Cir. 2011); *Freeman v. Corzine*, 629 F.3d 146, 156–57 (3d Cir. 2010); *Nat'l Solid Wastes Mgmt. Ass'n v. Daviess Cty.*, 434 F.3d 898, 901–02 (6th Cir. 2006), *vacated and remanded on other grounds*, 550 U.S. 931, 127 S.Ct. 2294, 167 L.Ed.2d 1087 (2007).

The Supreme Court recently held that the zone of interests test does not fall under the prudential standing rubric; instead, whether a plaintiff's injury falls within a law's zone of interests goes to whether the plaintiff has a cause of action. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, —— U.S. ——, 134 S.Ct. 1377, 1387, 188 L.Ed.2d 392 (2014). The Supreme Court in *Lexmark* addressed the zone of interests inquiry only as it applies to statutory claims; it did not address constitutional claims, such as Plaintiffs' dormant Commerce Clause claim. *Id.* To the Court's knowledge, only the Third Circuit has addressed whether *Lexmark* applies to constitutional claims. In

Maher Terminals, the Third Circuit applied the zone of interests test to determine whether the plaintiff had stated a Tonnage Clause[25] claim, while clarifying that post *Lexmark* this was not a prudential standing issue.[26] *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 805 F.3d 98, 105, 110 (3d Cir. 2015). This Court sees no reason not to apply *Lexmark* to constitutional claims. Just as "a rose by any other name would smell as sweet,"[27] so, too, does the zone of interests test apply whether labeled a prudential standing issue or a cause of action issue. The Supreme Court's reasoning that the zone of interests test is more logically a cause of action question applies equally to statutory and constitutional claims, and *Lexmark* did not reject the zone of interests test—it merely reclassified it. Accordingly, and in light of the numerous cases that have applied the zone of interests test to dormant Commerce Clause claims, the Court applies the zone of interests test to determine whether Plaintiffs have alleged a cause of action.[28]

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[25] The Tonnage Clause of the Constitution prohibit states from imposing taxes on cargo shipments without the consent of Congress. U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage . . . .").

[26] The District Court for the Northern District of California has also addressed whether *Lexmark* applies to constitutional claims. In *HomeAway Inc. v. City & Cty. of San Francisco*, the district court held that *Lexmark* did not address the prudential doctrine of third- party standing as applied to constitutional claims and declined to extend *Lexmark* as invalidating that strand of prudential standing doctrine. No. 14-CV-04859-JCS, 2015 WL 367121, at *6–7 (N.D. Cal. Jan. 27, 2015). Because third-party interests are not at issue here, the decision in *HomeAway* is not relevant.

[27] William Shakespeare, *Romeo and Juliet*, act 2, sc. 2.

[28] In their opposition brief, Plaintiffs did not address Intervenors' argument that Plaintiffs' dormant Commerce Clause claim

The zone of interests protected by the dormant Commerce Clause is the economic interests of out-of-state entities. *Allocco Recycling, Ltd. v. Doherty*, 378 F.Supp.2d 348, 358 (S.D.N.Y. 2005); *see also Yakima Valley Mem'l Hosp.*, 654 F.3d at 932 ("Any alleged injury 'must somehow be tied to a barrier imposed on interstate commerce.'" (quoting *City of Los Angeles v. Cty. of Kern*, 581 F.3d 841, 848 (9th Cir. 2009))). In other words, Plaintiffs must "allege an injury stemming from the application of the [ZEC program] in a manner discriminatory to out-of-state interests," *L.A.M. Recovery, Inc. v. Dep't of Consumer Affairs*, 184 Fed.Appx. 85, 88–89 (2d Cir. 2006) (summary order) (citing *Boston Stock Exch.*, 429 U.S. at 321, 97 S.Ct. 599), whether due to facial discrimination against or an undue burden on out-of-state economic interests.

Plaintiffs entirely fail to allege any injury arising from discrimination against or an undue burden on out-of-state economic interests. As to their claim that the ZEC program facially discriminates against out-of-state nuclear power providers by awarding ZECs only to New York nuclear power plants, Plaintiffs do not allege that they own or represent an out-of-state nuclear power plant.[29] In addition, Plaintiffs allege that the

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should be dismissed because Plaintiffs lack prudential standing, although Plaintiffs did attempt to address the issue in response to the Court's question during oral argument, *see* Tr. 35:4–39:15. "[F]ailure to adequately brief an argument constitutes waiver of that argument at [the] motion to dismiss stage." *Guzman v. Macy's Retail Holdings, Inc.*, No. 09 CIV. 4472 (PGG), 2010 WL 1222044, at *8 (S.D.N.Y. Mar. 29, 2010) (quotation marks and citation omitted). Nevertheless, the Court will consider the merits of the prudential standing issue, albeit reframed as a cause of action issue.

[29] At oral argument, counsel for Plaintiffs represented to the Court that Plaintiff Electric Power Supply Association includes

ZEC program is "directly discriminatory" because it "is not even-handed with respect to other technologies that could produce carbon-free electricity," Compl. ¶ 98, and that various Plaintiffs own or have members that own in– and out-of-state power suppliers (without specifying whether the power suppliers are nuclear), Compl. ¶¶ 10-15. That those Plaintiffs may be discriminated against because the ZEC program is available only to nuclear power plants—as opposed to other kinds of power plants that produce few or no greenhouse gas emissions—does not constitute a cause of action under the dormant Commerce Clause. That alleged injury does not fall within the zone of interests protected by the dormant Commerce Clause—namely the protection of *out-of-state* economic interests. The dormant Commerce Clause does not protect the economic interests of non-nuclear power plants, regardless of where they are located or whether they are carbon-free. *See Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 500 (5th Cir. 2004) (plaintiffs did not have prudential standing to bring dormant Commerce Clause claim on a facial discrimination theory because the plaintiffs' injury was "not related to any out-of-state characteristic of their business").

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at least one member that is an out-of-state nuclear power plant. Tr. 35:17–25. But, "[o]n a motion to dismiss, the Court must only examine the allegations in the complaint to determine whether Plaintiff has met the [zone of interests test]." *Allocco Recycling, Ltd.*, 378 F.Supp.2d at 357 (citing *Nash v. Califano*, 613 F.2d 10, 14 (2d Cir. 1980)). Because the Court holds that even if Plaintiffs had a cause of action, their dormant Commerce Clause claims would fail, it would be futile for Plaintiffs to amend their Complaint to include allegations that they own or represent out-of-state nuclear facilities.

Plaintiffs also lack a cause of action to bring a dormant Commerce Clause claim on their undue burden theory. According to that theory, Plaintiffs will be injured by the ZEC program because the otherwise unprofitable nuclear power plants receiving ZECs will drive down the auction prices received by all power plants, including Plaintiffs' power plants, and will thus cause them to leave or discourage them from entering the market. Compl. ¶¶ 47, 74. But this alleged injury also falls outside the zone of interests protected by the dormant Commerce Clause. Under Plaintiffs' theory, the same price-distorting effects and the same alleged injury would occur (probably to a more significant degree) if ZECs were extended to nuclear power plants nationwide.[30] Thus, because Plaintiffs would be allegedly injured by the ZEC program's market distortion effect even if New York provided ZECs to in– and out-of-state nuclear power plants, Plaintiffs are not harmed because of an alleged undue burden on out-of-state economic interests.[31]

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[30] The District Court for the Northern District of Illinois made a similar point with respect to a dormant Commerce Clause challenge in *Vill. of Old Mill Creek*, 2017 WL 3008289, at *7, but did so in the context of holding the complaining plaintiffs lacked Article III standing to challenge Illinois' ZEC program. That district court wrote: "If the procurement process were non-discriminatory, the out-of-state, non-nuclear plaintiffs would still be injured. Similarly, the general market-distorting effects on non-nuclear plants outside of Illinois would still be felt if the ZEC procurement process subsidized nuclear plants without favoring in-state interests." *Id.*

[31] In evaluating whether the plaintiffs had a cause of action under the Copyright Act, the Supreme Court in *Lexmark* analyzed the zone of interests and proximate cause requirements separately. 134 S.Ct. at 1388–91. The proximate cause analysis is similar to the zone of interests analysis and concerns "whether the harm alleged has a sufficiently close connection to the con-

Although "the zone of interests test is not a rigorous one," *Nat'l Weather Serv. Employees Org., Branch 1–18 v. Brown*, 18 F.3d 986, 989 (2d Cir. 1994), the interest sought to be protected must be at least *arguably* within the zone of interests to be protected by the dormant Commerce Clause, *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). Because Plaintiffs' interests are, at best, "marginally related" to the protection of out-of-state economic interests, Plaintiffs lack a cause of action.[32] *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987).

B. Market Participant Exception and Subsidies

Even if Plaintiffs had a cause of action, their dormant Commerce Clause claim would fail because New York was acting as a market participant, not as a regulator, when it created ZECs. The dormant Commerce Clause "does not prohibit a state from participating in the free market if it acts like a private enterprise." *United Haulers Ass'n, Inc. v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 255

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duct the statute prohibits." *Id.* at 1390. In other words, "the proximate-cause requirement generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct." *Id.* For the same reasons that Plaintiffs' undue burden claim is not within the dormant Commerce Clause's zone of interests, it also fails to satisfy the proximate cause requirement.

[32] Moreover, the Supreme Court has suggested that a less generous approach may be appropriate outside of the Administrative Procedure Act ("APA") context. *Lexmark Int'l, Inc.*, 134 S.Ct. at 1389 ("[T]he breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the APA may not do so for other purposes." (quoting *Bennett v. Spear*, 520 U.S. 154, 163, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997))).

(2d Cir. 2001). "'[A] state regulates when it exercises governmental powers that are unavailable to private parties,' such as the imposition of civil or criminal penalties to compel behavior." *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208 (2d Cir. 2003) (quoting *United Haulers Ass'n, Inc.*, 261 F.3d at 255). But, "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976).

In *Alexandria Scrap*, in order to ameliorate the aesthetic and environmental problem associated with abandoned automobiles, Maryland created a bounty payable to any licensed processor that destroyed any vehicle formerly titled in Maryland. *Id.* at 797, 96 S.Ct. 2488. Maryland imposed a more burdensome title documentation requirement on out-of-state processors than in-state processors in order to receive the bounty. *Id.* at 801, 96 S.Ct. 2488. An out-of-state processor claimed that the Maryland law violated the dormant Commerce Clause because it gave Maryland processors an unfair advantage in the market for bounty-eligible hulks. *Id.* at 802, 96 S.Ct. 2488. The Supreme Court disagreed. It held that the Maryland law did not violate the dormant Commerce Clause because Maryland did not seek to prohibit the flow of hulks or regulate that flow but instead "entered into the market itself to bid up their price" for the legitimate purpose of protecting Maryland's environment. *Id.* at 806, 809, 96 S.Ct. 2488. The Court acknowledged that the effect of the law was that Maryland hulks would be primarily destroyed by in-state processors and that in-state processors would primarily receive the bounties, but the Court held that "no trade barrier of

the type forbidden by the Commerce Clause" restricted the movement of Maryland hulks out-of-state. *Id.* at 810, 96 S.Ct. 2488. Instead, the hulks remained in Maryland "in response to market forces, including that exerted by money from the State." *Id.*

Building on *Alexandria Scrap*, in a case involving facts and allegations much closer to those at issue here, the District Court for the District of Connecticut dismissed the plaintiff's dormant Commerce Clause claim, reasoning that Connecticut was acting as a market participant when it created a market for RECs that subsidized clean energy generation. *Allco Fin. Ltd. v. Klee*, Nos. 3:15–cv–608 (CSH), 3:16–cv–508 (CSH), 2016 WL 4414774, at *23–25 (D. Conn. Aug. 18, 2016), *aff'd*, 861 F.3d 82 (2d Cir. 2017). In *Allco*, the Plaintiff generated RECs in Georgia through one of its solar power facilities, but those RECs did not satisfy Connecticut's requirements, which required that RECs be generated from power plants within the Northeast. *Id.* at *21. The district court concluded that, just as Maryland had incentivized market participants to destroy hulks by financially rewarding them to do so, Connecticut was merely making it "more lucrative for generators to produce and distribute clean energy in Connecticut" by creating a secondary REC market. *Id.* at *24. Connecticut is "not obligated to spread the benefit of that market to states that do not also bear the burden of the cost of the subsidy, which is ultimately paid by Connecticut ratepayers." *Id.* The district court held that Connecticut was not acting as a regulator because it was "not

preventing the flow of clean energy or regulating the conditions on which it may occur."[33] *Id.*

This case follows in the footsteps of *Alexandria Scrap* and the district court's decision in *Allco*. New York's ZEC program does not create a trade barrier or prevent or regulate the flow of energy renewable, nuclear, or otherwise. New York gives financially eligible nuclear generators that have historically contributed power into the New York market credit for the zero-emission attributes of each MWh of electricity they produce. Compl. ¶ 67. NYSERDA then buys the ZECs from the nuclear generators at an administratively determined price, and the cost is ultimately passed on to New York ratepayers. Compl. ¶¶ 69, 73. Just like Maryland in *Alexandria Scrap* and Connecticut in *Allco*, by distributing subsidies through the ZEC program to otherwise financially struggling nuclear power plants, New York is participating in the energy market and exercising its right to favor its own

[33] The Second Circuit affirmed the district court's dormant Commerce Clause ruling on a different ground without commenting on the district court's analytical approach. The Second Circuit applied *General Motors Corp. v. Tracy*, 519 U.S. 278, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997), to conclude that the Connecticut REC program did not violate the dormant Commerce Clause because a REC that satisfies Connecticut's REC program can be produced only in the Northeast and is thus a different product that does not compete against a REC produced in Georgia. *Allco*, 861 F.3d at 103–08. The district court's analytical approach is more applicable here than the Second Circuit's approach given that the dormant Commerce Clause claim is not that New York is discriminating against a competing product from out-of-state but that New York (1) is not giving ZECs to out-of-state energy producers, and (2) is creating an undue burden on interstate commerce because ZECs distort market pricing and incentives.

citizens.[34] Moreover, just as Maryland and Connecticut were not required to subsidize out-of-state businesses when in-state residents were paying for the subsidies, neither is New York required to provide financial assistance in the form of ZECs to out-of-state power plants when the ZECs are ultimately paid for by New York ratepayers.

Plaintiffs argue that this case is distinguishable because New York, and not the free market, sets the price of the ZECs and because ZECs are distributed on the basis of financial need. Opp. 40. Plaintiffs have not articulated why those distinctions are relevant to the dormant Commerce Clause analysis, and the Court does not find them to be relevant. New York is paying the nuclear power plants a set dollar amount for each MWh of electricity they produce in recognition of the zero-emission attributes of their electricity. This is no different than Maryland paying a set bounty to hulk processors. Whether the subsidy amount is at a government-set rate, as it is here and as it was in *Alexandria Scrap*, 426 U.S. at 797 n.5, 96 S.Ct. 2488, or set by market forces, as it was in *Allco*, 2016 WL 4414774, at *20, has no impact on the market participant analysis. Nor does the fact that ZECs are distributed based on financial need. The dormant Commerce Clause does not restrict which in-state businesses a State may subsidize when it is expending

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[34] New York is favoring its own citizens in the ZEC program as it is currently applied because only three power plants currently receive ZECs, and they are all in New York. The parties dispute whether the ZEC program, by requiring nuclear power plants to have been historical providers of energy to New York, effectively limits eligibility to New York nuclear power plants. *Compare* Defs. Mem. 23, *and* Intervenors Mem. 23, *and* Defs. Reply 13–14, *with* Opp. 37.

its own funds to do so, so long as the State does not also impose "taxes and regulatory measures impeding free private trade in the national marketplace," *Reeves, Inc. v. Stake*, 447 U.S. 429, 436–37, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980).

Indeed, regardless of the market participant exception, although the Supreme Court has "never squarely confronted the constitutionality of subsidies," *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 589, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (quotation marks and citation omitted), "[a] pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business," *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994); *see also New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988) ("Direct subsidization of domestic industry does not ordinarily run afoul of [the dormant Commerce Clause] . . . .")[35] The Supreme Court has, however, struck down a state subsidy; it did so when a subsidy to in-state producers was coupled with a tax on in-state and out-of-state producers and thus functioned like a discriminatory tax on out-of-state producers. *West Lynn Creamery, Inc.*, 512 U.S. at 214–15, 114 S.Ct. 2205. But the subsidy at issue here is not linked to a tax on out-of-state electricity generators—it is "a pure subsidy" for the environmental attributes of

[35] Courts often apply the market participant exception to dormant Commerce Clause cases concerning subsidies, but because some cases have analyzed whether subsidies violate the dormant Commerce Clause independent of and without mention of—the market participant exception, this Court also addresses whether ZECs are a permissible subsidy pursuant to those cases, independent of the market participant exception doctrine.

nuclear energy and is paid for by New York retail energy consumers. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) (noting that instead of instituting an unconstitutional flow control ordinance to make a waste disposal facility commercially viable, the town could have subsidized the facility through general taxes or municipal bonds); *see also United Haulers Ass'n, Inc. v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 368, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007) (same). Accordingly, the ZEC program is a permissible subsidy, and the market participant exception to the dormant Commerce Clause applies. For these additional reasons, the Complaint does not state a plausible dormant Commerce Clause claim.[36]

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' and Intervenors' motions to dismiss. The American Wind Energy Association's motion for leave to file an *amicus* brief is GRANTED. The Clerk of Court is respectfully directed to terminate Docket Entry Nos. 54, 76 and 150 and to close this case.

SO ORDERED.

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[36] Because Plaintiffs lack a cause of action, the market participant exception applies, and the ZEC program is a permissible subsidy, the Court need not reach the parties' arguments regarding whether the ZEC program is facially discriminatory or poses an undue burden. Nevertheless, the Court is skeptical that the ZEC program poses a disparate, undue burden on out-of-state economic interests on the theory, as alleged by Plaintiffs, that ZECs artificially reduce market prices. That alleged harm is not disparate—it affects in-state and out-of-state power plants equally.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. __

COALITION FOR COMPETITIVE ELECTRICITY, DYNEGY INC., EASTERN GENERATION, LLC, ELECTRIC POWER SUPPLY ASSOCIATION, NRG ENERGY, INC., ROSETON GENERATING LLC, AND SELKIRK COGEN PARTNERS, L.P.,

Plaintiffs,

v.

AUDREY ZIBELMAN, in her official capacity as Chair of the New York Public Service Commission; and PATRICIA L. ACAMPORA, GREGG C. SAYRE, AND DIANE X. BURMAN, in their official capacities as Commissioners of the New York Public Service Commission,

Defendants.

COMPLAINT

1. This case arises from unlawful New York Public Service Commission ("PSC") regulations that intrude on the exclusive authority of the Federal Energy Regulatory Commission ("FERC") over "the sale of electric energy at wholesale in interstate commerce" pursuant to the Federal Power Act ("FPA"), 16 U.S.C. § 824(b)(1). FERC has determined that competitive market forces best set wholesale energy prices and thus has mandated and approved auction-based markets for wholesale electric energy in the New York

region and other regions nationwide. Under FERC's system, as the PSC has acknowledged the forces of competition "have benefited consumers but have impaired the financial viability of upstate nuclear plants, to the point where plant owners have announced the intention to close plants that are otherwise fully licensed and operational." Order Adopting a Clean Energy Standard, Aug. 1, 2016 (the "ZEC Order"), at 45.[1]

2. Seeking to change the results of FERC's market-based auction system, the PSC issued the ZEC Order to bail out four uneconomic upstate nuclear power plants and keep them in the market for at least twelve more years, via so-called Zero Emissions Credits ("ZECs"). Unless enjoined or eliminated, these credits will result in New York's captive ratepayers paying the owners an estimated $7.6 billion over twelve years to the owners of these plants. Indeed, it appears that 100% of the ratepayer subsidies will go to a single company, which will own all of the subsidized plants. The actual dollar amount of the ZECs is tethered to the price of electricity in the FERC-regulated wholesale market. That is, particular nuclear generators are entitled to ZECs when the PSC finds that the wholesale market price is "insufficient to provide adequate compensation" to them, and the amount of the subsidies is reduced or increased as wholesale prices fluctuate. There is no entitlement to any ZECs

[1] The ZEC Order is available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={44C5D5B8-14C3-4F32-8399-F5487D6D8FE8}. Although the Order covers several matters and includes several ordering clauses, this case concerns only the "Tier 3" subsidies to upstate nuclear generators, as set forth therein. ZEC Order at 19-20, 45-61, 119-150. The pertinent pages are attached hereto as Exhibit A. Plaintiffs are not challenging the Tier 1 and Tier 2 portions of the Order.

if wholesale market prices established under FERC's auspices rise above a specified level.

3. If the ZECs go into effect, as they are scheduled to do in April 2017, they will profoundly disrupt the FERC-approved energy-market auction structure and result in the transfer of more than $600 million a year of ratepayer funds to Exelon. At current wholesale prices, for every megawatt hour ("MWh") of energy the upstate nuclear plants sell into the FERC-jurisdictional market, the nuclear units will receive a more than 80 percent premium from the ZECs. That is, for each MWh sold, they will receive the current locational price of energy ($19.71 per MWh for Ginna, for example, and $20.63 per MWh for FitzPatrick and Nine Mile[2]) plus a $17.48 ZEC payment subsidy, funded entirely by New York consumers. In other words, the FitzPatrick and Nine Mile plants will both receive $38.11 per MWh of energy produced, while a competing energy generator, located next door, would receive just $20.63 per MWh. If the wholesale price of electricity decreases over the next two years, the bonus payments to the subsidized nuclear plants will increase above the current $17.48 per MWh level. The bonus would decrease, in turn if wholesale market prices increase to specified levels equated with the cost of operating the nuclear plants.

4. The ZEC payments threaten to disrupt the economically efficient function of the FERC-approved monthly capacity market auctions administered by the NYISO. In anticipation of significant disruption to the April 2017 and subsequent monthly capacity

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[2] Prices based on around-the-clock average day-ahead market prices for October 1, 2015 September 30, 2016, and published at: http://www.nyiso.com/public/markets_operations/marketdata/custom_report/index.jsp?report=dam_1bmp_zonal.

market results, financial over-the-counter capacity markets that trade in advance of the FERC-sponsored have already shown dramatic price declines as a result of the ZEC order. These declines reflect that nuclear plants that were scheduled to leave the market are now likely to remain in operation. The artificial retention of the nuclear units in the market has a significant effect on wholesale capacity market prices subject to FERC's exclusive jurisdiction.[3]

5. The prospect of these out-of-market payments has already caused three of the four affected nuclear plants to reverse their decisions to close, preventing the New York energy markets from reaching the efficient market equilibrium that the FERC-approved wholesale process would have otherwise produced.

6. If the ZECs go into effect, New York's *retail* ratepayers will be forced to fund an effort by the PSC to artificially depress *wholesale* market prices, which disrupts the FERC-approved auctions and market processes. The nuclear plants will not retire as scheduled, but will continue to bid into the wholesale market auctions, with the incentive and ability to offer their supply into the auctions at artificially lower prices *(i.e.,* at prices that do not fully cover their costs). The result of these below-cost bids will be below market prices. This would harm other generators, including the Plaintiffs, because the lower auction prices will result in lower revenues. In the long term, with non-subsidized generators forced to exit the market, lower prices will deter potential new generators – including generators of renewable sources of energy –

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[3] *See The Brattle Group, New York's Upstate Nuclear Power Plants' Contribution to the State Economy* (hereinafter "The Brattle Group 2015"), which estimates an approximately $15 billion impact on wholesale energy prices over 12 years.

from entering the market. The result will be reduced supply and increased prices for local utilities, and thus for the homeowners and businesses that they serve.

7. The ZEC program is unlawful because it operates in the area of FERC's exclusive jurisdiction, and federal law thus preempts it. Such preemption invalidated similar measures that Maryland had adopted, under the U.S. Supreme Court's decision earlier this year in *Hughes v. Talen Energy Marketing, LLC,* 578 U.S. ___ (2016). As a further and independent basis for federal preemption, moreover, the ZEC program will frustrate the long-term functioning of the FERC-jurisdictional markets. The program results in a mix of energy resources that will be far less economically efficient than if the markets were allowed to work as designed.

8. The ZEC program is also invalid under the dormant Commerce Clause. The ZECs solely benefit certain wholesale producers of nuclear energy in New York, to the disadvantage of out-of-state producers who compete in the wholesale market. New York has thus failed to regulate evenhandedly to effectuate a legitimate local public interest, and the effects of its regulation on interstate commerce are more than incidental. For all of these reasons, the Court should enter appropriate declaratory and injunctive relief.

PARTIES

9. Plaintiff Coalition for Competitive Electricity ("CCE") is a non-profit trade organization, chartered in Delaware, formed by certain electric power suppliers whose businesses will be harmed if the ZEC Order goes into effect.

10. Plaintiff Dynegy Inc. ("Dynegy") owns and operates nearly 26,000 MW of power-generating

capacity throughout the Midwest and Northeast and two retail electric companies serving businesses and residents in Illinois, Ohio, and Pennsylvania. Dynegy's indirect subsidiary Sithe/Independence Power Partners, LP ("SIPP") owns and operates the Independence Energy Facility in Oswego, New York, a gas-fueled generator with a capacity of 1,060 MW. Through an affiliated power marketer, SIPP actively participates in the New York-area FERC-regulated wholesale electricity auctions.

11. Plaintiff Eastern Generation, LLC ("Eastern") owns and operates, through its subsidiaries, 72 generating units at seven facilities with a total average capacity of 4,961 MW. The facilities are located in New York, Illinois, Michigan, and Ohio. Eastern units provide over 18 percent of electricity capacity for the City of New York. Eastern actively participates in the New York-area FERC-regulated wholesale electricity auctions.

12. Electric Power Supply Association ("EPSA") is the national trade association representing leading competitive electric power suppliers, and is incorporated under the laws of the District of Columbia. EPSA's members include companies that are involved in competitive wholesale and retail electricity markets, with significant financial investments in electric generation and electricity marketing operations in New York and throughout the United States. EPSA seeks to bring the benefits of competition to all power customers. Many EPSA members actively participate

in the New York-area FERC-regulated wholesale electricity auctions.[4]

13. Plaintiff NRG Energy, Inc. ("NRG") is the largest independent power producer in the United States with over 50,000MW of diverse resources – powered by solar, wind, nuclear, gas, coal, oil, and cogeneration – and is one of the nation's largest competitive retail energy suppliers, with roughly three million retail customers. In New York, NRG owns four power plants in Staten Island, Queens, Haverstraw, and Oswego, totaling approximately 4,000 MW of generation. NRG affiliates also offer demand response services in New York, which are also highly influenced by prices in the FERC-jurisdictional markets, as well as selling power to New York customers at retail through a variety of affiliates. Through its ownership of these resources, NRG actively participates in the New York-area FERC-regulated wholesale electricity auctions.

14. Plaintiff Roseton Generating LLC ("Roseton") is the owner and operator of the Roseton electricity generation facility, a 1,242MW natural gas- and fuel-oil-fired generation facility in Newburgh, New York. Roseton actively participates in the New York-area FERC-regulated wholesale electricity auctions.

15. Plaintiff Selkirk Cogen Partners L.P. ("Selkirk Cogen") is the owner of a 432-MW natural-gas-fired combined-cycle cogeneration facility in Bethlehem, New York. Selkirk Cogen actively participates in the New York-area FERC-regulated wholesale electricity auctions.

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[4] The views expressed in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

16. Defendant Audrey Zibelman is Chair of the PSC and is sued here only in her official capacity.

17. Defendant Patricia L. Acampora is a Commissioner of the PSC and is sued here only in her official capacity.

18. Defendant Gregg C. Sayre is a Commissioner of the PSC and is sued here only in his official capacity.

19. Defendant Diane X. Burman is a Commissioner of the PSC and is sued here only in her official capacity.

JURISDICTION AND VENUE

20. This Court has jurisdiction over the subject matter of this case, under 28 U.S.C. § 1331, because the claims arise under federal law, specifically the Supremacy Clause and the Commerce Clause of the U.S. Constitution, and under 28 U.S.C. § 1983.

21. This Court has the authority to grant the requested declaratory relief under 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57, and authority to grant the requested injunctive relief under 28 U.S.C. § 1651(a) and Federal Rules of Civil Procedure 2202 and 65.

22. This Court has jurisdiction to order prospective relief in the form of a declaratory judgment or an injunction against Defendants in their official capacities as officers of an agency of the State of New York. *Ex parte Young,* 209 U.S. 123, 129 (1908).

23. Venue is properly in this district pursuant to 28 U.S.C. § 1391, because at least one defendant resides in this district, as the PSC has a major office in this district.

FACTS

Exclusive Federal Jurisdiction Over the Wholesale Electricity Market

24. Under the FPA, FERC has exclusive regulatory authority, to the exclusion of state and local governments, over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1); *see also id. §* 824(d) (defining a "wholesale" sale as a sale of electric energy to a buyer "for resale" to another buyer).

25. The scope of interstate regulation has grown over the years, as technological developments made it increasingly possible to transmit energy over long distances. Local delivery networks gave way to the modern "grid" network, with electricity constantly moving in interstate commerce throughout the United States.

26. FERC is exclusively empowered to regulate the interstate wholesale market to ensure, *inter alia,* that rates are "just and reasonable." 16 U.S.C. § 824d(a). In determining whether a state regulation interferes with this authority, courts consider "the *target* at which the state law *aims,"* and "measures aimed directly at interstate purchasers and wholesales for resale" are preempted. *Oneok, Inc. v. Learjet, Inc.,* 135 S. Ct. 1591, 1599 (2015). State actions that *"directly* affect the wholesale rate" are likewise invalid. *FERC v. Electric Power Supply Ass'n,* 136 S. Ct. 760, 772 (2016) (quotation omitted). The Supremacy Clause preempts any state regulation that effectively sets the wholesale rate a generator will receive. *Hughes,* 578 U.S. ___.

The FERC Regulatory Regime and the NYISO

27. Instead of directly setting wholesale rates, FERC has opted to regulate by using market-based auctions that are administered to establish the "just and reasonable rates" the FPA requires. FERC has explained that it relies on market processes "to bring more efficient, lower cost power to the Nation's electricity consumers." *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.,* FERC Order No. 888, 61 Fed. Reg. 21,540, 21,541 (May 10, 1996).

28. FERC authorizes and regulates "independent system operators" ("ISOs") and "regional transmission organizations" ("RTOs") to oversee the interstate auctions that are part of such market processes. The state of New York is in a region where wholesale electricity is bought and sold via auctions conducted by an ISO called the New York Independent System Operator, Inc. ("NYISO"). Some of the buyers in NYISO's wholesale auctions are entities located outside of New York, although most buyers are in-state utilities and competitive energy providers that resell to New York customers and businesses. The energy suppliers in NYISO's wholesale auctions include generators and demand-response entities located inside and outside of New York. NYISO's auctions are considered interstate wholesale markets, and FERC regulates them.

29. NYISO operates two distinct types of wholesale auctions: energy and capacity (among others, which have less direct bearing on this Complaint). There are two types of energy auctions – "day-ahead" and "real-time."

Energy Markets

30. With respect to the energy market, the goal of both the day-ahead and real-time auctions is to ensure that the NYISO "dispatches" (that is, turns on and regulates the output level of) sufficient generation resources to meet the actual amount of power used by consumers – or "load" in energy parlance – at any given moment. Unlike most other commodities that can be bought and sold in markets, electricity cannot be economically stored in appreciable quantities. If the amount of generation on the system falls short of demand levels, the grid operator will take a series of FERC-mandated steps to limit the negative consequences, starting with voltage reductions or "brownouts" and ending, in more severe cases, with load shedding or "rotating blackouts" to restore balance. If these measures to reduce load to meet available supply are not successful, uncontrolled widespread blackouts may result.

31. NYISO aims to prevent a supply/demand mismatch by running sophisticated day-ahead and real-time energy markets that take into account physical limitations on the transmission lines, generator availability, predicted energy usage, and many other factors. Because the transmission system has various physical limitations, the price of power varies by location, with electricity costing more in some parts of New York than in others.

32. In the day-ahead energy market, generators bid the price at which they are willing to generate a particular quantity of electricity for next-day delivery. In the real-time energy markets, the NYISO price increases or decreases, signaling the need for participating generators to produce more or less electricity as real-time conditions change.

33. The economic theory behind the energy markets is simple: the NYISO accepts bids from generators, beginning with the lowest and moving up until all demand bids are satisfied. (The reality is more complicated, as the NYISO determines separate energy prices, every five minutes, for hundreds of individual locations across New York.) The price of the final bid that satisfies all demand for a given location is known as the "market clearing price" or "locational based marginal price" and is paid uniformly to all successful supply-side bidders in that location. The wholesale price of electricity in both the day-ahead and real-time energy markets can rise very steeply at times of peak demand. Markets naturally deploy the most efficient and cheapest generators first; additional quantity must be provided by less efficient generators that cost more to run.

34. Unlike other types of generators, which can be turned on and off, or adjusted quickly to produce more or less energy, as conditions warrant, nuclear generators are typically dispatched in the day-ahead market and run continuously at maximum output. Because they have no alternative to selling their output in the NYISO energy auctions, they typically bid into these markets as "price takers," meaning that they will sell their entire output at whatever clearing price the market determines, even if the price is negative (in which case the generators would actually pay money for the right to download their output to the grid). A large price-taking unit significantly decreases energy-market prices paid to competitors, as it injects large quantities of energy into the grid, which lowers market-clearing prices. As long as energy-market prices, on average, are higher than the nuclear unit's marginal operating costs, this may be financially sustainable for a nuclear unit, since the total revenues

earned will exceed the unit's costs of production. Recent decreases in energy-production costs, however, largely driven by access of cheap shale gas, have decreased energy prices below the level necessary to keep some nuclear units operating.[5]

Capacity Markets

35. In order to ensure that the NYISO has the electricity-producing resources (the generating capacity) it needs to operate the grid reliably, the NYISO operates a capacity auction. On a seasonal basis, NYISO calculates how much generating capacity is needed to allow the electric grid to run reliably under forecasted peak demand and in the presence of significant losses of generating and transmission facilities. NYISO establishes the amount of electricity-generation capacity that New York retail electric suppliers ("load serving entities" or "LSEs") are required to purchase in order to meet customer demand under peak conditions. New York LSEs can meet their capacity obligations either through bilateral contracts with generation-owners (or with generation that they own), or through the NYISO-administered auction markets for reliability products known as capacity (the "Installed Capacity" or "ICAP" auctions), which FERC established.

36. In contrast to the energy auctions, where *electricity itself* is bought and sold, capacity auctions are for the purchase and sale of *options* to produce

[5] The owner of the Nine Mile and Ginna facility states that it "realizes a facility cost of $50.00 per megawatt hour." Docket No. 16-E-0270, "Petition of Constellation Energy Nuclear Group LLC; R.E. Ginna Nuclear Power Plant, LLC; and Nine Mile Point Nuclear Station, LLC to Initiate a Proceeding to Establish the Facility Costs for the R.E. Ginna and Nine Mile Point Nuclear Power Plants," at 2.

electricity. The NYISO, as buyer of a capacity-market option, receives the right, at its sole discretion, to call upon the seller of the option (a power generator) to produce a specified amount of energy if and when needed. Each generator that sells capacity in the NYISO capacity market is required to participate in the day-ahead energy market, and to respond in real-time, if conditions warrant. While the buyer of an option – in this case, the NYISO – need not exercise its option to require the seller to produce energy, the capacity market ensures that the grid will have the *ability* to furnish the amount of energy needed by consumers at any given moment in time.

37. The amount of capacity that the New York LSEs are required to purchase in the NYISO capacity markets is determined through a rigorous reliability planning process conducted by the New York State Reliability Council and overseen by FERC. Under FERC oversight, NYISO determines the required amount of capacity, and then it administers FERC-approved monthly capacity auctions, which are conducted separately for each of four sub-zones within the NYISO region. FERC also approves key parameters of the capacity-market auction, in particular, the shape of the administratively determined "downward sloping" demand curve that establishes the price LSEs are required to pay for capacity in various reliability scenarios and in various locations across New York.

38. As supplies of capacity are reduced (signaling a heightened risk to reliability), capacity prices increase to induce additional infrastructure investments. As supplies of capacity become more abundant (signaling a potential over-supply), capacity prices decrease, leading to the potential closure of inefficient generat-

ing units. Under FERC's auspices, NYISO has carefully calibrated its "downward sloping" demand curve to ensure that consumers receive the desired level of electrical-system reliability at the lowest possible price. Over time, the FERC-approved market design is self-correcting and leads to efficient economic equilibrium. The costs of capacity purchased in the NYISO capacity auctions are apportioned to LSEs on a volumetric-share basis.

39. In the capacity auction, generators offer to sell a certain amount of capacity at a certain price at a certain location. As with the energy auctions, the capacity offers in each of New York's four constrained capacity zones are "stacked" from lowest to highest, and bids are accepted until the requisite total demand has been met. The last and highest offer price needed to meet the demand in each zone establishes the market-clearing price for that zone. Any generator that offered at or below this price "clears" in the market and is paid the clearing price. Such a generator in turn is generally obligated to deliver, if called upon in the day-ahead or real-time energy markets, the amount of electricity to match the capacity that had cleared the auction in that generator's accepted offer. The generators whose offers are above the clearing price receive no payment and have no delivery obligation.

40. NYISO has explained that the auction's stacking mechanism "creates [an] incentive for capacity providers to be efficient and cost effective in order to be selected. Further, it creates price signals for new capacity to enter the market if it can supply capacity at prices below the clearing price. At the same time, the market provides price signals for existing suppliers to exit the market if they are unable to beat

the clearing price." *NYISO Markets: New York's Marketplace for Wholesale Electricity* at 5.[6]

Total Market Compensation

41. The total compensation a generator receives in the market is the sum of its energy-market and capacity-market revenues (as well as ancillary services market revenues, which accounts for only a small part of a generator's total earning potential).

42. An uneconomic generator can be artificially encouraged to remain in the market by subsidizing the generator's capacity-market earnings, or by subsidizing the generator's earnings in the wholesale energy markets. Because FERC determines both wholesale electricity market prices through NYISO's auction processes, there is no meaningful difference between whether the State elects to replace the FERC jurisdictional auction-derived capacity rate or energy rate. In both cases, because subsidized generators would be uneconomic in the absence of the subsidy, the subsidy distorts wholesale market price signals and directly interferes with the way in which FERC intends wholesale markets to function.

How Zero Emission Credits
Distort the Wholesale Market

43. The ZECs distort the functioning of the FERC-regulated energy and capacity markets, in the NYISO region and nationwide.

44. Under the ZEC subsidy program, an uneconomic nuclear generator receives a higher price per

[6] Available at: http://www.nyiso.com/public/webdocs/media_room/publications_presentations/OtherReports/OtherReports/NYISO%20Markets%20-%20New%20Yorks%20Marketplace%20for%20Wholesale%20Electricity.pdf.

MWh of energy it sells into the wholesale energy market than the rate established pursuant to FERC-approved market rules. Retail ratepayers in New York are the ones required to fund the difference between the wholesale energy rate authorized by FERC and the higher, subsidized rate, established by the state. This state-determined "revised" price contradicts FERC's determination that the NYISO-determined single clearing price is the just and reasonable rate for resources participating in the energy markets. Under the stacking mechanism used to set prices in the NYISO markets, moreover, the artificial retention of the uneconomic nuclear generators in the wholesale markets adds additional (uneconomic) supply in the energy market, which harms competitors (and economic efficiency) by artificially reducing wholesale energy prices and forcing otherwise economic generation *(i.e.,* non-subsidized generation that is more efficient than the nuclear units at issue) to inefficiently leave the market. In addition, the ZEC subsidies will deter the entry of new efficient suppliers, including suppliers of renewable energy, and the end result is higher prices to consumers and businesses in the long term.

45. Forced subsidization of the nuclear generators by retail customers equally distorts wholesale *capacity* market auction outcomes. Under the stacking mechanism, the retention of otherwise uneconomic producers artificially increases the supply of capacity, which directly leads to lower prices. This harm is more than hypothetical: three of the covered nuclear generators had announced that they would shut down some or all of their generating units, only to reverse their decisions once the ZEC program was announced. Artificially retaining generators in the capacity market that should have retired contravenes the economically

efficient market structure that NYISO designed and FERC approved.

46. In addition, FERC has previously acted to prevent the exercise of buyer-side, or monopsony, market power from infecting the capacity market. Buyer-side market power occurs when a state entity or other large buyer of capacity provides for retail customers to provide subsidies to select generating units in order to induce them to enter into, or remain in, the marketplace, even though market revenues are insufficient to warrant attracting the investment. These uneconomic units, in turn, lower capacity prices in the FERC jurisdictional market by suppressing the clearing price in the auction, which decreases the amount the buyer pays for all remaining capacity purchases and thereby reduces its total cost for capacity. Because capacity-market prices are sensitive to even small shifts in the supply/demand balance, the decrease in total capacity market costs can be large. In some cases, the reduction in total capacity market costs can exceed the artificial subsidy needed to cause the distortion in prices. To prevent this economically inefficient outcome, FERC has been extremely vigilant in protecting its capacity markets against state-subsidized resources undercutting its investment price signals.

47. In this case, by artificially retaining the otherwise uneconomic nuclear units, the PSC is using the ZEC subsidy to exert a large depressive effect on energy and capacity prices, which one group of experts estimated at $15 billion over 12 years.[7] While artificially depressed (below-market) energy and capacity prices may save New York ratepayers money in the

[7] *See supra* n. 3.

short run, these savings will be offset by both the increased costs of the ZECs themselves and by the enormous forgone benefits of competition and more efficient generation over the long run. Regardless of the short-run or long-run effect, New York – like Maryland in *Hughes* – has taken action to alter what the state views as unsatisfactory consequences of the prices set by the wholesale markets under FERC's exclusive jurisdiction.

48. Artificially suppressed prices threaten the viability of more efficient generators, including Plaintiffs, and discourage investment in efficient new, flexible generators better suited to integrate weather-dependent, zero-carbon renewable generating resources like wind and solar. Accordingly, not only will the ZEC program ultimately lead to higher wholesale prices, but it will also stifle the unquestionable environmental benefits derived from competitive electric markets.

49. The ZEC program, which is called "Tier 3" in the ZEC Order, is easily distinguishable from the Renewable Energy Credit ("REC") program, the "Tier 1" and "Tier 2" programs in the ZEC Order.[8] Under the Tier 1 and Tier 2 programs, qualified renewable generators (such as solar, wind, and biomass) earn RECs for each MWh of electricity they generate. New York LSEs are required to acquire a certain number of RECs each year or make an Alternative Compliance Payment.

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[8] New York has had an REC program for over a decade prior to the ZEC Order. *See* Order Regarding Retail Renewable Portfolio Standard, Case no. 03-E-0188 (9/24/04) (available at http://www3.dps.ny.gov/pscweb/WebFileRoom.nsf/Web/85D8CCC6A42DB86F85256F1900533 518/$File/301.03e0188.RPS.pdf). The ZEC Order reconstitutes New York's REC program, and now refers to RECs as Tier 1 or Tier 2, with ZECs constituting Tier 3.

50. Federal law authorizes States to provide a different level of compensation to certain types of renewable generators, but makes no such allowance for States to set the level of compensation for nuclear generators. *See* 16 U.S.C. § 796 (authorizing states to set prices for Qualified Facilities, defined as renewable facilities with output less than 80 MW or gas-fired facilities that meet specified efficiency requirements). In addition, Congress has provided renewable generators with tax incentives, in the form of Production Tax Credits and Energy Investment Tax Credits, 20 U.S.C. §§ 45 & 48.

51. RECs also differ from ZECs in several other important respects. Similar to the REC programs established in many other states and regions, under the PSC's REC program, RECs are created by all qualified renewable generators, without regard to economic need. The price of RECs is not tethered in any way to wholesale electricity prices. Rather, RECs are publicly traded, so that their value varies based on supply and demand, including the competitive interactions among alternative qualified suppliers of renewable generation (based on the overall economics of their respective technologies, their specific generating units, and their own operational efficiencies).

The New York ZEC Program

52. Several New York's older nuclear generators have become uneconomic in recent years, in particular the Robert Emmett Ginna plant ("Ginna") in Ontario and the James A. FitzPatrick ("FitzPatrick") and Nine Mile Point 1 plants, also in Scriba. The newer, more efficient Nine Mile 2 plant in Scriba is operating without any financial issues.

53. These nuclear plants are Exempt Wholesale Generators ("EWGs") under the Public Utility Holding Company Act, 42 U.S.C. § 16451 *et seq*. An EWG is a person engaged "exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale." *Id.* § 79z-5a. These nuclear facilities thus can only produce energy and sell it at wholesale.

54. Exelon owns the Ginna plant, as well as the Nine Mile Point plaint. In 2014, after millions of dollars in losses, Exelon threatened to retire the Ginna plant, as the expected revenues from the sale of capacity and energy into the NYISO markets were insufficient to cover its costs of continued operation. Citing its status as a large taxpayer and employer, Ginna pleaded for state aid to keep the facility open.

55. As a temporary measure to ensure system reliability, FERC approved a Reliability Support Service Agreement ("RSSA") between Ginna and a local utility, under which retail customers pay a minimum $2.20 monthly surcharge through March 2017 to prop up Ginna while the reliability problems on the grid associated with Ginna's retirement are corrected by way of a $144,855,000 transmission-system upgrade, scheduled for completion in March 2017.[9] Once the planned upgrades are completed, Ginna will no longer be needed for reliability, and it would be expected to close (absent the ZEC bailout).[10]

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[9] Http://documents.dps.ny.gov/public/ Common/ViewDoc.aspx?DocRefId={59B4ADCD-E7B2-4OFF-B3F0-2755F0C12A00}.

[10] Http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={151A78E9-8112-4169-AE7F-114516908853}.

56. Entergy owns the FitzPatrick plant, which has suffered from similar economic problems. In 2015, Entergy announced the plant would close at the end of its current fuel cycle, expected to be in January 2017. FitzPatrick looked to the state to provide incentives to keep the plant open to save local jobs and tax revenues. Exelon agreed to buy FitzPatrick from Entergy if, but only if, the state provided a bailout subsidy.[11]

57. In January 2016, Exelon similarly announced that, in view of continued losses, Nine Mile 1 would be closed in the absence of price support from the state. Unlike Ginna and FitzPatrick, Nine Mile Point has two nuclear facilities. Although Nine Mile 1 is losing money, the newer Nine Mile 2 plant is profitable without subsidies.

58. The PSC adopted the ZEC program in response to the financial problems at these three plants. Ostensibly to avoid "losing the carbon-free attributes of this generation before the development of new renewable resources between now and 2030," the PSC established a mechanism to provide out-of-market funding to Ginna, Fitzpatrick, and Nine Mile Point, purportedly for the "zero-emissions attributes of nuclear zero-carbon electric generating facilities where public necessity to encourage the continued creation of the attributes is demonstrated." ZEC Order at 19.

59. Only nuclear plants specifically selected by the PSC are eligible to receive the ZEC subsidy. Other

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[11] *See* Joint Application under FPA Section 203 of Entergy Nuclear FitzPatrick, LLC and Exelon Generation Company, LLC, Ex. I, § 5.06(e) available at http://elibrary.ferc.gov/idmws/file_list.asp?document_id=14487740.

zero-carbon resources in New York receive no compensation for their zero-carbon attributes. Once the ZEC subsidy is taken into account, the uneconomic nuclear resources expect to receive a higher level of wholesale market compensation than nuclear generators operating in New York that are profitable and that do not qualify for ZEC payments. Thus, the ZEC Order simply serves to keep the uneconomic capacity and energy from these specific units in the FERC-regulated wholesale markets, notwithstanding the fact that wholesale market price signals are indicating that these units should be retired.

60. In June 2015, the PSC opened a proceeding entitled "In the Matter of the Implementation of a Large-Scale Renewable Program and a Clean Energy Standard," case no. 15-E-0302 (the "LSR proceeding"). There was no mention of the upstate nuclear plants or any type of ZEC program in the initial notice of the LSR proceeding or in the accompanying paper entitled "Large Scale Renewable Energy Development in New York: Options and Assessment," which was prepared jointly by the PSC's staff, the New York State Energy Research and Development Authority ("NYSERDA"), and outside consultants. Shortly thereafter, in July 2015, the State Energy Planning Board promulgated a State Energy Plan ("SEP") with a goal that 50 percent of all electricity used in the state should by 2030 be generated from renewable energy sources. The SEP does not mention the upstate nuclear plants or any type of ZEC program.

61. After the announcements of the closing of Ginna and FitzPatrick, the PSC in January 2016 expanded the scope of the LSR proceeding and ordered its staff

to develop a white paper with recommendations to keep the upstate nuclear generators open.[12]

62. Four days later, the staff issued its white paper which proposed, *inter alia,* that the PSC adopt a ZEC program to save New York nuclear generators facing "financial difficulties." The white paper proposed that ZECs be issued "based upon the difference between the anticipated operating costs of the units and forecasted wholesale prices."[13] The proposed ZEC program was said to be "similar to the Ginna RSSA" and was designed "to provide qualifying nuclear plants with support payments, reflective of their going forward costs of operation, to ensure they continue to operate." Unlike the Ginna RSSA, however, the ZEC program would be implemented without FERC approval and without a determination that any of the plants are needed for reliability.

63. In April 2016, the U.S. Supreme Court rendered its decision in *Hughes v. Talen Energy Marketing, LLC,* 578 U.S. (2016), which held that state subsidies to electricity generators are unconstitutional if "tethered" to FERC-regulated wholesale electricity prices. Apparently recognizing that its original proposal was plainly unconstitutional under *Hughes,* the PSC staff hastily revised its recommendation in July 2016 and changed the formula for determining the

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[12] *See* Order Expanding Scope of Proceeding and Seeking Comments (1/21/16), available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={C29C66EA-CE42-4FD2-B679-19A39E0F1C4F}.

[13] Staff White Paper on Clean Energy Standard (1/25/16) at 32, available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B930CE8E2-F2D8-404C-9E36-71A72123A89D%7D.

amount of the ZEC subsidies. Although the new formula was ostensibly based upon a federal interagency working group's estimated "social cost of carbon,"[14] this was window dressing, changing the name but not the intent to replace the FERC-determined energy price with a state-determined energy price, with respect to Ginna, FitzPatrick, and Nine Mile Point. Indian Point, a fourth New York nuclear generating station, located in Westchester County, was not recommended for inclusion in the ZEC program.

64. The PSC adopted the revised recommendation on August 1, 2016 and claimed that the ZEC program was not preempted because it "closely ties the pricing mechanism for ZECs to the environmental attribute" and is "untethered to a generator's wholesale market participation." ZEC Order at 134, 151. The PSC acknowledged, however, that "federal law on what measures are or are not untethered is currently unclear, creating an element of risk for any kind of program." *Id.* at 121. The PSC also ignored the fact that the revised version of the program is contingent on the nuclear units' participation in the FERC-jurisdictional wholesale markets, because the payment of ZEC subsidies occurs if, and only if, the nuclear generator "produces" electricity. All electricity produced by these nuclear generators must be sold directly or indirectly in the NYISO auctions, as there are no alternative markets.

65. The ZEC program thus establishes a new state-created energy price "adder" granted only to the designated nuclear generators. The adder would not

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[14] Staffs Responsive Proposal for Preserving Zero Emissions Attributes (7/8/16) at 2, available at http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7BBBFA4008-FD27-4209-B8E1-AD037578101E%7D.

occur unless the nuclear generators sell their energy into the wholesale market and thus is directly tethered to the wholesale price of electricity. The PSC disqualified Indian Point from the ZEC program specifically because it "has a much higher level of market revenues" (ZEC Order at 130), which further indicates how tightly the adder is tethered to the wholesale electricity markets.

66. The price-suppressive effects of the ZECs on the FERC-regulated wholesale markets also impermissibly discriminate against other non-carbon emitting technologies. Under the ZEC program, a small hydroelectric dam producing zero-emission energy would receive the FERC-determined energy price, but would not qualify for ZECs. Other generators of renewable energy and out-of-state entities are similarly disadvantaged, substantially burdening interstate (as well as international) commerce.

67. Under the ZEC Order, a New York nuclear generator that makes a showing of "public necessity" is entitled to a long-term subsidy contract with NYSERDA. To find the triggering "public necessity" for a particular facility, the PSC must find, *inter alia,* that the facility's revenues "are at a level that is insufficient to provide adequate compensation to preserve the zero-emission environmental values or attributes historically provided by the facility." *Id.* at 124. In other words, the nuclear generator's entitlement to ZECs depends upon the PSC's determination that the generator's compensation from the FERC-regulated auctions is "inadequate." Accordingly, at the threshold, the entire ZEC program is tethered to PSC findings that necessarily contradict FERC's determination that the wholesale price is "just and reasonable."

68. Inadequate compensation is the second of five factors the PSC must consider before finding the requisite "public necessity" for the issuance of ZECs to a nuclear facility. The five prong test in its entirety is:

> (a) the verifiable historic contribution the facility has made to the clean energy resource mix consumed by retail consumers in New York State regardless of the location of the facility;
>
> (b) the degree to which energy, capacity and ancillary services revenues projected to be received by the facility are at a level that is insufficient to provide adequate compensation to preserve the zero-emission environmental values or attributes historically provided by the facility;
>
> (c) the costs and benefits of such a payment for zero-emissions attributes for the facility in relation to other clean energy alternatives for the benefit of the electric system, its customers and the environment;
>
> (d) the impacts of such costs on ratepayers; and
>
> (e) the public interest.

Id. at 124. The PSC has already found that the requisite "public necessity" exists for the Ginna, FitzPatrick, and the Nine Mile Point 1 and 2 nuclear facilities. *Id.* at 128. If the planned sale of FitzPatrick to Exelon is completed, then all of the $7.6 billion in subsidies will go to a single company, Exelon. (There has not been a finding of public necessity regarding Indian Point, which is owned by Entergy.)

69. Once the PSC finds a "public necessity" with respect to a particular nuclear facility, the generator will then, under a contract with NYSERDA, sell its ZECs to NYSERDA at a price determined administratively by the PSC. As noted, a nuclear facility is only entitled to ZECs to the extent it "produces" electricity, and the designated facilities have no choice but to sell their production in the NYISO wholesale auctions. In addition, the value of each ZEC is tethered to wholesale electricity prices in the manner set forth below.

70. For the first two years, from April 1, 2017, through March 31, 2019, the PSC has set the ZEC price at $17.48 per MWh for each MWh of electricity produced by the facility. In other words, each qualifying nuclear generator will get an additional $17.48 for each MWh of electricity it generates (subject to a possible cap), in addition to the price the facility receives for the sale of the electricity and capacity in the FERC-regulated wholesale market. As wholesale energy prices in the region now average around $20 per MWh, the ZEC adder discriminatorily boosts the nuclear generators' revenue by over 80 percent for each MWh generated. The ZEC price was said to be based on the "social cost of carbon" (as estimated by a federal inter-agency working group on a dollars-per-short ton basis, times a fixed 0.53846 "conversion factor" from short tons to MWh) minus the generator's putative value of avoided greenhouse gas emissions under the Regional Greenhouse Gas Initiative (the "baseline RGGI effect"). *Id.* at 51, 130.

71. After the first two years, the amount of the subsidy, if any, is again directly tied to forecast prices in the FERC-regulated NYISO wholesale market. Specifically, the price of each ZEC will be, for each two-

year tranche, the social cost of carbon minus the baseline RGGI effect, and minus the amount by which the NYISO "Zone A [western New York] forecast energy price and ROS [rest of state] forecast capacity price combined exceeds $39/MWh." ZEC Order at 131. In other words, as forecast prices in the FERC-regulated NYISO wholesale auctions increase, the ZEC subsidies directly decrease, to the point of ultimate elimination if forecast prices in the FERC-regulated markets increase enough.

72. In addition to this price-tethering, the ZEC program directly affects the quantity of electricity available in the wholesale markets. ZECs are provided up to the "MWh amount that represents the verifiable historic contribution the facility has made to the clean energy resource mix consumed by retail consumers in New York State, as specified in the NYSERDA contract." *Id.* at 51. The calculated amount is both a "cap and obligation" – if more is produced, no additional subsidy is given; if less is produced, the underperforming generator is subject to "appropriate financial consequences." *Id.* at 144-46. The PSC is thus dictating the quantity of electricity to be sold into the FERC-regulated wholesale electricity markets, as well as the price.

73. After buying the ZECs from the nuclear generators at the price mandated by the PSC, NYSERDA is to resell them to each NY LSE on a *pro rata* basis. Each LSE is required "to purchase an amount of ZECs per year of the total amount of ZECs purchased by NYSERDA in proportion to the electric energy load served by the LSE in relation to the total electric energy load served by all load serving entities in the New York Control Area." *Id.* at 51. Even competitive retail suppliers providing 100 percent carbon

emission-free energy to their customers as a premium service are required to purchase ZECs from the State. The rate-regulated LSEs (that is, the traditional distribution utilities) are authorized to pass on the costs of LSE purchases to their customers, the retail ratepayers, while the PSC presumes that competitive LSEs will likewise add the cost of ZECs into the prices they offer to consumers.

74. If the ZEC program goes into effect as planned, in April 2017, Plaintiffs will be damaged, because the subsidies will enable the nuclear generators, who compete against Plaintiffs in interstate markets, to continue operating money losing facilities, and selling uneconomic capacity and energy into the FERC-regulated auctions, causing the auctions to return significantly lower prices, which disrupts FERC's efforts to promote, design, and implement competitive wholesale energy and capacity markets.

75. The PSC and defendant commissioners are immune from damages liability. Accordingly, the harm to Plaintiffs from implementation of the unconstitutional ZEC program will be irreparable.

CLAIMS FOR RELIEF

COUNT I

FIELD PREEMPTION – SUPREMACY CLAUSE

76. Plaintiffs herein incorporate all previous allegations.

77. Under the Supremacy Clause, if Congress enacts a federal law regulatory scheme and intends to fully occupy the field it has chosen to regulate, any state law in this field is "field preempted" and thus invalid, without regard for the impact of the state regulation upon the national interest.

78. The ZEC Order is field preempted. Under the FPA, 16 U.S.C. § 824(b), FERC has exclusive jurisdiction over the sale of electric energy and the sale of capacity at wholesale in interstate commerce. Federal law exclusively occupies the entire field of wholesale electricity sales.

79. NYISO's energy and capacity auctions are wholesale interstate markets for the sale of electricity, and they fall within the field of FERC's exclusive authority. The ZEC Order invades that field because it directly affects the wholesale clearing price of electricity sales in the NYISO auctions.

80. Specifically, the nuclear generators offer into the NYISO auctions. Under FERC-approved rules, all generators whose offers "clear" receive the market clearing price, which is the wholesale market price. The ZEC requirement invades FERC's exclusive regulatory field by directly altering the revenue to be paid to the nuclear generators. The ZECs would provide the nuclear plants with substantial out-of-market payments for each MWh of electricity they produce, thus effectively replacing the auction clearing price received by these plants with the alternative, higher price preferred by the PSC.

81. The FERC-determined price paid to competing generators in the energy market is also suppressed by the uneconomic retention of the nuclear units, which also frustrates FERC's market design, causing a concomitant lowering of the clearing price to be paid to plaintiffs and other competitors.

82. Finally, the continued operation of the otherwise non-economic nuclear generators has a significant price suppressive effect in the capacity market,

frustrating FERC's goals of ensuring electric reliability through the capacity market. But for the subsidy, these units would leave the market, temporarily decreasing the amount of supply in the market, and increasing prices until the market responded with the necessary level of investment in new generation, thereby finding a new equilibrium level.

83. The ZEC Order is therefore field preempted, because (a) FERC has exclusive jurisdiction to set wholesale prices, yet the ZEC program guarantees the favored generators a higher price than the competitive market price set by FERC; and (b) the ZEC program interferes with FERC's exclusive jurisdiction over wholesale prices by affecting the behavior of participants in both energy and capacity auctions.

COUNT II

CONFLICT PREEMPTION –
SUPREMACY CLAUSE

84. Plaintiffs herein incorporate all previous allegations.

85. Even in the absence of field preemption, any state law or regulation is "conflict preempted" and thus invalid if it conflicts with federal law or frustrates the purpose of a federal law.

86. The ZEC Order is conflict preempted by the FPA. FERC, the agency charged with implementing the FPA, has determined that market-based processes – approved and overseen by FERC – are the best way to bring more efficient, lower cost power to the Nation's electricity consumers. As NYISO has explained, the auction market process "creates [an] incentive for capacity providers to be efficient and cost effective in order to be selected. Further, it creates price signals

for new capacity to enter the market if it can supply capacity at prices below the clearing price. At the same time, the market provides price signals for existing suppliers to exit the market if they are unable to beat the clearing price." *NYISO Markets, supra* at 4.

87. The ZEC Order enables the nuclear generators to offer in the auction markets at a lower price, likely below actual costs, over a lengthy twelve-year period of time. The clearing price of the auctions will thus be artificially suppressed well into the next decade. The offers of some generators will be rejected, even though (absent the nuclear generators' subsidized participation) they would have cleared the auction; and the generators whose offers are accepted will be undercompensated, because the clearing price will be artificially lower than what a competitive market process – as established by FERC – would have produced, and lower than the actual cost to provide the capacity service.

88. The ZEC Order will disrupt market signals. The subsidized nuclear generators, even though uneconomic, will stay in operation; generators that are otherwise economic will exit the market because they are receiving an artificially suppressed price and thus lower revenues; and investors will be discouraged from financing and building new economic generators. Supply will then be reduced, and the market price will increase yet new investors will be deterred from entering a marketplace plagued by subsidized distortions.

89. The ZEC program also interferes with FERC's decision to structure the wholesale markets for capacity and energy on market-based principles in order to encourage the exit of uneconomic generating capacity – when a generator's costs exceed its revenues – to

encourage the entry, when appropriate, of more efficient generators. It is clear from the ZEC Order that the PSC simply disagrees with FERC's determination that the markets should determine the fate of the uneconomic nuclear generators.

90. The ZEC program will also affect interstate and international wholesale markets outside New York and the NYISO. Because the ZEC Order will artificially suppress the NYISO auction prices, generators will prefer, where possible, to sell in wholesale markets other than NYISO, for example in markets run by the New England area ISO, by PJM (the ISO for Pennsylvania, twelve other states, and the District of Columbia), or by Canadian entities. This shift will increase supply and reduce prices in those other markets, and thus the ZECs will have market-distorting ripple effects throughout the national market and beyond New York's borders.

91. If New York truly believes that nuclear generators require a subsidy to achieve environmental goals, it is entitled to petition FERC to adopt market rule changes that would encourage better price formation in the FERC-jurisdictional markets, or take other steps to increase market prices to levels sufficient to allow the nuclear generators to recover their costs. Instead of following this course, the PSC has opted to disregard FERC's exclusive jurisdiction over wholesale electricity rates.

92. The ZEC Order therefore stands as an obstacle to FERC's regulatory scheme, which depends upon fair competition and the functioning of competitive auction markets without interference from out-of-market subsidies. Under the Supremacy Clause, the PSC may not supplant FERC's scheme with its own preferred approach.

COUNT III

DORMANT COMMERCE CLAUSE,
UNDER 28 U.S.C. § 1983

93. Plaintiffs herein incorporate all previous allegations.

94. The ZEC Order is invalid under the dormant Commerce Clause, U.S. Const. art. I, § 8. Under this provision, states cannot discriminate against interstate commerce nor can they unduly burden interstate commerce, even in the absence of federal legislation regulating the activity. Any state action that burdens interstate commerce is invalid if the burden is clearly excessive in relation to the putative local benefits. A state action is invalid if it does not regulate evenhandedly to effectuate a legitimate local public interest, or if its effects on interstate commerce are more than incidental.

95. Although states have the right to regulate the retail sale of electricity within their own borders, the wholesale sale of electricity involves interstate commerce, which the state may not regulate. NYISO's wholesale markets are interstate and international in nature, as they involve the sale and transmission of energy and capacity from generators located in other states and in Canada, and the purchase of such commodities by customers in other states.

96. The ZEC Order is purely protectionist in nature, enacted for political reasons to save jobs at the subsidized generators and the property tax revenues therefrom. The PSC's attempts to preserve local industry from the rigors of interstate competition are prohibited by the Commerce Clause.

97. Although the reduction of carbon emissions is important, this can be achieved more effectively by means that would neither discriminate against interstate or international commerce nor frustrate the progress competitive markets have been delivering in the form of environmental benefits.

98. The ZEC Order is directly discriminatory, as only specified New York nuclear facilities are eligible to receive ZECs. The program is not even-handed with respect to other technologies that could produce carbon-free electricity and with respect to out-of-state generation. It therefore violates the Commerce Clause.

99. Even if the ZEC program is not deemed discriminatory, it is still invalid under the Commerce Clause because it imposes market-distorting burdens on interstate and international commerce that far outweigh the purported local benefits. As detailed above, the ZECs would cause more efficient interstate generators to leave the market and discourage the entry of new competitors.

100. In fact, the purported local benefits are largely illusory. Artificially suppressed prices – achieved through ratepayer subsidies provided to uneconomic nuclear generating units – will ultimately lead to reduced supply and higher prices, as they will deter the development of newer, more efficient market entry needed to moderate higher prices.

101. Defendants' actions in enacting and implementing the ZEC Order have deprived plaintiffs of their Commerce Clause "rights, privileges, or immunities" within the meaning of 28 U.S.C. § 1983. Plaintiffs have been injured by these deprivations and are

entitled to redress under § 1983. *Dennis v. Higgins,* 498 U.S. 439 (1991).

PRAYER FOR RELIEF

In light of the foregoing, Plaintiffs seek:

A. a declaration that the portions of the ZEC Order addressing nuclear subsidies are invalid because it is preempted by federal law;

B. a permanent injunction requiring Defendants to withdraw the portions of the ZEC Order addressing the nuclear subsidies and/or preventing defendants from implementing the ZEC Order;

C. reasonable attorneys' fees (28 U.S.C. § 1988) and costs; and

D. all such other relief to which they may be entitled.

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Respectfully submitted,

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