17-2654-cv

United States Court of Appeals
for the
Second Circuit

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,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

DONALD B. VERRILLI, JR.
MUNGER, TOLLES & OLSON LLP
1155 F Street, NW, 7th Floor
Washington, DC 20004
(202) 220-1100

– and –

HENRY WEISSMANN
FRED A. ROWLEY, JR.
MARK R. YOHALEM
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue, Suite 5000
Los Angeles, California 90071
(213) 683-9100

JONATHAN D. SCHILLER
DAVID A. BARRETT
BOIES SCHILLER FLEXNER LLP
575 Lexington Avenue
New York, New York 10022
(212) 446-2300

– and –

STUART H. SINGER
BOIES SCHILLER FLEXNER LLP
401 East Las Olas Boulevard, Suite 1200
Fort Lauderdale, Florida 33301
(954) 356-0011

Attorneys for Plaintiffs-Appellants

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.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel for Plaintiffs-Appellants certifies as follows:

- Plaintiff Coalition for Competitive Electricity is not a public company and has no publicly held parents, subsidiaries, or affiliates.
- Plaintiff Dynegy Inc. ("Dynegy") is a publicly held company. Dynegy does not have a parent company, there are no publicly held companies that have a 10% or greater ownership interest in Dynegy, and Dynegy has no publicly held subsidiaries or affiliates.
- Plaintiff Eastern Generation, LLC is not a public company and has no publicly held parents, subsidiaries or affiliates.
- Plaintiff Electric Power Supply Association is not a public company and has no publicly held parents, subsidiaries or affiliates.
- Plaintiff NRG Energy, Inc. ("NRG") has publicly traded shares. No publicly held company has a 10% or greater ownership interest in NRG. NRG Yield, Inc., ("NYLD") is a publicly traded affiliate of NRG. NRG has no other parents, subsidiaries, or affiliates that are publicly traded.
- Plaintiff Rensselaer LLC is not a public company and has no publicly held parents, subsidiaries or affiliates.
- Plaintiff Roseton Generating LLC is not a public company and has no publicly held parents, subsidiaries or affiliates.
- Plaintiff Selkirk Cogen Partners, L.P. has four corporate parents. Two parent companies—Atlantic Power Corporation and Osaka Gas Co. Ltd.—are public companies, and the other two are private. Selkirk Cogen Partners L.P. has no public affiliates or subsidiaries.

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. § 1291. Following entry of a Memorandum Opinion and Order granting Defendants' Rule 12(b)(6) motions on July 25, 2017, SPA-1,[1] District Court ECF Docket no. ("ECF") 159, the District Court entered final judgment on July 27, 2017. SPA-48, ECF 160. Plaintiffs-Appellants timely filed a Notice of Appeal on August 24, 2017. A-318, ECF 161.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The New York Public Service Commission ("PSC") adopted a so-called Zero Emissions Credit ("ZEC") program in August 2016. The ZEC program subsidizes sales of electricity produced by three nuclear power plants in upstate New York. These sales occur in interstate wholesale electricity markets, which are under the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC"), pursuant to the Federal Power Act ("FPA"), 16 U.S.C. §§ 824, *et seq*. The issues on appeal are:

1. Whether *Armstrong v. Exceptional Child Center, Inc*., 135 S.Ct. 1378 (2015), which interpreted the Medicaid Act, precludes private suits in

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[1] Citations in the form "A-___" are to the Joint Appendix, and "SPA-___" to the Special Appendix. Unless otherwise indicated, in quotations throughout this brief, all emphases are added and all internal citations are omitted.

equity to enforce FPA preemption claims, overruling decades of precedent allowing such private enforcement.

2. Whether Plaintiffs' complaint states a claim that the ZEC program is subject to field or conflict preemption because it mandates that certain favored producers receive payments in connection with their wholesale electricity sales that exceed the FERC-approved auction clearing price and distort the wholesale electricity market.

3. Whether the complaint states a claim that the ZEC program violates the dormant Commerce Clause by discriminating in favor of subsidized in-state nuclear plants or by unduly burdening interstate commerce.

STATEMENT OF THE CASE

Plaintiffs filed this action in the Southern District of New York (Valerie E. Caproni, J.) to enjoin the Defendant state officials from enforcing the ZEC portion of an order (the "ZEC Order") entered by the PSC. A-80 (State of N.Y., Pub. Svc. Comm'n, Order Adopting a Clean Energy Std. (Aug. 1, 2016)).

The ZEC program uses subsidies tethered to wholesale market prices to prop up three failing New York nuclear power plants, all of which are owned by affiliates of Defendant-Intervenor Exelon Corporation. A-61, ECF 1 (Complaint ("Compl.") ¶¶ 55-58). These plants sell electricity, in competition with Plaintiffs' power plants, in wholesale auctions conducted under FERC supervision. A-51, 65 (Compl. ¶¶ 34, 64-65). The Exelon plants—known as FitzPatrick, Ginna and Nine Mile Point—were not able to compete successfully in those wholesale markets; they were operating at a loss and would have gone out of business without the additional support payments mandated by the state. A-60 (Compl. ¶¶ 52-58). To keep these plants operating, the ZEC program provides subsidies, over and above the FERC-approved auction rates, for the electricity they sell into wholesale auctions. A-40, 62 (Compl. ¶ 3, 58). New York consumers of electricity foot the bill for these subsidies, which are projected to reach $7 billion over the next dozen years.

Plaintiffs allege that the ZEC program is unconstitutional because it is preempted by the FPA and violates the Commerce Clause. A-71 (Compl. ¶¶ 76-101). In providing ZEC subsidies tied to participation in wholesale markets, the PSC has usurped FERC's exclusive authority under the FPA to set just and reasonable rates that power producers receive in connection with sales of electricity into wholesale auctions. For preemption purposes, the New York ZEC program is identical in substance to a state program that the Supreme Court unanimously invalidated in *Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288 (2016). The program invades FERC's exclusive jurisdiction because it replaces the FERC-determined just and reasonable auction prices for wholesale electricity with a different rate determined by the state. ZEC subsidies also distort wholesale auction outcomes in conflict with FERC's policy of using auctions to set wholesale electricity prices. Finally, the ZEC program favors three in-state nuclear plants at the expense of out-of-state generators who compete in the same FERC auction markets, thereby violating the dormant Commerce Clause.

A. Facts

1. The Federal Regulatory Scheme

The FPA gives FERC broad and exclusive authority over "the sale of electric energy at wholesale in interstate commerce," 16 U.S.C. § 824(b)(1), including regulation of any charges "in connection with" wholesale rates and any "rules and regulations affecting or pertaining to such rates or changes," 16 U.S.C. §§ 824d(a), 824e(a). FERC has "exclusive jurisdiction over 'rates and charges ... received ... for or in connection with' interstate wholesale sales," *Hughes*, 136 S.Ct. at 1297 (quoting 16 U.S.C. § 824d(a)), and has exclusive authority to ensure that wholesale electricity rates are not "unjust, unreasonable, unduly discriminatory or preferential," *id*. at § 824e(a).

FERC has determined that the just and reasonable rates for wholesale energy and capacity should be set by competitive energy markets and auctions, rather than traditional cost-of-service ratemaking, in states like New York that have elected to participate in competitive wholesale electricity markets since 1999. *See* A-48 (Compl. ¶ 27); *N.J. Bd. of Public Utils. v. FERC*, 744 F.3d 74, 81 (3d Cir. 2014). In New York, the wholesale auctions are managed by the New York Independent System Operator ("NYISO"), under rules and procedures FERC has approved. *See*

Central Hudson Gas & Electric Co. et al., 83 FERC P 61,352 (1998), 86 FERC P 61,062 (1999), order on reh'g, 88 FERC P 61,138 (1999); A-48 (Compl. ¶¶ 27-28); *N.J. Bd*, 744 F.3d at 82

NYISO operates two main types of wholesale auctions: energy and capacity. A-49 (Compl. ¶ 29). Both auctions employ "stacking" of bids from lowest to highest until the requisite quantity is covered. A-50, 54 (Compl. ¶¶ 33, 39-40). The price of the highest-stacked bid sets the "market clearing price," which all bidders at or below that price receive. *Id.* The clearing price is by definition the FERC-approved "just and reasonable" rate. *Hughes*, 136 S.Ct. at 1297.

In "energy" auctions, generators bid the lowest price they will accept to sell a specified quantity of electrical output on a spot or short-term basis. A-49 (Compl. ¶¶ 30-34). In "capacity" auctions, generators bid, and NYISO purchases, options to call upon the generator to produce a specified amount of energy if and when needed in the future, which insures the long-term reliability of the electric system. A-52 (Compl. ¶ 35-40).

FERC adopted the supply/demand-based auction process "to bring more efficient, lower cost power to the Nation's electricity consumers" by aligning incentives. *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). "A high clearing price in the capacity auction encourages new generators to enter the market, increasing supply and thereby lowering the clearing price in same-day and next-day auctions three years' hence; a low clearing price discourages new entry and encourages retirement of existing high-cost generators." *Hughes*, 136 S.Ct. at 1293. Over time, the FERC-approved market design is self-correcting and leads to efficient economic equilibrium. A-55 (Compl. ¶ 40).

2. The ZEC Program's Manipulation of Wholesale Markets

New York's ZEC program disrupts FERC's market-based approach to setting wholesale rates. To keep Exelon's three favored plants in operation, the ZEC program provides a subsidy payment for each megawatt of electricity these plants sell into the wholesale auction, over and above the FERC-approved auction price. The program thus countermands the outcome of the FERC-regulated auction process, which sets rates too low to allow those plants to operate profitably. In so doing, the ZEC program artificially inflates supply, which depresses the auction clearing price to the disadvantage of more efficient wholesale market participants, including Plaintiffs.

The ZEC subsidy for these plants is expressly tethered to wholesale prices resulting from the NYISO auctions. A-69 (Compl. ¶¶ 70-71). The ZEC price formula starts with a Base Subsidy Amount,[2] which is set at $17.48 per megawatt hour ("MWh") for the first two years of the program, increasing to $21.38 by 2021. A-266 (ZEC Order App. E, p. 13). From 2023-2029, the Base Subsidy Amount increases even further, though the precise amount depends on the future mix of renewable and conventional generation resources. A-259 (*id*. at App. E, p. 6). To establish the ZEC subsidy amount, the Base Subsidy Amount is adjusted biennially by reference to forecast wholesale market prices in two specified areas of the state. A-215 (ZEC Order 131).[3] The ZEC Order sets a baseline wholesale price index of $39/MWh, which approximates the sum of recent forecasts of energy and capacity prices in the specified NYISO markets for the first two years of the ZEC program. A-222 (*id.* at 138-139). As prices in the wholesale markets rise above $39/MWh in future years, the ZEC subsidy is reduced dollar for dollar. *Id*.; *see also* A-258 (App. E at 5-8). If prices decline after having risen above the $39/MWh benchmark, the ZEC subsidy is increased dollar for dollar, up to the Base Subsidy

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[2] The PSC refers to this amount as the "Social Cost of Carbon," adjusted for revenue anticipated from the Regional Greenhouse Gas Initiative. But because Plaintiffs dispute the derivation of these amounts and allege they are simply a dollar amount designed to keep the Exelon plants in business, Plaintiffs refer to it instead as the Base Subsidy Amount.

[3] Specifically, the Base Subsidy Amount is reduced by the amount by which the "Zone A [western New York] Forecast Energy Price and [rest of state] Forecast Capacity Price combined exceeds $39/MWh." No subsidized plant is in Zone A. A-215 (ZEC Order 131).

Amount. The effect of these calculations is that the three subsidized Exelon plants are guaranteed two revenue streams for the electricity they sell into wholesale auctions: (1) the amounts they earn in the wholesale markets, plus (2) the Base Subsidy Amount; but (2) is reduced as (1) increases. New York has effectively decreed that until FERC's prices increase to, and remain at, a level deemed sufficient by the state, the plants receiving ZECs will be paid for wholesale electricity sales at a rate substantially higher than the FERC-approved market price.

The ZEC Order requires "load serving entities" (LSEs)—the local utilities that purchase power at wholesale and sell it at retail to end-use consumers—to make ZEC subsidy payments to the favored nuclear power plants in addition to paying the FERC-approved auction rates for wholesale power. LSEs are authorized to pass the cost of the subsidy on to consumers. The LSEs make the ZEC payments through a state entity, the New York State Energy Research and Development Authority ("NYSERDA"), which acts solely as a middleman. A-68 (Compl. ¶¶ 69-73).

While the ZEC Order does not expressly mandate that the plants receiving ZEC subsidies bid into the NYISO auctions, it presupposes that they will do so, and in fact the subsidized generators must do so, both by virtue of legal obligation and as a practical economic reality. A-51, 65 (Compl. ¶¶ 34, 64). The whole purpose of the ZEC program is to shore up the three plants' economic performance by guaranteeing them more than the wholesale price for each megawatt of electricity they sell at wholesale in the NYISO auctions. A-39, 61 (Compl. ¶¶ 2-3, 55-58).

Unlike plants whose output can be adjusted quickly in response to fluctuations in demand, nuclear generators (including FitzPatrick, Ginna and Nine Mile Point) run continuously at maximum output. A-51 (Compl. ¶ 34). Because they cannot store their production or sell it elsewhere, the subsidized nuclear generators typically bid into energy auctions as "price takers," selling their entire output at the market clearing price. *Id.* Furthermore, as Exempt Wholesale Generators ("EWGs") under the Public Utility Holding Company Act, 42 U.S.C. §§ 16451, *et seq.*, FitzPatrick, Ginna, and Nine Mile Point are legally obligated to sell their electricity only at wholesale. *AmerGen Energy Co.*, 91 FERC ¶ 62,049 (2000).

The ZEC program not only alters the prices that result from FERC's auction-based system, but also distorts the market mechanism that signals that certain plants are uneconomical and should close. Enabling the three state-favored nuclear plants to remain open increases the supply of capacity in the market above economically efficient levels, reducing the value of energy and capacity produced by other, more efficient generators. A-56 (Compl. ¶¶ 44-45). In turn, the ZEC subsidies' manipulation of the wholesale market will deter investment in and entry of efficient new generators, including zero-carbon renewables like wind and solar. The long-term result will be higher prices to consumers. A-58 (Compl. ¶¶ 47-48).

3. New York's Targeted Subsidies for the Exelon Plants

Although the ZEC program is theoretically open to any nuclear generator that has made a "historic contribution" to New York's clean energy mix, A-134, 209 (ZEC Order 50, 125), the program was designed to ensure that the only recipients of the ZEC subsidies will be FitzPatrick, Ginna and Nine Mile Point. A-39, 61 (Compl. ¶ 2-3, 54-58). The PSC enacted the ZEC program in response to Exelon's threat to close those plants. A-61 (Compl. ¶¶ 54-58). The "historic contribution" requirement effectively eliminates all out-of-state nuclear plants.

The original ZEC proposal, which was issued by the PSC staff in January 2016, provided for subsidies to nuclear plants facing "financial difficulties," with the subsidy amount "based upon the difference between the anticipated operating costs of the units and forecasted wholesale prices." A-203 (ZEC Order 119). FitzPatrick, Ginna, and Nine Mile Point were expressly identified as plants with such "financial difficulties." However, after the Supreme Court held in *Hughes* that state subsidies to electricity generators are preempted by the FPA if they are "[]tethered" to FERC-regulated wholesale electricity prices, 136 S.Ct. at 1299, the PSC staff issued a revised recommendation in July 2016 that changed the formula for determining the ZEC subsidy amounts (A-65 (Compl. ¶ 63)). The new formula was ostensibly based upon a federal interagency working group's estimated "social cost of carbon." But this merely changed the subsidy's name, not its intent or effect: to greatly increase the FERC-determined price with a state-mandated subsidy for the Ginna, FitzPatrick and Nine Mile Point plants. *Id.* Despite the name change, the final ZEC price was set at a level that would enable the nuclear plants to stay afloat (A-39 (*id.* ¶ 2)), and Exelon promptly announced that they would remain open (A-41(*id.* ¶ 5)). Indian Point, a profitable nuclear plant in Westchester County, was not recommended for inclusion in the ZEC program. A-65, 67 (*id.* ¶¶ 63, 68).

Although the revised ZEC recommendation was packaged as a "clean air" measure, a number of environmental groups, as well as ratepayers and other civic organizations, strongly opposed it. The Sierra Club and other environmental groups objected that the ZEC program was "blatant corporate favoritism" and a "consumer rip-off" to force New York's consumers to buy "dirty and dangerous nuclear power" at high cost, even though "real clean energy options are available for lower cost."[4] The environmental objectors disputed the PSC's stated premise for the ZEC program, which was 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] Despite the objections, the PSC adopted the staff's revised recommendation on August 1, 2016. A-65 (Compl. ¶ 64). Several environmental groups, a municipality, and ratepayers have sued in New York state court to enjoin the ZEC program; that suit is pending.[6]

B. Procedural History

Plaintiffs filed the complaint on October 19, 2016. A-38. Exelon, as the beneficiary of the ZECs, intervened as a Defendant. ECF 39. Both Exelon and the state Defendants filed Rule 12(b)(6) motions to dismiss. ECF 54, 76. The district court first stayed discovery and thereafter granted the motions. ECF 80, 108, 159.

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[4] N.Y. State Dep't of Pub. Svc., Matter Master: 15-01168/15-E-0302, DPS.NY.GOV, http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=15-e-0302 (Filing No. 328) (comments of Alliance for a Green Econ., Council on Intelligent Energy & Conservation Policy, Nuclear Info. & Res. Serv., Sierra Club-Atl. Chapter). 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 (Filing No. 348).

[5] *See, e.g., id*. (Filings nos. 194 & 348) ("voluminous literature demonstrates that nuclear power is extremely ill-suited to combating to [sic] climate change").

[6] *Hudson River Sloop Clearwater, Inc. v. New York State Public Service Commission* (Sup. Ct., Albany Co. Index No. 07242-16) (filed Nov. 30, 2016).

In its order of dismissal, the court applied *Armstrong v. Exceptional Child Center, Inc*., 135 S.Ct. 1378 (2015), to find that 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." SPA-11. The court distinguished this Court's decision in *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 144-47 (2d Cir. 2016), which interpreted *Armstrong* as not precluding equitable relief under the Airport Noise and Capacity Act ("ANCA").

Despite holding that *Armstrong* precluded relief, the court proceeded to the merits. As to field preemption, the court held that, even though the New York ZEC program directly affects the rate received by the Exelon nuclear plants for their wholesale electricity sales, the program does not impinge upon FERC's exclusive authority. The court distinguished the Maryland program in *Hughes* on the ground that the New York program "does not condition or tether ZEC payments to wholesale auction participation." SPA-29. The court also held that Plaintiffs had not stated a claim for conflict preemption because, while Plaintiffs alleged "clear damage to federal goals," any such damage was "indirect and incidental," and the allegations were not "plausible" in light of FERC's approval of "similar" programs involving Renewable Energy Credits ("RECs"). *Id.* at SPA-31-34.

The court held that Plaintiffs lacked Article III standing to assert Commerce Clause claims because their alleged injuries are not "within the zone of interests to be protected by the dormant Commerce Clause." SPA-41. The court further rejected the Commerce Clause claims on the merits, reasoning that "New York was acting as a market participant, not as a regulator, when it created ZECs [and thus was validly] participating in the energy market and exercising its right to favor its own citizens." SPA-42, 45.

Plaintiffs timely appealed. A-318.

Shortly before the district court's decision in this case, a challenge by some of the Plaintiffs here to a similar ZEC program adopted by the Illinois Legislature also was dismissed. *See Electric Power Supply Ass'n v. Star*, No. 17 CV 1164, 2017 WL 3008289 (N.D. Ill. Jul. 14, 2017). That decision has been appealed to the Seventh Circuit (No. 17-2445, appeal filed July 17, 2017).

SUMMARY OF ARGUMENT

1. Plaintiffs properly invoked the district court's equity jurisdiction to enjoin enforcement of the ZEC program as preempted by the FPA. Unlike the Medicaid Act construed in *Armstrong*, 135 S.Ct. 1378, the FPA does not evidence an intent to withdraw equity jurisdiction. On the contrary, the FPA expressly

confers jurisdiction on district courts over "all suits in equity," 16 U.S.C. § 825p, and the federal courts, consistent with this grant, have long entertained suits seeking to enjoin state action as preempted by the FPA.

Armstrong held that two aspects of the Medicaid Act "combined" to demonstrate Congress's intent to foreclose equity jurisdiction: the withholding of federal funds was the "sole remedy" set forth in the Act for a state's failure to comply with the Act's requirements (the "remedies" factor); and the statutory standard that plaintiffs sought to enforce was "judicially unadministrable" (the "administrability" factor). 135 S.Ct. at 1385. The district court agreed with Plaintiffs that the FPA standard Plaintiffs seek to enforce is "not judicially unadministrable." SPA-12. This finding should have ended the inquiry because the administrability factor was essential to the Supreme Court's holding that the Medicaid Act precludes private enforcement. Accordingly, *Armstrong* is inapplicable here. But even if *Armstrong's* remedies factor were considered, the district court erred in concluding that it was met. The provision of the FPA granting FERC authority to bring an action to enforce the FPA does not impliedly foreclose a private suit. The district court's contrary conclusion ignores the FPA's broad grant of equity jurisdiction and is foreclosed by this Court's decision in *East Hampton*, 841 F.3d 133.

2. *Hughes* establishes that New York's ZEC program is field preempted because it intrudes into FERC's exclusive jurisdiction over wholesale power transactions. Just as Maryland, in *Hughes*, could not augment the wholesale auction rate through a contract for differences that changed the amount received by wholesale power generators for auction sales, New York cannot do so by providing a subsidy that increases the rate received by three favored nuclear plants for sales in the wholesale market. In both cases, the state has set a wholesale rate different from the FERC-approved rate. It makes no difference that New York invokes environmental objectives and calls its subsidy a "zero emissions credit"; whatever the merits of those goals, New York may not accomplish them by tethering the subsidy to wholesale markets.

The district court erroneously concluded that *Hughes* does not apply because the ZEC Order, unlike the Maryland statute in *Hughes*, does not formally mandate that ZEC recipients participate in wholesale auctions. But FERC's exclusive jurisdiction cannot be so easily evaded. The three Exelon plants already sell all the electricity they generate in the NYISO auctions, and the program's purpose is to prevent them from closing, as they otherwise would due to insufficient revenue earned in the auctions. The PSC had no need to require that ZEC-subsidized plants participate in and clear the auctions because both the law and the reality of their business compels it. Consequently, the New York ZEC program is no different from the preempted Maryland program in *Hughes*.

3. The district court further erred in dismissing Plaintiffs' conflict preemption claim. The court, notwithstanding well-pleaded allegations in the complaint, failed to credit Plaintiffs' allegations that the ZEC subsidy would severely distort auctions for energy and capacity, and thereby undermine federal policy that wholesale electric rate be determined by such competitive auctions.

4. On the Commerce Clause claim, the district court wrongly held that Plaintiffs lacked standing even though they are the targeted and disadvantaged competitors affected by the ZEC subsidy. On the merits, the court erred in holding that "New York was acting as a market participant, not as a regulator, when it created ZECs." SPA-42. New York is not acting as a participant in the wholesale markets. It is not facilitating commerce, nor taking ownership or possession of any goods. It promulgated the ZEC Order through a regulatory commission in its capacity as a *regulator*. The district court erred in cutting short the factually intensive inquiry required to adjudicate a Commerce Clause claim where a state program operates to benefit only a single company's in-state businesses.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision granting 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 district court also could refer to the ZEC Order, which is referenced in the complaint, in order to ascertain what actions the PSC took and its stated reasons for doing so. SPA-3 n. 2 (citing *Cortec Indus.. Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991). The district court could not, however, treat the PSC's factual findings as true where they are inconsistent with the allegations of the complaint. *See Turkmen v. Hasty*, 789 F.3d 218, 226 n.6 (2d Cir. 2015), *rev'd in part on other grounds sub nom. Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017) ("at the pleading stage, although we must consider the words [in a document incorporated into the complaint by reference], we need not consider the truth of those words to the extent disputed by Plaintiffs"; "reliance on any assertion of fact requires a credibility assessment that we are fundamentally unsuited to make at the Rule 12(b)(6) stage"); *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) ("If the court takes judicial notice, it does so in order to determine what statements [a document] contained—but again not for the truth of the matters asserted.").

II. THE DISTRICT COURT HAS EQUITY JURISDICTION OVER PLAINTIFFS' PREEMPTION CLAIMS.

The district court erred in concluding that Congress impliedly foreclosed private suits for injunctive relief. SPA-9-14. If upheld, this extraordinary ruling would wipe out a whole category of long-established federal jurisdiction under the FPA and would similarly bar preemption claims to enforce many other federal statutes.

Plaintiffs seek injunctive and declaratory relief to prevent the enforcement of state law on the ground that it is preempted by the FPA. This is a classic invocation of equity jurisdiction. "[T]he Supreme Court has consistently recognized federal jurisdiction over declaratory- and injunctive-relief actions to prohibit the enforcement of state or municipal orders alleged to violate federal law." *East Hampton*, 841 F.3d at 144; *accord Verizon Md., Inc. v. Pub. Svc. Comm'n of Md.*, 535 U.S. 635, 642 (2002) (finding "no doubt that federal courts have jurisdiction" under 28 U.S.C. § 1331 over a suit asking a court to enjoin the enforcement of federally preempted state law). The Supreme Court reconfirmed the availability of such injunctive relief in *Armstrong*, where it noted that the "ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." 135 S.Ct. at 1384; *accord Friends of East Hampton Airport*, 841 F.3d at 1144 (collecting cases).

As *Armstrong* acknowledged, the "power of the federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." 135 S.Ct. at 1385. But the Supreme Court set a high bar for recognizing any such implied limitations. It found an implied limitation in *Armstrong* only because two interrelated features of the Medicaid Act together "establish[ed] Congress's 'intent to foreclose' equitable relief." *Id*. First, the "sole remedy ... for a State's failure to comply with Medicaid's requirements" was withholding of funds by the agency. While this provision "might not, *by itself*, preclude the availability of equitable relief," it did so "when combined with the judicially unadministrable" standard expressed in the statute. *Id.* (emphasis in original). Neither of these considerations applies to the FPA.

A. Because the FPA Is Judicially Administrable, the *Armstrong* Exception to Equity Jurisdiction Does Not Apply.

The district court correctly concluded that Plaintiffs' preemption claims do not involve a "judicially unadministrable standard." SPA-12-14. In *Armstrong*, the plaintiffs asked the district court to decide whether state Medicaid reimbursement rates met statutory requirements that the rates be "'consistent with efficiency, economy, and quality of care,' ... while 'safeguard[ing] against unnecessary utilization of ... care and services.'" 135 S.Ct. at 1385. The Supreme Court held that the "sheer complexity" of this "judgment laden standard" made it "judicially unadministrable." *Id.*

In sharp contrast, the legal standards for deciding Plaintiffs' preemption claim are well within the traditional competence of the courts. As the district court recognized, Plaintiffs "are not asking the Court to set rates." SPA-12 n.10. Plaintiffs ask the court to determine whether New York's ZEC program impinges upon FERC's exclusive authority over rates and charges "received … in connection with" wholesale electricity rates and "rules and regulations pertaining to or affecting such rates or charges." 16 U.S.C. § 824d(a); *see also* § 824e(a). The FPA provisions allocate regulatory responsibility between the federal government and the states, an issue familiar to the courts.

The statutory text delimiting FERC's power cannot be compared, either in breadth or complexity, to Section 30A of the Medicaid Act. It describes the jurisdictional nexus to wholesale electricity rates using phrases ("in connection with" and "pertaining to or affecting") that courts frequently encounter in statutes. *See FERC v. Elec. Power Supply Ass'n (EPSA)*, 136 S.Ct. 760, 774 (2016) (construing FERC's "affecting" jurisdiction under the FPA and referencing "similar terms like 'relating to' or 'in connection with'"). Just as a federal court could evaluate compliance with ANCA "without engaging in [a] 'judgment-laden' review," *East Hampton Airport*, 841 F.3d at 147, so too may the court determine if the ZEC Order is preempted by the FPA. Indeed, the Supreme Court recently applied the same FPA provisions at issue here in considering the preemption claim in *Hughes*, determining that a state law "contravene[ed] the FPA's division of authority between state and federal regulators." 136 S.Ct. at 1297. And while Plaintiffs ask the Court only to vindicate FERC's ratemaking authority, even determination of a just and reasonable rate would not be "judicially unadministrable." SPA-12-13.

Because Plaintiffs' claims do not require application of a "judicially unadministrable" standard, *Armstrong* does not apply. That should have been the end of the inquiry. The district court erred when it went on to hold—based solely on *Armstrong*'s remedies factor—that the FPA forecloses equity jurisdiction. SPA-13-14 (finding "no indication in *Armstrong* that both factors must be satisfied in order to conclude that Congress intended to foreclose equitable relief to private parties"). *Armstrong* expressly states that the first factor "might not, *by itself*, preclude the availability of equitable relief." *Armstrong*, 135 S.Ct. at 1385 (emphasis in original, citing *Virginia Office of Protection & Advocacy v. Stewart*, 563 U.S. 247, 256 n. 3 (2011)); *see also Armstrong*, 135 S.Ct. at 1388 (Breyer, J., concurring) ("several characteristics of the federal statute before us, when taken together, make clear that Congress intended to foreclose respondents from bringing this particular action for injunctive relief"). That is the reason the Court went on to address the administrability factor and held that both factors "combined" to foreclose private injunction actions. *Id.* at 1385.

Armstrong thus makes clear that equity jurisdiction cannot be defeated by the mere availability of agency and enforcement remedies. This is underscored by the *Armstrong* Court's supporting citation to *Stewart*, 563 U.S. 247. In *Stewart*, the Court held that a statute's provision of a specific administrative enforcement method, standing alone, "does not demonstrate that Congress has 'displayed an intent not to provide the "more complete and more immediate relief" that would otherwise be available under *Ex parte Young*.'" *Id.* at 256 n. 3. *See also Barry v. Lyon*, No. 13-CV-13185, 2015 WL 12838828, at *2 (E.D. Mich. Jun. 5, 2015) ("To be clear, the [*Armstrong*] Court held that *both* of these aspects *combined* to foreclose equitable relief." [emphasis in original]); *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1216 (M.D. Ala. 2015) (the first *Armstrong* factor, without the second, is insufficient to defeat equity jurisdiction).

B. The FPA Confirms, Rather than Implicitly Forecloses, a Private Equitable Remedy.

Even if there were a need to consider the first *Armstrong* factor, the district court erred in holding that the FPA evinces an intent to bar private actions against its enforcement. In stark contrast to the Medicaid Act construed in *Armstrong*, the FPA confers jurisdiction on district courts over "*all suits in equity* and actions at law." 16 U.S.C. § 825p. This express grant of equity jurisdiction confirms the background presumption, reaffirmed in *Armstrong*, that courts possess equity jurisdiction to enjoin federally preempted state laws.

The federal courts have, for decades, exercised equity jurisdiction to adjudicate private suits seeking to enjoin state action as preempted by the FPA.[7] Despite repeatedly amending the FPA—in 1978, 1980, 1986, 1992, 2005, and 2015—Congress has never cast doubt on courts' equity jurisdiction over such suits or sought to amend Section 825p's grant of equity jurisdiction. Under the prior construction canon, Congress must be presumed to have known of the long line of cases recognizing private equity actions, and to have adopted their interpretation of the FPA. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 590 (2010); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

The district court nevertheless construed the FPA as evidencing an intent to foreclose private enforcement actions because "Congress implicitly provided a 'sole remedy' in the FPA—specifically, enforcement by FERC." SPA-11. This was error.

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[7] *See, e.g.*, *PPL Energy Plus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014); *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84 (2d Cir. 2012); *AEP Tex. N. Co. v. Tex. Indus. Energy Consumers*, 473 F.3d 581 (5th Cir. 2006); *Pub. Serv. Co. v. Patch*, 167 F.3d 15 (1st Cir. 1998); *Sayles Hydro Assocs. v. Maughan*, 985 F.2d 451 (9th Cir. 1993); *Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 812 F.2d 898 (4th Cir. 1987); *Ark. Power & Light Co. v. Mo. Pub. Serv. Comm'n*, 829 F.2d 1444 (8th Cir. 1987); *see also New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) (district court erred in abstaining in a utility's suit for equitable relief on FPA preemption grounds against state ratemaking order); *Hughes*, 136 S.Ct. at 1296 n.6 (because no party challenged whether plaintiffs could seek declaratory relief, Court "assumes without deciding that they may").

Initially, the district court observed that "the FPA grants FERC broad enforcement authority," including "to bring an action in federal district court to enjoin any person violating the FPA or to enforce compliance." SPA-11 (citing 16 U.S.C. § 825m(a)). Unlike the Medicaid Act, however, § 825p does not give FERC *sole* authority to enforce the FPA. Instead, it confers federal jurisdiction over "all" suits in equity, which includes private suits. *See First Jersey Secs., Inc. v. Bergen*, 605 F.2d 690, 694 (3d Cir. 1979) (the "primary purpose" of statutory provision granting jurisdiction over "all suits in equity and actions at law" is to "provide exclusive federal jurisdiction for suits brought by the [agency] *or private parties*"). FERC's authority under other provisions of the FPA to institute administrative or judicial proceedings cannot be read to negate Congress's express grant of district court jurisdiction over "all suits in equity." These provisions can and thus must be given effect by reading the FPA to allow for parallel private and agency enforcement. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (discussing anti-surplusage canon).

This Court recently used just such reasoning in *East Hampton*, 841 F.3d 133. The Court held that Congress did not intend in ANCA to limit a federal court's equity power to enjoin preempted local laws restricting use of and access to a town airport. *Id*. at 144-47. The Court concluded that although ANCA permits the Secretary of Transportation to terminate an airport's federal funding if its noise or access restrictions violate ANCA, "there is no textual basis to conclude that the loss of federal funding is the *only* consequence for violating ANCA." *Id*. at 145 (emphasis added). The Court pointed to another provision of ANCA, which allowed the Secretary (but not a private party) to bring an action to obtain legal remedies, including injunctive relief. *Id.* (quoting 49 U.S.C. § 47533(3)). That remedy showed that "Congress did not intend [the funding provision] to be the only means of enforcing ANCA's procedural requirements." *Id.* "The fact that Congress conferred such broad enforcement authority on the [Secretary], 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 [preempted] local laws." *Id.* at 146.

These grounds for distinguishing *Armstrong* apply with even greater force here. In this case, as in *East Hampton*, Plaintiffs seek to "preclude a [state] entity from subjecting them to [state] laws enacted in violation of federal requirements." *Cf.* 841 F.3d at 146. Here, as in *East Hampton*, the federal statute at issue does not limit remedies to "withholding funds," *Armstrong*, 135 S.Ct. at 1385, but also confers "enforcement authority" on a federal agency, *East Hampton*, 841 F.3d at 146. In contrast to ANCA, however, the FPA also includes an express grant of equity jurisdiction, which shows Congress *contemplated*, and certainly did not intend to foreclose, private suits in equity.

The district court attempted to distinguish *East Hampton* on the ground that, "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 rules governing small power production facilities, after first exhausting their administrative remedies." SPA-12 (citing 16 U.S.C. § 824a-3(h)(2)(B)). The district court's reasoning is incorrect because it confuses a private cause of action with equity jurisdiction. *See also* SPA-11 n. 9 (stating that this Court's discussion of equity jurisdiction in *East Hampton* "is not entirely clear" and suggesting that the inquiry is "whether a cause of action exists"). Plaintiffs do not claim that the FPA creates a private right of action. As *Armstrong* explained, the "ability to sue to enjoin unconstitutional actions by state ... officers" does not require a general "private right of action." *Id.*, 135 S.Ct. at 1384. *See supra* note 7 (collecting cases that decide FPA preemption claims without regard to existence of private right of action). Plaintiffs may proceed on their preemption suit because federal courts generally have equity jurisdiction over lawsuits challenging state action as preempted; the FPA's grant of jurisdiction specifically allows for such suits to prevent state encroachment on FERC authority, and PURPA does nothing to divest the courts of that jurisdiction.

Verizon Maryland is on point. There, the Court found no need to decide whether the Telecommunications Act of 1996 created a private cause of action because the preemption claim fell within traditional equity jurisdiction. 535 U.S. at 642-43. The Court also rejected the argument that the Act stripped the courts of such jurisdiction by including a private right of action to obtain judicial review of certain types of state decisions (but not the one at issue in that case) for conformity with the statutory standards. The statute "merely makes *some other* actions by state commissions reviewable in federal court. This is not enough to eliminate jurisdiction under § 1331." *Id*. at 643 (emphasis in original).

Under *Verizon Maryland*, PURPA's subsequent creation of a private right of action to enforce *different* substantive standards cannot be read to foreclose private lawsuits to prevent enforcement of preempted state action. That is doubly so because the district court's interpretation of PURPA would effectively work a highly-disfavored implied repeal of the FPA's express grant of equity jurisdiction. *See Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) (absent clearly stated congressional intention, implied repeal will be found only where two statutory provisions irreconcilably conflict, or where the later act is clearly intended as a substitute). It is impossible to construe PURPA's private cause of action to impliedly repeal an express grant of equity jurisdiction enacted some 50 years earlier, where the two statutes can easily be harmonized and the courts have consistently construed the FPA to allow private preemption suits.

Parallel private and agency remedies have coexisted in the federal courts for decades. Neither *Armstrong* nor any other case has remotely suggested that the government's ability to sue forecloses a private equity action. And since federal agencies have authority to enforce nearly every federal regulatory statute, the district court's holding proves far too much—it would effectively wipe out all rights of private parties to seek to enjoin federally preempted state action.

III. THE ZEC PROGRAM IS PREEMPTED BY THE FEDERAL POWER ACT.

A. The ZEC Program Is Preempted Because It Intrudes upon an Exclusively Federal Field of Law by Ensuring that Certain Favored Nuclear Generators Receive Payments in Connection with Their Wholesale Electricity Sales Over and Above the Rates that FERC Has Determined Are Just and Reasonable.

Congress invested FERC with exclusive power over the field of interstate wholesale electricity sales. 16 U.S.C. § 824(a) (FERC's exclusive jurisdiction covers "the sale of [electric] energy at wholesale in interstate commerce"). In particular, the FPA gives FERC exclusive authority to ensure that "[a]ll rates and charges … received by any public utility for or in connection with the … sale of electric energy" for resale are "just [and] reasonable." *See id.* § 824d(a), 824e(a).

FERC's authority to enforce just and reasonable wholesale rates is cast in encompassing terms. It is not limited to regulating the specific rates that utilities pay directly “for” wholesale electricity, but extends to “[a]ll” payments that sellers “receive[]” from whatever source “in connection with” wholesale sales, as well as to “all rules and regulations affecting or pertaining to such rates.” *Id*. § 824d(a). As the Supreme Court has explained “[t]he FPA ‘leaves no room either for direct state regulation of the prices of interstate wholesales’ or for regulation that ‘would indirectly achieve the same result.’” *EPSA*, 136 S.Ct. at 780 (quoting *N. Nat. Gas Co. v. State Corp. Comm’n of Kan.*, 372 U.S. 84, 91 (1963)). Because state programs that provide for additional payments to producers “in connection with” their sale of electricity into the wholesale market “invade[] FERC’s regulatory turf,” they are preempted by the FPA. *Hughes*, 136 S.Ct. at 1297.

When the rates for wholesale electricity sales are established via the FERC-approved auction process, those rates are by definition the rates that FERC has determined to be just and reasonable. *See supra* pp. 4-5. A state’s attempt to augment those rates, by requiring purchasers in the wholesale market to pay additional amounts to sellers for the wholesale electricity they purchase, is necessarily an attempt to change the rate that FERC has approved. That is precisely what New York has done. Its ZEC program is therefore preempted.

1. The ZEC Program Is Functionally Indistinguishable from the Program that Was Found Preempted in *Hughes*.

The ZEC program ensures that Exelon’s three unprofitable nuclear plants in New York receive payments for their wholesale electricity sales that exceed the just and reasonable rates established by the FERC-approved wholesale auctions. The ZEC subsidy payments manipulate the outcome of the wholesale auctions by topping up the FERC-approved auction rates by an amount that brings them to the level that New York deems appropriate. To the extent the FERC-approved auction rates fall below New York's target, the favored producers receive ZEC payments to make up the difference.

In substance, the New York ZEC program is identical to the Maryland subsidy program that the Supreme Court unanimously held pre-empted in *Hughes*. Maryland required LSEs to enter into "contract[s] for differences" with a favored power plant. 136 S.Ct. at 1294. If the plant cleared the PJM capacity auction, but the clearing price fell below the state's target price, LSEs paid the shortfall to the plant; if the PJM price 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.*

The Supreme Court had no difficulty seeing that Maryland's program impermissibly "sets an interstate wholesale rate, contravening the FPA's division of authority between state and federal regulators." *Id.* at 1297; *accord id.* at 1300 (Sotomayor, J., concurring); *id.* at 1301 (Thomas, J., concurring in the judgment). It did not matter that Maryland's goal was to encourage construction of new generators. "States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates." *Id.* at 1298.

The New York ZEC program intrudes on FERC's exclusive authority over wholesale rates in the same way. Just as in *Hughes*, the state requires LSEs to make up the difference between the state's rate and the FERC-approved market rates. Just as in *Hughes*, the amount of the subsidy varies inversely with FERC-approved auction rates—as market prices rise, the subsidy falls; and as market prices thereafter fall, the subsidy goes up. And just as in *Hughes*, the subsidy is "received" by the favored producers "in connection with" the sale of electricity on wholesale markets. 16 U.S.C. §§ 824d(a), 824d(e).

All of the electricity that these favored producers generate must be bid into and clear the NYISO auctions. The complaint alleges—and it is a well-understood reality—that these generators "have no alternative to selling their output in the NYISO energy auctions" A-51 (Compl. ¶ 34), and so "[a]ll electricity produced by these nuclear generators must be sold directly or indirectly in the NYISO auctions, as there are no alternative markets" A-65 (Compl. ¶ 64). Thus, the ZEC subsidy will not be received "unless the nuclear generators sell their energy into the wholesale market." A-66 (Compl. ¶ 65). The ZEC program is therefore preempted for the same reasons that Maryland's program was preempted.

The district court's effort to distinguish *Hughes* is wholly unpersuasive. The district court recognized that as "the forecast wholesale price of electricity increases, the price of a ZEC decreases." SPA-7 (citing Compl., ¶ 71); *see also* SPA-18 (ZEC prices are calculated using forecast wholesale rates). The court also accepted that nuclear generators are eligible to receive ZEC subsidies only if NYISO auction rates are insufficient for the generator to stay in business. The court nevertheless found *Hughes* distinguishable because the ZEC Order "itself does not require the nuclear generators to sell into the NYISO auction." SPA-20. While noting Plaintiffs' allegation that "all of the electricity produced by these nuclear generators must be sold into the NYISO energy auctions because they have no alternative way to sell their output" (SPA-4 (citing Compl. ¶¶ 34, 64)), the district court characterized such sales as a "business decision," not a "requirement imposed by New York" (SPA-20). The district court similarly dismissed the allegation that, as exempt wholesale generators, the Exelon plants are legally required to sell their output into wholesale markets, finding it dispositive that New York has not required the generators to participate in the wholesale auctions. SPA-21.

New York had no need to formally require the Exelon plants to participate in the wholesale auctions, because the state knew that federal law requires them to sell into the wholesale electricity market and that those plants had "no alternative" but to do so. A-51(Compl. ¶ 34). Whereas the Maryland plan reviewed in *Hughes* sought to encourage new entry, the ZEC program is directed at three existing plants, which were already participating in the wholesale auctions. The PSC adopted the ZEC program in direct response to the plants' inability to remain profitable at wholesale auction rates. That is why it conditions eligibility for ZEC subsidies on the supposed inadequacy of wholesale rates. Indeed, one nuclear plant was not included in the program because it "has a much higher level of market revenues." A-66 (Compl. ¶ 65 (quoting ZEC Order 130)).

The district court distinguished *Hughes* based entirely on the absence of a formal, express condition mandating that a producer clear the wholesale auction. *See* SPA-21 ("It is that aspect of the ZEC Order that saves the ZEC program from the problems faced in *Hughes*."). This approach cannot be reconciled with *Hughes* and other precedents enforcing the FPA's jurisdictional boundaries, or with the Supreme Court's clear direction about how preemption analysis proceeds. The Maryland program at issue in *Hughes* was preempted because it "set[] an interstate wholesale rate" by ensuring that a favored producer would receive additional state-required payments in connection with the wholesale electricity it sold at auction. 136 S.Ct. at 1297. The ZEC program does the exact same thing. It does not matter whether a state sets a wholesale rate through variable subsidies *expressly* conditioned on clearing the auction, or through variable subsidies conditioned on production that, as a legal and practical matter, must be cleared through the auctions. A-65 (Compl. ¶ 64). "The FPA 'leaves no room either for direct state regulation of the prices of interstate wholesales' or for regulation that 'would indirectly achieve the same result.'" *EPSA*, 136 S.Ct. at 780 (quoting *N. Nat. Gas Co.*, 372 U.S. at 91); *accord Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 360-64 (1988) (invalidating state attempt to second-guess the reasonableness of interstate wholesale rates); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956-62 (1986) (same).

The Supreme Court has been emphatic that "[p]reemption is not a matter of semantics," *Wos v. E.M.A.*, 568 U.S. 627, 636 (2013), and has repeatedly rejected the kind of form-over-substance evasions in which the district court engaged here:

> a State may not evade the preemptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect.... In a preemption case … a proper analysis requires consideration of what the state law in fact does, not how a litigant might choose to describe it.

568 U.S. at 636-37. *Accord Nat'l Meat Assoc. v. Harris*, 565 U.S. 452, 462-64 (2012) (holding state law preempted based on its practical operation).

Similarly, in *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963), 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. While the state rule did not expressly regulate wholesale prices, "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; *see also Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325 (1981) (state causes of action based on railroad's discontinuation of operation are preempted because their practical effect is to sanction the carrier for abandonment, which is within the federal agency's exclusive jurisdiction).[8]

The district court distinguished *Northern Natural Gas* on the basis that "the ZEC program does not order utilities to make any purchases of energy or capacity" (SPA-29), but this misses the point. *Northern Natural Gas* establishes that state law is preempted even if it does not formally regulate wholesale rates, if that is its

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[8] *See also N.J. Realty Title Ins. Co. v. Div. of Tax Appeals,* 338 U.S. 665, 673 (1950) ("Our inquiry is narrowed to whether in practical operation and effect the tax is in part a tax upon federal bonds … regardless of the accounting label employed in describing it."); *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 192-95 (4th Cir. 2007) (preempting law that "effectively mandated" conduct subject to exclusive federal jurisdiction, as it left employers with no other "rational choice" but to follow a certain course); *S.D. Mining Ass'n v. Lawrence Cty.*, 155 F.3d 1005, 1011 (8th Cir. 1998) (ordinance that prohibited the "only practical way" of mining in an area deemed a "de facto ban" on all mining in that area and therefore held preempted); *Blue Circle Cement, Inc. v. Bd. of Cty. Comm'rs*, 27 F.3d 1499, 1508 (10th Cir. 1994) (local law imposing "explicit or de facto" ban on federally encouraged activity can be preempted).

practical effect. *See N. Nat. Gas*, 372 U.S. at 91. The states' decisions to order purchases in *Northern Natural Gas*, or to condition a subsidy on sales in *Hughes*, were different means by which the states engaged in the forbidden practice of adjusting wholesale rates.

This Court's reasoning in *Allco* confirms that the absence of a statutory compulsion for generators to sell (or for LSEs to purchase) in the wholesale markets does not by itself save a state program from field preemption under *Hughes*. The *Allco* court considered a Connecticut program that encouraged wholesale purchases of energy through bilateral contracts. The Court first explained that the program did not compel any transaction at all, let alone one connected to FERC auctions as opposed to bilateral contracts. *See Allco Fin. Ltd. v. Klee,* 861 F.3d82, 98-99 (2d Cir. 2017). This fact, however, was alone insufficient to distinguish *Hughes*; the Court held *Hughes* inapplicable primarily because the Connecticut program "requires that any bilateral contract that results from that process be subjected to review by FERC for justness and reasonableness." *Id.* at 99.

The New York ZEC program, unlike the program in *Allco*, *does* effectively compel generators to sell in the FERC auctions and adjusts the rate that the generators receive in the auctions. And, unlike the program in *Allco*, the New York ZEC program provides no mechanism for FERC approval of the rates resulting from the ZEC subsidy, but instead is designed to *override* the FERC-mandated auction rates for its beneficiaries.

The district court also gave insufficient weight to the link between the ZEC subsidy amount and wholesale rates. By awarding the subsidy only to those generators whose current market revenues are (in the PSC's determination) insufficient, and then periodically adjusting the subsidy inversely with changes in wholesale market rates, New York has done precisely what *Hughes* forbids: "it disregards an interstate wholesale rate required by FERC." 136 S.Ct. at 1299. Indeed, the subsidy varies in almost exactly the same manner that the contracts for differences in *Hughes* operated, shrinking as rates rise and growing as rates thereafter fall, to make up the difference between supposedly inadequate wholesale market rates and the rate New York thinks the generators should receive. The district court's conclusion that a "whole host" of other subsidies, "such as tax incentives or direct subsidies," also involve "propping up" an unprofitable generator (SPA-18), is beside the point. Unlike those subsidies, the ZEC is *conditioned* on the inadequacy of wholesale rates, and is adjusted in response to those rates. The connection to wholesale auction markets is express and integral to the ZEC program, unlike the "incidental" effect that these other subsidies may have by increasing the supply of electricity.

The district court also relied on *Rochester Gas & Electric Corp. v. PSC*, 754 F.2d 99 (2d Cir. 1985), to support its conclusion that tying the ZEC subsidy to wholesale rates is not problematic. SPA-19. In *Rochester Gas*, the Court held that the PSC could take a utility's expected wholesale revenues into account when setting the *retail* rates that the utility could charge its customers. 754 F.2d at 105. This retail ratemaking did not alter the wholesale rate, nor did it compel the utility to engage in a wholesale transaction on state-prescribed terms. *See id.* at 102 (noting that such action may be preempted).

The *Rochester Gas* holding, which address state retail rate-making, has no relevance to the ZEC program, which addresses wholesale rate-making. By establishing the amount that wholesale buyers and sellers must exchange in addition to auction rates, New York impermissibly sets a rate received "in connection with" wholesale sales. *Cf. EPSA*, 136 S.Ct. at 777 ("To set a retail electricity rate is thus to establish the amount of money a consumer will hand over in exchange for power."). Whereas *Rochester Gas* held that considering wholesale revenues in setting retail rates would not cause the utility "to change its position toward" wholesale sales, 754 F.2d at 102, the ZEC program has a direct impact on the nuclear plants' "position toward" the wholesale markets.

The New York ZEC program provides a subsidy that in reality depends on participation in the wholesale market, in an amount that depends on wholesale prices. Because the New York ZEC program is no different in these essential respects from the Maryland program invalidated in *Hughes*, it too is preempted.

2. Preemption of the ZEC Program Leaves New York with Ample Authority to Achieve Legitimate Policy Objectives Within Its Protected Sphere of Authority Under the FPA.

Preempting the ZEC program merely removes one particular "regulatory means that intrude[s] on FERC's authority over interstate wholesale rates." *Hughes*, 136 S.Ct. at 1298. New York retains ample authority to promote power generation and to protect the health and welfare of its citizens through other means not tethered to the FERC-approved rates set by wholesale auctions. The state can provide tax incentives or land grants, construct state-owned generation facilities, opt out of the deregulated market entirely, or even provide direct subsidy payments not tethered to wholesale markets. *See id*. at 1299 (identifying but not addressing the permissibility of such measures). But what the state cannot do is dictate the amounts that generators receive in connection with their sales of electricity at wholesale.

In particular, Plaintiffs do not allege that state Renewable Energy Credit ("REC") programs are preempted. Typical REC programs allow qualified renewable energy sources, such as solar, wind, or biomass, to earn RECs for each unit of output. A-59 (Compl. ¶ 49). States may require LSEs to acquire RECs or make an alternative compliance payment. *Id*. The purpose of RECs is to induce new entry by renewable generators, not to bail out existing generators that have failed in a competitive market.

For purposes of the preemption analysis in this case, there are at least two fundamental differences between ZECs and RECs. First, while the ZEC subsidy is tethered to wholesale prices, REC prices are essentially determined by the supply and demand of renewable energy: as LSEs seek to buy more RECs, the price goes up, as does the incentive for producers to generate additional clean energy. A-60 (Compl. ¶ 51). As such, the price of RECs can rise or fall based on forces wholly independent of the specific rates set at wholesale auctions (namely, the supply of and demand for renewable energy).

Second, ZECs are available only to generators that sell in wholesale auction markets, guaranteeing that each ZEC sale will be tied to the sale of electricity at wholesale. By contrast, RECs are offered to all qualified renewable power producers (A-60 (Compl. ¶¶ 50-51)), some of which may not participate in the wholesale auctions, or even sell at wholesale at all. For example, an industrial facility that installs solar panels can consume the energy onsite and sell the resulting RECs to a third party (A-163 (ZEC Order 79-80)), neither of which would be a wholesale transaction. Thus, RECs are not necessarily tethered to wholesale market participation, and they do not establish a wholesale rate.

Nonetheless, the district court found no "legally significant" distinction between ZECs and RECs in terms of "effect ... on the wholesale auction," since both purport to provide compensation for the environmental "attributes" of certain generation sources. SPA-26-27. The field preemption analysis, however, does not turn on whether New York's goal was environmental. "States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates." *Hughes*, 136 S.Ct. at 1298. The flaw in ZECs, which does not apply to RECs, is that they are tethered to the wholesale market.

The district court believed that "FERC has clearly held that RECs are not preempted" in a pre-*Hughes* administrative decision, *WSPP*, 139 FERC ¶ 61,061 (2012). SPA-27. But the reasoning in *WSPP* only highlights the features of the ZEC program that make it preempted. There, FERC addressed REC programs that had no connection to an organized market with energy and capacity auctions, let alone a program tethered to the wholesale price set by such auctions. FERC explained that "based on available information," the RECs were outside its jurisdiction if they did not provide for payments "in connection with" the sale of electricity at wholesale. 139 FERC ¶ 61,061 at ¶ 24. FERC was careful to limit its holding to the features of the three specific REC products before it, stating that "although a transaction may not directly involve the transmission or sale of electric energy, the transaction could still fall under the Commission's jurisdiction because it is 'in connection with' or 'affects' jurisdictional rates or charges." *Id.* ¶ 22. FERC noted that it would have jurisdiction over programs "that directly affect the rate or are closely related to the rate," and emphasized the lack of connection between the RECs at issue in *WSPP* and wholesale rates. *Id.* (quoting *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004)).

The ZEC program, by contrast, is "closely related to the rate" approved by FERC. The subsidy is provided only to generators that sell exclusively in wholesale markets. It is contingent upon the inadequacy of three specific generators' wholesale revenues. And it is periodically adjusted to vary with wholesale rates. The district court's contrary conclusion—that the ZEC program is entirely "separate from a wholesale charge or rate" (SPA-27)—is unsupportable given these facts. New York's ZEC program is precisely the sort of subsidy that, while ostensibly separate from the wholesale electricity markets, is so "closely related" to the FERC rates that it must "still fall under the Commission's jurisdiction." *WSPP*, 139 FERC ¶ 61,061 at ¶ 22. In fact, by artificially separating the ZEC subsidies from the wholesale auction transactions, New York's program underscores the prescience of FERC's warning in *WSPP*:

> The Commission further notes that parties cannot avoid Commission jurisdiction by simply separating a bundled REC transaction so that the sale of energy and the REC sale are included in separate

> documents. Contracting parties cannot avoid Commission jurisdiction by splitting a unified agreement into separate agreements, one for the sale of unbundled RECs and one for the sale of energy.
> *Id*. at ¶ 26.

B. The ZEC Program Conflicts with Federal Law that Requires Wholesale Rates to Be Determined in Approved Auction Markets.

Even if it does not intrude on a preempted federal field, a state law is preempted if it "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, 1595 (2015) (internal quotation marks omitted), or "interferes with the methods by which the federal statute was designed to reach this goal," *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

FERC has chosen to achieve the statutory goal of just and reasonable rates for wholesale power transactions by relying on auctions administered by NYISO. In its review and approval of NYISO rules, FERC sought to balance competing interests. Rates should be high enough to encourage development of new generation when demand exceeds supply or when power can be generated more efficiently. Rates should be low enough to encourage the retirement of inefficient facilities if more efficient generators can meet expected demand; rates should be affordable based on current needs but also sufficient to encourage investment to satisfy projected future needs; rates should encourage innovation without discouraging investment by undermining settled expectations; and so forth. *See,* *e.g.*, *Hughes*, 136 S.Ct. at 1293; *NYISO, Inc.*, 158 FERC ¶ 61,028 at ¶ 19 (2017) (approving in part a NYISO tariff designed to provide, among other things, "appropriate price signals regarding the value of capacity in each capacity region, while simultaneously providing the needed revenues to elicit new market entry if and when required to ensure reliability"); *N.Y. Pub. Svc. Comm'n v. NYISO*, 153 FERC ¶ 61,022, at ¶¶ 47 – 51 (2015) (considering the incentives facing current and future renewable energy providers in evaluating provisions of NYISO tariff); *NYISO and N.Y. Transm. Owners.*, 126 FERC ¶ 61,046 at ¶ 115 (2009) (approving aspects of tariff modification "because it strikes a reasonable balance between existing capacity, pre-existing agreements and the needs of the market").

The intended and actual effect of New York's ZEC program is to ensure that the targeted nuclear plants will be compensated for their wholesale electricity sales at rates above what FERC has determined they should receive. *See Vango Media, Inc. v. City of New York*, 34 F.3d 68, 73 (2d Cir. 1994) ("[T]he question of preemption is defined, in part, by the purpose of the state law, and, in part, by the state law's actual effect."). Countermanding the outcome of FERC's competitive auctions is the express purpose of the ZEC program. As the PSC stated: "Increased natural gas availability has increased competition in the wholesale electricity market, pricing out some nuclear operators that face increasing costs. This *problem* is especially relevant to upstate nuclear plants." A-271 (ZEC Order, App. G, at 5). What the PSC described as a "problem"—competition from more efficient generators—is the very goal of FERC's wholesale market design. The distortion of FERC-approved "just and reasonable" rates in wholesale markets, and frustration of FERC's broader regulatory objectives, are therefore not mere "incidental" effects, but rather the very aim of the ZEC program.

The distortive effects of the ZEC program radiate through the FERC-approved auction process in multiple ways. The subsidy enables the unprofitable plants to keep dumping substantial amounts of electricity into the FERC markets for over a decade, even though the FERC-approved price signals should cause the plants to retire. Worse still, because the ZEC subsidy requires the plants to commit to remaining in the market for the program's entire 12-year contract term (A-227 (ZEC Order 143-146), the plants will bid all of their output into the NYISO energy auctions as price takers (A-51 (Compl. ¶ 34)). Further, the plants have every incentive to bid into the capacity auctions at a price low enough to ensure that they clear, even zero.

ZECs not only insulate these generators from FERC's ratesetting, thereby thwarting FERC's goal of "encourag[ing] retirement of existing high-cost generators," *Hughes*, 136 S.Ct. at 1293, but also distort price signals to all other wholesale generators by encouraging the favored generators to bid as price takers and thereby artificially depress market prices. The combined result is to keep aging nuclear plants in operation past their natural lifespan, while creating barriers to entry for more efficient and cleaner energy generators. *See PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 478-79 (4th Cir. 2014) (finding that state rate-setting "has the potential to seriously distort the PJM auction's price signals, thus 'interfer[ing] with the method by which the federal statute was designed to reach its goals'" (quoting *Pub. Util. Dist.*, 379 F.3d at 650)), *aff'd on other grounds* in *Hughes*,136 S.Ct. at 1297, 1299 n.13.

The district court brushed aside this conflict based on its view that the ZEC program was not "aimed at wholesale market participation or wholesale prices." SPA-36 (stating that "this would be a stronger case for conflict preemption" if the program were so aimed). The ZEC program could hardly be more targeted at wholesale rates, as it is awarded only to certain wholesale market sellers, whose wholesale revenues are inadequate, at an amount set with reference to wholesale rates. Once those sellers are guaranteed a subsidy, they lose the incentive to compete on price and to innovate—two key pillars of FERC's wholesale market.

The tethering to wholesale markets makes the ZEC program unlike the program considered in *Allco*, in which the only connection to wholesale markets was that the program would increase the supply of electricity. *See Allco*, 861 F.3d at 101. *Allco* did not address a program that was expressly tied to wholesale rates, let alone a program that intentionally overrides such rates.

The district court observed that "FERC has approved state programs with 'renewable portfolio mandates and greenhouse reduction goals.'" SPA-32 (quoting *Pac. Gas & Elec. Co.*, 123 FERC ¶ 61,067, at ¶ 34 (2008)). Plaintiffs, however, do not contend that all state attempts to promote clean energy are incompatible with the FPA and FERC policy. States are authorized, when acting within their jurisdiction, to encourage use of clean energy. What they may not do is interfere with market signals from FERC-mandated auctions. FERC's decision in *Pacific Gas & Electric*, cited by the district court, does not support the conclusion that states can advance their environmental goals by any means they choose, and it says nothing about state subsidies tethered to market prices. On the contrary, FERC stated that it, not a state, would in the future evaluate whether the utility's costs incurred in connection with its transmission project "were prudently incurred and will result in just and reasonable rates." *Id.* ¶ 38. That holding is diametrically opposed to the district court's suggestion that states can affect wholesale rates *without* FERC oversight as long as their asserted objectives are environmental.

FERC has never approved an environmental subsidy that is tethered to wholesale rates. On the contrary, FERC has approved subsidies that encourage renewable power generation only after determining that they would "not affect wholesale electricity rates." *See WSPP*, 139 FERC ¶ 61,061 at ¶¶ 22-24.

New York has authority to subsidize clean power generation through non-rate-related measures that may have an indirect effect on the price signals that the FERC-approved auction rates provide to the market. But New York cannot directly distort the price signals that the auctions send by setting a higher, state-approved rate for wholesale electricity sales to certain favored wholesale energy generators so that they can disregard the FERC-approved rates. That is the necessary consequence of the FPA's allocation of authority between the federal government and the states. Because the ZEC program interferes in a direct and substantial way with FERC's regulation of the wholesale market, it is also conflict preempted.

IV. THE ZEC PROGRAM VIOLATES THE COMMERCE CLAUSE.

The Commerce Clause protects Plaintiffs from New York's attempt to insulate its in-state generators from the rigors of interstate competition. The "dormant" component of the Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *W. Lynn Creamery v. Healy*, 512 U.S. 186, 192 (1994) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)). The ZEC subsidy was enacted for the purpose of allowing favored New York power plants to prevail in interstate competition against Plaintiffs, thereby preserving local jobs and tax revenue. This protectionism violates the Commerce Clause.

A. Plaintiffs State a Claim for a Commerce Clause Violation.

Courts apply "a two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79 (1986). Under the first "tier," a state law is *per se* invalid if it discriminates against interstate commerce on its face, *see, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997); has the "practical effect" of discriminating against interstate economic activity, *see, e.g., Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 350-51 (1977); or evinces a protectionist purpose, *see, e.g., Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984). Under the second "tier," even a state law that survives the first tier because it "regulates even-handedly" with only "incidental" effects on interstate commerce," *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245, 255 (2d Cir. 2001), is invalid if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits," *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The ZEC subsidy fails both tiers of Commerce Clause scrutiny.

1. The ZEC Subsidy Is a *Per Se* Violation of the Commerce Clause.

NYISO is a hub of interstate commerce; it operates integrated energy and capacity markets where in-state and out-of-state participants buy and sell wholesale electricity. A-48 (Compl. ¶ 28). Plaintiffs compete directly with the in-state Exelon plants in this interstate market. A-43, 51 (Compl. ¶¶ 10-15, 34). These plants, however, have failed in that interstate competition, as the PSC itself found (A-271 (ZEC Order, App. G, at 5), leading Exelon to threaten to close the plants absent "price support from the state" (A-61, 62 (Compl. ¶¶ 54, 56-57). New York then enacted the ZEC program to provide this support. A-62, 64 (Compl. ¶ 58, 61-62).

New York's market manipulation to prop up local businesses presents a textbook Commerce Clause violation. For instance, the town in *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383 (1994), determined "that special financing [was] necessary to ensure the long-term survival" of a local solid waste transfer station. Like New York, it decided to "employ discriminatory regulation to give that project an advantage over rival businesses." *Id.* at 394. The Supreme Court held this was impermissible because the station operated on "the open market to earn revenues" and though the regulation did not "in explicit terms seek to regulate interstate commerce, it [did] so nonetheless by its practical effect and design." *Id.* Likewise, in *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995), Illinois sought to prop up its local coal industry by encouraging the use of scrubbers to allow the continued burning of Illinois coal. This ran afoul of the Commerce Clause by "neutralizing the advantage possessed by lower cost out of state producers." *Id.* at 595. The Seventh Circuit recognized that "even ingenious discrimination is forbidden by the Commerce Clause." *Id.* at 596 (quoting *West Lynn Creamery*, 512 U.S. 186).

Plaintiffs similarly allege that the ZEC program discriminates on its face, and in effect and purpose, by deliberately propping up the in-state Exelon plants via a distortion of the interstate energy market. A-63 (Compl. ¶ 59). As the district court recognized, only New York plants currently reap the competitive benefits of the ZEC program (SPA-45 n.34), and as Plaintiffs allege, only New York plants ever will (A-67, 78 (Compl. ¶¶ 67-68, 98)).

Because the ZEC subsidy on its face, and in effect, interferes with interstate commerce by subsidizing the local Exelon plants in their competition against out-of-state generators in the NYISO auctions, and because this tilting of the playing field was the motive for the subsidy, the ZEC program triggers all three concerns that apply at the first "tier" of Commerce Clause scrutiny. *See supra* p. 10. For that reason, the subsidy is a *per se* Commerce Clause violation, and there is no need to weigh the putative local interests.

2. The ZEC Subsidy Inflicts Harms on Interstate Commerce that Outweigh Any Putative Local Interests.

Even if there were some legitimate interest for a measure intended to protect the in-state facilities, the complaint pleads that the harm to interstate competition in the wholesale energy market outweighs that interest. For that reason, the subsidy would fall at the second tier just as it must at the first. The complaint alleges that the ZEC program imposes market-distorting burdens that will drive out, and deter entry of, more cost-efficient, environmentally friendly out-of-state generators. A-58, 66, 78 (Compl. ¶¶ 47-48, 66, 99-100). Further, any reduction of carbon emissions can be achieved more effectively by non-discriminatory means. A-77 (Compl. ¶ 97). At the motion-to-dismiss stage, these allegations of the putative benefits and burdens must be accepted as true, and Plaintiffs are entitled to prove their allegations at trial. *See, e.g., Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 51 (2d Cir. 2007) (remanding for consideration of fact issues that existed on both the burden and benefits sides of the *Pike* balancing equation).

This Court's decision in *Allco* confirms this conclusion. There, in upholding Connecticut's REC program, the Court instructed that to withstand a motion to dismiss, plaintiffs must plead facts illustrating that a state regulation's burden is clearly excessive in relation to putative local benefits, including the financial burdens imposed by the regulation and "facts relating to any putative local benefits that may be derived." 861 F.3d at 108. In contrast to the plaintiff in *Allco*, Plaintiffs have pleaded detailed facts in the complaint establishing how the ZEC program works, how it distorts the interstate electricity market, and how the purported environmental benefits can be better achieved through other means.

B. Plaintiffs' Allegations Fall Within the "Zone of Interests" Protected by the Commerce Clause

The district court incorrectly reasoned that, even if the ZEC program violated the Commerce Clause, Plaintiffs could not state a claim because their injuries do not "fall within the zone of interests protected by the dormant Commerce Clause—namely the protection of *out-of-state* economic interests." SPA-40-42 (emphasis in original). This misapprehends the nature of Plaintiffs' Commerce Clause injury. Plaintiffs do not complain about an inability to compete for ZECs. Rather, Plaintiffs complain about having to compete in the interstate wholesale energy market when the playing field has been tilted by New York's subsidies for the favored local Exelon plants.

A claim under the Commerce Clause would be outside the zone of interests only if it were "marginally related to or inconsistent with the purposes" of the Commerce Clause. *Clarke v. Securities Industry Ass'n* 479 U.S. 388, 399 (1987). "The test is not meant to be especially demanding." *Id.* "The Supreme Court has held that this requirement is satisfied whenever the interest sought to be protected by plaintiffs is *arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 92 (2d Cir. 2009) (emphasis in original). As this Court held in

Selevan, a plaintiff's claim is within the Commerce Clause's "zone of interests" if the challenged regulation "in some way *affects* interstate commerce." *Id.*

Here, Plaintiffs—who include out-of-state electricity generators (A-43 (Compl. ¶¶ 9-12))—assert a claim in the heartland of that zone of interests: "the right of businesses to compete on an equal footing wherever they choose to operate." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F.3d 150, 161 (2d Cir. 2006). As pleaded in the complaint, New York's ZEC "program is not even-handed … with respect to out-of-state generation." A-78 (Compl. ¶ 98). The question is not whether discrimination between generation technologies "constitute[s] a cause of action under the dormant Commerce Clause" (SPA-41), but whether out-of-state generators harmed by a program designed to prop up failing New York wholesale energy sellers fall within the Commerce Clause's zone of interests. Respectfully, that is not a close question: they do.

The district court speculated that "the same price-distorting effects and the same alleged injury would occur ... if ZECs were extended to nuclear power plants nationwide." SPA-41. But that is irrelevant. The ZEC program does not extend nationwide; it is crafted to benefit only the favored local plants. Moreover, Plaintiffs did not ask the district court to rewrite the ZEC Order to extend nationwide. The district court could not grant such relief, and given the protectionist motivations behind the ZEC program (A-60 (Compl. ¶¶ 52-68)), it is highly unlikely that New York would ever adopt such a program. The remedy sought by Plaintiffs is to enjoin the program, as adopted, and that injunction would remedy Plaintiffs' Commerce Clause injury.

C. New York Adopted the ZEC Program as a Regulator, Not a Market Participant.

Relying on *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), the district court concluded that the ZEC program was permissible under the dormant Commerce Clause because "New York is participating in the energy market and exercising its right to favor its own citizens." SPA-45. This conclusion is wrong.

In *Selevan*, this Court rejected a similar market-participant defense. The Court explained that the question to be answered is whether "the government is acting like a private business or a governmental entity." 584 F.3d 82 at 93. Where the government "competes with other entities" in an open market, it is a market participant. *Id.* By contrast, when the government exercises any of its unique powers, it is behaving as a regulator. *Id.* at 93-94. Thus, in *Alexandria Scrap*, Maryland acted as a market participant when it paid a bounty for the removal of automobile hulks from Maryland streets and junkyards. 426 U.S. at 809.

In contrast to the market participation in *Alexandria Scrap*, New York's ZEC program "cannot plausibly be analogized to the activity of a private purchaser." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). New York is not using state funds to purchase energy in the marketplace. Rather, the state is mandating that third-party LSEs engage in transactions that funnel private money to private nuclear power plants. There are no private companies behaving analogously to New York; no private company *could* behave that way because a private company could not mandate that LSEs buy energy from Exelon's plants. New York no more "participates" in the electricity market through the ZEC program than it "participates" in the automobile insurance market by mandating that drivers purchase car insurance.

The district court also relied on *Allco Finance Limited v. Klee*, No. 3:15-cv-608 (CSH), 2016 WL 4414774 at *24 (D. Conn. Aug. 18, 2016), which held that Connecticut's REC program did not implicate the Commerce Clause because Connecticut's creation of a REC market was analogous to Maryland's market participation in *Alexandria Scrap*. SPA-45. While this Court affirmed the dismissal of the *Allco* complaint, it did not hold that Connecticut was acting as a market participant, but rather that its regulations were not impermissible under *Pike*. *See Allco*, 861 F.3d at 102-08. Indeed, the Court made clear that it viewed the REC program as a "*regulatory* response to the needs of the local energy market." *Id.* at 107 (emphasis added). The ZEC program is also "regulatory" in nature, but, as explained above, it lacks the features that made the REC program in *Allco* permissible.

Finally, the district court ignored the nature of the ZEC program in holding that it is a "pure subsidy" funded out the state's own revenue. SPA-45-47. It is simply not true that "New York is paying the nuclear plants a set dollar amount" as Maryland did in *Alexandria Scrap*. SPA-45. New York has established a regulatory mandate, requiring private third parties to funnel cash to the in-state nuclear plants. A-67, 68, 70 (Compl. ¶¶ 67, 69, 73). Although this transaction nominally flows through NYSERDA, it is in reality a transaction between a private LSE and a private generator. The state is not paying the generators a single dollar out of its general revenue. The distinction is constitutionally significant—as is shown by the very cases cited by the district court. *See* SPA-46; *Carbone*, 511 U.S. at 393 (1994); *United Haulers Ass'n v. Oneida-Herkimer Waste Mgmt. Auth.*, 550 U.S. 330, 368 (2007).

CONCLUSION

The dismissal of Plaintiffs' claims should be reversed and the case remanded for plenary consideration.

Dated: October 13, 2017 Respectfully submitted,

By: */s/ Donald B. Verrilli, Jr.*

Donald B. Verrilli, Jr.
MUNGER, TOLLES & OLSON LLP
1155 F Street, NW
Washington, DC 20004
Telephone: (202) 220-1100

Henry Weissmann
Fred A. Rowley, Jr.
Mark R. Yohalem
MUNGER, TOLLES & OLSON LLP
350 South Grand Ave., Ste. 5000
Los Angeles, CA 90071
Telephone: (213) 683-9100

Jonathan D. Schiller
David A. Barrett
BOIES SCHILLER FLEXNER LLP
575 Lexington Ave.
New York, NY 10022
Telephone: (212) 446-2300

Stuart H. Singer
BOIES SCHILLER FLEXNER LLP
401 E. Las Olas Blvd., Ste. 1200
Fort Lauderdale, FL 33301
Telephone: (954) 356-0011

Attorneys for Plaintiffs-Appellants

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By: */s/ Donald B. Verrilli, Jr.*
Donald B. Verrilli, Jr.
Attorney for Plaintiffs-Appellants