THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

COALITION FOR COMPETITIVE ELECTRICITY, DYNEGY INC., EASTERN GENERATION, LLC, ELECTRIC POWER SUPPLY ASSOCIATION, NRG ENERGY, INC., ROSETON GENERATING LLC, and SELKIRK COGEN PARTNERS, L.P., *Plaintiffs*, v. AUDREY ZIBELMAN, in her official capacity as Chair of the New York Public Service Commission; and PATRICIA L. ACAMPORA, GREGG C. SAYRE, and DIANE X. BURMAN, in their official capacities as Commissioners of the New York Public Service Commission, *Defendants*.	Case No. 1:16-cv-8164(VEC)

PROPOSED BRIEF OF AMICUS CURIAE
NATURAL RESOURCES DEFENSE COUNCIL, INC.
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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**Application *pro hac vice* pending

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CORPORATE DISCLOSURE STATEMENT

The Natural Resources Defense Council, Inc. (NRDC), is a non-profit environmental and public health organization committed to protecting public health and the environment through research and advocacy. NRDC has no parent corporations and no publicly issued stock shares or securities. No publicly held corporation owns any stock in NRDC.

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BACKGROUND AND INTEREST OF AMICUS CURIAE

Amicus curiae Natural Resources Defense Council (NRDC) is a national non-profit environmental advocacy organization. Curbing climate change and building the clean energy future are among NRDC's top institutional priorities, and we frequently advocate before federal regulatory bodies, wholesale energy market operators, state siting and regulatory authorities, and the federal courts to promote and defend clean energy policies like New York's Clean Energy Standard. NRDC participated extensively in the administrative proceedings before the New York Public Service Commission that led to adoption of the Clean Energy Standard Order on August 1, 2016.[1]

New York's Clean Energy Standard Order contains a suite of policies aimed at making New York a leader in fighting climate change and decarbonizing the electricity sector. First, the Order directs the state's utilities and other electricity providers to take actions to ensure that, by 2030, fifty percent of the state's electricity comes from renewable sources such as solar and wind. CES Order at 2. Nuclear power does not qualify for participation in this "50 by 30" renewables program. *Id.* at 78. Second, the Order establishes a separate and distinct Zero Emissions Credit Program (ZEC Program) that requires utilities and other electricity providers to purchase credits from nuclear power plants that meet a "public necessity" standard—meaning that they provide public policy benefits to the state that must be preserved. *Id.* at 124. The Commission values these Zero Emissions Credits (ZECs) by using a formula that accounts for the emissions avoided when electricity is generated by nuclear power, as opposed to from fossil fuel generation that would be needed if nuclear units were to abruptly retire.

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[1] *See* N.Y. Pub. Serv. Comm'n, Case 15-E-0302, *Order Adopting a Clean Energy Standard* (Aug. 1, 2016), *available at* http://tinyurl.com/hr5euxa (CES Order).

Although NRDC strongly supported New York's adoption of the Clean Energy Standard as a whole, we did not support its policy decision to include the ZEC Program within the Clean Energy Standard.[2] Nuclear energy, while low-carbon, is neither clean nor renewable, and it presents a host of potential risks and impacts.[3] Nevertheless, we agree with Defendants that the state acted within its lawful authority in adopting the ZEC Program.

Under the Federal Power Act, New York and other states have well-established authority to regulate utilities and to determine the appropriate resource mix as a matter of state policy. The Federal Energy Regulatory Commission (FERC) has long recognized states' "traditional" authority over "utility generation and resource portfolios." FERC Order No. 888, 61 Fed. Reg. 21,540, at 31,782 n.544 (1996). States may, for example, require utilities to "purchase power from the supplier of a particular type of resource," *see S. Cal. Edison Co.*, 70 FERC ¶ 61,215, at 61,676 (1995) (*S. Cal. Edison Co. I*), or require utilities to purchase credits reflecting the public-policy attributes of renewable generation that the state deems desirable, *see WSPP Inc.*, 139 FERC ¶ 61,061, at 61,426 (2012). The ZEC Program is a lawful exercise of this traditional state authority, which coexists with FERC's authority over wholesale electricity rates.

The electricity sector is complex, but the application of the law in this case is straightforward. Because the ZEC Program does not impermissibly intrude on or conflict with FERC's authority to set wholesale rates, it is not preempted by the Federal Power Act.[4] Plaintiffs'

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[2] *See* N.Y. Pub. Serv. Comm'n, Case 15-E-0302, *Comments of the Clean Energy Organizations Collaborative* (Apr. 22, 2016), *available at* http://tinyurl.com/hjnqc24.

[3] For more background on these risks, see https://www.nrdc.org/issues/minimize-harm-and-security-risks-nuclear-energy.

[4] NRDC also agrees with Defendants that New York's ZEC Program does not violate the dormant Commerce Clause. We do not address that issue in this brief.

claims to the contrary rest on an incorrect reading of the Supreme Court's recent decision in *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016). *See* Compl. ¶¶ 7, 63, ECF No. 1. Although Plaintiffs are not challenging the separate renewable energy requirements in the Clean Energy Standard Order, their misinterpretation of *Hughes*, if adopted by the Court, could harm state clean energy policies in New York and beyond by raising the shadow of similar legal challenges. As this case will be one of the first to interpret *Hughes*, this Court's decision will have significance not only for New York's program, but also for other states' efforts to maintain and develop clean energy policies to meet their public health and environmental protection goals.

At least twenty-nine states and the District of Columbia have adopted Renewable Portfolio Standards: laws aimed at promoting renewable energy development, diversifying states' electricity sources, and achieving state public health and environmental goals.[5] According to the U.S. Department of Energy, state Renewable Portfolio Standards "have been a key driver" of innovation and growth in renewable energy in the United States in recent years, with "[r]oughly 60% of new U.S. renewable generation and capacity additions since 2000 . . . [being] driven by these policies."[6] Renewable Portfolio Standards are a remarkably effective mechanism for states to achieve long-term greenhouse gas emission reductions and to reduce air pollution.[7]

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[5] *See* Galen Barbose, *U.S. Renewables Portfolio Standards: Overview of Status and Key Trends* 3 (Nov. 5, 2015), *available at* http://tinyurl.com/gmvax7h. Multiple Renewable Portfolio Standards have come or are coming to the end of their time horizons in the next few years. *See, e.g.*, Mich. Comp. Law § 460.1027(1), (3) (providing for increasing renewables requirements through December 31, 2015). In these states and others contemplating clean energy legislation, *see, e.g.*, S.B. 438, 98th Leg., Reg. Sess. (Mich. 2015), *available at* http://tinyurl.com/zbtpegm, the importance of maintaining legal certainty regarding states' authority is acute.

[6] U.S. Dep't of Energy, *New Study: Renewable Energy for State Renewable Portfolio Standards Yield Sizable Benefits* (Jan. 7, 2016), *available at* http://tinyurl.com/hjnzsvt.

[7] State Renewable Portfolio Standards reduced greenhouse gas emissions by fifty-nine million metric tons in 2013 alone. *See* Ryan Wiser *et al.*, *A Retrospective Analysis of the Benefits*

It is critical that states continue to lead in adopting clean energy policies to combat climate change and reduce dangerous pollutants that threaten human health and the preservation of a livable environment. The Federal Power Act preserves states' authority to do just that. The Court should dismiss Plaintiffs' preemption claims.

SUMMARY OF ARGUMENT

"[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).[8] As FERC has long recognized, this traditional authority—which includes the power to regulate the public-policy attributes of electricity generation, such as by directing utilities to purchase renewable energy or to purchase credits from zero-carbon sources—is untouched by the Federal Power Act. *See, e.g.*, Order No. 888, 61 Fed. Reg. 21,540, at 31,782 n.544. New York's ZEC Program is a straightforward exercise of this well-established state authority over environmental attributes, and it does not intrude upon or conflict with FERC's regulation under the Federal Power Act.

Ultimately, this case is decided by one simple, defining feature of the ZEC Program: it assigns value to public policy attributes associated with electricity generation, rather than setting any prices for the sale of electricity itself. As FERC has explained, where such attributes are sold separately from the underlying electricity, they fall squarely within states' jurisdiction. *See WSPP*, 139 FERC ¶ 61,061, at 61,426. Plaintiffs argue that various features of the ZEC Program

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and Impacts of U.S. Renewable Portfolio Standards 13 (Jan. 2016), *available at* https://emp.lbl.gov/sites/all/files/lbnl-1003961.pdf.

[8] In this context, "utilities" refers to (1) electric distribution companies that buy electricity from generators at wholesale and sell it to end-use customers at retail, (2) companies that generate electricity and sell it at wholesale (such as New York's nuclear generators), and (3) vertically-integrated utilities that generate electricity and sell it to end-use customers at retail.

change the "effective" price of electricity and that the program must therefore be preempted. But these arguments run contrary to the fundamental structure of the Federal Power Act, as articulated in the very Supreme Court decisions on which Plaintiffs appear to rely. Those recent cases—*ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015), *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760 (2016) (*EPSA*), and *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016)—take a practical approach to interpreting state and federal authority in the energy sector. They make clear that while states may not modify the rates for actual wholesale electricity sales set by FERC, they *may* exercise their traditional authority over utilities in ways that affect wholesale rates—for example, by enacting Renewable Portfolio Standards, directing utilities to purchase power or credits from specific generation types, or offering tax incentives. The ZEC Program is a lawful exercise of this authority.

ARGUMENT

I. Statutory Background

A. The Federal Power Act preserves states' traditional authority to regulate public policy attributes associated with electricity generation

The Federal Power Act is a "collaborative federalism statute" that "envisions a federal-state relationship marked by interdependence." *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring). Originally enacted in 1935 after the Supreme Court held that the dormant Commerce Clause prohibited states from setting rates for certain sales of energy in interstate commerce, *see EPSA*, 136 S. Ct. at 767 (citing *Pub. Util. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89-90 (1927)), the Federal Power Act directs the federal government, acting through FERC, to ensure that the "rate[s]" for interstate wholesale sales of electric energy are "just and reasonable." 16 U.S.C. § 824d(a). The Act also authorizes FERC "to ensure that rules or practices 'affecting' wholesale rates are just and reasonable." *EPSA*, 136 S. Ct. at 774; *see*

also 16 U.S.C. §§ 824d(a), 824e(a). At the same time, the Act makes clear that states retain jurisdiction over "any other sale of electric energy," 16 U.S.C. § 824(b)(1), including retail sales (i.e., sales to end-use customers) and wholesale sales that occur entirely within the state. *See EPSA*, 136 S. Ct. at 766. States also retain control over "facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1).

Traditionally, FERC exercised its statutory authority primarily by reviewing wholesale contracts that utilities submitted to it, assessing whether the rates in those contracts were just and reasonable in light of the utilities' costs of service, and ordering modifications to those rates where necessary. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., Wash.*, 554 U.S. 527, 532-33 (2008). This regulatory action is generally described either as "regulating" the rates for wholesale electricity sales, or as "setting" them. *EPSA*, 136 S. Ct. at 767-68. Over time, as the energy industry has "increasingly become a competitive interstate business," *id.* at 768, FERC has gradually shifted to a more market-oriented approach to regulation. *See Morgan Stanley*, 554 U.S. at 535-38 (discussing this evolution). As *EPSA* explains, to promote market competition, "FERC encouraged the creation of nonprofit entities to manage wholesale markets on a regional basis." 136 S. Ct. at 768. Each of these "wholesale market operator[s] . . . conducts . . . competitive auction[s] to set wholesale prices for electricity." *Id.*[9] FERC reviews the market operators' auction rules to ensure that they "efficiently balance[] supply and demand" between generators and utilities serving end-use customers. *Hughes*, 136 S. Ct. at 1294. As long as auctions are conducted according to those FERC-

[9] New York's wholesale market operator is the New York Independent System Operator (NYISO).

approved rules, FERC "deem[s]" the resulting prices to be "*per se* just and reasonable," and thereby "sets" rates at the prices arrived at through operation of the auctions. *Id*. at 1297-98.

FERC's authority to determine just and reasonable wholesale rates exists alongside states' "traditional[]" authority over "the regulation of utilities" within their jurisdiction. *Ark. Elec. Coop. Corp.*, 461 U.S. at 377. States' authority includes the power "to direct the planning and resource decisions of utilities under [the state's] jurisdiction," such as by "order[ing] utilities to . . . purchase renewable generation." *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) (internal quotation marks omitted); *cf. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (observing that under the Atomic Energy Act, passed after the Federal Power Act, "[s]tates retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns"). States may "diversify their generation mix to meet environmental goals in a variety of ways," including by "requir[ing] a utility . . . to purchase power from the supplier of a particular type of resource." *S. Cal. Edison Co. I*, 70 FERC ¶ 61,215, at 61,676. States may also direct planning and resource decisions by requiring utilities to purchase "Renewable Energy Credits" (RECs), which reflect various public-policy attributes of renewable electricity generation that the state deems valuable, separate and apart from the production of electricity itself. When those credits are "unbundled" (i.e., traded separately from the electricity itself), FERC has held that they are subject to regulation by states, not FERC. *See WSPP*, 139 FERC ¶ 61,061, at 61,426; *see also Wheelabrator Lisbon, Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008) (noting that "RECs are inventions of state property law"); *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004, at 61,007 (2003)

(noting that "[s]tates, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded").[10]

In evaluating whether state policies are preempted by the Federal Power Act (or its companion statute, the Natural Gas Act), courts "must proceed cautiously," recognizing that the Act "was drawn with meticulous regard for the continued exercise of state power . . . ." *ONEOK*, 135 S. Ct. at 1599 (internal quotation marks omitted)[11]; *see also Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 754 F.2d 99, 104 (2d Cir. 1985) (explaining that "federal regulation" of the energy sector "had no purpose or effect to cut down state power" (internal quotation marks omitted)). As Justice Sotomayor explained in her concurrence in *Hughes*, the Federal Power Act's "collaborative" nature means that "courts must be careful not to confuse the congressionally designed interplay between state and federal regulation . . . for impermissible tension that requires pre-emption under the Supremacy Clause." *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (internal quotation marks and citation omitted).

B. *EPSA* articulates a practical approach to interpreting the Federal Power Act

The Federal Power Act generally assigns authority over interstate wholesale rates to the federal government, and authority over all other sales to the states. Yet because wholesale and retail sales in modern electricity markets are "inextricably linked," *EPSA*, 136 S. Ct. at 766, the Supreme Court has recognized that a "''Platonic ideal' of strict separation between federal and

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[10] Contrary to Plaintiffs' suggestion, *see* Compl. ¶ 50, state Renewable Portfolio Standards are not dependent upon the Public Utility Regulatory Policies Act of 1978 (PURPA) (codified in part at 16 U.S.C. § 796). "[S]tates have numerous ways outside of PURPA to encourage renewable resources," *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, at 62,080 (1995) (*S. Cal. Edison Co. II*), and those other means include Renewable Portfolio Standards.

[11] Although *ONEOK* involved the Natural Gas Act, not the Federal Power Act, "the relevant provisions of the two statutes are analogous," and courts have "routinely relied on [Natural Gas Act] cases in determining the scope of the [Federal Power Act], and vice versa." *Hughes*, 136 S. Ct. at 1298 n.10. FERC administers both laws.

state realms cannot exist.'" *Id*. at 776 (quoting *ONEOK*, 135 S. Ct. at 1601). In its recent decision in *EPSA*, the Supreme Court endorsed a "common-sense" approach to determining the Act's allocation of federal and state authority that emphasizes the ability of regulators to craft workable rules. *Id.* at 774. *EPSA*'s practical approach to Federal Power Act interpretation allows FERC and the states to complement one another's regulation in an overlapping manner, as necessary to "eliminate vacuums of authority over the electricity markets" that would allow "private interests to subvert the public welfare." *Id*. at 780 (internal quotation marks omitted).

In *EPSA*, the Supreme Court considered whether a FERC rule regulating compensation of "demand response" resources in wholesale electricity markets was a proper exercise of federal jurisdiction.[12] The Court held that it was, concluding that FERC had properly exercised its authority to enact rules addressing practices "affecting" wholesale rates. *Id.* at 773-74 (citing 16 U.S.C. §§ 824d(a), 824e(a) (emphasis omitted)). Recognizing that this statutory term, "[t]aken for all it is worth, . . . could extend FERC's power to some surprising places," the Court "limit[ed]" it to "rules or practices that *directly* affect the wholesale rate." *Id.* at 774 (internal quotation marks and brackets omitted; emphasis in original). The Court concluded that FERC, in regulating demand response compensation, was exercising its jurisdiction over a practice "directly affecting" wholesale rates. *Id.* at 773-74.

Further, the Court held that FERC's exercise of jurisdiction did not infringe upon states' retail rate-setting authority. *Id.* at 775-76. Explaining that "rates" and "rate-setting" under the Federal Power Act must be interpreted in a literal fashion, *id.* at 777-78, the Court held that FERC's rule did not constitute retail rate-setting, and thus did not intrude upon the states'

[12] "Demand response" is a practice whereby electricity consumers, typically aggregated by companies known as a "demand response providers," "commit[] *not* to use power at certain times" in exchange for compensation. *EPSA*, 136 S. Ct. at 767, 771 (emphasis in original).

"exclusive . . . jurisdiction" over retail rates. *Id.* at 767. Even though FERC's demand response rule "effectively" changed retail rates for electric energy by "altering consumers' incentives to purchase that product," the Court reasoned that the rule did not "set actual rates" in the "most prosaic, garden-variety sense." *Id*. at 777-78; *see also id*. at 777 ("To set a retail electricity rate is . . . to establish the amount of money a consumer will hand over in exchange for power. Nothing in [the Federal Power Act] . . . suggests a more expansive" definition.). FERC's rule therefore did not intrude upon states' authority to regulate retail rates.

The Court's analysis of the interplay between state and federal jurisdiction, moreover, shows that when FERC exercises its "affecting" jurisdiction, it does not necessarily displace state regulation of the same subject matter. FERC's demand response rule provided for federal regulation of demand response providers, but it also gave states a "veto power," "allow[ing] any State regulator to prohibit its consumers from making demand response bids in the wholesale market." *Id.* at 779. In other words, the rule specifically allowed for overlapping and complementary roles for the states and the federal government. The Court observed favorably that this "feature of the Rule" was part of what established its validity: it "removes any conceivable doubt as to [the rule's] compliance with [Section 201(b) of the Federal Power Act's] allocation of federal and state authority." *Id.* at 780.

If FERC's "affecting" jurisdiction were exclusive, the Court's decision in *EPSA* would have looked quite different. The Court would have had to examine (as the respondents in that case argued[13]) whether the state veto "directly affected" rates in FERC's wholesale markets and was therefore void as an impermissible intrusion into FERC's exclusive jurisdiction. That is not

[13] *See* Brief for the Respondents at 40, *FERC v. Elec. Power Supply Assoc.*, 136 S. Ct. 760 (2016) (2016) (Nos. 14-840, 14-841), 2015 WL 5169103, at *40.

what the Supreme Court did. On the contrary, the Court specifically pointed to the states' veto power as a salutary feature of the rule—indicating that overlapping state and federal jurisdiction is not only permissible, but desirable. Whereas the Supreme Court had previously held that FERC's jurisdiction to determine whether wholesale *rates* are just and reasonable under 16 U.S.C. § 824e(a) is "exclusive," *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986), *EPSA* demonstrates that FERC's jurisdiction over rules and practices "*affecting*" wholesale rates, 16 U.S.C. § 824e(a), is not.

EPSA built upon the Supreme Court's decision from the prior term, *ONEOK*, which similarly approved of overlapping state and federal regulation of matters directly affecting wholesale rates under the Natural Gas Act. *See EPSA*, 136 S. Ct. at 776-77. *ONEOK* held that state antitrust law claims were not field-preempted by the Natural Gas Act despite the fact that "FERC has promulgated detailed [antitrust] rules" that "prohibit[] the very kind of anticompetitive conduct that the state actions attack." *ONEOK*, 135 S. Ct. at 1599, 1602-03. By reaching this conclusion, *ONEOK* necessarily decided that state regulation can permissibly overlap with FERC's exercise of its "affecting" jurisdiction, and that, therefore, FERC's "affecting" jurisdiction is not exclusive. States retain the power to regulate "the background marketplace conditions that affect[] both [FERC-]jurisdictional and non[-FERC-]jurisdictional rates," so long as they do not "challenge the reasonableness of any rates expressly approved by FERC." *Id.* at 1602.

The proper test for field preemption where state regulation directly affects a wholesale rate, *ONEOK* explains, is to focus on "the *target* at which [a] law *aims*," and to invalidate state regulations only where they aim "directly" at regulating in FERC's exclusive wholesale rate-setting sphere. *Id.* at 1599-600. Notably, *ONEOK* devised this "aim" test only to determine the

"target" of a law that regulates both "non[-FERC-]jurisdictional as well as [FERC-]jurisdictional sales." *Id.* at 1599 (emphasis omitted). In contrast, where a state has acted within its own exclusive sphere (such as retail rate-setting or pricing emissions attributes), and therefore by definition has acted within its own domain rather than FERC's, such an examination is unnecessary; state action in such cases is preempted only if it irreconcilably conflicts with FERC's regulation. *See id.* at 1601 (noting that a prior case addressing such a situation "is best read as a conflict preemption case, not a field preemption case").

C. The Court's decision in *Hughes* follows this practical framework

The most recent case in the Supreme Court's Federal Power Act jurisprudence is *Hughes*—a self-avowedly "limited" decision that is consistent with the practical approach of *ONEOK* and *EPSA*. *Hughes*, 136 S. Ct. at 1299. While Plaintiffs characterize *Hughes* as setting forth a new test for states' authority to regulate electricity generation, *see* Compl. ¶ 63, the Court did no such thing. Rather, *Hughes* is simply an application of the rule that once FERC sets a rate for a sale of electricity, states may not set a different rate for that same sale.

Hughes involved a Maryland program in which the state ordered utilities to enter into twenty-year "contracts for differences" with a natural gas plant developer, guaranteeing the developer fixed revenues for the electric capacity it sold into the wholesale market operator's auction. *Hughes*, 136 S. Ct. at 1294-95. Maryland's program had two features that, in combination, were critical to the Court's holding: First, payments under the contracts were contingent upon a "bid and clear" requirement. *Id.* at 1295. The natural gas plant developer was required to submit bids to sell its capacity into the wholesale market operator's FERC-regulated auction. Under such auctions, bids only "clear" if they are lower than the highest offer necessary to meet demand. The developer would receive payments under Maryland's required contracts for differences only if its bids "cleared" the auction and were thereby accepted. Second, the

contracts conveyed no property interest separate from the capacity itself. Rather, they provided only for payments to be made after and in conjunction with the rate FERC set for capacity, thereby adjusting FERC's approved capacity rate. *Id.*

Under Maryland's program, if the developer's offers cleared the auction, and the auction assigned a clearing price that was lower than Maryland's guaranteed price, Maryland utilities would pay the developer the difference. Conversely, if the developer received an auction clearing price that was higher than Maryland's guaranteed price, the developer would pay the utilities the difference. In this manner, rather than governing the sale of any separate products (such as credits for avoided emissions) that were not subject to FERC's jurisdiction, the explicit purpose and function of the contract payments was to adjust the FERC-approved rate *for the sale of that specific capacity to the wholesale market operator*, replacing it with a different rate of Maryland's choosing. *See id.* at 1297 ("We agree with the Fourth Circuit's judgment that Maryland's program *sets an interstate wholesale rate* . . . ." (emphasis added)).

Hughes thus involved a situation in which a state had "set actual rates" in what *EPSA* would call the "most prosaic, garden-variety sense." *EPSA*, 136 S. Ct. at 778. Because of this, the Court concluded that the state program was preempted under the Federal Power Act by applying its prior holdings in *Nantahala* and *Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988). As *Hughes* explained, "[i]n each of those cases, a State determined that FERC had failed to ensure the reasonableness of a wholesale rate, and the State therefore prevented a utility from recovering—through retail rates—the full cost of wholesale purchases." 136 S. Ct. at 1298 (citing *Miss. Power & Light*, 487 U.S. at 360-64 and *Nantahala*, 476 U.S. at 956-62). The Supreme Court in those cases responded by "invalidat[ing] the States' attempts to second-guess the reasonableness of interstate wholesale rates." *Id.* "Once FERC sets such a

rate . . . a State may not conclude," in exercising its own authority, that "the FERC-approved wholesale rates are unreasonable." *Id.* at 1298 (internal quotation marks omitted).

The Supreme Court took care, however, to emphasize the narrow scope of its holding in *Hughes*, so as to avoid impinging upon states' ability to carry out their traditional regulatory functions. *See id.* at 1298. The Court stated: "Our holding is limited: We reject Maryland's program *only* because it disregards an interstate wholesale rate required by FERC." *Id.* at 1299 (emphasis added). In other words, it was not the "ends" Maryland sought to achieve that were impermissible, but rather Maryland's particular "regulatory means," which involved "second-guess[ing]" the specific rates for electric capacity already approved by FERC. *Id.* at 1298. *Hughes* went on to state:

> Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures untethered to a generator's wholesale market participation. So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable.

Id. at 1299 (internal quotation marks and citation omitted).

Hughes therefore did not set forth any new or complicated test related to whether state regulation is somehow "tethered" to the FERC-jurisdictional wholesale markets. *Contra* Compl. ¶ 63. Rather, the Court merely affirmed that a state may not "set" the literal "rate" for the wholesale sale of electric capacity at a price that is different from the rate that FERC has approved for that same sale. *Hughes*, 136 S. Ct. at 1298. The Court clarified that its holding *did not* reach other state actions that accomplish the same regulatory "ends" without using this same impermissible "means." *Id*. By so limiting its holding, *Hughes* stayed true to *ONEOK* and *EPSA*'s practical approach. That approach preserves the ability of both state and federal regulators to carry out overlapping functions in a complementary manner and recognizes that

there can be no "hermetically sealed" jurisdictional division between federal and state authority. *EPSA*, 136 S. Ct. at 776.

II. The ZEC Program Is Not Preempted by the Federal Power Act

New York's ZEC Program is not preempted by the Federal Power Act. As explained below, it does not intrude into FERC's exclusive domain of wholesale rate-setting; it does not directly affect wholesale rates; and it does not conflict with FERC's regulation under the Act. To the contrary, it is a textbook example of a state carrying out its "traditional" authority over "utility generation and resource portfolios" in a manner that is consistent with FERC's regulation of wholesale electricity sales. *See* FERC Order No. 888, 61 Fed. Reg. 21,540, at 31,782 n.544.

A. The ZEC Program does not intrude on FERC's authority to regulate wholesale rates

The ZEC Program does not intrude on FERC's authority over wholesale rates. As the Clean Energy Standard Order specifies, the ZEC Program "does not establish wholesale energy or capacity prices[;] it only establishes pricing for *attributes* completely outside of the wholesale commodity markets administered by NYISO." CES Order at 132-33 (emphasis added).[14] Such attributes are governed by "state property law," not by FERC. *See Wheelabrator*, 531 F.3d at 186. Because ZECs reflect a zero-emissions attribute that is "unbundled" from the sale of the underlying electricity, they are for purposes of preemption analysis analogous to other state-issued Renewable Energy Credits reflecting environmental attributes, over which FERC has specifically disclaimed jurisdiction. *See WSPP*, 139 FERC ¶ 61,061 at 61,426; *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004, at 61,007. By regulating emissions attributes, rather than adjusting electric

[14] Having provided for renewable energy value attributes elsewhere in the Clean Energy Standard Order, the ZEC Program values emissions avoided through the preservation of nuclear resources based on a formula designed to measure the contribution of such resources as compared to business as usual. *See* CES Order at 128, 131.

capacity prices themselves as the Maryland program did in *Hughes*, the ZEC Program avoids replacing any wholesale rates set by FERC.

Further, unlike the Maryland program invalidated in *Hughes*, the ZEC Program does not require participating facilities to "bid and clear" in FERC-regulated markets. While the conveyance of an unbundled property interest alone would be enough to separate this case from *Hughes* and render the ZEC Program not preempted, the absence of any wholesale electricity market bidding requirements further establishes that the ZEC Program does not override FERC-approved rates, and therefore is not preempted under *Hughes*.

For the same reason, the ZEC Program is not field-preempted under the *ONEOK* test, even if that test were to apply.[15] The ZEC Program is "aimed directly at" public policy *emissions attributes* that convey a separate property interest under state law—not at regulating rates for the sales of *electricity*. *ONEOK*, 135 S. Ct. at 1600.

Plaintiffs implicitly acknowledge that the ZEC Program does not actually set rates for electricity sales, but they nevertheless contend that it "*effectively* sets . . . wholesale rate[s]" by supplementing the revenue that nuclear generators receive in the wholesale markets. Compl. ¶¶ 26, 44 (emphasis added). In Plaintiffs' formulation, "[t]he modifier 'effective' is doing . . . more work than any conventional understanding of rate-setting allows." *EPSA*, 136 S. Ct. at 777. *EPSA* counsels that rate-setting under the Federal Power Act must be understood "in only [its] most prosaic, garden-variety sense": as determining "the price paid" for a specific amount of

[15] As explained above in Section I(B), *ONEOK*'s examination of the "aim" of the state regulation was necessary only because the regulation in question directly affected FERC's wholesale rates. That test does not apply where, as here, a state has regulated within its own exclusive sphere. The ZEC Program does not directly affect wholesale electricity rates. *See infra* Section II(B).

energy or capacity. *Id.* at 778. Paying generators for the zero-emissions attributes of their generation does not fit within this literal definition of "rate-setting."

Indeed, finding state regulations preempted based on their "effective" impacts on wholesale rates, as Plaintiffs urge this Court to do, would implicate virtually every state regulation of retail rates or generators, given the "inextricably linked" nature of "the wholesale and retail markets in electricity." *Id.* at 766. For example, state tax incentives may likewise "affect the price" of a generator's wholesale rates by making it more profitable, but FERC has long recognized that such measures are well within states' authority. *S. Cal. Edison Co. II*, 71 FERC ¶ 61,269, at 62,080 (noting that "[s]tates . . . may seek to encourage renewable or other types of resources through their tax structure, or by giving direct subsidies," and that "[u]se of the tax structure may allow states to affect the price of renewables or other alternatives"). The Supreme Court's "limited" holding in *Hughes*, 136 S. Ct. at 1299, does not support Plaintiffs' radical interpretation.

Unlike Maryland's program, nothing in the ZEC Program requires nuclear generators to engage in any particular behavior in FERC-regulated wholesale markets. While the ZEC Program places certain limits on the amount of credits each eligible facility may create, it does not—contrary to Plaintiffs' assertions—limit or prescribe the amount of electricity those facilities may sell in FERC-regulated wholesale markets. *Compare* Compl. ¶ 72 (incorrectly alleging that the ZEC Program "dictat[es] the quantity of electricity to be sold into the FERC-regulated wholesale electricity markets"), *with* CES Order at 154-57 (specifying various requirements regarding *ZEC* transactions, not electricity transactions).

Plaintiffs attempt to draw such a link by observing that under the ZEC Program, a Zero Emissions Credit is created "if and only if[] the nuclear generator 'produces' electricity," Compl.

¶¶ 64, 69, but the requirement that a generator produce electricity says nothing about how or where it may ultimately *sell* that electricity. Even if the relevant generators had "no choice but to sell their production in the NYISO wholesale auctions," Compl. ¶ 69, that would be a feature of *FERC*'s rules, not the ZEC Program. Further, that eligible facilities must produce electricity is integral to defining the zero-emissions benefits the program seeks to secure; those benefits will be realized only if the facilities do in fact generate electricity, thereby displacing fossil-fuel burning sources (such as Plaintiffs' facilities). The same is true for RECs, over which FERC has specifically disclaimed jurisdiction. *See WSPP*, 139 FERC ¶ 61,061, at 61,426; *see also, e.g.*, Or. Rev. Stat. §§ 469A.010, 469A.135 (providing for "renewable energy certificates" associated with electricity that is "generated" by certain types of facilities); Conn. Gen. Stat. § 16-245a (requiring certain amounts of electricity to be "generated" from "renewable energy sources").

Plaintiffs also repeatedly characterize the ZEC Program as "tethered" to FERC's regulation of the wholesale markets in various ways, apparently attempting to seize on the Supreme Court's use of the word "untethered" in *Hughes*. *See* Compl. ¶¶ 67, 69. As explained above, however, the Supreme Court's passing use of this word did not adopt a new preemption test. *See supra* Section I(C). The ZEC Program does not "disregard[] an interstate wholesale rate required by FERC" by replacing that rate after the fact with a different rate of the state's own choosing, and therefore it is not "[]tethered" in the sense that *Hughes* used that word. *Hughes*, 136 S. Ct. at 1299. What the ZEC Program does is take FERC's regulation into account when deciding whether a particular nuclear facility is eligible to create Zero Emissions Credits (i.e., by considering whether projected wholesale market revenues will be insufficient to provide for that facility's continued operation) and when determining the value of the Credits (which, among other things, accounts for wholesale market price forecasts). *See* CES Order at 124, 131. These

aspects of the program are not like the explicit and literal rate modification of Maryland's program in *Hughes*, and they are perfectly permissible under binding Second Circuit precedent. As the Second Circuit explained in *Rochester Gas*, just as FERC may "take into account activities it cannot regulate in setting rates for activities that it may regulate," so may states "take into account" *FERC*'s regulatory actions in deciding matters within their own jurisdiction. 754 F.2d at 103.

The purpose of these features is to ensure that Zero Emissions Credits reflect the value of avoiding the "increased air emissions" associated with "heavier utilization of existing fossil-fueled plants or the construction of new gas plants" that would otherwise occur without the ZEC Program. CES Order at 128. In other words, the program is designed to compensate for reductions of emissions, as measured against a baseline that takes into account FERC's actions. The fact that the ZEC Program takes wholesale energy price forecasts into account does not convert the program into a regulation of electricity sales. Rather, it is simply the state's way of ensuring that it is rationally and effectively valuing the zero-emissions attributes it seeks to preserve, and not granting generators a windfall when they do not *add* to the amount of emissions avoided.[16] This is perfectly permissible under the Federal Power Act. As the Second Circuit has recognized, "FERC's and the states' respective areas of jurisdiction were designed to coordinate with each other. . . . [T]he legislation does not contemplate ineffective regulation at either the state or federal level." *Rochester Gas*, 754 F.2d at 103 (internal quotation marks and

[16] Whether to credit only additional generation as compared to business as usual is a complex policy determination best left to state commissions, not courts. Similar features in Renewable Portfolio Standards may ensure that states do not pay windfalls to existing renewable generators where financial support is not necessary to retain them. *See, e.g.*, N.Y. Pub. Serv. Comm'n, Case 03-E-0188, *Order Regarding Retail Renewable Portfolio Standard*, at 8 (Sept. 24, 2004), *available at* http://tinyurl.com/zqbhq5w.

alterations omitted). The ZEC Program thus "aims" at defining the precise public-policy attribute the state seeks to encourage—certain avoided emissions—and not at setting wholesale electricity rates. *ONEOK*, 135 S. Ct. at 1599, 1602.

To determine the program's aim—assuming *arguendo* that such a determination were even required (see *supra* Section I(B) and *infra* Section II(B) regarding why it is not)—the Court need only examine the ZEC Program's terms, as set forth in the Clean Energy Standard Order. While the district court in *ONEOK* decided that case on summary judgment, it did so because discovery was necessary to determine whether each of the defendants sold gas subject to FERC's regulation under the Natural Gas Act, and thus whether they could raise preemption as a defense to plaintiffs' state-law antitrust claims. *See In re W. States Wholesale Natural Gas Antitrust Litig.*, No. 03-1431, 2011 WL 2912910, at *6-17 (D. Nev. July 18, 2011), *aff'd in part, rev'd in part*, 715 F.3d 716 (9th Cir. 2013), *aff'd sub nom. ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015). After finding no issue of material fact as to whether each defendant was a FERC-regulated seller, the district court decided as a matter of law that plaintiffs' antitrust claims were "aimed at Defendants' alleged . . . anti-competitive collusive behavior" and were therefore preempted. *Id.* at *20. This was a legal determination that did not require factual development or an investigation into motive. *See also id.* at *2 (noting that one of the courts in the multi-district litigation initially dismissed the claims based on its impression that plaintiffs had conceded the only relevant fact—that defendants sold gas in interstate markets). Here, too, identifying the ZEC Program's "aim"—if doing so were necessary—would be a legal determination for which factual development is not required.

The Commission's alleged subjective motivations, *see* Compl. ¶¶ 58-63, are beside the point. States may seek to supplement wholesale market price signals in a number of ways, such

as through tax policy, so long as they use a permissible "means." *Hughes*, 136 S. Ct. at 1298-99; *see also, e.g.*, *S. Cal. Edison Co. II*, 71 FERC ¶ 61,269, at 62,080 (recognizing that states may encourage renewable resources "through their tax structure, or by giving direct subsidies," among other things). If it were otherwise, subjective intent could lead to inconsistent results; a Renewable Portfolio Standard in one state could be upheld while the *exact same standard* in the neighboring state is struck down, purely based on different courts' assessments of the states' subjective motivations. That is not what *ONEOK* requires.

In sum, the ZEC Program is an exercise of authority within the state's own traditional domain, and in any event, its structure demonstrates that it aims at defining attributes associated with generation, not at setting wholesale electricity rates. The program therefore is not preempted, and Plaintiffs' preemption claims should be dismissed.

B. The ZEC Program's alleged "effects" on the wholesale market do not impermissibly intrude on FERC's authority

Plaintiffs also contend that the ZEC program is field-preempted because it "directly affects the quantity of electricity available in the wholesale markets." Compl. ¶ 72; *see also id.* ¶ 83(b). Their claim fails under FERC and Supreme Court precedent.

First, FERC has held that "when an unbundled REC" is bought or sold "independent of a wholesale electric energy transaction, . . . the unbundled REC transaction *does not affect* wholesale electricity rates" as that term is understood under the Federal Power Act, and therefore "does not fall within [FERC's] jurisdiction." *WSPP*, 139 FERC ¶ 61,061, at 61,426 (emphasis added). The same reasoning should apply here. New York's ZEC Program creates unbundled credits that may be bought and sold independently of the associated electricity; under FERC's analysis, these credits "do[] not affect" wholesale rates under the Federal Power Act. *Id.*

FERC's position is consistent both with *EPSA* and with the D.C. Circuit decision on which *EPSA* relied for the rule "limiting FERC's 'affecting' jurisdiction to rules or practices that '*directly* affect the wholesale rate.'" *EPSA*, 136 S. Ct. at 774 (quoting *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004) (alterations omitted)). That D.C. Circuit decision explained that FERC's "affecting" jurisdiction "is limited to those methods or ways of doing things on the part of the [wholesale market operator] that directly affect the rate or are closely related to the rate, not all those remote things beyond the rate structure that might in some sense indirectly or ultimately do so." *Cal. Indep. Sys. Operator Corp.*, 372 F.3d at 403. Further, it cited with approval a prior D.C. Circuit decision approving a FERC rule that read the phrase "contracts affecting such rate" under the Natural Gas Act to be "limited to contracts . . . which directly govern the rate in a [FERC-]jurisdictional sale—providing for the rate in whole or in part, or specifying or embodying it, or setting forth rules by which it is to be calculated." *Id.* (quoting *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1506 (D.C. Cir. 1990) (alteration and internal quotation mark omitted)). These formulations all suggest that, to constitute a "direct effect," the rule or practice in question must pertain directly and specifically to the terms and conditions or the functioning of the relevant wholesale market itself. Here, the ZEC Program does not "directly govern" any wholesale rates, *id.*, because it values public policy attributes *associated with* electricity production, not electricity itself.

EPSA similarly compels dismissal of Plaintiffs' claim. As discussed above, *EPSA* and *ONEOK* indicate that FERC's jurisdiction over practices "directly affecting" wholesale rates is not exclusive. *See supra* at Section I(B). In *EPSA*, the Supreme Court described the state "veto" feature in FERC's demand-response rule—allowing states to block demand-response providers from entering into wholesale electricity markets—not as a defect, but as a virtue that established

the rule's validity. *See* 136 S. Ct. at 779-80 ("That feature of the Rule removes any conceivable doubt as to its compliance with [Section 201(b) of the Federal Power Act's] allocation of federal and state authority."). Even assuming the ZEC Program *does* directly affect the wholesale rates, then, that would not invalidate the program as Plaintiffs contend.

The only other possible reading of *EPSA* is that it did not view the state "veto," *id.* at 779, as "directly affecting" wholesale rates. But this alternative reading, too, requires dismissal of Plaintiffs' claim. If the state veto in *EPSA*—whereby states set wholesale market entry rules for the auctions that ultimately produce wholesale rates—does not "directly affect" those rates, then certainly, New York's ZEC Program does not either. The ZEC Program affects rates only by altering a generator's revenues, just as countless other state policies (such as tax laws) do. By comparison *market entry rules*, which set the terms by which wholesale rates are arrived at, have a far more immediate effect on those rates. Either way, the only conclusion here that is consistent with *EPSA* is this: the ZEC Program's alleged effects on the wholesale market do not impermissibly intrude on FERC's domain.

C. The ZEC Program does not conflict with FERC's regulation

Finally, the ZEC Program does not impermissibly conflict with FERC's regulation. By regulating the sale of a distinct product (Zero Emissions Credits)—rather than adjusting FERC-approved auction prices for energy or capacity after the fact, as Maryland's contract-for-differences program did—the ZEC Program avoids inconsistency with FERC's wholesale rate-setting regime. Far from "interfer[ing] with FERC's decision to structure the wholesale markets for capacity and energy on market-based principles" as Plaintiffs allege, Compl. ¶ 89, the ZEC Program creates a separate state-jurisdictional product that is structured very similarly to the RECs that FERC has *expressly decided* fall under state authority. *See, e.g.*, *WSPP*, 139 FERC ¶ 61,061, at 61,426. The ZEC Program accepts FERC's determinations as the sole price-setting

mechanism for energy and capacity. Accordingly, "comply[ing] with both state and federal law" remains fully possible, and the ZEC Program is consistent with "the full purposes and objectives of Congress." *ONEOK*, 135 S. Ct. at 1595 (internal quotation mark omitted).

Plaintiffs are mistaken that the ZEC Program must be invalid simply because its operation affects the composition of New York's generation mix. *See* Compl. ¶ 44. While the Federal Power Act does not permit states to actually set rates for wholesale energy or capacity and then compel FERC to accommodate such an encroachment, *see Hughes*, 136 S. Ct. at 1298, states have always carried out regulations within their own sphere of jurisdiction that affect wholesale rates in ways that FERC must account for. Indeed, the reality that FERC "take[s] into account activities it cannot regulate in setting rates for activities that it may regulate," *Rochester Gas*, 754 F.2d at 103, "would appear to be an everyday affair." *FPC v. Conway Corp.*, 426 U.S. 271, 280 (1976) (quoted by *Rochester Gas*, 754 F.2d at 103). FERC has specifically accounted for state subsidies in the past, for example, by approving modifications to market entry rules that take them into account. *See N.J. Bd. of Pub. Util. v. FERC*, 744 F.3d 74, 90-91 (3d Cir. 2014).

FERC is not the sole entity responsible for "determin[ing] the fate" of generators, as Plaintiffs suggest. *See* Compl. ¶ 89. Rather, FERC's role is to regulate the rates for the generators' wholesale sales of electric energy and capacity, which will inevitably vary according to factors outside FERC's control, such as commodity costs and state regulation. Such state regulation affecting wholesale rates is explicitly contemplated by the terms of the Act. *See, e.g.*, 16 U.S.C. § 824(b) (preserving state jurisdiction over "facilities used for the generation of electric energy"). Indeed, it has *always* had great influence on the "fate" of generators. One quintessential example of such regulation is "integrated resource planning," carried out by states for decades and expressly approved of by FERC, *see* Order No. 888, 61 Fed. Reg. 21,540, at

31,782 n.544, and recognized by the Supreme Court, *New York v. FERC*, 535 U.S. 1, 24 (2002), by which state regulators assess their energy and generation capacity needs and approve a plan to meet those needs. *See, e.g.*, Va. Code § 56-599 (requiring each state utility to submit, for state commission review, "an integrated resource plan" providing for the procurement of energy and capacity that may include, among other things, "power purchase contracts," "[b]uilding new generation facilities," "[r]elying on purchases from the short term or spot markets," and taking action "to diversify its generation supply portfolio"). Indeed, states may permissibly influence the "fate" of generators in any number of ways, such as through laws governing labor rules, environmental standards, and tax policy. Thus, because the ZEC Program does not set rates for *energy* or *capacity* (as the Maryland program did), allegations that the ZEC Program merely affects wholesale rates, or the composition of which generators are likely to operate in New York, do not state a conflict-preemption claim.

CONCLUSION

For the foregoing reasons, NRDC urges the Court to grant Defendants' motion to dismiss Plaintiffs' claims that the ZEC Program is preempted under the Federal Power Act.

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Respectfully submitted,

/s/ Nancy S. Marks

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