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

VILLAGE OF OLD MILL CREEK, FERRITE INTERNATIONAL COMPANY, GOT IT MAID, INC., NAFISCA ZOTOS, ROBERT DILLON, RICHARD OWENS, And ROBIN HAWKINS, both individually and d/b/a ROBIN'S NEST,	)	
Plaintiffs,	)	Case No. 1:17-cv-01163
v.	)	District Judge Manish S. Shah
ANTHONY M. STAR, in his official capacity as Director of the Illinois Power Agency,	)	
Defendant.	)	

ELECTRIC POWER SUPPLY ASSOCIATION, DYNEGY INC., EASTERN GENERATION LLC, NRG ENERGY, INC., and CALPINE CORPORATION,	)	
Plaintiffs,	)	Case No. 1:17-cv-01164
v.	)	District Judge Manish S. Shah
ANTHONY M. STAR, in his official capacity as Director of the Illinois Power Agency, and BRIEN J. SHEAHAN, JOHN R. ROSALES, SADZI MARTHA OLIVA, MIGUEL DEL VALLE, and SHERINA MAYE EDWARDS, in their official capacities as Commissioners of the Illinois Commerce Commission,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS OF INTERVENOR
EXELON GENERATION COMPANY, LLC

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INTRODUCTION

Nuclear power plants generate large amounts of electricity without emitting carbon dioxide, sulfur dioxide, nitrogen oxides, or other harmful air pollutants. But by 2016, nuclear plants across the country, including several that serve Illinois residents, had announced their intent to retire. If these plants retired, their output would largely be replaced by fossil fuel-burning plants that emit large quantities of these harmful pollutants. Illinois's Zero Emission Standard ("ZEC Program") is intended to help preserve the environmental benefits that these nuclear power plants provide. It does so by giving qualifying nuclear power plants "zero emission credits" ("ZECs"), which recognize the environmental value of nuclear plants' ability to generate electricity without pollution. In the energy industry, this ability is known as a plant's "environmental attribute."

Illinois modeled the ZEC Program on similar longstanding state programs compensating the environmental attributes of renewable generation. Since 1999, more than half of the states, including Illinois, have adopted "renewable energy credit" (or "REC") programs, which "are inventions of state property law." *Wheelabrator Lisbon, Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008) (quoting *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004, 61,005 (2003)). REC programs exist because a power plant is more than just the energy it sells. A pollution-emitting coal plant and a renewable wind or solar farm might generate the same amount of electricity, but their environmental impacts differ greatly. Through REC programs, states recognize the positive environmental impact of renewable generation by allowing renewable generators to sell credits when they generate electricity using their emissions-free technology. Retail sellers or distributors of electricity, such as utilities, are required to buy such credits in proportion to their share of a state's electricity consumption (or "load"). In this way, REC programs provide financial support to clean energy generators that would not otherwise be competitive with fossil-fuel generation, allowing renewable generation to displace emitting generation and thereby avoid carbon emissions and other air pollution.[1]

The legality of REC programs is well-established. Under the Federal Power Act ("FPA"), the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction to regulate wholesale electricity sales (*i.e.*, sales by generators to retail suppliers); but states have the exclusive power to regulate generation facilities and retail rates. 16 U.S.C. § 824(b). State-mandated REC programs fall on the state side of the line, because they provide compensation for attributes of generation, and require retail sellers to purchase credits reflecting those attributes. FERC agrees. Applying its expertise, FERC has held that states may establish credit programs like RECs that compensate generators for producing electricity using a particular technology. Accordingly, FERC recognizes that states (and not FERC) may regulate the purchase or sale of RECs, even when the generators receiving RECs also sell their electricity at wholesale—so long as the RECs are not sold in the same transaction as the electricity. *WSPP Inc.*, 139 FERC ¶ 61,061, P 21 (2012).

The ZEC Program applies the REC model to nuclear generation. Like RECs, ZECs are credits certifying that electricity was created using emission-free technology (nuclear power), thereby compensating nuclear plants for the environmental value of their production. Illinois's two public utilities are required to buy ZECs in a proportion equal to the share of the State's electricity that each delivers. And ZECs are bought and sold separately from electricity.

Nonetheless, two groups of plaintiffs (together, "Plaintiffs")—retail consumers of electricity in Illinois (the "Retail Plaintiffs"), and competitor generators who burn fossil fuels (the "Fossil Fuel Plaintiffs")—claim that ZECs (but not RECs) are preempted by FERC's authority over wholesale electricity sales. They argue that the ZEC Program intrudes on FERC's authority

[1] *See generally, e.g.*, Barry Rabe, *Race to the Top: The Expanding Role of U.S. State Renewable Portfolio Standards*, 7 Sustainable Dev. L. & Pol'y 10 (2007).

by "effectively replac[ing] the auction clearing price" for electricity sold at wholesale. EPSA Compl. ¶ 72; Retail Compl. ¶ 70.[2] But ZEC payments do not "adjust" wholesale rates. Just like RECs, ZECs are payments for the environmental benefits of an emission-free method of generation, and they are bought and sold separate and apart from the sale of electricity.

Nor is the ZEC Program preempted merely because, as Plaintiffs claim, it will affect the prices in FERC-regulated wholesale electricity auctions by allowing nuclear plants that would otherwise retire to continue operating. EPSA Compl. ¶¶ 74-75; Retail Compl. ¶ 79. That theory is obviously overbroad. It would invalidate scores of state regulations that also affect prices in FERC-regulated auctions and influence the mix of power plants that produce electricity—not only REC programs, but also state tax incentives, cap-and-trade programs, environmental regulations (like requiring that plants install scrubbers), direct subsidies, and even the decision whether or not to issue a construction permit for a new plant. The courts and FERC have rejected such an expansive theory of preemption, which would obliterate core state police powers and the express reservation to states in the FPA of authority to regulate generation facilities. 16 U.S.C. § 824(b).

Plaintiffs also contend that the ZEC Program violates the dormant Commerce Clause and the Equal Protection Clause. These claims are likewise without merit and should be dismissed.

REGULATORY BACKGROUND

The FPA divides jurisdiction between federal and state regulators.

FERC Jurisdiction. FERC has jurisdiction over wholesale sales, 16 U.S.C. § 824(b)(1), and ensures that "rates and charges made, demanded, or received … for or in connection with the … [wholesale] sale of electric energy" are "just and reasonable." *Id*. § 824d(a). FERC also has authority to ensure that "rules and regulations affecting" such rates are "just and reasonable." *Id.*

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[2] References to the "EPSA Compl." and the "Retail Compl." are to the complaints in case numbers 17-cv-1164 and 17-cv-1163, respectively.

FERC has established auction markets in which wholesale sellers in Illinois may participate.[3] EPSA Compl. ¶¶ 29-31; Retail Compl. ¶¶ 35-37. The Midcontinent Independent System Operator, Inc. ("MISO") administers the auction markets for southern Illinois and 15 other states; PJM Interconnection, LLC ("PJM") does so for northern Illinois and 12 other states and the District of Columbia. EPSA Compl. ¶ 30. These entities administer one auction for energy (electricity itself), and another for capacity (a commitment to deliver a set quantity of electricity in the future). *Id.* ¶¶ 32-35, 37-38; Retail Compl. ¶¶ 38-41, 43-44; *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1293 (2016). For each, MISO and PJM calculate how much energy or capacity is required, and accepts generators' supply offers in order of cost (least expensive first), until the need is met. EPSA Compl. ¶¶ 33-35, 41; Retail Compl. ¶¶ 39-41, 45; *FERC v. Elec. Power Supply Ass'n ("EPSA")*, 136 S. Ct. 760, 768 (2016). The offer price of the last (most expensive) unit accepted is the "clearing price," which is paid to every supplier whose offer is accepted. EPSA Compl. ¶¶ 35, 41; Retail Compl. ¶ 41; *EPSA*, 136 S. Ct. at 768.

State Jurisdiction. The FPA expressly "limits FERC's regulatory reach, and thereby maintains a zone of exclusive state jurisdiction." *EPSA*, 136 S. Ct. at 767. It "places beyond FERC's power," "the regulation of 'any other sale'—most notably, any retail sale—of electricity." *Id.* at 766 (quoting 16 U.S.C. § 824(b)). States also have exclusive jurisdiction "over facilities used for the generation of electric energy," like power plants. 16 U.S.C. § 824(b)(1). States enjoy "broad powers under state law" to "direct the planning and resource decisions of utilities under their jurisdiction," including "order[ing] utilities to build renewable generators themselves, or … order[ing] utilities to ... purchase renewable generation." *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) (quoting *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, 62,080

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[3] FERC also allows wholesale buyers and sellers to enter into bilateral contracts—and to set their own contract price for wholesale electricity—outside the auctions. EPSA Compl. ¶ 37; Retail Compl. ¶43.

(1995)). As the Supreme Court has recognized, "[i]t is a fact of economic life" that the spheres of federal and state regulation—though distinct—are not "hermetically sealed" from one another. *EPSA*, 136 S. Ct. at 776. States regularly take action in their sphere that affects areas of federal control; and FERC's actions within its sphere likewise affect areas of state control. *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) ("[T]he Federal Power Act, like all collaborative federalism statutes, envisions a federal-state relationship marked by interdependence."). Thus, states may "require retirement of existing generators, [require construction of] expensive, environmentally-friendly units, or … take any other action in their role as regulators of generation facilities," even though "those choices … affect[] the [wholesale] market clearing price." *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009).

FACTUAL BACKGROUND

In December 2016, Illinois enacted the ZEC Program as part of comprehensive legislation addressing energy reform. *See* SB 2814, Public Act 099-0906, 99th Gen. Assemb. (Ill. 2016), http://www.ilga.gov/legislation/99/SB/PDF/09900SB2814enr.pdf ("SB 2814"). The legislation addressed a host of state energy needs: increasing funding for energy efficiency; initiating a community solar fund; and funding job training for low-income communities. The legislation also expanded the state's existing REC program to procure long-term contracts for RECs from renewable generators. 20 ILCS 3855/1-75(c).[4] A REC is defined under Illinois law as "a tradable credit that represents the environmental attributes of one megawatt hour of energy produced from a renewable energy resource." *Id.* § 1-10. RECs have value because Illinois, like dozens of other states, requires electric utilities to buy a certain quantity of them. *See id.* § 1-75(c)(1), (4)-(6).

The ZEC Program applies the REC model to nuclear generators, which, like renewable

[4] For provisions of SB 2814 that will be codified, citations are provided to the statutory provisions, as amended by SB 2814, that will be in effect as of June 1, 2017, the effective date of SB 2814.

generators, do not emit air pollution. In passing the ZEC Program, the General Assembly realized that to "[r]educe emissions of carbon dioxide and other air pollutants, such as sulfur oxides, nitrogen oxides, and particulate matter" that "adversely impact Illinois," SB 2814 § 1.5(1)-(2), it had to "expand its commitment to zero emission energy generation and value the environmental attributes of zero emissions generation" like "nuclear power." *Id.* § 1.5(3). The ZEC Program thus compensates selected nuclear plants by directing the purchase of ZECs by the state's utilities. Like a REC, a ZEC is a "tradable credit that represents the environmental attributes of one megawatt hour of energy produced from" a nuclear facility. 20 ILCS 3855/1-10.

Under the ZEC Program, the Illinois Power Agency ("IPA") and Illinois Commerce Commission ("ICC") will select nuclear plants to receive ZECs and will then direct the state's utilities to procure ZECs from those plants. 20 ILCS 3855/1-75(d-5)(1). Nuclear plants seeking to participate will first submit bids to the IPA. *Id.* § 1-75(d-5)(1)(A). The IPA will review the bids and, based on statutory public interest factors, recommend to the ICC that certain plants receive ZECs. *Id.* § 1-75(d-5)(1)(C). The public interest criteria include "minimizing carbon dioxide emissions that result from electricity consumed in Illinois," "minimizing sulfur dioxide, nitrogen dioxide, and particulate matter emissions that adversely affect the citizens" of Illinois, and "any existing environmental benefits that are preserved by the" selection of the winning facilities. *Id.* The ICC will review the IPA's recommendations and finally determine which plants will be selected to receive ZECs, based on the criteria identified above. *Id.* § 1-75(d-5)(1)(C-5). Then the winning facilities will contract to sell their ZECs. *Id.* This process will not begin until after June 1, 2017, the legislation's effective date, and so the actual signing of contracts will not occur until later in the year. *See* 5 ILCS 75/2.

The ZEC price is based on the social cost of carbon, an economic estimate of the damage inflicted by carbon emissions that was prepared by a federal interagency task force. *Id.* § 1-75(d-5)(1)(B); *Zero Zone, Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 677-78 (7th Cir 2016). The Illinois legislature found that estimate to be "an appropriate valuation of the environmental benefits provided by zero emission facilities." SB 2814 § 1.5. However, "to ensure that the procurement remains affordable to retail customers in this State if electricity prices increase," *id.*, the ZEC price can be reduced if forecasted energy prices in Northern Illinois and the average of MISO and PJM capacity prices together exceed a benchmark of $31.40/MWh. 20 ILCS 3855/1-75(d-5)(1)(B).

LEGAL STANDARD

In deciding a motion to dismiss, the Court construes the complaint "in the light most favorable to the plaintiffs, accepting as true all well-pleaded facts alleged and drawing all permissible inferences in their favor." *Fortress Grand Corp. v. Warner Bros. Entm't Inc.*, 763 F.3d 696, 700 (7th Cir. 2014) (quoting *Active Disposal, Inc. v. City of Darien*, 635 F.3d 883, 886 (7th Cir. 2011)). But Plaintiffs' allegations "cannot save a claim if they are implausible." *Id.*

ARGUMENT

I. Plaintiffs' Allegations Fail to State a Claim of Field Preemption.

In "all pre-emption cases," the Court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Kole v. Vill. of Norridge*, 941 F. Supp. 2d 933, 948 (N.D. Ill. 2013) (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). Congress had no such intent in the FPA. That Act "had no purpose or effect to cut down state power," and was "drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 754 F.2d 99, 104 (2d Cir. 1985) (quoting *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 517-18 (1947)). Moreover, the presumption against preemption "applies with particular force" when the federal statute at issue is alleged to preempt "a field traditionally occupied by the States," *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008), and here, legislation (like the ZEC Program) that is "designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of [states'] police power." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960). Plaintiffs' allegations do not overcome this strong presumption.

A. Plaintiffs' Contention That The ZEC Program "Directly Alters" The Auction Clearing Price Fails To State A Field Preemption Claim.

Plaintiffs first assert that the ZEC Program regulates wholesale rates, and thus is preempted, because it "directly alter[s]" the price "paid to … nuclear generators" for the electricity they sell at wholesale. EPSA Compl. ¶ 72; Retail Compl. ¶ 70. But FERC has held that payments for the environmental attributes of electricity production—like ZEC or REC payments—do *not* fall within FERC's jurisdiction over wholesale rates, because they do *not* alter the price paid for the electricity itself. That interpretation of the FPA is supported by two recent decisions of the Supreme Court, which reject Plaintiffs' overly expansive view of what it means to regulate rates.

1. FERC Has Held That REC Payments Do Not Alter A Wholesale Price, And ZECs Are Not Materially Different From RECs.

Under the FPA, states retain their "traditional[]" authority over "the regulation of utilities," one "of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). This includes the authority to promote environmentally friendly methods of generating electricity. *See, e.g., Conn. Dep't*, 569 F.3d at 481; *Entergy Nuclear*, 733 F.3d at 417. One way that states do so is through RECs, "an environmental commodity established by state law and generated by renewable energy facilities." *CITGO Petroleum Corp. v. Integrys Energy Servs., Inc.*, No. 10 C 4743, 2012 WL 2129402, at *3 n.6 (N.D. Ill. June 12, 2012). ZECs share the features of RECs that place RECs within state jurisdiction: ZECs are tied to electricity production, not sales, and are sold separately from that electricity.

As FERC has explained, a REC "certif[ies] that electric energy was generated pursuant to certain requirements and standards," and is thus created when electricity is produced, regardless of whether or how that electricity is sold at wholesale. *WSPP*, 139 FERC ¶ 61,061, at P 21. Indeed, "[g]enerally speaking," in a REC transaction, "the renewable energy attributes are 'unbundled' from the energy itself and sold separately." *Wheelabrator*, 531 F.3d at 186. For example, a renewable generator may sell its electricity to one utility or in the wholesale market, but sell the REC representing the environmental benefits of that electricity's production to another utility.

FERC has held that when RECs are "unbundled" and sold independently of electricity in this way, the REC transaction falls outside FERC's jurisdiction. *WSPP*, 139 FERC ¶ 61,061, at P 24 ("an unbundled REC transaction … does not fall within [FERC's] jurisdiction" over wholesale sales).[5] Indeed, FERC "explicitly acknowledges that state law governs" such transactions. *Wheelabrator*, 531 F.3d at 190. The reason is simple. RECs reflect the production of electricity, not its sale. So, FERC has held, when RECs are sold in a transaction separate from the wholesale sale of electricity, payment for a REC is "not a charge *in connection with* a wholesale sale," and does not set or even "affect wholesale electricity rates." *WSPP*, 139 FERC ¶ 61,061, at P 24 (emphasis added). Instead, FERC has concluded, RECs are "separate commodities" that "are *not* compensation for capacity and energy." *Cal. Pub. Utils. Comm'n*, 133 FERC ¶ 61,059, P 31 n.62 (2010) (emphasis added). FERC has accordingly "not evince[d] an intent to occupy the relevant field—namely, the regulation of [RECs]." *Wheelabrator*, 531 F.3d at 190.

[5] The same is true for emissions allowances, which likewise represent an environmental attribute associated with electrical generation. *See Edison Elec. Inst.*, 69 FERC ¶ 61,344, 62,288-89 (1994).

FERC's holding disposes of Plaintiffs' first theory of field preemption, because ZECs are just like RECs in all material respects. *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714 (1985) (agency's views are "dispositive on the question of [field preemption] unless … inconsistent with clearly expressed congressional intent"). Like RECs, ZECs certify that electricity was "produced" in a particular way—by "a zero-emissions facility." 20 ILCS 3855/1-10. Like RECs, ZECs are created when electricity is "*produced*," regardless of whether, how, or to whom the electricity is sold—whether in wholesale auctions, through bilateral contracts, or directly to a retail customer. *Id.* (definitions of RECs and ZECs) (emphasis added). And, like RECs, ZECs are sold "unbundled" from any wholesale sale of electricity. *Wheelabrator*, 531 F.3d at 186. ZECs will be sold to utilities in transactions independent of any wholesale electricity sale. ZECs can be sold to one utility, while the electricity is sold to a different utility or simply into the wholesale market. Indeed, utilities will purchase ZECs and charge them to customers even when those customers buy 100% renewable power, and thus *could not* purchase electricity from a ZEC-eligible nuclear plant. *See* Retail Compl. ¶ 62 (agreeing). And ZECs are purchased by the state's utilities in proportion to the electricity they *deliver* to retail customers, regardless of whether that electricity was purchased from the ZEC-eligible generators.[6] *See id.* § 1-75(d-5)(1). In sum, ZECs (like RECs) are "separate commodities" reflecting the environmental attributes of production, "not compensation for capacity and energy." *Cal. Pub. Utils.*, 133 FERC ¶ 61,059, at P 31 n.62; 20 ILCS 3855/1-10 (ZEC "represents the environmental attributes" of energy produced).

FERC's determination that unbundled REC payments fall within states' jurisdiction over generation facilities—and that REC payments do not set, "directly alter," or affect wholesale

[6] In Illinois, both utilities and alternative retail electric suppliers sell electricity to retail customers. *See* 220 ILCS 5/16-102. Utilities physically deliver the electricity to the customer even if an alternative retail supplier is selling it. Because a utility's ZEC obligation is based on its delivery of electricity, a utility will be required to purchase ZECs for customers receiving electricity bought by some *other* electricity supplier.

rates—is entitled to *Chevron* deference, and can only be ignored if it unreasonably interprets the FPA. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1871, 1874-75 (2013) (*Chevron* deference applies to an agency's interpretation of its own jurisdiction); *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 461 (D.C. Cir. 2005). It does not. FERC's interpretation reflects the common-sense principle that regulating a product's *method of production* is not the same thing as regulating its *price*. If an environmentally-conscious state pays corn farms to use no pesticides when growing corn, the state is not regulating the price of corn (even though the price of corn will be affected). So too, FERC has held, if a state pays wind farms to emit no pollution when generating electricity, the state is not regulating the price of electricity. Thus, under *WSPP*, ZECs (like RECs) fall outside of FERC's jurisdiction and do not directly alter wholesale rates.

2. *EPSA* And *Hughes* Confirm That ZEC Payments Do Not Directly Alter A Wholesale Price.

The reasoning of two recent Supreme Court cases confirms FERC's straightforward conclusion that environmental-attribute payments like ZEC payments do not intrude on FERC's jurisdiction over wholesale rates. First, in *EPSA*, the Court reasoned that the term "rate" under the FPA is defined in a "prosaic, garden-variety" sense. 136 S. Ct. at 777-78. Under that meaning, "[t]o set a retail electricity rate" means simply "to establish the amount of money a consumer will hand over in exchange for power." *Id.* at 777. Nothing in the FPA "suggest[ed]" a more "expansive" definition. *Id.* The FPA uses the same term—"rates"—to define the wholesale prices over which FERC has jurisdiction. 16 U.S.C. § 824d(a). So under *EPSA*, "[t]o set a [wholesale] rate" means simply "to establish the amount of money a [purchaser] will hand over in exchange for [wholesale] power." *EPSA*, 136 S. Ct. at 777.

Then, in *Hughes*, the Court applied that rule and clarified what state action *would* "set[] an interstate wholesale rate": expressly conditioning a state payment on making a wholesale sale, by mandating that generators receive payment if—but only if—they consummate sales at wholesale. *Hughes*, 136 S. Ct. at 1297. The Maryland program in *Hughes* offered subsidy payments to a new gas-powered generator but "condition[ed] receipt of those subsidies on the new generator selling capacity into a FERC-regulated wholesale auction." *Id.* at 1292. The generator would "receive[] no [subsidy]" at all "if its capacity fail[ed] to clear the auction." *Id.* at 1295. The Court held that the program "sets an interstate wholesale rate" and "invades FERC's regulatory turf" because it conditioned payment on completion of a wholesale sale. *Id.* at 1297 (emphasis added).

Hughes emphasized that its holding was "limited" and made clear that a state program that did not so "condition payment" would not suffer the Maryland program's "fatal defect":

> We … need not and do not address the permissibility of various other measures States might employ to encourage development of … clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector. Nothing in this opinion should be read to foreclose … 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 (emphasis added) (quoting Br. for Resp't 40). *Hughes* applied *EPSA*'s definition of "rate" both in what *Hughes* invalidated and in what it preserved. When a state declares that it will pay if, but only if, a generator completes a wholesale auction sale, that payment changes the "amount of money" the seller receives for that sale—setting the wholesale rate. *EPSA*, 136 S. Ct. at 777. But if payments are *not* conditioned on selling in the wholesale market, and thus are not tethered to wholesale market participation, they do not change the "amount of money" received "in exchange for" the power sold, and so do not set wholesale rates. *Id.*

Thus, the question under *Hughes* and *EPSA* is whether ZEC payments change the amount of money received by nuclear generators *in exchange for the electricity* they sell at wholesale. ZEC payments do not. Again, ZEC payments are tied to *production* of electricity, and are not "bundled" with a wholesale sale, because ZEC payments are not conditioned upon the electricity being sold at wholesale. *See supra* at 10. Unlike in *Hughes*, a generator will receive ZECs for producing electricity, regardless of whether it bids into, or clears, the wholesale auction. Consequently, ZEC payments do not alter "the amount of money a [buyer] will hand over in exchange" for wholesale electricity, *EPSA*, 136 S. Ct. at 777, and "do not suffer from the fatal defect that render[ed] Maryland's program unacceptable." *Hughes*, 136 S. Ct. at 1299.

Fossil Fuel Plaintiffs allege that ZEC payments "effectively" alter wholesale rates by increasing the amount of money nuclear generators have at the end of the day. EPSA Compl. ¶ 72. That argument is obviously overbroad, however, because it would invalidate any state subsidy, in any form, if the recipient sells at wholesale. Moreover, *EPSA* rejected essentially that same argument. In *EPSA*, the challengers contended that FERC (rather than the state) was intruding into the state's (rather than FERC's) exclusive jurisdiction over retail sales under the FPA by regulating the compensation paid to retail consumers for reducing their electricity use—known as "demand-response." 136 S. Ct. at 767, 777. Like Plaintiffs, the *EPSA* challengers argued that FERC's demand-response program "*effective[ly]*" set retail rates by increasing the amount of money a retail consumer saves by not using electricity. *Id.* at 777. The Court rejected that argument because it made "[t]he modifier 'effective'" do "more work than any conventional understanding of rate-setting allows." *Id.* Nothing in the FPA, the Court said, even "suggest[ed]" that "expansive" definition of rate-setting. *Id.* at 777-78. That holding forecloses Plaintiffs' theory that ZEC payments "effectively" replace the wholesale rate simply by increasing the amount of money that generators will have in their pocket. *EPSA* makes clear that does not set a "rate."

3. It Is Irrelevant Whether The ZEC Program Is Tethered To Wholesale Market *Prices*, As Opposed To Wholesale Market *Participation*.

Plaintiffs try to skirt the clear holdings of *EPSA* and *Hughes*. Even though ZEC payments are not conditioned on wholesale market *sales*, Plaintiffs contend that the ZEC price is impermissibly "tethered to FERC-regulated whol[e]sale *prices*," because the ZEC price can drop if wholesale prices are forecast to increase. EPSA Compl. ¶¶ 53, 63; Retail Compl. ¶ 57; 20 ILCS 3855/1-75(d-5)(1)(B). (As noted above, the ZEC price can decline if wholesale prices are forecast to increase, but can never rise above the social cost of carbon. 20 ILCS 3855/1-75(d-5)(1)(B).)

As an initial matter, this is an odd argument for Fossil Fuel Plaintiffs to make, because the premise is that if the state had *not* allowed the price to adjust downward, but instead simply priced every ZEC at an amount equal to the social cost of carbon, the program would be lawful. Yet that would amount to a larger subsidy for the nuclear plants receiving ZEC payments, which would injure Fossil Fuel Plaintiffs *more* under their theory of harm. That is a standing problem. "[I]n order to demonstrate standing, a plaintiff's injury must match the legal problem he alleges. A plaintiff cannot attack a perceived problem that does not cause him injury …." *Johnson v. U.S. Office of Pers. Mgmt.*, 783 F.3d 655, 663 (7th Cir. 2015). Plaintiffs' alleged injury-in-fact is not traceable to the ZEC price-adjustment, and would not be redressed by its elimination. "Put differently, plaintiffs' … injury would continue to exist even if the [ZEC Program] were cured of [this] alleged infirmit[y]." *Id.* at 662. Fossil Fuel Plaintiffs therefore lack Article III standing to base a preemption claim on a program feature that, under their theory, *reduces* their injury. *Id.*

In any event, the argument also fails to state a claim on the merits. *Hughes* says clearly that it was concerned about tethering payments "to a generator's wholesale market *participation*"—its wholesale *sales*, not wholesale *prices*. 136 S. Ct. at 1299 (emphases added) (quoting Br. for Resp't 40). Indeed, the *very next sentence* holds that the "fatal defect" in the Maryland program was "condition[ing] payment of funds on capacity clearing the [wholesale] auction"—that is, on completing a wholesale sale. *Id.* *Hughes* made the same point twice more.

Id. at 1297 (payments were impermissible because the generator was "*require[d] … to participate in the PJM capacity auction*" (emphasis added)); *id.* at 1297 n.9 (payments were impermissible "*because [they] are conditioned on* [the generator's] capacity clearing the auction—and, accordingly, on [the generator] selling that capacity" (emphasis added)). By contrast, Plaintiffs will search in vain for *any* statement in *Hughes* forbidding "tethering" to wholesale prices. More than that: *Hughes* explicitly states that it does *not* invalidate "tethering" to wholesale prices. "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," and "[*n*]*othing* in [the] opinion" can be read to "foreclose" it. *Id.* at 1299 (emphases added).

In fact, courts have affirmatively upheld states' ability to account for wholesale prices when setting the price for products and services within state jurisdiction. *See Rochester Gas*, 754 F.2d 99. The plaintiff in *Rochester Gas* argued, like Plaintiffs, that a rate set by a state agency was "preempted" because it included "an estimate of [wholesale] sales … revenue." *Id.* at 101. The Second Circuit rejected that argument, reasoning that "there is a distinction between, on the one hand, regulating [wholesale] sales, and on the other, reflecting the profits from a reasonable estimate of those sales" when acting within the state's jurisdiction. *Id.* at 105. Hence, the Second Circuit held that the state may "impute revenue from a reasonable estimate of [a utility's]" wholesale sales when setting retail rates. *Id.* That must be right. Numerous states throughout PJM and MISO maintain vertically integrated utilities—that is, utilities that own their own generating plants and sell their power directly to retail customers as well as on the wholesale markets, and that charge retail rates sufficient to recover their costs. These states generally reduce the amount these generators can charge at retail by the amount of *wholesale* revenues the generator has received, to prevent it from receiving a windfall. *See* Lowell E. Alt, Jr., *Energy Utility Rate*

Setting 59 (2006) (noting that regulated "[e]lectric utilities often get additional revenue from wholesale electricity sales" and that state regulators "subtract[] the revenues from these other sources" when setting the utilities' retail rates). If Plaintiffs' "tethering to prices" theory were the law, this well-established mode of state regulation would be illegal.

Plaintiffs presumably derived their price-tether theory from the fact that the Maryland program in *Hughes* paid generators a price that moved up and down to guarantee the generator a fixed wholesale revenue stream (known as a contract-for-differences). 136 S. Ct. at 1295. But, as discussed above, that was not the "fatal defect" identified by the Court. *Id.* at 1299. And in any event, the comparison to the pricing mechanism in *Hughes* is inapposite.

First, the ZEC price is initially set based on—and might never deviate from—the social cost of carbon, which is the value of the environmental harm abated by the nuclear generators. 20 ILCS 3855/1-75(d-5)(1)(B). That has nothing to do with wholesale prices. *Second*, the ZEC price cannot rise above the social cost of carbon even if wholesale prices are forecast to fall. *See id.* The ZEC price can adjust only one way—down—to protect retail consumers from rate increases if prices are forecast to rise. SB 2814 § 1.5. Thus, unlike the program in *Hughes*, it does not protect participating nuclear generators against the market risk of falling wholesale prices. *Third*, unlike in *Hughes*, the ZEC price is not, at any point, based on the actual wholesale prices received by the winning nuclear facilities. The energy prices used in the ZEC price formula are projected prices derived from futures trading markets that are *not* part of the wholesale markets and not regulated by FERC. *See* 20 ILCS 3855/1-75(d-5)(1)(B)(iii). The capacity prices used are a composite of PJM and MISO capacity prices—a composite that no generator receives, because generators may only sell capacity in one market. *See id.* Tying the ZEC price to these indices is thus not materially different from tying it to any other price the winning nuclear facilities will not receive, like electricity prices in California or natural gas prices in Pennsylvania.

In short, Plaintiffs cannot evade what *WSPP*, *EPSA*, and *Hughes* make clear. A payment made for a generator's environmental attributes that is not conditioned on the generator's wholesale sales does not directly alter a wholesale rate or intrude on FERC's jurisdiction over such rates. Instead, it falls comfortably within states' jurisdiction over generation facilities.

B. Contrary To Fossil Fuel Plaintiffs' Allegations, Effects On Auction Prices Do Not Trigger Field Preemption.

Fossil Fuel Plaintiffs also allege that the ZEC Program is field preempted because it "directly affects" the prices and participants in FERC's auctions. EPSA Compl. ¶¶ 71, 73-75.[7] As an initial matter, Fossil Fuel Plaintiffs repeatedly allege that FERC's "directly affecting" jurisdiction is "exclusive." *Id.* ¶¶ 26, 70, 71. *EPSA* flatly rejects that claim. It holds that "no matter how direct, or dramatic, its impact on wholesale rates," "FERC cannot take an action" that would "transgress[]" the FPA's reservation to states of authority over retail rates or generation facilities. *EPSA*, 136 S. Ct. at 775. Thus, if the ZEC Program falls within states' reserved authority over generation facilities, it does not matter whether, as Fossil Fuel Plaintiffs claim, the ZEC Program "directly affects" wholesale rates.

Moreover, *EPSA* makes sense only if FERC's "directly affecting" jurisdiction is not exclusive. *EPSA* held that FERC could regulate the *level* of compensation paid to demand-response bidders (*i.e.*, consumers) because how much compensation was paid would directly affect wholesale rates. By that logic, preventing consumers from receiving *any* compensation for demand response would necessarily also directly affect wholesale rates. Yet *EPSA* held that states could forbid consumers from participating in demand response programs because FERC had not

[7] Although the FPA gives FERC jurisdiction over practices "affecting" rates, *EPSA* interpreted that to mean only practices that "*directly* affect" rates. *EPSA*, 136 S. Ct. at 774 (quotation marks omitted).

decided to do so. *Id.* at 779-80. Thus, so long as FERC has not decided to regulate a particular matter, states may regulate it—even if it "directly affects" wholesale rates—without being field preempted. *See New York v. FERC*, 535 U.S. 1, 25 (2002) (explaining that, although FERC perhaps had jurisdiction to regulate bundled retail transmission services, it had declined to do so, leaving states free to regulate them).[8] FERC has not attempted to regulate environmental attribute payments, so the ZEC Program is not field preempted even if it "directly affects" wholesale rates.

In any event, even if FERC's jurisdiction over "direct effects" were exclusive, the effects that Fossil Fuel Plaintiffs allege are not "direct" as a matter of law. Plaintiffs allege that the ZEC Program "directly" affects the wholesale markets because it prevents nuclear generators from retiring, which artificially inflates "the amount of supply in the market," reducing prices. EPSA Compl. ¶ 74. But FERC, interpreting the scope of its "directly affects" jurisdiction, held in *WSPP* that an "unbundled REC transaction *does not affect* wholesale electricity rates," even though RECs affect auction prices in *exactly* the way Fossil Fuel Plaintiffs allege triggers preemption here. *WSPP*, 139 FERC ¶ 61,061, at P 24. REC programs provide payments to certain generators, "altering the revenue" they receive; the higher revenues allow these generators to enter the market even though the auction price alone would make them "uneconomic"; and their presence "lower[s]" the "clearing price … paid to" other participants. EPSA Compl. ¶¶ 72-73. Although Plaintiffs attempt to distinguish RECs from ZECs in other ways, *id.* ¶¶ 52-53, they do not (and could not) deny that RECs affect wholesale prices and alter which generators participate in the wholesale markets.[9] FERC's view that these are not "direct" effects is entitled to deference.

Federal courts agree that state action is not preempted merely because it changes who

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[8] The same is not true of FERC's jurisdiction over wholesale rates themselves; that jurisdiction is exclusive. That is why state action is field preempted when it attempts to "set" a wholesale rate, as in *Hughes*.

[9] Indeed, several of the Fossil Fuel Plaintiffs have argued to FERC that REC payments artificially suppress prices by billions of dollars. *See, e.g.*, *ISO New England Inc.*, 147 FERC ¶ 61,173, P 67 (2014).

supplies electricity to the wholesale markets. The "law of supply-and-demand is not the law of preemption." *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 255 (3d Cir. 2014). States may "require retirement of existing generators, [require construction of] expensive, environmentally-friendly units, or … take any other action in their role as regulators of generation facilities," even though "those choices affect the pool of bidders in the [wholesale capacity market], which in turn affects the market clearing price." *Conn. Dep't*, 569 F.3d at 481. It is thus irrelevant whether the ZEC Program will allow nuclear units to remain in the wholesale market. The D.C. Circuit has made clear that the state may, without triggering preemption, *directly* force a generator to leave the market (by "requir[ing] [its] retirement") or enter the market (by requiring its construction). *Id.*; *see also Entergy Nuclear*, 733 F.3d at 417 (states may "direct the planning and resource decisions of utilities" by "order[ing] utilities to build renewable generators themselves" (quoting *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, 62,080 (1995))). *A fortiori*, a state can *indirectly* incentivize a generator to stay in the market by paying the generator for its environmental attributes.

The reason for that is simple. When a state acts on its side of the FPA's jurisdictional divide—here, by regulating generation—it would be an "extravagant interpretation of the scope of federal power" to find it field preempted merely because of its wholesale-market impacts. *Nw. Cent.*, 489 U.S. at 512.[10] In *Northwest Central*, Kansas "regulate[d] rates of production" of natural gas wells, "as a means of exercising traditional state control over the conservation of natural resources." *Id.* "To be sure," that regulation was "expected" to "have an effect on [interstate pipelines'] cost structures and hence on interstate rates" within FERC's jurisdiction. *Id.* But to preempt on that basis "would be largely to nullify that part of [the Natural Gas Act] that leaves to the States control over production." *Id.* at 514. The same is true of the FPA: to field preempt

[10] Courts have "routinely relied on NGA cases in determining the scope of the FPA." *Hughes*, 136 S. Ct. at 1298 n.10.

merely because Illinois's regulation of generation has an effect on wholesale rates "would be largely to nullify that part of [the FPA] that leaves to the States control over [generation]." *Id.*

II. Plaintiffs Fail To State A Conflict Preemption Claim.

A. Plaintiffs' Allegations Do Not Satisfy The Stringent Test For Conflict Preemption.

Under the FPA, "conflict-pre-emption analysis must be applied sensitively … so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Nw. Cent.*, 489 U.S. at 515. Hence, the Supreme Court has held that so long as the state is "regulat[ing] production or other subjects of state jurisdiction," "and the means chosen [are] at least plausibly … related to matters of legitimate state concern," the state program is not conflict preempted unless it causes "*clear damage* to [FERC's] goals." *Id.* at 518, 522 (emphasis added). That is so even when the state program is "*[d]esigned* as a counterweight to market, contractual, and regulatory forces" set in motion by FERC's policies. *Id.* at 497 (emphasis added). Therefore, Plaintiffs' claims fail as a matter of law.

As discussed above, the state is regulating production. And the ZEC Program is plainly "related to matters of legitimate state concern." *Id.* at 518. The ZEC Program is just one component of a broader legislative package to promote clean energy by increasing job training in the solar industry; promoting renewable generation; increasing energy efficiency; and reducing greenhouse gas emissions and other hazardous air pollutants. *See* 20 ILCS 3855/1-5(4), (6)-(9) (describing purposes of bill). The Program's purpose is "to achieve the State's environmental objectives and reduce the adverse impact of emitted air pollutants on the health and welfare of the State's citizens." SB 2814 § 1.5.[11] Plaintiffs cannot seriously dispute that the ZEC Program is "at

[11] *See also* SB 2814 § 1.5(1) ("Reducing emissions of carbon dioxide and other air pollutants, such as sulfur oxides, nitrogen oxides, and particulate matter, is critical to improving air quality in Illinois for Illinois

least plausibly … related to" Illinois's efforts to maintain low-emissions energy.

Plaintiffs nevertheless allege that the ZEC Program causes "clear damage" to FERC's goals by allowing nuclear generators to continue operating when they otherwise would have retired. *See* EPSA Comp. ¶¶ 79-84. This, the Fossil Fuel Plaintiffs allege, will "artificially suppress[]" prices, will lead economic generators to leave the market because they are receiving less compensation, and will deter the entry of new generation, because prices will be lower and so "market signals" will be "disrupt[ed]." *Id.* ¶¶ 79-80. These effects on the wholesale markets, Plaintiffs contend, conflict with "FERC's regulatory scheme," which they believe "depends upon … the functioning of competitive auction markets *without interference* from out-of-market subsidies to achieve just and reasonable rates." *Id.* ¶ 84 (emphasis added); Retail Compl. ¶ 79.

That is wrong, for three reasons. *First*, courts have rejected that theory as overbroad. Plaintiffs have no limiting principle. *Any* state policy that affects market entry or exit, or market auction clearing prices, would under their theory conflict with FERC's markets and be preempted. EPSA Compl. ¶ 84. Yet the Supreme Court has held that an "impact" or "effect" on wholesale markets "does not without more result in conflict pre-emption." *Nw. Cent.*, 489 U.S. at 516. And courts have found it "[o]bvious[]" that "not every state regulation that incidentally affects federal markets is preempted." *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 479 (4th Cir. 2014), *aff'd sub nom. Hughes*, 136 S. Ct. 1288. "[O]therwise, the states might be left with no authority whatsoever to regulate power plants because every conceivable regulation would have some effect on operating costs or available supply." *Solomon*, 766 F.3d at 255.

Second, because of its incurable overbreadth, Plaintiffs' theory would invalidate numerous state programs that are indisputably legal. Plaintiffs' theory relies on "an idealized vision of

residents."); *id.* § 1-5(6) ("Including … zero emission credits … in [the State's energy] portfolio will reduce long-term direct and indirect costs to consumers by decreasing environmental impacts ….").

[wholesale] markets free from the influence of public policies," but as one FERC commissioner recently explained, "such a world does not exist." *N.Y. State Pub. Serv. Comm'n*, 2017 WL 496267, at *11 (2017) (Bay, Comm'r, concurring). Much state regulation significantly impacts the wholesale markets. For example, many states have enacted stringent pollution controls on fossil-fuel generators, and nearly a dozen also participate in cap-and-trade programs requiring fossil-fuel generators to buy emissions credits. These measures increase fossil-fuel generators' effective cost of producing electricity, changing the price at which they will sell electricity, and may lead (and be intended to force) those plants to leave the market. EPSA Compl. ¶ 80. In addition, more than half of the States have enacted REC programs, which, along with tax credits, brownfield development credits, and other "out-of-market subsidies," *id.* ¶ 84; Retail Compl. ¶ 79, also "affect[] the behavior of participants in … auctions," and keep uneconomic generators in the market, EPSA Compl. ¶¶ 75, 79-82. These measures would all be invalid under Plaintiffs' theory of conflict preemption, yet Plaintiffs will not cite any case finding them conflict-preempted.

Indeed, Fossil Fuel Plaintiffs concede (and Retail Plaintiffs do not dispute) that a state could *tax* the air pollutant emissions that result from producing electricity using coal, oil, or natural gas. *See* ECF No. 38-3, Ex. A, ¶ 51, No. 17-cv-1164 (Fossil Fuel Plaintiffs conceding that "[t]here are many non-distorting ways of 'internalizing' the costs of CO2 emissions … such as imposing a carbon tax …."). That concession dooms their conflict preemption claim. ZECs simply do the reverse of a pollution tax, paying for the absence of air pollution, rather than taxing its presence. If the latter does not conflict with the FPA's goals, neither does the former.

Third, Plaintiffs' theory rests on a misconception of FERC's policies. Plaintiffs allege not only that FERC uses wholesale auctions to promote efficient market outcomes and reduce the cost of power, but also that FERC seeks to achieve those ends *to the exclusion of all others*, such that

FERC views *any* state program that affects either market participants or market prices as inconsistent with its goals. But FERC has never adopted any such policy, and Plaintiffs cite none in their Complaints. In fact, FERC has characterized states' "renewable portfolio mandates and greenhouse reduction goals" as "*consistent with* significant policy objectives of the Commission." *Pac. Gas & Elec. Co.*, 123 FERC ¶ 61,067, P 34 (2008) (emphasis added). FERC has thus repeatedly approved of state programs that, like the ZEC program, penalize fossil fuel generation or subsidize zero-emissions generation. FERC has stated:

- That states "may … grant loans, subsidies, or tax credits to particular facilities on environmental or policy grounds." *Cal. Pub. Utils.*, 133 FERC ¶ 61,059, at P 31 n.62.
- That "state[s] may separately provide additional compensation for environmental externalities … through the creation of renewable energy credits (RECs)." *Id.* at P 31.
- That states may "encourage renewable or other types of resources … by giving direct subsidies," even when doing so "allow[s] states to affect the [wholesale] price" or makes clean generation "more competitive in a cost comparison with fossil-fueled generation." *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, 62,080 (1995).
- That states are "free" to incentivize clean generation, "even if the price signals in the regional wholesale capacity market indicate that [those] resources are [not] needed." Amicus Br. of United States at 33, *Hughes*, 136 S. Ct. 1288, 2016 WL 344494.
- That "[p]ermissible state programs" include "renewable energy certificate[]" programs and requirements "that local utilities purchase … electricity" from clean generators. *Id.* at 34.

In addition, vertically integrated generators that are guaranteed to recover their costs from retail ratepayers are nevertheless permitted to participate in wholesale markets, even if they would be unable to compete if forced to rely on wholesale revenues alone. Yet FERC "has not required any … measures to address the potential competitive impact … on other competitors in those [wholesale] markets" of a subsidized, vertically-integrated generator's wholesale sales. *See Utilization of Elec. Storage Res. for Multiple Servs. When Receiving Cost-Based Rate Recovery*, 158 FERC ¶ 61,051, P 22 (2017).

If Plaintiffs believe that the ZEC Program has unique features that render it distinguishable from the direct subsidy programs, environmental externality payments, REC programs, and vertically integrated utilities that FERC allows to co-exist with the wholesale markets, Plaintiffs can request that FERC carve out an exception to the policies stated above for the ZEC Program. But Plaintiffs cannot ask this Court to conclude that the ZEC Program causes "clear damage" to FERC's objectives when FERC itself has expressly sanctioned environmental credit and subsidy programs that are functionally identical to the ZEC Program.

B. Only FERC Can Address Plaintiffs' Allegations.

Plaintiffs' conflict-preemption claims suffer an additional infirmity: They depend on Plaintiffs' contention that the ZEC Program's effects on the market "undermin[e] FERC's ability to provide just and reasonable rates." EPSA Compl. ¶ 11; *see also id.* ¶ 84; Retail Compl. ¶¶ 35, 47. But, as discussed above, innumerable state programs currently influence wholesale market conditions and market prices. *See supra* at 22. Nonetheless, FERC has reviewed PJM and MISO's existing market tariffs and has concluded that the rates the wholesale auctions are currently producing are just and reasonable. *See, e.g.*, *PJM Interconnection, LLC*, 158 FERC ¶ 61,133 (2017). In other words, FERC has concluded—contrary to Plaintiffs' assertions—that the wholesale auctions *still* produce just and reasonable rates notwithstanding the existence of state environmental credit programs, pollution controls, tax incentives, and direct state subsidies.

Plaintiffs allege that this subsidy program, unlike these others, will cause rates to be unjust and unreasonable. But that is for FERC to say. The Supreme Court has explained that "[s]tatutory reasonableness" under the FPA "is an abstract quality represented by an area rather than a pinpoint," and there is "a substantial spread between what is unreasonable because too low and what is unreasonable because too high." *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951). Only FERC may "reduce the abstract concept of reasonableness to concrete expression in dollars and cents," even if a "court may think a different level more reasonable." *Id.*

Plaintiffs' allegations about "distortions" to wholesale prices—which is just a pejorative way of describing effects that Plaintiffs dislike—are thus policy arguments that should be directed to FERC, not this Court. If FERC agrees with the Plaintiffs that the ZEC Program "distorts" prices, it has ample tools to respond. Some of the Plaintiffs have already asked FERC to adjust its bidding rules in a way that they contend would prevent the "distortion" of prices. *See infra* at 26 & n.12. The ZEC Program thus poses no obstacle to FERC regulating the wholesale markets as it sees fit. For that reason as well, Plaintiffs' conflict preemption claims fail.

III. Plaintiffs Lack A Cause Of Action To Bring Their Preemption Claims.

A. The FPA Does Not Authorize A Private Cause Of Action To Challenge State Action As Preempted.

Plaintiffs' preemption counts should additionally be dismissed because Plaintiffs lack a cause of action. Invoking the Supremacy Clause, Plaintiffs argue that the FPA preempts the ZEC Program. EPSA Compl. ¶¶ 68-84; Retail Compl. ¶¶ 67-80. But in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), the Supreme Court held that the Supremacy Clause "does not create a cause of action." Instead, it simply "instructs courts what to do when state and federal laws clash." *Id.* at 1383. Because Plaintiffs have no other cause of action, dismissal is required.

The FPA's express language does not authorize private suits. *See Imperial Irrigation Dist. v. Cal. Indep. Sys. Operator Corp.*, No. 15-CV-1576-AJB-RBB, 2016 WL 4087302, at *4 (S.D. Cal. Aug. 1, 2016). And the Supreme Court has long held that the Act does not provide an implied cause of action, either. *Montana-Dakota Utils.*, 341 U.S. at 251, 255 (affirming on ground that "petitioner has not established a cause of action"). Instead, the FPA creates "prescriptions … for" FERC "to apply and, independently of Commission action, creates no right which courts may enforce." *Id.* at 251.

Nor can Plaintiffs claim an equitable cause of action to seek "injunctive relief against state officers who are violating, or planning to violate, federal law." *Armstrong*, 135 S. Ct. at 1384; *see also id.* (describing equitable suits under *Ex parte Young*, 209 U.S. 123, 155-56 (1908)). Equitable suits are "subject to express and implied statutory limitations," and if the relevant statutory scheme establishes "Congress's 'intent to foreclose' equitable relief," courts may not entertain a preemption suit. *Id*. at 1385 (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002)). In *Armstrong*, the Court held that the Medicaid Act implicitly precludes private enforcement. The same considerations that were dispositive in *Armstrong* are controlling here.

First, the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Armstrong*, 135 S. Ct. at 1385 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)). Here, Congress established a comprehensive scheme for the regulation of wholesale electricity markets. Plaintiffs may bring a "complaint" to FERC if, as their Complaints allege, they believe a practice interferes with the wholesale markets and results in rates that are unjust and unreasonable. 16 U.S.C. §§ 824d(e), 824e(a); *see* EPSA Compl. ¶¶ 11, 46, 84; Retail Compl. ¶¶ 35, 47. Some of the Fossil Fuel Plaintiffs have in fact brought such a complaint at FERC.[12] FERC can assess whether it agrees with Plaintiffs or not, and if it does agree, it can take whatever corrective actions it deems appropriate to ensure that wholesale rates remain just and reasonable. If Plaintiffs are aggrieved by FERC's decision, they can seek review in the circuit

[12] *See* Motion to Amend, and Amendment to, Complaint and Request for Expedited Action on Amended Complaint, *Calpine Corp. v. PJM Interconnection, LLC*, No. EL16-49-000 (filed Jan. 9, 2017).

courts. 16 U.S.C. § 824*l*(b). The availability of these administrative proceedings that "would permit Plaintiffs to pursue their claim" indicates that "Congress intended to foreclose equitable enforcement of" the statute. *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 152 F. Supp. 3d 90, 102-05 (E.D.N.Y. 2015), *aff'd in part, vacated in part on other grounds*, 841 F.3d 133 (2d Cir. 2016).

Moreover, if FERC finds that a practice or program interferes with its jurisdiction or prevents it from being able to ensure just and reasonable wholesale rates, FERC (but not a private person) is expressly authorized to "bring an action" in federal court "to enjoin" "any acts or practices which constitute or will constitute a violation of the provisions of" the FPA. 16 U.S.C. § 825m(a).[13] The fact that "the federal agency may be able to sue a State to compel compliance with federal rules" is another reason to read the FPA as precluding an equitable cause of action. *Armstrong*, 135 S. Ct. at 1389 (Breyer, J., concurring).

Second, Congress *did* provide a private cause of action under the FPA, but it is not applicable here. Specifically, the Public Utility Regulatory Policies Act ("PURPA"), which was enacted as part of the FPA, provides an express private cause of action to challenge state rules governing certain small power production facilities (mainly renewable generators), but only after first petitioning FERC to bring suit itself. *See* 16 U.S.C. § 824a-3(h)(2)(B); *Allco Fin. Ltd. v. Klee*, 805 F.3d 89, 91-92 (2d Cir. 2015). Congress's express choice to create a private remedy in a circumscribed section of the FPA, but not under the Act generally, implies that the latter omission was purposeful. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) ("[W]here a

[13] *See Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1289-94 (D. Colo. 2016) (concluding, after *Armstrong*, that Controlled Substances Act's delegation of enforcement authority to Attorney General precluded private suits), *appeal docketed*, No. 16-1095 (10th Cir. Mar. 29, 2016); *Friends of the E. Hampton Airport*, 152 F. Supp. 3d at 104 (concluding that Secretary of Transportation's "exclusive[]" authority in Airport and Airway Improvement Act's "comprehensive administrative enforcement scheme" precluded private suits).

statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." (quotation marks omitted)). Plaintiffs' position is doubly anomalous because when Congress chose to create a private cause of action in PURPA, it required administrative exhaustion. *See* 16 U.S.C. § 824a-3(h)(2)(B); *Allco*, 805 F.3d at 96-97. Yet here, Plaintiffs would read congressional silence as permitting them to bypass FERC altogether.

Third, as in *Armstrong*, resolving Plaintiffs' preemption claims would "require application of a judicially unadministrable standard." *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 146 (2d Cir. 2016). The gravamen of Plaintiffs' complaints is that the ZEC Program will "distort" wholesale prices and prevent FERC from setting "just and reasonable" rates. *See* EPSA Compl. ¶¶ 45-49, 73-75, 79-84; Retail Compl. ¶¶ 47-57, 76-79. But, as described above, federal courts are poorly suited to determine whether rates are just and reasonable: "To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission," even if a "court may think a different level more reasonable." *Montana-Dakota Utils.*, 341 U.S. at 251. Courts should thus decline to grant causes of action to challenge state action as preempted on grounds relating "to the setting of rates" because the "history of ratemaking demonstrates that administrative agencies are far better suited to th[e] task [of ratemaking] than judges." *Armstrong*, 135 S. Ct. at 1388 (Breyer, J., concurring).

Finally, interconnected interstate electricity markets require a coherent regulatory policy. By "mak[ing] the agency remedy that it provided exclusive," Congress "achiev[es] the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking." *Id.* at 1385 (majority op.) (quotation marks omitted). Private suits, by contrast, "risk … inconsistent interpretations and misincentives," and "inappropriate application of the statute" by courts whose horizons are limited to the particular suits before them. *Id.* (quotation marks omitted). That is a risk Congress chose not to take in the FPA.

In sum, Congress delegated to FERC the responsibility for determining whether wholesale prices are just and reasonable, what steps should be taken to ensure that they remain so, and the authority to sue for preemption if it concludes that a state program obstructs its ability to regulate at wholesale. Plaintiffs should not be permitted to circumvent this comprehensive administrative scheme, and therefore lack a cause of action to bring their preemption claims.

B. Retail Plaintiffs Additionally Lack A Cause of Action (Or Prudential Standing) Because Their Interest In Avoiding A Retail Surcharge Falls Outside The Zone Of Interests Protected By The FPA.

Retail Plaintiffs' preemption claims should also be dismissed because their alleged injury falls outside the zone of interests protected by the FPA. That injury stems from the decision by Illinois to assess a retail charge on their utility bill. *See* Retail Compl. ¶¶ 9, 11-12, 52, 62. Yet states have exclusive authority to regulate retail sales of electricity, and are free to impose whatever charges on retail bills they wish. 16 U.S.C. § 824(b); *EPSA*, 136 S. Ct. at 775 (setting the "terms of sale at retail" is "a job for the States alone"). Retail Plaintiffs do not contest that the ZEC surcharge falls within the state's authority and is not itself invalid under any theory of preemption. Nevertheless, they allege that, because the surcharge will be used by the state's utilities to buy ZECs, they may claim that the ZEC Program is preempted. This Court should reject that theory.

A plaintiff's claims "must fall within the zone of interests to be protected or regulated by the statute or constitutional provision at issue," or face dismissal. *Levine v. Prudential Bache Props., Inc.*, 855 F. Supp. 924, 934 (N.D. Ill. 1994); *see N. Ill. Chapter Builders v. Lavin*, No. 04 C 50357, 2005 WL 6046290, at *2 (N.D. Ill. Mar. 24, 2005) (assessing whether plaintiff had prudential standing by looking to allegedly preempting statute). Retail Plaintiffs fall outside the zone of interests of the FPA. The "meaning of the zone-of-interests test" as applied to the FPA "is to be determined not by reference to the overall purpose of the Act …, but by reference to the particular provision of law upon which the plaintiff relies." *Grand Council of Crees (of Quebec) v. FERC*, 198 F.3d 950, 956 (D.C. Cir. 2000) (quoting *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997)). Retail Plaintiffs invoke Sections 201 and 205 of the FPA, which grant FERC authority to ensure that wholesale electricity rates are "just and reasonable." *See* Retail Compl. ¶¶ 1, 32, 34, 69, 74 (citing 16 U.S.C. §§ 824 and 824d). Those provisions, dealing with wholesale rates, only protect the consumer interest "in being charged non-exploitative rates." *Grand Council*, 198 F.3d at 956 (quoting *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, 1178 (D.C. Cir. 1987)).

Retail Plaintiffs, however, do not complain about wholesale rates, much less that those rates are "exploitative." Indeed, they do not even "claim that [the state law] will directly injure them as power buyers …." *Id.* at 958. Retail Plaintiffs' sole claim of injury stems from the retail surcharge. *See* Retail Compl. ¶¶ 11-12, 15, 75, 86, 90. Yet their interest in avoiding a surcharge that the state has full authority to impose is, "at best, 'orthogonal' to the purposes of" the FPA provisions they invoke. *Nw. Requirements Utils. v. FERC*, 798 F.3d 796, 809 (9th Cir. 2015) ("wholesale energy customers" interested in "reduc[ing] [their utility's] costs, which are passed on to them by statutory mandate," lacked prudential standing under the FPA). Accordingly, Retail Plaintiffs' claim falls outside the zone of interests protected by the FPA and should be dismissed.

IV. Plaintiffs' Dormant Commerce Clause Claims Should Be Dismissed.

Plaintiffs also contend that the ZEC Program violates the dormant Commerce Clause, both (1) because it allegedly discriminates against out-of-state nuclear plants and (2) because it "imposes market-distorting burdens on interstate … commerce that far outweigh the purported local benefits" under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *See* EPSA Compl. ¶¶ 85-93; Retail Compl. ¶ 82. These allegations fail to state a claim.

A. Each Set Of Plaintiffs Lacks Standing To Raise Its Dormant Commerce Clause Claims.

1. The Retail Plaintiffs Lack Prudential Standing.

The Retail Plaintiffs lack prudential standing to raise *either* type of Commerce Clause claim. "Although the Seventh Circuit has yet to apply the zone of interests test in the context of the dormant Commerce Clause, other Circuits have found that plaintiffs whose injuries are unrelated to interstate commerce are not within the zone of interests for prudential standing." *Liberty Disposal, Inc. v. Scott*, 648 F. Supp. 2d 1047, 1052 (N.D. Ill. 2009). These cases hold that consumers paying the costs of a governmental program do not have prudential standing to challenge it under the dormant Commerce Clause if their own interstate commerce is unaffected and their injury would not be cured by removing the program's discriminatory aspects. *See Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cty.*, 115 F.3d 1372, 1380 (8th Cir. 1997) ("We are aware of no Commerce Clause case … grant[ing] standing to a plaintiff who was a consumer whose alleged harm was the passed-on cost incurred by the directly regulated party."). For example, in *Individuals for Responsible Gov't, Inc. v. Bd. of Cty. Comm'rs ex rel. Washoe Cty.*, 110 F.3d 699 (9th Cir. 1997), residents challenged a trash-hauling law as discriminatory, contending that it imposed a surcharge on them to pay for the trash hauling. *Id.* at 701. But they lacked prudential standing, because "[t]heir injury (being forced to pay for services they do not want) would exist even if" the ordinance's geographical restriction were removed. *Id.* at 703-04.

Under these cases, Retail Plaintiffs lack prudential standing. Their own activity in interstate commerce is unaffected by the ZEC Program. And their alleged injury—the passed-on regulatory costs of their utilities' purchases—would be the same regardless of whether the ZEC Program were discriminatory. Either way, Retail Plaintiffs will pay a ZEC surcharge. Their injury thus does not give them standing. *Freeman v. Corzine*, 629 F.3d 146, 157 (3d Cir. 2010) ("plaintiffs whose interest is merely one in avoiding a passed-on fee or cost" lack standing).

2. The Fossil Fuel Plaintiffs Lack Article III Or Prudential Standing.

The Fossil Fuel Plaintiffs, for their part, lack both Article III and prudential standing to raise a discrimination-based claim. To have either type of standing, plaintiffs must allege a nexus between their injury and the *discriminatory* aspect of the state's regulation. *See Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498-500 (5th Cir. 2004); *cf. Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 554 (7th Cir. 2007) (plaintiff could not complain of discriminatory export/import provision that did not affect it and was not "addressed to" it). That is, "a plaintiff's injury must match the legal problem he alleges. A plaintiff cannot attack a perceived problem that does not cause him injury." *Johnson*, 783 F.3d at 663.

In *National Solid Waste*, the plaintiffs, a group of trash haulers, alleged that ordinances requiring that trash be hauled to certain in-state processing centers violated the dormant Commerce Clause by preventing trash from being hauled outside of the state. *See* 389 F.3d at 495-96. The plaintiffs did not have prudential standing because their injury was in no way caused by any discrimination against out-of-state hauling: the plaintiffs did not themselves haul any trash out of state, or intend to do so. *Id.* at 499-500. The allegedly *discriminatory* nature of the ordinances *did not affect* those plaintiffs because "plaintiffs' injury [was] not related to any out-of-state characteristic of their business." *Id.* at 500. A court within this district has summarized this case law as follows: a plaintiff has prudential standing to allege a discrimination claim when its "injury … would be remedied if the geographical restriction were removed." *Liberty Disposal, Inc.*, 648 F. Supp. 2d at 1053; *Johnson*, 783 F.3d at 662 (plaintiffs lack standing when their "injury would continue to exist even if the [legislation] were cured of all of its alleged infirmities").

That is not true of the Fossil Fuel Plaintiffs. They allege that out-of-state *nuclear* facilities that could sell electricity into Illinois are effectively excluded from the ZEC Program, but Fossil

Fuel Plaintiffs do not allege that they operate any such facilities that seek to participate in the Program. EPSA Compl. ¶¶ 15-19. Their only alleged harm is receiving lower wholesale revenues because the Program will allow nuclear plants to stay in the market. *See id.* ¶ 66. That harm would be the same if *any* nuclear plant, including an out-of-state plant, receives ZECs. Even "if favoritism exists, [Fossil Fuel Plaintiffs] could [not] conceivably have suffered any cognizable harm as a result," because they are harmed regardless of which plants receive ZECs. *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 12 (1st Cir. 2007). In other words, just as in *National Solid Waste*, the allegedly *discriminatory* nature of the ZEC Program *does not affect* the Fossil Fuel Plaintiffs, even if the ZEC Program as a whole does. And so Fossil Fuel Plaintiffs cannot show that their injury "would be remedied if the [alleged] geographical restriction were removed." *Liberty Disposal, Inc.*, 648 F. Supp. 2d at 1053.

B. Plaintiffs' Discrimination-Based Claims Fail On The Merits.

Plaintiffs do not allege that the ZEC legislation *facially* discriminates against out-of-state nuclear facilities.[14] They could not, because the legislation defines an eligible "Zero emission facility" as any nuclear facility "interconnected with [PJM] or [MISO]," whether in or outside of Illinois. 20 ILCS 3855/1-10. Out-of-state facilities in either PJM or MISO can qualify for ZECs if they can demonstrate that they satisfy the geographically neutral air-pollution public interest criteria that the ICC is directed to apply. *See id.* § 1-75(d-5)(1)(C-5).

Plaintiffs point out that the IPA must "consider" a variety of publicly available reports, one

[14] Fossil Fuel Plaintiffs do claim that the legislation facially discriminates against other forms of carbon-free generation, *see* EPSA Compl. ¶¶ 65, 90, but the Supreme Court has repeatedly held that states may choose to benefit particular products, technologies, or industry segments without violating the dormant Commerce Clause. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (state could ban plastic milk cartons, favoring pulpwood producers over producers of plastic resin); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127-28 (1978) (the dormant Commerce Clause protects "the interstate market, not particular interstate firms," and state could favor certain gasoline stations over others); *Baude v. Heath*, 538 F.3d 608, 615 (7th Cir. 2008).

of which is about the closure of two nuclear plants in Illinois. *Id.* § 1-75(d-5)(1)(C). But the IPA also must consider a number of other reports, including those created "by or for [PJM or MISO]" about the emissions impacts of the closure of nuclear plants in *other* states. *Id.* Asking an agency not to close its eyes to publicly available reports, some of which are about out-of-state plants, does not discriminate in favor of in-state plants. In any event, the ICC—not the IPA—actually *selects* the plants that will receive ZECs, and the ICC is permitted to consider only three neutral environmental criteria, *id.* § 1-75(d-5)(1)(C-5): (1) "minimizing carbon dioxide emissions that result from electricity consumed in Illinois," (2) "minimizing sulfur dioxide, nitrogen oxide, and particulate matter emissions that adversely affect the citizens of this State," and (3) "the incremental environmental benefits resulting from the procurement," *id.* § 1-75(d-5)(1)(C-5)(i)-(ii). None of those criteria discriminates based on a plant's geographic location.

Fossil Fuel Plaintiffs fare no better with their theory that the ZEC Program was "enacted for political reasons in an attempt to save jobs and property tax revenues at the subsidized generators." EPSA Compl. ¶ 88. This Court must "assume that the objectives articulated by the [state] are [the] actual purposes of the statute, unless an examination of the circumstances forces [the Court] to conclude that they 'could not have been a goal.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (citation omitted); *id.* at n.15; *see also, e.g.*, *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 400 (9th Cir. 2015) (applying that standard in assessing whether "a challenged statute has a discriminatory purpose or effect under the Commerce Clause" (quoting *Rocky Mtn. Farmers Union v. Corey*, 730 F.3d 1070, 1097-98 (9th Cir. 2013))); *E. Ky. Res. v. Fiscal Ct. of Magoffin Cty.*, 127 F.3d 532, 542 (6th Cir. 1997) (in assessing statute's purpose under the dormant Commerce Clause, "[t]here is … no more persuasive evidence … than the words by which the legislature undertook to give expression to its wishes," which are "[o]ften

… sufficient in and of themselves to determine the purpose of the legislation" (quotation marks omitted)). Plaintiffs bear the burden. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

Here, the legislation states its purpose: to reduce air-pollution emissions. *See supra* at 20-21 & n.11. Fossil Fuel Plaintiffs do not, and cannot, plead facts that could show that this purpose "*could not* have been" at least "*a* goal" of the ZEC Program. *Clover Leaf Creamery*, 449 U.S. at 463 n.7 (emphasis added). Indeed, they admit that "the reduction of carbon emissions is important," alleging only that such progress "can be achieved more effectively by [other] means." EPSA Compl. ¶ 89. They do point to statements from the Illinois governor stating that the ZEC Program will bring local jobs. *Id.* ¶ 61. But even if the governor's prediction comes true—which is as yet undetermined—the Supreme Court has refused to look past a state's "environmental" purpose merely because legislators had provided an "economic defense" of the legislation based on its "beneficial side effects on state industry." *Clover Leaf Creamery*, 449 U.S. at 463 n.7.[15]

Fossil Fuel Plaintiffs, along with the Retail Plaintiffs, thus instead contend that despite being facially neutral, the legislation will be discriminatory in effect—that "only favored Illinois nuclear plants will receive subsidies." EPSA Compl. ¶¶ 13, 90; Retail Compl. ¶ 9. That contention fails to state a claim for two reasons.

1. Plaintiffs' Allegations Cannot Support A Facial Challenge.

Plaintiffs opted to sue now, before the ICC has selected which nuclear facilities would be

[15] Fossil Fuel Plaintiffs also allege that the ICC's administrative process is a "sham." EPSA Compl. ¶ 59. But state administrative action is "entitled to a presumption of regularity," and "the state agency charged with enforcement of the statute at issue" is assumed not to have "deliberately flouted" it. *Carter v. Smith Food King*, 765 F.2d 916, 923 (9th Cir. 1985); *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935) (presumption of validity attaches to "orders of [state] administrative bodies" in dormant Commerce Clause analysis). Only "clear evidence to the contrary" will persuade a court that "public officers" have not "properly discharged their official duties." *Godfrey v. United States*, 997 F.2d 335, 338 n.4 (7th Cir. 1993) (quoting *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926)). Fossil Fuel Plaintiffs make no plausible allegation that the ICC will ignore its statutory duties.

eligible for ZECs. Plaintiffs have thus "waged the suit as a 'facial' challenge to the statute"—meaning they must show it is invalid regardless of how the ICC applies it. *Baude v. Heath*, 538 F.3d 608, 613 (7th Cir. 2008). As a result, the state "receives the benefit of any plausible factual suppositions," and the Court must dismiss Plaintiffs' claims "if there is any substantial possibility that [the legislation] will be valid in operation." *Id.*

It is not hard to imagine such a possibility. For example, the ICC's administrative record may demonstrate that Illinois's nuclear plants are better at reducing concentrations of sulfur oxides, nitrogen oxides, and other air pollutants in Illinois, thereby justifying the ICC's selection of those plants under neutral criteria. *See Rocky Mtn. Farmers Union v. Corey*, 730 F.3d 1070, 1089 (9th Cir. 2013) ("[A] regulation is not facially discriminatory simply because it affects in-state and out-of-state interests unequally."). It is also possible that only Illinois nuclear plants will apply, mooting Plaintiffs' claim of discrimination; or that the ICC will select an out-of-state plant. Plaintiffs would need to allege that in *each* of these circumstances, the ZEC Program would be invalid. Plaintiffs' allegations do not even attempt to surmount that burden.[16]

Nor could they do so. In *Northwest Central*, the Supreme Court rejected a claim that Kansas's regulation of natural gas production violated the dormant Commerce Clause because it had discriminatory "effects" on producers in other states. The Court reasoned that those effects "would be incident … to Kansas' efforts to regulate production … under the powers saved to the States in [the Natural Gas Act]," and that "[t]here would be little point to" the State's "power over production rates if the inevitable repercussions of States' exercise of this power in the arena of interstate commerce meant a State could not constitutionally [act]." *Nw. Cent.*, 489 U.S. at 523-

[16] Indeed, the possibility that no out-of-state plant will even apply for ZECs underscores why Plaintiffs lack standing to pursue this claim—they do not know whether any out-of-state plant will apply, because they do not own any such plants. They are merely third parties attempting to piggyback on the rights of a hypothetical out-of-state plant that is yet to be excluded from the program.

24. Thus, the Court refused to invalidate Kansas's regulation because doing so would "render meaningless Congress' sweeping saving of power over production to the States." *Id.* at 524. Again, the same logic applies here. The ZEC Program falls within states' reserved authority under the FPA to regulate electricity production within its borders, and the effects on interstate markets alleged by Plaintiffs are merely "incident … to" that regulation. This Court should not "render meaningless" the FPA's reservation of authority to the states by concluding that a state program violates the Commerce Clause merely because of a disparate effect on interstate commerce.

2. The Dormant Commerce Clause Does Not Apply To Subsidy Programs That Are Like The ZEC Program.

Even assuming that only Illinois nuclear generators are selected—and even assuming they were the only intended recipients and that their selection could not be justified under the geographically neutral environmental criteria set forth in the statute—the ZEC Program still would not be invalid. As Plaintiffs repeatedly assert, the ZEC Program is a "subsidy" for zero-emissions nuclear generation. EPSA Compl. ¶¶ 7, 11, 46, 49, 62, 74, 83; Retail Compl. ¶¶ 15, 57-58, 62, 79. But the dormant Commerce Clause does not apply to subsidy payments that address environmental problems. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

Alexandria Scrap addressed a complaint directed at another environmental program—a Maryland subsidy program intended to deal with the problem of a growing number of aging automobile hulks sitting in Maryland streets and junkyards. *Id.* at 796-97. The program paid a "bounty" for these hulks' destruction, and immunized processors from liability in certain circumstances. *See id.* at 797. But the program was not evenhanded: The rules were significantly less onerous for processors in Maryland than those out of state, and the "practical effect" was "to limit the [bounty] to hulks that stayed inside Maryland" for processing. *Id.* at 799-802, 803.

The Court held that such subsidy programs do not implicate the dormant Commerce

Clause. That Clause applies when a state acts "either through prohibition or through burdensome regulation." *Id.* at 806. But when the State does not enact a "trade barrier of the type forbidden by the Commerce Clause" to "impede[]" the "movement" of interstate commerce, but instead merely subsidizes local industry, the Clause has no application. *Id.* at 809-10. Maryland's purpose—"commendable as well as legitimate"—was to "protect[] the State's environment." *Id.* at 809. And as "the means of furthering [that] purpose," Maryland had permissibly "elected the payment of state funds … to encourage the removal of automobile hulks." *Id.* Such a subsidy—a bounty paid for removing an environmental problem—was not "the kind of action with which the Commerce Clause is concerned." *Id.* at 805.

Alexandria Scrap applies here. Illinois's purpose, "commendable as well as legitimate," is to "protect[] the State's environment." *Id.* at 809. "As the means of furthering this purpose," Illinois has elected to pay a bounty—a ZEC payment—for the elimination of air pollution. *Id.* The Commerce Clause has no application to this "state-created" bounty. EPSA Compl. ¶ 64; Retail Compl. ¶ 56. Because Illinois (under Plaintiffs' theory) is merely subsidizing local industry, it is imposing neither a "prohibition" nor "burdensome regulation" on interstate commerce. *Alexandria Scrap*, 426 U.S. at 806.

Just last year, a Connecticut district court rejected a dormant Commerce Clause challenge to a state REC program on precisely that ground. *See Allco Fin. Ltd. v. Klee*, No. 16-cv-508, 2016 WL 4414774, at *23-25 (D. Conn. Aug. 18, 2016), *appeal docketed*, No. 16-2946 (2d Cir. Aug. 23, 2016). Such programs, the court explained, may make "it more lucrative for generators to produce and distribute clean energy," but they do not "prevent[] the flow of clean energy or regulat[e] the conditions on which it may occur." *Id.* at *24. And because "Connecticut created [the] market for RECs," it was "not obligated to spread the benefit … to states that do not also bear the … cost of the subsidy, which is ultimately paid by Connecticut ratepayers." *Id.* Thus, the REC program was "protectionist only in the [permissible] sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve." *Id.* (quotation marks omitted). And so "the dormant Commerce Clause [did] not apply." *Id.* at *25. The same would be true of the ZEC Program, even accepting Plaintiffs' allegations as true.

C. Plaintiffs' *Pike* Claim Fails.

Plaintiffs also contend the ZEC Program is invalid under *Pike*. *Pike* held that even non-discriminatory laws are invalid if they impose a "burden" on interstate commerce that is "*clearly* excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142 (emphasis added). But Plaintiffs' allegations cannot satisfy that "tough test." *Cavel Int'l, Inc.*, 500 F.3d at 555-56. They do not contest the program's environmental benefits. The only "burden" on *inter*state commerce identified by Plaintiffs is that "more efficient interstate generators" will "leave the market" and "new competitors" will be "discourage[d]" from entering. EPSA Compl. ¶¶ 91-92; Retail Compl. ¶ 86. But the claim that some generators will lose and some will benefit from the ZEC Program is insufficient to state a claim under *Pike*. *See Clover Leaf Creamery*, 449 U.S. at 473-74 (facially geographically neutral regulation constitutional under *Pike* despite benefiting predominantly in-state pulpwood industry). Because the ZEC Program "is an exercise of [Illinois's] traditional and congressionally recognized power over [electricity generation]," and because the ZEC Program applies evenhandedly to in and out-of-state facilities, it does not violate *Pike*. *Nw. Cent.*, 489 U.S. at 526 (rejecting *Pike* claim despite state program's effects on interstate natural gas markets).

V. Retail Plaintiffs' Equal Protection Clause Claim Fails.

Retail Plaintiffs also contend that the ZEC Program violates the Equal Protection Clause. *See* Retail Compl. ¶¶ 18, 64-65, 88-94. Retail Plaintiffs' theory is apparently that Illinois has discriminated against its own citizens by imposing a retail surcharge on only them, and not on out-of-state customers within PJM or MISO. *Id.* ¶ 90. That claim fails. Because the ZEC Program "doesn't involve a suspect classification, rational-basis review applies." *Indiana Petroleum Mktrs. & Convenience Store Ass'n v. Cook*, 808 F.3d 318, 322 (7th Cir. 2015). Under that standard of review, a statute "comes to court bearing 'a strong presumption of validity,' and the challenger must 'negative every conceivable basis which might support it.'" *Id.* (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993)). To uphold a statute, the court "need only find a 'reasonably conceivable state of facts that could provide a rational basis' for the classification." *Id.* (quoting *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1072 (7th Cir. 2013)).

Retail Plaintiffs' single-sentence allegation in Paragraph 90—their only support for this claim—falls far short of surmounting this "heavy" burden. *Id.* Illinois imposed a retail surcharge on its own residents for two reasons. *First*, the ZEC Program is aimed at "improving air quality in Illinois for Illinois residents," and in avoiding "climate change trends that could significantly adversely impact Illinois." SB 2814 § 1.5(1)-(2). It makes sense, therefore, that Illinois residents would bear the cost of the Program. *Second*, rather than regulating interstate commerce, Illinois elected to use the funds of its taxpayers to achieve its state environmental goals—a perfectly permissible choice. *See Alexandria Scrap*, 426 U.S. 794. Retail Plaintiffs' afterthought of an equal protection claim should be dismissed.[17]

CONCLUSION

For the foregoing reasons, the Complaints should be dismissed with prejudice.

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[17] Even if it had wanted to impose a surcharge on the residents of other states, Illinois likely could not have. *See Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 777 (1992) (noting the "fundamental requirement of both the Due Process and Commerce Clauses that there be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax'" (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345 (1954)). Illinois cannot be required to violate the Due Process Clause to satisfy the Equal Protection Clause.

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Respectfully submitted,

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