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

COALITION FOR COMPETITIVE ELECTRICITY et al., Plaintiffs, v. AUDREY ZIBELMAN, in her official capacity as Chair of the New York Public Service Commission, et al., Defendants.	Case No. 1:16-cv-08164-VEC

REPLY IN SUPPORT OF
MOTION TO DISMISS OF INTERVENORS
CONSTELLATION ENERGY NUCLEAR GROUP, LLC, EXELON CORPORATION,
R.E. GINNA NUCLEAR POWER PLANT LLC,
AND NINE MILE POINT NUCLEAR STATION LLC

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FERC's decision in *WSPP Inc.* interprets the Federal Power Act ("FPA") to hold that "an unbundled REC transaction that is independent of a wholesale electric energy transaction does not fall within [FERC's] jurisdiction." 139 FERC ¶ 61,061, P 24 (2012). Plaintiffs do not dispute that is a reasonable interpretation of the FPA. But it is fatal to Plaintiffs' claim that FERC has occupied the field. The ZEC Program operates the same as a renewable energy credit ("REC") program in all relevant ways; it just applies to carbon-free nuclear generators, not renewable generators. ZEC transactions are unbundled from, and independent of, wholesale electricity sales. Hence, state regulations creating ZECs, like those for RECs, are not field preempted. Plaintiffs' conflict preemption and Commerce Clause claims also fail.

ARGUMENT

I. Plaintiffs' Field Preemption Claim Fails As A Matter of Law.

A. The ZEC Program Does Not "Adjust" A Wholesale Rate.

Much of Plaintiffs' opposition contends that the ZEC Program is regulating or adjusting wholesale rates. Opp. 2-3, 20-21, 26. But the Supreme Court has rejected Plaintiffs' view of what it means to regulate rates. And FERC has held that environmental credit programs like ZECs do not regulate wholesale electricity rates.

The test for whether a State is regulating wholesale rates is simple: to "set" a rate is "to establish the amount of money … hand[ed] over in exchange for power. Nothing in [the Federal Power Act] suggests a more expansive notion." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 777 (2016) ("*EPSA*"). That is why the "fatal defect" in *Hughes* was that Maryland had "condition[ed] payment of funds on capacity clearing the auction." *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016). When a state declares that it will make payments if, but only if, a generator completes a wholesale auction sale, that changes the "amount of money" the seller

receives for sales—adjusting the wholesale rate. *EPSA*, 136 S. Ct. at 777. But for the same reason, *Hughes* declined to preempt measures "untethered to a generator's wholesale market participation." 136 S. Ct. at 1299 (quotation marks omitted). If payments are not conditioned on selling in the wholesale market, they do not "establish the amount of money" received "in exchange for [the] power" sold—and so do not adjust wholesale rates. *EPSA*, 136 S. Ct. at 777.

FERC drew the same line in *WSPP*, holding that states have jurisdiction to subsidize environmentally friendly generation through REC programs. FERC explained that RECs are state-created "instruments certifying that electric energy was generated pursuant to certain … standards"—*e.g.*, using renewable technologies, which provide environmental benefits. *WSPP*, 139 FERC ¶ 61,061, P 21. RECs are thus "separate commodities from … capacity and energy" and do not provide "compensation for capacity [or] energy." *Cal. Pub. Utils. Comm'n*, 133 FERC ¶ 61,059, P 31 & n.62 (2010). Hence, so long as a REC is "unbundled"—*i.e.*, sold "independent of … wholesale electric energy," *WSPP*, 139 FERC ¶ 61,061, P 24—REC payments are not payments in connection with wholesale sales, and fall under state jurisdiction. *Id.* P 21.

Three facts—"taking [Plaintiffs'] factual allegations to be true and drawing all reasonable inferences in the[ir] favor," *Harris v. Mills*, 572 F.3d 66, 71-72 (2d Cir. 2009)—establish that ZECs share the attributes of RECs that, under these cases, put them outside of federal jurisdiction.

1. Like RECs, ZECs "certify[] that electric energy was generated pursuant to certain … standards"—namely, through nuclear fission. *WSPP*, 139 FERC ¶ 61,061 P 21; *see* Compl. ¶¶ 58, 64, 69; Order, App'x E at 1.

2. ZECs are sold to the New York State Energy Research and Development Agency ("NYSERDA") "independent of a wholesale electric energy transaction." *Id.* P 24. NYSERDA does not purchase facilities' electricity. Compl. ¶¶ 69, 73; Order 19-20, 151, 156.

3. Payment for a ZEC is not "condition[ed] … on capacity clearing the auction" or on participating in the wholesale markets. *Hughes*, 136 S. Ct. at 1299. Instead, payment depends solely on whether power is *generated*. Order 94, 132-33, App'x E at 1; Compl. ¶ 64 (payments "occur[] if, and only if, the nuclear generator 'produces' electricity"); *id.* ¶ 69; Mem. 8-9.

Because ZEC payments do not change the amount the nuclear facilities are paid *for their wholesale sale* of electricity, under the law, they do not "adjust[] an interstate wholesale rate." Opp. 3.

1. Plaintiffs Cannot Distinguish ZECs From RECs.

Plaintiffs *could* have challenged *WSPP* as an unreasonable interpretation of the FPA. The burden would have been heavy, because *Chevron* deference applies to agency interpretations of their own jurisdiction. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871, 1874-75 (2013). But Plaintiffs concede *WSPP* is correct. Opp. 4, 28-31. Their case thus boils down to whether they can distinguish ZECs from RECs in a way that is legally relevant. They cannot.

Plaintiffs claim RECs are different because their price "is determined solely by competitive processes," not "set by the State." Opp. 4, 30-31. To begin, that is a false distinction. The REC "market" exists only because New York has created RECs, given them to certain generators (creating supply), and required LSEs to buy them (creating demand). Mem. 10 & n.6. New York also sets the maximum price via "Alternative Compliance Payments," which utilities may pay instead of buying RECs. Order 39. Prices flow not from the "invisible hand," but from the state's.

Anyway, this non-distinction is legally irrelevant. Nothing in *WSPP* or any case Plaintiffs cite even mentions such a distinction. For good reason: The principles establishing that RECs fall within state jurisdiction do not turn their pricing mechanism, whether market-based or administrative. Either way, RECs and ZECs are "separate commodities from … capacity and energy," *Cal. Pub. Utils.*, 133 FERC ¶ 61,059, P 31 & n.62, and payments for them do not change the amount received "in exchange for power." *EPSA*, 136 S. Ct. at 777. New York thus was acting within its sphere. And in that sphere, administrative price-setting, based on the social cost of carbon, is a reasonable policy choice: The PSC chose it because there were "too few owners … for there to be a valid competitive process." Order 130 n.89. Whether REC programs are preempted cannot turn on whether there are many participating sellers or a few.

Plaintiffs also try to distinguish RECs based on the ZEC Program's eligibility criteria. Plaintiffs point first to the PSC's consideration of facilities' "economic need." Opp. 4, 40. Again, that is a non-distinction. REC programs' *whole purpose* is to support emission-free generation that is in "economic need": These programs aim to make profitable renewable generators that, otherwise, would not enter the market. Mem. 10 n.6. Next, Plaintiffs point to the PSC's consideration of whether a facility has "contributed to producing power used within the State." Opp. 4, 40. But New York's REC program requires facilities to have "deliver[ed] the underlying energy for consumption in New York." Order 106. And again, these distinctions are irrelevant to FERC's reason for viewing RECs as outside its jurisdiction—that such credits merely certify that generation was environmentally friendly and do not compensate for capacity and energy.[1]

Plaintiffs argue that *WSPP* does not support the ZEC Program because ZECs are not "unbundled" from wholesale electricity sales. Opp. 28. Per Plaintiffs, that is because the ZEC Program "requires the use" of a ZEC "for every MWh of wholesale electricity that an LSE buys." *Id.* at 28-29. This is wrong. First, Plaintiffs mischaracterize the Program. As Plaintiffs concede elsewhere, the purchase requirement is in fact based on the amount of "electric energy load served by" the LSE—*i.e.*, the LSE's *retail sales*, not wholesale purchases. Opp. 11; Compl. ¶ 73; Order 20, 51. New York's REC program is the same, pegging LSEs' purchase duty to "total load served." Order 78. So, when an LSE generates its own power to sell to retail customers, rather than buying at wholesale, it still has a ZEC obligation.[2] Conversely, when an LSE purchases wholesale power to run its facilities, not to resell, those purchases do not affect its ZEC obligation. ZEC purchases

[1] Plaintiffs' distinctions are also perverse. A program open to all nuclear facilities anywhere, regardless of need, would have larger effects on prices. Under Plaintiffs' theory, that should be more problematic, not less. *E.g.*, Opp. 7, 33.

[2] This is no mere hypothetical. The New York Power Authority ("NYPA") owns substantial generation it uses to serve retail customers, which reduces its wholesale purchases. Yet NYPA must buy ZECs based on its full share of the state's load. Order 6, 51; *see* NYPA, What We Do, http://nypa.gov/facilities/default.htm (visited Jan. 26, 2017).

thus are not "inextricably tied to the LSEs' purchases of wholesale electricity." Opp. 29.

Second, Plaintiffs misunderstand what "unbundled" means. It just means the REC or ZEC changes hands separately from any wholesale sale. *See Wheelabrator Lisbon, Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008) (RECs are "unbundled from the energy itself" when "sold separately"). Plaintiffs do not dispute that ZECs meet *that* definition, because they cannot. Generators sell ZECs, but not electricity, to NYSERDA. They dispose of the electricity however they choose. *See* Order 68, 94, 132-33. And, as Plaintiffs admit, LSEs must purchase ZECs even if they are "not [buying energy] from a nuclear generator." Opp. 28.[3]

Plaintiffs thus cannot distinguish ZECs from RECs on any relevant ground. *WSPP*'s holding that RECs do not adjust wholesale rates squarely applies to ZECs.

2. Plaintiffs' Reliance On *Hughes* Is Misplaced.

Although *WSPP* resolves this case, Plaintiffs construct an argument that would extend *Hughes* so as to effectively overrule *WSPP*. They claim that *Hughes* sweeps broadly to invalidate any "subsidy" program that could be said to "supplement" the revenues of "a favored generator," even if the "supplement" is actually an "environmental credit" and is not conditioned on any wholesale sale. Opp. 2-3. But *Hughes* itself rejects Plaintiffs' expansive reading:

> Our holding is limited: … [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*

[3] Plaintiffs rely on a single sentence in *WSPP*, which states that "if a wholesale sale … requires the use of an emissions allowance," FERC has jurisdiction over the allowance. Opp. 28 (quoting *WSPP*, 139 FERC ¶ 61,061, P 23). Even a cursory review refutes Plaintiffs' misreading. FERC explains that when a wholesale sale cannot occur except by using an allowance (as when a polluting plant must obtain one in order to sell), the transactions are not independent. But in the next sentence, omitted by Plaintiffs, FERC makes clear: "if the [allowance's] sale or transfer occurs independent of a sale of electric energy for resale in interstate commerce, it is outside of [FERC] review." *WSPP*, 139 FERC ¶ 61,061, P 23. That is the case here: the sale of the ZEC occurs independent of any wholesale sale of electricity.

defect that renders Maryland's program unacceptable.

136 S. Ct. at 1299 (emphasis added) (citation omitted). This follows from *EPSA*'s narrow interpretation of what it means to set a rate. Only if payments are "condition[ed] … on … clearing the auction," *id.*, do they alter the amount "hand[ed] over … for power," *EPSA*, 136 S. Ct. at 777.

The only question under *Hughes* thus is whether the ZEC Program has "condition[ed] payment … on … clearing the auction." *Hughes*, 136 S. Ct. at 1299; *see also id.* at 1297 n.9 (payments adjusted an interstate rate "because the payments are conditioned on … selling … capacity"). It has not. Mem. 8-9, 12-13. ZECs are given for *production* of electricity, regardless of how or where it is sold. Order, App'x E at 1; Mem. 8-9. One Plaintiff admitted as much in a recent FERC filing, conceding "ZEC[] … payments are tied to energy *production*."[4] Because payment does not depend upon a wholesale sale, the ZEC Program does not alter "the amount of money a [buyer] will hand over in exchange" for wholesale electricity. *EPSA*, 136 S. Ct. at 777.[5]

Plaintiffs dance around this fatal flaw by asserting that the ZEC-eligible nuclear generators have no *practical* "alternative to selling … in NYISO energy auctions." Opp. 25 (quoting Compl. ¶¶ 34, 64). Thus, Plaintiffs say, the ZEC Program creates an "effective" tether that determines what the generators receive for wholesale sales. Opp. 20-21. That is factually inaccurate,[6] and also gets the law wrong. In Plaintiffs' argument, as in *EPSA*, "[t]he modifier 'effective' is doing … more work than any conventional understanding of rate-setting allows." *EPSA*, 136 S. Ct. at 777. Preemption turns on whether the state has *actually* determined "the amount of money … exchange[d]" for electricity at wholesale—not whether it has "effectively" done so. *Id.* at 777-78.

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[4] Request for Expedited Action at 11, Docket No. EL13-62-002 (FERC Jan. 9, 2017), http://bit.ly/2j8upi3.

[5] The same Plaintiff has asked FERC to change its rules to prevent Intervenors' facilities from selling in NYISO capacity auctions. If FERC agrees, Intervenors may no longer be able to "sell[] … in the NYISO [capacity] auctions," Opp. 25, but still would be paid for ZECs—illustrating that ZECs are "untethered to wholesale market participation." *Hughes*, 136 S. Ct. at 1299 (quotation marks omitted).

[6] The ZEC-eligible facilities could also make direct sales at retail. Mem. 9 n.5.

Otherwise, *WSPP* would have come out differently. *WSPP*'s premise is that renewable generators are selling RECs to one buyer and selling their electricity at wholesale to another buyer. Indeed, Plaintiffs' argument would invalidate any state subsidy program benefiting a generator that sells its output at wholesale—or any state tax imposed on the emissions of such a generator. Either could be characterized as "effectively" changing the amount the generator receives for wholesale sales. Yet *Hughes* expressly did not disturb such programs, 136 S. Ct. at 1299, and FERC has held that states may "encourage renewable or other types of resources … by giving direct subsidies." *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, 62,080 (1995); *see Cal. Pub. Utils.*, 133 FERC ¶ 61,059, P 31 n.62 (states may give "subsidies … to particular facilities on environmental … grounds").

Plaintiffs next attempt to rewrite *Hughes*, claiming that state subsidies are preempted "if they are 'tethered' to FERC-regulated wholesale *electricity prices*," and highlighting that the ZEC price can adjust downward based on *forecast* wholesale prices starting in year three. Opp. 8 (emphasis added); *id.* at 19 (similar).[7] But as explained, *Hughes* prohibits "[]tether[ing]" payment to "wholesale market *participation*," 136 S. Ct. at 1299 (emphasis added), not to wholesale market *prices*—and certainly not to *estimated* prices. That distinction is crucial. The Second Circuit held in *Rochester Gas & Electric Corp. v. PSC*, 754 F.2d 99 (2d Cir. 1985), that states may use "impute[d] revenue from a reasonable estimate of" wholesale sales without intruding on federal jurisdiction. *Id.* at 105. It reasoned, in line with *EPSA* and *Hughes*, 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 setting "[retail] rates," or here, the price of ZECs. *Id.* Plaintiffs ignore that case, but it is binding precedent.

In any event, even if the *Hughes* decision *had* turned on a "tether" to wholesale prices, the

[7] Plaintiffs thus concede that the ZEC Program is lawful during its first two years.

pricing mechanism in the ZEC Program differs in numerous ways:

- *Hughes* did not involve an environmental program at all, but instead involved a contract-for-differences with a new gas-fired generator that needed a longer revenue guarantee than the FERC markets permitted. *Hughes*, 136 S. Ct. at 1297.

- The contract-for-differences simply provided a "contract price" sufficient to cover the generator's costs. *Id.* at 1295. The ZEC price is based upon the social cost of carbon, which is the value of the environmental harm abated by the nuclear generators. Order 150-51.

- Under the contract-for-differences, payments would rise to offset falling market prices so as to guarantee the generator's revenue. *Hughes*, 136 S. Ct. at 1299. By contrast, the ZEC price can never rise above the social cost of carbon, even if market prices fall. Order 129-30, 138. Intervenors remain exposed to the market risk of falling prices.

- Under the contract-for-differences, payments floated up and down based on the actual wholesale revenues received by the generator. *Hughes*, 136 S. Ct. at 1295. By contrast, the potential downward price adjustment in years 3-12 of the ZEC Program is based on *forecast* wholesale prices. There is no true-up if the forecasts turn out to be inaccurate. Order 138-39. Moreover, the adjustment in the ZEC Program is based on forecast prices for Zone A, a portion of the state into which the nuclear facilities do not even sell. *Id.* at 139.

- While the ZEC price can be adjusted downward in years 3-12 of the program if forecast wholesale prices increase above a benchmark of $39/MWh, that downward adjustment benefits consumers, not the nuclear facilities, by ensuring the program remains affordable.

Equally meritless is the claim that the ZEC Program includes an impermissible "tether[]" because eligibility supposedly "is triggered by a specific finding that the rate deemed 'just and reasonable' by FERC is 'insufficient' to produce a profit." Opp. 20-21. Again, that is not the "tether" *Hughes* deemed problematic. To the contrary, *Hughes* affirmed that its holding did not bar states from providing "direct subsidies" to plants. 136 S. Ct. at 1299. And *whenever* a state provides a subsidy to a struggling plant, it is doing so because wholesale revenues are insufficient.

B. Plaintiffs' Assertions About Effects Do Not State A Claim.

Alternatively, Plaintiffs claim that even if the ZEC Program does not alter "the amount … hand[ed] over in exchange for power," *EPSA*, 136 S. Ct. at 777, it "directly affects" wholesale rates and so is preempted for that reason. *See, e.g.*, Opp. 3, 27.

FERC rejected that argument in *WSPP*. Plaintiffs block quote the portion of *WSPP* stating

that a transaction "could still fall under the Commission's jurisdiction" if it "affects" wholesale rates. Opp. 28. But they omit the punchline two paragraphs later. Applying the "directly affect" test, FERC held that "when an unbundled REC transaction is independent of a wholesale electric energy transaction," it "does not affect wholesale electricity rates." *WSPP*, 139 FERC ¶ 61,061, P 24. That is because the effect of ZECs and RECs on wholesale prices is quintessentially *indirect*. ZECs affect prices, if at all, only by impacting a generator's decision whether to enter, remain in, or exit the market—a decision also affected by many other state programs that would equally be preempted under Plaintiffs' broad theory. Mem. 14-16. While Plaintiffs attempt to distinguish ZECs from RECs, *supra* at 3-5, ZECs plainly are not more *direct* in the manner in which they allegedly affect wholesale prices. Both are indirect. Indeed, the D.C. Circuit has specifically held that states may "require retirement of existing generators [or construction of] expensive, environmentally-friendly units, or … take any other action in their role as regulators of generation," even though "those choices affect the pool of bidders" in wholesale markets "which in turn affects the market clearing price." *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009). Plaintiffs ignore that holding, but they cannot evade it.[8]

Plaintiffs also make a broader argument, asserting the ZEC Program is preempted because it "affects" wholesale rates. *E.g.*, Opp. 17, 18, 19, 23, 24, 27, 30. But again, FERC and federal courts have rejected that argument. *See* Mem. 15-17 (collecting cases). The "law of supply-and-demand is not the law of preemption." *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 255 (3d

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[8] *EPSA*, which Plaintiffs cite, Opp. 26-27, provides no support for disturbing *WSPP*'s conclusion. *EPSA* states that FERC can assert jurisdiction over "rules or practices that 'directly affect'" wholesale rates. 136 S. Ct. at 774 (citation omitted). But even if FERC could permissibly find that a program is within its "directly affecting" jurisdiction, it can also *decline* to make that finding. And when FERC declines to make that finding, states' action in the area is not preempted. *See New York v. FERC*, 535 U.S. 1, 25-28 (2002) (FERC permissibly chose "not to assert jurisdiction" over certain retail transmissions, leaving states to regulate). This case is *a fortiori*, because, in *WSPP*, FERC did not just decline to exercise its "directly affects" jurisdiction—it interpreted that jurisdiction *not* to apply to REC payments.

Cir. 2014); *S. Cal. Edison*, 71 FERC ¶ 61,269, at 62,080 (states may "giv[e] direct subsidies" to renewables even if doing so "allow[s] states to affect the price"). "To find field pre-emption merely because … rates might be affected would be largely to nullify … the States['] control over production." *Nw. Central Pipeline Corp. v. State Comm'n of Kan.*, 489 U.S. 493, 514 (1989).[9] Plaintiffs have no answer to the myriad state programs their theory would doom. Mem. 16.[10]

C. *Oneok* Supports Dismissal Of Plaintiffs' Claims.

Relying on *Oneok*, Plaintiffs claim the ZEC Program is preempted because it is "'aimed directly at'" FERC's sphere, by targeting "nuclear generators selling exclusively at wholesale in interstate commerce." Opp. 19 (quoting *Oneok v. Learjet, Inc.*, 136 S. Ct. 1591, 1600-01 (2015)).

Oneok refutes, rather than supports, Plaintiffs' claims. *Oneok* involved state antitrust lawsuits that would have directly regulated how gas sellers priced their wholesale sales—that is, the "state law … applied … to … [FERC] jurisdictional sales." 135 S. Ct at 1599. Yet still, the suits were *not* preempted: They aimed at preventing distortion of the *retail* market, and so were not "target[ed]" at FERC's domain. *Id.* (emphasis deleted). This case is easier than *Oneok* because the ZEC Program does not regulate wholesale market conduct. *Supra* at 1-8.

Plaintiffs' theory is apparently that states can never target regulation at "generators selling exclusively … at wholesale." Opp. 19. But this "target," 135 S. Ct at 1599—generators—is squarely within states' sphere, which includes generation facilities. 16 U.S.C. § 824(b)(1). That

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[9] *See Oneok v. Learjet, Inc.*, 136 S. Ct. 1591, 1600 (2015) ("no one could claim that FERC's regulation of … wholesale rates forecloses every other form of state regulation that affects those rates"); *Hughes*, 136 S. Ct. at 1298 (when states "regulate within the domain Congress assigned," no preemption arises even when "laws incidentally affect areas within FERC's domain").

[10] Particularly egregious is Plaintiffs' citation of *Midwest Power Systems, Inc.*, 78 FERC ¶ 61,067 (1997), for the proposition that "states cannot … *affect* the price of wholesale electricity." Opp. 30 (emphasis added). *Midwest Power* holds the opposite. *Midwest Power* repeats the settled principle that states cannot "set rates" for wholesale sales. 78 FERC ¶ 61,067 at 61,246. It then affirms that states "have numerous ways … to encourage" environmentally friendly generation, including "order[ing] utilities to build [such] generators themselves," "deny[ing] certification of other types of facilities," or "encourag[ing such] resources through their tax structure, or by giving direct subsidies," *id.* at 61,248—even though such measures doubtless affect wholesale prices.

remains true even when those generators sell their output at wholesale. It has to be that way: Plaintiffs' overbroad argument would invalidate emissions controls, REC programs, and any other law applying to generators that sell electricity at wholesale. *See supra* at 9-10.

Plaintiffs fare no better with their claim that New York targeted FERC's sphere by "substitut[ing]" its "'own determinations'" regarding what "wholesale price is 'just and reasonable,'" and "contradict[ing] FERC's determination" as to wholesale rates. Opp. 10, 26 (quoting *Hughes*, 136 S. Ct. at 1297). New York made no judgment about what wholesale rates are just and reasonable, and never second-guessed FERC's. *Cf.* Order 67-68 (recognizing FERC's "exclusive authority to regulate the sale of electric energy at wholesale"). The "target at which [New York] aim[ed]" was different. *Oneok*, 135 S. Ct. at 1599 (emphasis deleted). The ZEC Program is an environmental initiative aimed at regulating generators' emissions (left to the states), not wholesale market conduct (left to FERC). Mem. 4-6, 18-19. The ZEC Program "encourag[es] production of … clean generation," *Hughes*, 136 S. Ct. at 1299, by compensating nuclear facilities for their "zero-emissions environmental values or attributes," as part of a comprehensive program that also supports renewable generation. Order 50; Mem. 4-6. That falls squarely within New York's "reserved authority … over in-state 'facilities used for the generation of electric energy,'" *Hughes*, 136 S. Ct. at 1292 (quoting 16 U.S.C. § 824(b)(1)), including its right to forestall "retirement of existing generators" and to encourage "more expensive, environmentally-friendly units." *Conn. Dep't of Pub. Util. Control*, 569 F.3d at 481. New York could not have "substitut[ed]" its judgment, Opp. 26, when FERC does not *make* judgments about such issues.

Plaintiffs also cite various cases from the 1980s and earlier, arising on far flung facts.[11]

[11] Plaintiffs cite *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), to support their argument that New York has "substitut[ed its] own determination[] of … just and fair" wholesale rates. Opp. 23 (quotation marks omitted). Those cases, however,

None supports preemption here. Their field preemption claim fails as a matter of law.

II. Plaintiffs' Conflict Preemption Claim Fails As A Matter Of Law.

As Intervenors explained, FPA "conflict-pre-emption analysis must be applied sensitively … to prevent the diminution of the role Congress reserved to the States." *Nw. Cent.*, 489 U.S. at 515. As long as a state regulates "production or other subjects of state jurisdiction," "and the means chosen [are] at least plausibly … related to matters of legitimate state concern," there is no conflict absent "clear damage to federal goals." *Id.* at 518, 522. Plaintiffs say they get a free pass because "conflict preemption … is inherently factual." Opp. 33; *see id.* at 34 (similar). But courts routinely dismiss conflict preemption claims,[12] because the inquiry is principally *legal*: The Court "examin[es] the federal statute as a whole and identif[ies] its purpose and intended effects," *Grocery Manufacturers Ass'n v. Sorrell*, 102 F. Supp. 3d 583, 616 (D. Vt. 2015) (quotation marks omitted), and then determines whether the statute's "operation within its chosen field ... must be

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show what a *real* "substit[ution]" looks like, and they underscore that New York has not done so. *Id.* *Mississippi* and *Nantahala* involved the clearest possible "conflict pre-emption," *Oneok*, 135 S. Ct. at 1601, in which "state law penalize[d] what federal law require[d]." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000). FERC found particular allocations of power to utilities were "just and reasonable" (requiring utilities to pay the resulting wholesale rates), yet state commissions "penalize[d]," *id.*, the utilities by finding the allocations were *not* reasonable (barring them from recovering the resulting costs from ratepayers). *Oneok*, 135 S. Ct. at 1601-02; *see Mississippi*, 487 U.S. at 371-73; *Nantahala*, 476 U.S. at 966-67. New York has done no such thing.

Plaintiffs cite *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), as holding any "substantial effect on wholesale prices" triggers preemption. Opp. 23. But, as *Oneok* makes clear, that is not what *Schneidewind* held. *Oneok*, 135 S. Ct. at 1600-01 (rejecting reading of *Schneidewind* that would preempt any "regulation … which [could] raise," or lower, "wholesale … costs."). The regulation in *Schneidewind* prohibited utilities from issuing securities without permission. It was preempted because, by regulating whether a pipeline could raise funds through equity, Michigan *directly* "control[led]" a key component of cost-based wholesale rates set by FERC: the regulated entity's capital structure (the amount of equity relative to debt). *Schneidewind*, 485 U.S. at 301-02, 308.

Finally, Plaintiffs cite *Northern Natural Gas Co. v. State Corp. Commission*, 372 U.S. 84 (1963), *see* Opp. 22, but it is off point. *Northern Natural* struck down a Kansas regulation that instructed interstate gas pipelines where to purchase their gas at wholesale, even though wholesale gas sales fall within FERC's jurisdiction. 372 U.S. at 92; *see Oneok*, 135 S. Ct. at 1600; *N. Natural*, 372 U.S. at 88-89, 92. This case would be analogous to *Northern Natural* if New York had instructed NYISO how to run its markets, or the ZEC facilities how to bid or where to sell electricity.

Much more relevant is *Northwest Central*, which holds that the state has authority to promote the production of gas in a certain gas field, even though doing so will affect wholesale rates. *See Nw. Cent.*, 489 U.S. at 512.

[12] *See, e.g.*, *Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583, 616–17 (D. Vt. 2015); *Virginia Uranium, Inc. v. McAuliffe*, 147 F. Supp. 3d 462, 477 (W.D. Va. 2015), *appeal docketed*, No. 16-1005 (4th Cir. Jan. 5, 2016); *Missouri Pet Breeders Ass'n v. Cty. of Cook*, 106 F. Supp. 3d 908, 918 (N.D. Ill. 2015); *E. Hampton Airport Prop. Owners Ass'n v. Town Bd. of Town of E. Hampton*, 72 F. Supp. 2d 139, 148 (E.D.N.Y. 1999).

frustrated," *id.* (quotation marks omitted).

Here, Plaintiffs' conflict claim is suitable for resolution on a motion to dismiss because it rests on a *legal* premise: That "FERC's goal" is "markets[] … in which competitive forces set … electricity prices" without the influence of any "state subsidy" affecting "market signals." Opp. 32-33. FERC's own statements reject that. Despite undisputed effects on price signals, 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 approved of states giving "direct subsidies" like REC payments, even though they "affect the price of renewables." *S. Cal. Edison Co.*, 71 FERC ¶ 61,269 at 62,080. FERC affirmed in its brief in *Hughes* that states are "free" to incentivize clean generation, "even if the price signals" in the "wholesale … market indicate" it is not needed. Amicus Br. of United States 33, *Hughes*, 2016 WL 344494. And NYISO, charged with administering FERC's markets in New York, has endorsed the ZEC Program. Mem. 19-20.

Plaintiffs claim the PSC acted because nuclear plants were endangered by "'increased competition' from low-cost" fossil fuel. Opp. 34 (quoting Order, App'x G, at 5). But even if true, that is irrelevant. States are free to *respond* to wholesale market conditions, and by doing so, they do not improperly pass judgment on whether rates creating those conditions are just and reasonable. *Northwest Central* proves the point. Kansas changed gas production rules in response to wholesale market conditions: production imbalances "result[ing] from" factors including a dwindling interstate market. 489 U.S. at 501-02. Yet the law was not preempted.

Plaintiffs also cite lower court decisions concerning the Maryland and New Jersey programs invalidated in *Hughes*. Opp. 33. But the Supreme Court's holding was self-consciously narrower, turning on the fact that payment was conditioned on "wholesale market participation."

Hughes, 136 S. Ct. at 1299 (quotation marks omitted).[13] And those programs involved payments to fossil-fuel generators, not the environmental interests that FERC has repeatedly respected.[14]

III. Plaintiffs' Dormant Commerce Clause Claim Should Be Dismissed.

A. The ZEC Program Is A Constitutional Subsidy.

Plaintiffs do not dispute that if this Court views the ZEC Program as similar to the program upheld in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), their dormant Commerce Clause claim fails.[15] Plaintiffs contend, however, that New York is acting as a regulator, not a market participant. But first, Plaintiffs' claim that New York is not "taking ownership or possession of any goods," Opp. 40, is belied by Plaintiffs' Complaint, which acknowledges New York "buy[s] the ZECs from the nuclear generators." Compl. ¶ 73; *see id.* ¶ 69. In any event, *every* market-participation case involves some state regulation. In *Alexandria Scrap*, Maryland accompanied its bounty program with classic regulation—penalties for keeping old automobile hulks and documentation requirements. 426 U.S. at 796-97. Thus, "Maryland employed the tools of regulation to invigorate its participation in the market for automobile hulks," and "[s]uperficially, the scheme was regulatory in nature." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 346 (2008) (plurality op.). But all that mattered was "Maryland had not only regulated but had also 'entered into the market itself to bid up [the] price' of automobile hulks," just as New

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[13] Similarly, Plaintiffs repeatedly quote Intervenors' pleadings and briefs in the prior litigation concerning the New Jersey and Maryland programs, depicting Intervenors as inconsistent. But those statements concerned programs that suffered the "fatal defect" identified by the Supreme Court, *Hughes*, 136 S. Ct. at 1299, and this case does not.

[14] Plaintiffs cite *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), but its relevance is hard to understand. The nuisance suits preempted in that case addressed the same question federal law had resolved—how much water pollution should be permitted?—and allowed states to "override" the "balance of interests" the EPA had reached. *Id.* at 495. Here, REC programs and the ZEC Program address an issue FERC does not regulate—the environmental attributes of electric generation—and FERC has approved states' doing so.

[15] Plaintiffs suggest that some subsidy programs may violate the dormant Commerce Clause. See Opp. 40. All that matters here, however, is that subsidy programs *like the ZEC Program* are constitutional, as *Alexandria Scrap* and *Allco* show.

York entered the market here. *Id.* Plaintiffs also cannot distinguish *Allco Finance Ltd. v. Klee*, No. 3:15-CV-608 (CSH), 2016 WL 4414774 (D. Conn. Aug. 18, 2016). They say "the state … sets the value of" ZECs, Opp. 40, but do not explain why that is relevant. *Id.* It is not. After all, the bounty in *Alexandria Scrap* was set administratively by the state. *See* 426 U.S. at 797 n.5.[16]

B. Plaintiffs Lack Standing To Raise Their Claim That The ZEC Program Discriminates In Favor Of In-State Plants.

Plaintiffs contend that their alleged lost wholesale revenues "plainly confer[] standing." Opp. 35 n.26. That confuses Article III injury-in-fact, which Intervenors do not contest, with Article III causation and prudential standing, which Plaintiffs' allegations fail to establish. Mem. 22. Plaintiffs do not allege they own out-of-state nuclear plants that could participate in the ZEC Program but for its alleged discrimination. Plaintiffs' alleged harm is instead limited to price suppression. But that harm would be caused by *any* subsidy to nuclear plants, discriminatory or not. Plaintiffs thus cannot show that the alleged *discriminatory* aspects of the ZEC Program have caused their injury, as required to show Article III causation or prudential standing. Mem. 22; *see L.A.M. Recovery, Inc. v. Dep't of Consumer Affairs*, 184 F. App'x 85, 88-89 (2d Cir. 2006) (no prudential standing where plaintiff alleged no "injury *stemming from* the application of the licensing requirement in a manner discriminatory to out-of-state interests" (emphasis added)).[17]

CONCLUSION

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

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[16] Plaintiffs fail to state a claim under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Crediting Plaintiffs' claimed burden on interstate commerce, that burden is not "different from that imposed on intrastate commerce." *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 50 (2d Cir. 2007) (quotation marks omitted); *see* Mem. 24-25. Plaintiffs have no response. And as a matter of law, Plaintiffs' alleged burdens are not "clearly excessive" relative to the Program's "local benefits." *Pike*, 397 U.S. at 142. Plaintiffs meekly respond that "fact issues" preclude dismissal. Opp. 39. Not so. Though Plaintiffs can allege burdens and benefits, this Court need not take as true Plaintiffs' *legal* conclusion that the alleged burdens "far outweigh" the "claimed environmental benefits," *id.*, *see Silva Run Worldwide Ltd. v. Gaming Lottery Corp.*, No. 96 CIV. 3232m2001 WL 396521, at *1 (S.D.N.Y. Apr. 19, 2001).

[17] By contrast, the plaintiffs in *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995), had standing because, as suppliers of out-of-state coal, they were disadvantaged by *discrimination* in favor of in-state coal.

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Respectfully submitted,

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