NO. 17-2445 (Consolidated with 17-2433)

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,

Plaintiffs-Appellants,

v.

ANTHONY M. STAR, *et al.*,

Defendants-Respondents.

On Appeal from a Final Judgment of the United States District Court for the Northern District of Illinois, No. 17 CV 1164

BRIEF OF PLAINTIFFS-APPELLANTS

Jonathan D. Schiller
David A. Barrett
BOIES, SCHILLER FLEXNER LLP
575 Lexington Ave., 7th Floor
New York, NY 10022
Telephone: (212) 446-2300
Email: *dbarrett@bsfllp.com*
jschiller@bsfllp.com

Stuart H. Singer
Pascual Oliu
BOIES, SCHILLER FLEXNER LLP
401 E. Las Olas Blvd., Ste. 1200
Fort Lauderdale, FL 33301
Telephone: (954) 356-0011
Email: *ssinger@bsfllp.com*
poliu@bsfllp.com

Donald B. Verrilli, Jr.
Counsel of Record
MUNGER, TOLLES & OLSON LLP
1155 F Street, NW
Washington, DC 20004
Telephone: (202) 220-1100
Email: *Donald.Verrilli@mto.com*

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

(Additional Counsel Listed on Inside Cover)

Leonard A. Gail
Suyash Agrawal
Paul Berks
MASSEY & GAIL LLP
50 E. Washington St., Suite 400
Chicago, IL 60602
Telephone: (312) 283-1590
Email: *lgail@masseygail.com*
sagrawal@masseygail.com
pberks@masseygail.com

Jonathan S. Massey
MASSEY & GAIL LLP
1325 G Street, N.W., Suite 500
Washington, DC 20005
Telephone: (202) 652-4511
Email: *jmassey@masseygail.com*

for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

- Plaintiff-Appellant Electric Power Supply Association is not a public company and has no publicly held parents, subsidiaries, or affiliates.
- Plaintiff-Appellant Dynegy Inc. ("Dynegy") is a publicly held company. Dynegy does not have a parent company and no publicly held companies own more than 10% of Dynegy's shares.
- Plaintiff-Appellant Eastern Generation, LLC is not a public company and has no publicly held parents, subsidiaries, or affiliates.
- Plaintiff-Appellant NRG Energy, Inc. ("NRG") has publicly traded shares. No publicly held company has a 10% or greater ownership interest in NRG. NRG Yield, Inc., ("NYLD") is a publically traded affiliate of NRG. NRG has no other parents, subsidiaries, or affiliates that are publicly traded.
- Plaintiff-Appellant Calpine Corporation ("Calpine") has no parent corporation, and no publicly held companies own 10% or more of Calpine stock.

STATEMENT CONCERNING ORAL ARGUMENT

Plaintiffs-Appellants request oral argument. This case presents important questions of federal preemption and Commerce Clause interpretation arising from a subsidy given by Illinois to certain in-state nuclear power plants that has profound implications for the wholesale electric market.

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JURISDICTIONAL STATEMENT

Plaintiffs filed this action in the Northern District of Illinois (Manish S. Shah, J.) to enjoin the Defendant State officials from enforcing the so-called Zero Emissions Credit ("ZEC") portion of an Illinois statute, the Future Energy Jobs Act ("FEJA"). Plaintiffs assert that the ZEC program is preempted by the Federal Power Act ("FPA"), 16 U.S.C. §§ 824, *et seq*. and violates the Commerce Clause. Appendix ("App.") 6 (Complaint ("Compl."), District Court ECF Docket no. ("ECF") 1 ¶¶ 12-13. The district court had subject matter jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

The district court denied Plaintiffs' motion for a preliminary injunction and entered final judgment dismissing the action. Memorandum Opinion and Order ("Op."), ECF 107; Judgment, ECF 108. This Court has jurisdiction under 28 U.S.C. §§ 1291, 1292(a)(1).

Judgment was entered on July 14, 2017 (ECF 108), and Plaintiffs timely filed their Notice of Appeal on July 17, 2017 (ECF 109; FRAP 4(a)(1)).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

"The State of Illinois created a 'zero emission credit' program to effectively subsidize nuclear power generation and corresponding sales of nuclear power in the wholesale market." Op. 1, ECF 107. The issues on appeal are:

1. Whether Plaintiffs, who are injured by subsidies granted to competitors through the Illinois ZEC program, have standing.

2. Whether *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), which interpreted the Medicaid Act, precludes private suits in equity to enforce the FPA, overruling decades of precedent allowing such private enforcement.

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

4. Whether the complaint states a claim that the ZEC program violates the dormant Commerce Clause by discriminating in favor of subsidized in-state nuclear plants.

5. Whether the district court erred in denying Plaintiffs' motion for preliminary injunction.

STATEMENT OF THE CASE

Illinois enacted FEJA to keep Exelon's unprofitable Clinton and Quad Cities nuclear power plants in operation. App. 26 (Compl. ¶ 58). These two Illinois plants, like the plants that Plaintiffs operate, sell electricity in wholesale auctions conducted under the supervision of the

Federal Energy Regulatory Commission ("FERC"). App. 15-17, 25, 32 (Compl. ¶¶ 36, 38, 54, 55, 72). Clinton and Quad Cities were operating at a loss and, but for the ZEC subsidy, would have shut down to stem continuing losses. App. 2, 26 (Compl. ¶¶ 2, 57). To keep these plants operating, the ZEC program provides subsidies, over and above the FERC-approved auction rates, for the electricity they sell into wholesale auctions. App. 26 (Compl. ¶ 58).

In providing ZEC subsidies tied to participation in wholesale markets, Illinois has usurped FERC's exclusive authority under the FPA to set just and reasonable rates received in connection with sales of electricity into wholesale auctions. The Illinois ZEC program is identical in substance to a state program that the Supreme Court unanimously invalidated as preempted in *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016). The program invades FERC's exclusive jurisdiction because it replaces the FERC-determined just and reasonable prices for wholesale electricity with a different rate determined by the State. ZEC subsidies also distort wholesale auction outcomes in conflict with FERC's policy of using auctions to set wholesale electricity prices. Finally, the ZEC program favors two in-state nuclear plants at the expense of out-of-state generators who compete in the same FERC auction markets, thereby violating the dormant Commerce Clause.

FACTS

A. The Federal Regulatory Scheme

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

FERC has determined that the just and reasonable rates for wholesale energy and capacity should be set by competitive energy markets and auctions, rather than traditional cost-of-service ratemaking, in regions that have elected to join wholesale electricity markets, such as those at issue in this case. *See* App. 12 (Compl. ¶ 29);

N.J. Bd. of Public Utils. v. FERC, 744 F.3d 74, 81 (3d Cir. 2014) ("FERC now seeks to ensure that market-based rates are 'just and reasonable' largely by overseeing the integrity of the interstate energy markets."). In states such as Illinois, regional transmission organizations and independent system operators manage the auctions that determine the wholesale rates energy producers receive, under rules and procedures that FERC has approved. *See* App. 12-13 (Compl. ¶ 30); *N.J. Bd*, 744 F.3d at 82. Chicago and northern Illinois are served by PJM Interconnection, L.L.C. ("PJM"). The rest of Illinois is served by Midcontinent Independent System Operator, Inc. ("MISO"). App. 12-13 (Compl. ¶¶ 29-31).

PJM and MISO operate two main types of wholesale auctions: energy and capacity. App. 13 (Compl. ¶ 31). Both auctions employ "stacking" of bids from lowest to highest until the requisite quantity is covered. App. 14, 18 (Compl. ¶¶ 35, 41). The price of the highest-stacked bid sets the "market clearing price," which all bidders at or below that price receive. *Id.* The clearing price is by definition the FERC-approved "just and reasonable" rate. *Hughes*, 136 S. Ct. at 1297.

In "energy" auctions, generators bid the price they will accept to sell a specified quantity of electrical output. App. 14-15 (Compl. ¶¶ 34-35). In "capacity" auctions, PJM or MISO purchase the option to call upon the generator to produce a specified amount of energy if and when needed, which insures the reliability of the electric system. App. 16-17 (Compl. ¶ 38).

FERC adopted the supply-demand based auction process "to bring more efficient, lower cost power to the Nation's electricity consumers" by aligning incentives. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.*, FERC Order No. 888, 61 Fed. Reg. 21,540, 21,541 (May 10, 1996). "A high clearing price in the capacity auction encourages new generators to enter the market, increasing supply and thereby lowering the clearing price in same-day and next-day auctions three years' hence; a low clearing price discourages new entry and encourages retirement of existing high-cost generators." *Hughes*, 136 S. Ct. at 1293. Over time, the FERC-approved market design is self-correcting and leads to efficient economic equilibrium. App. 18 (Compl. ¶ 40).

B. The ZEC Program's Manipulation of Wholesale Markets

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

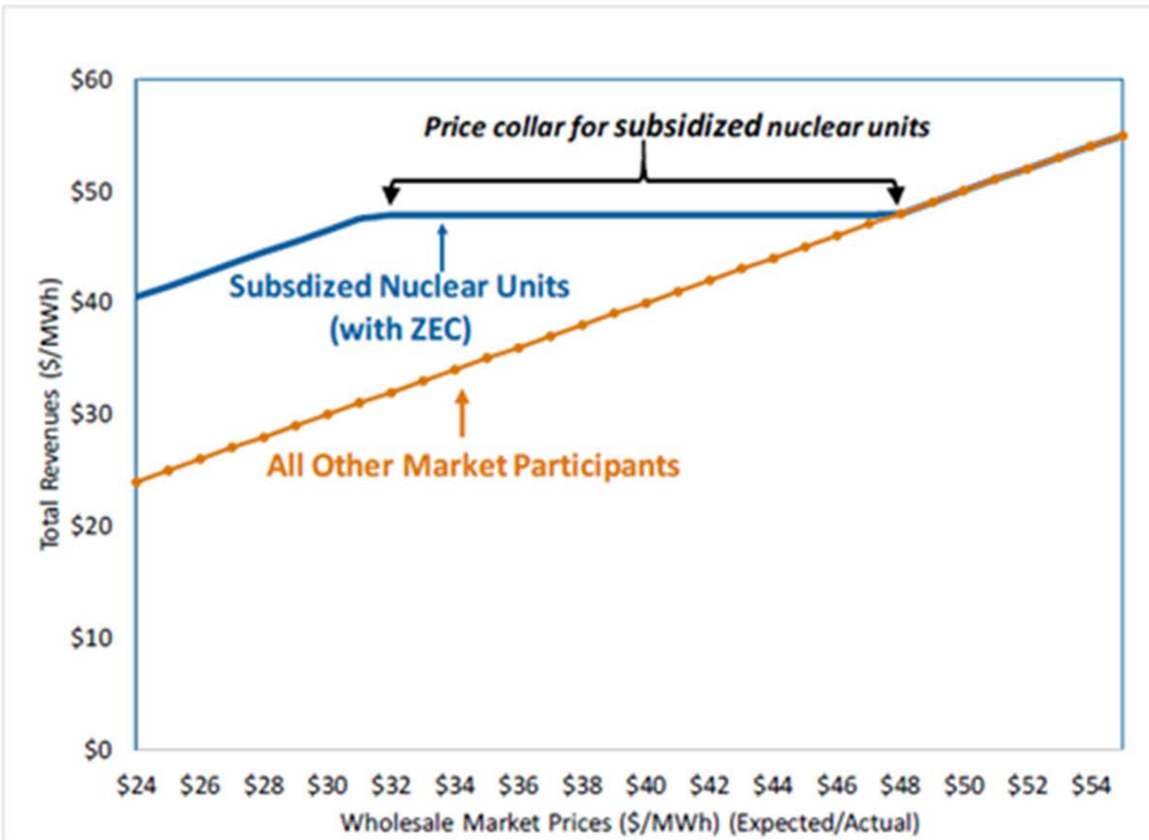
The ZEC subsidy for Quad Cities and Clinton is expressly tethered to wholesale prices resulting from the PJM and MISO auctions. As auction prices decrease, the ZEC subsidy increases, and vice versa, thereby guaranteeing that the plants will be paid for wholesale electricity sales at the rate Illinois prefers, despite the prices resulting from the PJM and MISO auctions. App. 2-3 (Compl. ¶¶ 3-5).

The statutorily prescribed formula for calculating the ZEC price starts with a Base Subsidy Amount,[1] which the statute sets at $16.50 per megawatt hour ("MWh") through 2023, increasing by $1 per MWh annually thereafter through 2027. 20 ILCS 3855/1-75(d-5)(1)(B). The formula continues with a Price Adjustment, which is calculated as the amount by which a market price index exceeds a wholesale price baseline. *Id.* The market price index is calculated based on forward energy prices in PJM and the average of forward PJM and MISO capacity prices. *Id.* The price baseline is $31.40 per MWh, which was based on the historical wholesale prices in PJM and MISO. *Id.*; *see also* App. 30 (Compl. ¶ 30). (The operation of the ZEC pricing formula is explained in the Declaration of David DeRamus, ECF 38-3, App. 43 ("DeRamus Decl.").)

The upshot is that, from now through 2023, the subsidized plants are guaranteed a combined rate of $47.90 per MWh (the $16.50 Base Subsidy Amount plus the $31.40 price baseline) as long as the market-price index is between $31.40 and $47.90 per MWh, regardless of

[1] FEJA refers to this amount as the "Social Cost of Carbon," but because Plaintiffs dispute its derivation and allege it is simply a dollar amount designed to keep Clinton and Quad Cities in business, Plaintiffs refer to it instead as the Base Subsidy Amount.

fluctuations in the wholesale market prices within that collar. To the extent revenue from wholesale auctions fall short of that guaranteed price, the ZEC subsidy makes up the difference. Even if wholesale prices fall below $31.40 per MWh, the plants will receive a subsidy of $16.50. The operation of the ZEC as a collar on wholesale prices can be shown as follows:



App. 59 (DeRamus Decl., fig. 4, ECF 38-3). Illinois has effectively decreed that, until FERC's prices increase to a level deemed sufficient

by the State, the plants receiving ZECs will be paid for wholesale electricity sales at a rate established by the State.

Illinois requires "load serving entities" (LSEs)—local utilities that purchase power at wholesale and sell it at retail to end-use consumers—to make the ZEC subsidy payments to the favored nuclear power plants in addition to the FERC-approved auction rates that they pay for the wholesale power they purchase. LSEs pass the cost of the subsidy on to consumers. App. 5-6, 20-21 (Compl. ¶¶ 10-11, 46).

While FEJA does not expressly mandate that the plants receiving ZEC subsidies bid into the PJM and MISO auctions, it presupposes that they will do so. The whole purpose of FEJA was to shore up the Quad City and Clinton plants' economic performance by guaranteeing them more than they would receive in the PJM and MISO auctions. App. 2, 5, 21, 26 (Compl. ¶¶ 2, 9, 47, 57). The complaint alleges that these nuclear plants have no choice but to bid into those auctions. App. 5, 15-17, 25-26, 29-30, 32 (Compl. ¶¶ 10, 36, 38, 54, 55, 56, 64, 66, 72); Op. 30-32, ECF 107 (recognizing that "in practice," the ZEC program "ha[s] the effect of conditioning payment on clearing the wholesale auction"). Unlike plants whose output can be adjusted quickly in response to fluctuations in demand, nuclear generators (including Quad Cities and Clinton) run continuously at maximum output. App. 15 (Compl. ¶ 36). Because they cannot store their production or sell it elsewhere, Quad Cities and Clinton typically bid into energy auctions as "price takers," selling their entire output at the market clearing price. *Id.* Exelon is legally obligated to bid Quad Cities and Clinton into the PJM and MISO capacity auctions, respectively. *See* App. 102-03 (Brief of Amicus PJM 10-11, ECF 88); *MISO*, 139 F.E.R.C. ¶61,199, at 260 (2012); Op. 30, ECF 107. Moreover, as an Exempt Wholesale Generator ("EWG") under the Public Utility Holding Company Act, 42 U.S.C. §§ 16451, *et seq.*, Clinton must sell its electricity only at wholesale. *Am. Energy Co.*, 91 FERC ¶ 62,049 (2000).

The ZEC program changes not only the prices that result from FERC's auction-based system, but also the market's signal that certain plants are uneconomic and should close. Enabling the two state-favored nuclear plants to remain open increases capacity above economically efficient levels, reducing the value of other, more efficient generators' capacity. App. 12-13, 20-21, 31 (Compl. ¶¶ 30, 46, 66). In turn, the ZEC subsidies' manipulation of the wholesale market will deter investment in and entry of efficient new generators, including zero-carbon renewables like wind and solar. The long-term result will be higher prices to consumers. App. 20-24 (Compl. ¶¶ 46, 49, 50).

C. Illinois' Targeted Subsidies for the Exelon Plants

Although the ZEC program is ostensibly open to any nuclear generator connected to PJM or MISO, 20 ILCS 3855/1-10 (definition of "Zero emission facility"), the only intended and actual recipients of the ZEC subsidies are Quad Cities and Clinton. App. 26 (Compl. ¶ 58). FEJA was enacted in response to Exelon's threat to close those plants. App. 2, 26 (Compl. ¶¶ 2, 57-58, 88).

ZECs are awarded through a "procurement process" run by the Illinois Power Agency and the Illinois Commerce Commission, based on "public interest criteria." App. 26-27 (Compl. ¶ 59) (citing 20 ILCS 3855/1-75(d-5)(1)(C)). Those "criteria" effectively require the agencies to select Clinton and Quad Cities. *Id.* For example, the statute references reports on the harmful effects of closing Clinton and Quad Cities, and it limits the ZEC program to 16% of the State's electricity needs—almost exactly the amount produced by these plants. 20 ILCS 3855/1-75(d-5)(1); App. 87-88 (DeRamus Decl. ¶ 115, ECF 38-3). When he signed

FEJA into law, the Governor said it would protect jobs at Clinton and Quad Cities, and on that same day, long before the "procurement process" even began, Exelon reversed its decision to close the plants and announced new hiring and capital improvements. App. 27-28 (Compl. ¶ 61). On an earnings call two months later, Exelon was so confident of the outcome of the so-called procurement process that it announced it was including ZEC revenue in its financial projections. *Id.*

PROCEEDINGS BELOW

Plaintiffs filed the Complaint on February 14, 2017, and moved for a preliminary injunction on March 31, 2017. App. 1 (Compl., ECF1); Mot., ECF 38. A similar case brought by ratepayers was transferred to Judge Shah. Motions to dismiss were filed both by the State Defendants and intervenor Exelon. ECF Nos. 51, 53. Judge Shah invited FERC to state its views on the issues, but it declined. ECF Nos. 81, 91. The court held the preliminary injunction motion in abeyance while it heard the motions to dismiss. Op. 43, ECF 107.

In its order granting the motions to dismiss, the court first concluded that Plaintiffs lack Article III standing to challenge "the price adjustment feature of the ZEC program," but do have standing to seek a prohibition on "enforcement of the ZEC program altogether." *Id.* 12-14. The court further concluded, however, that under *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), the FPA bars private plaintiffs from bringing "an equitable cause of action to enjoin the ZEC program on the basis of [FPA] preemption." *Id.* 22-23.

The court nevertheless proceeded to the merits. As to field preemption, the court held that the ZEC program did not impinge upon FERC's exclusive authority because, unlike the Maryland program in *Hughes*, the Illinois program did not impose a formal legal requirement on the nuclear plants to participate in and clear the capacity or energy auction in order to receive a subsidy. *Id.* 32. The court also found that Plaintiffs had not stated a claim for conflict preemption because FERC could "address any problem the ZEC program creates with respect to just and reasonable wholesale rates." *Id.* 34.

The court held that Plaintiffs lacked Article III standing to assert their Commerce Clause claims because the injuries are not "traceable to discrimination against the commerce of other states." *Id.* 16-17. The court then rejected the Commerce Clause claims on the merits, reasoning that the State's environmental and public-health rationales, even though allegedly pretextual, outweighed the "alleged harm to out-of-state power generators who will be competing in auctions against subsidized participants." *Id.* 39-40.

Having granted the motions to dismiss, the court denied the preliminary injunction motion because "plaintiffs cannot show a likelihood of success on the merits." *Id.* 43 n.37.

Plaintiffs appealed. Notice, ECF 109.

After the district court's decision in this case, a challenge to New York's ZEC program was dismissed. *Coalition for Competitive Elec. v. Zibelman*, No. 16-cv-08164-VEC, 2017 WL 3172866 (S.D.N.Y. Jul. 25, 2017). That decision has been appealed to the Second Circuit.

SUMMARY OF ARGUMENT

1. Plaintiffs have standing because they are injured by the ZEC program's subsidization of their competitors, which will reduce their revenue. The district court acknowledged as much but wrongly truncated Plaintiffs' standing, allowing Plaintiffs to challenge only the "creation of a minimum subsidy" but not the price adjustment feature that reduces the ZEC subsidy as wholesale market prices increase. FEJA makes clear, however, that the legislature viewed the price

adjustment as inextricably linked to the minimum price in computing the ZEC subsidy. Plaintiffs plausibly prayed for relief (invalidation of the ZEC subsidy as a whole) that would redress their injury.

2. Plaintiffs properly invoked the district court's equity jurisdiction to enjoin enforcement of the ZEC program as preempted by the FPA. Unlike the Medicaid Act construed in *Armstrong*, 135 S. Ct. 1378, the FPA does not evidence an intent to withdraw equity jurisdiction. On the contrary, the FPA expressly confers jurisdiction on district courts over "all suits in equity." 16 U.S.C. § 825p. Neither of the aspects of the Medicaid Act that led the Supreme Court in *Armstrong* to conclude that Congress had foreclosed equity jurisdiction—that the withholding of federal funds was the "sole remedy" provided in the Medicaid Act, and that the specialized statutory standard was not judicially administrable—are present in this case. The FPA provides an equitable remedy, and the determination of whether state law is preempted is within the traditional competence of the judiciary. Plaintiffs do not ask the Court to determine what rate is just and reasonable, but only to enforce FERC's jurisdiction to establish the just and reasonable rate via the auction process.

3. On the merits, *Hughes*, 136 S. Ct. 1288, establishes that Illinois' ZEC program is field preempted because it intrudes into FERC's exclusive jurisdiction over wholesale power transactions. Just as Maryland, in *Hughes*, could not effectively set a rate through a contract for differences that changed the amount wholesale power generators received for their sales, Illinois cannot do so through the expedient of calling its subsidization a "zero emissions credit" that manipulates the rate two favored nuclear plants receive for electricity they sell in the wholesale market. In both cases, the state has effectively set a wholesale rate.

The district court erroneously concluded that *Hughes* does not apply because FEJA, unlike the Maryland statute in *Hughes*, does not formally mandate that ZEC recipients participate in the wholesale auctions. But FERC's exclusive jurisdiction cannot be so easily evaded. Quad Cities and Clinton were already participating in the PJM and MISO auctions, and they have no choice but to continue to do so. There was no need for the statute to require that ZEC-subsidized plants participate in and clear the auctions because the reality of their business compels it. Because, as the district court acknowledged, the

ZEC program "effectively subsidize[s] nuclear power generation and corresponding sales of nuclear power in the wholesale markets" (Op. 1, ECF 107), the ZEC price "effectively replac[es] the auction clearing price" (*id*. 10). As such, the Illinois ZEC program is no different from the Maryland program that the Supreme Court held in *Hughes* was preempted.

4. The district court also erred in dismissing Plaintiffs' conflict preemption claim on the basis that FERC could take steps to accommodate, *i.e*., offset, the deleterious effects of the state scheme. States cannot thwart federal policy by shifting the burden to the federal agency to devise a mechanism that might partially ameliorate those effects.

5. The district court further erred in pretermitting the factually intensive inquiry required to adjudicate a Commerce Clause claim where a statute operates to benefit only two in-state businesses.

6. Because the district court denied a preliminary injunction based on its finding that Plaintiffs failed to state a claim, that decision must be reversed as well.

ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] *de novo* a district court's decision granting a motion to dismiss under Rule 12(b)(6), accepting all well-pleaded factual allegations in the complaint as true and drawing all reasonable inferences in favor of the appellants." *Heng v. Heavner, Beyers & Mihlar, LLC*, 849 F.3d 348, 351 (7th Cir. 2017) (citation omitted). Denial of a preliminary injunction is reviewed for abuse of discretion, but no deference is given where, as here, the "decision… is premised on an error of law." *Burlington N. & Santa Fe Ry. Co. v. Bhd. of Locomotive Eng'rs*, 367 F.3d 675, 678 (7th Cir. 2004).

II. PLAINTIFFS' FEDERAL PREEMPTION CLAIMS ARE JUSTICIABLE.

A. The District Court Erred in Finding Plaintiffs Lacked Article III Standing to Challenge the Price Adjustment Component of the Illinois ZEC Subsidy.

To establish standing, Plaintiffs must show (1) an injury in fact, (2) fairly traceable to defendants' conduct, and (3) that likely would be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs allege that the ZEC program will harm them by depressing auction prices and producing lower revenues. App.

5 (Comp. ¶ 10). These allegations establish an injury in fact traceable to defendants' conduct. Plaintiffs also meet the redressability requirement. They seek "a declaration that the portions of FEJA establishing the ZEC nuclear subsidies are invalid," and "a permanent injunction preventing Defendants from implementing FEJA's ZEC program." App. 39 (Prayer). Because the ZEC program causes the injury Plaintiffs allege, an injunction against its operation would redress that injury.

The district court nevertheless concluded that Plaintiffs had standing to challenge only one part of the ZEC subsidy price (the $16.50 Base Subsidy Amount) but not the interlocking Price Adjustment part. Op. 12-14, ECF 107. The court opined that Plaintiffs' harms are not traceable to the Price Adjustment because "eliminating the price adjustment feature would leave in place a fixed ZEC price that is equal to the [Base Subsidy Amount]," which would create a larger subsidy and thus more harm. *Id.* 12-13. While cast in terms of traceability, the district court's reasoning actually sounds in redressability: the court assumed that the remedy if Plaintiffs prevail would be an order "eliminating" only the Price Adjustment while "leav[ing] in place" the

Base Subsidy Amount. *See id.* 13 ("injury would exist even if the statute were cured of its ties to the wholesale auction prices").

The text of FEJA, however, makes clear that the Base Subsidy Amount and Price Adjustment comprise a unitary subsidy. The price per ZEC is "an amount that equals the [Base Subsidy Amount]…. However*, to ensure that the procurement remains affordable to retail customers in this State if electricity prices increase*, the price in an applicable delivery year shall be reduced below the Base Subsidy Amount by the amount [of the] ('Price Adjustment')…." 20 ILCS 3855/1-75(d-5)(1)(B) (emphasis added). This makes the Price Adjustment integral to the calculation of the subsidy. The legislature capped the overall subsidy in relation to the wholesale price as a means "*to ensure*" that the cost to retail customers "remains affordable."

Plaintiffs plausibly prayed for relief that would redress their injury, namely, invalidation of the ZEC subsidy as a whole. No more is required at this stage to establish standing. The district court's assumption that, if Plaintiffs prevail, the remedy might be to invalidate only the Price Adjustment and not the Base Subsidy Amount constituted a premature consideration of the merits, *i.e.*, the relief the court may grant if Plaintiffs were to prevail. Op. 13, ECF 107. Standing, however, "in no way depends on the merits." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015) (holding that plaintiffs had standing, despite also holding that plaintiffs' claims failed on the merits).

Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton, 422 F.3d 490 (7th Cir. 2005), sets forth the correct approach. In that case, the plaintiff challenged a provision in a compact between an Indian tribe and a state and sought an order severing that provision from the compact. The defendant argued that severance was not an available remedy under the statute; instead, if plaintiff prevailed, the case would be remanded to the agency, which might reapprove the compact. This Court rejected that argument as "confus[ing] standing with the merits." *Id.* at 501. Because plaintiff's position regarding available remedies was not "frivolous," redressability "depends upon the relief requested, not the relief [plaintiff] could prove it was entitled to on the merits. Here, there is a substantial likelihood that the requested relief would alleviate the harm." *Id.* at 502. *See also Wiesmueller v.*

Kosobucki, 571 F.3d 699, 703 (7th Cir. 2009) (standing exists "as long as there is some nonnegligible, nontheoretical, probability of harm that the plaintiff's suit if successful would redress"); 15 Moore's Federal Practice § 101.42 (3d ed. 2015) ("Redressability does not require that the plaintiff actually be entitled to the relief sought; it is enough that the requested relief, if granted, would redress the plaintiff's injury." (citing *Lac Du Flambeau*)).

Here, the "relief requested"—invalidation of the ZEC subsidy as a whole—would redress the harm alleged. Given the integrated nature of the Base Subsidy Amount and the Price Adjustment, that requested relief is hardly "frivolous," and the possibility is much more than "slight" that such relief will be granted.

In fact, the Price Adjustment could not be severed from the Base Subsidy Amount. Under Illinois law, despite a general severability clause, statutory provisions cannot be severed when they "are so mutually 'connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole.'" *People ex rel. Chicago Bar Ass'n v. State Bd. of Elections*, 558 N.E.2d 89, 98-99 (Ill. 1990). In

Lee v. Ret. Bd. of Policemen's Annuity & Benefit Fund of Chicago, 201 N.E.2d 361, 363 (Ill. 1964), a limitation on eligibility for a benefit was held inseverable because eliminating the limitation would "extend the benefits to a much larger group and to greatly increase the burden on taxpayers." As in *Lee*, severing the Price Adjustment would render the ZEC subsidy "essentially different in its effect and operation from what it would be were the whole law valid," and the remedy therefore must be to hold the ZEC subsidy "invalid as a whole." *Id.*; *see also Kakos v. Butler*, 63 N.E.3d 901, 911-12 (Ill. 2016) (unconstitutional "provision reducing the size of the jury" could not be severed because it worked in tandem with provision "raising the amount to be paid per juror" and the legislature did not intend for the "cost of jury trials [to] dramatically increase without any offset").

The principal case on which the district court relied to reject standing, *Johnson v. United States Office of Personnel Management*, 783 F.3d 655 (7th Cir. 2015), is wholly inapposite. *Johnson* is an extremely unusual case in which a Senator and his staff member challenged regulations under the Affordable Care Act that allowed them "to receive more *favorable* treatment than they believe they are entitled to—specifically, a pre-tax healthcare contribution from the government and insurance purchased from a SHOP exchange." *Id.* at 660 (emphasis original). The plaintiffs nevertheless asserted that they were injured by the portion of the regulation that required them to determine which members of the Senator's staff would be covered by the regulation. The Court rejected that theory, holding that any claimed administrative burden did not give the plaintiffs "standing to challenge the aspects of the Rule that they allege are illegal, which are *unrelated* to the imposition of an administrative burden." *Id.* at 661 (emphasis added). That holding has no bearing on this case, where the text of the statute expressly links the Base Subsidy Amount to the Price Adjustment. The *Johnson* court emphasized that the rule before it was "divisible," that it "substantively amend[ed] six separate regulations," and that plaintiffs' "alleged administrative burden is caused by amendments to a different regulation" than the one whose lawfulness they challenged. *Id.* at 663. In contrast, Plaintiffs challenge a single integrated subsidy.

By "analyz[ing] separately two parts of an integrated regulation," the district court impermissibly reframed Plaintiffs' claims and "divorced" the Base Subsidy Amount from the Price Adjustment, contrary to the legislature's intent. *Cf. W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). Plaintiffs have standing to challenge the ZEC subsidy.

B. The District Court Erred in Concluding that Congress Impliedly Foreclosed Private Party Enforcement of the FPA.

The district court also erred in holding that the FPA impliedly forecloses private suits for injunctive relief. Op. 19, ECF 107. This extraordinary ruling, if accepted, would wipe out a whole category of long-established federal jurisdiction under the FPA, and would similarly bar preemption claims to enforce many other federal statutes.

Plaintiffs seek injunctive and declaratory relief to prevent enforcement of a state law on the grounds that it is preempted by the FPA. This is a classic invocation of equity jurisdiction. In *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), the Court said it had "no doubt that federal courts have jurisdiction under [28 U.S.C.] § 1331 to entertain" a suit seeking a declaration that a state order was unlawful, and an injunction prohibiting its enforcement, on the grounds that it was preempted by federal law. *Id.* at 642 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14 (1983)). In *Armstrong*, 135 S. Ct. 1378, the Court reaffirmed its "long recogni[tion]" that where private plaintiffs assert that state action is preempted by federal law, "the court may issue an injunction upon finding the state regulatory actions preempted. … The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Id.* at 1384.

To be sure, as the *Armstrong* Court acknowledged, the "power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Id.* at 1385. But the Court set a high bar for finding an implied limitation on the courts' equity jurisdiction. It concluded that two interrelated features of the Medicaid Act "establish Congress's 'intent to foreclose' equitable relief." *Id.* First, the "sole remedy … for a State's failure to comply with Medicaid's requirements" was withholding of funds by the agency. While this provision "might not, *by itself*, preclude the availability of equitable relief," it did so "when combined with the judicially unadministrable" standard expressed in the statute. *Id.* (emphasis original). Neither of these considerations applies to the FPA.

1. The FPA Confirms, Rather than Forecloses, a Private Remedy.

In stark contrast to the Medicaid Act construed in *Armstrong*, the FPA expressly confers jurisdiction on district courts over "*all suits in equity* and actions at law," 16 U.S.C. § 825p (emphasis added). That express grant of equity jurisdiction confirms the background presumption, reaffirmed in *Armstrong*, that courts possess equity jurisdiction to enjoin state laws that are preempted.

Federal courts have frequently exercised such equity jurisdiction to adjudicate private suits seeking to enjoin state action as preempted by the FPA.[2] When Congress amended the FPA in 1978, 1980, 1986, 1992, 2005, and 2015, it is presumed to have known of that consistent

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

line of cases. Under the prior construction canon, the Court may infer that Congress adopted that interpretation of the FPA. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 590 (2010); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

The district court nevertheless construed the FPA as evidencing an intent to foreclose private enforcement actions for three reasons, each of which is unavailing.

First, the court noted that the FPA authorizes FERC "to bring an action in federal court to enjoin [unjust or unreasonable] acts or practices." Op. 20, ECF 107; *see also Coalition for Competitive Elec. v. Zibelman,* No. 16-CV-8164 (VEC), 2017 WL 3172866, at *5 (S.D.N.Y. July, 25, 2017). But unlike the Medicaid Act, 16 U.S.C. § 825p does not give FERC sole authority to enforce the FPA. Instead, it confers federal jurisdiction over "all" suits in equity, and this language must be interpreted to include to private suits. *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 694 (3d Cir. 1979) ("primary purpose" of statutory provision granting jurisdiction over "'all suits in equity and actions at law … '" is to "provide exclusive federal jurisdiction for suits brought by the [agency] or private parties"). FERC's authority under other provisions of the FPA to institute administrative or judicial proceedings (Op. 20, ECF 107) cannot be read to negate Congress's express grant of district court jurisdiction over "all suits in equity." Rather, both provisions can, and therefore must, be given effect by reading the FPA to allow for parallel private and agency enforcement. *E.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (discussing anti-surplusage canon). That is why these remedies have coexisted in the federal courts for decades. Neither *Armstrong* nor any other case has even remotely suggested that the government's ability to bring an action forecloses a private suit in equity. *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 146 (2d Cir. 2016) (*Armstrong* did not preclude equity jurisdiction under the Airport Noise Control Act because "[t]he fact that Congress conferred such broad enforcement authority on the FAA, and not on private parties, does not imply its intent to bar such parties from invoking federal jurisdiction … to preclude a municipal entity from subjecting them to local laws enacted in violation of federal requirements"). And because nearly every federal statute can be enforced by the federal government, the district court's novel holding would wipe out the long-recognized right of private parties to bring equitable suits to enjoin state action that is preempted by federal law.

Second, the district court pointed to the FPA's establishment of administrative remedies before FERC, and suggested that Plaintiffs' purported "failure to exhaust" those remedies was "problematic." Op. 21, ECF 107. The FPA, however, does not condition its express grant of equity jurisdiction on the exhaustion of administrative remedies. *See Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166, 1173 (9th Cir. 2002) (when a federal statute "does not require that a plaintiff exhaust his administrative remedies before proceeding to federal court," the "plaintiff[] may elect to proceed either before the [agency] or in district court").

As *Armstrong* illustrates, the existence of an alternative agency remedy does not, alone, "preclude the availability of equitable relief"; it was the Medicaid Act's "sole remedy … *combined with*" substantive standards ill-suited to judicial decisionmaking that precluded such relief. 135 S. Ct. at 1385 (emphasis added). The FPA is just one of many federal statutes that allow an aggrieved party to pursue administrative remedies, and yet have been enforced by private parties in injunction suits against preempted state action. *See, e.g.*, *Ass'n of Am. R.R.s v. South Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1096 (9th Cir. 2010) (considering preemption claim under the Interstate Commerce Commission Termination Act of 1995, even though statute also allows administrative remedies); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 463 (8th Cir. 1993) (considering preemption claim under the Hazardous Materials Transportation Act, even though statute provides for administrative remedies).

In attempting to cast FERC's regulatory and remedial authority as exclusive, the district court erroneously relied on *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). That case involved the Indian Gaming Regulatory Act ("IGRA"), which created an integrated right (to good faith negotiation with the State regarding a gaming compact) and remedy (a judicial order to negotiate for 60 days, followed by mediation, followed by a decision by the Secretary of the Interior). After concluding that the remedial provisions were unconstitutional, *id.* at 73, the Court held that a judicially created remedy would "cast[] aside" remedial "limitations" on the substantive right created by the statute.

Id. at 74-76. By contrast with the "quite modest set of sanctions" in IGRA, an equitable action under *Ex Parte Young*, 209 U.S. 123 (1908), would expose the state official "to the full remedial powers of a federal court." *Id*. at 75. Because there would be no reason to follow the "intricate," limited remedial scheme set forth in IGRA if "complete and more immediate relief would be available under *Ex Parte Young*," the Court concluded that such an equitable action was incompatible with the statute. *Id*.

The FPA is completely different. It does not say or imply that it can be enforced only in an administrative proceeding, or otherwise establish specific and limited remedies for violation of its substantive commands. On the contrary, the FPA expressly confers equity jurisdiction on the federal courts, thereby giving both FERC and private parties the prerogative to invoke the jurisdiction of the federal courts to enforce the FPA against states. Whereas IGRA "impose[d] upon the State a liability that is significantly more *limited* than would be the liability imposed upon the state officer under *Ex parte Young*," 517 U.S. at 75-76, the FPA includes no such limitation. It all but uses the phrase *Ex Parte Young*.

Third, the district court erroneously concluded that the Public Utility Regulatory Policies Act ("PURPA") demonstrates that the FPA forecloses private equitable relief. Op. 20, ECF 107; *see also Coalition for Competitive Elec.,* 2017 WL 3172866, at *6. The court invoked the presence of an express private right of action in PUPRA to infer that the absence of a similar express private right of action in the FPA was "intentional." Op. 20, ECF 107. Plaintiffs, however, do not claim that the FPA creates a private right of action. As *Armstrong* explained, the "ability to sue to enjoin unconstitutional actions by state … officers" is a "judge-made remedy" grounded in the courts' equitable power. 135 S. Ct. at 1384. It does not require a general "private right of action." *Id.* As noted, many cases have entertained preemption claims for declaratory and injunctive relief, without regard to the existence of a private right of action under the FPA. *See supra* note 2.

Verizon Maryland is on point. There, the Court found no need to decide whether the Telecommunications Act of 1996 created a private cause of action because the claim that the state's action was preempted fell within traditional federal question jurisdiction to entertain an equitable action. 535 U.S. at 642-43. The Court also rejected the argument that the Act stripped the courts of such jurisdiction by including a private right of action to obtain judicial review of certain types of state decisions (but not the one at issue in that case) for conformity with the standards set forth in the statute. The statute "merely makes *some other* actions by state commissions reviewable in federal court. This is not enough to eliminate jurisdiction under § 1331." *Id*. at 643 (emphasis original). Under *Verizon Maryland*, PURPA's creation, decades after the FPA, of a private right of action to enforce *different* substantive standards, cannot be read to foreclose private enforcement actions.

The district court also interpreted PURPA's requirement that parties exhaust FERC administrative remedies before instituting an action in federal court, 16 U.S.C. § 824a-3(h)(2)(B), to suggest that Plaintiffs' failure to exhaust administrative remedies in this case was "problematic." Op. 21, ECF 107. On the contrary, the inclusion of an express exhaustion requirement in PURPA, contrasted with the absence of such a requirement under the FPA, suggests that exhaustion is *not* required under the FPA. Of course, that assumes PURPA is relevant at all to the interpretation of the scope of equity jurisdiction under the FPA, but "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) (quotations omitted).

2. The FPA Is Judicially Administrable.

In *Armstrong*, the Supreme Court concluded that the Medicaid Act's remedy provision "by itself" might not preclude equitable relief, but did so "when combined with the judicially unadministrable nature of § 30(A)'s text" and the "sheer complexity" of the statute's health-care mandate. 135 S. Ct. at 1385; *see also id.* at 1388 (Breyer, J., concurring) (emphasizing the "broad and nonspecific" nature of the statutory mandate). That mandate directed states to provide for Medicaid rates "'consistent with efficiency, economy, and quality of care,' all the while 'safeguard[ing] against unnecessary utilization of … care and services.'" *Id.* at 1385 (citation omitted). In concluding that Plaintiffs' action turned on a similarly "judicially unadministrable" standard (Op. 22, ECF 107), the district court misconstrued Plaintiffs' claims.

The standards applicable to Plaintiffs' preemption claim are well within the traditional competence of the courts, and a far cry from the health-care mandate in *Armstrong*. Plaintiffs ask the court to determine whether Illinois' ZEC program impinges upon FERC's exclusive regulatory authority over rates and charges "received ... in connection with" wholesale electricity rates and "rules and regulations pertaining to or affecting such rates or charges." 16 U.S.C. § 824d(a); *see also* § 824e(a). The FPA provisions allocate regulatory responsibility between the federal government and the states, an issue familiar to the courts. The statutory text delimiting FERC's power cannot be compared, either in breadth or "sheer complexity," to Section 30(A) of the Medicaid Act. It describes the jurisdictional nexus to wholesale electricity rates using phrases ("in connection with" and "pertaining to or affecting") that courts frequently encounter in statutes. *See FERC v. Elec. Power Supply Ass'n (EPSA)*, 136 S. Ct. at 764, 774 (2016) (construing FERC's "affecting" jurisdiction under the FPA and referencing "similar terms like 'relating to' or 'in connection with'"). Because courts routinely apply these sorts of statutory limitations, they cannot be equated with a "judgment laden standard" requiring determinations about "efficiency, economy, and quality of care." *Armstrong*, 135 S. Ct. at 1385; *accord Friends of East Hampton*, 841

F.3d at 147 (distinguishing *Armstrong* and recognizing equity jurisdiction because a "federal court can evaluate … compliance with [the Airport Noise Control Act] without engaging in [a] 'judgment-laden review…").

The judicial administrability of the FPA's jurisdictional standards is confirmed by the decades of precedent resolving FPA preemption questions, including in *Hughes*, where the Supreme Court applied identical preemption principles, grounded in the same FPA provisions. *See infra* p. 42. Because the Supreme Court had no trouble applying the FPA's provisions establishing FERC power, and because Plaintiffs' action rests upon the same provision, the district court was wrong to conclude that their suit "would require the application of 'judicially unadministrable' standards." Op. 21, ECF 107. Even the district court in *Coalition for Competitive Energy* disagreed with this conclusion. 2017 WL 3172866, at *6-7.

The district court was equally wrong in suggesting that Plaintiffs' suit would require it to apply the "'judgment-laden'" standard for "just and reasonable" rates. The issue in this case is not what rates should be set, but who should set them. Like the plaintiffs in *Hughes*, Plaintiffs are not asking the court to set "just and reasonable" wholesale rates—or to set any rates at all. FERC has already established that the "just and reasonable" rate is the one fixed by wholesale auctions, and Plaintiffs seek merely to enforce that determination. That is the same relief, requiring the same preemption analysis, that the district court would need to weigh if FERC itself challenged Illinois' ZEC program.

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

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

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

FERC's authority to ensure just and reasonable wholesale rates is cast in encompassing terms. That authority is not limited to regulating the specific rates that utilities pay directly "for" wholesale electricity, but extends to "[a]ll" payments that sellers "receive[]" from whatever source "in connection with" wholesale sales, as well as to "all rules and regulations affecting or pertaining to such rates." *Id.* § 824d(a). As the Supreme Court has explained, this statutory text makes crystal clear that "[t]he FPA 'leaves no room either for direct state regulation of the prices of interstate wholesales' or for regulation that 'would indirectly achieve the same result.'" *EPSA*, 136 S. Ct. 760, 780 (2016) (quoting *N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 91 (1963)). Because state programs that provide for additional payments to producers "in connection with" their sale of electricity into the wholesale market "invade[] FERC's regulatory turf," they are preempted by the FPA. *Hughes*, 136 S. Ct. at 1297.

When the rates for wholesale electricity sales in PJM and MISO are established via the FERC-approved auction process, those rates are by definition the rates that FERC has determined to be just and reasonable. *See supra* pp. 4-6. A state's attempt to augment those rates through additional payments to wholesale sellers is necessarily an attempt to change the rate that FERC has approved. That is precisely what Illinois has done. Its ZEC program is therefore preempted.

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

The ZEC program ensures that Exelon's two Illinois nuclear plants receive payments for their wholesale electricity sales that exceed the just and reasonable rates established by the FERC-approved PJM and MISO auctions. These ZEC subsidy payments guarantee that, over a wide range of market clearing prices, the two favored plants receive the rate that Illinois deems appropriate (currently $47.90 per MWh), rather than the FERC-approved rates set at auction. To the extent the FERC-approved auction rates fall below $47.90, the favored producers receive ZEC payments to make up the difference (up to a maximum subsidy of $16.50 per MWh).

In substance, the Illinois ZEC program is identical to the Maryland subsidy program that the Supreme Court unanimously held pre-empted in *Hughes*. Maryland required LSEs to enter into "contract[s] for differences" with a favored power plant. 136 S. Ct. at 1294. If the plant cleared the PJM capacity auction, but the clearing price fell below the state's target price, LSEs paid the difference to the plant; if the PJM price rose above the target, the plant paid the difference to the LSEs. *Id. at* 1295. As long as the plant cleared the capacity auction, it was guaranteed to receive the legislature's target rate. *See id.*

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

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

All of the electricity that these favored producers generate must be bid into and clear the PJM and MISO auctions. The complaint alleges—and it is a well-understood reality—that the nuclear plants eligible for ZEC payments have sold their output into the PJM and MISO auctions (App. 25, 32 (Compl. ¶¶ 54, 72)), and "will continue to bid into the wholesale market auctions" (App. 5 (Compl. ¶ 10)), because they "have no alternative" (App. 15 (Compl. ¶ 36)), such that the ZEC subsidy "will not occur unless the 'winning' nuclear generators sell their energy into the wholesale markets" (App. 30 (Compl. ¶ 64)). *See also* App. 16-17, 25, 31-32 (Compl. ¶¶ 38, 54, 55, 56 66, 72); App. 56 (DeRamus Decl. ¶ 35, ECF 38-3 ("In PJM and MISO, there is simply no practical means for a selected nuclear unit to avoid bidding into, and ultimately clearing, the wholesale energy markets, if it is to receive any ZEC payments.")). The ZEC program is therefore preempted for the same reasons that Maryland's program was preempted. PJM, the

FERC-regulated entity that administers the auctions, agrees: "The proposed ZEC payments here, in their structure, effect, and apparent purpose, appear to be economically equivalent to the contract for differences at issue in *Hughes* and should be treated the same." App. 106 (PJM Amicus Brief 14, ECF 88).

The district court's effort to distinguish *Hughes* is wholly unpersuasive. The district court acknowledged that the ZEC program does exactly what *Hughes* held a State may not do: it "effectively replac[es] the auction clearing price." Op. 10, ECF 107; *see also id.* 1 (ZEC program "effectively subsidize[s] nuclear power generation and corresponding sales of nuclear power *in the wholesale markets*" (emphasis added)). The court nevertheless justified its departure from *Hughes* by seizing on the one ostensible difference between Maryland's program and the ZEC program—the fact that FEJA does not expressly mandate participation in the auctions as a condition of receiving the ZEC. But Illinois had no need to impose such a formal requirement. Unlike the new gas plant Maryland sought to encourage in *Hughes* (App. 105 (PJM Amicus Brief 13, ECF 88)), Illinois' goal was to prop up two existing nuclear power plants, which the Illinois legislature knew were *already* participating, and had no choice but to participate, in the auctions. Indeed, the legislature enacted the ZEC program in direct response to the plants' inability to remain profitable at wholesale auction rates. Nevertheless, for the district court the absence of a formal "express condition" mandating that a producer clear the wholesale auction was sufficient to defeat preemption, even though the ZEC program "in practice (and when combined with other market forces), ha[s] the effect of conditioning payment on clearing the wholesale auction." Op. 32, ECF 107.

The district court's conclusion cannot be reconciled with *Hughes* and other precedents enforcing the FPA's jurisdictional boundaries, or with the Supreme Court's clear direction about how preemption analysis proceeds. The Maryland program at issue in *Hughes* was preempted because it "set[] an interstate wholesale rate" by ensuring that a favored producer would receive additional state-required payments in connection with the wholesale electricity it sold at auction. 136 S. Ct. at 1297. The ZEC program does the exact same thing. It does not matter whether a state sets a wholesale rate through variable subsidies *expressly* conditioned on clearing the auction, or through variable subsidies "that in practice … have the effect of conditioning payment on clearing the wholesale auction." Op. 32, ECF 107. "The FPA 'leaves no room either for direct state regulation of the prices of interstate wholesales' or for regulation that 'would indirectly achieve the same result.'" *EPSA*, 136 S. Ct. at 780 (quoting *N. Nat. Gas Co.*, 372 U.S. at 91); *accord Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 360-64 (1988) (invalidating state attempt to second-guess the reasonableness of interstate wholesale rates); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956-62 (1986) (same).

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

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

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

Similarly, in *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963), the Court held that a state rule requiring an interstate pipeline to purchase gas ratably from producers was preempted because its practical effect was to regulate wholesale gas prices. While the state rule did not expressly regulate wholesale prices, "our inquiry is not at an end because the orders do not deal in terms with prices or volumes of purchases .... The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same result." *Id.* at 90-91 (citations omitted); *see also Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325 (1981) (state causes of action based on railroad's discontinuation of operation are preempted because their practical effect is to sanction the carrier for abandonment, which is within the federal agency's exclusive jurisdiction).[3]

[3] *See also N.J. Realty Title Ins. Co. v. Div. of Tax Appeals,* 338 U.S. 665, 673 (1950) ("Our inquiry is narrowed to whether in practical operation and effect the tax is in part a tax upon federal bonds … regardless of the accounting label employed in describing it."); *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 192-95 (4th Cir. 2007) (preempting law that "effectively mandated" conduct subject to exclusive federal jurisdiction, as it left employers with no other

Seeking a way around this binding authority, the district court hypothesized that the ZEC program *might* differ in practice from the Maryland program preempted in *Hughes* because generators *might* "receive ZECs even if they do not clear the capacity auction and even if they do not participate in the energy auction." (Op. 30.) That speculation was impermissible. The complaint alleges that Clinton and Quad Cities have bid and must continue to bid in the wholesale energy markets administered by PJM and MISO. Because the district court was required to accept those allegations as true (and because they are true), "what the state law in fact does," *Wos*, 568 U.S. at 637, is no different from what the law preempted in *Hughes* did.

"rational choice" but to follow a certain course); *S.D. Mining Ass'n v. Lawrence Cty.*, 155 F.3d 1005, 1011 (8th Cir. 1998) (ordinance that prohibited the "only practical way" of mining in an area deemed a "de facto ban" on all mining in that area and therefore held preempted); *Blue Circle Cement, Inc. v. Bd. of Cty. Comm'rs*, 27 F.3d 1499, 1508 (10th Cir. 1994) (local law imposing "explicit or de facto" ban on federally encouraged activity can be preempted). The district court distinguished these cases on the ground that they involve state action that effectively prohibited conduct that federal law authorized. Op. 29 n.28, ECF 107. But the principle that courts look to the practical effect of a state law in evaluating preemption applies in all preemption cases.

The Clinton and Quad Cities plants are not only practically required to bid into the wholesale markets; they are legally mandated to do so, both because Exelon is a member of PJM and MISO, whose FERC tariffs require such participation (App. 102-03 (PJM Amicus Brief 10-11, ECF 88)), and because Clinton is an EWG (*see* App. 25 (Compl. ¶ 56)). The district court nevertheless speculated that "Clinton could forego its EWG status and seek [Illinois Commerce Commission] approval to sell its energy at retail…." Op. 30 n.30, ECF 107. In addition to ignoring the allegations in the complaint (*see* App.15-16 (Compl. ¶ 36)), the district court cited no case supporting the proposition that a state regulation escapes preemption if the state *might* subsequently approve a change that would remove regulated entities from the federal sphere. The rule is the opposite: if a state regulation "presents the 'prospect of interference with the federal regulatory power,' then the state law may be pre-empted even though 'collision between the state and federal regulation may not be an inevitable consequence.'" *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (quoting *N. Nat. Gas Co.*, 372 U.S. at 91-92).

The district court's errors stem in significant part from its misreading of the Supreme Court's *EPSA* decision. *EPSA* did not give states a green light to "effectively" set wholesale rates as long as they avoided doing so explicitly or "nominally." Op. 27, ECF 107. The *EPSA* majority and dissent sparred over whether a FERC regulation that had an effect on *opportunity costs* of retail transactions would "effectively" set retail rates. *See EPSA*, 136 S. Ct. at 777. The majority concluded that "altering consumers' incentives to purchase that product" by changing the "cost of a foregone economic opportunity" is not the same as setting a rate for the product, *id.* at 777-78, and the dissent disagreed, *id.* at 784. But every member of the Court agreed that a regulation sets retail rates if it "establish[es] the amount of money a consumer will hand over in exchange for power," *id.* at 777—whether it does so "nominally," "effectively," "expressly," or in any other manner. *See id.*; *id. at* 786-87 (Scalia, J., dissenting) (citing *Black's Law Dictionary* for the idea that "the very definition of price" is "[t]he amount of money or other consideration asked for or given in exchange for something else" (internal quotations omitted)). The ZEC program establishes a target amount of money that certain nuclear plants will receive in connection with their wholesale electricity sales, and thus sets a rate under the definitions of both the *EPSA* majority and dissent. Properly understood, *EPSA* refutes the district court's analysis.

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

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

In particular, Plaintiffs do not allege that state Renewable Energy Credit ("REC") programs are preempted. Typical REC programs allow qualified renewable energy sources, such as solar, wind, or biomass, to earn RECs for each unit of output. App. 23-24 (Compl. ¶ 51). States may require LSEs to acquire RECs or make an alternative compliance payment. *Id.* The purpose of RECs is to induce new entry by renewable generators, not to bail out existing generators that have failed in a competitive market they chose to enter.

For purposes of the preemption analysis in this case, the fundamental difference between ZECs and RECs is how the prices are determined. Whereas the ZEC subsidy is tethered to wholesale prices, REC prices are essentially determined by supply and demand of renewable energy: as LSEs seek to buy more RECs, the price goes up,[4] as does the incentive for producers to generate additional clean energy. App. 24 (Compl. ¶ 52). As such, the price of RECs can rise or fall based on forces independent of wholesale production (namely, the supply of and demand for renewable energy). Because RECs do not set wholesale rates as the ZEC program does, they lack the ZEC program's "fatal defect." *Hughes*, 136 S. Ct. at 1299. *See also* App. 102 (PJM Amicus Brief 10 n.4, ECF 88) (whereas ZEC payments "are targeted to

[4] Illinois caps the price of RECs and the aggregate retail rate impact of RECs. 20 ILCS 3855/1-75(c)(1)(E).

supplementing wholesale market revenues," other subsidies for renewables "are both determined and awarded in a manner entirely separate from the wholesale market").

Nonetheless, the district court assumed that "RECs are similar to ZECs," in that they both purport to provide compensation for the environmental attributes of certain generation sources. Op. 32, ECF 107. But the field preemption analysis does not turn on whether Illinois' true goal was environmental. *But see* App. 26 (Compl. ¶ 58) (alleging that true purpose was to protect jobs). The flaw in ZECs, which does not apply to RECs, is that they are tethered to the wholesale market. "States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates." *Hughes*, 136 S. Ct. at 1298.

In a pre-*Hughes* decision, *WSPP*, 139 FERC ¶ 61,061 (2012), FERC addressed a REC program that had no connection to an organized market with energy and capacity auctions, let alone one tethered to the wholesale price set by such auctions. FERC explained that "based on available information," RECs were outside its jurisdiction if they did not provide for payments "in connection with" the sale of electricity at wholesale. *Id.* ¶ 24. FERC was careful to limit its holding to the features of the particular REC program before it, stating that "although a transaction may not directly involve the transmission or sale of electric energy, the transaction could still fall under the Commission's jurisdiction because it is 'in connection with' or 'affects' jurisdictional rates or charges." *Id.* ¶ 22. FERC noted that it would have jurisdiction over programs "that directly affect the rate or are closely related to the rate." *Id.* (quoting *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004)). Contrary to the district court's analysis (Op. 32-33, ECF 107), the identification of a renewable attribute separate from the energy commodity was not alone sufficient to avoid FERC's jurisdiction; FERC emphasized the lack of a connection between the REC program at issue in *WSPP* and wholesale rates—the polar opposite of the ZEC program.

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

Even if it does not intrude on a preempted federal field, a state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Oneok, Inc. v,* *Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) (internal quotation marks omitted), or if it "interferes with the methods by which the federal statute was designed to reach this goal," *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

The method FERC has chosen to achieve the statutory goal of just and reasonable rates for wholesale power transactions is to rely on auctions administered by PJM and MISO. In its review and approval of PJM and MISO rules, FERC seeks to balance competing interests. Rates should be high enough to encourage development of new generation when demand exceeds supply or when power can be generated more efficiently. Rates should be low enough to encourage the retirement of inefficient facilities if more efficient generators can meet expected demand; rates should be affordable based on current needs but also sufficient to encourage investment to satisfy projected future needs; rates should encourage innovation without discouraging investment by undermining settled expectations; and so forth. *See, e.g.*, *Hughes*, 136 S. Ct. at 1293; *PJM Interconnection, LLC*, 119 FERC ¶ 61,318, ¶ 2 (2007).

The intended and actual effect of Illinois' ZEC program is to ensure that Exelon's Illinois nuclear plants will be compensated for their wholesale electricity sales at rates above what FERC has determined they should receive. *See Aux Sable Liquid Prods. v. Murphy*, 526 F.3d 1028, 1037 (7th Cir. 2008) (conflict preemption analysis considers not only the text of the law, but also whether conflict will arise in practice). Illinois has done so to ensure that these two plants remain in operation despite their inability to compete at FERC-approved rates. In this way, the ZEC program directly interferes with the policy objectives reflected in FERC's market-based ratesetting. *See PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 479 (4th Cir. 2014) ("[T]he [contracts for differences] are structured to actually set the price received at wholesale. They therefore directly conflict with the auction rates approved by FERC."), *affirmed on other grounds sub. nom. Hughes*, 136 S. Ct. 1288; *Pub. Util. Dist. No. 1 v. IDACORP Inc.*, 379 F.3d 641, 650 (9th Cir. 2004) ("[B]y asking the court to set a fair price, Grays Harbor is invoking a state rule (specifically, contract law) that would interfere with the method by which the federal statute was designed to reach it goals (specifically, FERC regulation of wholesale electricity rates)."); App. 93 (PJM Amicus Brief 1, ECF 88 (FEJA "will substantially harm the wholesale electricity markets" and "will frustrate Congress' intent to promote competition")); App. 99 (*id.* 7 ("[g]enerators that receive subsidies to prevent them from retiring in response to the price signals coming from the PJM market represent uneconomic generation whose continued participation distorts PJM's market outcomes by suppressing prices")).

The distortive effects of the ZEC program radiate through the FERC-approved auction process in multiple ways. Because the favored plants are guaranteed a rate of $47.90 per MWh across a wide range of market-clearing prices, Clinton and Quad Cities will bid all of their output into the MISO and PJM energy auctions for the next decade. Further, because the ZEC subsidy provides sufficient additional revenue to keep the plants in the black, Clinton and Quad Cities have every incentive to bid into the capacity auctions at a price they will clear, even zero, taking the market clearing price of the capacity auctions. The ZEC not only insulates these generators from FERC's ratesetting (which should "encourage[] retirement of existing high-cost generators," *Hughes*, 136 S. Ct. at 1293), but also distorts price signals to all other plants in the market by artificially increasing supply and depressing the market rates. That, in turn, discourages investment in more efficient generation and may lead to the retirement of plants that, under FERC's approved ratesetting, would otherwise remain in the market. *See id.; see also Nazarian*, 753 F.3d at 478-79 (finding that state ratesetting "has the potential to seriously distort the PJM auction's price signals, thus 'interfer[ing] with the method by which the federal statute was designed to reach its goals'" (quoting *Pub. Util. Dist.*, 379 F.3d at 650)).

The district court brushed aside this conflict on the theory that "FERC can address any problem the ZEC program creates with respect to just and reasonable rates," *id. at* 34-35. But that gets matters exactly backwards. Illinois "cannot regulate in a domain Congress assigned to FERC and then require FERC to accommodate [the State's] intrusion." *Hughes*, 136 S. Ct. at 1298 n. 11. *See also Maryland v. Louisiana*, 451 U.S. 725, 751 (1981) ("FERC need not adjust its rulings to accommodate the [state program]. To the contrary, the State may not trespass on the authority of the federal agency."); *accord Nazarian*, 753 F.3d at 479 ("The fact that FERC was forced to mitigate the

Generation Order's distorting effects using the MOPR, however, tends to confirm rather than refute the existence of a conflict."). The ZEC program establishes an alternative rate that conflicts with the market-based rates FERC has already established; even if FERC could partially mitigate that conflict—and the district court did not explain how it could actually do so—FERC is not required to "accommodate" this state-imposed ratesetting.

This does not mean that Illinois lacks authority to take any measures that may have an effect on the price signals that the FERC-approved auction rates provide to the market. But Illinois cannot distort the price signals that the auctions send by ensuring that certain favored produces will be guaranteed to receive a state-approved rate for wholesale electricity sales, rather than the FERC-approved rate. That is the necessary consequence of the FPA's allocation of authority between the federal government and the States. Because the ZEC program interferes in a direct and substantial way with FERC's regulation of the wholesale market, it is preempted.

IV. PLAINTIFFS HAVE STATED A CLAIM FOR VIOLATION OF THE COMMERCE CLAUSE.

The Commerce Clause protects Plaintiffs from the "competitive injury" caused by "the 'inability to compete on an equal footing'" with the subsidized Illinois plants. *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 594-95 (7th Cir. 1995). The ZEC subsidy was enacted for the purpose of allowing those Illinois plants to prevail in interstate competition against Plaintiffs, thereby preserving local jobs. This protectionism violates the Commerce Clause.

A. Plaintiffs Have Standing to Raise Commerce Clause Claims.

Plaintiffs have standing to raise their Commerce Clause claims because ZEC subsidies inflict a competitive injury upon them in the interstate market for wholesale energy, and the ZEC program was enacted to benefit local plants. The district court repeated the same severability error it made with respect to the Price Adjustment when it concluded that Plaintiffs lack standing because "the injury to the generator plaintiffs is from the ZEC subsidy, not the identity of the ZEC recipient" and that the subsidy "would continue to exist even if the legislation were cured of the alleged discrimination." Op. 16, 17, ECF 107 (citation and internal quotations omitted).

FEJA injures Plaintiffs because it allows the Exelon plants to continue dumping their energy, at what would otherwise be an insupportable loss, by paying a subsidy for every MWh the plants generate. Absent the subsidy, the plants would close. Whether Plaintiffs' "injuries would continue to exist even if the legislation were cured of the alleged discrimination" depends on the remedy selected, and it is premature to decide that question now or to assume that the remedy would not include invalidation of the ZEC subsidy. *See supra* pp. 21-23.

Plaintiffs have standing because it cannot be said with certainty that Illinois would provide the ZEC subsidy without directing it to the in-state Exelon plants. *Wiesmueller*, 571 F.3d at 703. As the complaint and FEJA's history—indeed, its very name: "Future Energy *Jobs* Act"—establish, directing the subsidy to those plants, and thereby protecting their local "good paying jobs," was the whole point. App. 27-28 (Compl. ¶ 61 & nn.5-8). There is far more than a "nonnegligible" and "nontheoretical" chance, *Wiesmueller*, 571 F.3d at 703, that Illinois would have forgone the subsidy altogether rather than compelling Illinois electricity consumers to provide a $3 billion subsidy to out-of-state generators, propping up out-of-state jobs rather than local ones. Moreover, under Illinois law, "if a proviso operates to limit the scope of the act in such a manner that by striking out the proviso the remainder of the statute would have a broader scope either as to subject or territory, then the whole of the act is invalid because such an extended operation would not be in accordance with the legislative intent." *Commercial Nat'l Bank of Chicago v. City of Chicago*, 432 N.E.2d 227, 241 (Ill. 1982). Giving the ZEC subsidy "broader scope as to subject [and] territory"—by allowing out-of-state plants to benefit—"would not be in accordance with the legislative intent." *Id.*

Because striking down the protectionist aspect of the ZEC subsidy would end the subsidy altogether, Plaintiffs have standing.

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

Courts apply "a two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79 (1986). Under the first "tier," a state law is *per se* invalid if it discriminates against interstate commerce on its face, *see, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997); has the "practical effect" of favoring in-state economic businesses, *see, e.g., Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1277-78 (7th Cir. 1992); or evinces a protectionist purpose, *see, e.g., Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984). Under the second "tier," even a state law that survives the first tier because it "is neutral on its face, has only indirect or incidental effects on interstate commerce, and regulates evenhandedly," *Gov't Suppliers*, 975 F.2d at 1277, is invalid if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The ZEC subsidy fails both tiers of Commerce Clause scrutiny.

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

MISO and PJM are hubs of interstate commerce; they operate integrated markets covering 13 States (PJM) and 15 States (MISO). App. 12-13 (Compl. ¶ 30). Plaintiffs compete directly with the in-state Exelon plants in this interstate market. App. 15-16 (Compl. ¶ 36). These plants, however, have failed in the interstate wholesale power markets administered by MISO and PJM, leading Exelon to close the plants unless "the State enacted 'adequate legislation' to provide billions of dollars in ratepayer-funded subsidies." *See* App. 25-26 (Compl. ¶¶ 54-55, 57). Illinois enacted FEJA to provide those subsidies. App. 26 (Compl. ¶ 58). Governor Rauner signed the bill at an Exelon plant, flanked by Exelon executives, promising to protect the "Clinton and Quad Cities' plants" and the jobs they provide. App. 27-28 (Compl. ¶ 61 & nn.5-8).

FEJA's market manipulation to prop up local businesses presents a textbook Commerce Clause violation. For instance, the town in *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383 (1994), determined "that special financing [was] necessary to ensure the long-term survival" of a local solid waste transfer station. Like Illinois, it decided to "employ discriminatory regulation to give that project an advantage over rival businesses." *Id.* at 394. The Supreme Court held this was impermissible because the station operated on "the open market to earn revenues" and though the regulation did not "in explicit terms seek to regulate interstate commerce, it [did] so nonetheless by its practical effect and design." *Id.* Likewise, in *Alliance for Clean Coal*, Illinois sought to prop up its local coal industry by encouraging the use of scrubbers to allow the continued burning of Illinois coal. This ran afoul of the Commerce Clause by "neutralizing the advantage possessed by lower cost out of state producers." 44 F.3d at 595. This Court recognized that "even ingenious discrimination is forbidden by the Commerce Clause." *Id.* at 596 (quoting *West Lynn Creamery*, 512 U.S. 186). Plaintiffs similarly allege that the ZEC program discriminates on its face, and in effect and purpose, by deliberately propping up the in-state Exelon plants via a distortion of the interstate energy market. App. 26-27 (Compl. ¶¶ 58-59).

While FEJA does not expressly state that the ZEC subsidies will be awarded only to the in-state Exelon plants, Plaintiffs have plausibly alleged that this outcome is foreordained, and that the "procurement process" is a "sham" because it can only come out in favor of the Exelon plants. App. 26-28 (Compl. ¶¶ 59-61). FEJA directs officials to give weight to "the premature closure of existing nuclear power plants in Illinois."[5] H.R. 1146, 98th Gen. Assemb., Reg. Sess. (Ill. 2014); *see* Act

[5] The district court observed that the statute also directs State officials to consult other reports and apparently credited Exelon's assertion that some of them concern non-Illinois plants. Op. 37 n.34, ECF 107. This improperly drew inferences against Plaintiffs, and neither Exelon nor the court even identified the reports. Resolution 1146 reports are the only reports specifically identified in the statute. *See* 20 ILCS 3855/1-75(d-5)(1)(C).

of Dec. 7, 2016, Sec. 1.5, 2016 Ill. Legis. Serv. P.A. 99-906 (S.B. 2814); 20 ILCS 3855/1-75(d-5)(1)(C) (both referencing H.R. 1146). The complaint alleges that FEJA, by design, protects the in-state plants that could no longer fairly compete in the wholesale market. App. 26-28 (Compl. ¶¶ 58-61). There is no doubt as to the outcome of the "procurement process": Exelon *promptly added ZEC subsidy revenues to its projected income before any selection took place*. App. 28 (Compl. ¶ 61).

The district court nevertheless found that the "statute gives neutral, non-discriminatory standards to the agencies," and was unwilling to accept that "the agencies will deliberately flout the ZEC bid-selection process." Op. 37, ECF 107. But as even the district court acknowledged, the complaint alleges that "the scales are tipped in favor of Clinton and Quad Cities." *Id*. 36-37. Plaintiffs do not need to plead that the agencies will discriminate against out-of-state bids, because the law itself already accomplishes that discrimination with its "tipped" scales.

In arriving at the contrary conclusion, the district court disregarded the allegations in the complaint and substituted its own implausible surmise as to what the facts would show. Op. 39, ECF 107 ("*Notwithstanding the allegations of the complaint*, the circumstances surrounding the enactment of the statute do not warrant an inference of discrimination.") (emphasis added). The court speculated that perhaps the bill's environmental standards "would justify a decision to select only Illinois generators." Op. 36, ECF 107. But the standards themselves were designed to ensure Exelon would win the bids.

Because the ZEC subsidy on its face, and in effect, interferes with interstate commerce by subsidizing the local Exelon plants in their competition against out-of-state generators in the MISO and PJM auction, and because tilting the playing field in favor of the local Exelon plants was the motive of the subsidy, the law triggers all three concerns that apply at the first "tier" of Commerce Clause scrutiny. *See supra* page 63. For that reason, the subsidy is *per se* a Commerce Clause violation, and there is no need to weigh the putative local interests.

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

Even if there were some legitimate interest for a measure intended to protect two in-state facilities, the complaint pleads that the harm to interstate competition in the wholesale energy market outweighs that interest. For that reason, the subsidy would fall at the second tier just as it must at the first. The complaint alleges that the ZEC program imposes market-distorting burdens that will drive out, and deter entry of, more cost-efficient, environmentally friendly out-of-state generators. App. 20-23 (Compl. ¶¶ 45-50). Further, any reduction of carbon emissions can be achieved more effectively by non-discriminatory means. App. 7, 37-38 (Compl. ¶¶ 14, 89). At a minimum, determining the balance of benefits and burdens requires an evidentiary record that precludes judgment on the pleadings, for such balancing "may be impossible to apply without some factual inquiries." *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995).

To escape those factual inquiries, the district court misapplied *Pike*. The court asserted that, "*[a]s a matter of law*, the state's legitimate interests include not only environmental concerns, but also the right to participate in or create a market, and the right to encourage power generation of its choosing." Op. 40, ECF 107 (emphasis added) (citations omitted). Whether those interests are legitimate may be a legal question, but whether they are pretextual is a factual question, and Plaintiffs have plausibly pleaded that this "state law purporting to promote environmental purposes is in reality 'simple economic protectionism.'" *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 471 (1981) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

Next, the district court asserted that while, "ordinarily, the fact-dependent balancing required to assess a dormant commerce clause challenge would preclude dismissal under Rule 12(b)(6)," that was not so here because "where the complaints allege a state-created commodity that only indirectly burdens other generators' ability to compete in wholesale auctions, they fail to state a dormant commerce clause claim." Op. 40, ECF 107. But the complaint alleges—and FEJA's provisions establish—a market manipulation in favor of the local Exelon plants that directly burdens Plaintiffs' ability to compete by allowing the Exelon plants to dump their power in the wholesale electricity market. Unlike the direct state market *participation* in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 (1976), Illinois' subsidy to Exelon "cannot plausibly be analogized to the activity of a private purchaser." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). Illinois is not paying Exelon to provide energy to the state government; it is subsidizing Exelon's sales to third-parties in transactions not involving the state. That is like the market *manipulation* found offensive in *C & A Carbone* and *Alliance for Clean Coal*.

At the motion to dismiss stage, the question is not whether Illinois ultimately will be able to show that it had a legitimate, non-protectionist motive for subsidizing the Exelon plants that predominates over the harm to the interstate market in wholesale energy. Instead, the question is whether, *given the facts alleged in the complaint*, Plaintiffs are entitled to an opportunity to prove the contrary. Plaintiffs should be given that opportunity in light of the facts pled in the complaint showing invidious protectionism, supported by FEJA's text and history.

V. PLAINTIFFS ARE ENTITLED TO A HEARING ON THEIR MOTION FOR A PRELIMINARY INJUNCTION.

After staying briefing on Plaintiffs' preliminary injunction motion and dismissing Plaintiffs' Complaint, the court denied the preliminary injunction motion without a hearing because "plaintiffs cannot show a likelihood of success on the merits." Op. 43 n.37, ECF 107. As noted, however, the Complaint states valid preemption and Commerce Clause causes of action. The expert declaration of Dr. DeRamus, filed with the preliminary injunction motion, provides strong evidentiary support for the Complaint's allegations.

The denial of the preliminary injunction motion should be reversed.

CONCLUSION

The decision granting defendants' motion to dismiss should be reversed and the case remanded with instructions to consider Plaintiffs' motion for preliminary injunction.

Dated: August 28, 2017 Respectfully submitted,

By: */s/ Donald B. Verrilli, Jr.*
Donald B. Verrilli, Jr.
Henry Weissmann
Fred A. Rowley, Jr.
Mark Yohalem
MUNGER, TOLLES &
OLSON LLP

Jonathan D. Schiller
Davia A Barnett
Stuart H. Singer
Pascual Oliu
BOIES, SCHILLER
FLEXNER LLP

Leonard A. Gail
Jonathan S. Massey
Suyash Agrawal
Paul J. Berks
MASEY & GAIL LLP

Attorneys for Plaintiffs-Appellants

Certificate of Compliance

1. This brief complies with the type-volume limit of Circuit Rule 32(c) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 13,947 words, as determined by Microsoft Word 2010.

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

Circuit Rule 30(d) Statement

I certify that all materials required by Circuit Rule 30(a) and 30(b) are attached to the brief or included in a separately bound Appendix.

Certificate of Service

I HEREBY CERTIFY that on August 28, 2017, I caused the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

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