No. ______

IN THE
Supreme Court of the United States

ELECTRIC POWER SUPPLY ASSOCIATION, NRG ENERGY, INC., AND CALPINE CORP.,

Petitioners,

v.

ANTHONY STAR, in his official capacity as Director of the Illinois Power Agency, and BRIEN J. SHEAHAN, JOHN R. ROSALES, SADZI MARTHA OLIVA, D. ETHAN KIMBREL, and ANASTASIA PALIVOS, in their official capacities as Commissioners of the Illinois Commerce Commission, and EXELON GENERATION COMPANY, LLC,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petition for Writ of Certiorari

HENRY WEISSMANN
MARK R. YOHALEM
STEPHANIE G. HERRERA
MUNGER, TOLLES & OLSON LLP
350 South Grand, 50th Floor
Los Angeles, CA 90071
(213) 683-9150
Henry.Weissmann@mto.com
Mark.Yohalem@mto.com
Stephanie.Herrera@mto.com

DONALD B. VERRILLI, JR.
Counsel of Record
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, DC 20004
(202) 220-1107
Donald.Verrilli@mto.com

(*Additional Counsel Listed on Inside Cover*)

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

STUART H. SINGER
BOIES SCHILLER FLEXNER LLP
401 East Las Olas Boulevard, Suite 120
Fort Lauderdale, Florida 33301
(954) 356-0011

QUESTION PRESENTED

The Federal Power Act (FPA), 16 U.S.C. §§ 791a *et seq.*, vests exclusive federal jurisdiction over "[a]ll rates and charges … received by any public utility for or in connection with the transmission or sale of electric energy" at wholesale in the Federal Energy Regulatory Commission (FERC). *Id.* § 824d(a). FERC is charged with ensuring that wholesale rates are "just and reasonable," *id.*, and has determined, as a matter of federal policy, that vibrant competition in the nation's wholesale electricity markets is the best mechanism for ensuring just and reasonable rates. To achieve this goal, FERC has authorized and oversees competitive, regional market-based auctions for the purchase of wholesale electricity, and has deemed the free market prices set through those auctions just and reasonable. This Court held in *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016), that federal jurisdiction preempts state subsidies that have the effect of "guarantee[ing]" that a wholesale generator will receive "a certain rate" other than the auction rate in connection with wholesale electricity sales. *Id.* at 1298–99.

The question presented is whether the FPA preempts only state subsidies that explicitly require a wholesale generator to sell its output in FERC-approved auctions, or whether the FPA also preempts state subsidies that lack such an express requirement but that, by design, subsidize only generators that sell their entire output via such auctions, thereby achieving the same effect.

PARTIES TO THE PROCEEDING BELOW

Petitioners here, Plaintiffs-Appellants below, are Electric Power Supply Association, NRG Energy, Inc., and Calpine Corp.

Respondents here, Plaintiffs-Appellants below, are Dynegy Inc. and Eastern Generation, LLC.

Respondents here, Defendants-Appellees below, are Anthony Star, In His Official Capacity As Director Of The Illinois Power Agency, and Brien J. Sheahan, John R. Rosales, Sadzi Martha Oliva, D. Ethan Kimbrel, and Anastasia Palivos, In Their Official Capacities As Commissioners of the Illinois Commerce Commission (and previously Miguel Delvalle, and Sherina Maye Edwards, In Their Official Capacities). D. Ethan Kimbrel and Anastasia Palivos became parties to the case In Their Official Capacities when they attained their current offices.

Also Respondent here, but Intervenor-Defendant-Appellee below, is Exelon Generation Company, LLC.

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PETITION FOR A WRIT OF CERTIORARI

Electric Power Supply Association, NRG Energy, Inc., and Calpine Corp. (Petitioners), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is reported at 904 F.3d 518. The order of the court of appeals denying rehearing is available at Pet. App. 56a–57a. The opinion of the district court is unpublished, but available at Pet. App. 12a–55a.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2018. A timely petition for rehearing and rehearing en banc was filed on September 27, 2018, and denied on October 9, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI, clause 2 of the United States Constitution, provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land; … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 824(b)(1) of the FPA, 16 U.S.C. § 824(b)(1), provides in pertinent part:

> It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to … that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

Section 824d(a) of the FPA, 16 U.S.C. § 824d(a), provides in pertinent part:

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

STATEMENT OF THE CASE

The Federal Power Act invests FERC with broad authority over "the sale of electric energy at wholesale in interstate commerce," including exclusive jurisdiction to determine that wholesale rates and charges are "just and reasonable." 16 U.S.C. §§ 824(b)(1), 824d(a), 824e(a). In *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016), this Court held that a State may not "second-guess" wholesale rates that FERC has deemed reasonable, and may not establish a subsidy scheme that compensates favored generators for wholesale sales at higher levels than FERC deems appropriate. *Id.* at 1298–99.

That is precisely what Illinois has done here. Concerned that certain inefficient nuclear plants could not operate profitably at the wholesale rates approved by FERC, Illinois established "zero emissions credits" (ZECs)—a multibillion dollar subsidy scheme designed to augment wholesale rates for those unprofitable plants. In a triumph of form over substance, the court of appeals nonetheless held that Illinois' program is not preempted because it does not explicitly condition that subsidy on the favored plants selling their output into the wholesale market. In so doing, the court brushed aside the complaint's well-pled allegations that the subsidized plants have sold and necessarily must sell all of their output at wholesale, rendering unnecessary an explicit statutory requirement to do so.

In *Hughes*, this Court invalidated a Maryland subsidy scheme that "guarantee[d]" a particular generator would receive compensation for its wholesale sales at levels the State thought appropriate, rather than at the market-based rate set through FERC-approved wholesale auctions. 136 S. Ct. at 1298–1299. Maryland had justified its scheme as an exercise of its "traditional authority over … in-state generation"—i.e., promoting the development of additional generation. *Id*. at 1299. And Maryland's scheme did not prescribe or enforce a wholesale rate directly. *Id.* at 1297 & n.9. But the Court held that the State had impermissibly invaded FERC's exclusive sphere of authority because Maryland's scheme tethered the subsidy to the movement of wholesale auction rates to ensure that the favored generator would receive overall revenues that the State deemed necessary for the plant to operate, thereby "disregarding interstate wholesale rates FERC has deemed just and reasonable." *Id*. at 1299.

Like Maryland, Illinois devised a subsidy program to ensure the profitable operation of in-state nuclear plants. Like Maryland, Illinois provides a per-megawatt-hour subsidy payment that fluctuates in response to movements in wholesale auction rates. And, like Maryland's subsidy, the Illinois subsidy takes the form of a side payment from utilities to subsidized generators, rather than a direct prescription of the wholesale rate.

Despite these close parallels to the preempted Maryland scheme, the court of appeals nonetheless held that Illinois has permissibly toed the line this Court drew in *Hughes* because the ZEC program does not explicitly require the favored plants to bid their electricity into, and clear, the FERC-authorized wholesale auctions. Instead, Illinois provides a subsidy payment for each unit of electricity generated. Pet. App. 6a. But to reach that result the court of appeals had to ignore a critical fact: The favored plants do (and, as a practical matter, must) sell the electricity they generate into the wholesale markets, irrespective of any regulatory compulsion. Had Illinois included an express "bid and clear" requirement, it would not have changed the operation of the subsidy scheme one iota. With or without that requirement, Illinois provides a per-megawatt-hour subsidy for the electricity these plants sell at wholesale. In reality, the Illinois scheme therefore operates in a manner indistinguishable from the

Maryland scheme preempted in *Hughes*. The court of appeals concluded otherwise only because it misunderstood this Court's direction in *Hughes* as to when States cross the line and invade FERC's jurisdiction.

By narrowly cabining the scope of exclusive federal authority over wholesale rates, the court of appeals (along with the Second Circuit in a case involving a similar New York subsidy program, *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41 (2d Cir. 2018) (*Zibelman*)), has given States a green light to enact all manner of subsidies to boost the wholesale revenues of favored in-state producers. Not surprisingly, other States are already following in the footsteps of Illinois and New York. See pp. 26–27 & fn. 7 *infra*. Unless this Court intervenes to clarify the meaning of its decision in *Hughes*, these subsidy programs will reorder the allocation of regulatory authority between the federal government and the States, and will do so in a manner that threatens FERC's efficient-market approach both to energy pricing and to competitive entry and exit by generating facilities. At the very least, this sharp departure from settled law and regulatory practice should not occur without further consideration by this Court. Plenary review is manifestly warranted.

A. The Federal Regulatory Regime

The FPA allocates regulatory authority over the market for electricity between the federal government and the States. FERC exercises broad exclusive authority over "the sale of electric energy at wholesale in interstate commerce," including exclusive jurisdiction to regulate "rates and charges

… received … for or in connection with” interstate wholesale electricity sales, and specifically to determine that particular wholesale rates are just and reasonable. 16 U.S.C. §§ 824(b)(1), 824d(a), 824e(a). The FPA reserves to States the authority to regulate “any other sale” of electricity (principally retail sales) as well as in-state “facilities used for the generation of electric energy.” 16 U.S.C. § 824(b)(1).

The respective roles of the federal government and the States in regulating electric energy markets have shifted over time, as the production and sale of electricity has become an increasingly interstate enterprise. See *Hughes*, 136 S. Ct. at 1292–93; *FERC v. Electric Power Supply Ass’n*, 136 S. Ct. 760, 768 (2016) (*EPSA*). Historically, most state energy markets were geographically confined, vertically integrated monopolies. In recent decades, however, most States restructured their energy markets so that power is now generated by networks of independent plants that deliver electricity through an “interconnected grid of near-nationwide scope.” *EPSA*, 136 S. Ct. at 768 (internal quotation marks and citation omitted).

As vibrant competition has arisen in the wholesale electricity market, FERC has responded to, and fostered, this evolution by replacing traditional monopoly cost-of-service ratemaking with market-based approaches to setting wholesale rates. *Id*. FERC now seeks to ensure “just and reasonable” rates “by enhancing competition” among multiple wholesale providers of electricity. *Id.* FERC has done so because it has concluded that competition is the most effective way “to bring more efficient, lower cost power to the Nation’s electricity consumers.” See

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); see also *Apache Corp. v. FERC*, 627 F.3d 1220, 1221 (D.C. Cir. 2010) (Kavanaugh, J.) ("[FERC's] goals are to promote competition and help American consumers gain access to reliable and affordable energy."). To achieve that purpose, FERC has endeavored "to break down regulatory and economic barriers that hinder a free market in wholesale electricity," *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 536 (2008) (*Snohomish*), and has chosen to rely on market forces in competitive auctions to fulfill its statutory charge of ensuring "just and reasonable" wholesale rates, *EPSA*, 136 S. Ct. at 768.

Suppliers of retail electricity to consumers and business users, called load-serving entities (LSEs), purchase electricity at wholesale either through the FERC-authorized auctions or directly from generators through bilateral contracts. *Hughes*, 136 S. Ct. at 1292–93. Rates set by contract are subject to FERC's wholesale jurisdiction and review. *Snohomish*, 554 U.S. at 531–32.

In and around the Midwest, the interstate wholesale auctions are operated by the Midwest Independent System Operator (MISO) and PJM Interconnection (PJM), under rules FERC has approved. MISO and PJM operate two main types of wholesale auctions: "energy" auctions, in which generators bid the lowest price at which they will sell a specified quantity of output on a spot or short-term basis, and "capacity" auctions, in which generators bid options to call upon the generator to produce a specified amount of energy as needed in the future. Pet. App. 16a.

These auctions set wholesale prices by "stacking" bids from lowest to highest until the requisite quantity is covered. The last and highest bid establishes the "market clearing price." Generators that bid at or below that price "clear" the auction and receive the clearing price. This approach incentivizes wholesale providers to be more efficient; it also promotes systemic efficiency by creating price signals that encourage new generators to enter the market if they can beat the clearing price and that encourage existing generators to exit the market if they cannot. See Pet. App. 17a; *Hughes*, 136 S. Ct. at 1293.

Nuclear generators typically bid into MISO and PJM auctions as "price takers," meaning that they sell their entire output at whatever clearing price the market determines. Unlike other types of generators that can increase or decrease output depending on whether it is profitable to sell at the wholesale price, nuclear generators must run continuously at maximum output. As a result, nuclear generators sell their entire output into the auctions regardless of the price—even if the price is below their cost of production.[1] See Pet. App. 17a.

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[1] Moreover, Exelon is legally obligated to bid the participating plants into the PJM capacity auctions, and one of the plants must sell its electricity at wholesale because it is an Exempt Wholesale Generator (EWG) under the Public Utility Holding Company Act, 42 U.S.C. §§ 16451, *et seq.*, *Am. Energy Co.*, 91 FERC ¶ 62,049 (2000). See Pet. App. 24a–25a, 42a n.30.

B. The Illinois ZEC Program

Illinois enacted the ZEC program as part of the Future Energy Jobs Act (FEJA) to subsidize certain in-state nuclear power plants that the state feared would close. Pet. App. 2a; see 20 Ill. Comp. Stat. 3855/1-75(d-5) (2016). "These favored producers receive what the state calls 'zero emission credits' or ZECs" for each megawatt of electricity they generate and sell into the market. Pet. App. 2a, 6a.

To receive ZECs, generators must participate in a procurement process that requires submission of certain eligibility information, such as annual power generation and cost projections, to the Illinois Power Agency (IPA). 20 Ill. Comp. Stat. 3855/1-75(d-5)(1)(A). Based on these submissions, the IPA will publish a proposed zero emission standard procurement plan, which will explain how bids for ZECs will be selected based on "public interest criteria." *Id.* § 1-75(d-5)(1)(C). These "criteria" effectively require selection of two unprofitable nuclear plants known as Clinton and Quad Cities that are owned by Respondent Exelon Corporation and that the complaint alleges were "pre-determined" to be the ZEC recipients. See Pet. App. 48a.

The statutorily prescribed formula for calculating the ZEC price starts with a "Base Subsidy Amount" (which the FEJA refers to as the "social cost of carbon"), which the statute sets at \$16.50 per MWh through 2023, increasing by \$1 per MWh annually thereafter through 2027. The Base Subsidy Amount is then adjusted based on the difference between a "market price index" and a wholesale price baseline set by the State (\$31.40 per MWh). Illinois derives the "market price index" from annual average prices in certain of the PJM and MISO auctions. See Pet. App. 2a; 20 Ill. Comp. Stat. 3855/1-75(d-5)(1)(B). The effect of this formula is that, from now through 2023, the subsidized plants are guaranteed a combined rate of $47.90 per MWh (the Base Subsidy Amount plus the price baseline), as long as the market-price index is between $31.40 and $47.90 per MWh—and not notwithstanding the FERC-approved auction rates.

LSEs must purchase ZECs from the favored nuclear plants—in addition to the FERC-approved rates the LSEs pay in the auctions—at a price determined by the State—a cost LSEs pass on to consumers.[2] See 20 Ill. Comp. Stat. 3855/1-75(d-5); *id.* § 1-75(C-5).

C. The ZEC Program in Operation: Targeted Subsidies to Unprofitable Plants

The Illinois ZEC program is, in both intended effect and operation, a targeted bailout for favored nuclear plants that are too inefficient to operate profitably in the free market.

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[2] Illinois LSEs must also acquire Renewable Energy Credits (RECs) each year. "[Q]ualified renewable generators (such as solar, wind, and biomass) earn RECs for each MWh of electricity they generate." As relevant here, RECs differ from ZECs in two fundamental respects: *First*, all qualified renewable generators create RECs, regardless of economic need, whereas ZECs are available only to favored nuclear plants facing financial difficulties; *second*, RECs are publicly traded, so the price of RECs varies based on supply and demand, whereas ZEC prices are set by the state and tethered to wholesale rates. See Pet. App. 19a n.10.

The ZEC program was enacted as part of the FEJA in response to Exelon's threat to shut down Clinton and Quad Cities, which would have cost the State "an estimated loss of 4,200 direct and secondary jobs, as well as approximately $1.2 billion in economic activity within four years." As the district court observed in the proceedings below, "The actual purpose of the statute—to save jobs and local tax revenues—was clear from its title, 'Future Energy Jobs Act.'" See Pet. App. 18a.

D. Proceedings Below

In February 2017, a group of electrical generators and trade groups of electrical generators that included Petitioners filed this action challenging the ZEC program on the ground that the program is preempted by the FPA.[3] See Pet. App. 58a. The complaint alleged, *inter alia*, that: (1) the price of ZECs is "tethered to the generators' wholesale market participation through the program's price adjustment feature," which causes the subsidy to vary inversely with FERC-approved auction rates; (2) plants can only receive ZECs if they produce electricity; and (3) all electricity produced by participating plants must be sold in wholesale auctions because there are no alternative markets. See Pet. App. 14a, 43a. Thus, the complaint alleged, the ZEC program guarantees a state-determined rate tethered to wholesale market prices—over-and-above the FERC-approved auction rate—for the electricity that favored generators pro-

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[3] This action was consolidated with a similar action brought by ratepayers. Pet. App. 12a. Petitioners also challenged the ZEC program as a violation of the dormant Commerce Clause in the proceedings below, but are not seeking this Court's review of that claim.

duce and sell at wholesale, just like the Maryland subsidy program this Court unanimously preempted in *Hughes*.

The district court granted motions to dismiss under Federal Rule of Civil Procedure 12(b)(6).[4] Pet. App. 55a. Addressing field preemption, the court held that the ZEC program does not impinge upon FERC's exclusive authority because, unlike the Maryland subsidy program in *Hughes*, the Illinois program does not expressly condition receipt of ZECs on participation and price-clearing in the wholesale auctions. The court reached this holding despite acknowledging Petitioners' well-pleaded allegations that: (1) PJM requires that the favored generators participate in one of its auctions (the capacity auction); (2) Clinton is designated as an EWG and, therefore, can only sell electricity through MISO's wholesale auction; and (3) because nuclear generators must run continuously at maximum output, they have no alternative to selling their output at wholesale. Pet. App. 41a–42a & n.30. The court then addressed conflict preemption and concluded that FERC could "address any problem the ZEC program creates with respect to just and reasonable wholesale rates." Pet. App. 46a.

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[4] The district court first held that plaintiffs lacked Article III standing to challenge "the price adjustment feature of the ZEC program," but had standing to seek a prohibition on "enforcement of the ZEC program altogether." Pet. App. 24a–25a. Applying *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), the court next held that plaintiffs lacked a private cause of action for their preemption challenge because the FPA implicitly forecloses equity jurisdiction over such a claim. Pet. App. 30a–34a. The court nevertheless then ruled on the merits.

The Seventh Circuit affirmed.[5] Pet. App. 1a–9a. Like the district court, the court of appeals distinguished *Hughes* on the ground that the Illinois ZEC program does not explicitly condition subsidies on wholesale market participation and price-clearing. Pet. App. 5a–6a. The court did not address the complaint's well-pleaded allegations that, as a matter of commercial reality, the favored plants *must* participate in wholesale auctions to receive ZECs.

REASONS FOR GRANTING THE WRIT

This case presents a question of exceptional importance to the regulation and efficient functioning of wholesale energy markets in the United States. Relying on an interpretation of this Court's decision in *Hughes* that confines the decision to its facts, the court of appeals held that States may guarantee wholesale energy sellers compensation above the just and reasonable rates set by FERC-approved wholesale auctions, so long as they do not formally mandate a wholesaler's participation in those auctions. This result cannot be squared with the plain text of the FPA, a fair reading of *Hughes*, or this Court's preemption jurisprudence.

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[5] The court of appeals did not reach the questions of whether Petitioners had Article III standing, whether Petitioners had a cause of action under *Armstrong*, or any of the other procedural issues addressed by the district court or in the parties' briefing before the court of appeals, because it found that Petitioners' preemption claim failed on the merits. In addition, although the court of appeals was reviewing a district court order granting motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court incorrectly stated that it was reviewing a grant of summary judgment. Pet. App. 3a.

The court of appeals based its decision principally on the final substantive paragraph of *Hughes*, in which this Court stated that "[n]othing in this opinion should be read to foreclose [states] from encouraging production of new or clean generation through measures 'untethered to a generator's wholesale market participation,'" and that "[s]o long as a State does not condition payment of funds on capacity clearing the [interstate] auction, the State's program [does] not suffer from the fatal defect that renders Maryland's program unacceptable." 136 S. Ct. at 1299. The court read this language as effectively holding that *only* state programs that formally require wholesale energy sellers to bid into and clear FERC-authorized auctions are preempted by Section 824d(a), freeing States to craft any other subsidy that avoids this formal requirement. The court reached that erroneous result despite language elsewhere in the *Hughes* opinion stating unambiguously that Section 824d(a) bars States from guaranteeing levels of wholesale compensation in disregard of FERC-authorized wholesale auction rates, 136 S. Ct. at 1298–99—which is precisely what Illinois has done.

The court of appeals was, however, correct about one thing: The proper allocation of authority between the States and the federal government depends upon striking the appropriate balance between permissible state efforts to promote energy production and impermissible state encroachment on FERC's exclusive authority over all wholesale rates and charges. See Pet. App. 6a–7a. But by drawing the boundary of federal authority as narrowly as it did, the court of appeals has opened the door to all manner of parochial state schemes to augment the wholesale revenues of favored local energy generators. If left uncorrected by this Court, that ruling (and a similar one by the Second Circuit in *Zibelman*) will ratify a fundamental transfer of regulatory authority to the States and away from the federal government and its policy of relying on market forces to set just and reasonable wholesale rates and send economically efficient signals regarding market entry and exit.

There is a pressing need for this Court's guidance because the economic and policy stakes are enormous. The Illinois ZEC program will direct a multi-billion dollar subsidy to Exelon that will grossly distort market outcomes. The New York ZEC program at issue in *Zibelman* will yield a further $7 billion in subsidies for Exelon. Other States will follow suit. New Jersey has already adopted a comparable subsidy scheme and others are considering similar measures. See pp. 26–27 & fn. 7 *infra*. Unless this Court intervenes, these subsidy schemes will impose huge costs and threaten serious distortions of the FERC-authorized mechanisms for setting wholesale rates at economically efficient levels and sending appropriate price signals to wholesale market participants. Although FERC's market-based price signal could have caused the favored inefficient plants to retire and efficient plants to enter the market in their place, the Illinois-dictated price signal will, by design, keep inefficient plants in the market and almost necessarily force *efficient* plants either to leave or not to enter.

This Court should speak definitively on the scope of Section 824d(a) and the meaning of its opinion in *Hughes* before such fundamental changes in the balance between federal and state regulatory authority, and damage to efficient market-based wholesale rate-setting, become entrenched.

I. The Court of Appeals' Decision Cannot be Reconciled with This Court's Decision in *Hughes* or with This Court's Approach to Preemption

A. This Court Held in *Hughes* That the FPA Expressly Preempts State Subsidy Programs That Disregard FERC-Approved Wholesale Auction Rates

1. The FPA confers on the federal government exclusive jurisdiction over "the sale of [electric] energy at wholesale in interstate commerce." 16 U.S.C. § 824(a). By its plain terms, Section 824d(a) provides that FERC's exclusive authority extends to "all rates and charges … received by any public utility for or in connection with the … sale of electric energy for resale." The statute is not limited to the specific rates wholesale sellers charge or wholesale buyers pay for direct wholesale purchases of electricity; rather, the text expressly extends to all amounts wholesale sellers "*receive*[]" from whatever source "*in connection with*" with such sales. *Id.* (emphasis added). As this Court explained in *EPSA*, this broad language "leaves no room either for direct state regulation of prices of interstate wholesales or for regulation that would indirectly achieve the same result." 136 S. Ct. at 780 (quotation marks and citation omitted). Section 824d(a) thus preempts all state laws and regulations that intrude on the exclusive field of federal wholesale rate regulation.

2. In *Hughes*, this Court applied the FPA's broad preemptive language to invalidate a Maryland scheme that guaranteed a particular level of wholesale compensation to a favored producer. Concerned that the FERC-authorized capacity auctions were not creating sufficient long-term incentives for new power generation, Maryland sought to ensure that a particular new plant could count on wholesale revenues sufficient to justify entering the market. To achieve that objective, Maryland required LSEs to enter into "contract[s] for differences" with the new plant. 136 S. Ct. at 1294. If the plant cleared the capacity auction at a price below the State's target price, LSEs paid the shortfall to the plant; if the wholesale clearing price in the capacity auction rose above the target, the plant paid the overage to the LSEs. *Id.* at 1295. As long as the plant cleared the capacity auction, it was guaranteed to receive the State's target rate. See *id.* Maryland required participation in the capacity auctions because the State's goal was to increase long-term wholesale supply commitments above the levels that the price signals of the FERC-authorized auctions had produced. The subsidized plant's participation in the capacity auction was therefore necessary to achieve Maryland's objective.

This Court concluded that by "guarantee[ing] … a certain rate for [wholesale] sales … regardless of the clearing price," Maryland's program impermissibly "set[] an interstate wholesale rate, contravening the FPA's division of authority between state and federal regulators." *Id.* at 1298–99. It did not matter that Maryland's goal was the permissible one of encouraging construction of new generators: States cannot "interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable, *even when States exercise their traditional authority over … in-state generation*," and "however legitimate" their ends. *Id.* at 1298–99 (emphasis added). Likening the Maryland program to those invalidated by this Court in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), this Court emphasized that, in each case, the State had run afoul of the FPA by attempting to second-guess the reasonableness of the FERC-approved wholesale auction rates. *Id.* at 1298.

B. The Court of Appeals' Approval of the Illinois ZEC Program Rests on a Misreading of *Hughes*

The court of appeals upheld Illinois' ZEC scheme even though it is functionally identical to the Maryland program held preempted in *Hughes*. In the view of the court of appeals, the ZEC program is saved from preemption because it does not formally mandate clearing the wholesale auction as a condition of receiving the subsidy. Pet. App. 6a–7a. That reading exalts form over substance and effectively confines *Hughes* to its facts, in contravention of the plain import of this Court's decision and the statutory policies it implements.

1. Like the Maryland program this Court held preempted in *Hughes*, Illinois' ZEC program intrudes on FERC's exclusive authority by guaranteeing the favored plants a level of wholesale compensation in disregard of the auction clearing price. Just as in *Hughes*, Illinois requires LSEs to make payments to

particular state-selected wholesale sellers to make up the difference between the FERC-approved market rates and the rates that Illinois believes the favored plants need in order to operate profitably. Just as in *Hughes*, the subsidy amount varies inversely with FERC-approved auction rates; as market prices rise, the subsidy falls, and if market prices thereafter fall, the subsidy goes back up. And, just as in *Hughes*, the subsidy is "received" by favored producers "in connection with" the sale of electricity in wholesale markets. 16 U.S.C. §§ 824d(a), 824d(e). The favored plants receive a ZEC subsidy for every megawatt-hour of output they sell at wholesale, and the subsidy fluctuates over time in reaction to average wholesale rates to ensure that these favored plants will earn revenues in a range that Illinois has determined will be sufficient to cover their costs. See *supra* pp. 9–10.

The structure of the ZEC program confirms that Illinois is doing exactly what *Hughes* forbids: attempting to "second-guess the reasonableness of interstate wholesale rates." *Hughes*, 136 S. Ct. at 1298. Illinois will select eligible plants based on "public interest criteria" that effectively require selection of plants that cannot operate profitably based on anticipated revenues from wholesale auctions. And the ZEC subsidy varies so that the FERC rate is topped up to the higher level that Illinois prefers for its favored plants. See *supra* pp. 9–10.

The provenance of the Illinois ZEC program underscores that its point is to guarantee wholesale revenues at state-determined levels. The ZEC program was enacted in direct response to Exelon's threat to shut down Clinton and Quad Cities; indeed, even the title of the implementing legislation demonstrates that the intended effect of the program was to address the perceived inadequacy of wholesale rates and bailout favored plants that cannot stay afloat if they receive only wholesale auction revenues. See Pet. App. 17a–18a.

That Illinois gave this wholesale subsidy the fig leaf of maintaining carbon-free power generation at these plants is irrelevant. As this Court explained in *Hughes*, "States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates." 136 S. Ct. at 1298. And, "States interfere … by disregarding interstate wholesale rates FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation." *Id.* at 1298–99. Thus, the analysis does not turn on what goals Illinois aims to advance, or even if it is acting in an area traditionally reserved for State authority—it is the *means* Illinois has chosen that impermissibly intrudes on FERC's exclusive jurisdiction.

In short, Illinois' ZEC program is functionally equivalent to Maryland's program and is preempted for the same reason: Whatever its rationale, Illinois cannot supplant the FERC-authorized wholesale rates by guaranteeing that favored producers will receive an alternative, state-determined rate in connection with their wholesale electricity sales. See 136 S. Ct. at 1298–99.

2. The court of appeals nonetheless upheld Illinois' ZEC program because it understood *Hughes* to hold that a subsidy program is preempted *only* if it

expressly conditions receipt of the subsidy on clearing the wholesale auction. Pet. App. 5a–6a. Because Illinois ostensibly required LSEs to pay subsidies for each unit of electricity produced by the favored plants, rather than for each unit of electricity sold in the wholesale market, the court concluded that "how [each plant] sells that power is up to it. It can sell the power in an interstate auction but need not do so." Pet. App. 6a. As a result, the court concluded that the "fatal defect that render[ed] Maryland's program unacceptable" in *Hughes* was not present here. Pet. App. 6a.

In so holding, the court brushed aside the complaint's allegations—which must be accepted as true at this stage of litigation, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)—that the plants must as a practical matter participate in the wholesale market, speculating that some of the subsidized power might be sold directly at retail to large consumers or might be sold through bilateral wholesale contracts rather than bid into the wholesale auctions.[6] Pet. App. 6a.

[6] The court of appeals also apparently believed that States may lawfully subsidize wholesale transactions made through bilateral contracts rather than through auctions. But bilateral contracts are wholesale sales within FERC's exclusive jurisdiction. *Snohomish*, 554 U.S. at 531–32. And FERC has concluded that the privately negotiated price of such contract sales is presumptively just and reasonable under the FPA. See *Allco Finance Ltd. v. Klee*, 861 F.3d 82, 99 (2d Cir. 2017). If a State then provides for an additional payment for each unit of electricity sold in this way, it is plainly dictating its own rate in disregard of the rate that FERC has determined to be presumptively just and reasonable. Moreover, even ignoring the complaint's allegations and treating bilateral contracts as outside FERC's jurisdiction, there is no evidence and the court of appeals never suggested

That theoretical possibility was enough for the court to conclude that ZEC subsidies were not paid or received in connection with wholesale sales and therefore did not invade FERC's exclusive jurisdiction.

That reasoning cannot be reconciled with *Hughes*. The court of appeals relied on a single sentence in *Hughes*, which states that the "fatal defect" in the Maryland scheme was that it "condition[ed] payment of funds on capacity clearing the auction." 136 S. Ct. at 1299. That sentence appears in the final substantive paragraph of the Court's opinion, which at the same time cautioned that the Court's ruling should not be read to signal that all State programs promoting or subsidizing power generation will be preempted by Section 824d(a). But the Court stated that it was expressing no view on the permissibility of "various other measures … including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or reregulation of the energy sector," *id.*—not that any and all such schemes were permissible. Maryland's auction-participation requirement left no doubt that its scheme was preempted. But it does not follow, and this Court was careful not to imply, that such a requirement is the only way a State could impermissibly invade FERC's exclusive jurisdiction.

As the Court made pellucid elsewhere in its opinion, whether a state subsidy scheme invades FERC's authority depends on whether it "guarantees" that favored producers would receive a state-

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that any bilateral sales that exist in Illinois are anything but trivial in comparison to the auction sales by nuclear plants.

determined rate in connection with wholesale electricity sales "regardless of the clearing price." *Id.* at 1298–99. The facts of this case amply demonstrate that a State can accomplish this prohibited result without imposing an express "bid and clear" requirement. In actual operation, the ZEC program provides a subsidy for each megawatt-hour of electricity sold on the wholesale market because, as the complaint alleges, the favored plants have no alternative to bidding into and clearing the wholesale markets. See Pet. App. 41a–42a & n.30. As a matter of commercial reality, the ZEC program would thus not operate any differently if the statute expressly conditioned receipt of the subsidy on auction participation and price-clearing; either way, the favored generators would sell their output into the wholesale auctions and receive an additional payment, over and above the FERC-approved wholesale rate, in connection with those sales.

The complaint's allegations thus establish that the absence of an express mandate requiring sales in the FERC-regulated market makes no difference. The subsidized plants cannot, and in reality do not, sell electricity other than at wholesale, and the ZEC program guarantees those plants will receive an amount other than the FERC-approved rate *in connection with* those sales. That is precisely what this Court in *Hughes* said the States cannot do. The court of appeals offered no sound reason, as a matter of law or policy, why a formal "bid and clear" requirement should mark the boundary between federal and state regulatory authority—and this case demonstrates just how arbitrary the court of appeals' boundary is.

C. The Court of Appeals' Analysis Cannot be Reconciled with This Court's Approach to Preemption

The Seventh Circuit's interpretation of *Hughes* is also incompatible with this Court's approach to preemption, both generally and in the FPA context.

1. This Court has repeatedly rejected arguments that a state law is saved from preemption simply because it does not *expressly* regulate within the federal sphere, if the practical effect of the law is to control conduct that is subject only to federal regulation. "[A] State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect." *Wos v. E.M.A.*, 568 U.S. 627, 636–37 (2013). Preemption analysis turns on "what the state law in fact does, not how the litigant might choose to describe it." *Id*. In *National Meat Ass'n v. Harris*, 565 U.S. 452 (2012), for example, this Court held that a California statute governing what type of meat could be sold at retail had the impermissible effect of regulating slaughterhouse operations, which were exclusively governed by the Federal Meat Inspection Act, 21 U.S.C. § 601 *et seq*. *Id.* at 463–64. This Court explained that permitting States to avoid preemption by strategically "framing" their regulations would "make a mockery" of the Supremacy Clause principles reflected in preemption doctrine. *Id.* at 464.

2. The Court has applied that same principle in interpreting the preemptive scope of the FPA in *Northern Natural Gas Co. v. State Corp. Commission*

of Kansas, 372 U.S. 84 (1963). There, 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. Although the state did not expressly regulate wholesale prices, this Court admonished that "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.

In holding that Illinois' ZEC subsidy is not preempted because it does not expressly require ZEC recipients to clear the wholesale auctions, the court of appeals accepted precisely the sort of form-over-substance argument that this Court has repeatedly rejected. *Northern Natural Gas* establishes that even if a state regulation does not formally regulate wholesale rates, it is nonetheless preempted if that is its practical effect. See 372 U.S. at 91. The Court unequivocally reaffirmed that principle in *EPSA*, decided during the same term as *Hughes*. See 136 S. Ct. at 780 ("The FPA "'leaves no room either for direct state regulation of the prices of interstate wholesales' … or for regulations that 'would indirectly achieve the same result.'" (quoting *N. Natural Gas*, 372 U.S. at 91)). Yet the court of appeals interpreted *Hughes* as holding the opposite: that only direct regulation via an express bid and clear requirement is preempted. There is no way to square that reading of *Hughes* with this Court's longstanding preemption jurisprudence or its holding in *EPSA* during the very same term.

II. This Court's Review is Manifestly Warranted

The decisions of the courts of appeals in this case and in *Zibelman* have placed the judiciary's imprimatur on a fundamental shift in the balance of regulatory authority between the federal government and the States under the FPA. In design and operation, the subsidy schemes that these decisions have blessed are the very impermissible intrusion on FERC's exclusive authority over the wholesale market that *Hughes* condemned. These schemes guarantee favored producers a state-determined wholesale rate in disregard of the market-determined rates that FERC has deemed just and reasonable. 136 S. Ct. at 1298–99. Unless this Court steps in now, States will know that they have *carte blanche* to guarantee generators wholesale rates of the States' own choosing, so long as they avoid including any express auction-clearing requirement.

1. The inevitable result will be a sharp turn away from the federal policy of relying on market mechanisms to set just and reasonable wholesale rates and to provide appropriate signals to wholesale providers about market entry and exit. The Illinois and New York ZEC programs will provide multibillion dollar subsidies to the favored plants that will massively distort wholesale markets. The impact of ZEC subsidies will only be magnified as more States rush to adopt comparable programs in the wake of these court of appeals decisions. Indeed, several other States—including Connecticut, New Jersey, Ohio, and Pennsylvania—have already

enacted similar subsidy programs or are contemplating doing so.[7]

These subsidy schemes massively distort wholesale markets. They encourage the subsidized generators to bid as price takers, which artificially depresses market prices, and enable unprofitable plants to keep dumping large amounts of electricity into the wholesale market even though FERC-approved price signals should cause these plants to retire. And the impact of ZEC subsidies will only be magnified as more States rush to adopt comparable programs in the wake of these decisions. Nor is there any reason to think that States will limit themselves to subsidizing nuclear power sold at wholesale. Some States may choose to provide wholesale revenue guarantees to renewable energy producers, while others may subsidize local producers that rely on coal or oil. There is now a real risk that the national commitment to competition and market-driven outcomes will be replaced by a patchwork of political rent-seeking, as electricity generators muster political power in their home States to seek special favors in the form of targeted subsidies that guarantee them higher wholesale revenues than FERC-authorized auctions would produce.

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[7] *See* Conn. Dep't of Energy & Environmental Protection and Conn. Public Util. Regulatory Auth., *Resource Assessment of Millstone Pursuant to Executive Order No. 59 and Public Act 17-3: Draft Report*, at 29–31 (Dec. 14, 2017); N.J. Stat. Ann. § 48:3-87.5 (2018); Penn. Gen. Assembly Nuclear Energy Caucus, *Bicameral Nuclear Energy Caucus Report: 2017-2018 Session*, at 30 (Nov. 29, 2018); Ohio S.B. 128 (proposed 2018); Ohio H.B. 381 (proposed 2018).

2. Plenary review is warranted notwithstanding that the United States did not advocate preemption of the Illinois ZEC program in the proceedings below or in the analogous case before the Second Circuit. See Pet. App. 4a. Although FERC apparently read this Court's decision in *Hughes* as foreclosing preemption of these ZEC subsidy programs, in the *Hughes* litigation the United States recognized that "[t]he additional payments made to the generators by the electric distribution companies are not to purchase capacity but rather are mechanisms to guarantee that generators will receive a specified price based on their wholesale sales and thereby subsidize the generators for clearing the auction and selling their capacity." Amicus Brief in Opposition to Certiorari, at 19, No. 14-614 (Sept. 16, 2015). As the United States recognized, "[t]hat arrangement is aimed directly at and distorts the Commission-approved market mechanism for setting wholesale rates and is preempted for that reason." *Id.* at 19–20.

FERC has subsequently recognized that the ZEC programs are wreaking havoc on the federal policy of market-based wholesale rates, and has initiated a proceeding to explore ways to mitigate these harms. *See Calpine Corp. v. PJM Interconnection, LLC*, 163 FERC ¶61,236 (June 29, 2018). The order initiating that proceeding acknowledges that "the integrity of competition in the wholesale capacity market" is undermined by "out-of-market support to … existing uneconomic resources." *Id.* at 64. Such subsidies, FERC said, "significantly impact the capacity market clearing prices and the integrity of the resulting price signals on which investors and consumers rely to guide the orderly entry and exit of capacity resources. We cannot rely on such a construct to harness competitive market forces and produce just and reasonable rates." *Id.* at 68–69. By "allow[ing] resources to suppress capacity market clearing prices, *id.* at 63, "out-of-market support, such as ZEC programs, has changed the circumstances [in the wholesale markets]," *id.* at 63, 67, requiring "sweeping changes" from FERC, *id.* at 84 (LaFleur, Commissioner, dissenting).

The court of appeals did not think the need for such market "adjustments" by FERC was probative of the preemption inquiry, reasoning that FERC's "need to make adjustments in light of states' exercise of their lawful powers does not diminish the scope of those powers." Pet. App. 7a. That misses the point. When State subsidies so distort wholesale price signals that FERC too is forced to meddle in the markets, that further undermines the overarching policy goal of FERC's regulatory framework: ensuring just and reasonable wholesale prices and a stable supply of efficient energy through competitive markets and free-market price signals.

That FERC has felt compelled to take these steps starkly confirms that the ZEC subsidies intrude on FERC's exclusive jurisdiction and that FERC is misreading *Hughes*. See *Hughes*, 136 S. Ct. at 1298 n.11 (States "cannot regulate in a domain Congress assigned to FERC and then require FERC to accommodate [that] intrusion"). In all events, the "division of regulatory authority" under the FPA is a "role which our system assigns to Congress." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 222–23 (1983) (rejecting FERC's position on preemption question); see also *New York v. FERC*, 535 U.S. 1, 41–42 (2002)

(Thomas, J., dissenting) (FERC's views on the scope of jurisdiction cannot override the "clear statutory mandate."). It is up to this Court to decide, as it did in *Hughes* and *EPSA*, how to interpret the FPA's allocation of authority between the federal government and the States.

3. This is not a situation in which further percolation in the courts of appeals is warranted. Indeed, delay risks long-term distortion of the energy markets. The emergence of massive state wholesale subsidy programs marks a critical inflection point in the evolution of energy markets and the rules that govern them. The programs already in place are causing multibillion dollar distortions and skewing decisions about long-term investment in energy generation. Much more is sure to follow if these decisions are allowed to stand. Markets are much easier to break than to fix. As in *Hughes*, this Court has not hesitated to grant review in the absence of any circuit conflict to address fundamental questions about the proper allocation of regulatory authority between the federal government and the States under the FPA in comparable circumstances. See *Snohomish*, 554 U.S. 527; *New York*, 535 U.S. 1. The Court's review is manifestly warranted here as well.

III. The Second Circuit's Decision in *Zibelman* is a Superior Vehicle for Addressing the Question Presented

Also pending before this Court is a concurrently filed petition for a writ of certiorari seeking review of the Second Circuit's judgment in *Zibelman*. Although this case would be an adequate vehicle for deciding the question presented, Petitioners respectfully suggest that the petition for certiorari should be granted in *Zibelman*, and that the petition in this case should be held pending resolution of that case.

The petition in *Zibelman* is a superior vehicle for resolution of the question presented because the court of appeals' decision below is marred by errors that could complicate review. *First*, although the court of appeals was reviewing an order granting a motion to dismiss, the court incorrectly stated that it was reviewing a grant of summary judgment, Pet. App. 3a, where the complaint's allegations need not be taken as true. That is significant because the court's decision rested on several factual assumptions about the nature and operation of energy markets that were contradicted by the complaint, unsupported by any record evidence, and wrong as a factual matter. *Second*, the court of appeal's decision below also rests on an erroneous understanding of the structure and operation of the Illinois ZEC program.[8] Although the Court could reach the merits despite these errors, it would add needless complications not presented by the petition in *Zibelman*.

CONCLUSION

The petition for a writ of certiorari should be held pending consideration of the petition for a writ of certiorari in *Zibelman*, and should then be decided as appropriate in light of the court's disposition of that petition. In the alternative, the petition for a writ of certiorari should be granted.

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[8] These factual and procedural errors were addressed in a rehearing petition, but the court took no corrective action.

Respectfully submitted,

DONALD B. VERRILLI, JR.
Counsel of Record
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, DC 20004
(202) 220-1107
Donald.Verrilli@mto.com

HENRY WEISSMANN
MARK R. YOHALEM
STEPHANIE G. HERRERA
MUNGER, TOLLES & OLSON LLP
350 South Grand, 50th Floor
Los Angeles, CA 90071
(213) 683-9150
Henry.Weissmann@mto.com
Mark.Yohalem@mto.com
Stephanie.Herrera@mto.com

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

January 7, 2019

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 17-2433 & 17-2445

ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,

Plaintiffs-Appellants,

v.

ANTHONY M. STAR, Director of the
Illinois Power Agency, *et al.*,

Defendants-Appellees.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 17 CV 1163 and 17 CV 1164 –
Manish S. Shah, *Judge*.

ARGUED JANUARY 3, 2018 —
DECIDED SEPTEMBER 13, 2018

Before EASTERBROOK and SYKES, *Circuit Judges*, and REAGAN, *District Judge*[*]

EASTERBROOK, *Circuit Judge*. Regional transmission organizations manage the interstate grid for electricity. See, e.g., *Benton County Wind Farm LLC v. Duke Energy Indiana, Inc.*, 843 F.3d 298 (7th Cir.

[*] Of the Southern District of Illinois, sitting by designation.

2016); *MISO Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016). Midcontinent Independent System Operator (MISO) and PJM Interconnection handle the grid in and around the Midwest. Many large generators of electricity sell most if not all of their power through auctions conducted by regional organizations, which are regulated by the Federal Energy Regulatory Commission. States must not interfere with these auctions. *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016).

Illinois has enacted legislation subsidizing some of the state's nuclear generation facilities, which the state fears will close. 20 ILCS 3855/1-75(d-5). These favored producers receive what the state calls "zero emission credits" or ZECs. (We call them credits.) Generators that use coal or gas to produce power must purchase these credits from the recipients at a price set by the state. The price of each credit is $16.50 per megawatt-hour, a number Illinois derived from a federal working group's calculation of the social cost of carbon emissions. (Coal and gas plants emit carbon dioxide; nuclear, wind, solar, and hydro plants don't.) The price per credit falls if a "market price index" exceeds $31.40 per megawatt-hour. Illinois derives this index from the annual average energy prices in the auction conducted by PJM and the prices in two of the state's regional energy markets. The adjustment is designed "to ensure that the procurement [of electricity] remains affordable to retail customers . . . if electricity prices increase". 20 ILCS 3855/1-75(d-5)(1)(B).

Plaintiffs (an association representing electricity producers, plus several municipalities) contend that the price-adjustment aspect of the state's system leads to preemption by the Federal Power Act because it impinges on the FERC's regulatory authority. They concede that a state may take many steps that affect the price of power. It may levy a tax on carbon emissions. It may tax the assets and incomes of power producers. It may use tax revenues to subsidize some or all generators of power. It may create a cap-and-trade system under which every firm that emits carbon must buy credits in a market (firms that emit less carbon, or none, will be the sellers). As plaintiffs see matters, although such systems *affect* the price in the PJM and MISO auctions, they do not *regulate* that price. But the zero-emission-credit system, plaintiffs insist, indirectly regulates the auction by using average auction prices as a component in a formula that affects the cost of a credit. The district judge did not agree with this argument and granted summary judgment to the defendants. 2017 U.S. Dist. LEXIS 109368 (N.D. Ill. July 14, 2017).

The parties' briefs address a number of procedural questions. These include whether a claim of preemption may be presented directly under the Supremacy Clause of the Constitution and whether relief under the theory of *Ex parte Young*, 209 U.S. 123 (1908), would be appropriate against the state defendants in light of remedies potentially available under the Federal Power Act. See *Armstrong v. Exceptional Child Center*, 135 S. Ct. 1378 (2015); *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002). But none of the procedural disputes concerns subject-matter jurisdiction, which rests on both 28 U.S.C. §1331 (federal-question jurisdiction) and 16 U.S.C. §825p (authorizing suits in equity to enforce the Federal Power Act). Because the district court's jurisdiction is secure, we can go straight to the merits—for, if we decide that federal law does not preempt the state statute, none of the procedural issues matters.

At oral argument we expressed concern that the Federal Energy Regulatory Commission had not decided whether Illinois has interfered with its authority over auctions for interstate power. After receiving submissions from the litigants addressing the possibility of invoking the doctrine of primary jurisdiction (another non-jurisdictional doctrine, despite its name) and waiting for the FERC to act on petitions pending before it, we decided to ask the agency to give us its views as an *amicus curiae*. The Commission and the United States then filed a joint brief concluding that Illinois' program does not interfere with interstate auctions and is not otherwise preempted. More briefs from the parties followed, and the appeals are at last ready for decision.

The Federal Power Act divides regulatory authority between states and the FERC. The Commission regulates the sale of electricity in interstate commerce (including auctions conducted by regional organizations), while states regulate local distribution plus the facilities used to generate power. 16 U.S.C. §824(b)(1). This allocation leads to conflict, because what states do in the exercise of their powers affects interstate sales, just as what the FERC does in the exercise of its powers affects the need for and economic feasibility of plants over which the states possess authority. For decades the Supreme Court has attempted to confine both the Commission and the states to their proper roles, while acknowledging that each use of authorized power necessarily affects tasks that have been assigned elsewhere. See, e.g., *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205 (1964); *FERC v. Electric Power Supply Association*, 136 S. Ct. 760 (2016).

Hughes, the most recent of these decisions, draws a line between state laws whose effect depends on a utility's participation in an interstate auction (forbidden) and state laws that do not so depend but that may affect auctions (allowed). 136 S. Ct. at 1297. The FERC has a policy that offers some price protection to new producers for the first three years of their participation in an auction. Maryland, concluding that three years is too short to encourage the addition of generation capacity, asked the Commission to increase the price-protection window to a decade. It declined. Maryland then decided to create price protection on its own by requiring older utilities to sign 20-year contracts with new entrants guaranteeing them a price floor, provided they sold their power in FERC-regulated auctions. As long as an entrant bid a price low enough to prevail in an auction, other producers had to make up the difference between that price and the guarantee. Because it is always possible to sell power in an auction by making a sufficiently low bid (PJM allows even negative bids, under which a producer offers to pay customers to take power off its hands), the Maryland system effectively allocated to new entrants a long-term right of first sale in the auction and in the process depressed the price that other producers would receive. This feature—that the subsidy depended on selling power in the interstate auction—is what led the Justices to conclude that Maryland had transgressed a domain reserved to the FERC.

The Court stressed that its decision covers only state rules that depend on participating in the interstate auction, stating: "States, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain." *Hughes*, 136 S. Ct. at 1298. "Nothing in this opinion should be read to foreclose [states] from encouraging production of new or clean generation through measures 'untethered to a generator's wholesale market participation.'" *Id*. at 1299. And that's what Illinois has done. To receive a credit, a firm must *generate* power, but how it sells that power is up to it. It can sell the power in an interstate auction but need not do so. It may choose instead to sell power through bilateral contracts with users (such as industrial plants) or local distribution companies that transmit the power to residences.

If a producer does offer power to an interstate auction, the value of a credit does not depend on its bid. True, the outcome of all PJM auctions, averaged over a year, may affect the value of a credit (if the average exceeds $31.40), but what (indeed, whether) a producer bids in the interstate auction does not determine the amount it receives. Every successful bidder in an interstate auction receives the price of the highest bid that clears the market. *Hughes*, 136 S. Ct. at 1293. The owner of a credit receives that market-clearing price, with none of the adjustments that Maryland law required. The zero-emissions credit system can influence the auction price only indirectly, by keeping active a generation facility that otherwise might close and by raising the costs that carbon-releasing producers incur to do business. A larger supply of electricity means a lower market-clearing price, holding demand constant. But because states retain authority over power generation, a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law. "So long as a State does not condition payment of funds on capacity clearing the [interstate] auction, the State's program [does] not suffer from the fatal defect that renders Maryland's program unacceptable." *Id*. at 1299.

This does not imply that PJM, MISO, and the Commission are unconcerned about the effect of state programs designed to subsidize producers of electricity. PJM has asked the Commission to approve changes to its auction design in order to improve the system's price-discovery and output-allocation effects in the wake of laws such as the one Illinois enacted. Recently the FERC declined to approve PJM's proposal and opened a new proceeding so that the Commission may determine for itself what changes, if any, should be made to auctions for interstate sales of electricity. *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶61,236 (June 29, 2018). Plaintiffs insist that the need to revamp the auction system shows that the Illinois statute must be preempted.

But that's not what the Commission said. Instead of deeming state systems such as Illinois' to be forbidden, the Commission has taken them as givens and set out to make the best of the situation they produce. It wrote: "We emphasize that an expanded [Minimum Offer Price Rule] in no way divests the states in the PJM region of their jurisdiction over generation facilities. States may continue to support their preferred types of resources in pursuit of state policy goals." Order at ¶158. As the Supreme Court remarked in *Hughes*, the exercise of powers reserved to the states under §824(b)(1) affects interstate sales. Those effects do not lead to preemption; they are instead an inevitable consequence of a system in which power is shared between state and national governments. Once the Commission reaches a final decision in the ongoing proceeding, the adequacy of its adjustments will be subject to judicial review; the need to make adjustments in light of states' exercise of their lawful powers does not diminish the scope of those powers.

A few words about the Constitution and we are done. Plaintiffs invoke the dormant Commerce Clause and its rule that states may not discriminate against interstate transactions. See, e.g., *United Haulers Association, Inc. v. Oneida- Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007). Plaintiffs observe that the credits are bound to help some Illinois firms and contend that this condemns them. But this amounts to saying that the powers reserved to the states by §824(b)(1) are denied to the states by the Constitution, because state regulatory authority is limited to the state's territory. On this view, whenever Illinois, or any other state, takes some step that will increase or reduce the state's aggregate generation capacity, or affect the price of energy, then the state policy is invalid. That can't be right; it would be the end of federalism. The Commerce Clause does not "cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, [just because] the legislation might indirectly affect the commerce of the country." *General Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997).

The commerce power belongs to Congress; the Supreme Court treats silence by Congress as preventing discriminatory state legislation. Yet Congress has not been silent about electricity: it provided in §824(b)(1) that states may regulate local generation. In *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), the Court rejected a constitutional challenge to a statute that permits states to close their borders to insurance written in other states—a statute that even permits states to supersede national legislation on the topic of insurance. Section 824(b)(1) does not go that far; it does not authorize express discrimination. But it does mean that the balancing approach of decisions such as *Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970), which ask whether a state's interest is strong enough to justify an interstate effect, does not apply to a state's regulation of electric capacity or a cross-subsidy between carbon-emitting generation and carbon-free generation.

Illinois has not engaged in any discrimination beyond what is required by the rule that a state must regulate within its borders. All carbon-emitting plants in Illinois need to buy credits. The subsidy's recipients are in Illinois; so are the payors. The price effect of the statute is felt wherever the power is used. All power (from inside and outside Illinois) goes for the same price in an interstate auction. The cross-subsidy among producers may injure investors in carbon-releasing plants, but only those plants in Illinois (for the state's regulatory power stops at the border). The combination of §824(b)(1) and the absence of overt discrimination defeats any constitutional challenge to the state's legislation.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

Nos. 17-2433 and 17-2445

ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,

Plaintiffs-Appellants,

v.

ANTHONY M. STAR, Director of the
Illinois Power Agency, *et al.*,

Defendants-Appellees.

Originating Case Information:
District Court Nos: 1:17-cv-01163 and 1:17-cv-01164
Northern District of Illinois,
Eastern Division District Judge Manish S. Shah

September 13, 2018

FINAL JUDGMENT

Before:

FRANK H. EASTERBROOK, Circuit Judge

DIANE S. SYKES, Circuit Judge

MICHAEL J. REAGAN, Chief District Court Judge[*]

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

[*] Of the Southern District of Illinois, sitting by designation.

APPENDIX C

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

[Filed 07/14/17]

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No. 17 CV 1163 and No. 17 CV 1164

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VILLAGE OF OLD MILL CREEK, *et al.*,

Plaintiffs,

v.

ANTHONY M. STAR, in his official capacity as Director of the Illinois Power Agency, *et al.*,

Defendants.

and

ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,

Plaintiffs,

v.

ANTHONY M. STAR, in his official capacity as Director of the Illinois Power Agency, *et al.*,

Defendants.

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Judge Manish S. Shah

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MEMORANDUM OPINION AND ORDER

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. The Future Energy Jobs Act[1] amended the Illinois Power Agency Act, 20 ILCS 3855/1-1 *et seq.*, and created a new commodity, the ZEC. The statute grants ZECs to certain qualifying energy-generating facilities. Those facilities are likely to be two nuclear power plants owned by Exelon in Illinois. Utilities that sell electricity to consumers must purchase ZECs from the qualifying power plants, and those utilities will pass the costs of ZECs onto their customers. The result is money in the coffers of Exelon from the sale of ZECs that will give it a benefit when pricing its energy in the wholesale market relative to competing energy producers that do not receive ZEC payments.

Two sets of plaintiffs filed suit to challenge the statute. In one case, the plaintiffs, Village of Old Mill Creek, Ferrite International Company, Got It Maid, Inc., Nafisca Zotos, Robert Dillon, Richard Owens, and Robin Hawkins, are delivery services customers of Commonwealth Edison Company in Illinois. In the second suit, plaintiff Electric Power Supply Association is a national industry association for competitive electric power producers, and plaintiffs Calpine Corporation, Dynegy Inc., Eastern Generation, LLC, and NRG Energy, Inc. are independent power producers that operate generators nationwide and provide wholesale electricity to utilities. Both the consumer plaintiffs and the generator plaintiffs bring claims against Anthony Star in his official capacity as Director of the Illinois Power Agency and the Commissioners of the Illinois Commerce Commission in their official capacities, seeking to

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[1] *See* SB 2814, Public Act 099-0906, 99th Gen. Assemb. (Ill. 2016), available at http://www.ilga.gov/legislation/99/SB/PDF/09900SB2814enr.pdf.

invalidate the statute. Exelon intervened in both actions to defend the ZEC program.

Defendants and Exelon each filed motions to dismiss the complaints. The motions are granted.

I. Legal Standards

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain factual allegations that plausibly suggest a right to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When analyzing a motion under Rule 12(b)(6), a court must accept all factual allegations as true and draw all reasonable inferences in the plaintiffs' favor, but a court need not accept legal conclusions or conclusory allegations. *Virnich v. Vorwald*, 664 F.3d 206, 212 (7th Cir. 2011) *as amended* (Jan. 3, 2012) (citing *Iqbal*, 556 U.S. at 680–82). Rule 12(b)(6) limits a court's consideration to "allegations set forth in the complaint itself, documents that are attached to the complaint, documents that are central to the complaint and are referred to in it, and information that is properly subject to judicial notice." *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013); *see also* Fed. R. Evid. 201(b). A challenge to plaintiffs' standing to bring a claim is a challenge to the court's subject-matter jurisdiction, and as in a Rule 12(b)(6) motion, the facts of the complaint are accepted as true. *Silha v. ACT, Inc.*, 807 F.3d 169, 173–74 (7th Cir. 2015).

II. Background

These two lawsuits are companion cases. The complaints are substantially similar, except that the consumer plaintiffs have an additional claim under the equal protection clause. In responding to defendants' and Exelon's motions to dismiss, the consumer plaintiffs largely adopted the generator plaintiffs' arguments.[2]

A. The Federal Power Act, FERC, and Wholesale Energy Markets

The Federal Power Act, 16 U.S.C. § 791a *et seq.*, allows both the Federal Energy Regulatory Commission and the states to regulate aspects of the electricity industry. Under the Federal Power Act, FERC has exclusive jurisdiction over wholesale sales of electric energy in the interstate market; it has the power to regulate wholesale electricity rates and any rule or practice that affects such rates.[3] 16 U.S.C. §§ 824(b), 824e(a). The states may regulate "any other sale" of electricity, which includes retail electric energy sales. *Id.* § 824(b).

FERC regulates wholesale rates of electric energy via interstate auctions. [1] ¶¶ 29–30. For most of Illinois, wholesale electricity is exchanged through auctions conducted by the Midcontinent Independent System Operator, Inc.[4] *Id.* ¶ 30. In Chicago and parts of northern Illinois, wholesale electricity is exchanged through auctions conducted by PJM Interconnection, L.L.C.[5] *Id.* Gaps between the supply and demand of electric energy can cause "uncontrolled widespread

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[2] Bracketed numbers refer to entries on the district court docket, and unless otherwise noted, citations are to the 17-cv-1164 docket; referenced page numbers are from the CM/ECF header placed at the top of filings.

[3] A "wholesale" sale is the sale of electric energy to a buyer "for resale" to another buyer. 16 U.S.C. § 824(d).

[4] MISO is an independent system operator that serves fifteen states as well as one Canadian province. [1] ¶ 30.

[5] PJM is a regional transmission organization that serves thirteen states and the District of Columbia. [1] ¶ 30.

blackouts." *Id.* ¶ 32. To prevent such gaps, MISO and PJM continuously run two types of wholesale auctions, "energy" and "capacity," because electricity cannot be stored economically or in sufficient quantities. *Id.* ¶¶ 31–32.

Both MISO and PJM run day-ahead and real-time energy auctions. *Id.* ¶ 31. In the day-ahead energy auction, generators submit a bid for a price at which they are willing to generate a particular quantity of electricity to be delivered the next day. *Id.* ¶ 34. In the real-time energy auction, MISO and PJM each increase or decrease the prices of electric energy every five minutes to signal the need for generators to produce more or less electricity as conditions change in real time. *Id.* "In contrast to the energy auctions, where *electricity itself* is bought and sold, capacity auctions are for the purchase and sale of *options* to purchase electricity." *Id.* ¶ 38 (emphasis original). MISO and PJM calculate the generating capacity needed for the electric grid to run reliably each year and they establish the amount of capacity that retail electric suppliers, known as load serving entities, must purchase to meet customer demand in their territory each year.[6] *Id.* ¶ 37. To satisfy capacity obligations, load servicing entities may either enter into bilateral contracts with generators or they may participate in an auction market conducted by MISO or PJM. *Id.* "Each generator that sells capacity in the MISO and PJM capacity markets is required to participate in the day-ahead

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[6] FERC oversees this process and requires MISO to purchase annual capacity obligations one month before the relevant delivery period and PJM to purchase capacity obligations three years ahead of the relevant delivery period. [1] ¶ 39.

energy market, and to respond in real-time, if conditions warrant." *Id.* ¶ 38.

For both energy and capacity auctions, MISO and PJM use a process called "stacking" to accept generators' bids. *Id.* ¶¶ 41–42. The generators' bids are stacked from lowest to highest in price, and MISO and PJM accept bids in that order until the demand has been met. *Id.* ¶ 41. Each bid that is accepted is said to "clear the market." *Id.* The price of the highest-accepted bid is called the "market clearing price"; all generators receive that price for each bid they submitted that cleared the market, even if a generator submitted a bid at a lower price. *Id.* ¶¶ 35, 41. Since nuclear generators run continuously at maximum output and have no alternative to selling their output in MISO and PJM auctions, they submit conservative bids in the hopes of clearing the auction.[7] *Id.* ¶ 36. During times of oversupply, nuclear generators will even pay to offload their energy output onto the grid, by submitting a bid for a negative price, so that they have room to generate more energy in the future. *Id.* This bidding strategy results in lower market clearing prices. *Id.*

B. Illinois's Future Energy Jobs Act and the ZEC Program

Exelon Corporation announced that it would shut down two of its nuclear generator facilities, Clinton and Quad Cities, unless the Illinois General Assembly passed "adequate legislation." [38-4] at 2–3. The two plants had lost more than $800 million over the last

[7] Generators' sources of compensation are predominantly their energy market and capacity market revenues; to a much lesser extent they also receive compensation from their ancillary services. [1] ¶ 43.

six years; but closing the plants would result in the estimated loss of 4,200 direct and secondary jobs, as well as approximately $1.2 billion in economic activity within four years. Succumbing to that pressure, the Illinois General Assembly created the zero emission credit program in the Future Energy Jobs Act.[8] The statute amends the Illinois Power Agency Act. *See* 20 ILCS 3855/1-1 *et seq.* When the governor signed the legislation into law, Exelon confirmed that Clinton and Quad Cities would operate for another ten years due to the new legislation. [38-11] at 2–3.

According to plaintiffs, the legislature's asserted goal for the statute, "environmental protection," was mere pretext for a bailout for Exelon's Clinton and Quad Cities plants. [1] ¶ 58. The actual purpose of the statute—to save jobs and local tax revenues—was clear from its title, "Future Energy Jobs Act." *Id.* Plaintiffs also noted that when the governor signed the bill into law, he said, "The Future Energy Jobs bill protects taxpayers, ratepayers, and the good-paying jobs at the Clinton and Quad Cities' plants." *Id.* ¶ 61.

The statute created a new commodity called a zero emission credit. A ZEC is a tradeable credit that represents the environmental attributes of one megawatt hour of energy produced from a zero emission facility (a nuclear power plant interconnected with MISO or PJM). 20 ILCS 3855/1-10. The Illinois Power Agency confers ZECs on those facilities that are "reasonably capable of generating cost-effective zero emission

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[8] *Illinois governor signs energy bill to help Exelon nuclear plants*, S&P GLOBAL PLATTS, (Dec. 7, 2016), available at http://www.platts.com/latest-news/electric-power/washington/illinois-governor-signs-energy-bill-to-help-exelon-21280324.

credits in an amount approximately equal to 16%[9] of the actual amount of electricity delivered by each electric utility to retail customers in the State during calendar year 2014."[10] 20 ILCS 3855/1-75(d-5)(1). Utilities are required to enter into contracts to purchase the ZECs from the winning zero emission facilities. *Id.* § 1-75(d-5)(1)(C-5). The contracts will have a term of ten years, ending May 31, 2027. *Id.* § 1-75(d-5)(1).

The retail suppliers must purchase all of the ZECs conferred on the selected zero emission facilities in each delivery year. *Id.* The price for each ZEC is the Social Cost of Carbon[11]; but, it may be reduced according to a "Price Adjustment," which is "the amount

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[9] Plaintiffs are suspicious of the 16% figure since it perfectly aligns with the amount of electricity that Clinton and Quad Cities provide. [100] at 24:2–8. They believe that the fact that the legislature used the 16% figure instead of calculating a competitive environmental amount that is universally beneficial is further proof that this is not an "open-ended program" in which other plants can compete, but it is a subsidy for Clinton and Quad Cities. *Id*. at 24:2–8, 30:11–17.

[10] The Illinois statute modeled the ZEC program on Renewable Energy Credit programs, which many states, including Illinois, have enacted. [38-3] ¶ 46; [1] ¶ 51; *see also* 20 ILCS 3855/1-75(c). Generally, under such programs, "qualified renewable generators (such as solar, wind, and biomass) earn RECs for each MWh of electricity they generate," and retail suppliers "are required to acquire a certain number of RECs each year or make an Alternative Compliance Payment." [1] ¶ 51. All qualified renewable generators create RECs. *Id.* ¶ 52. "RECs are competitively traded outside of the wholesale energy markets, so that their value varies based on supply and demand." *Id.*

[11] The U.S. Interagency Working Group on Social Cost of Carbon set the price for the Social Cost of Carbon at $16.50 per megawatt hour in August 2016. 20 ILCS 3855/1-75(d5)(1)(B)(i).

[. . .] by which the market price index[12] for the applicable delivery year exceeds the baseline market price index[13] for the consecutive 12-month period ending May 31, 2016." *Id.* § 1-75(d-5)(1)(B). The purpose of the price adjustment is "to ensure that the procurement remains affordable to retail customers in this State if electricity prices increase." *Id.*

To receive ZECs, facilities must participate in a procurement process and submit eligibility information, such as annual power generation and cost projections, to the Illinois Power Agency. *Id.* § 1-75(d-5)(1)(A). The IPA will publish its proposed zero emission standard procurement plan, which will explain how bids will be

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[12] The market price index each delivery year is the sum of projected energy and capacity prices. 20 ILCS 3855/1-75 (d-5)(1)(B)(iii). Projected energy prices are calculated using the energy forward prices for each month of the applicable delivery year averaged for each trade date during the calendar year immediately preceding that delivery year. *Id.* § 1-75(d-5)(1)(B)(iii)(aa). Projected capacity prices are calculated using the sum of fifty percent of the Base Residual Auction price, as determined by PJM, divided by twenty-four hours per day, and multiplied by fifty percent of the resource auction price, as determined by MISO's resource auction, divided by twenty-four hours per day. *Id.* § 1-75(d-5)(1)(B)(iii)(bb). PJM's Base Residual Auction is held each year during the month of May; it determines capacity obligations for a delivery year three years in advance. *See RPM Base Residual Auction FAQs*, PJM, available at https://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/rpm-base-residual-auction-faqs.ashx.

[13] The baseline market price index for the consecutive twelve-month period ending May 31, 2016 is $31.40 per megawatt hour. 20 ILCS 3855/1-75(d-5)(1)(B)(ii). This is based on the sum of the average of PJM's day-ahead energy auction price, fifty percent multiplied by the Base Residual Auction capacity price, as determined by PJM, divided by 24 hours per day, and fifty percent multiplied by the Planning Resource Auction capacity price, as determined by MISO, divided by 24 hours per day. *Id.*

selected based on "public interest criteria," such as minimizing carbon dioxide emissions that result from electricity consumed in Illinois, and minimizing sulfur dioxide, nitrogen oxide, and particulate matter emissions that adversely affect the citizens of Illinois. *Id.* § 1-75(d-5)(1)(C). The procurement plan will also provide a detailed explanation about how the IPA will consider and weigh each public interest factor. *Id.* In developing the plan, the IPA will review "any reports issued by a State agency, board, or commission [. . .], as well as publicly available analyses and studies performed by or for regional transmission organizations that serve the State and their independent market monitors." *Id.*

C. Effects of the ZEC Program

The sale of ZECs will provide those selected nuclear plants with out-of-market payments for each megawatt hour of electricity they produce, "effectively replacing the auction clearing price received by these plants with the alternative, higher price preferred by the Illinois General Assembly." [1] ¶ 4. This will affect the FERC-approved energy market auction structure not only because the nuclear plants will not retire as scheduled, but also because they will continue to bid into the wholesale market auctions at artificially lower prices. *Id.* ¶¶ 6, 10.[14] Lower auction prices lead to lower revenues for all generators. *Id.* ¶ 10. In turn, low revenues could cause generators that are more efficient than the ZEC recipients to exit the market or

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[14] At current wholesale prices, for every megawatt hour of energy the subsidized nuclear plants sell into the FERC-jurisdictional market, they will receive the locational price of energy (approximately $18 and $25 per MWh at Quad Cities and Clinton, respectively), plus a ZEC payment subsidy (approximately $16.50 in 2017, with possible increases in future years). [1] ¶ 7.

it could deter potential new generators from entering the market. *Id.* Additionally, "artificially suppressed wholesale market prices are likely to result in higher energy bills for retail ratepayers as they are forced to pay the nuclear subsidy as a charge on their retail electric bills." *Id.* ¶ 11. ZECs are estimated to cost Illinois' ratepayers $235 million per year over ten years. *Id.* ¶ 3.

The generator plaintiffs believe that they will incur millions of dollars in damages because they will lose auctions they otherwise would have won and they will receive less revenue from auctions they do win. *Id.* ¶ 66. Meanwhile, the consumer plaintiffs will face higher utilities bills as Commonwealth Edison Company and Amaren Illinois increase retail charges pursuant to the automatic adjustment tariffs.[15] 17-cv-1163, [28] ¶ 2 (citing 20 ILCS 3855/1-75(d-5)(1)(B) and (d-6)(6)).

Plaintiffs seek to invalidate the ZEC program by arguing that it is preempted by the Federal Power Act and that it violates the dormant commerce clause. *See* [1] ¶¶ 76–93. The consumer plaintiffs also allege that the program denies them the equal protection of federal laws governing the wholesale electricity markets, in violation of the Fourteenth Amendment. 17-cv-1163, [1] ¶¶ 88–94.

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[15] Commonwealth Edison Company, a subsidiary of Exelon, filed a proposed tariff modification with the ICC, which will allow Commonwealth Edison Company to bill all retail customers a ZEC charge of 0.195 cents per kilowatt hour beginning June 1, 2017. 17-cv-1163, [65] at 2; [65-1]. One of the consumer plaintiffs has already received a bill for the "Zero Emission Standard" charge. 17-cv-1163, [70] at 2.

III. Analysis

A. Standing

Article III of the United States Constitution limits federal court jurisdiction to "cases" and "controversies." U.S. Const., art. III, § 2. To establish constitutional standing, plaintiffs must show an "injury in fact" that is "fairly traceable" to the defendant's conduct and that is "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016). At the pleading stage, the plaintiffs must clearly allege facts that demonstrate each element. *Id.* To establish "prudential"[16] or statutory standing, plaintiffs must show that the statutory cause of action encompasses the plaintiffs' claim. *Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296, 1302 (2017). The presumption is that "a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014). Courts use "traditional tools of statutory interpretation" to decide whether a plaintiff is within the zone of interests and therefore has statutory standing. *Bank of Am.*, 137 S. Ct. at 1303. The inquiry is not whether Congress *should have* authorized the plaintiff's cause of action, but whether Congress *in fact* authorized it. *Lexmark*, 134 S. Ct. at 1388 ("Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, [. . .] it cannot limit a cause of action that Congress has created merely because 'prudence' dictates.").

[16] *See Lexmark International v. Static Control Components*, 134 S. Ct. 1377, 1386 (2014) (describing the "prudential" label as misleading).

1. *The Generator Plaintiffs Do Not Have Article III Standing to Challenge the Price Adjustment*

The generator plaintiffs take issue with the price adjustment feature of the ZEC program. [1] at ¶ 63. The plaintiffs argue that the state has tied, or tethered, its subsidies to auction prices and participation in a manner that is preempted by federal law. The price adjustment is characterized as a "price collar," since it ensures that the ZEC price decreases if wholesale market prices increase, up to a limit, and it increases if wholesale market prices decrease. [83] at 24, 27 (citing [38-3] ¶ 40).[17] A price collar insulates ZEC recipients from changes in wholesale market prices, the generator plaintiffs argue. As Exelon points out, though, eliminating the price adjustment feature would leave in place a fixed ZEC price that is equal to the Social Cost of Carbon. This would create a larger subsidy for ZEC recipients, which would cause more harm to the generator plaintiffs, under their theory. The injury caused by the ZEC subsidy is not traceable to the price adjustment, because that injury would exist even if the statute were cured of its ties to wholesale auction prices. *See Johnson v. U.S. Office of Pers. Mgmt.*, 783 F.3d 655, 661–62 (7th Cir. 2015).

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[17] "The amount of the ZEC payment received by a generator will thus fluctuate between $0 and $16.50/MWh, depending on future wholesale energy and capacity prices in Illinois. A participating nuclear generator (i.e., Exelon) will receive no ZEC payments in a given delivery year if projected energy and capacity prices in Illinois rise above $47.90/MWh for that year (= $31.40 baseline market index + $16.50 SCC). Within these two bookends, the ZEC payment varies in a formulaic way based on current and projected wholesale energy and capacity prices." [38-3] ¶ 39.

The generator plaintiffs argue that *Johnson* is distinguishable from their case because the plaintiffs in *Johnson* were injured by amendments to a different rule than the one they were challenging, whereas the generator plaintiffs challenge the same regulation that they allege injured them. What the generator plaintiffs gloss over, however, is that the court rejected the argument that a plaintiff has standing to challenge a rule as a whole simply because that rule is "indivisible" and one part of the rule injured the plaintiff. *Id.* at 662–63. The court reasoned that "demonstrating an injury caused by one aspect of a legislative action [is] not sufficient to give [. . .] standing to challenge other aspects of that action." *Id.* at 662. The generator plaintiffs do not have standing to challenge the ZEC program's price adjustment.

But the generator plaintiffs have alleged an injury by a ZEC priced at the Social Cost of Carbon, and that injury is traceable to an aspect of the challenged statute—the creation of a minimum subsidy that rewards a nuclear power plant and leads to subsidized participation in the federally regulated market. A court order prohibiting enforcement of the ZEC program altogether would redress that injury. *See Allco Fin. Ltd. v. Klee*, No. 16-2946, 2017 WL 2782856, at *8–9 (2d Cir. June 28, 2017). The generator plaintiffs present a case or controversy over the ZEC program.

2. *The Consumer Plaintiffs Do Not Have Prudential Standing for Preemption Claims*

The states have the power to regulate retail sales of electricity and to impose charges on retail bills. Nevertheless, the consumer plaintiffs challenge the ZEC program on preemption grounds, arguing that they will be harmed by the resulting charges on their utility bills and that their payments will be used by utilities to purchase ZECs. 17-cv-1163, [1] ¶¶ 9, 11–12. Since the ZEC program authorizes utilities to recover its costs from all retail customers through an "automatic adjustment clause tariff," the consumer plaintiffs note that even customers who purchase electricity from competitive suppliers and not the utilities will see increased charges. *Id.* ¶¶ 52, 62.

The consumer plaintiffs are injured by the ZEC charges on their bills, which are traceable to the Illinois statute and would be redressed if the charges were prohibited. They have Article III standing, but that does not mean that they can bring preemption claims under the Federal Power Act. Courts look to the provision upon which the plaintiff relies, not the overall purpose of the legislation in question, to determine if the plaintiffs' interest is within the statute's zone of interests. *Bennett v. Spear*, 520 U.S. 154, 175–76 (1997). The consumer plaintiffs' complaint refers to 16 U.S.C. §§ 824 and 824d. Section 824 states that "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest," and that while federal regulation "of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce" is necessary, it should not extend to matters that are subject to regulation by the states. 16 U.S.C. § 824(a). The consumer plaintiffs' claim is expressly excluded from § 824's interests because the states have the power to regulate retail sales of electricity and impose retail charges that are subject to state regulation.

Although § 824d is titled, "Rates and charges; schedules; suspension of new rates; automatic adjustment clauses," it refers only to FERC's authority and obligation to ensure that wholesale electricity rates, and the rules and regulations affecting them, are "just and reasonable." 16 U.S.C. § 824d. It describes what public utilities may and may not do with respect to charges, but those directives refer to FERC as the enforcer. *Id.* § 824d(b)–(e). Section 824d also provides that FERC must review public utilities' practices under automatic adjustment clauses and, after an evidentiary hearing, FERC may order a public utility to modify the terms or practices in connection with an automatic adjustment clause. *Id.* § 824d(f). Section 824d does not grant similar authority or establish any such obligation on public utilities or retail consumers. Given that the consumer plaintiffs' injury involves the retail surcharge, their interests are outside of the zone of interests of the federal statutes. *See Nw. Requirements Utils. v. F.E.R.C.*, 798 F.3d 796, 809 (9th Cir. 2015).

3. *Plaintiffs Do Not Have Article III Standing for Dormant Commerce Clause Claims*

"[A] plaintiff must demonstrate standing for each claim he seeks to press. This means that, for each claim of wrongdoing alleged, a plaintiff must demonstrate [. . .] that he has suffered (or is imminently threatened with) an injury that is traceable to the wrongdoing alleged *in that* particular claim." *Johnson*, 783 F.3d at 661 (internal citations omitted) (emphasis original). The dormant commerce clause challenges raise a standing issue distinct from the other claims. The injuries are similar—the market impact on wholesale prices and increased rates passed onto consumers—but if those harms are not traceable to discrimination against the commerce of other states, then plaintiffs do not present a case or controversy under the dormant commerce clause.

The generator plaintiffs say the ZEC program favors the Clinton and Quad Cities nuclear plants (because of the weighted factors in the ZEC procurement process), and thereby discriminates against non-Illinois nuclear generators. [1] ¶ 90. But the injury to the generator plaintiffs is from the ZEC subsidy, not the identity of the ZEC recipient.[18] If the procurement process were non-discriminatory, the out-of-state, non-nuclear plaintiffs would still be injured. Similarly, the general market-distorting effects on non-nuclear plants outside of Illinois would still be felt if the ZEC procurement process subsidized nuclear plants without favoring in-state interests. Finally, the retail surcharges passed onto the consumer plaintiffs would be the same even if the utilities purchased ZECs from out-of-state facilities.

The generator plaintiffs respond that they have alleged an inability to compete "on equal footing" in the interstate market and that courts have found Article III standing for similarly injured plaintiffs. *See All. for Clean Coal v. Miller*, 44 F.3d 591, 594 (7th Cir. 1995) (quoting *Ne. Florida Chapter of Associated Gen.*

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[18] One of the members of plaintiff EPSA is a nuclear plant in Pennsylvania, [38-3] at 47 n.93, and it claims that it is injured by not being able to receive ZECs. Although this allegation was not in the complaint, I do consider it. This entity is more likely to have an injury traceable to in-state favoritism, but it does not allege that it intends to seek ZECs or that it is in fact prohibited from participating in the ZEC procurement process. Its injury, then, is like the other generator plaintiffs'. It is harmed by the subsidy, whether or not that subsidy is awarded on the basis of in-state economic protectionism. Moreover, EPSA brings this action "as an organization," *see* [1] ¶ 15 n.3, so this additional fact about one of its members does not change the organization's discrimination theory, and it remains true that the allegations in the complaint are insufficient to confer standing for the dormant commerce clause claims.

Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993)). But in these cases, the discrimination against out-of-state plaintiffs caused the injury; here, favoritism for Clinton and Quad Cities is a feature of the overall legislation, but it is not the source of the injury. The plaintiffs' "injur[ies] would continue to exist even if the [legislation] were cured" of the alleged discrimination. *Johnson*, 783 F.3d at 662. Regardless of whether ZEC recipients are in Illinois or not, the generator plaintiffs' injury from lower wholesale prices remains the same, and the consumer plaintiffs will receive higher bills. Since plaintiffs' injuries are not traceable to the alleged in-state favoritism, they do not have Article III standing to challenge it.[19]

The plaintiffs' preemption and dormant commerce clause claims are, in large part, not justiciable. But since the generator plaintiffs have adequately alleged standing to challenge the ZEC program in part, and since the consumer plaintiffs bring an equal protection claim (the increased electricity rates they will pay give them standing to bring such a claim), the cases do

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[19] I do not reach Exelon's arguments that plaintiffs do not fall within the zone of interests of the dormant commerce clause. I note, however, that the consumer plaintiffs are not like the plaintiffs in *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 286 (1997). The plaintiffs in *Tracy* were directly burdened by the challenged law. The consumer plaintiffs here are not the direct target of discrimination by the ZEC program; their activity in interstate commerce is not altered by Illinois's statute. The consumer plaintiffs also argue that since the ZEC program provides for an automatic pass-through of the costs, it harms the consumers and not the utilities, which are mere conduits. But, it does not follow from the automatic pass-through of costs that the utilities have no injury and no standing. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984) (wholesalers paying a discriminatory tax have standing to challenge the tax even though they pass the costs of the tax onto their customers).

present controversies that are within the judicial power to adjudicate. I therefore address the merits of defendants' motions to dismiss for failure to state a claim. *But see Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 805 (7th Cir. 2011) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998) (courts must not reach the merits if standing is lacking).

B. The Preemption Cause of Action

The ability to sue to enjoin unconstitutional actions by state or federal officers is a judge-made remedy that does not rest on an implied right of action in the supremacy clause. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). While federal courts retain the power to enjoin such unlawful action, that power is subject to express and implied statutory limits. *Id.* at 1385.

In *Armstrong*, the Supreme Court considered § 30(A) of the Medicaid Act, 42 U.S.C. § 1396a(30)(A), and found that Congress explicitly conferred enforcement of a "judgment-laden standard" exclusively on the Secretary of Health and Human Services, and held that plaintiffs could not bring a private right of action to enforce the act. *Id.* at 1385. Specifically, the Court explained: "[t]he sheer complexity associated with enforcing § 30(A), coupled with the express provision of an administrative remedy, § 1396c, shows that the Medicaid Act precludes private enforcement of § 30(A) in the courts." *Id.* Plaintiffs distinguish the Federal Power Act from § 30(A) of the Medicaid Act by arguing that the Federal Power Act does not provide a sole remedy and it expressly gives district courts exclusive jurisdiction over "all *suits in equity* and actions at law." [83] at 42 (citing 16 U.S.C. § 825p). The act does not expressly prohibit a private suit for injunctive relief, but that is not the only way for Congress to signal a limitation on judicial power, and the cause of action it did authorize does not provide the answer plaintiffs suggest. Section 825p of the Federal Power Act gives district courts jurisdiction over suits that FERC is authorized to bring under § 825m(a), but such vesting jurisdiction in the district courts does not create a *private* cause of action. *See Montana-Dakota Utilities Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 249 (1951).

Plaintiffs' preemption claims do not constitute "proper cases" for private suits for injunctive relief. *See Armstrong*, 135 S. Ct. at 1384. First, "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996); *see also Ex parte Young*, 209 U.S. 123 (1908). In the wholesale electricity markets arena, parties can bring a complaint to FERC if they believe a practice interferes with the markets or creates unjust or unreasonable rates or practices[20]; FERC can take corrective actions to ensure that wholesale rates and practices remain just and reasonable; and parties that disagree with FERC's decision can seek review in the circuit courts. 16 U.S.C. §§ 824d(e), 824e(a), 824l(b). Relatedly, if FERC discovers that rates or the practices affecting rates are unjust or unreasonable, it is expressly author-

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[20] Exelon points out that some plaintiffs have already brought such a complaint to FERC. [53-1] at 35 n.12. FERC does not have a quorum, [91] at 2, so it is not surprising that plaintiffs look to the courts. But FERC's current paralysis does not change the structural limitations on judicial power.

ized to bring an action in federal court to enjoin such acts or practices. 16 U.S.C. § 825m(a). Express provisions, such as these, which provide for the enforcement of a substantive rule, signal Congress's intention to preclude other methods of enforcing the same substantive rule. *Armstrong*, 135 S. Ct. at 1385 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)).

Additionally, Congress provided a private cause of action under the Federal Power Act in the Public Utility Regulatory Policies Act. The act authorizes a private cause of action to challenge state rules governing small power production facilities if the private party had already petitioned FERC to bring suit itself. 16 U.S.C. § 824a-3(h)(2)(B). By its terms, the act does not apply to this case. It demonstrates, however, Congress's intention to create only a limited private remedy in the Federal Power Act. As Exelon asserts, the omission of a general private right of action in the Federal Power Act should, therefore, be understood as intentional. *See also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) ("[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." (citation omitted)). It also shows that even when Congress chose to create a private cause of action in the Federal Power Act, it required administrative exhaustion, *see* 16 U.S.C. § 824a-3(h)(2)(B), which would suggest that plaintiffs' failure to exhaust here is also problematic. Finally, a coherent regulatory policy for interstate electricity markets is a desirable outcome, and it is one that private suits undermine. *See Armstrong*, 135 S. Ct. at 1385. Following the reasoning of *Armstrong*, I conclude that the Federal Power Act does not authorize a private cause of action for injunctive relief against the defendants.

Plaintiffs argue that this court can issue a declaratory judgment or an injunction against defendants in their official capacities under *Ex parte Young*. The doctrine of *Ex parte Young* provides a narrow exception to Eleventh Amendment immunity for claims brought against state officers in their official capacities if the complaint seeks prospective injunctive relief in order to end a continuing federal law violation. *Seminole*, 517 U.S. at 73. *Ex parte Young* actions historically involved a party bringing a preemptive action against a state official, to challenge a possible enforcement proceeding under state law. *See Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 262 (2011) (Kennedy, J., concurring). Plaintiffs agree that they are not the potential target of any state enforcement proceedings. That leaves the prospect of an *Ex parte Young*-style equitable action discussed in *Armstrong*, 135 S. Ct. at 1385. Such an action is foreclosed if it would require the application of "judicially unadministrable" standards. *Id.*

The Federal Power Act directs FERC to ensure that wholesale electricity rates, and the rules and practices affecting those rates, are "just and reasonable." 16 U.S.C. § 824e(a). This is the kind of "judgment-laden" standard that is "judicially unadministrable." *Armstrong,* 135 S. Ct. at 1385; *see also Montana-Dakota Utilities*, 341 U.S. at 251 ("Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of [FERC].").

Plaintiffs insist that the relief they seek is not judicially unadministrable because they are "ask[ing] the

Court only to decide whether, as in *Hughes*, a state regulatory program 'impermissibly intrudes upon the wholesale electricity market, a domain Congress reserved to FERC alone.'" [83] at 43 (citing *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016)). But, the parties in *Hughes* did not challenge whether the plaintiffs were entitled to seek declaratory relief under the Supremacy Clause, so the Court "assume[d] without deciding that they may." 136 S. Ct. at 1296 n.6. Therefore, citing to *Hughes* on this point does not advance plaintiffs' claim. Furthermore, as Exelon argues, as a practical matter, plaintiffs are asking the court to do more than just declare the ZEC program unlawful. While it may be possible to simply declare a program preempted and enjoin it in its entirety, the gist of plaintiffs' claims requires more. Plaintiffs agree that states can affect the wholesale market by subsidizing local industry, but they argue that this program distorts the market too much. [83] at 12, 38. The declaration sought by plaintiffs would require a court to draw some lines, to give the state direction on how not to interfere with wholesale rates while acting within its undisputed authority to regulate, and once a court enters that arena, it treads on FERC's exclusive expertise.

Plaintiffs cannot bring an equitable cause of action to enjoin the ZEC program on the basis of preemption.[21]

C. Federal Power Act Preemption

Preemption of a state law by federal law may be express or implied; it "is compelled whether Congress' command is explicitly stated in the statute's language

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[21] I nevertheless reach the merits of plaintiffs' preemption claims, in the event their claims can be read to seek a blanket injunction with no reference to the reasonableness of wholesale pricing.

or implicitly contained in its structure and purpose." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983) (citation omitted). Implied preemption takes two forms: field preemption, "where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively," and conflict preemption, where "state law is pre-empted to the extent that it actually conflicts with federal law." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). Preemption results from congressional action and agency action when the federal agency acts within the scope of its authority. *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 369 (1986).

The plaintiffs argue that Illinois's ZEC program is preempted by the Federal Power Act and FERC's exclusive authority. The parties rely on and discuss at length three Supreme Court cases: *Oneok, Inc. v. Learjet, Inc.*,[22] *F.E.R.C. v. Elec. Power Supply Ass'n*,[23] and *Hughes*,[24] as well as one FERC decision: *WSPP*.[25]

In *Oneok*, the Supreme Court warned courts to proceed cautiously when considering a state law that may apply to energy sales within the federal agency's jurisdiction, and find "pre-emption only where detailed examination convinces [the court] that a matter falls within the pre-empted field as defined by our precedents." 135 S. Ct. at 1599. Like earlier cases, *Oneok* reiterated "the importance of considering the *target* at which the state law *aims* in determining whether that law is pre-empted." *Id.* (emphasis original). *Oneok* upheld an antitrust law that a state applied to regulate wholesale gas prices, which inevitably affected the

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[22] 135 S. Ct. 1591 (2015).

[23] 135 S. Ct. 1591 (2015).

[24] 136 S. Ct. 1288.

[25] 139 FERC ¶ 61061 (Apr. 20, 2012).

wholesale market, because its purpose was to combat antitrust violations, not regulate wholesale prices. *Id.* at 1599–60.

Defendants assert that under *Oneok*, FERC does not have exclusive jurisdiction over *everything* that affects wholesale sales or rates. Since *Oneok* rejected the argument that state laws affecting wholesale rates or sales are field preempted, defendants conclude that the Federal Power Act does not impliedly occupy the entire field of things affecting wholesale rates or sales. Plaintiffs acknowledge that laws "aimed at 'subjects left to the States to regulate,' such as generally applicable state antitrust laws, blue sky laws, tax laws, and recycling laws, are not field preempted because their impact on interstate wholesale rates is incidental or indirect." [83] at 22 (citing *Oneok*, 135 S. Ct. at 1600–01). But, plaintiffs argue that the ZEC program is not a broadly applicable law because ZECs are only available to specifically selected, non-viable nuclear plants, as determined by the Illinois Power Agency.[26] Moreover, they believe that the program was aimed at the wholesale market, because the point of the ZECs is to keep the nuclear power plants generating electricity for sale into the wholesale market.

Plaintiffs' theory that the ZEC program is preempted because it intends to alter the outcomes of the wholesale auctions is not supported by *Oneok* or *Northwest Central Pipeline Corporation v. State Corporation Commission of Kansas*, 489 U.S. 493 (1989), on which *Oneok* relied. *Northwest Central* upheld state regula-

[26] The ZEC program does not expressly exclude any generators from applying. It describes a detailed bid selection process and the criteria that will be considered in that process, but plaintiffs do not explain how those or other provisions lead to the conclusion that the ZEC program does not apply broadly.

tion that was "[d]esigned as a counterweight to market, contractual, and regulatory forces," and it expressly rejected a version of plaintiffs' argument: "To find field pre-emption of [state] regulation merely because purchasers' costs and hence rates might be affected would be largely to nullify that part of NGA § 1(b) that leaves to the States control over production" because "there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market and contractual situations." 489 U.S. at 497, 514. *Oneok* does not stand for the proposition that a state law that regulates generation is invalid if the state knew the law would affect the wholesale market.

States may influence, through regulation, which generators participate in FERC's market, even though the end result may affect the wholesale market. Plaintiffs do not dispute that REC programs, tax incentives, and carbon taxes, which are within the states' jurisdiction, are lawful. *See* [83] at 26 n.12, 31–32. REC programs and tax incentives encourage renewable generators to produce, while carbon taxes discourage fossil fuel generation. Similarly, the ZEC program is aimed at a certain type of electricity generation facilities. Although the ZEC program will affect wholesale electricity rates, those rates were not its target[27]; thus, the general rule supplied by *Oneok* (and *Northwest Central*) does not require preemption.

The parties agree that *EPSA* defined FERC's exclusive jurisdiction as that which "directly affects" the

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[27] Defendants note that while plaintiffs argue that the statute's stated purpose was pretext, the complaint does not allege that the statute's true aim or purpose was to adjust or disregard wholesale rates. Instead, plaintiffs allege that its actual purpose was to save jobs and generate local tax revenues. *See* [1] ¶ 58.

wholesale rate. [52] at 19; [83] at 27–28; *see also* 136 S. Ct. 760. The Supreme Court explained:

> FERC has the authority [. . .] to ensure that rules or practices 'affecting' wholesale rates are just and reasonable. [. . .] [T]hat statutory grant could extend FERC's power to some surprising places. [. . .] So if indirect or tangential impacts on wholesale electricity rates sufficed, FERC could regulate now in one industry, now in another, changing a vast array of rules and practices to implement its vision of reasonableness and justice. We cannot imagine that was what Congress had in mind. For that reason, [. . .] we now approve, a common-sense construction of the [Federal Power Act]'s language, limiting FERC's 'affecting' jurisdiction to rules or practices that 'directly affect the [wholesale] rate.'

EPSA, 136 S. Ct. at 774 (citation omitted).

Plaintiffs allege that ZECs, by providing out-of-market payments, effectively replace the auction clearing price, and they argue that *EPSA* should not be read to limit FERC's jurisdiction to only those transactions that establish the amount of money a purchaser will hand over in exchange for wholesale power. Plaintiffs also argue that "a state regulation that substantially affects the quantity or terms of wholesale sales is preempted." [83] at 28 n.14 (citing *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 307–08 (1988); *N. Nat. Gas. Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 90–93 (1963); *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 477 (4th Cir. 2014), *aff'd sub nom. Hughes*, 136 S. Ct. 1288).

EPSA stands for the opposite of what plaintiffs describe. First, *EPSA* defined rate-setting as establishing the amount of money a purchaser will "hand over in exchange for [wholesale] power." *EPSA*, 136 S. Ct. at 777. Second, *EPSA* expressly rejected the argument that a law could "effectively" regulate wholesale rates when it did not do so "nominal[ly]"; the Supreme Court reasoned that such an argument made "[t]he modifier 'effective' [do] more work than any conventional understanding of rate-setting." *Id.* Nothing in the Federal Power Act, the Court said, even "suggest[ed]" that "expansive" of a definition of rate-setting. *Id.* at 777–78. Furthermore, as Exelon notes, *EPSA* explained that FERC cannot take action that transgresses states' authority over generation, "no matter how direct, or dramatic," the program's "impact on wholesale rates." [92] at 19 (quoting 136 S. Ct. at 775, 780 n.10).

EPSA recognized that wholesale and retail markets in electricity cannot be "hermetically sealed" from one other. 136 S. Ct. at 776. As a result, transactions in the wholesale market will have "natural consequences" at the retail level, as will FERC's regulation of wholesale matters. *Id.* Although the opinion addressed a question of FERC encroaching on the state, the analysis applies equally to the states encroaching on FERC. Thus, under *EPSA*, a state regulation that substantially affects the quantity and terms of wholesale sales is not necessarily preempted. *Id.* ("[A] FERC regulation does not run afoul of § 824(b)'s proscription just because it affects—even substantially—the quantity or terms of retail sales."). The key inquiry is whether FERC or the state is regulating what takes place in their respective markets, because when the state regulates what takes place in the retail market, in furtherance of its charge to improve that market, then the effect on wholesale rates is irrelevant. *Id.* ("whatever the effects at the retail level," when "every aspect of the regulatory plan happens exclusively on the wholesale market and governs exclusively that market's rules" there is no preemption).

Hughes involved a state regulatory program that provided subsidies through state-mandated contracts benefitting new generators on the condition that the new generator would sell its capacity into a FERC-regulated wholesale auction. 136 S. Ct. at 1292. Competitors of the new generators brought suit, and ultimately, the Supreme Court held that the state's regulatory scheme invaded FERC's exclusive jurisdiction. *Id.* The Court's holding was "limited":

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

Id. at 1299 (internal citations omitted). Based on this passage, defendants and Exelon argue that the ZEC program is distinguishable from the regulatory scheme that *Hughes* rejected. They argue that because the ZEC program exclusively regulates separate sales of credits that represent environmental benefits of nuclear power generation and it does not regulate the rate or transaction terms of wholesale power, the program does not run afoul of *Hughes*.

Plaintiffs respond that *Hughes* is not distinguishable because the facilities' receipt of ZECs is conditioned on their participation in the wholesale auction. Plaintiffs explain that generators can only receive ZECs if they produce electricity and they can only dispose of that electricity by selling it in the wholesale auctions; and since generators have to dispose of electricity to be able to make more, they have to sell electricity to the wholesale auctions to continue receiving ZECs. According to plaintiffs, *Hughes* "[cannot] be read to allow state measures that in reality intrude on exclusive federal jurisdiction just because they do not contain express language to that effect. A *de facto* implicit requirement is enough." [83] at 23 n.10 (citing *N.J. Realty Title Ins. Co. v. Div. of Tax Appeals in Dep't of Taxation & Fin. of N.J.*, 338 U.S. 665, 673 (1950); *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 192–95 (4th Cir. 2007); *S. Dakota Min. Ass'n, Inc. v. Lawrence Cty.*, 155 F.3d 1005, 1011 (8th Cir. 1998); *Blue Circle Cement, Inc. v. Bd. of Cty. Comm'rs of Cty. of Rogers*, 27 F.3d 1499, 1508 (10th Cir. 1994)).[28]

PJM requires all generators in its region to offer their capacity into the PJM capacity auction; if a generator's capacity clears, PJM requires the generator to sell into PJM's energy market.[29] Since the ZECs provide insufficient revenue to support the plant, PJM argues in its amicus brief, "the nuclear plant must offer below its real costs to ensure it clears the whole-

[28] In these cases, the state effectively prohibited conduct that federal law authorized.

[29] PJM "is exploring" ways to change its participation requirement to "remove subsidized resources from the price formation process and thus accommodate state subsidies in a manner that might be acceptable to FERC and PJM's stakeholders." [88] at 12 n.6.

sale auction," which gives them revenue from the auction in addition to revenue from future ZECs for continued operation. [88] at 12. Finally, PJM argues that because PJM requires generators to participate in the wholesale markets, the ZEC program did not need to include a condition similar to the one included in *Hughes*; therefore, in practice, the ZEC program is not distinguishable from the regulatory scheme in *Hughes*.

Illinois does not require participation in wholesale auctions in order to receive ZECs. PJM requires participation in the capacity auction, but generators are not required to clear that auction. In fact, they can receive ZECs even if they do not clear the capacity auction and even if they do not participate in the energy auction. Generators in MISO's region are not required to participate in or clear any auctions in order to receive ZECs.[30] It is true that: (1) bid stacking creates an incentive for generators to submit low enough bids to clear the auction so that they can offload their supply; and (2) ZEC-selling generators will have an additional incentive to clear the auction, and therefore, they are perhaps more likely to submit low bids. Nevertheless, the ZEC program does not *mandate* auction clearing in PJM or MISO, and the state, while taking advantage of these attributes to

[30] Plaintiffs argue that because Clinton is designated as an Exempt Wholesale Generator under the Public Utility Holding Company Act, 42 U.S.C. § 16451 *et seq.*, it can only sell its electricity in MISO's wholesale auction. But, Clinton could forego its EWG status and seek ICC approval to sell its energy at retail, and then it would no longer be limited to selling its electricity in MISO's wholesale auctions.

confer a benefit on nuclear power, is not imposing a condition directly on wholesale transactions.[31]

Plaintiffs also argue that the ZEC program is analogous to the state regulatory scheme in *Hughes* because ZECs are "tethered" to the generators' wholesale market participation through the program's price adjustment feature. [83] at 24. As discussed above, the initial price of ZECs (the Social Cost of Carbon) has nothing to do with wholesale prices. *See* 20 ILCS 3855/1-75(d-5)(1)(B). The price adjustment allows the price of ZECs to fall below that initial price, and the amount by which it decreases is calculated using a composite of projected prices from the energy and capacity markets; therefore, even an adjusted ZEC price is not based on the wholesale price a ZEC recipient receives. *Id.* § 1-75(d-5)(1)(B). These projected and composite prices are not within FERC's jurisdiction. Thus, the "tether" in this case is not to wholesale participation or transactional pricing; the tether is to broader, indirect wholesale market forces.

Read together, *EPSA* and *Hughes* stand for the proposition that preemption applies whenever a tether to wholesale rates is indistinguishable from a direct effect on wholesale rates. The qualifier "direct" is important; influencing the market by subsidizing a participant, without subsidizing the actual wholesale transaction, is indirect and not preempted. Since a generator can receive ZECs for producing electricity and the credits are not directly conditioned on clearing wholesale auctions, ZEC payments do not suffer from

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[31] *See Allco*, No. 16-2946, 2017 WL 2782856, at *10 (rejecting a claim that a state program compelled wholesale transactions where the program directed certain contracts, but did not guarantee that the wholesale transaction would occur).

the "fatal defect" in *Hughes*, *see* 136 S. Ct. at 1299, nor do they alter the amount of money that is exchanged for wholesale electricity, *see EPSA*, 136 S. Ct. at 777. *Hughes* should not be extended to invalidate state laws that do not include an express condition, but that in practice (and when combined with other market forces), have the effect of conditioning payment on clearing the wholesale auction. That is not the kind of market participation that worried the Court in *Hughes*, and to read *Hughes* to apply to this program would intrude on the state's authority to regulate power generation.

RECs are similar to ZECs, and the parties do not suggest that RECs are preempted. In *WSPP*, FERC held that when RECs are "unbundled" and sold independently of electricity, the REC transaction falls outside of FERC's jurisdiction. 139 FERC ¶ 61,061, ¶ 24 (2012). FERC reasoned that an REC sale is "not a charge in connection with a wholesale sale," and it does not set or even "affect wholesale electricity rates." *Id.* Plaintiffs note that *WSPP* was not a "sweeping ruling," it was an uncontested proceeding that was limited to facts involving RECs; it does not require this court to reach a similar decision as to ZECs. [83] at 34. That is true, but FERC's conclusion that it is possible to unbundle an environmental attribute credit from the sale of electricity without stepping on FERC's toes is persuasive when applied to ZECs. Illinois's ZECs, unlike RECs, must be purchased by utilities in an amount proportional to their retail sales, which in turn are proportional to their wholesale electricity purchases, but this does not mean the ZEC transaction is bundled with wholesale transactions. A bundled, or dependent transaction is one where a credit sale takes place as part of the same transaction as a wholesale energy sale. 139 FERC ¶ 61,061, at ¶ 24. The ZEC transactions required by the Illinois statute are distinct from wholesale energy sales. While not dispositive, FERC's acknowledgment that RECs are outside its jurisdiction indicates that similar programs that authorize transactions in state-created credits that are distinct from wholesale transactions are not preempted.

Plaintiffs argue that the ZEC program invades FERC's field of exclusive jurisdiction because it provides nuclear plants with substantial out-of-market payments, thereby directly affecting the revenue that nuclear generators will be paid and effectively replacing the auction clearing price. I conclude, however, that the ZEC program falls within Illinois's reserved authority over generation facilities; Illinois has sufficiently separated ZECs from wholesale transactions such that the Federal Power Act does not preempt the state program under principles of field preemption.

State law that conflicts with federal law is preempted. *English*, 496 U.S. at 79 (citations omitted). Such conflicts occur where: (1) "it is impossible for a private party to comply with both state and federal requirements," or (2) "[the] state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* Conflict preemption asks whether the state law does "clear damage" to the goals of federal legislation. *Nw. Cent.*, 489 U.S. at 522 ("Unless clear damage to federal goals would result, FERC's exercise of its authority must accommodate a State's regulation of production.").

Plaintiffs contend that the ZEC program conflicts with federal law because it interferes with the wholesale auction process, which FERC has selected as the method for establishing just and reasonable rates. A core principle of conflict preemption is that "courts must be careful not to confuse the 'congressionally designed interplay between state and federal regulation,' [. . .] for impermissible tension that requires pre-emption under the Supremacy Clause." *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (quoting *Nw. Cent.*, 489 U.S. at 518).

Plaintiffs' allegations that the ZEC program will affect FERC's wholesale auction process do not support a finding that the ZEC program does "clear damage" to FERC's goals. The market distortion caused by subsidizing nuclear power can be addressed by FERC and the interplay between state and federal regulation can continue to exist.[32] Plaintiffs' theory of conflict preemption is that distorting the wholesale market conflicts with FERC's preference for competitive auctions. This is too broad a theory of preemption and would inappropriately limit state authority. So long as FERC can address any problem the ZEC program creates with respect to just and reasonable wholesale rates—and nothing in the complaints suggest that FERC is hobbled in any way by the state statute—there is no conflict. The complaint certainly alleges that ZECs will cause billions of dollars in market impact, but it does not allege that FERC is damaged in its ability to determine just and reasonable rates. The regulatory structure remains unaltered, and

[32] Not surprisingly, Exelon was opposed to these kinds of subsidies until it was a beneficiary of them. *See* [83] at 37. That it has taken both sides of the policy debate over subsidies is irrelevant to whether the state-created market distortions at issue here conflict with federal regulations. There is no dispute that ZECs will affect the market and that Illinois has created a subsidy that favors certain participants in the wholesale auctions. The program, however, does not require auction clearing and does not prevent FERC from setting wholesale rates. Exelon's biases notwithstanding, Illinois is not in conflict with FERC.

FERC's power undiminished.[33] Consequently, the ZEC program does not conflict with the Federal Power Act.

D. The Commerce Clause

The commerce clause provides that Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const., art. I, § 8, cl. 3. The clause includes an implicit restraint on state authority to regulate interstate commerce, even in the absence of a conflicting federal statute. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). This dormant commerce clause guards against "the evils of 'economic isolation' and protectionism," while also "recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623–24 (1978).

A law that discriminates against interstate commerce on its face, has the effect of favoring in-state economic interests over out-of-state interests, or harbors a discriminatory purpose, is subject to a per se rule of invalidity. *United Haulers*, 550 U.S. at 338. The state may only overcome the per se rule of invalidity by showing that it has no other means to advance a

[33] Plaintiffs argue that the subsidies will stand as an obstacle to the federal plan for competitive wholesale auctions and that Illinois is doing indirectly what it cannot do directly—adjusting wholesale auction-clearing prices. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987). But indirect effects are permissible under *EPSA* and *Hughes*, and, in my view, the proper articulation of the federal interest here is in setting just and reasonable wholesale rates. FERC can continue to use all the tools at its disposal to set just and reasonable rates, and the possible need to react to ZECs is not sufficient to amount to clear damage to wholesale rate-setting.

legitimate local purpose. *Id.* at 338–39. By contrast, "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless 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). In balancing the *Pike* factors, courts consider the nature of the local interest involved and whether an alternative existed that could promote the local interest with a lesser impact on interstate commerce. *Id.* Accordingly, dormant commerce clause claims, especially of the latter category, turn on a "sensitive, case-by-case analysis" of the facts, including the "purposes and effects" of the law at issue. *See, e.g.*, *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). Cases involving facially neutral laws typically require an evidentiary record to be developed before resolution is possible. *See United Haulers*, 550 U.S. at 337.

Plaintiffs argue that the state statute discriminates against interstate commerce on its face because: (1) "ZECs solely benefit certain in-state wholesale producers of nuclear energy in Illinois, to the disadvantage of out-of-state producers who compete in the wholesale market," [83] at 46 (citing [1] ¶¶ 58–59); and (2) "the purported 'procurement process,' based on 'public interest criteria,' is a sham, as Clinton and Quad Cities have been pre-determined to be the 'winners' of the ZEC contracts," *id.* (citing [1] ¶ 59).[34]

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[34] Plaintiffs say that "[the statute] directs the IPA to consider reports under House Resolution 1146," and one such report identifies the Clinton and Quad Cities plants as plants that will potentially close; this is relevant because preserving zero emission facilities is a factor in the "public interest" criteria of the bid selection process. [83] at 46. The same provision that plaintiffs draw on, however, directs the IPA to consider other reports, some of which,

I disagree. The statute is not facially discriminatory because it does not preclude out-of-state generators from submitting bids for ZECs. The alleged sham process to select ZEC recipients indicates that the scales are tipped in favor of Clinton and Quad Cities, but that does not mean that the agencies charged with selecting the recipients will discriminate. The statute gives neutral, non-discriminatory standards to the agencies, and plaintiffs do not allege that the agencies will deliberately flout the ZEC bid-selection process. *See Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935). Since the complaint does not include any plausible allegations that the ICC will ignore its statutory duties, there is no support for the conclusion that the procurement process is facially discriminatory. *See Godfrey v. United States*, 997 F.2d 335, 338 n.4 (7th Cir. 1993) (only "clear evidence to the contrary" will persuade a court that "public officers" have not "properly discharged their official duties").

Plaintiffs also contend that the statute has the clear effect of favoring in-state economic interests over out-of-state interests. Assuming that only Illinois nuclear generators are selected, the ZEC program would not be invalid, necessarily, because there are many ways to explain how a valid program could produce that

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Exelon argues, are about out-of-state plants. 20 ILCS 3855/1-75(d-5)(1)(C). Considering such reports does not facially favor in-state plants. Additionally, the ICC and not the IPA selects the plants that will receive ZECs. Since the ICC may only consider three neutral environmental criteria—(1) "minimizing carbon dioxide emissions that result from electricity consumed in Illinois," (2) "minimizing sulfur dioxide, nitrogen oxide, and particulate matter emissions that adversely affect the citizens of this State," and (3) "the incremental environmental benefits resulting from the procurement," *Id.* § 1-75(d-5)(1)(C-5)(i)–(ii)—it does not discriminate based on a plant's geographic location.

end. For example, it is possible that no out-of-state generator will submit a bid, thereby mooting plaintiffs' discriminatory effects claim. It is also possible that the ICC will decide that Illinois generators are in the best position to reduce air pollutants in Illinois, which would justify a decision to select only Illinois generators. In light of plaintiffs' facial challenge, and accepting the allegations of how the program will work in practice, I conclude that there is a substantial possibility that the statute will be non-discriminatory in effect.

Plaintiffs also argue that the statute has a discriminatory purpose. They say that it was enacted for political reasons, to save jobs and property tax revenues tied to Clinton and Quad Cities. Plaintiffs point to the statements Governor Rauner made when he signed the bill into law: "The Future Energy Jobs bill protects taxpayers, ratepayers, and the good-paying jobs at the Clinton and Quad Cities' plants." [83] at 47. Plaintiffs argue that the stated environmental purpose was a mere pretext; they cite the original version of the statute, which set the ZEC price as the difference between the nuclear generator's costs and revenues from energy and capacity markets.[35] Plaintiffs explain that this price formula was changed in the final version in response to *Hughes*. *Id.* (citing 20 ILCS 3855/1-75(d-5)(1)(B)).

Defendants say that the statute was intended to advance public health and protect the environment by reducing the emissions of air pollutants created by energy generators; it attempts to achieve these goals by offering credits to zero-emission generators. Courts

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[35] [83] at 19 n.7 (citing S.A. 3, S.B. 1585, at 82–83, 99th Gen. Assemb. (Ill. May 12, 2016), available at http://www.ilga.gov/legislation/99/SB/PDF/09900SB1585sam003.pdf.

must "assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces [the Court] to conclude that they 'could not have been a goal of the legislation.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (citation omitted). The statute was both environmental legislation and job-saving legislation. Notwithstanding the allegations of the complaint, the circumstances surrounding the enactment of the statute do not warrant an inference of discrimination. Plaintiffs do not cite any language in the legislation that would support such an inference. The governor's and some legislators' celebratory remarks about the potential job-saving effects of the law do not negate the ZEC program's environmental purpose and public health interests. These statements suggest political favoritism on the part of some for the local economy, but they do not evince an intent to discriminate against out-of-state commerce. The law may have been underinclusive in the breadth of the subsidy, because Illinois could have subsidized more nuclear power, but that does not mean its purpose was protectionist, instead of environmental.

The statute is not subject to a per se rule of invalidity. Plaintiffs argue that the ZEC program fails the *Pike* test because its impacts on interstate commerce far outweigh any claimed environmental benefits. Specifically, the complaint alleges that the ZEC program distorts the market by driving out and deterring the entry of more cost-efficient, environmentally-friendly, out-of-state generators, [1] ¶¶ 45–50; and that the reduction of carbon emissions can be achieved through means that do not discriminate against interstate commerce, *id.* ¶¶ 14, 89. Exelon notes that the state offers a payment through the ZEC program, but the state allows all other actors to participate in commerce freely, which does not make interstate commerce more difficult. The commerce clause is not concerned with the burdens created when a state participates in a market and exercises the right to favor its own citizens over others. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). The creation of the ZEC has created a new market, and while that market may affect the wholesale energy market, it is an incidental burden on the channels of interstate commerce in which plaintiffs participate.

Ordinarily, the fact-dependent balancing required to assess a dormant commerce clause challenge would preclude dismissal under Rule 12(b)(6). But here, 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. As a matter of law, the state's legitimate interests include not only environmental concerns, *see Clover Leaf*, 449 U.S. at 471, but also the right to participate in or create a market, *see Alexandria Scrap*, 426 U.S. at 810, and the right to encourage power generation of its choosing, *see Hughes*, 136 S. Ct. at 1299. The alleged harm to out-of-state power generators who will be competing in auctions against subsidized participants is not clearly excessive when balanced against these weighty and traditional areas of permissible state regulation.

E. The Equal Protection Clause

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting U.S. Const. amend. XIV).

Under the rational basis test, which the parties agree applies in this case, "the [state's] action simply 'cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006) (quoting *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001)).

The consumer plaintiffs allege that the ZEC program violates the equal protection clause because it favors Illinois-based nuclear generators over other electricity producers by imposing wholesale electricity costs on Illinois consumers but not on electricity consumers of the several other states in the MISO and PJM regions. 17-cv-1163, [1] ¶ 65. They argue that the ZEC program does not pass the rational basis test because it makes Illinois electricity consumers "second-class consumers" in the MISO or PJM regions for ten years. 17-cv-1163, [58] at 19–20 (citing *Zobel v. Williams*, 457 U.S. 55 (1982); *Williams v. Vermont*, 472 U.S. 14 (1985); and *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612 (1985)). Specifically, plaintiffs argue, "an additional ZEC charge will be added to the bills of Illinois electricity consumers, but not to bills of electricity consumers in other states in PJM or MISO *even if they purchase electricity generated by Clinton or Quad Cities*, for the wholly arbitrary reason that Clinton and Quad Cities are located in Illinois." 17-cv-1163, [58] at 20 (emphasis original). The Constitution only requires Illinois to treat equally the people within its jurisdiction. As such, Illinois does not run afoul of the Fourteenth Amendment by treating Illinoisans differently from citizens from other states that live in the MISO or PJM regions. Furthermore, the complaint does not allege that Illinois could have imposed a surcharge on people in the MISO and PJM regions that lived outside of Illinois.

The consumer plaintiffs also allege that the ZEC program does not pass the rational basis test because the stated environmental purpose of the ZEC program was an attempt to mask the legislature's true goal of subsidizing the Clinton and Quad Cities plants and such "[*u*]*ltra vires* and unlawful purposes can never be legitimate government purposes." 17-cv-1163, [58] at 21. Yet, "[w]hen dealing with local economic regulation, 'it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.'" *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1071 (7th Cir. 2013) (citation omitted). The rational basis test requires courts to presume legislation is valid and to uphold it as long as there is a rational relation to some legitimate end. *Id.* (citation omitted). "Once [the court] identif[ies] a plausible basis for the legislation, [the] inquiry is at its end." *Id.* (citation omitted).

The rational basis for the ZEC program is outlined in § 1.5 of the statute, which states in relevant part: "The General Assembly therefore finds that it is necessary to establish and implement a zero emission standard, which will increase the State's reliance on zero emission energy through the procurement of zero emission credits from zero emission facilities, in order to achieve the State's environmental objectives and reduce the adverse impact of emitted air pollutants on the health and welfare of the State's citizens." *See* SB 2814, Public Act 099-0906, 99th Gen. Assemb. (Ill. 2016).[36] These reasons are plausible; accordingly, I

[36] Available at http://www.ilga.gov/legislation/publicacts/99/099-0906.htm.

look no further. The consumer plaintiffs do not state an equal protection claim.

IV. Conclusion

Defendants' and Exelon's motions to dismiss are granted. The plaintiffs' claims are dismissed in part for lack of subject-matter jurisdiction and in part for failure to state a claim. The plaintiffs' motions for a preliminary injunction are denied.[37] The Clerk shall enter final judgment and terminate these cases.

ENTER:

/s/ Manish S. Shah
Manish S. Shah
United States District Judge

Date: July 14, 2017

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[37] Because the complaints fail to state a claim, plaintiffs cannot show a likelihood of success on the merits and preliminary injunctive relief would not be appropriate. Courts usually give plaintiffs an opportunity to amend a complaint after a first dismissal. Here, however, the deficiencies in plaintiffs' claims cannot be cured with different allegations. These plaintiffs cannot pursue the legal theories they have articulated (or they do not have standing to do so). Therefore, I decline to give them leave to amend.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 17-2445

ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,

Plaintiffs-Appellants,

v.

ANTHONY M. STAR, Director of the
Illinois Power Agency, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 17 CV 1164
Manish S. Shah, *Judge*.

October 9, 2018

Before

FRANK H. EASTERBROOK, Circuit Judge
DIANE S. SYKES, Circuit Judge
MICHAEL J. REAGAN, District Judge*

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* Of the Southern District of Illinois, sitting by designation.

ORDER

Plaintiffs-appellants filed a petition for rehearing on September 27, 2018. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX E

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

[Filed 02/14/17]

Case No. 17-cv-01164

ELECTRIC POWER SUPPLY ASSOCIATION, DYNEGY INC., EASTERN GENERATION, LLC, NRG ENERGY, INC., and CALPINE CORPORATION,

Plaintiffs,

v.

ANTHONY M. STAR, in his official capacity as Director of the Illinois Power Agency, and BRIEN J. SHEAHAN, JOHN R. ROSALES, SADZI MARTHA OLIVA, MIGUEL DEL VALLE, and SHERINA MAYE EDWARDS, in their official capacities as Commissioners of the Illinois Commerce Commission,

Defendants.

Judge

Magistrate

COMPLAINT

1. This case arises from unlawful Illinois legislation, the so-called Future Energy Jobs Act ("FEJA"),[1]

[1] FEJA, Public Act 099-0906 (12/7/16), available at http://www.ilga.gov/legislation/publicacts/99/PDF/099-0906.pdf. This lawsuit only challenges the portions of FEJA that amended IPAA to create the Zero Emissions Credit program for nuclear generators.

to the extent it amended the Illinois Power Agency Act ("IPAA"), 20 ILCS 3855,[2] in a manner that intrudes on the exclusive authority of the Federal Energy Regulatory Commission ("FERC") over "the sale of electric energy at wholesale in interstate commerce" pursuant to the Federal Power Act ("FPA"), 16 U.S.C. § 824(b)(1).

2. FERC has determined that competitive market forces best set wholesale energy prices and thus has mandated and approved auction-based markets for wholesale electric energy sales in Illinois and across regions which serve over two-thirds of the population of the United States. Under this system, the forces of competition have benefited consumers but have impaired the financial viability of the Clinton and Quad Cities nuclear generating plants, to the point where Exelon, the owner of both of these plants, decided to close them unless the State bailed them out with billions of dollars in subsidies, to be paid by Illinois electricity consumers.

3. Seeking to change the results of the FERC-approved market-based auction system, the Illinois General Assembly enacted FEJA, *inter alia*, to prop up these two uneconomic nuclear power plants and keep them in the market for at least ten more years, via so-called Zero Emissions Credits ("ZECs"). Unless enjoined or eliminated, these credits will result in Illinois' captive ratepayers overpaying an estimated $235 million per year over ten years to Exelon.

4. The ZEC program invades FERC's exclusive regulatory field by directly altering the revenue to be paid to the nuclear generators. The ZECs provide the

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[2] The FEJA amendments to IPAA become effective on June 1, 2017, and all citations in this Complaint are to the post-June 1 version of the IPAA.

nuclear plants with substantial out-of-market payments for each MWh of electricity they produce, thus effectively replacing the auction clearing price received by these plants with the alternative, higher price preferred by the Illinois General Assembly.

5. Under FEJA's ZEC program, the actual dollar amount of the ZECs is expressly tethered to the price of electricity in the FERC-regulated wholesale markets. That is, nuclear generators are entitled to ZECs if, but only if, wholesale electricity prices are at a level that the "environmental benefits" of the nuclear plants will "cease to exist" without subsidies. 20 ILCS 3855/1-75(d-5)(1)(C). Furthermore, the amount of the subsidies is to be adjusted as wholesale prices fluctuate, and there is no entitlement to any ZECs if wholesale market prices established under FERC's auspices rise above a specified level. *Id*. (d-5)(1)(B).

6. If the ZEC program goes into effect, as it is scheduled to do in June 2017, it will profoundly disrupt the FERC-approved energy market auction structure and result in the transfer of hundreds of millions of dollars a year of ratepayer funds to Exelon at the expense of other generators that would have been economically viable without discriminatory subsidies. Those very same subsidies that artificially sustain a few uneconomic units impair the financial outlook for generators that are competing on the basis of FERC regulated market rules. The shareholders-owners of these companies invested capital because the Federal Power Act prohibits rates that are "unjust, unreasonable, unduly discriminatory or preferential," as the rates in the FEJA undoubtedly are. 16 U.S.C. § 824e.

7. At current wholesale prices, for every megawatt hour ("MWh") of energy the subsidized nuclear plants sell into the FERC-jurisdictional market, the nuclear

units will receive a premium of more than 70 percent from the Illinois ratepayers through ZECs. That is, for each MWh sold, they will receive the locational price of energy, which is currently around $18 and $25 per MWh at Quad Cities and Clinton respectively, plus a 2017 $16.50 ZEC payment subsidy (with possible increases in future years), funded entirely by Illinois consumers. As a result, in 2017 the Clinton and Quad Cities plants will be paid a total of $34.50 or $41.50 per MWh of energy that they sell in FERC-regulated wholesale markets, while a competing energy generator at the same location would receive just $18 or $25 per MWh. The bonus payments to the subsidized nuclear plants are scheduled to adjust over the ten-year life of the program, changing based on current wholesale capacity and energy prices.

8. The ZEC payments will disrupt the economically efficient functioning of the FERC-regulated energy and capacity market auctions. The artificial retention of uneconomic nuclear units in the market has a dramatic effect on wholesale market prices subject to FERC's exclusive jurisdiction.

9. The prospect of these out-of-market payments has already caused Exelon to reverse its decision to close the Clinton and Quad Cities facilities, preventing the Illinois energy markets from reaching the efficient market equilibrium that the FERC-mandated wholesale markets would have otherwise produced.

10. If the ZECs go into effect, Illinois's *retail* ratepayers will be forced to fund an effort by the General Assembly to artificially depress *wholesale* market prices, which disrupts the FERC-approved auctions and market processes. The nuclear plants will not retire as scheduled, but will continue to bid into the wholesale market auctions, with the incentive and

ability to offer their supply of electricity into the auctions at artificially lower prices (*i.e.*, at prices that do not fully cover their costs). The result of these below-cost bids will be below market prices in the wholesale market. This will harm other generators, including the Plaintiffs, because the lower auction prices will result in lower revenues. In the long term, lower prices will force some generators who are more efficient than the ZEC recipients to exit the market and will deter potential new generators – including generators of renewable sources of energy – from entering the market.

11. Paradoxically, the artificially suppressed wholesale market prices are likely to result in higher energy bills for retail ratepayers as they are forced to pay the nuclear subsidy as a charge on their retail electric bills. Consumers will also experience higher wholesale prices over the long-run, since providers of capital will be unwilling to enter the markets without adding a significant risk premium to reflect the fact that the State is undermining FERC's ability to provide just and reasonable rates.

12. The ZEC program is unlawful because it operates in the area of FERC's exclusive jurisdiction, and federal law thus field preempts it under the Supremacy Clause of the United States Constitution. On field preemption grounds, the Supreme Court recently invalidated similar Maryland measures in *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016). Moreover, the ZEC program is conflict-preempted, as it stands as an obstacle to the intended functioning of the FERC-jurisdictional markets. The ZEC program results in a mix of energy resources that will be far less economically efficient than if the markets were allowed to work as designed.

13. The ZEC program is also invalid under the dormant Commerce Clause. The ZECs solely benefit certain in-state wholesale producers of nuclear energy in Illinois, to the disadvantage of out-of-state producers who compete in the wholesale market. The General Assembly has thus failed to regulate evenhandedly to effectuate a legitimate local public interest, and the effects of its regulation on interstate commerce are more than incidental. For all of these reasons, the Court should enter appropriate declaratory and injunctive relief.

14. Although the reduction of carbon emissions is important, this can be achieved much more effectively by means that would neither discriminate against interstate or international commerce nor frustrate the progress competitive markets have been delivering in the form of environmental benefits. If Illinois truly believes that Clinton and Quad Cities require additional revenues to achieve environmental goals, it is entitled to petition FERC to adopt market rule changes or take other steps to increase market prices to levels sufficient to allow the nuclear generators to recover their costs.

PARTIES

15. Plaintiff Electric Power Supply Association ("EPSA") is the national trade association representing leading competitive independent power producers and marketers, and is incorporated under the laws of the District of Columbia. EPSA's member companies are involved in competitive wholesale and retail electricity markets, with significant financial investments in electric generation and electricity marketing operations in Illinois and throughout the United States. EPSA seeks to bring the benefits of competition to all power customers. Many EPSA members

actively participate in the Illinois-area FERC-regulated wholesale electricity auctions.[3]

16. Plaintiff Dynegy Inc. ("Dynegy") owns and operates more than 31,000 MW of power-generating capacity throughout the Midwest, Northeast, Mid-Atlantic and Texas and two retail electric companies serving businesses and residents in Illinois, Ohio, and Pennsylvania. In Illinois, Dynegy owns 12 power plants, totaling more than 9,000 MW of generation. Dynegy's retail companies serve approximately 840,000 Illinois residential customers through municipal, township and county aggregation, and approximately 20,000 Illinois commercial and industrial customers. Through subsidiaries, Dynegy actively participates in the Illinois-area FERC-regulated wholesale electricity auctions.

17. Plaintiff Eastern Generation, LLC ("Eastern") owns and operates, through its subsidiaries, 72 generating units at seven facilities with a total average capacity of 4,961 MW. The facilities are located in Illinois, Michigan, New York, and Ohio. Eastern actively participates in the Illinois-area FERC-regulated wholesale electricity auctions.

18. Plaintiff NRG Energy, Inc. ("NRG") is the largest independent power producer in the United States with over 50,000 MW of diverse resources – powered by solar, wind, nuclear, gas, coal, oil, and cogeneration – and is one of the nation's largest competitive retail energy suppliers, with roughly three million retail customers. In Illinois, NRG owns six power plants, totaling approximately 4,326 MW of generation. Through its ownership of these resources, NRG actively partici-

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[3] The views expressed in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

pates in the Illinois-area FERC-regulated wholesale electricity auctions.

19. Calpine Corporation ("Calpine") is a Delaware corporation engaged, through various subsidiaries, in the development, financing, acquisition, ownership, and operation of independent power production facilities and the wholesale and retail marketing of electricity in the United States and Canada. Calpine has a fleet of 81 power plants in operation or under construction, representing approximately 26,000 MW of generating capacity, including the Geysers geothermal facilities, the largest geothermal complex in the world, located in Northern California. Through wholesale operations and its retail business, Calpine's subsidiaries serve customers in 24 states, Canada, and Mexico. Calpine subsidiaries own the Zion Energy Center in Illinois and actively participate in the MISO and PJM FERC-regulated wholesale electricity auctions.

20. Defendant Anthony M. Star is the Director of the Illinois Power Agency ("IPA), which has specific authority to implement and enforce the FEJA ZEC program. Mr. Star is sued here only in his official capacity.

21. Defendants Brien J. Sheahan, John R. Rosales, Sadzi Martha Oliva, Miguel del Valle, and Sherina Maye Edwards are Commissioners of the Illinois Commerce Commission ("ICC"), which has specific authority to implement and enforce the FEJA ZEC program. The commissioners are sued here only in their official capacity.

JURISDICTION AND VENUE

22. This Court has jurisdiction over the subject matter of this case, under 28 U.S.C. § 1331, because the claims arise under federal law, specifically the

Supremacy Clause and the Commerce Clause of the U.S. Constitution, and under 28 U.S.C. § 1983.

23. This Court has the authority to grant the requested declaratory relief under 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57, and authority to grant the requested injunctive relief under 28 U.S.C. § 1651(a) and Federal Rule of Civil Procedure 65.

24. This Court has jurisdiction to order prospective relief in the form of a declaratory judgment or an injunction against Defendants in their official capacities as officials of the Illinois agencies responsible for implementing and administering the challenged ZEC program. *Ex parte Young*, 209 U.S. 123, 129 (1908).

25. Venue is properly in this district pursuant to 28 U.S.C. § 1391, because the Defendants reside in this district, as the IPA has its headquarters in this district, and the ICC has a major office here.

FACTS

Exclusive Federal Jurisdiction Over the Wholesale Electricity Market

26. Under the FPA, FERC has exclusive regulatory authority, to the exclusion of state and local governments, over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1); *see also id.* § 824(d) (defining a "wholesale" sale as a sale of electric energy to a buyer "for resale" to another buyer). This exclusive authority extends to the imposition of any charges "in connection with" wholesale rates, and the enacting of any "rules and regulations affecting or pertaining to such rates or charges." *Id*. §§ 824d(a), 824e(a).

27. The scope of interstate regulation has grown over the years, as technological developments made it increasingly possible to transmit energy over long distances. Local delivery networks gave way to the modern "grid" network, with electricity constantly moving in interstate commerce throughout the United States.

28. FERC is exclusively empowered to regulate the interstate wholesale market to ensure, *inter alia*, that rates are "just and reasonable." 16 U.S.C. § 824d(a). In determining whether a state regulation interferes with this authority, courts consider "the *target* at which the state law *aims*," and "measures aimed directly at interstate purchasers and wholesales for resale" are preempted. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015). State actions that "*directly* affect the wholesale rate" are likewise invalid. *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 772 (2016) (quotation omitted). The Supremacy Clause preempts any state regulation that effectively alters the wholesale rate a generator will receive. *Hughes*, 136 S. Ct. at 1297-99.

The FERC Regulatory Regime, MISO, and PJM

29. Instead of directly setting wholesale rates, FERC has opted to regulate by using market-based auctions that are administered to establish the "just and reasonable rates" the FPA requires. FERC has explained that it relies on market processes "to bring more efficient, lower cost power to the Nation's electricity consumers." *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).

30. FERC authorizes and regulates "independent system operators" ("ISOs") and "regional transmission organizations" ("RTOs") to oversee the interstate auctions

that are part of such market processes. The largest part of the state of Illinois is in a region where wholesale electricity is bought and sold via auctions conducted by an ISO called the Midcontinent Independent System Operator, Inc. ("MISO"), which serves all or parts of 15 U.S. states (as far south as Louisiana) and the Canadian province of Manitoba. The remainder of the state, including Chicago and parts of northern Illinois, is in a region where wholesale electricity is bought and sold via auctions conducted by an RTO called PJM Interconnection, L.L.C. ("PJM"), which serves all or parts of thirteen states (as far east as New Jersey) and the District of Columbia. The energy suppliers in MISO's and PJM's wholesale auctions include generators and demand-response entities (aggregators of customers capable of reducing their electric demand) located inside and outside of Illinois. MISO's and PJM's auctions are interstate wholesale markets regulated by FERC.

31. MISO and PJM operate two distinct types of wholesale auctions: energy and capacity (among others, which have less direct bearing on this Complaint). There are two types of energy auctions – "day-ahead" and "real-time."

Energy Markets

32. With respect to the energy market, the goal of both the day-ahead and real-time auctions is to ensure that the MISO and PJM "dispatch" (that is, turn on and regulate the output level of) sufficient generation resources to meet the actual amount of power used by consumers – or "load" in energy parlance – at any given moment. Unlike most other commodities, electricity cannot at this time be economically stored in appreciable quantities. If the amount of generation on the system falls short of demand levels, the grid

operator will take a series of FERC-mandated steps to limit the negative consequences, starting with voltage reductions or "brownouts" and ending, in more severe cases, with load shedding or "rotating blackouts" to restore balance. If these measures to reduce load to meet available supply are not successful, uncontrolled widespread blackouts may result.

33. MISO and PJM aim to prevent a supply/demand mismatch by running sophisticated day-ahead and real-time energy markets that take into account physical limitations on the transmission lines, generator availability, predicted energy usage, and many other factors. Because the transmission system has various physical limitations, the price of power varies by location, with electricity costing more in some parts of Illinois than in others.

34. In the day-ahead energy market, generators bid the price at which they are willing to generate a particular quantity of electricity for next-day delivery. In the real-time energy markets, MISO and PJM prices increase or decrease, signaling the need for participating generators to produce more or less electricity as real-time conditions change.

35. In the energy auctions, MISO and PJM accept bids from generators, beginning with the lowest and moving up until enough bids are accepted to fully satisfy the demand. MISO and PJM determine separate energy prices, every five minutes, for hundreds of individual locations across their respective territories. The price of the final bid that satisfies all demand for a given location is known as the "market clearing price" or "locational-based marginal price" and is paid uniformly to all successful supply-side bidders in that location. The wholesale price of electricity in both the day-ahead and real-time energy markets can rise very

steeply at times of peak demand. Markets naturally deploy the most efficient and cheapest generators first; additional quantity must be provided by less efficient generators that cost more to run.

36. Unlike other types of generators, which can be turned on and off, or adjusted quickly to produce more or less energy, as conditions warrant, nuclear generators run continuously at maximum output. Because they have no alternative to selling their output in the MISO and PJM energy auctions, they typically bid into the day-ahead markets as "price takers," meaning that they will sell their entire output at whatever clearing price the market determines, even during times of oversupply when the price may be negative (in which case the generators would actually pay money for the right to download their output to the grid). Large inflexible units such as these nuclear units can actually frustrate system operators and can trigger a need to curtail intermittent renewables during such times. A large price-taking unit significantly decreases energy-market prices paid to competitors, as it injects large quantities of energy into the grid, which lowers market-clearing prices. As long as energy market prices, on average, are higher than the nuclear unit's marginal operating costs, this may be financially sustainable for a nuclear unit, since the total revenues earned will exceed the unit's costs of production. Recent decreases in natural gas fired energy production costs, however, largely driven by access to cheap shale gas, have decreased prevailing energy prices below the level necessary to keep some nuclear units operating.

Capacity Markets

37. In order to ensure that MISO and PJM have the electricity-producing resources (the generating capacity)

they need to operate the grid reliably, MISO and PJM operate capacity auctions. On an annual basis, MISO and PJM calculate how much generating capacity is needed to allow the electric grid to run reliably under forecasted peak demand and in the presence of significant losses of generating and transmission facilities. MISO and PJM establish the amount of electricity generation capacity that retail electric suppliers ("load serving entities" or "LSEs") in their respective territories are required to purchase in order to meet customer demand under peak conditions. LSEs can meet their capacity obligations either through bilateral contracts with generation-owners (or with generation that they own), or through the MISO and PJM administered auction markets for reliability products known as capacity (the "Installed Capacity" or "ICAP" auctions), which FERC established.

38. In contrast to the energy auctions, where *electricity itself* is bought and sold, capacity auctions are for the purchase and sale of *options* to purchase electricity. MISO or PJM, as a buyer of a capacity market option, receives the right, at its sole discretion, to call upon the seller of the option (a power generator) to produce a specified amount of energy if and when needed. Each generator that sells capacity in the MISO and PJM capacity markets is required to participate in the day-ahead energy market, and to respond in real-time, if conditions warrant. While the buyer of an option – in this case, MISO or PJM – need not exercise its option to require the seller to produce energy, the capacity markets ensure that the grid will have the *ability* to furnish the amount of energy needed by consumers at any given moment in time.

39. The amount of capacity that LSEs are required to purchase in the MISO and PJM capacity markets is

determined through rigorous reliability planning processes overseen by FERC. Under FERC oversight, MISO purchases annual capacity obligations one month before the relevant delivery period. PJM, by contrast, purchases capacity three years ahead. Either way, each ISO/RTO determines the required amount of capacity in its respective territories according to the FERC-approved rules governing the capacity market, which results in a zonal capacity market price (*i.e.*, the auction may result in separate prices for each of the various sub-zones within the MISO and PJM regions). FERC also approves key parameters of the capacity market auction, including the installed reserve margin and total quantity of capacity to be procured. In PJM, FERC has approved the use of an administratively determined "downward sloping" demand curve that establishes the price LSEs are required to pay for capacity in various reliability scenarios and in various locations. In MISO, FERC has approved the use of a "vertical" demand curve to determine the price-quantity pair.

40. As supplies of capacity are reduced (signaling a heightened risk to reliability), capacity prices increase to induce additional infrastructure investments. As supplies of capacity become more abundant (signaling a potential over-supply), capacity prices decrease, leading to the potential closure of inefficient generating units. Under FERC's auspices, MISO and PJM have carefully calibrated their rules to ensure that consumers receive the desired level of electrical-system reliability at the lowest possible price. Over time, the FERC-approved market design is self-correcting and leads to efficient economic equilibrium. The costs of capacity purchased in the MISO and PJM capacity auctions are apportioned to LSEs on a volumetric-share basis.

41. In the capacity auctions, generators offer to sell a certain amount of capacity at a certain price at a certain location. As with the energy auctions, the capacity offers in each of the capacity zones are "stacked" from lowest to highest, and bids are accepted until the requisite total demand has been met. The last and highest offer price needed to meet the demand in each zone establishes the market-clearing price for that zone. Any generator that offered at or below this price "clears" in the market and is paid the clearing price. Such a generator in turn is generally obligated to deliver, if called upon in the day-ahead or real-time energy markets, the amount of electricity to match the capacity that had cleared the auction in that generator's accepted offer. The generators whose offers are above the clearing price receive no payment and have no delivery obligation.

42. The auction's stacking mechanism creates an incentive for capacity providers to be efficient and cost effective in order to be selected. It creates price signals for new capacity to enter the market for generators that can supply capacity at prices below the clearing price. On the other hand, the market provides price signals for existing generators to exit the market if they are unable to beat the clearing price.

Total Market Compensation

43. The total compensation a generator receives in the market is the sum of its energy market and capacity market revenues (as well as ancillary services, which account for only a small part of a generator's total earning potential).

44. An uneconomic generator will likely remain in the market if it receives a State subsidy of its energy and/or capacity market earnings rather than retire

because it is no longer competitive. In both cases, because subsidized generators would be uneconomic in the absence of the subsidy, the subsidy distorts wholesale market price signals and directly interferes with the way in which FERC intends wholesale markets to function.

How Zero Emission Credits Distort
the Wholesale Market

45. The Illinois ZEC program created by FEJA distorts the functioning of the FERC-regulated energy and capacity markets in the MISO and PJM regions and nationwide.

46. Under the ZEC subsidy program, an uneconomic nuclear generator receives a higher price per MWh of energy it sells into the wholesale energy market than the rate established pursuant to FERC-approved market rules. Illinois retail ratepayers fund the difference between the wholesale energy rate authorized by FERC and the higher, subsidized rate, established by the State. This state-determined "revised" price contradicts FERC's determination that MISO- and PJM-determined clearing prices are the just, reasonable and not unduly discriminatory or preferential rate. Under the stacking mechanism used to set prices in the MISO and PJM markets, moreover, the artificial retention of the uneconomic nuclear generators in the wholesale markets adds additional (uneconomic) supply in the energy market, which harms competitors (and economic efficiency) by artificially reducing wholesale energy prices and forcing otherwise economic generation (*i.e.*, non-subsidized generation that is more efficient than the nuclear units at issue) to inefficiently leave the market. In addition, the ZEC subsidies will deter the entry of new efficient suppliers, including suppliers of renewable energy, and the long-

term result will be higher prices to consumers and businesses.

47. Forced subsidization of the nuclear generators by retail customers equally distorts wholesale *capacity* market auction outcomes. Under the stacking mechanism, the retention of otherwise uneconomic producers artificially increases the supply of capacity, which directly leads to lower prices. Exelon expressly announced that the Clinton and Quad Cities plants would shut down unless the ZEC program was enacted. The artificial retention of generators in the capacity market that should have retired contravenes the economically efficient market structure that MISO and PJM designed and FERC approved.

48. In addition, FERC has previously acted to prevent the exercise of buyer-side, or monopsony, market power from infecting the capacity market. Buyer-side market power occurs when a state entity or other large buyer of capacity is able to effectuate the receipt of an above market payment to a limited quantity of supply in order to enable that supplier to enter or remain in the market at an artificially low price and at the same time cause a centralized market clearing price reduction such that the entity (or the customers upon which it seeks to benefit) will realize a net savings on the balance of their in-market purchases needed to serve their needs. These uneconomic units, in turn, lower capacity prices in the FERC-jurisdictional market by suppressing the clearing price in the auction, which reduces a buyer's total payment for capacity. Because capacity market prices are sensitive to even small shifts in the supply/demand balance, the effect of lower capacity prices and corresponding decrease in total capacity market costs can be large. To prevent this economically inefficient out-

come, FERC has been vigilant in protecting the capacity markets from distortion by means of state subsidies that would undercut the critical investment price signals from the auction markets. FERC has recognized that if left unchecked, state subsidies would lead to higher prices overall to the detriment of consumers over the long run.

49. In this case, by artificially retaining the otherwise uneconomic nuclear units, Illinois is using the ZEC subsidy to exert a large depressive effect on energy and capacity prices. While artificially depressed (below-market) energy and capacity prices may save Illinois ratepayers money in the short run, these savings will be offset by both the increased costs of the ZECs themselves and by the enormous forgone benefits of competition and the ability to retain and attract more efficient generation over the long run. In fact, PJM has calculated the benefits of competitive markets to its consumers. PJM finds its services offer approximately $2.8 billion to $3.1 billion per year to consumers[4] – in other words, the ZEC payments result in the erosion of significant benefits that are not just theoretical, but actually quantified by PJM. Regardless of the short-run or long-run effect, Illinois – like Maryland in *Hughes* – has taken action to alter what the state views as unsatisfactory consequences of the prices set by the wholesale markets under FERC's exclusive jurisdiction.

50. Artificially suppressed prices threaten the viability of more efficient existing generators, including Plaintiffs, and discourage investment in efficient new, flexible generators better suited to integrate

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[4] http://www.pjm.com/about-pjm/~/media/about-pjm/20151016-value-proposition.ashx.

weather-dependent, zero-carbon renewable generating resources like wind and solar. The suppressed prices also lower the market revenues received by wind and solar renewables that are the real long-term no-carbon solution, and so the consumer backed incentives paid under legitimate Renewable Energy Credit ("REC") programs will also have to increase. Accordingly, not only will the ZEC program ultimately lead to higher consumer costs over the long run, but it will also stifle the unquestionable environmental benefits derived from competitive electric markets.

51. The Illinois ZEC program is easily distinguishable from the Renewable Energy Credit ("REC") programs many states have enacted. These programs vary significantly from state to state but, under a typical REC program, qualified renewable generators (such as solar, wind, and biomass) earn RECs for each MWh of electricity they generate. LSEs are required to acquire a certain number of RECs each year or make an Alternative Compliance Payment.

52. RECs differ from ZECs in several important respects. RECs are created by *all* qualified renewable generators, without regard to economic need. The price of RECs is not fixed by the State and is not tethered in any way to wholesale electricity prices. Rather, RECs are competitively traded outside of the wholesale energy markets, so that their value varies based on supply and demand, including the competitive interactions among alternative qualified suppliers of renewable generation (based on the overall economics of their respective technologies, their specific generating units, and their own operational efficiencies).

53. In contrast, Illinois' ZEC program is different in every respect:

- ZECs are not available to all qualified renewable generators, but rather just to certain nuclear plants specifically selected through an IPA "procurement process" on the basis of economic need rather than the value of a particular attribute.
- The value of ZECs is fixed by the State rather than by competitive markets.
- The value of ZECs is expressly tied to the price of electricity in the FERC-regulated wholesale markets, and the amount of the subsidies is adjusted as wholesale prices fluctuate.

FEJA's Illinois ZEC Program

54. Among Illinois's six nuclear generating plants, only Clinton, a single-reactor plant in Clinton, IL, and Quad Cities, a two-reactor plant in Cordova, IL, are currently operating unprofitably. Exelon, the owner of both of these plants, has announced that the two plants lost $800 million in the last seven years. Clinton sells its output in the MISO wholesale markets and Quad Cities sells its production in PJM wholesale markets.

55. Quad Cities is so inefficient that its bid did not clear in the PJM capacity auction for the 2019-2020 planning year and thus it will not receive capacity revenue for that period. Clinton's bid did clear MISO's 2016 one-year forward capacity auction, but these capacity revenues were insufficient to avoid continued losses.

56. Both of these nuclear plants are Exempt Wholesale Generators ("EWGs") under the Public

Utility Holding Company Act, 42 U.S.C. § 16451 *et seq*. An EWG is a person engaged "exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale." *Id.* § 79z–5a. These nuclear facilities thus can only sell the energy they produce into the wholesale market.

57. In 2016, after hundreds of millions of dollars in losses, Exelon announced it was "forced to retire" the Clinton and Quad Cities plants, as the expected revenues from the sale of capacity and energy into the MISO and PJM markets were insufficient to cover its costs of continued operation. Citing its status as a large taxpayer and employer, Exelon said it would consider reversing its decision and keeping these two plants open only if the State enacted "adequate legislation" to provide billions of dollars in ratepayer-funded subsidies.

58. In response to extensive lobbying by Exelon and local politicians, the Illinois General Assembly included the ZEC program in FEJA. Although "environmental protection" was the legislature's asserted goal, the clear and actual purpose of FEJA was to save jobs and local tax revenues associated with these plants, as demonstrated by the very name of the law – Future Energy Jobs Act. FEJA is not environmental legislation; it is just a mechanism to provide out-of-market funding to Clinton and Quad Cities.

59. Under FEJA, only nuclear plants specifically selected through an IPA "procurement process" are eligible to receive the ZEC subsidies. 20 ILCS 3855/ 1- 75(d-5)(1)(C). Although the law states that the IPA is to award ZEC contracts to the "winners" of the procurement process, with the winners to be determined on the basis of "public interest criteria," *id.*, the

process is a sham, as Clinton and Quad Cities have been pre-determined to be the "winners" of the ZEC contracts.

60. FEJA directs the IPA to consider reports under House Resolution 1146. One report under House Resolution 1146 titled "Potential Nuclear Power Plant Closings" specifically identifies Exelon's Quad Cities and Clinton's nuclear units. The report concluded that the facilities needed higher prices to cover their costs. FEJA provides that "the selection of winning bids shall take into account the incremental environmental benefits resulting from the procurement, such as any existing environmental benefits that are preserved by the procurement . . . and would cease to exist if the procurements were not held, including the preservation of zero emission facilities." 20 ILCS 3855/1-75(d-5)(1)(C). As "preservation of zero emission facilities" is to be the key factor in the "public interest" determination, all other facilities are effectively excluded, as no other Illinois nuclear plant is in danger of closing.

61. Indeed, when he signed the bill into law, Governor Rauner expressly stated, "The Future Energy Jobs bill protects taxpayers, ratepayers, and *the good-paying jobs at the Clinton and Quad Cities' plants*."[5] Furthermore, Exelon itself has boasted that FEJA "ensures the continued operations of Clinton and Quad Cities for at least 10 years."[6] Exelon reversed its decision to close these two plants on the very day the governor signed the law, and within days it announced plans to fast track multiple capital projects at these

[5] http://www.exeloncorp.com/newsroom/governor-rauner-signing-of-future-energy-jobs-bill (emphasis added).

[6] http://www.exeloncorp.com/newsroom/fejb-econ-impact-rls.

plants.[7] In an earnings call on February 8, 2017, Exelon stated that it had already recognized anticipated Illinois ZEC revenue in its financial statements.[8] This plainly shows that Exelon's plants are the predetermined winners of the so-called "competitive procurement process."

62. The ZEC program excludes all other zero-carbon resources in Illinois and elsewhere, and thus no others will receive compensation for their zero-carbon attributes. Once the ZEC subsidy is taken into account, the uneconomic nuclear resources (Clinton and Quad Cities) will receive a higher level of wholesale market compensation than other nuclear generators operating in Illinois, all of which are now profitable without subsidies. Thus, FEJA simply serves to maintain the uneconomic capacity and energy from the Clinton and Quad Cities units in the FERC-regulated wholesale markets, notwithstanding the fact that wholesale market price signals are indicating that these units should be retired.

63. The exact amount to be paid to Clinton and Quad Cities is to be determined by a complicated formula that is tethered to FERC-regulated wholsale prices in both the MISO and PJM energy and capacity markets. For 2017, these two nuclear generators will receive an additional $16.50 for each MWh of electricity they produce and sell. The $16.50 price is said to be based on the "Social Cost of Carbon," as determined by a federal interagency working group. 20 ILCS 3855/1-75(d-5)(1)(B). Beginning in 2023, this price will

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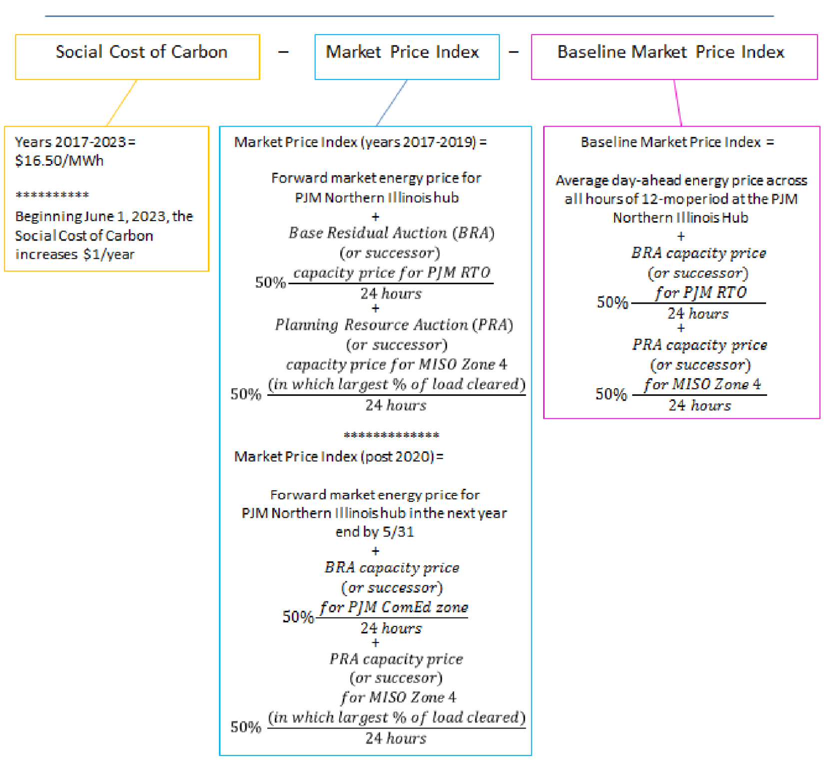
[7] http://www.exeloncorp.com/newsroom/governor-rauner-signing-of-future-energy-jobs-bill.

[8] http://seekingalpha.com/article/4043975-exelon-exc-q4-2016-results-earnings-call-transcript.

increase by \$1.00 each year. *Id*. Beginning in 2018, the price is also subject to a "Price Adjustment," which is determined by the amount "by which the market price index for the applicable delivery year exceeds the baseline market price index for the consecutive 12-month period ending May 31, 2016." *Id*. Both the "market price index" and the "baseline market price index" are based on the sum of specified PJM and MISO forecast energy and capacity prices. *Id*. The essence of the formula is that the ZEC payments will go down if FERC-regulated energy and capacity prices go down.

64. The ZEC pricing formula is set forth in its entirety in Exhibit A. It can be summarized as shown in this table:

ZEC Price = Social Cost of Carbon - Price Adjustment (Market Price Index - Baseline Market Price Index)



The ZEC program thus establishes a new state-created energy price "adder" granted only to the "winners" of the IPA procurement program. The adder will not occur unless the "winning" nuclear generators sell their energy into the wholesale markets, and thus the adder is directly tethered to the wholesale price of electricity.

65. The price-suppressive effects of the ZECs on the FERC-regulated wholesale markets also impermissibly discriminate against other non-carbon emitting technologies. Under FEJA's ZEC program, a small hydroelectric dam producing zero-emission energy will receive the FERC-determined energy price, but would not qualify for ZECs. Other generators of renewable energy and out-of-state entities are similarly disadvantaged, substantially burdening interstate (as well as international) commerce.

66. If the ZEC program goes into effect as planned in June 2017, Plaintiffs will incur many millions of dollars in damages, because the subsidies will enable the nuclear generators, who compete against Plaintiffs in interstate markets, to continue operating money losing facilities, and selling uneconomic capacity and energy into the FERC-regulated auctions, causing the auctions to return significantly lower prices. Plaintiffs will lose auctions they otherwise would have won, and they will receive less revenue from auctions they do win.

67. The State of Illinois, the IPA, and the defendant IPA director are immune from damages liability. Accordingly, the harm to Plaintiffs from implementation of FEJA's unconstitutional ZEC program will be irreparable.

CLAIMS FOR RELIEF

COUNT I

FIELD PREEMPTION – SUPREMACY CLAUSE

68. Plaintiffs herein incorporate all previous allegations.

69. Under the Supremacy Clause, if Congress enacts a federal law regulatory scheme and intends to fully occupy the field it has chosen to regulate, any state law in this field is "field preempted" and thus invalid, without regard for the impact of the state regulation upon the national interest.

70. FEJA's ZEC program is field preempted. Under the FPA, 16 U.S.C. § 824(b), FERC has exclusive jurisdiction over the sale of electric energy, the sale of capacity at wholesale in interstate commerce, and wholesale electricity rates. FERC also has exclusive jurisdiction over measures that affect, pertain to, or are connected with wholesale electricity rates. *Id*. §§ 824d(a), 824e(a). Federal law exclusively occupies the entire field of wholesale electricity sales.

71. MISO and PJM's energy and capacity auctions are wholesale interstate markets for the sale of electricity, and they fall within the field of FERC's exclusive authority. FEJA's ZEC program invades that field because it directly affects the wholesale clearing price of electricity sales in the MISO and PJM auctions.

72. Specifically, the nuclear generators offer into the MISO and PJM auctions. Under FERC-approved rules, all generators whose offers "clear" receive the market clearing price, which is the wholesale market price. The ZEC requirement invades FERC's exclusive regulatory field by directly altering the revenue to be paid to the nuclear generators. The ZECs provide the

nuclear plants with substantial out-of-market payments for each MWh of electricity they produce, thus effectively replacing the auction clearing price received by these plants with the alternative, higher price preferred by the Illinois General Assembly.

73. The FERC-determined price paid to competing generators in the energy market is also suppressed by the uneconomic retention of the nuclear units, which also frustrates FERC's market design, causing a concomitant lowering of the clearing price to be paid to plaintiffs and other competitors.

74. Finally, the continued operation of the otherwise non-economic nuclear generators has a direct and significant price suppressive effect in the capacity market, frustrating FERC's goals of ensuring electric reliability through the capacity market. But for the subsidy, these units would leave the market, temporarily decreasing the amount of supply in the market, and increasing prices until the market responded with the necessary level of investment in new generation, thereby finding a new equilibrium level. The turnover of generating units is essential to delivering the benefits of competition to consumers as state of the art technologies replace less efficient, less flexible, more costly resources.

75. FEJA's ZEC program is therefore field preempted, because (a) FERC has exclusive jurisdiction to set wholesale prices, yet the ZEC program guarantees the favored generators a higher price than the competitive market price set by FERC; and (b) the ZEC program interferes with FERC's exclusive jurisdiction over wholesale prices by directly affecting the behavior of participants in both energy and capacity auctions and the ultimate outcome of those auctions.

COUNT II

CONFLICT PREEMPTION – SUPREMACY CLAUSE

76. Plaintiffs herein incorporate all previous allegations.

77. Even in the absence of field preemption, any state law or regulation is "conflict preempted" and thus invalid if it conflicts with federal law, frustrates the purpose of a federal law, or is an obstacle to full implementation of federal law. A state measure may be conflict preempted even if its impact on federal law is only indirect or incidental.

78. FEJA's ZEC program is conflict preempted by the FPA. FERC, the agency charged with implementing the FPA, has determined that market-based processes – approved and overseen by FERC – are the best way to bring more efficient, lower cost power to the Nation's electricity consumers. The auction market process creates an incentive for capacity providers to be efficient and cost effective in order to be selected. It creates price signals for new capacity to enter the market if it can supply capacity at prices below the clearing price. At the same time, the market provides price signals for existing suppliers to exit the market if they are unable to beat the clearing price.

79. FEJA's ZEC program enables the nuclear generators to offer in the auction markets at a lower price, below actual costs, over a lengthy ten-year period of time. At the expense of industrial progress, the clearing price of the auctions will thus be artificially suppressed for an entire decade. The offers of some generators will be rejected, both existing and new, even though (absent the nuclear generators' subsidized participation) they would have cleared the auction.

The generators whose offers are accepted will be under-compensated, because the clearing price will be artificially lower than what a competitive market process – as established by FERC – would have produced, and lower than the actual cost to provide the capacity service.

80. FEJA's ZEC program will disrupt market signals. The subsidized nuclear generators, even though uneconomic, will stay in operation; generators that are otherwise economic will exit the market because they are receiving an artificially suppressed price and thus lower revenues; and investors will be discouraged from financing and building new economic generators. Supply will then be reduced, and new investors will be deterred from entering a marketplace plagued by subsidized distortions.

81. The ZEC program also interferes with FERC's decision to structure the wholesale markets for capacity and energy on market-based principles in order to encourage the exit of uneconomic generating capacity – when a generator's costs exceed its revenues – to encourage the entry, when appropriate, of more efficient generators. It is clear from FEJA's ZEC program that Illinois simply disagrees with FERC's determination that the markets should determine the fate of the uneconomic nuclear generators.

82. FEJA's ZEC program will also affect interstate and international wholesale markets outside Illinois and the MISO and PJM. Because the ZEC program will artificially suppress the MISO and PJM auction prices, generators will prefer, where possible, to sell in wholesale markets other than MISO and PJM. This shift will increase supply and reduce prices in those other markets, and thus the ZECs will have market-

distorting ripple effects throughout the national market and beyond Illinois's borders.

83. If Illinois truly believes that Clinton and Quad Cities require a subsidy to achieve environmental goals, it is entitled to petition FERC to adopt market rule changes or take other steps to increase market prices to levels sufficient to allow the nuclear generators to recover their costs. Instead of following this course, the Illinois General Assembly has opted to disregard FERC's exclusive jurisdiction over wholesale electricity rates.

84. FEJA's ZEC program therefore stands as a formidable obstacle to FERC's regulatory scheme, which depends upon fair competition and the functioning of competitive auction markets without interference from out-of-market subsidies to achieve just and reasonable rates. Under the Supremacy Clause, Illinois may not supplant FERC's scheme with its own preferred approach.

COUNT III

DORMANT COMMERCE CLAUSE, UNDER 28 U.S.C. § 1983

85. Plaintiffs herein incorporate all previous allegations.

86. The FEJA's ZEC program is invalid under the dormant Commerce Clause, U.S. Const. art. I, § 8. Under this provision, states cannot discriminate against interstate commerce nor can they unduly burden interstate commerce, even in the absence of federal legislation regulating the activity. Any state action that burdens interstate commerce is invalid if the burden is clearly excessive in relation to the putative local benefits. A state action is invalid if it does not

regulate evenhandedly to effectuate a legitimate local public interest, or if its effects on interstate commerce are more than incidental.

87. Although states have the authority to regulate the retail sale of electricity within their own borders, the wholesale sale of electricity involves interstate commerce, which the state may not regulate. MISO and PJM's wholesale markets are interstate and international in nature, as they involve the sale and transmission of energy and capacity from generators located in other states and in Canada, and the purchase of such commodities by customers in other states.

88. FEJA's ZEC program was enacted for political reasons in an attempt to save jobs and property tax revenues at the subsidized generators. Illinois's attempts to preserve local industry from the rigors of interstate competition are prohibited by the Commerce Clause.

89. Although the reduction of carbon emissions is important, this can be achieved more effectively by means that would neither discriminate against interstate or international commerce nor frustrate the progress competitive markets have been delivering in the form of environmental benefits.

90. FEJA's ZEC program is directly discriminatory, as only favored Illinois nuclear plants will receive subsidies. Although all nuclear facilities connected to MISO or PJM are purportedly eligible to apply for ZEC subsidies, the procurement criteria have been rigged so that only Clinton and Quad Cities may be selected as the "winning bidders." Moreover, the program is not even-handed with respect to other technologies that could produce carbon-free electricity and with respect to out-of-state generation. It therefore violates the Commerce Clause.

91. Even if the ZEC program is not deemed discriminatory, it is still invalid under the Commerce Clause because it imposes market-distorting burdens on interstate and international commerce that far outweigh the purported local benefits. As detailed above, the ZECs would cause more efficient interstate generators to leave the market and discourage the entry of new competitors.

92. In fact, the purported local benefits are largely illusory. Artificially suppressed prices – achieved through ratepayer subsidies provided to uneconomic nuclear generating units – will ultimately lead to reduced supply and higher prices, as they will deter the development of newer, more efficient market entry needed to moderate higher prices. The ZEC program will hurt Illinois consumers and businesses and will cost jobs.

93. Implementing the FEJA's ZEC program deprives plaintiffs of their Commerce Clause "rights, privileges, or immunities" within the meaning of 28 U.S.C. § 1983. Plaintiffs have been injured by these deprivations and are entitled to redress under § 1983. *Dennis v. Higgins*, 498 U.S. 439 (1991).

PRAYER FOR RELIEF

In light of the foregoing, Plaintiffs seek:

A. a declaration that the portions of FEJA establishing the ZEC nuclear subsidies are invalid because they are preempted by federal law and violate the Commerce Clause;

B. a permanent injunction preventing Defendant from implementing FEJA's ZEC program;

C. reasonable attorneys' fees and costs, including pursuant to 28 U.S.C. § 1988; and

D. all such other relief to which the Court may find Plaintiffs are entitled.

By: */s/Leonard A. Gail*
Leonard A. Gail

Jonathan S. Massey (*pro hac vice* pending)
MASSEY & GAIL, LLP
1325 G Street, NW
Suite 500
Washington, DC 20005
Telephone: (202) 652-4511
jmassey@masseygail.com

Leonard A. Gail
Suyash Agrawal
Paul J. Berks
MASSEY & GAIL, LLP
50 East Washington Street Suite 400
Chicago, IL 60602
Telephone: (312) 283-1590
jmassey@masseygail.com
sagrawal@masseygail.com
pberks@masseygail.com

Attorneys for Plaintiffs

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

Stuart H. Singer (*pro hac vice* pending)
William T. Dzurilla
(*pro hac vice* pending)
BOIES, SCHILLER & FLEXNER LLP
401 East Las Olas Blvd., Suite 1200
Fort Lauderdale, FL 33301
Telephone (954) 356-0011
ssinger@bsfllp.com
wdzurilla@bsfllp.com

Edward J. Normand (*pro hac vice* pending)
Jason C. Cyrulnik (*pro hac vice* pending)
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
Telephone: (914) 749-8200
enormand@bsfllp.com
jcyrulnik@bsfllp.com