

EXHIBIT A

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 COALITION FOR COMPETITIVE
4 ELECTRICITY, et al.,

5 Plaintiffs,

6 v.

16 Cv. 8164 (VEC)

7 AUDREY ZIBELMAN, et al.,

8 Defendants.

9 March 29, 2017
10 11:00 a.m.

11 Before:

12 HON. VALERIE E. CAPRONI
13 District Judge

14 APPEARANCES

15 BOIES, SCHILLER & FLEXNER LLP
16 Attorneys for Plaintiffs
17 BY: JONATHAN D. SCHILLER
18 STUART H. SINGER
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22 BY: SCOTT H. STRAUSS
23 PETER HOPKINS
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Attorneys for Intervenors
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DAVID W. DEBRUIN

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1 (In open court, case called)

2 THE COURT: Good morning. Let's see who I have got.

3 MR. SINGER: Good morning, your Honor, Stuart Singer
4 from Boise, Schiller & Flexner on behalf of plaintiffs. With
5 me is Jonathan Schiller and David Barrett also from Boise,
6 Schiller and Flexner on behalf of plaintiffs.

7 THE COURT: Good morning.

8 MR. STRAUSS: Good morning, your Honor, Scott Strauss
9 from the law firm of Spiegel & McDiarmid, LLP, and here with my
10 partner Peter Hopkins, and we're here for defendants.

11 MR. PRICE: Good morning, your Honor, Matthew Price
12 from Jenner & Block on behalf of intervenors, and with me David
13 Debruin.

14 THE COURT: Good morning. This is the defendants'
15 motion, so we'll start with the defendants.

16 MR. STRAUSS: Very well.

17 THE COURT: My plan is to give you total about an
18 hour. So you got about 20 minutes and I will save ten minutes
19 for the end.

20 MR. STRAUSS: Very well. Your Honor, plaintiffs'
21 complaint should be dismissed because it's built on a
22 mischaracterization of the New York ZEC program.

23 The ZEC program does not set or adjust the wholesale
24 electricity rate. ZEC payments are not conditioned on the
25 completion of wholesale electricity sales. ZEC payments

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1 compensate for the environmental attributes of nuclear
2 generation which produces energy without emitting harmful
3 greenhouse gases.

4 THE COURT: I recognize that there are ZECs and there
5 are RECs, but sort of principally is there any real difference
6 between the two programs from the standpoint of impact of
7 wholesale rates?

8 MR. STRAUSS: Not from the standpoint of what is at
9 issue in this proceeding.

10 THE COURT: Not as far as the defendants are
11 concerned.

12 MR. STRAUSS: For sure.

13 THE COURT: Why do I think the three gentlemen have a
14 very different view?

15 MR. STRAUSS: They most certainly do. The ZECs, like
16 the RECs, are state-created property. The states price them,
17 the states administer those programs. So long as they are not
18 conditioned on completing wholesale electricity sales, which
19 the RECs are not and the ZECs are not, then they do not intrude
20 FERC's field. They do not hit a constitutional tripwire in
21 that regard, and therefore, they're outside of it.

22 Remember FERC itself has found that states don't
23 intrude on federal rate setting, the jurisdiction of federal
24 government, by paying generators for environmental attributes
25 so long as those payments are independent -- the way FERC

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1 characterizes it, they're called unbundled -- from any kind of
2 a wholesale sale. And that's what's happening here. New
3 York's program meets that test.

4 THE COURT: Is it important to your argument that, if
5 this is true, that nucleus power is sold bilaterally, as
6 opposed to it all going into the auction?

7 MR. STRAUSS: What is important for our argument is
8 the State of New York does not condition the ZEC on the nuclear
9 power being disposed of in any particular way. So yes, it
10 could be sold bilaterally, it can be sold into the auctions,
11 perhaps it can be sold in some other way if Exelon so chooses
12 and is able to sell it directly to an end user.

13 The point is that however it's sold is up to Exelon.
14 The ZEC isn't dependent on the completion of a particular sale.
15 And that's the difference between this case and the Supreme
16 Court's decision in the Hughes case. In the Hughes case the
17 Maryland program was conditioned on the completion of a
18 wholesale sale. So what you had was you had a completed
19 wholesale sale and then Maryland would adjust the price for
20 that sale.

21 That's not what happened here. The energy can be sold
22 as it will. Remember, the retail rate payers who pay for the
23 ZECs may not buy any nuclear energy. There's no requirement
24 to. They pay for the ZECs on the basis of their share of the
25 retail load they serve in New York, not on the basis of the

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1 wholesale energy --

2 THE COURT: So it's entirely proportional. So Con Ed
3 pays whatever its proportion or share of energy is.

4 MR. STRAUSS: Its share of the retail demands it meets
5 in the State of New York, yes, that's how the ZEC payments are
6 made.

7 THE COURT: And they pass that along to the rate
8 payers.

9 MR. STRAUSS: They pass it along to the rate payers,
10 of course. Certain things are always true, your Honor.

11 THE COURT: And it is all true that everything gets
12 passed along to the rate payers.

13 MR. STRAUSS: Now remember, New York is supporting
14 these financially challenged nuclear plants because if they
15 close they create a hole in the state's power supply that will
16 be filled by carbon-emitting resources. This is not an idle
17 concern. It is pointed out in CBS order, in the commission's
18 order. And I apologize for the acronyms, your Honor, this is
19 an acronym-heavy industry.

20 The commission notes the circumstances in Germany
21 where nuclear plants were abruptly closed after the Fukushima
22 accident, and they saw a surge in emissions even though they
23 had aggressive solar development. New York's action is
24 consistent with the cooperative federalism that's at the core
25 of the Federal Power Act that makes clear that FERC has

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1 authority over wholesale electricity sales, but it also
2 preserves state authority over generation, and that's the
3 authority that New York is relying on here.

4 Remember, we mentioned RECs before. ZECs serve the
5 same functions as the REC programs. Plaintiffs say the REC
6 programs are permissible but the ZEC program is
7 unconstitutional.

8 THE COURT: I find that puzzling.

9 MR. STRAUSS: They can't have it both ways. The REC
10 and ZEC programs have different pricing mechanisms, but those
11 distinctions make no difference in this context. They are both
12 state created. There's no one-size-fits-all method for pricing
13 them. The key point is that they both look to achieve
14 environmental goals by providing financial support to preferred
15 generators based on production, not the completion of wholesale
16 sales.

17 Now New York's action, I think as I mentioned,
18 comports fully with recent Supreme Court precedent. I think
19 that's important to highlight. In the past two years the
20 Supreme Court has issued three opinions that indicate when a
21 state may be overstepping the Federal Power Act's
22 jurisdictional boundaries. The ZEC program stays well within
23 the lines the court has drawn. It does not invade FERC's
24 field. Again, unlike the Maryland program that was declared
25 unconstitutional in Hughes, the ZEC payments are not

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1 conditioned on competing wholesale sale, they don't adjust the
2 price of a wholesale sale.

3 THE COURT: If FERC did not like this program, is
4 there a process that they could step in and say you can't do
5 this?

6 MR. STRAUSS: Absolutely. Absolutely. They could
7 step in in a number of ways; on complaint by a party who
8 believes that the market rule should be tweaked in some fashion
9 or refined in some fashion, or they could do it on their own.

10 As we know, in this instance the plaintiffs have gone
11 to FERC and asked FERC to reconsider how the market design
12 works. We wouldn't be here now if the FERC market design
13 precluded subsidized resources from bidding. The only reason
14 we're here is because it allows it. The energy industry is
15 rife with subsidies. This isn't the only one. New York didn't
16 invent subsidies, they've been around, and FERC knows about
17 that.

18 THE COURT: So New York State, for example, could give
19 a property tax exemption to a nuclear plant which would affect
20 in some sense their ability to compete, and everyone agrees
21 that's permissible.

22 MR. STRAUSS: That's right. Remember in the Hughes
23 case the Supreme Court specifically points out their holding is
24 very limited. It's only based on this one fatal defect, this
25 condition. They go out of their way to say look, we're not

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1 trying to get in the way of what other things states may do,
2 direct subsidies, taxes, tax incentives, land grants. So they
3 were trying to make clear that Maryland has stepped on a very
4 specific tripwire. New York has not stepped on that tripwire
5 here.

6 You might also keep in mind that in the Supreme Court
7 EPISA case it defines what a rate is. A rate is the money
8 that's exchanged for a particular product. The New York
9 program does not change the amount of money that retail rate
10 payers will pay for wholesale energy produced by these nuclear
11 plants.

12 THE COURT: Say that again.

13 MR. STRAUSS: The New York program does not change the
14 amount of money that retail rate payers pay for the nuclear
15 plant energy. So for example --

16 THE COURT: Is that because you are separating the
17 environmental attributes from the power?

18 MR. STRAUSS: Exactly. That's the reason.

19 And obviously the ZEC payments aren't targeted at
20 wholesale rates. It should be crystal clear from the
21 commission's order. This is an effort to decarbonize the power
22 supply in New York. It's a very aggressive REC program with a
23 very ambitious goal, 50 percent renewables by 2030.

24 In order to get there, one of the transitional pieces
25 that New York needs is to keep those nuclear plants around for

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1 another twelve years, because if they're not here, we're going
2 to end up in a situation where the Germans were. Abruptly
3 losing those plants will cause a surge in harmful emissions,
4 and essentially we'll have a situation of taking one step
5 forward and at least two steps back, and that's what we're
6 trying to avoid.

7 There's likewise no basis to find this program
8 conflict preempted. The state is acting on its side of the
9 Federal Power Act dividing line, affecting the power supply.
10 That's appropriate. That's something the states can do. Doing
11 that does not make it impossible for FERC to address the
12 situation if it chooses to do so, as we just discussed a few
13 moments ago.

14 The commission can address its rules, should it choose
15 to do so. To date it has not. And as I say, it's well aware
16 of subsidies, as we know from the cases we cite, the Am.
17 Ref-Fuel case at FERC and the WSPF case also at FERC, the
18 Wheelabrator case from the Second Circuit. FERC is aware that
19 its central markets price for energy and capacity, they don't
20 price for environmental attributes. That's left to the states.

21 THE COURT: How many states have these sorts of
22 programs, either RECs or programs like RECs or programs like
23 ZECs?

24 MR. STRAUSS: I believe it's more than half. It's
25 something like 29 states and the District of Columbia have the

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1 REC programs.

2 THE COURT: Has FERC stepped in and tried to
3 intervene?

4 MR. STRAUSS: No, your Honor.

5 THE COURT: Okay.

6 MR. STRAUSS: It has not sought to change, no, because
7 FERC recognizes these are stateside programs.

8 Now as we pointed out in the letter we sent to you
9 last week, FERC has opened up a technical conference to talk
10 about these questions, so FERC is actively looking at these
11 issues.

12 THE COURT: What should I make of that? Should I
13 delay deciding something until after the FERC conference, or
14 are you letting me know that FERC is having a conference?

15 MR. STRAUSS: We pointed out in the context of our
16 Armstrong arguments that there's a need to address these issues
17 on a national basis. These are national concerns, and we have
18 an expert agency that is directing them actively. We're simply
19 trying to point out to you that is an ongoing consideration.
20 FERC is looking at this.

21 But notice says essentially we know states are doing
22 things, the markets do things, we would like to have a way in
23 which everyone gets everything; the states get what they need,
24 the feds get what they need, the markets work, the state
25 policies are implemented and so forth. The point for you was

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1 to simply say this is a complicated national program but we
2 have an expert agency looking at it.

3 And I think it feeds into the argument we make in the
4 context of Armstrong, which is that these kinds of preemption
5 questions really, when you have a comprehensive enforcement
6 scheme at FERC and you have a broad statute like a just and
7 reasonable provision, which is a broadly-worded rate statute,
8 it's not that you couldn't make a decision, your Honor,
9 obviously, but our sense is that that decision really ought to
10 be made by the federal agency expert.

11 THE COURT: Okay.

12 MR. STRAUSS: On the question of conflict preemption,
13 I think I covered that.

14 Finally the commerce clause. Bunch of different
15 arguments we have here, your Honor. First of all, we don't
16 think this program falls within the commerce clause at all
17 because we think this is a program where the states created the
18 commerce, and the state goes into the market and buys the
19 product and the state can determine the terms under which they
20 do that.

21 Separately -- and essentially that's the decision was
22 made in the recent Connecticut REC case, the Allco case, which
23 is pending in front of the Second Circuit. But even if that
24 market participant exception not apply, we don't think there's
25 been any showing that this program is facially discriminatory

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1 or discriminatory at all. Out-of-state nuclear plants are not
2 precluded from participating from the ZEC program. There is no
3 geographic restriction. If you can meet the criteria you can
4 get a ZEC. And while there are no out-of-state nuclear plants
5 that are currently scheduled to receive ZECs, that doesn't mean
6 that two or three years from now it might not be different.

7 THE COURT: Well, that would require them changing the
8 rules.

9 MR. STRAUSS: No, the rule provides for revisiting the
10 determination. Remember, these are two-year tranches. It can
11 be revisited if there's a change four, five, six years from
12 now.

13 THE COURT: But it would be something else, because
14 there are no out-of-state nuclear power plants that
15 historically provided power inside New York. Do I correctly
16 understand that?

17 MR. STRAUSS: There are no out-of-state nuclear plants
18 that provide power inside New York that meet the financial
19 challenge requirement of the ZECs.

20 THE COURT: Are there any that have provided power
21 inside of New York but are economically okay?

22 MR. STRAUSS: You know, your Honor, it's a good
23 question. I don't have the answer for you today. I can try to
24 get you that answer.

25 What I do know is that out-of-state -- let's start

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1 this way, non-nuclear facilities, whether in or out of state,
2 are treated identically under the ZEC regulation. They're
3 ineligible.

4 THE COURT: Are they affected the same? Does New York
5 buy power from out-of-state generators?

6 MR. STRAUSS: Undoubtedly they do. I don't know to
7 what extent.

8 THE COURT: Because it all goes into the grid?

9 MR. STRAUSS: There may be sales made directly to New
10 York. I don't know to what extent. I don't have that answer.
11 But nuclear plants, out-of-state nuclear plants that currently
12 are not receiving ZECs are not precluded from seeking a ZEC in
13 the future if they meet the criteria.

14 In terms of a discriminatory effect, we don't see it.
15 As I said, we don't think it's discriminatory at all, so we
16 certainly don't think there's a discriminatory effect or a
17 discriminatory purpose.

18 To the extent there is some way to show some
19 incidental burden on interstate commerce, we think it's
20 certainly outweighed by the strong local interest here in
21 environmental protection and decarbonizing New York power's
22 supply, which we think is more important than ever.

23 THE COURT: Okay. Intervenor?

24 MR. PRICE: Thank you, your Honor.

25 I don't want to repeat my colleague's arguments, but

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1 there are a few points I would like to add.

2 First, with respect to the argument --

3 THE COURT: You represent nuclear plants, right?

4 MR. PRICE: That's correct. We represent the plants
5 that are benefiting from the program.

6 THE COURT: Okay.

7 MR. PRICE: With respect to the argument that there's
8 an adjustment to the wholesale rate, I think it's important
9 that this Court really read Hughes carefully. And throughout
10 Hughes when the court describes the Maryland program it
11 explains that the problematic aspect of that Maryland program
12 was that payment was actually conditioned on a requirement by
13 the state that the plant participate in the wholesale market
14 and sell there.

15 And I think a special emphasis is basically the last
16 sentence of the opinion that so long as the state does not
17 condition payment on capacity clearing the auction, the state's
18 program would not suffer from the fatal defect that renders
19 Maryland's program unacceptable. And the court was well aware
20 of the pricing mechanism of that program and other factors of
21 that program. That's what it chose to focus on as the fatal
22 defect, and absent that, the fatal defect doesn't exist. So we
23 think this is clearly outside of Hughes' holding.

24 And that's really as it needs to be, because I think
25 it's common ground between plaintiffs, defendants and

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1 intervenors in this case that the Federal Power Act permits
2 states to subsidize and affect wholesale markets in all sorts
3 of ways. If you move beyond payment conditioned on sale to
4 some other test for field prediction it becomes very
5 unpredictable and hard to implement. It's not clear where
6 their line will be drawn.

7 And I think what the Supreme Court is doing is drawing
8 a very clear line that is connected to what it means to set a
9 rate -- and the EPSA decision discusses that at page 776 and
10 777 -- it's to exchange money that you receive in exchange for
11 a sale. And that's the same line that WSPP, the REC case,
12 reflects; if you're paying for production, it's a stateside
13 thing, unless you are bundling that together with an energy
14 sale so it becomes part of a sale of energy. And that's not
15 what happened here. The ZECs are sold independent of any sale
16 of energy.

17 A couple of words on conflict preemption. My
18 colleague talked about how there are all sorts of steps that
19 FERC could take if it thought there was an issue in its
20 markets. And the standard is: Is there an obstacle to the
21 federal achievement of its goals? And when FERC has abundant
22 steps it could take but has chosen to take none of them, and to
23 the contrary actually recognized the importance of these
24 stateside initiatives and their general compatibility with
25 these goals, we don't think there's a claim stated for conflict

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1 preemption.

2 And I did want to address specifically something that
3 the plaintiffs wrote in the response in the technical
4 conference, which is they pulled quote from Hughes about
5 regulating around, and FERC shouldn't have to regulate around
6 states. But I want to call the Court's attention to the
7 specific words the court used in footnote 11 in Hughes,
8 Maryland cannot regulate in a domain Congress assigned to FERC
9 and then require FERC to accommodate Maryland's intrusion.

10 So the Supreme Court was talking about a field
11 preemption problem where the state actually regulated in FERC's
12 domain. In that case, yes, it's field preemptive. But we're
13 outside the realm of the field preemption, we're talking about
14 conflict preemption. That quote doesn't apply. And I think
15 the relevant test and the relevant case to look at is really
16 Northwest Central. Northwest Central is a Natural Gas Act
17 case, and that statute has been interpreted similarly to the
18 Federal Power Act.

19 And Northwest Central recognizes in some sense there's
20 a tension between state and federal goals that is built into
21 the statute, because these markets are not hermetically sealed
22 from one another. What states do affect the federal markets
23 and vice versa. And so you can't have conflict preemption
24 every time the states are affecting or forcing the federal
25 government to react in some way because it would simply destroy

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1 the state's ability to act.

2 And so the test that Northwest Central gives
3 immediately after the quotation that plaintiffs quote, the test
4 Northwest Central gives is where state law impacts on matters
5 within FERC's control, the state's purpose must be to regulate
6 production or other subjects of state jurisdiction, and the
7 means chosen must at least plausibly be related to matters of
8 legitimate state concern. So that's the test for conflict
9 preemption on page 518 of Northwest Central. And I think that
10 test is certainly met here for the reasons that we explained in
11 the briefs.

12 One word on the commerce clause. In addition to the
13 arguments that my colleague made, I did want to explain to
14 Court that in our view the plaintiffs lack standing to pursue
15 this claim. It's an issue they don't even address in their
16 opposition brief. But in order to allege some sort of commerce
17 clause violation because of basically discrimination or
18 discriminatory intent, you need to actually be the party who is
19 adversely affected by the discrimination, and the plaintiffs
20 have not alleged that they own any nuclear facilities that they
21 would like to receive ZECs but can't because they're located
22 outside of New York. So for that reason we think the commerce
23 clause claim should be dismissed as well.

24 THE COURT: Okay. Thank you.

25 Mr. Singer.

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1 MR. SINGER: Thank you, your Honor. If it would
2 please the Court, we have a PowerPoint. And if it's easier, we
3 put that also in a binder, if I might approach.

4 THE COURT: Thank you.

5 MR. SINGER: And we provided that to the other side.

6 I'd like to start, before dealing with the PowerPoint,
7 with an assertion that state's counsel made that FERC could
8 simply act in this area. Well, your Honor, if you entered the
9 ruling which the defendants are asking for, that none of this
10 involves an area of federal jurisdiction, that it doesn't, in
11 the language of the Court, directly affect federal electricity
12 markets at wholesale, then FERC could not directly act on that.
13 They might be able to take other steps in their markets to
14 complement that, but you would be essentially saying that this
15 is a state concern and not within a federal exclusive
16 jurisdiction. And so it does have consequences on FERC's
17 ability to directly regulate, to prohibit a ZEC, to directly
18 regulate the ZEC.

19 THE COURT: Well, I guess my question is that if FERC
20 thinks the ZEC program is interfering with its responsibilities
21 I would have thought they would have acted. They had to plenty
22 of time.

23 MR. SINGER: It's a fairly new program, the ZEC, which
24 was enacted, as your Honor knows, last summer. Currently FERC
25 does not have a forum. FERC is not in a position where it can

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1 take any action. The technical conference is just hearing
2 information. And it reflects, we submit, that FERC is
3 concerned about the effect that this Zero Emission Credit will
4 have on distorting the wholesale electric markets.

5 And why do they have that concern? Because it's the
6 policy of the federal government, the policy of FERC, that fair
7 and reasonable rates be set by a market mechanism. And the
8 entire purpose of this ZEC is to distort that market mechanism.

9 THE COURT: Let's get to that. How is this different
10 in a fundamental way by any number of other things that states
11 can do that will affect in some way a particular energy
12 producer's ability to compete; so for example, a property tax
13 exemption, which would lower their operating costs, or a REC,
14 which you don't object to?

15 MR. SINGER: Well, your Honor, I think the answer is
16 you used the term "in some way." If this was just an indirect
17 effect it would be different. We acknowledge that the states
18 could take steps such as creating new power plants,
19 decommissioning plants. That's what the Supreme Court talked
20 about in Hughes. That's what the FERC brief by the Solicitor
21 General submitted to Hughes. They didn't say you could do a
22 ZEC either in Hughes or in the FERC brief. Why is the ZEC
23 different from Renewable Energy Credits?

24 First of all, the Renewable Energy Credits are not
25 based on a determination of an inadequacy of the market price.

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1 This is expressly based on a determination by the Public
2 Service Commission that you have an adequate compensation in
3 the market.

4 In fact, if I could go to -- this would be, I think,
5 tab 3. In the order itself it says public necessity is what
6 has to be determined. And what governs public necessity? That
7 energy, capacity and ancillary services revenues projected to
8 be received by the facility are at a level that is insufficient
9 to provide adequate compensation to preserve essentially the
10 nuclear plants.

11 So that's one difference. You don't see that in a
12 Renewable Energy Credit. It just requires that the Renewable
13 Energy Credit be accompanied for every hour that's purchased by
14 load-serving entities.

15 There's a second important difference, and that is the
16 amount of the ZEC, because the amount of the ZEC is determined
17 in relation to the wholesale market prices. That comes out of
18 the order. There's a formula. And in fact, it would be
19 tethered to that wholesale market price going forward. That is
20 a direct factual allegation we make in the complaint which must
21 be accepted as true, and it clearly is true because it comes
22 from the order.

23 Right now the price is \$17.48 per megawatt hour. But
24 going forward it's going to be determined not just by the
25 social cost of carbon, but modified by the amount that future

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1 forecasts predict that certain Zone A energy prices exceed \$39
2 per megawatt hour. You don't have that in any of these
3 records. That is what distinguishes the ZEC from the REC.
4 That is what distinguishes the ZEC, which has only been done in
5 New York, and recently in Illinois, where there is also
6 litigation pending, and explains why the REC is different and
7 is not subject to the same issues.

8 Now, your Honor, if we could go back to --

9 THE COURT: Well, the price is different, but in terms
10 of its impact on the market, how is it different?

11 MR. SINGER: Well --

12 THE COURT: I mean your beef is that what New York has
13 decided to do is affecting the wholesale market.

14 MR. SINGER: Yes.

15 THE COURT: So the ZECs are priced different than the
16 RECs, but how does that affect what effect it has on your
17 issue, which is the wholesale market?

18 MR. SINGER: Well, we allege that it affects the
19 wholesale market in several ways. First, the allegation that
20 we have made --

21 THE COURT: What tab is that? There's no way I can
22 see that.

23 MR. SINGER: It is paragraphs 34, 53 and 64.

24 THE COURT: What tab?

25 MR. SINGER: Tab one in the book.

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1 THE COURT: Okay.

2 MR. SINGER: And what we have done here is compare the
3 allegation in Exelon's motion to dismiss where they say that
4 this is not tied to wholesale market participation to the
5 specific allegations in the complaint that it is.

6 We have alleged that the ZEC recipients, the nuclear
7 plants, have no alternative but to sell their output in the
8 energy auction, that there are price takers, meaning they'll
9 bid at a level where they're certainly going to clear.

10 There's also a second factor that they largely ignore,
11 which is that these nuclear plants are exempt wholesale
12 generators under the Public Utility Holding Act. Why is that
13 important, your Honor? Because that means they must sell this
14 power at wholesale. It means the power is being sold through
15 the auction. That requires that the nuclear plants sell all
16 their capacity in the auction.

17 The only response is in a footnote in Exelon's brief
18 that says well, maybe in the future these nuclear plants can
19 obtain some amendment to their EWG status, but certainly that
20 doesn't support a motion to dismiss. They haven't obtained
21 that change in status. I'm not sure they would be able to do
22 that.

23 But in any event, as things stated today, they sell
24 all this power into the auction markets, and that means that
25 this is going to be directly tied to the auction market. And

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1 we allege that. All electricity produced by these generators
2 must be sold directly or indirectly in the NYISO auctions as
3 there are no alternative markets, which is paragraph 64 of the
4 complaint.

5 THE COURT: But it's not tied in the same way that the
6 contract for differences is to their clearing price.

7 MR. SINGER: It's effectively tied, your Honor,
8 because they have to sell in the wholesale market. It wouldn't
9 matter, we submit, in Hughes. If Maryland had come in there
10 and simply said that well, we're going to do everything the
11 same and it's going to go to all this wholesale power that has
12 to go through the auction market, but just in the statute say
13 well, we're regulating the generation of that, there's nothing
14 in the case to say that that would be permissible.

15 And think about what that would mean if all of the
16 federal preemption jurisdiction and all the exclusive federal
17 jurisdiction could be circumvented by the state simply not in
18 the order itself tying the regulation to an amount which clears
19 the auction by its terms when by effect it clearly is going to
20 have to be sold into the auction and all of that power is going
21 to go into the auction. And what about the distorting effect?
22 We allege that.

23 And your Honor, they have talked a lot about field
24 preemption, but certainly for conflict preemption we don't even
25 need to show a tether. We don't even need to meet the

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1 standards in Hughes because Hughes only deals with field
2 preemption. They didn't need to reach the issue of conflict
3 preemption that courts in Maryland and New Jersey also found on
4 a factual record existed, because there conflict preemption has
5 frustrated the federal purpose, the federal purpose of an open
6 market.

7 THE COURT: But those courts weren't dealing with
8 ZECs.

9 MR. SINGER: No, they were dealing with contract for
10 differences.

11 THE COURT: Which is different. The contract for
12 differences are different from the ZECs and RECs.

13 MR. SINGER: Not in a constitutionally significant
14 manner, your Honor, because the contract for differences also
15 tried to adjust the market price, like this is seeking to do,
16 it's based on --

17 THE COURT: This isn't adjusting the market price, the
18 market price is what the market price.

19 MR. SINGER: Hughes did not adjust the market price.
20 The person who bought the amount of electricity at auction at
21 that price, that was the price that was paid. What it did is
22 you had a separate amount which was being paid for by basically
23 an agency and charged through rate payers through the contract
24 for difference. There was not a state regulation there that
25 the person in the auction had to bid at a certain level, it was

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1 a combination of the contract for differences and the auction
2 price that changed the price, adjusted the price, that the
3 auction would otherwise lead to.

4 And the same is true here. You look at the Zero
5 Emission Credit, and that provides an amount in addition to
6 what the market would otherwise give these nuclear plants. And
7 what is the effect of that? You're changing the auction. If
8 you look at tab 8, this is the market without subsidies. The
9 parties bid, you have a clearing price.

10 And then if you add subsidies, which we do at tab 9,
11 you have a change both we submit and alleged in who is going to
12 clear the auction, because you can't compete with a subsidized
13 entity, so parties that would otherwise clear the auction.

14 MR. STRAUSS: Your Honor, is this evidence?

15 MR. SINGER: This is a demonstrative to show the
16 points we allege in the complaint.

17 THE COURT: That's fine.

18 MR. SINGER: So there's two effects on the market.

19 THE COURT: He has colors. It's a graph.

20 MR. SINGER: It hopefully simplifies in showing that
21 there's two affects on the market as a result of this.

22 THE COURT: But this would be true if they decided to
23 give big tax exemptions, too, right? Because you're reducing
24 the operating costs of one of the producers in the market.

25 MR. SINGER: But the way they -- it is possible that

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1 if you just wrote a check -- if New York decided to just write
2 a check to a nuclear plant, that would have some of the same
3 effects. But there's questions in a political environment
4 about whether that would be done. They don't do that here.

5 Instead what they tried to do is create a subsidy
6 that's tied to the perceived inadequacy of the wholesale market
7 and tie that to the wholesale market price going forward.
8 That's like saying in Maryland, Maryland -- what Hughes said
9 they couldn't do they could do because you just could have
10 built a new power plant with state funds. That could have
11 happened in Hughes.

12 THE COURT: But I'm focusing on your argument that you
13 stated a claim because the ZECs in this sense affect who is
14 clearing because it's helping this particular producer. If
15 that were the law, you would not be able to give tax exemptions
16 to particular power plants because that could also have the
17 effect of moving your red line one way or the other.

18 MR. SINGER: It's not just a moving of the red line.
19 That is conflict -- that affects conflict preemption.

20 THE COURT: That's what we were talking about is
21 conflict preemption.

22 MR. SINGER: Hughes was only a field preemption case.
23 In Hughes the key thing was tethering the wholesale market
24 participation. And that's what Exelon has said, except we
25 alleged this is tethered to wholesale market participation

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1 because these nuclear plants have no alternative but to sell
2 this electricity they produce into the wholesale market.

3 THE COURT: Can I decide that as a matter of law?

4 MR. SINGER: I don't think you can decide as a matter
5 of law that they aren't selling into the wholesale market
6 exclusively. We have alleged that they are. I think they
7 would have a hard --

8 THE COURT: But can I say the way -- as a matter of
9 law, without any discovery and certainly without a trial, can I
10 say the way this is set up it is not -- it has managed to go
11 through the hole that Hughes created for them?

12 MR. SINGER: No.

13 THE COURT: Why can't I?

14 MR. SINGER: First because of factual allegations that
15 this is tethered to the wholesale electric market, which is the
16 test that Hughes talked about.

17 THE COURT: Well, but the rule is the rule. I mean I
18 can read the rule as well as you can read the rule. So if
19 you're making an allegation that is blatantly contradicted by
20 what the Public Service Commission has done, I don't have to
21 accept your allegation.

22 MR. SINGER: But our allegation talks about wholesale
23 electric market participation, and it is the defendants who
24 have said -- first of all, it's our allegations, of course,
25 which control on a motion to dismiss, but they're the ones who

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1 said well, we might be able to use bilateral contracts, so it
2 may be that not all of this would be sold at wholesale. Or it
3 may well be that we could have retail contracts, so maybe not
4 all of that would be sold in the auction. Or maybe, as Exelon
5 has said, we could change our status as an exempt wholesale
6 generator which requires them to sell this on the wholesale
7 market.

8 Those are factual assertions that they have made in
9 filing a motion to dismiss. Those can't be credited. We
10 dispute those. If those are rejected, then you have -- your
11 conclusion is that this is tethered to the wholesale market
12 participation because that is where all of the generated
13 electricity coming out of these nuclear plants is going. And
14 so they are in fact conditioning the ZEC on wholesale market
15 participation. That is why factually there needs to be
16 discovery to prove our points on that.

17 THE COURT: Is there a difference, or why isn't there
18 a difference between it being conditioned on wholesale
19 participation and simply as a matter of fact right now they are
20 participating, that all of the energy is going into the
21 auction?

22 MR. SINGER: I don't think there's a constitutionally
23 relevant difference here, your Honor.

24 THE COURT: Why not?

25 MR. SINGER: Because if the state regulates in an area

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1 of wholesale -- exclusive federal concern, here wholesale
2 electricity, but just doesn't use the words "wholesale electric
3 rates," that doesn't mean their regulation is permissible if
4 the operation of that state order or state legislation serves
5 to regulate by effect in the wholesale electric markets.

6 Many of the cases that we cite had no direct tie to
7 price in the wholesale market but the courts have found them
8 unconstitutional. The Schneidewind case dealt with a
9 regulation on how power producers would be able to sell
10 securities. Two of the cases we cite deal with how costs are
11 calculated.

12 So there's no requirement in any of the federal
13 preemption cases that there be an express statement in the
14 Public Service Commission's order that we are tying our
15 regulation to wholesale participation. And to find otherwise
16 would be to create a huge loophole, a truck hole, really, where
17 you could vitiate exclusive federal jurisdiction, because then
18 states could do everything up to and including regulating
19 generation and sale of power by just not using the words: This
20 is conditioned on the power clearing the wholesale market.

21 So if they are actually regulating in this market --
22 and that's what we have alleged here, because they have to sell
23 in the wholesale market, both by law as a matter of fact --
24 then they are regulating that market.

25 And then how does that distinguish it from the things

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1 which the states can do? That goes back to Supreme Court
2 cases, which Hughes reaffirmed, statements in those cases that
3 say the test is whether something directly affects, and the
4 Oneok case which says whether or not the purpose of the
5 regulation is to affect the wholesale market.

6 Well, clearly the purpose here is to affect the
7 wholesale market. They gain no benefits, their perceived and
8 purported environmental benefits, unless it affects the
9 wholesale market, unless it has this change on which parties
10 are able to clear the auction, whether it keeps the nuclear
11 power plants, which are otherwise inefficient, which under the
12 market would otherwise go out of business, it keeps them alive
13 by subsidizing, to the tune of \$7.6 billion to one entity,
14 Exelon. That is at odds with the federal policy that the
15 market makes those determinations. But there is no --

16 THE COURT: Then do you deal with the environmental
17 attributes?

18 MR. SINGER: Well, the environmental attribute, if
19 decoupled entirely from wholesale electric rates, are RECs.

20 THE COURT: That's for renewable energy, but nuclear
21 isn't renewable.

22 MR. SINGER: If there was -- it would be a different
23 case than this, your Honor, if you had, for instance, an
24 attempt to include nuclear within the renewable energy credits
25 not tied to a determination of inadequacy by the Public Service

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1 Commission of the rates and the revenue that the plants are
2 receiving, and critically not tied to the forecast wholesale
3 prices in those markets going forward. That is the distinction
4 between the RECs and the ZECs. You don't have that tie for the
5 RECs.

6 In fact, one of the charts that we have included at
7 tab 5 shows that going forward there's a direct relationship
8 here, because as you go into these future years, like the
9 second tranche of years, the amount that is going to be
10 received, the amount of a ZEC will vary based on the forecast
11 wholesale market price. If that price exceeds \$39, the amount
12 of the ZEC will decrease. If it's below \$39, then it doesn't
13 decrease. So they are expressly tying this in the terms of the
14 order to forecast wholesale prices.

15 What's the only thing they say about? That that's
16 forecast prices, not actual prices. But there's nothing in
17 federal preemption that says that a state can circumvent what
18 is an area of federal jurisdiction by using forecast prices
19 rather than actual prices. Forecast prices, of course, are
20 based on the actual prices.

21 THE COURT: They help.

22 MR. SINGER: Excuse me?

23 THE COURT: They help.

24 MR. SINGER: Yes, one would think. They are trying
25 to. And the one case they cite to, the Rochester Gas case,

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1 said nothing of the type that the state could regulate in that
2 area if they used wholesale prices. What it says is that a
3 state could simply include the forecast amounts of those
4 wholesale prices for retail level of determining the costs and
5 rate of return for retail utility. So there's no basis to say
6 that because this is a forecast rate rather than an actual rate
7 that they're allowed to tether the ZEC to the wholesale market
8 in a manner which the PSC order expressly does.

9 THE COURT: I guess the question is: What's a tether?
10 In the contract for differences the tether was clear. The
11 clearing price defined the amount that was going to the
12 producer.

13 MR. SINGER: Yes.

14 THE COURT: That's a very tight tether. And if I read
15 Hughes that way, this is not that type of a tether.

16 MR. SINGER: We think it essentially is that type of a
17 tether, because a tether is a relationship, and the
18 relationship here, as we have seen, is here in two ways:
19 First, the ability to get the ZEC is determined by a PSC, the
20 Public Service Commission determination of the inadequacy of
21 the revenues received. Because those revenues are to wholesale
22 revenues, that is a direct relationship.

23 THE COURT: Well, I don't buy that, but go ahead.

24 MR. SINGER: And second, there's a determination on
25 price, which we have.

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1 THE COURT: There's a relationship to price.

2 MR. SINGER: Yes.

3 THE COURT: Your argument is a relationship -- because
4 of wholesale price is not exactly but somewhat part of the
5 equation that gets you to the value or the price of the ZEC,
6 that that is the tether.

7 MR. SINGER: Yes, it's related. Just like in the
8 contract for differences, there it was --

9 THE COURT: It's different from a contract from
10 differences.

11 MR. SINGER: Well, there, your Honor, you had the
12 amount that comes out of the auction, and the contract makes up
13 the difference.

14 THE COURT: And A minus B equals C.

15 MR. SINGER: Right. Here you have, A, the forecast
16 amount of what auctions will be, and then you determine the
17 amount of the subsidy, B -- well, actually you then look at B
18 as the amount of the subsidy to get to a certain level.

19 THE COURT: But there are some other things in that
20 equation, and the other things are important to New York State.

21 MR. SINGER: There are other things such as a maximum
22 level that it can't exceed where they use the cost of carbon.
23 By the way, they just put that in after the -- that wasn't even
24 there until Hughes, but then they put that in. The order
25 before Hughes expressly talked about the cost of being an

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1 adequate reimbursement to these nuclear plants.

2 THE COURT: Should I consider that at all?

3 MR. SINGER: I don't think it's necessary that you get
4 there, but we alleged it factually this is essentially a
5 subterfuge for that.

6 THE COURT: So you think there is no social cost of
7 carbon or you think New York is not really considering the
8 social cost of carbon?

9 MR. SINGER: Our position is not disputing that there
10 is a climate issue and there's a social cost to carbon. We're
11 accepting that and saying that's fine. But you cannot use the
12 wholesale rate, which is being used here, as part of
13 determining the price that you are going to provide a Zero
14 Emission Credit at, because that is a tether.

15 THE COURT: That's your argument. I got it. Go
16 ahead.

17 MR. SINGER: Your Honor, we also -- very briefly on
18 Armstrong, Armstrong was the Medicaid decision. It was a
19 decision which dealt with a statute that didn't provide for
20 judicial review on the reasonableness of rates, it dealt with
21 actually determining what rate provided equal access. None of
22 that is true here. Here there's a long line of cases where
23 judges such like yourself determined federal preemption
24 questions in this area. Congress never sought to change that,
25 and we think the Friends of East Hampton case, which was a

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1 Second Circuit decision applying Armstrong, squarely supports
2 this.

3 Your Honor, a lot of the discussion --

4 THE COURT: I'm sorry, you're probably going to hit
5 this, but I want to make sure that you do, the last point that
6 the intervenors made, which is why do you have standing for the
7 dormant commerce clause argument?

8 MR. SINGER: Well, your Honor, we contend we do have
9 standing because we include clients who are in the power
10 industry. They have the ability, if they own renewable
11 facilities, such as NRG, which is one of our clients, owns a
12 number of renewable energy sources that are not getting benefit
13 of ZEC. The discrimination of the ZEC doesn't require that the
14 parties outside of New York have nuclear facilities, it would
15 be sufficient as long as they have zero emitting facilities,
16 because that's the basis on which the defendants seek to acts.

17 Secondly, we represent industry associations such as
18 EPSA, which include utilities and other parties throughout the
19 country. There are a lot of nuclear power plants outside of
20 New York. If your Honor goes to -- I believe it is tab 54,
21 that's a graphical depiction of all the nuclear power plants
22 outside of New York.

23 THE COURT: And they're important to me because
24 they're members of EPSA?

25 MR. SINGER: Well, at least one is a member of EPSA.

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1 But what it shows is that there is a lot of potential power
2 facilities, nuclear facilities, outside of New York.

3 Now the commerce clause --

4 THE COURT: That have never historically provided
5 energy inside New York?

6 MR. SINGER: That's correct. And that is, in our
7 view, a facial discrimination by the defendants' order, because
8 they say well, on its face anyone can qualify, but the order
9 itself says you can only qualify if you have historically
10 contributed to the New York power supply. That's essentially
11 protectionist legislation, or protectionist administration
12 order.

13 THE COURT: And your client, the plaintiff, is harmed
14 because?

15 MR. SINGER: Well --

16 THE COURT: What difference would it make if the red
17 dot just south of wherever that is were included?

18 MR. SINGER: Well, the ability to have a
19 discriminatory order has kept alive these two or three nuclear
20 plants that are being subsidized. As a result of that, our
21 clients will lose business. They will lose bids because you
22 cannot compete effectively with a subsidized entity.

23 THE COURT: But if nuclear power plants countrywide
24 were included, you would be in the same boat. Your people --
25 your clients who were complaining that you're not being -- that

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1 they're being subsidized and you're not, it would have the same
2 impact or worse impact if it included nuclear power plants in
3 the surrounding three states.

4 MR. SINGER: But that's not what they have done.

5 THE COURT: But the question is standing.

6 MR. SINGER: Well, of course there's no contest that
7 we have actual injury and fact standing. The Prudential
8 standings are a very loose standard here, your Honor.

9 And there's also the fact that as renewable producers
10 we're being discriminated against. NRG, for example, has a
11 variety of renewable power producers who are not getting the
12 benefit of ZEC because it is limited to these three plants.

13 THE COURT: But don't they get RECs?

14 MR. SINGER: If everyone in state and who would
15 compete out of state get RECs but only nuclear plants get ZECs,
16 that is discrimination. That is adding -- you can't just
17 separate out the nuclear producers from the rest of the market.
18 So from a commerce clause perspective, they compete with one
19 another. And the fact that they have weighted it against
20 non-carbon emitting producers that our client has out of state
21 that could otherwise compete and win in auctions is
22 discrimination. That comes from the discrimination that you
23 require historical participation in the New York market.

24 THE COURT: So they have never competed in the New
25 York market?

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1 MR. SINGER: Well, I don't think there's a factual
2 record to show whether some of them have sold electricity that
3 has wound up in the New York market.

4 THE COURT: Then they have historically provided
5 energy in New York and they're eligible.

6 MR. SINGER: I'm not saying that they have. As far as
7 we know, there's no nuclear plant outside of New York that has
8 contributed. And the record that not been established on the
9 commerce clause issue to see whether or not there have been any
10 renewable parties that have contributed.

11 But our point is on its face they're not entitled to
12 restrict a subsidy to entities that have historically
13 contributed to the New York power supply. Why should that be
14 relevant to going forward if you are trying to have an
15 even-handed subsidy? That would have been completely
16 inconsistent with the Seventh Circuit decision in the Alliance
17 for Clean Coal and other decisions.

18 So with respect, we believe the commerce clause claims
19 as well as conflict preemption, which the courts have said is a
20 fact-intensive matter, and where what we have been talking
21 about in Hughes and the FERC decision and WSPP, all of that was
22 dealing with field preemption. The conflict preemption was
23 found in Maryland and in lower courts, Fourth Circuit there,
24 and in the Third Circuit district court case involving New
25 Jersey. And they found those on a factual record. In fact,

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1 all of these cases are really dealt with on a full factual
2 record.

3 And we're here now on a motion to dismiss where the
4 defendants are trying to avoid having a factual record created,
5 created on the issue of whether in fact this is tethered.
6 That's a factual issue. Created on whether or not they have to
7 participate in the wholesale market, whether or not this idea
8 that they have thrown out that they can sell at retail or avoid
9 the wholesale market, that's a factual issue. Whether or not
10 the operation of this subsidy will distort the wholesale market
11 and contradiction of FERC policy, that is a factual issue. And
12 we believe that the commerce clause is also a factual issue
13 there.

14 So your Honor, for all those reasons we think the
15 motion to dismiss should be denied.

16 THE COURT: Okay. Back to the defendants.

17 MR. STRAUSS: Your Honor, the State of New York has
18 not made a finding that wholesale rates are not just
19 unreasonable for wholesale sales. We have not made any finding
20 about the justice or reasonableness of wholesale rates for
21 those sales.

22 And the piece of order that --

23 THE COURT: What were they pointing to?

24 MR. STRAUSS: They were pointing to the language, I
25 believe it's at tab 3 of their book. I believe Mr. Singer

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1 paraphrased it. What the commission found was that the
2 revenues, the anticipated revenues in the market would be
3 insufficient to preserve the zero emission environmental
4 attributes. That's what this is about. It's not about
5 wholesale energy, it's about the environmental attributes and
6 how you go about preserving them.

7 Now we priced them based on the social costs of
8 carbon, but we do include a potential reduction based on an
9 anticipated forecast of what might happen in wholesale revenue.

10 THE COURT: So it's only a subtraction?

11 MR. STRAUSS: It can't go up, it can only down. The
12 social cost of carbon is a cap, and it would be subtracted if
13 the forecast hits above a certain price.

14 THE COURT: That is your notion that therefore it's
15 not tethered?

16 MR. STRAUSS: It's not tethered. We're not setting
17 the wholesale rate when we do that. We're taking into account
18 the possibility that the plants might sell in the wholesale
19 market. There's no condition that they have to do so. There's
20 no requirement that you look at the wholesale price that
21 actually occurs when they complete the sale and adjust it.

22 This is really nothing like Hughes. In Hughes -- you
23 asked the questions what did they mean by tether. They said
24 what they meant. Justice Ginsberg says it. And she's very
25 clear. She says their holding is limited, it doesn't address

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1 the possibility of measures we mentioned this morning, tax
2 incentives, land grants, direct subsidies, construction,
3 state-owned generation, we're not touching any of that, so long
4 as it doesn't condition the payment of funds on capacity
5 clearing the auction. That didn't happen here. There is no
6 requirement to do that.

7 THE COURT: What about the plaintiff's argument that
8 while the order may not say that, as a practical matter it does
9 require it because you have got to sell them to the auction?
10 And I believe you told me when I first saw you that you are a
11 price taker or the nuclear power plants are price takers.

12 MR. STRAUSS: That's correct.

13 THE COURT: So they will clear.

14 MR. STRAUSS: They will clear if they bid at a low
15 price, I believe that is correct, but there is no requirement
16 to do so. And there's no requirement that -- remember what the
17 plaintiffs say in their complaint, I believe it's in paragraph
18 64, what it says is the nuclear plants will sell directly or
19 indirectly into the auction. Indirectly means bilateral
20 contract. There's limitation here that says if they did so
21 bilaterally they would be selling into the auction. What
22 happens there is they will be selling the output to someone
23 else who might or not bid the power into the auction. Remember
24 also, this is exactly the way the REC programs work. It's the
25 same thing. It's a payment based on production.

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1 THE COURT: So from your perspective, what is the
2 difference in the pricing mechanism between the RECs and the
3 ZECs? Because it sounds to me like what the plaintiffs' real
4 beef is is the subtraction that can occur based on the price of
5 the auction.

6 MR. STRAUSS: I think the plaintiffs' real beef is
7 that the RECs are set in some fashion on the market basis,
8 whereas the ZECs, because you have three plants at the moment
9 and one entity that owns them, the state couldn't use a market
10 price to set the price, it had to set the price
11 administratively. I think that's their beef.

12 THE COURT: Why couldn't it be set by the market?

13 MR. STRAUSS: The only players in the market at the
14 moment would be the three nuclear plants. So rather than do it
15 that way -- and I don't think -- for constitutional
16 significance, I don't think it makes any difference. The
17 states are pricing an environmental attribute that they get to
18 price. And the way they go about doing it in this case I think
19 is consistent with the Rochester Gas case. I think Mr. Singer
20 is wrong about that. What you have there is a retail product,
21 and the state, in looking at the price of the retail product,
22 takes into account the fact that there may be wholesale
23 revenues involved that will affect what the price ought to be.

24 I think what New York is trying to do here is to make
25 sure that we don't overpay for these ZECs, and so we have come

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1 up with a means by which the price could only be adjusted
2 downward, it doesn't go up. And if, for whatever reason, those
3 future forecasts show that wholesale prices are going to be
4 sufficiently high, the ZEC payments could drop to zero. That's
5 how they might work.

6 I think you're absolutely correct the CFDs are -- the
7 contracts for differences are not like the ZECs.

8 I'm going through my notes to see what Mr. Singer
9 said.

10 And on the commerce clause issue, as to the
11 non-nuclear plants, whether they're inside or outside the State
12 of New York they're not discriminated against on the basis of
13 geography under this program. They're treated the same.
14 They're not eligible for ZECs no matter where they're located.
15 So I don't think that matters one way or the other.

16 Give me a moment, your Honor.

17 THE COURT: Sure.

18 (Pause)

19 MR. STRAUSS: I think that's all I have, your Honor.

20 THE COURT: Okay.

21 Intervenor?

22 MR. PRICE: Thank you, your Honor. Just four points,
23 if I could make. The first has to do with tethering. I agree
24 with my colleague that the Supreme Court was very clear what it
25 viewed that test to be. It means: Is it conditioned on the

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1 wholesale sale?

2 The Supreme Court was aware of the pricing scheme in
3 Hughes, and that is not where it chose to focus on. It chose
4 to focus on the conditioning. One would think if it viewed the
5 pricing scheme as impermissible tethering it would have said
6 that somewhere in its opinion, and you can search high and low
7 and it's nowhere to be found.

8 The second point related to their theory of tethering,
9 that because we have to sell under the wholesale market there's
10 a tether. There's a lot of things wrong with that argument,
11 but I think as a matter of law I don't know of any preemption
12 doctrine, and they certainly have cited no case that suggests
13 that preemption, which is a doctrine about what states can do,
14 the answer to that question depends upon how private parties
15 react to the regulatory scheme and make their own choices in
16 response to the law. That would be a strange idea that a state
17 sovereign power could be erased because private parties might
18 choose to organize their businesses in certain ways.

19 And I also add that --

20 THE COURT: Sorry, that sounds right, but what
21 precisely is that responding to?

22 MR. PRICE: Well, the plaintiffs' argument was that
23 because allegedly the nuclear facilities have no choice but to
24 sell under the wholesale market, that is what makes this
25 program preemptive. And it's also false as a matter of law

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1 that they have no choice, because we cite 18 CFR 366.7(c)(3) in
2 our brief, and it makes clear we can just withdraw our
3 wholesale generator status.

4 There's nothing that requires us to sell on the
5 wholesale market, it's a business choice that we have made to
6 be exempt generators and sell on the wholesale market. We can
7 choose otherwise and sell bilaterally. Actually one-third of
8 the Nine Mile Plant is owned by Long Island Power Authority,
9 which serves retail customers.

10 The idea that preemption should turn on how we
11 organize our business is a very, very odd thing. If we were
12 sell a portion of our plant tomorrow to a utility that then
13 serve retail load then all the sudden the program is okay?
14 That's not the way the preemption works. Preemption is about
15 the state action and when the state action is in the federal
16 field. And here the state has not imposed any requirement that
17 we sell at wholesale. The state has not done that, and that's
18 all that matters for the purposes of preemption.

19 THE COURT: Okay.

20 MR. PRICE: The WSP case actually supports this,
21 because in that case the question only arose because the WSP,
22 which was an independent system operator, was faced with the
23 question of hey, we have all these renewable generators selling
24 at wholesale and they're also selling these ZECs -- or these
25 RECs, I should say, and what do we do about that problem? What

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1 do with do about the problem? What do we do about the fact
2 that they're selling wholesale and they're selling RECs? And
3 FERC said as long as they're not part of the same transaction,
4 the RECs fall out of our jurisdiction. So FERC has really
5 rejected the premise of plaintiffs' argument already.

6 And the last point I would make is that their argument
7 that just because we sell in the wholesale market that somehow
8 implicates preemption, that would be true of a subsidy if New
9 York just wrote a check to us tomorrow. We would still --
10 their argument would equally apply to that, yet they have
11 conceded that that would be lawful. So I don't understand what
12 the principle is that they're relying on to draw the line that
13 they want to draw. The principal is the ones set forth in the
14 Hughes case.

15 Now their second theory of tethering -- this is the
16 next point, your Honor -- has to do with these prices, the fact
17 that the price might go down if wholesale prices go above a
18 certain index.

19 Now in the first place, this is an odd argument for
20 them to make, because it effectively concedes the legality of
21 the first two years of the program where the price is fixed,
22 and if that is the illegality that they're complaining about, I
23 don't see how they're injured by it. How are they injured by
24 the fact that their competitors are now receiving less money
25 from the state?

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1 THE COURT: They might receive less money.

2 MR. PRICE: They might receive less money.

3 THE COURT: If the price goes up.

4 MR. PRICE: For the state to take that action in order
5 to protector retail consumers from higher prices that might
6 result from this program seems entirely within the state's
7 realm as the regulator of retail sales.

8 I also want to address Rochester Gas & Electric, which
9 I think is very relevant to this point. The situation there
10 was the state was regulating in its zone retail sales and
11 needed to set retail rates in a way that would allow the
12 utility to recover its costs completely. And so what the
13 Public Service Commission did is it said okay, how much do you
14 need to cover your costs? How much are you going to make in
15 the wholesale markets? And now we're going to make sure you
16 recover the difference from retail rate payers.

17 So it looked at wholesale revenues and set its own
18 rates with that reality in mind. And the court said no
19 problem, there's a difference between regulating wholesale
20 sales and contemplating that they're going to be made. And our
21 case falls on the second side of that distinction.

22 And this still happens today in vertically integrated
23 facilities all over the country where the state commission is
24 setting retail rates recognizing that there is a certain amount
25 of wholesale revenue. So accepting their argument will really

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1 have sweeping consequences that would upset the entire
2 regulatory regime that has essentially operated since the
3 Federal Power Act was enacted.

4 THE COURT: Let me interrupt you for a second. What
5 is your answer to that?

6 MR. SINGER: Well, Rochester Gas was a case that dealt
7 with regulation at the retail level and simply said that the
8 fact that you're looking at a forecast price and what was
9 called incremental sales as part of that regulation base did
10 not involve preemption. It was not a regulation.

11 In fact, your Honor, if you turn, I think it's tab 28
12 in our binder, it specifically talks about reflecting the
13 profits from a reasonable estimate of wholesale sales in
14 calculating rates of return did not constitute regulation of
15 wholesale rates. So the Rochester Gas case does not help them.

16 And think about what the alternative would be, that if
17 in fact states could regulate in an area that would otherwise
18 be preempted if they just use forecast prices rather than
19 actual prices --

20 THE COURT: No, no, no, but that's not his argument.
21 His argument is in Rochester Gas they were taking into account
22 the wholesale revenue, which is what sort of ZECs do, it takes
23 into account what may be wholesale revenue to the nuclear power
24 plants to keep the retail costs down. So theoretically it's
25 the same thing.

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1 MR. SINGER: We disagree, your Honor. What they were
2 taking into account in Rochester was to deal with things that
3 would be normally within the state's prerogative of retail
4 regulation, regulation of retail.

5 THE COURT: But part of that was taking into account
6 what the generator was getting off of their wholesale sales.

7 MR. SINGER: But this is not a regulation at retail
8 here, this is creating an amount that is going to a wholesale
9 producer, the nuclear plants.

10 The ZEC is not going -- if this was just an issue with
11 the load-serving entity selling electricity to individuals and
12 calculating some tax, for example, on carbon and including a
13 forecast measure of some element at wholesale as part of that
14 tax, that would be more comparable to Rochester because it
15 would operate at the retail level. But here, this is operating
16 at the wholesale level. It is operating to subsidize and to
17 change what would otherwise be the auction rate for the
18 production of nuclear power and the sale of that nuclear power
19 into the wholesale market.

20 THE COURT: It's not changing the auction rate.

21 MR. SINGER: But Hughes did not do so expressly
22 either. Hughes did not say we're changing the auction rate, it
23 effectively changed it by having a contract added to it, just
24 like the ZEC subsidy effectively changes it here. Hughes would
25 not have been different if Maryland had said we'll create a

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1 capacity-creating credit and allow that to be sold and added to
2 the wholesale price that otherwise would come out of the
3 auction. Your Honor, respectfully, we submit that's the same.

4 MR. PRICE: The argument really isn't responsive. The
5 state is regulating the environmental attribute here. That's
6 on the state side of the ledger. Their claim is that is
7 crosses the line because it looks at wholesale prices in some
8 way. And that's the argument Rochester rejected. So I think
9 it's pretty straightforward.

10 On standing, very briefly, this is the first I am
11 hearing about some of their members maybe owning nuclear plants
12 somewhere. There's no allegation in the complaint that any of
13 them are harmed by purported out-of-state discrimination
14 against out-of-state nuclear plants.

15 As to the idea that zero emitting facilities are
16 harmed, they have REC programs. And the state is entitled to
17 divide up its programs in the way it sees fit and have
18 particular programs aimed toward particular technologies.
19 That's not a geographic discrimination, that's a state policy
20 judgment that different types of regulation need different
21 types of programs to support them. And I think the Minnesota
22 Clover Leaf case makes very clear that the state is entitled
23 to, for example, favor paperboard production at the expense of
24 plastic production. That's not an issue of discrimination
25 against commerce.

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1 And the last point just related to conflict preemption
2 is that they claim that if you rule that this isn't preemptive,
3 FERC cannot act, and that is just false. FERC could tomorrow,
4 if it wanted to, simply close its markets to those plants
5 altogether and say sorry, you can't sell wholesale anymore, you
6 go find your own way. FERC could do that. And FERC hasn't
7 done that. In fact, every indication that we provided in our
8 brief on page 19 there's a series of FERC decisions, FERC has
9 suggested that it's comfortable with programs of this kind.

10 And respectfully, they really are asking this Court to
11 issue a preemption decision that could wipe away the state's
12 ability to pursue programs of this kind at all when FERC hasn't
13 indicated that at all that it believes there's a problem that
14 they even need to address by altering market rules, let alone
15 eliminating the state programs all together.

16 THE COURT: And also the Supreme Court said quite
17 clearly the states are allowed to regulate the Environmental
18 Act, at least to them.

19 MR. PRICE: I agree with that.

20 Thank you, your Honor.

21 THE COURT: All right. I have given you over an hour.

22 First off, let me also say, and I meant to say at the
23 very beginning: Thank you very much for the briefing. This is
24 probably the best briefed case I have had all the time I have
25 been on bench. So thank you for that.

