UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COALITION FOR COMPETITIVE ELECTRICITY, DYNEGY INC., EASTERN GENERATION, LLC, ELECTRIC POWER SUPPLY ASSOCIATION, NRG ENERGY, INC., ROSETON GENERATING LLC, and SELKIRK COGEN PARTNERS, L.P.,

Plaintiffs,

-against-

AUDREY ZIBELMAN, in her official Capacity as Chair of the New York Public Service Commission and PATRICIA L. ACAMPORA, GREGG C. SAYRE, and DIANE X. BURMAN, in their official capacities as Commissioners of the New York Public Service Commission,

Defendants.

Docket No. 1:16-CV-8164

(VEC/KNF)

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

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Dated: January 27, 2017

ORAL ARGUMENT REQUESTED

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Defendants, the Chairman and members of the New York Public Service Commission, reply in support of their Motion to Dismiss (Dkt. 54) and supporting memorandum (Dkt. 55). Plaintiffs' Opposition (Dkt. 95) fails to rehabilitate their fatally flawed complaint (Dkt. 1).

I. PLAINTIFFS FAIL TO STATE A PREEMPTION CLAIM.

Contrary to Plaintiffs' claims, New York adopted the zero-emission credit (ZEC) component of the CES Order (Dkt. 55-1) to prevent the imminent loss of enormous amounts of zero-emission electricity, which would be replaced largely by fossil-fueled generation, undermining New York's environmental goals. Dkt. 55 at 3-5; Dkt. 55-1 at 3-6, 19-20. New York's actions fall squarely within the field reserved to the States by the Federal Power Act (FPA).

A. The CES Order is not field preempted.

Plaintiffs say the ZEC program is preempted because it allegedly: (1) adjusts the price of wholesale sales subject to Federal Energy Regulatory Commission (FERC) jurisdiction; or (2) directly affects those sales. But it does neither. Like renewable energy credit (REC) and similar programs—enacted in nearly thirty states[1]—the ZEC program pays eligible generators for the environmental attributes of electricity production regardless of how the resulting energy is sold. Such programs are independent of wholesale electricity sales, and neither intrude on nor interfere with FERC's regulation of those sales. Plaintiffs' attempts to distinguish ZECs from RECs are unavailing, and Plaintiffs' basic theory—that environmental credits effectively adjust wholesale electricity prices—could imperil REC programs nationwide.

1. ZECs pay for environmental attributes of electricity production.

FERC has exclusive jurisdiction over wholesale electricity sales in interstate commerce, but lacks jurisdiction over generation facilities, 16 U.S.C. § 824(b)(1), and has held itself power-

[1] Brief of Amicus Curiae Natural Resources Defense Council, Inc. in Support of Defendants' Motion to Dismiss, Dkt. 83 at 3.

less to consider environmental concerns in electricity ratemaking, *Grand Council of Crees v. FERC*, 198 F.3d 950, 957 (D.C. Cir. 2000). States regulate environmental aspects of electricity generation by restricting harmful activities and promoting beneficial ones. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481-82 (D.C. Cir. 2009). Environmental credits—like RECs and ZECs—promote preferred means of electricity generation. They are "inventions of state property law whereby the renewable energy attributes are 'unbundled' from the energy itself and sold separately." *Wheelabrator Lisbon, Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008) (*Wheelabrator)*. Such programs serve many goals, *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004, P 4 (2003), *reh'g denied*, 107 FERC ¶ 61,016 (2004), *appeal dismissed sub nom. Xcel Energy Servs. Inc. v. FERC*, 407 F.3d 1242 (D.C. Cir. 2005), and promote various technologies.[2]

Plaintiffs say the ZEC payments impermissibly adjust the uniform "market clearing price" paid to all successful bidders in the NYISO electricity auctions. Dkt. 95 at 6. But in *American Ref-Fuel Company*, FERC considered the interplay between state environmental credits and another federal law that sets a uniform energy price,[3] and reached the opposite conclusion. The dispute there concerned whether federal law dictated the disposition of RECs as between energy sellers and buyers, when their sales contracts predated the states' creation of RECs and were silent as to their conveyance. Because federal law guaranteed sellers the same rates for electric energy and capacity regardless of fuel type, FERC concluded that those rates provided no compensation for environmental attributes. *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004, P 22. "It follows," FERC said, that those attributes "are separate from, and may be sold separately from, the capaci-

[2] Center for Climate and Energy Solutions, *Clean Energy Standards*, https://perma.cc/FKA3-LKV2 (last visited Jan. 25, 2017); Center for Climate and Energy Solutions, Comparison of Qualifying Resources for Individual States' RPS and AEPS (July 7, 2011), https://perma.cc/9HZQ-HYUA (last visited Jan. 25, 2017).

[3] The law was the Public Utilities Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 (1978).

ty and energy." *Am. Ref-Fuel Co.*, 107 FERC ¶ 61,016, P 16. FERC concluded that state law governs REC disposition and pricing. As "RECs are created by the States," the states decide "who owns [them] in the initial instance, and how they may be sold or traded." *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004, P 22. Circuit precedent is in accord. *Wheelabrator*, 531 F.3d at 189-90 & n.10. In short, states can create separately sellable property reflecting environmental attributes of production, and, when they do, the total compensation for energy and unbundled production attributes necessarily exceeds the price for energy alone.

The same analysis obtains here. NYISO capacity and energy prices are fuel-neutral; a uniform clearing price is paid to all suppliers whose offers "clear[]" the auctions. *See* Dkt. 1, ¶ 33. NYISO auctions thus pay sellers *only* for energy and capacity, not environmental attributes, which can be sold and paid for separately. *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004, P 22. Plaintiffs do not claim otherwise. They pointedly refrain from challenging the REC component of the CES Order, which likewise pays eligible resources for environmental attributes not compensated in electricity sales. Indeed, Plaintiffs cite no case holding that state environmental credits invade with FERC's electricity pricing turf.

Plaintiffs say the result in a recent preemption case, *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016), "would have been the same had the subsidy [there] been labeled an 'environmental credit' . . . ; or—in light of Maryland's goal to increase electric production—a 'capacity generating credit.'" Dkt. 95 at 3. But environmental and "capacity generating" credits are different. FERC-regulated regional auctions pay for electric energy and capacity (the option to purchase energy), not for environmental attributes. The Court found Maryland's program preempted because it provided the seller a different price "for its interstate sales of capacity to PJM," *Hughes*, 136 S. Ct. at 1297, and emphasized that it was not foreclosing states from en-

couraging "clean generation through measures untethered to a generator's wholesale market participation." *Id.* at 1299 (quotation omitted). "So long as a State does not condition payment of funds on capacity clearing the auction," it does not "suffer from the fatal defect that renders Maryland's program unacceptable." *Id.*

Plaintiffs say that the ZEC payments are impermissibly "tethered" and fail after *Hughes* because ZEC eligibility requires a showing that energy sale revenues are "inadequate." Dkt. 95 at 10. They portray this alleged "tethering" as a distinction between ZECs and RECs and proof that ZECs "contradict FERC's determination that the wholesale price is 'just and reasonable.'" *Id.* at 10, 20-21, 31. But New York nowhere decided that NYISO auction prices were inadequate compensation for sales in those markets. And it did not condition ZEC payment on auction sales. New York simply opted to pay eligible generators "to preserve the[ir] zero-emissions environmental values or attributes" when they were at risk of being lost because the generators would not keep operating based on revenue from electricity sales alone. Dkt. 55-1 at 50. This was not materially different from New York's decision, elsewhere in the CES Order, to make RECs available only to *new* renewable resources (*see id.* at 65)—which, by definition, have not been built to date on the expectation of electricity sales alone. In each case, New York focused on obtaining or retaining incremental zero-emissions attributes beyond those that would be secure without the program.[4]

Plaintiffs identify nothing in federal law that forecloses the state's decision. Even assuming that FERC requires uniform prices for all NYISO capacity and energy sales, Dkt. 1, ¶ 33,

[4] Plaintiffs also argue that ZECs are field preempted because ZECs are available to fewer generators than RECs. Dkt. 95 at 19. But New York's RECs and ZECs are components of a single emissions-reduction program; ZECs cannot be examined in isolation. The nose count comparison also is skewed. Though only three generators are ZEC-eligible, together they produce more emissions-free energy than all the renewable generators eligible to receive RECs under the CES Order, at least until late in the renewable build-up. Plaintiffs' argument also is perverse: if ZECs were more widely available, their potential to affect NYISO capacity and energy prices indirectly, subject to FERC's rules on how subsidized resources participate in the auctions and affect prices, would be greater.

which it does not,[5] environmental attributes need not be priced the same way. *Wheelabrator*, 531 F.3d at 190 (FERC has not "occup[ied] the relevant field—namely, the regulation of renewable energy credits"); *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004, P 22 (States decide "who owns the REC[s] . . . and how they may be sold or traded"); Brief for Respondent at 9, *Xcel Energy Servs., Inc. v. FERC*, 407 F.3d 1242 (D.C. Cir. 2005) (No. 04-1182), https://perma.cc/G6UA-DJ5M (FERC *Xcel* Br.) ("Just as a state determines whether the REC it creates conveys with [energy sold], *so, too, the state determines the price of the REC if it conveys separately*") (emphasis added).

This likewise dooms Plaintiffs' claim that ZECs are field preempted because they (unlike RECs) are priced administratively. *See* Dkt. 95 at 30-31. If RECs and ZECs were wholesale electricity price adjustments, they would be preempted no matter how the state priced them. But Plaintiffs' premise is wrong. RECs and ZECs are instead separate, independently sold products. That FERC relies on market forces (where possible) to set federal electricity prices does not require New York to set ZEC prices the same way. *See* FERC *Xcel* Br. at 9.[6]

Plaintiffs complain about the magnitude of the ZEC payments. *E.g.*, Dkt. 95 at 1, 2, 7, 10. But New York priced ZECs based on the federally-calculated social cost of carbon, minus adjustments for New York's participation in a multi-state greenhouse-gas program and potential adjustment to reflect forecasted electricity price increases. Dkt. 55 at 6-7. The difference—and,

[5] FERC authorizes higher capacity and energy payments to specific generators where threatened retirements jeopardize transmission-system reliability (a matter within FERC's jurisdiction). *See generally N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,116, PP 1-9, 17 (2015). The ZEC program is parallel as to matters within the state's jurisdiction: New York pays for emissions attributes when retirements jeopardize the state's environmental goals.

[6] In any case, New York has relied on market pricing where possible (e.g., in creating RECs for new renewable generation), and resorted to administrative pricing for ZECs because of market power concerns. Dkt. 55-1 at 130 n.89. FERC, too, defaults to administrative pricing where market power prevents competition from establishing reasonable prices for jurisdictional sales. *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 987 (D.C. Cir. 2009).

thus, ZEC prices—reflects the degree to which those programs fail to compensate the environmental benefits of zero-emission production.

Plaintiffs object that ZEC prices may be reduced based on forecasted electricity price increases, but those adjustments do not change what a ZEC *is*—payment for an environmental attribute created by producing qualified electric energy, however that energy is sold. And when states set state-jurisdictional retail rates, federal law allows them to account for expected FERC-jurisdictional revenues. *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 754 F.2d 99, 100 (2d Cir. 1985) (Retail electricity rate reduction based on expected wholesale-sales revenues not preempted). ZEC pricing follows the same, well-established convention.

In short, neither ZECs nor RECs are preempted adjustments of wholesale electricity prices. They are separate property rights reflecting environmental electricity production benefits. The FPA leaves such matters to the states, disposing of any field preemption claim.[7] Both FERC and Plaintiff Electric Power Supply Association (EPSA) have pointed to RECs as examples of *un*-preempted generation support.[8]

2. ZECs payments do not "affect[]," "pertain[] to," or "connect[] with" wholesale energy sales.

Plaintiffs likewise fail in attempting to reframe the field preemption inquiry as whether the ZEC program "'affects,' 'pertains to,' or is 'connected with' wholesale electricity rates."

[7] *Compare N. Nat. Gas Co. v. Kan. Corp. Comm'n*, 372 U.S. 84, 92 (1963) (preemption of Kansas law regulating FERC-jurisdictional pipeline's purchases from in-state wells) *with Nw. Cent. Pipeline Corp. v. Kan. Corp. Comm'n*, 489 U.S. 493, 508, 514 (1989) (*Nw. Central*) (*no* preemption of law regulating production of gas to be purchased, "despite the new order's probable consequences for pipeline purchasing practices and price structures"). *See also Oneok, Inc. v. Learjet, Inc*., 135 S. Ct. 1591, 1600-01 (2015) (no preemption of state laws aimed at "subjects left to the States to regulate").

[8] Brief for the U.S. and FERC as Amici Curiae at 15-16, *PPL EnergyPlus*, *LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014) (No. 13-4330) (comparing preempted state wholesale rate-setting with un-preempted REC regulation); Brief of the Electric Power Supply Association, the Edison Electric Institute, and PJM Power Providers Group, Inc. as *Amici Curiae* in Support of Respondents at 19-20, *Hughes*, 136 S. Ct. 1288 (2016) (Nos. 14-614, 14-623), https://perma.cc/Y2L5-MTFJ (citing "renewable or other fuel-based standards" as un-preempted state actions).

Dkt. 95 at 18. FERC's so-called "affecting" jurisdiction is not unbounded; it is limited to matters that *directly* affect FERC jurisdictional wholesale sales. *FERC v. Elec. Power Supply Ass'n,* 136 S. Ct. 760, 774 (2016). And FERC already has held that sales of unbundled attributes of electricity production, separate from sales of the energy itself, "do[] *not* affect wholesale electricity rates," are "*not* a charge in connection with a wholesale sale of electricity," and are "outside of the Commission's jurisdiction under sections 201, 205 and 206 of the FPA." *WSPP, Inc.*, 139 FERC ¶ 61,061, PP 18, 24 (2012) (emphasis added). These holdings are fatal to Plaintiffs' claims.

Plaintiffs mischaracterize *WSPP*. FERC did not devise a two-part test asking whether a REC sale "'occurs independent of a sale of electric energy for resale . . .' *and* does not 'affect' jurisdictional rates." Dkt. 95 at 28 (emphasis added). FERC decided that the second condition follows from the first, placing unbundled REC sales outside FERC jurisdiction. *WSPP*, 139 FERC ¶ 61,061, P 24.

Plaintiffs do not allege that ZEC sales and wholesale energy and capacity sales are "part of the same transaction." *Id.* They admit instead that ZECs result from electricity "produc[tion]" by eligible generators, and are purchased by a New York state agency. Dkt. 95 at 10.[9] ZECs are *not* contingent on any particular disposition of the electric energy. The generators could sell the energy at negotiated rates to bilateral purchasers, in the NYISO markets at either auction prices or cost-based rates, or to industrial or governmental customers for their own end use. That some options may be more feasible or attractive now is of no moment. The key point is that New York has not tied the ZECs payments to—or bundled the payments with—any capacity or energy sale.

[9] *Indep. Power Prods. of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc*., Request for Expedited Action of the Electric Power Supply Association at 11, Docket No. EL13-62-002 (Jan. 9, 2017), eLibrary No. 20170109-5121, https://perma.cc/2CRX-XHFX (EPSA Motion) ("[ZEC] payments are tied to energy production."). EPSA is a Plaintiff here.

The ZECs and the electricity will be sold at different times, in different transactions, to different purchasers.

B. The CES Order is not conflict preempted.

Given "Congress' decision that the [electric industry] should be subject to a dual regulatory scheme," conflict preemption "must be applied sensitively . . . so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Nw. Central*, 489 U.S. at 514-15; *accord Hughes*, 136 S. Ct. at 1300 ("Pre-emption inquiries related to such collaborative programs are particularly delicate.") (Sotomayor, J., concurring). State regulation may be conflict preempted "if it is impossible to comply with both state and federal law; if state regulation prevents attainment of FERC's goals; or if a state regulation's impact on matters within federal control is not an incident of efforts to achieve a proper state purpose." *Nw. Central*, 489 U.S. at 516 (citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300, 308-09 (1988)). But there is no conflict when the state "regulate[s] production or other subjects of state jurisdiction" in pursuit of "matters of legitimate state concern," unless "clear damage to federal goals would result." *Id.* at 518, 522.

No such circumstances exist here. Environmental attribute sales are no recent invention: FERC has known about such state programs for nearly two decades,[10] yet has never expressed an intent to preempt them. FERC instead adopted fuel-neutral wholesale electricity auctions against the backdrop of states subsidizing beneficial generators, including through sales of environmen-

[10] *See Madison Windpower, LLC*, 93 FERC ¶ 61,270 (2000) (affirming that a wind farm's "incidental" business of selling state-created "green power certificates," in addition to selling energy in NYISO markets, would not jeopardize its "exempt wholesale generator" status).

tal attributes. Indeed, the NYISO *supports* the use of ZECs to retain nuclear generation, at least "until longer term market solutions can be developed."[11]

Like RECs, ZECs affect the generator mix available to supply electricity in wholesale auctions and, thus, if FERC allows, can indirectly affect auction prices. But that is no basis for conflict preemption. "[T]he law of supply-and-demand is not the law of preemption." *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 255 (3d Cir. 2014). And Plaintiffs' suggestion (Dkt. 95 at 33) that wholesale auctions are the exclusive determinants of generator development or retirement is wrong. FERC said in *Hughes* that states are free to support new resources or forestall retirements "even if the price signals in the regional wholesale capacity market indicate that no [such] resources are needed." Brief for the United States as Amicus Curiae at 33, *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016) (Nos. 14-614, 14-623), https://perma.cc/4ELB-QKCU.

Instead of trying to force fuel neutrality on the states, FERC controls how state-supported generators participate in wholesale auctions and affect resulting prices.[12] Plaintiff EPSA has asked FERC to adopt special bid rules for the NYISO capacity auction applicable to ZEC recipients. *See* EPSA Motion, *supra* note 9, at 10. This Court cannot find a conflict when *FERC*, not New York, will decide how subsidized resources participate in wholesale auctions and affect resulting prices.

[11] Letter from Bradley C. Jones, President & CEO, NYISO, to Hon. Audrey Zibelman, Chair, N.Y. State Pub. Serv. Comm'n, Case 15-E-0302 – Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard (July 22, 2016), https://perma.cc/G4NR-DG23. In contrast, the views of Plaintiffs' amicus—who monitors an adjacent region's markets and does not speak for the regional organization charged with running them—are of questionable relevance.

[12] *See PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, P 139, *on reh'g*, 137 FERC ¶ 61,145 (2011), *reh'g denied*, 138 FERC ¶ 61,160, *and reh'g denied*, 138 FERC ¶ 61,194 (2012), *review denied sub nom. N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014).

II. PLAINTIFFS HAVE NO STATUTORY OR EQUITABLE PREEMPTION CAUSE OF ACTION.

There is an independent reason to dismiss Plaintiffs' preemption claims. Plaintiffs fail to answer—and thus concede—Defendants' argument that Plaintiffs have no private cause of action under the FPA or the Supremacy Clause. Dkt. 55 at 7-9; *see*, *e.g.*, *Cunningham v. Tenn. Cancer Specialists, PLLC*, 957 F. Supp. 2d 899, 921 (E.D. Tenn. 2013). And Plaintiffs' claim that the FPA does not foreclose pursuit of equitable judicial relief for alleged statutory violations is wrong. As Plaintiffs admit, their right to seek equitable relief turns on analyses of the FPA's enforcement machinery and the extent to which the FPA is "administrable" by federal district courts. Dkt. 95 at 15-17. Yet Plaintiffs offer little FPA analysis, and mistakenly rely instead on a decision involving the Airport Noise and Capacity Act (ANCA). Dkt. 95 at 14-15 (citing *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133 (2d Cir. 2016) (*Friends*)).[13]

A. The FPA enforcement scheme is comprehensive.

Statutory analysis demonstrates Congress' foreclosure of private equitable relief. *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1385 (2015). "Congress['s] creat[ion of] a remedial scheme for the enforcement of a particular federal right" is reason to "refuse[] to supplement that scheme with one created by the judiciary." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996). Plaintiffs neither dispute that the FPA provides a comprehensive administrative enforcement framework to ensure just and reasonable wholesale rates, Dkt. 55 at 10-11, nor challenge that FERC can find state law preempted. *Id.* at 10 & n.20. Instead, they misread the FPA as authorizing private litigants to bring "both suits in equity and FERC administrative proceedings." Dkt. 95 at 15. FPA Section 317, 16 U.S.C. § 825p, gives district courts jurisdiction over all FPA enforcement "suits in equity and actions at law," but that speaks to the court's pow-

[13] Plaintiffs also rely on decisions concerning other unrelated statutes. *See* Dkt. 95 at 13-15 & n.13.

er—not who can invoke it. *Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 249 (1951) (Provisions "vesting jurisdiction in the District Courts[] do[] not create causes of action, but only confer[] jurisdiction to adjudicate those arising from other sources").[14] FERC alone is authorized, "in its discretion," to bring actions to enjoin FPA violations. 16 U.S.C. § 825m(a).

B. Plaintiffs' claims are "rate-related."

Plaintiffs seem to concede that the FPA's "just and reasonable" rate-setting standard is not judicially administrable, arguing instead that their preemption claims do not implicate FPA rate-setting. Dkt. 95 at 16. But the NYISO "auction process" is an exercise of FERC's exclusive "rate setting authority," *Simon v. Keyspan Corp.*, 694 F.3d 196, 207 (2d Cir. 2012), and Plaintiffs' Complaint—a self-serving brief on the theory, design, and practice of FERC-regulated auction markets—is riddled with claims that the ZEC program distorts markets and suppresses auction prices.[15] Plaintiffs' field preemption theory is that the CES Order invades FERC's field because it directly affects NYISO wholesale electricity auction clearing prices, Dkt. 1, ¶ 79, and their conflict preemption claim is that the CES Order "interferes with FERC's decision to structure the wholesale markets for capacity and energy on market-based principles." *Id.* ¶ 89. Even if Plaintiffs are not asking the Court to set particular rates, the complaint plainly involves "rate-related requests for injunctive relief." *Armstrong*, 135 S. Ct. at 1389 (Breyer, J., concurring).[16]

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[14] *See also Clark v. Gulf Oil Corp.*, 570 F.2d 1138, 1146 (3d Cir. 1977) ("[G]rant of jurisdiction in the district courts need not be read as extending beyond those causes of action *expressly* provided for elsewhere in the Act") (emphasis supplied). *Clark* construed the jurisdictional provision of the Natural Gas Act (NGA). The FPA and NGA are construed *in pari materia*. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

[15] Plaintiffs contend that the ZECs undermine FERC's ability to use auctions to set a "just and reasonable rate" by altering the behavior of auction participants. Dkt. 1, ¶¶ 44, 81-83, 84-92; *accord* Dkt. 95 at 11 ("As a result [of the ZEC program], auction clearing prices will be significantly lower, which will both disrupt FERC's efforts to promote, design, and implement competitive wholesale energy and capacity markets and greatly lower Plaintiffs' revenues.").

[16] Even if the court could adjudicate Plaintiffs' particular claims in this case, that would not establish a cause of action. *Armstrong* rejects a case-by-case approach to assessing the availability of equitable relief under rate-regulatory statutes such as the FPA. "[C]ourts might in particular instances be able to resolve rate-related requests for injunctive

FERC regulates generating unit participation in NYISO auctions, Dkt. 55 at 17, and Plaintiffs have acknowledged FERC's "extreme[] vigilan[ce] in protecting its capacity markets against state-subsidized resources undercutting its [market] price[s]." Dkt. 1, ¶ 47. As noted, Plaintiff EPSA recently filed at FERC seeking changes in the NYISO tariff to protect against the alleged market "threat from the ZECs program." EPSA Motion, *supra* note 9, at 10. There is no reason to conduct parallel agency and court proceedings, wasting resources and giving Plaintiffs two bites at the apple, when the FPA's comprehensive scheme of relief "achiev[es] the expertise, uniformity, widespread consultation, and resulting administrative guidance that . . . accompan[ies] agency decisionmaking." *Armstrong*, 135 S. Ct. at 1385.

C. *Friends* does not support Plaintiffs' position.

Relying on *Friends*, Plaintiffs claim that the FPA falls outside any limitation adopted in *Armstrong* because FERC is authorized to enforce the FPA through both administrative and judicial proceedings and is not limited to a "sole remedy." Dkt. 95 at 15. But as Justice Breyer noted in *Armstrong,* the agency's ability "to sue a State to compel compliance with federal rules" is another reason to read the FPA as precluding an equitable cause of action, 135 S. Ct. at 1389 (Breyer, J., concurring), not the other way around.

Friends nonetheless found that the ANCA's empowering of the Secretary to seek judicial enforcement did not "imply [Congress's] intent to bar" equitable actions by private parties. 841 F.3d at 146. But that conclusion was subject to an important limitation: it applies only where private parties file suit "not to enforce the federal law themselves, but to preclude a municipal entity from subjecting them to local laws enacted in violation of federal requirements." *Id*. Plaintiffs here are not raising a preemption defense to a regulation directed against *them*. They seek "to

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relief quite easily. But [there is] no easy way to separate in advance the potentially simple sheep from the more harmful rate-making goats." *Armstrong*, 135 S. Ct. at 1389 (Breyer, J., concurring).

enforce the federal law themselves," *id.*, because of the indirect impact the ZECs may have on them (if FERC allows it) via ZEC recipients' participation in NYISO auctions. Such suits are what Congress intended to preclude when it gave FERC discretionary enforcement authority.[17]

Unlike the ANCA, which has no administrative enforcement mechanism,[18] the FPA creates a comprehensive remedial framework. The FPA is thus akin to the Airport and Airway Improvement Act (AAIA), under which equitable relief also was sought in *Friends*. The District Court found such suits foreclosed by the AAIA because Congress "place[d] authority for the enforcement of the AAIA's Grant Assurances exclusively in the hands of the Secretary . . . through a comprehensive administrative enforcement scheme." 152 F. Supp. 3d at 104. That ruling was not challenged or otherwise disturbed on appeal. Similarly, the FPA places enforcement authority exclusively in FERC's "hands . . . through a comprehensive administrative enforcement scheme." *Friends*, 152 F. Supp. 3d at 104. Plaintiffs are not without a preemption remedy; they can seek relief from FERC.

III. PLAINTIFFS FAIL TO STATE A COMMERCE CLAUSE CLAIM.

Plaintiffs' dormant Commerce Clause claim is premised on the contention that the ZEC program is facially discriminatory because it "ensur[es] that no out-of-state generators are eligible to receive ZECs." Dkt. 95 at 37. That is wrong as a matter of law. First, it depends on viewing one CES component in isolation and ignoring that REC revenues are available to out-of-state carbon-free resources. Dkt. 1, ¶ 98; Dkt. 55-1 at 30. Second, it contradicts the CES Order's express language on ZEC eligibility. New York made ZECs available to nuclear generators that his-

[17] In *Friends*, the Second Circuit found that the ANCA-based challenge "would not require application of a judicially unadministrable standard," *id.* at 146, but the FPA's "just and reasonable" standard (like the Medicaid rate-making statute in *Armstrong*) is "obviously incapable of precise judicial definition." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008).

[18] *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 152 F. Supp. 3d 90, 105 (E.D.N.Y. 2015), *aff'd in part and vacated in part*, 841 F.3d 133 (2d Cir. 2016).

torically have supplied New York, "regardless of the location of the facility." *Id.* at 50. Had out-of-state nuclear generators verifiably provided energy to New York, they would have been eligible for ZECs. *Id.* That they did not do so is a background market condition, not a restriction New York imposed.

Plaintiffs' claim of discriminatory effect fares no better. "[A]ny notion of discrimination assumes a comparison of substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1977) (footnote omitted). The requisite comparability is not present here. New York seeks through the ZEC program to preserve existing non-carbon-emitting power supplies to satisfy transitional energy needs. Fossil fuel-fired resources lack this crucial environmental attribute and are not capable of serving the same purpose. The dormant Commerce Clause does not bar New York from distinguishing between generation types to promote environmental goals and applying these distinctions even-handedly to in- and out-of-state generators. *See Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1089 (9th Cir. 2013), *reh'g en banc denied*, 740 F.3d 507, *cert. denied*, 134 S. Ct. 2884 (2014).

While Plaintiffs lob unsubstantiated protectionism claims, the CES Order states the ZEC program's environmental basis, and that articulation is controlling. *Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456, 463 n.7 (1981). The ZEC program preserves the unique environmental attributes of the existing nuclear generation that has historically served New York consumers, thereby enabling a shift to new carbon-free generation sources while avoiding increased interim reliance on carbon-emitting resources. There can be no argument—and Plaintiffs offer none—that New York's goal of transitioning to a cleaner generation portfolio is impermissible.

Plaintiffs' conclusory allegations of "market-distorting burdens," Dkt. 95 at 39, do not save its Commerce Clause claim. ZECs promote rather than burden commerce. Moreover, to

state a claim under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), plaintiffs must allege *disparate* burdens on in-state and out-of-state entities. *Jones v. Schneiderman*, 974 F. Supp. 2d 322, 350 (S.D.N.Y. 2013). Here, no disparate burden on out-of-state commerce is present. ZECs are available to nuclear units, wherever located, that provided at-risk zero-emission electricity to New York, and New York retail electricity consumers pay for the ZECs. All other resources—wherever located—are ineligible.

Similar to the Connecticut REC program upheld in *Allco Fin. Ltd. v. Klee*, Nos. 3:15-cv-608 (CSH), 3:16-cv-508 (CSH), 2016 WL 4414774, at *23-24 (D. Conn. Aug. 18, 2016), *appeal docketed*, No. 16-2946 (2d Cir. Aug. 23, 2016), the ZEC program "incentivizes the production and distribution of [nuclear] clean energy in and around [New York], where it will have a measurable impact on [New York's] goals." *Id*. It is irrelevant for Commerce Clause purposes that New York has administratively priced the ZECs that the state purchases through NYSERDA in order to "protect[] the State's environment." *Hughes v. Alexandria Scrap Corp*., 426 U.S. 794, 809 (1976). And even if the CES Order *in toto* subsidized only in-state producers, "[d]irect subsidization of domestic industry does not ordinarily run afoul of [Commerce Clause] prohibition." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). Plaintiffs "cannot defeat [the ZEC program by attempting to] shoe-horn[] it into the confines of the dormant Commerce Clause." *Allco Fin. Ltd.*, 2016 WL 4414774, at *23.

IV. CONCLUSION

Defendants request that the Court grant their motion (Dkt. 54) and dismiss this case in its entirety.

Respectfully submitted,

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Dated: January 27, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have on this 27th day of January, 2017, electronically filed the foregoing Reply in Support of Defendants' Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(B)(6) with the Clerk of the District Court using the CM/ECF system, which will send notification of such filing to counsel of record in this proceeding.

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