

# **EXHIBIT A**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

VILLAGE OF OLD MILL CREEK, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	No. 17-cv-01163
	)	
v.	)	Judge Manish S. Shah
	)	
ANTHONY STAR, in his official	)	Magistrate Judge Susan E. Cox
capacity as Director of the Illinois	)	
Power Agency,	)	
	)	
Defendant.	)	

**PROPOSED BRIEF OF AMICUS CURIAE  
NATURAL RESOURCES DEFENSE COUNCIL  
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND  
IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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## BACKGROUND AND INTEREST OF AMICUS CURIAE

Amicus curiae Natural Resources Defense Council (NRDC) is a national non-profit environmental advocacy organization. Curbing climate change and building the clean energy future are among NRDC's top institutional priorities. We frequently advocate before federal regulatory bodies, wholesale energy market operators, state siting and regulatory authorities, and federal courts to promote and defend clean energy policies. NRDC was a leading member of the Illinois Clean Jobs Coalition, which lobbied for the passage of the Future Energy Jobs Act legislation, Ill. Pub. Act No. 099-0906 (Legislation) that is the subject of this litigation. NRDC was also granted leave in December 2016 to file an amicus curiae brief in the pending litigation in the Southern District of New York concerning virtually identical issues. Order Granting Motion to File Amicus Brief, Dkt. 49, *Coal. for Competitive Energy v. Zibelman*, No. 16-8164 (S.D.N.Y. Dec. 12, 2016).

The Legislation contains a suite of policies aimed at making Illinois a leader in fighting climate change and decarbonizing the electricity sector. These include improvements to the state's Renewable Portfolio Standard, a program requiring, among other things, that a specified percentage of energy come from renewable sources, as verified through Renewable Energy Credits; significant solar energy incentives, including a community solar program; and a strong energy efficiency program. The Legislation also includes a program of Zero Emissions Credits (ZECs), designed to keep nuclear power plants from closing by providing financial support to them for ten years. NRDC is skeptical of nuclear power because of the significant safety, global security, environmental, and economic risks that the use of this technology imposes on society.<sup>1</sup> However, NRDC strongly supported the Legislation as a whole because of the important energy-efficiency and renewable-

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<sup>1</sup> For background on NRDC's stance on nuclear power, see *NRDC Policy Basics: Nuclear Energy* (Feb. 2013), <https://www.nrdc.org/sites/default/files/policy-basics-nuclear-energy-FS.pdf>.

energy measures it includes, and because it will move Illinois away from its current reliance on fossil fuels toward a clean energy future.

Despite our reservations about nuclear power, NRDC agrees with Defendants that Illinois acted within its lawful authority in adopting the ZEC program. Plaintiffs' overbroad and incorrect constitutional arguments, if adopted, would muddy the waters of preemption doctrine under the Federal Power Act (FPA) and cause widespread uncertainty with regard to state clean energy programs. The overbroad preemption ruling Plaintiffs seek could impede progress toward a decarbonized electricity grid by undercutting the traditional authority states use to promote development and use of renewable energy. NRDC urges the Court to reject this warping of the statutory scheme.

Our brief explains that, under the FPA, states have authority to regulate utilities and to determine the appropriate energy resource mix as a matter of state law and policy. The Federal Energy Regulatory Commission (FERC), whose role is defined by the FPA, has long recognized states' traditional authority over utility generation and resource portfolios. The Supreme Court decisions interpreting FPA jurisdiction leave ample room for states to act even where such action touches on areas of federal regulation. Our brief further explains that the over-expansive application of federal preemption that Plaintiffs seek could create substantial ambiguity regarding the scope of states' authority more generally. This uncertainty would have an overall chilling effect on sound energy regulation, impeding the development and execution of clean energy policies.

The stakes are high, and not just for Illinois. At least twenty-nine states and the District of Columbia have adopted Renewable Portfolio Standards to achieve state public health and environmental goals, and countless other state programs advance clean energy in various additional

ways.<sup>2</sup> It is critical that states continue to have the authority to adopt clean energy policies to combat climate change and reduce dangerous pollutants that threaten human health and a livable environment. The FPA preserves states' authority to do just that. The Court should therefore dismiss Plaintiffs' preemption claims.<sup>3</sup>

## ARGUMENT

### I. The Supreme Court has articulated rational boundaries on FPA jurisdiction that leave room for states to exercise their traditional energy regulatory authority

The U.S. Supreme Court has been careful to interpret the FPA in a manner that preserves traditional state authority, and that does not expand federal control to its theoretical outer reaches to swallow up that authority altogether. The Court's recent decisions in *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760 (2016) (*EPSA*), and *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) (*ONEOK*), articulate a practical framework for state and federal coexistence in the increasingly integrated energy sector, leaving room for states to carry out actions like the ZEC program to achieve a desired mix of generating resources. The Court's opinion in *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016), is consistent with that framework and prior decisions. *Hughes* articulates the rule that states cannot directly invade FERC's core province of wholesale rate-setting by stepping in and changing those rates, but it explicitly preserves states' ability to achieve the same regulatory outcomes by means that do not involve modifying wholesale rates. Courts "must proceed

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<sup>2</sup> See Galen Barbose, U.S. *Renewables Portfolio Standards: 2016 Annual Status Report* 5 (Apr. 2016), <https://emp.lbl.gov/sites/all/files/documents/lbnl-1005057.pdf>. Multiple Renewable Portfolio Standards have come or are coming to the end of their time horizons in the next few years. See, e.g., Me. Rev. Stat. tit. 35-A, § 3210 (providing for a portion of retail electricity sales to be accounted for by new renewable resources through December 31, 2017); N.J. Admin. Code § 14:8-2.3 (providing for increasing renewables requirements through May 31, 2021). In these states and others contemplating clean energy legislation, the importance of maintaining legal certainty regarding states' authority is acute. The Database of State Incentives for Renewables and Efficiency includes nearly 4000 different state policies. See Database of State Incentives for Renewables & Efficiency, <http://www.dsireusa.org/> (last visited Apr. 10, 2017).

<sup>3</sup> NRDC also agrees with Defendants that Illinois's ZEC program does not violate the dormant Commerce Clause. We do not address that issue in this brief.

cautiously,” recognizing that the FPA “was drawn with meticulous regard for the continued exercise of state power . . . .” *ONEOK*, 135 S. Ct. at 1599 (internal quotation marks omitted).

**A. The FPA preserves states’ traditional authority to regulate public policy attributes associated with electricity generation**

The FPA is a “collaborative federalism statute” that “envisions a federal-state relationship marked by interdependence.” *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring). It gives FERC jurisdiction over interstate wholesale electricity prices, while states retain jurisdiction over other energy transactions. The FPA directs the federal government, acting through FERC, to ensure that the “rates” for interstate wholesale sales of electric energy are “just and reasonable.” 16 U.S.C. § 824d(a); *see also id.* § 824e(a).<sup>4</sup> It also authorizes FERC “to ensure that rules or practices ‘affecting’ wholesale rates are just and reasonable.” *EPSA*, 136 S. Ct. at 774; *see also* 16 U.S.C. §§ 824d(a), 824e(a). States retain jurisdiction over “any other sale of electric energy,” 16 U.S.C. § 824(b)(1), including retail sales (*i.e.*, sales to end-use customers) and wholesale sales that occur entirely within the state. *See EPSA*, 136 S. Ct. at 766. States also retain control over “facilities used for the generation of electric energy.” 16 U.S.C. § 824(b)(1).

FERC’s authority to determine just and reasonable wholesale electricity rates is thus designed to coexist alongside states’ traditional energy regulatory authority, rather than intrude upon it. “[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.” *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 377 (1983). States’ traditional utility regulatory authority includes the power “to direct the planning and resource decisions of utilities under [the state’s] jurisdiction,” such as by “order[ing] utilities to purchase renewable generation.” *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d

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<sup>4</sup> The process of reviewing electricity sales prices and determining whether they are just and reasonable is generally described either as “regulating” rates or as “setting” them. *See generally EPSA*, 136 S. Ct. at 767-68.

Cir. 2013) (internal quotation marks omitted); *cf. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (observing that under the Atomic Energy Act, passed after the FPA, “[s]tates retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns”); *S. Cal. Edison Co.*, 70 FERC ¶ 61,215, at 61,676 (1995) (recognizing that states may “diversify their generation mix to meet environmental goals in a variety of ways,” including by “requir[ing] a utility . . . to purchase power from the supplier of a particular type of resource”).

States may also direct planning and resource decisions by requiring utilities to purchase Renewable Energy Credits (RECs), which, like ZECs, reflect various attributes of renewable electricity generation that the state deems valuable, separate and apart from its value as electric energy. When those credits are “unbundled”—*i.e.*, sold separately from the electricity itself—FERC has held that they are subject to regulation by states, not by FERC. *See WSPP Inc.*, 139 FERC ¶ 61,061, at 61,426 (2012); *see also Wheelabrator Lisbon, Inc. v. Conn. Dep’t of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008) (noting that “RECs are inventions of state property law”); *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004, at 61,007 (2003) (noting that “[s]tates, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded”).

**B. *EPSA* and *ONEOK* make clear that exclusive rate setting jurisdiction is narrowly construed, and federal and state jurisdiction is in part concurrent**

Although the FPA divides federal and state authority between wholesale and retail sales as described above, the Supreme Court has recognized that these electricity markets are now “inextricably linked” rather than “hermetically sealed from each other,” such that a “Platonic ideal” of strict separation between federal and state realms cannot exist.” *EPSA*, 136 S. Ct. at 766, 776 (citing *ONEOK*, 135 S. Ct. at 1601). The *EPSA* Court thus endorsed a practical approach to determining the FPA’s allocation of federal and state authority that emphasizes the ability of regulators to craft workable rules. *Id.* at 774. In particular, it made clear that FERC’s FPA jurisdiction

over rules or practices “affecting” wholesale rates, 16 U.S.C. § 824e(a), in contrast to its jurisdiction over setting the rates themselves, is not exclusive.

*EPSA* considered the converse of the situation at issue here: whether a FERC rule impermissibly intruded upon state retail rate jurisdiction. Specifically, the Court evaluated whether a FERC rule regulating sales of “demand response” in wholesale electricity markets administered by regional grid operators—“demand response” being a promise to meet energy needs by cutting demand rather than generating more electricity—was a proper exercise of federal jurisdiction over practices “affecting” wholesale rates. *Id.* at 773-74 (citing 16 U.S.C. §§ 824d(a), 824e(a) (emphasis omitted)). The Court concluded that it was.

In so holding, however, the Court limited the impact on states’ traditional energy regulatory authority in three important ways. First, the Court “limit[ed]” the reach of FERC’s “affecting” jurisdiction to “rules or practices that *directly* affect the wholesale rate.” *Id.* at 774 (internal quotation marks and brackets omitted; emphasis in original). It expressed concern that the FPA’s “affecting” language, “[t]aken for all it is worth, . . . could extend FERC’s power to some surprising places,” and recognized that such intrusion into areas of traditional state power was not the intent of Congress. *Id.* The Court proceeded to find that FERC’s rule for demand-response compensation was a proper exercise of its jurisdiction under this limiting principle, given the direct relationship between the regional grid operators’ rules at issue and wholesale electricity rates. *Id.* at 774-75.

Second, the Court’s decision demonstrates that FERC’s jurisdiction over practices directly affecting rates, unlike its authority to regulate wholesale rates themselves, is not exclusive. FERC’s demand-response rule regulated transactions pursuant to FERC’s “affecting” jurisdiction, but it also gave states a “veto power,” “allow[ing] any State regulator to prohibit its consumers from making demand response bids in the wholesale market.” *Id.* at 779. In other words, the rule specifically allowed for overlapping and complementary roles for the states and the federal government. The

Court observed favorably that this “feature of the Rule” was part of what established its validity: it “removes any conceivable doubt as to [the rule’s] compliance with [Section 201(b) of the FPA’s] allocation of federal and state authority.” *Id.* at 780.<sup>5</sup>

In this respect, *EPSA* built upon the Supreme Court’s decision from the prior term, *ONEOK*, which similarly approved of overlapping state and federal regulation of matters directly affecting wholesale rates under the Natural Gas Act.<sup>6</sup> *See EPSA*, 136 S. Ct. at 776-77. *ONEOK* held that state antitrust law claims were not field-preempted by the Natural Gas Act, despite the fact that “FERC has promulgated detailed [antitrust] rules” that “prohibit[] the very kind of anticompetitive conduct that the state actions attack.” *ONEOK*, 135 S. Ct. at 1599, 1602. By approving overlapping state and FERC regulation of the exact same conduct, *ONEOK* necessarily decided—as did *EPSA*—that states have authority over some matters directly affecting wholesale rates.

*ONEOK* held that states retain the power to regulate practices “that affect[] both [FERC-]jurisdictional and non[-FERC-]jurisdictional rates,” so long as such regulation “aims” at matters within their own jurisdictional sphere. *Id.* at 1599, 1602. Where a state targets a matter within its traditional authority, like retail rates or environmental attributes of generation, state action is preempted only where it leads to conflict preemption because it irreconcilably clashes with FERC’s regulation. *See id.* at 1601 (noting that a prior case addressing such a situation “is best read as a

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<sup>5</sup> If FERC’s “affecting” jurisdiction were exclusive, as Plaintiffs suggest, the Court’s decision in *EPSA* would have looked quite different. The Court would have needed to examine (as the respondents in that case argued) whether the state veto “directly affected” rates in FERC’s wholesale markets and thereby impermissibly intruded into FERC’s exclusive jurisdiction. *See* Brief for Respondents Elec. Power Supply Ass’n et al. at 40, *EPSA*, 136 S. Ct. 760 (2015) (Nos. 14-840, 14-841), 2015 WL 5169103, at \*40 (arguing that “th[e] provision for explicit state override is tantamount to a concession that FERC has overstepped its regulatory boundaries. . . . [I]f FERC were right that it has jurisdiction to control ‘demand response’ participating in the wholesale markets, it is hard to see how state action seeking to block that participation would be constitutional.”). That is not what the Supreme Court did, however. It instead cited the state’s veto power as a salutary feature of the rule. *See EPSA*, 136 S. Ct. at 780.

<sup>6</sup> Although *ONEOK* involved the Natural Gas Act, not the FPA, “the relevant provisions of the two statutes are analogous,” and courts have “routinely relied on [Natural Gas Act] cases in determining the scope of the FPA, and vice versa.” *Hughes*, 136 S. Ct. at 1298 n.10. FERC administers both laws.

conflict pre-emption case, not a field pre-emption case”).<sup>7</sup> *ONEOK* and *EPSA* thus both interpret the word “affecting” in the FPA in a practical manner, recognizing that given the “inextricably linked” nature of the energy sector, the FPA naturally encompasses some matters over which states also exercise authority, even as FERC’s core wholesale rate-*setting* jurisdiction is exclusive. *See EPSA*, 136 S. Ct. at 766, 776.

Third, and perhaps most importantly with respect to this case, *EPSA* held that the terms “rates” and “rate-setting” under the FPA must be interpreted narrowly and literally. *Id.* at 777-78. That is, not every regulatory action that effectively moves rates up or down by changing costs or incentives of market participants constitutes “rate-setting,” for which the FPA assigns exclusive jurisdiction to either FERC (for wholesale interstate sales) or the states (for retail sales). The *EPSA* Court further rejected the respondents’ arguments that FERC’s demand-response rule, while not directly setting retail rates, “effectively” changed those rates by influencing consumer incentives to arrive at the same practical result. The Court held that the rule did not “set actual rates” in the “most prosaic, garden-variety sense.” *Id.* at 777-78; *see also id.* at 777 (“To set a retail electricity rate is . . . to establish the amount of money a consumer will hand over in exchange for power. Nothing in [the FPA] . . . suggests a more expansive” definition.). The Court rejected the respondents’ formulation, in which “[t]he modifier ‘effective’ is doing . . . more work than any conventional understanding of rate-setting allows.” *Id.*

Taken together, *EPSA*’s conclusions dictate that the FPA does not rigidly wall off large areas of exclusive federal and state jurisdiction. By confining exclusive rate-setting jurisdiction to the literal exchange of money for electric power, while adopting a concurrent jurisdictional structure over

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<sup>7</sup> As the dissent put it, the majority opinion in *ONEOK* “reasons that” where a “case involves a practice that affects both wholesale and retail rates, the [FPA] tolerates state regulation that takes aim at the practice’s retail-stage effects.” *Id.* at 1605 (Scalia, J., dissenting).

matters “affecting” rates, *EPSA* provides a workable framework with the regulatory flexibility that states and FERC need to carry out their respective roles.

**C. *Hughes* defines the narrow category of wholesale rate-setting that is exclusively federal**

*Hughes*, a self-avowedly “limited” decision, involved the small category of wholesale rate-setting, as *EPSA* narrowly defined that concept, that is the exclusive province of the federal government. *Hughes*, 136 S. Ct. at 1299. Applying the established rule that a state may not disregard FERC’s regulation of wholesale rates, *Hughes* concluded that once FERC sets a rate for a sale of electricity, states may not set a different rate for that same sale. *Id.* at 1298-99. In *Hughes*, the State of Maryland implemented a program that specifically changed the rates set by wholesale power auctions. Utilities purchasing energy were required to enter into “contract[s] for differences” with a natural gas power plant selected by Maryland, such that every time the utilities purchased wholesale power they would have to pay to the plant developer the difference between the rate set in the wholesale auction and the higher rate guaranteed by state regulation. The rate adjustment was conditioned on the plant’s “clearing” the wholesale market, meaning it had made a specific wholesale sale, and the adjustment occurred after and in conjunction with that specific sale. The Court determined that, in requiring this contractual arrangement, Maryland was re-setting the price of the energy itself, pure and simple. *Id.* at 1297. No unbundled sale of non-electricity attributes (like ZECs or RECs) was involved. Rather, in *Hughes*, the state had “set actual rates” in what *EPSA* would call the “most prosaic, garden-variety sense.” *EPSA*, 136 S. Ct. at 777-78.

The Supreme Court took care to emphasize the narrow scope of its holding in *Hughes*, so as to avoid impinging upon states’ ability to carry out their traditional regulatory functions. *See Hughes*, 136 S. Ct. at 1298-99. The Court stated: “Our holding is limited: We reject Maryland’s program *only* because it disregards an interstate wholesale rate required by FERC.” *Id.* at 1299 (emphasis added). In other words, it was not the “ends” Maryland sought to achieve that were impermissible, but

rather Maryland's particular "regulatory means," which involved "second-guess[ing]" the specific rates for electric capacity already approved by FERC. *Id.* at 1298. *Hughes* went on to state:

Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures untethered to a generator's wholesale market participation. So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable.

*Id.* at 1299 (internal quotation marks and citation omitted). In so saying, the Court made clear that apart from the narrow class of state regulations that are "[tethered to a generator's wholesale market participation]"—which the Court defines as meaning that payment to the generator is "conditioned" on its "capacity clearing the [wholesale] auction" at a rate approved by FERC, which the state then disregards in favor of a different rate for that same sale of electricity, *id.*—the FPA does not limit states' authority to pursue clean energy policies as they have traditionally done.

## **II. Finding the Illinois ZEC program preempted by the FPA would contravene Supreme Court FPA jurisprudence and threaten states' clean energy policies**

Even though the Illinois ZEC program promotes a resource with significant safety, global security, environmental and economic risks, the program itself is a textbook exercise of a state's traditional authority over utility generation and resource portfolios in a manner compatible with FERC's regulation of wholesale electricity sales. The program is consistent with *EPSA* and *ONEOK*, and it is unlike Maryland's price-setting scheme invalidated in *Hughes*. Striking it down would be a significant departure from Supreme Court jurisprudence, and would entail going far beyond the limits emphasized by the *Hughes* Court. A ruling denying Illinois's authority here could jeopardize far more than just the nuclear plants that Illinois is seeking to preserve: it could threaten innovative and effective state efforts throughout the nation to promote use of clean energy and decarbonize the power grid. It could, moreover, chill both federal and state regulation of the power sectors, creating a regulatory vacuum.

**A. The Illinois ZEC program is a valid exercise of traditional state authority as interpreted by the Supreme Court in *EPSA*, *ONEOK*, and *Hughes***

As a regulation designed to influence the mix of generation resources through the sale of unbundled low-carbon attributes, the Illinois ZEC program fits comfortably into the framework of permissible state regulation described by *EPSA* and *ONEOK*. It regulates the sale of low-carbon attributes unbundled from the sale of electricity itself. As noted above, these unbundled credits are governed by “state property law,” not by FERC. *Wheelabrator*, 531 F.3d at 186. In this important way, ZECs are like state-issued RECs reflecting environmental attributes, over which FERC has specifically disclaimed jurisdiction. *See WSPP Inc.*, 139 FERC ¶ 61,061 at 61,426 (“[W]hen an unbundled REC” is bought or sold “independent of a wholesale electric energy transaction, . . . the unbundled REC transaction *does not affect* wholesale electricity rates” as that term is understood under the FPA, and therefore “does not fall within [FERC’s] jurisdiction.”). This principle alone should end the inquiry into preemption.

Plaintiffs attempt to cram the Illinois ZEC program into the *Hughes* mold, but it simply does not fit. Unlike Maryland’s program in *Hughes*, nothing about the ZEC program adjusts wholesale prices set by FERC. Once a ZEC generator sells its energy at wholesale auction, that sale price is fixed, unadjusted by any “contract for differences.” The price of ZECs is based on the “Social Cost of Carbon,” a number unrelated to market prices, and fine-tuned based on a general index of *projected future* energy prices. Rather than altering any actual wholesale price that has already been determined by FERC to be “just and reasonable,” as Maryland’s program did, the Illinois program modifies ZEC prices based on general market indices to ensure that consumers’ retail bills remain as affordable as possible, while valuing the environmental attributes that the state wishes to promote.

Since the Illinois ZEC program does not directly affect FERC-approved rates set at auction (by, for instance, setting the rules for those auctions in potential conflict with FERC’s own rules), the program does not intrude upon FERC’s “affecting” jurisdiction. *EPSA*, 136 S. Ct. at 774 (FERC’s

“affecting” jurisdiction is limited to “rules or practices that *directly* affect the wholesale rate.” (emphasis in original; internal quotation marks omitted). Moreover, even if the ZEC program could be construed as somehow directly affecting wholesale rates (which it cannot), as discussed above, *EPSA* and *ONEOK* affirm that FERC’s jurisdiction over practices “directly affecting” wholesale rates is not exclusive and that states and the federal government may exercise overlapping jurisdiction in this area.<sup>8</sup>

Although Plaintiffs cannot show that the ZEC program “directly affects” a wholesale rate in the manner defined by *EPSA* or “sets” a rate as prohibited in *Hughes*, they nonetheless depend heavily on the fact that sale of ZECs would indirectly impact market prices by making nuclear generators more competitive in the wholesale market than they otherwise would be. In so doing, Plaintiffs rely on precisely the argument that *EPSA* squarely rejected—*i.e.*, the contention that even if the ZEC program does not actually set a wholesale rate, it “effectively” does so by influencing competition. Complaint ¶ 72, *Elec. Power Supply Ass’n v. Star*, No. 17-1164 (N.D. Ill. filed Feb. 14, 2017) (Generators’ Complaint). However, just as in the generators’ rejected argument in *EPSA*, “[t]he modifier ‘effective’ is doing . . . more work in plaintiffs’ argument than any conventional understanding of rate-setting allows.” *EPSA*, 136 S. Ct. at 777. Selling unbundled ZECs, at a price unaffected by actual wholesale rates set at auction, does not fit within *EPSA*’s “prosaic, garden-variety” definition of “rate-setting.” *Id.* at 778.

Simply put, the FPA does not require an unfettered free market, uninfluenced by state policy choices, which Plaintiffs imply as a standard. Quite to the contrary, as discussed above, FERC has made clear that states have authority to set policies establishing their mix of energy generation

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<sup>8</sup> Even if it directly affected wholesale rates, the ZEC program would fall into the realm of permissible overlapping regulations because (1) it “aims” at environmental attributes of generation, an area of traditional state authority, *EPSA*, 136 S. Ct. at 776 (quoting *ONEOK*, 135 S. Ct. at 1599), and (2) it does not impermissibly “conflict” with FERC’s own regulation, *ONEOK*, 135 S. Ct. at 1601.

sources, including, *inter alia*, through RECs and required power-purchase agreements. *S. Cal. Edison Co.*, 70 FERC ¶ 61,215, at 61,676; *WSPP Inc.*, 139 FERC ¶ 61,061, at 61,426. As *EPSA* further made clear, nearly *any* state policy choice concerning energy generation will in some way influence generators' costs or revenues, and thereby affect wholesale rates; but that fact does not automatically trigger exclusive federal jurisdiction and obliterate such state policies. 136 S. Ct. at 773-74. Rather, the FPA, designed and interpreted to guide the complex interplay of federal and state energy regulation, accommodates these forms of state regulation.

**B. Adopting Plaintiffs' broad preemption arguments could undercut traditional state authority and jeopardize states' clean energy initiatives**

There can be little doubt that a key objective of Supreme Court jurisprudence on FPA jurisdiction is to preserve the traditional police power of states to regulate energy generation. Even *Hughes*, which invalidated a state law that crossed a clear line, goes out of its way to emphasize that its prohibition ought not be interpreted so broadly as to undermine traditional state authority to “encourage[e] production of new or clean generation.” 136 S. Ct. at 1299.

Misreading *Hughes*, Plaintiffs urge this Court to run roughshod over the Supreme Court's objective in a manner that would leave preemption determinations ungoverned by any clear limiting principle, and to sow discord and confusion with regard to a wide variety of beneficial state energy policies. Most notable among these would be Renewable Portfolio Standard programs that states across the nation are using to promote clean energy such as solar and wind, and other actions they are taking to motivate investment in and expansion of clean energy resources, like programs to advance energy storage. Such policies take a wide variety of forms, with eligibility based on technology type and/or economic need.<sup>9</sup> Many Renewable Portfolio Standards, like that of Illinois,

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<sup>9</sup> *See, e.g.*, Order Regarding Retail Renewable Portfolio Standard at 8, Case 03-E-0188 (N.Y. Pub. Serv. Comm'n, Sept. 24, 2004), [http://www3.dps.ny.gov/pscweb/WebFileRoom.nsf/Web/85D8CCCC6A42DB86F85256F1900533518/\\$File/301.03e0188.RPS.pdf](http://www3.dps.ny.gov/pscweb/WebFileRoom.nsf/Web/85D8CCCC6A42DB86F85256F1900533518/$File/301.03e0188.RPS.pdf).

establish a system of Renewable Energy Credits (RECs). Some of these systems include cost-control measures such as setting an Alternative Compliance Payment price that utilities may pay in lieu of buying RECs,<sup>10</sup> or limiting total REC payments to a certain percentage of a utility's total costs.<sup>11</sup>

A ruling adopting Plaintiffs' broad logic that the ZEC program is somehow preempted because it indirectly suppresses wholesale market prices (Generators' Complaint ¶¶ 73-74), or requires eligible entities to produce electricity (Generators' Complaint ¶ 72) could threaten this whole range of state policies. Moreover, even a narrower decision, focusing on the ZEC programs' eligibility criteria or payments linked to price forecasts, would create confusion and the specter of litigation, given the blurry and difficult line-drawing exercise that such a decision would invite. By contrast, a decision adhering to the "rate-setting" line drawn by *Hughes* and the framework established by *EPSA* and *ONEOK* would further ease the administration of state clean energy programs, providing states with legal certainty as they develop and implement policies.

Beyond this potential harm to state programs, an overbroad preemption decision could potentially create a regulatory vacuum, a no man's land of issues into which both states and FERC would be reluctant to venture, out of concern with triggering preemption. Such a result would contravene the very purpose of the FPA. As the *EPSA* Court observed, Congress's "precise[]" intent was to "to eliminate vacuums of authority over the electricity markets." 136 S. Ct. at 780. The concurrent federal-state jurisdiction allowed under *EPSA*, and the Court's acknowledgement that state regulation may indirectly affect prices without running afoul of federal "affecting" jurisdiction,

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<sup>10</sup> See Ivan Gold, Nidhi Thakar, *A Survey of State Renewable Portfolio Standards: Square Pegs for Round Climate Change Holes?*, 35 WM. & MARY ENVTL. L. & POL'Y REV. 183, 195 n.92 (2010) (discussing various states' alternative compliance payment mechanisms).

<sup>11</sup> See, e.g., Wash. Rev. Code § 19.285.050.

leave room for states to take innovative action to regulate energy. This in turn frees FERC from concern that its regulatory decisions may have the unintended consequence of delimiting state jurisdiction. If that concurrent jurisdiction were undercut, both state and federal regulatory action could be chilled. States may shrink from any measures to promote clean energy—particularly any creative and previously untried measures—or may adopt inferior program designs that cost more for customers, to avoid the risk of protracted litigation to define the nature of the impact and re-assess the jurisdictional boundary. FERC, for its part, may well hold back on taking regulatory action where there is any jurisdictional ambiguity to avoid undercutting states. Now more than ever, complex and geographically integrated energy markets need both state and federal regulators working in partnership to achieve clean energy goals. The Supreme Court has wisely recognized that need and left room for it in interpreting the FPA. This Court should do likewise.

### **CONCLUSION**

For the foregoing reasons, NRDC urges the Court to grant Defendants' motion to dismiss Plaintiffs' claims that the ZEC program is preempted under the FPA, and to find with respect to Plaintiffs' motions for a preliminary injunction that there is no likelihood of success on the merits.

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Respectfully submitted,

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