

# 17-2654-CV

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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

*Plaintiffs-Appellants,*

– v. –

AUDREY ZIBELMAN, in her official capacity as Chair of the New York Public Service Commission, PATRICIA L. ACAMPORA, in her official capacity as Commissioner of the New York Public Service Commission, GREGG C. SAYRE, in his official capacity as Commissioner of the New York Public Service Commission, DIANE X. BURMAN, in her official capacity as Commissioner of the New York Public Service Commission,

*Defendants-Appellees,*

EXELON CORP., R.E. GINNA NUCLEAR POWER PLANT LLC, CONSTELLATION ENERGY NUCLEAR GROUP, LLC, NINE MILE POINT NUCLEAR STATION LLC,

*Intervenor-Defendants-Appellees*

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**BRIEF OF AMICI CURIAE  
ELECTRICITY REGULATION SCHOLARS  
IN SUPPORT OF DEFENDANTS-APPELLEES**

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## TABLE OF CONTENTS

Interest of Amici Curiae.....	1
Summary of the Argument .....	2
I. Energy Credit Programs Are Consistent with Historic State Authority over Electric Utilities and the FPA’s Division of Authority.....	5
A. State Regulation of Electric Generation Facilities Has Aimed to Protect Consumers and Facilitate Industry Development .....	7
B. State Utility Regulation Evolved in the 1970s to Account for Environmental Harms of Electric Generation .....	10
C. State Energy Credit Programs Align Industry Restructuring with Energy Supply and Environmental Goals and Historic Objectives of Utility Regulation.....	13
D. New York’s ZEC Program Is an Energy Credit Program that Permissibly Affects Wholesale Market Rates .....	18
II. Appellants’ Reading of the FPA Expands FERC’s Jurisdiction And Denies FERC the Authority to Harmonize Its Regulation with State Programs.....	20
A. Appellants Ask the Court to Question Long-Standing FERC Practice .....	21
B. Expanding FERC’s Exclusive Field to Preempt Energy Credit Programs Invites FERC Regulation of Emission Allowances and Financial Products .....	26
Conclusion .....	28
Appendix – List of Amici.....	29

## TABLE OF AUTHORITIES

### Federal Cases

<i>Allco Finance Ltd. v. Klee</i> , 861 F.3d 82 (2d Cir. 2017) .....	15, 20
<i>Conn. Light &amp; Power Co. v. FPC</i> , 324 U.S. 515 (1945).....	5
<i>Federal Power Comm’n. v. Hope</i> , 320 U.S. 591 (1944) .....	7
<i>FERC v. Electric Power Supply Association</i> , 136 S.Ct. 760 (2016) 4, 5, 25	
<i>Hughes v. Talen</i> , 136 S.Ct. 1288 (2016).....	6, 20
<i>Ill. Nat. Gas Co. v. Cent. Ill. Pub. Serv. Co.</i> , 314 U.S. 498 (1942).....	6
<i>N. Central Pipeline v. Corp. Comm’n of Kan.</i> , 489 U.S. 493 (1989) .....	20
<i>New Jersey Bd. of Pub. Utils. v. FERC</i> , 744 F.3d 74 (3d Cir. 2014).....	21
<i>New York v. FERC</i> , 535 U.S. 1, 19 (2002).....	6, 15, 24
<i>Pac. Gas &amp; Electric v. State Energy Comm’n.</i> , 461 U.S. 190 (1983) .....	5
<i>PPL Energyplus v. Solomon</i> , 766 F.3d 241 (3d Cir. 2014) .....	20
<i>S.C. Pub. Serv. Auth. v. FERC</i> , 762 F.3d 41 (D.C. Cir. 2014) .....	23
<i>Wheelabrator Lisbon, Inc. v. Conn. Dep’t of Pub. Util. Control</i> , 531 F.3d 183 (2d Cir. 2008).....	13, 24

### State Cases

<i>Engie Gas v. Dept. of Pub. Utils.</i> , 475 Mass. 191 (Ma. 2016) .....	15
<i>ITT Co. v. Board of Public Utility Comm’rs</i> , 84 N.J. 184 (N.J. 1913).....	8
<i>People ex. rel. New York Edison Co. v. Willcox</i> , 207 N.Y. 88 (N.Y. 1912).7	

### Federal Statutes

16 U.S.C. § 2602 .....	12
16 U.S.C. § 824a–3 .....	23
16 U.S.C. §824d .....	25
16 U.S.C. §824e .....	25

## **FERC Orders**

<i>Aircraft Services Corp.</i> , 122 FERC ¶ 62,118 (2008) .....	24
<i>American Ref-Fuel Company</i> , 105 ¶ FERC 61,004 (2003) .....	24
<i>California Indep. Sys. Operator</i> , 118 FERC ¶ 61,226 (2007) .....	22
<i>California Indep. Sys. Operator</i> , 119 FERC ¶ 61,061 (2007) .....	22
<i>Int’l Transmission Co.</i> , 120 FERC ¶ 61220 (2007) .....	23
<i>ISO New England</i> , 158 FERC ¶ 61,138 (2017) .....	22
<i>Midcontinent Indep. Sys. Operator</i> , 156 FERC ¶ 61,235 (2010) .....	23
<i>Midwest Power Systems, Inc.</i> , 78 FERC ¶ 61,067 (1995) .....	13
<i>Morgantown Energy</i> , 139 FERC ¶ 61,066 (2012) .....	24
<i>New York Indep. Sys. Operator</i> , 122 FERC ¶ 61,211 (2008) .....	22
<i>New York Pub. Serv. Comm’n. v. NYISO</i> , 153 FERC ¶ 61,022 (2015)...	22
Order No. 1000, 136 FERC ¶ 61,051 (2010) .....	23
Order No. 764, 139 FERC ¶ 61,246 (2012) .....	23
Order No. 792, 145 FERC ¶ 61,159 (2013) .....	23
Order No. 888, 61 Fed. Reg. 21540 (1996) .....	13
<i>S. California Edison</i> , 121 FERC ¶ 61168 (2007) .....	23
<i>S. California Edison</i> , 70 FERC ¶ 61,215 (1995) .....	13
<i>Smoky Hills Wind Project II, LLC</i> , 125 FERC 62,286 (2008) .....	24
<i>Windham Solar and Allco Finance</i> , 156 FERC ¶ 61,042 (2016) .....	24

## **State Statutes**

1907 Wis. Laws. 499 .....	8
1970 N.Y. Laws ch. 155 .....	12
1972 N.Y. Laws ch. 385 .....	12
1975 N.Y. Laws ch. 687 .....	12

1978 N.Y. Laws ch. 707 .....	12
2004 Maryland Laws Ch. 487 .....	17
2007 Oregon Laws Ch. 301 .....	17
CAL. PUB. UTIL. CODE § 399.11 .....	17
Hawaii H.B. 623 (2015) .....	17
Illinois Public Act 95-481 (2007) .....	17
N.H. REV. STAT. ANN. § 362-F .....	17

### **State Administrative Orders and Regulations**

Consol. Edison, 8 P.U.R. 4th 475 (N.Y. P.S.C. 1975) .....	10
Madison Gas & Electric, 5 P.U.R. 4th 28 (Wis. P.S.C. 1974) .....	10
Order Regarding Retail Renewable Portfolio Standard, Case 03-E-0188 (N.Y. P.S.C. 2004) .....	17

### **Other Authorities**

Galen Barbose, Lawrence Berkeley National Lab, “U.S. Renewables Portfolio Standards: 2017 Annual Status Report,” Jul. 2017 .....	22
Kyle Binder, et al., “Price Interaction in State Level Renewable Energy Credit Trading Programs,” THE ELECTRICITY JOURNAL (May 2016) ...	23
Hon. Richard D. Cudahy, “PURPA: The Intersection of Competition and Regulatory Policy,” 16 ENERGY L.J. 419 (1995). .....	17
William K. Jones, “Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870–1920,” 79 COLUMBIA L. REV. 426 (1979) .....	11
David Moskowitz, National Association of Regulatory Utility Commissioners, “Profits and Progress Through Least Cost Planning” (Nov. 1989) .....	16

## INTEREST OF AMICI CURIAE

*Amici* are energy law scholars who have expertise in the interplay between state utility law and FERC's regulation of interstate electricity markets under the Federal Power Act (FPA). *Amici* contend that Appellants are advancing a reading of the FPA that expands the scope of FERC's jurisdiction and creates regulatory gaps that would inhibit states from advancing legitimate policy goals.

This brief aims to inform the Court about the history and purpose of state electric utility regulation. *Amici's* brief fit state energy credit programs, like New York's Zero Emission Credit program, in historical context to demonstrate that state energy credit programs are consistent with long-standing objectives of state utility laws.

The brief also demonstrates that FERC has accommodated these state programs, explains how that accommodation is consistent with the FPA, and warns that sweeping preemption claims based on exclusive jurisdiction can hamstring regulators and threaten important public policy initiatives.

*Amici* are listed in the Appendix. None of the *amici* are being compensated for participating in this brief. Counsel for *amici* drafted this brief in its entirety, with substantial input from certain *amici*. No party contributed any money to fund this brief. All parties consented to the filing of this brief.

## SUMMARY OF THE ARGUMENT

State energy credit programs require utilities to purchase credits that represent the environmental attributes of electricity generated by specified types of facilities. More than half of states enforce such programs. Although credit programs date back only two decades, their objectives are rooted in century-old public utility laws that pre-date the Federal Power Act (FPA).

States enacted energy credit programs to align their regulation of generation facilities and utility portfolios with the legal, financial, and technical structures of a transformed industry. State utility restructuring laws, passed in the 1990s, separated power generation from its delivery and forced utilities to procure power from wholesale markets to meet consumer demand. While this change, along with federal reforms, brought additional transactions under FERC's purview, it did not shrink the scope of state authority or alter the purposes of state utility regulation.

In granting public utility regulators sweeping authority over electric utilities in the early twentieth century, states sought to protect consumers from monopoly prices while facilitating the industry's development. To achieve these twin goals, states empowered regulatory commissions to supervise industry expansion, regulate utility securities, and set consumer rates. These tools provided regulators with control over utility generation investments.

The states' regulatory model evolved in response to an abrupt shift in the economics of electricity generation and a growing

recognition of the need to mitigate the industry's environmental harms. "Integrated resource planning," introduced in the 1970s, allowed state regulators to review long-term utility resource decisions, including the fuels used for electricity generation. Planning aimed to guard against imprudent generation investments and ensure that the industry was developing consistently with state environmental goals.

Energy credit programs, first enacted in the 1990s, are premised on legislative determinations about the types of electric generation that meet environmental goals and diversify the state's energy supply. They are a derivative of regulatory planning, updated to reflect states' utility restructuring laws that catalyzed the creation of today's organized wholesale markets. Rather than requiring utilities to construct and maintain generation, which would be inconsistent with restructuring, energy credit programs direct utilities to acquire credits from specified types of facilities, such as wind or solar.

Energy credit programs achieve the original twin aims of utility regulation — consumer protection and industry development. They provide consumers with the benefits of a cleaner and more diverse energy supply while isolating them from the risks of developing new generation projects. Many credit programs include cost containment mechanisms to further protect consumers. For industry, credits spur investment in new facilities and provide utilities with a cost-effective, flexible compliance mechanism.

New York's Zero Emission Credit (ZEC) program is wholly consistent with the electricity industry's legal structure and with the historic goals of utility regulation. The ZEC program selects nuclear



generators because they meet state environmental goals. The program places legal obligations on utilities, not generators selling at wholesale, and it protects consumers by ensuring that they do not overpay for the state-determined environmental benefits of nuclear power.

Appellants' sweeping view of FERC's rate regulation authority threatens to preempt state energy credit programs. Under appellants' reading of the FPA, a state energy credit program is preempted because payments to generators for credits are made "in connection with" wholesale sales. *Brief at 30, 32, 40*. Appellants' novel reading of the FPA confuses Congress's broad delegation of authority to FERC to set just and reasonable wholesale rates with imagined Congressional intent to usurp traditional state functions. It is inconsistent with precedent and would call into question long-standing FERC practice.

In asking this Court to reinterpret FERC's rate regulation authority, appellants seek to deny FERC the opportunity to harmonize its market regulation with state programs, as it has done in numerous proceedings. In doing so, appellants would weaken FERC's authority and create new regulatory gaps. Energy credit programs would be beyond the reach of states, and FERC would be unable to reconcile state programs with wholesale power markets. The resulting "regulatory 'no man's land,'" *FERC v. Electric Power Supply Association*, 136 S.Ct. 760, 780 (2016) (citation omitted) would threaten traditional state efforts to pursue legitimate consumer protection and environmental goals without providing FERC any authority to achieve those ends.

While eliminating energy credit programs, appellants' proposed expansion of FERC's exclusive field could also sweep environmental

emission allowances and an array of financial products under FERC's rate regulation jurisdiction. This Court should reject appellants' reading of the FPA because it would unduly diminish state authority while "extend[ing] FERC's power to some surprising places." *Id.* at 774.

### **I. ENERGY CREDIT PROGRAMS ARE CONSISTENT WITH HISTORIC STATE AUTHORITY OVER ELECTRIC UTILITIES AND THE FPA'S DIVISION OF AUTHORITY**

"Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Pac. Gas & Electric v. State Energy Comm'n.*, 461 U.S. 190, 205 (1983). Prior to the 1980s, nearly all electric generation was owned by utilities that were subject to extensive regulation under state public utility laws. Under this industry structure, state utility regulators wielded substantial control over generation investments for the purposes of protecting consumers and facilitating the industry's orderly development.

When Congress passed the FPA in 1935, most states had already developed a comprehensive scheme for utility regulation. The FPA filled a regulatory gap by providing FERC with jurisdiction over wholesale sales in interstate commerce, but explicitly reserves to states jurisdiction over matters that they had been actively regulating, including generation facilities. Congress wrote the FPA "to be a complement to, and in no sense a usurpation of, State regulatory authority." *Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 525 (1945). The FPA is thus a "collaborative federalism statute[] [that] envisions a

federal-state relationship marked by interdependence.” *Hughes v. Talen*, 136 S.Ct. 1288, 1300 (2016) (J. Sotomayor, concurring).

When approaching preemption claims, “[c]ourts must be careful not to confuse the ‘congressionally designed interplay between state and federal regulation’ for impermissible tension that requires pre-emption.” *Id.* (citation omitted). In an early preemption case under the companion Natural Gas Act, the Supreme Court remarked that its jurisdictional inquiry looks “to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce.” *Ill. Nat. Gas Co. v. Cent. Ill. Pub. Serv. Co.*, 314 U.S. 498, 505 (1942). More recently, the Court summarized that its task in an FPA case about FERC’s jurisdiction was to “examine the nature and scope of the authority granted by Congress to the agency.” *New York v. FERC*, 535 U.S. 1, 19 (2002) (citation omitted).

Energy credit programs fit comfortably within state authority under this framework. As discussed in this section of the brief, these programs adapt traditional authority over generation facilities and utility portfolios to a restructured industry to meet the original twin goals of utility regulation. Part II of the brief explains that appellants’ overly broad view of FERC’s jurisdiction is inconsistent with how courts and FERC have understood the FPA and would upset the balance between state and federal authorities.

## A. State Regulation of Electric Generation Facilities Has Aimed to Protect Consumers and Facilitate Industry Development

Authority over generation facilities is an integral and inherent feature of the states' century-old model for electric utility regulation. Courts have long understood that this model aims to protect consumers from monopoly prices while facilitating the industry's development. In New York, the Public Service Law was "intended to prevent, on the one hand, the evils of an unrestricted right of competition, and, on the other hand, the abuses of monopoly." *People ex. rel. New York Edison Co. v. Willcox*, 207 N.Y. 88 (N.Y. 1912).

Early twentieth century public utility laws provided regulatory commissions with three key levers over utility generation investments. With each lever, regulators had to "balanc[e] the consumer and investor interests." *Federal Power Comm'n. v. Hope*, 320 U.S. 591, 603 (1944).

First, regulators controlled the entry of new electric utilities and expansion of existing utilities through the issuance of certificates of public convenience and necessity. Some states, including New York, required utilities to obtain a certificate prior to constructing new electric generation facilities. The certificate process reflected the prevailing view that competition between utilities would raise consumer rates. The certificate requirement aimed to prevent "ruinous competition and wasteful duplication of physical facilities," thereby protecting both utilities' investments and consumers' rates.<sup>1</sup>

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<sup>1</sup> See William K. Jones, "Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870–1920," 79 COLUMBIA L. REV. 426 (1979).

Second, regulators governed issuances of utility securities, including those used to finance construction of generation projects. In some states, regulators reviewed not only “the legality of the financial proposition advanced, but [also] the very merits of the subject-matter itself from the standpoint of a wise public policy, which was to have for its ultimate object the safe-guarding of the public against ill-considered and reckless financial ventures.” *Interstate Telephone and Telegraph Co. v. Board of Public Utility Comm'rs*, 84 N.J. 184, 187 (N.J. 1913). In such states, regulators could consider whether a new generation facility financed by the proposed securities was in the public interest. Oversight of utility securities protected consumers and utility investors from overcapitalization.

Third, regulators set consumer rates, which compensate the utility for the costs of utility generation assets, as well as other utility investments and expenditures. Wisconsin, the first state to comprehensively regulate electric utilities, set rates based on the valuation of utility property “actually used and useful for the convenience of the public.” *1907 Wis. Laws 499*. This standard allowed regulators to eliminate a generation asset from a utility’s rates if they concluded that the plant was not “useful.”

For much of the industry’s history, utility generation costs declined steadily and consumer demand grew rapidly. In this environment, regulators used these three levers primarily to facilitate the industry’s orderly development and rarely needed to protect consumers from expensive power generation projects. That changed in the 1970s when several factors combined to transform the electric business from a long-

run decreasing cost industry into a long-run increasing cost industry.<sup>2</sup> Rising costs and declining demand growth led to higher consumer rates and expanded interest in rate cases and generation siting decisions.

In response, utility regulators became increasingly interventionist. In proceedings about security issuances, regulators denied utility requests due to concerns about costly projects. In rate cases, regulators concluded that consumers should not pay for billions of dollars of utility expenses for over-budget power plants. Such rulings favored consumers, but regulators also used their long-standing powers to facilitate the industry's development amidst challenging economic conditions. New ratemaking practices provided utilities with needed cash so they could avoid borrowing at high interest rates and cost-effectively complete major projects.

Meanwhile, legislatures around the country transformed the certificate process. Some states, including New York, created siting boards that were required to make findings about a range of issues, such as the proposed plant's environmental effects, before issuing a certificate. Other states specified factors that utility regulators had to consider before approving the siting of a new generation facility.

As described below, this trend toward increased regulatory oversight continued, as regulators crafted new mandates and processes to manage the rising costs of electric generation.

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<sup>2</sup> Contributing factors included interest rates, labor costs, fuel prices, inflation, and the industry's exhaustion of economies of scale.

## B. State Utility Regulation Evolved in the 1970s to Account for Environmental Harms of Electric Generation

In the 1970s, Congress and state legislatures enacted numerous environmental laws, many of which regulated the electricity industry. In general, state utility regulators had no role in administering these laws; utility regulation reforms were largely distinct from the wave of environmental lawmaking that swept across the country. However, utility regulators routinely drew on authority in their organic statutes and the original twin aims of utility regulation to consider the environmental effects of electricity generation.

As the costs of electricity skyrocketed, utility regulators recognized that they had to redesign consumer rate structures. In a 1974 decision, Wisconsin regulators explained that “electric rates are still structured to encourage the use of additional electricity during maximum or peak-usage periods, and it is precisely such usage that spearheads the need for additional generating capacity, with all of the attendant economic, environmental, and social costs.”<sup>3</sup> New York regulators similarly recognized in 1975 that rates ought to be “economically efficient . . . reflect[ing] external, e.g., environmental costs, as well as those explicitly borne by supplying companies . . . [and] thus, in principle, . . . rate structure[s] should achieve the interrelated purposes of conservation and environmental protection.”<sup>4</sup>

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<sup>3</sup> Madison Gas & Electric, 5 P.U.R. 4th 28 (Wis. P.S.C. 1974).

<sup>4</sup> Consol. Edison, 8 P.U.R. 4th 475 (N.Y. P.S.C. 1975).

The transition from rates designed to encourage consumption to “efficient” rates was intended to motivate conservation and thereby mitigate the need for expensive new power plants. But by the early 1980s, regulators in many states changed tactics and required utilities to offer consumers incentives and services aimed at reducing energy use. This recognition that energy savings could substitute for energy generation informed further reforms.

“Integrated resource planning” aimed to select a mix of generation investments, wholesale power purchases, and conservation programs that meet long-term consumer demand. While utilities had been accustomed to building new generation to meet forecasted demand, integrated resource planning required utilities to consider conservation programs and wholesale power purchases on equal footing with new generation construction. Rather than meeting all consumer needs with utility-constructed projects, regulators and utilities endeavored to build an efficient portfolio of demand- and supply-side resources.

For proposed utility-constructed generation, regulators scrutinized both the size of new power plants and the fuels they would use. Events of the 1970s — including oil and natural gas price spikes and billions of dollars of nuclear power plant cost overruns — highlighted the economic significance of fuel choice decisions. For both economic and environmental reasons, some states required utilities to evaluate renewable energy resources and combined heat-and-power facilities that burned fossil fuels more efficiently than typical power plants.

Several states also required separate consideration of environmental factors as part of the planning process. A 1989 report



published by the National Association of Regulatory Utility Commissioners (NARUC) found that “an increasing number [of] states” attempted to incorporate the costs of environmental externalities.<sup>5</sup>

Because the planning process was rooted in consumer protection and industry development, utility regulators in some states found sufficient authority in their organic statutes to require planning. By the early 1990s, regulators in about half of states engaged in integrated resource planning, with parameters set by law in most states.

In New York, the Legislature passed a series of laws on utility and energy planning. In 1970, it allowed regulators to “encourage” each utility to “formulate and carry out [a] long-range” plan that considers “the preservation of environmental values and the conservation of natural resources.”<sup>6</sup> Two years later, the Legislature required each utility to develop a “long-range plan for future operations.”<sup>7</sup> In 1975, it amended that provision, and charged utilities with developing a joint plan.<sup>8</sup> Three years later, the Legislature repealed that law, created a new state entity, and tasked it with drafting an “energy master plan” that considered the “health, safety, and welfare of the people of the state and the quality of the state’s environment.”<sup>9</sup>

In 1992, Congress endorsed integrated resource planning, requiring laggard states to “consider” adopting the practice.<sup>10</sup> FERC

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<sup>5</sup> David Moskowitz, National Association of Regulatory Utility Commissioners, “Profits and Progress Through Least Cost Planning” (Nov. 1989).

<sup>6</sup> 1970 N.Y. Laws ch. 155.

<sup>7</sup> 1972 N.Y. Laws ch. 385.

<sup>8</sup> 1975 N.Y. Laws ch. 687.

<sup>9</sup> 1978 N.Y. Laws ch. 707.

<sup>10</sup> Energy Policy Act of 1992, 106 Stat. 2776, 2796 (codified at 16 USC §§ 2602).

orders in 1995, just prior to industry restructuring, conclude that states have jurisdiction over “integrated resource planning and utility buy-side and demand-side decisions . . . [and] over utility generation and resource portfolios,”<sup>11</sup> and have authority to order a utility to “purchase power from . . . a particular type of resource.”<sup>12</sup> These state authorities were critical for achieving state and national policy objectives. As the late Judge (and former state regulator) Richard Cudahy then recognized, important goals such as “fuel diversity and energy conservation might be completely ignored if the only emphasis in evaluating generation is on the current market price.”<sup>13</sup>

### C. State Energy Credit Programs Align Industry Restructuring with Energy Supply and Environmental Goals and Historic Objectives of Utility Regulation

The most prevalent state energy credit program, enacted by nearly thirty states, is the renewable portfolio standard (RPS). Most programs require utilities to acquire renewable energy credits (RECs) to demonstrate to regulators that a certain amount of the energy they sell to consumers is derived from particular types of generation.<sup>14</sup>

RECs are “inventions of state property law.” *Wheelabrator Lisbon, Inc. v. Conn. Dep’t of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008). A REC can signify that a quantity of electricity was generated

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<sup>11</sup> FERC Order No. 888, 61 Fed. Reg. 21540, 21625 n. 544 (1996).

<sup>12</sup> *S. California Edison*, 70 FERC ¶ 61,215 (1995); see also *Midwest Power Systems, Inc.*, 78 FERC ¶ 61,067 (1995).

<sup>13</sup> Hon. Richard D. Cudahy, “PURPA: The Intersection of Competition and Regulatory Policy,” 16 ENERGY L.J. 419, 421 (1995).

<sup>14</sup> Some states also require that the utility purchase the associated energy for some portion of the total REC requirement.

by a certain type of resource, or it can represent the environmental attributes of a quantity of electricity. RECs are used by utilities to comply with state energy credit programs and by businesses that want to make marketing claims about the electricity they consume.

State energy credit programs allow utilities to comply with RECs generated by a mix of wind, solar, geothermal, and other state-selected resources. Several states have carve-outs for specific types of resources. For example, Massachusetts required utilities in 2015 to procure ten percent of their energy from renewable resources, two percent from biomass resources, and an additional one percent from small-scale solar resources. A few states are more specific. Maryland requires utilities to purchase offshore wind credits from specified facilities.

Initial energy credit programs were enacted with industry restructuring legislation in the late 1990s. State restructuring laws required or encouraged utilities to sell their power plants. Now “wires-only” utilities, they procure power to meet consumer demand through wholesale auction markets and power purchase agreements and deliver that power over their distribution infrastructure to consumers. Restructured utilities continue to administer conservation programs.

Restructuring is consistent with the original twin objectives of utility regulation. It protects consumers by shifting the risk of power plant construction away from captive utility ratepayers and on to investors in non-utility owned power plants. This shift also safeguards the continued viability of utilities that had faced dire financial predicaments in the 1980s due to costly generation projects.

Requiring utilities to procure energy credits, rather than energy, is consistent with the fundamental premise of restructuring. States could have required utilities to construct renewable generation or enter into long-term contracts for renewable energy. But doing so “would re-expose ratepayers to the very types of risks that the Legislature sought to protect them from when it enacted the restructuring act.” *Engie Gas v. Dept. of Pub. Utils.*, 475 Mass. 191, 208 (Ma. 2016) (holding that regulators were not authorized to approve long-term contracts for natural gas pipelines financed by electric utility rates).

Like integrated resource planning, energy credit programs regulate the portfolio of resources that utilities draw from to meet local demand. To realize the environmental and other benefits of renewable energy, many states require utilities to procure RECs generated by facilities that deliver energy to their region. *See Allco Finance Ltd. v. Klee*, 861 F.3d 82 (2d Cir. 2017) (finding that a regional deliverability requirement is necessary to meet Connecticut’s environmental goals and does not violate the dormant Commerce Clause).

This deliverability requirement is consistent with the technical nature of the interstate grid. “Any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce. . . . Energy flowing onto a power network or grid *energizes the entire grid*, and consumers then draw undifferentiated energy from that grid.” *New York v. FERC*, 535 U.S. at 7. Utilities purchasing in-region RECs support generators that contribute to the pool of energy that serves their ratepayers.

State energy credit programs complement energy transactions on the restructured grid. FERC-initiated reforms allow generators to sell energy to a market operator, such as the NYISO. A utility buying from the market operator purchases undifferentiated energy, not energy from a specific generator. RECs serve an accounting function, allowing utilities (and other consumers) to take credit for renewable energy even though they are not actually consuming it or purchasing it directly from the generator.<sup>15</sup>

State energy credit programs are tied directly to the twin goals of utility regulation. As discussed, industry turmoil of the 1970s revealed that generation fuel choices were inextricably linked to financial and environmental risk. States thus found it necessary to supplement regulators' original three levers over utility generation investments with integrated resource planning. Energy credit programs adapt centralized planning by replacing a regulatory process with legislative determinations about the types of generation that will protect consumers and facilitate the industry's development.<sup>16</sup>

To protect consumers, many energy credit programs have cost containment mechanisms that limit consumer rate increases due to utility credit purchases. Some states specify that credit purchases may not exceed a specified percentage of total expenditures. Many states also set a ceiling on credit prices.

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<sup>15</sup> In practice, most large-scale renewable energy facilities are financed with long-term power purchase agreements rather than short-term sales to a market operator.

<sup>16</sup> New York and Arizona are the only two states where the RPS was established by state utility regulators rather than the legislature.

Consumer protection aspects of energy credit programs are broader than ratepayers’ bills. When it initially adopted an RPS, New York regulators found that the program would benefit consumers by “reduc[ing] the exposure to wholesale oil and natural gas price spikes and supply interruptions” and aimed to design a program that “maximizes” local environmental and economic benefits.<sup>17</sup> The Maryland General Assembly found broad benefits “accrue to the public at large,” including “long-term decreased emissions, a healthier environment, increased energy security, and decreased reliance on and vulnerability from imported energy sources.”<sup>18</sup> Other state legislatures have articulated similar findings.<sup>19</sup>

From the industry’s perspective, energy credit programs facilitate the development of local and regional sources of power that meet state environmental goals. And by requiring utilities to buy credits rather than constructing generation facilities, energy credit programs do not burden utility balance sheets.

While energy credit programs are relatively new creations in the context of the one-hundred-year history of state utility regulation, they are an integral piece of the governance structure of today’s electric grid. By creating a commodity that represents the environmental attributes of electricity, states exercise control over utility portfolios without directing transactions for electricity. Energy credit programs adapt

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<sup>17</sup> New York Public Service Commission, Order Regarding Retail Renewable Portfolio Standard, Case 03-E-0188 (Sep. 24, 2004).

<sup>18</sup> 2004 Maryland Laws Ch. 487.

<sup>19</sup> CAL. PUB. UTIL. CODE § 399.11; Hawaii H.B. 623 (2015); Illinois Public Act 95-481 (2007); 2007 Oregon Laws Ch. 301; N.H. REV. STAT. ANN. § 362-F.

historic police powers over utility generation investments to achieve the original twin goals of utility regulation in a restructured industry.

#### D. New York's ZEC Program Is an Energy Credit Program that Permissibly Affects Wholesale Market Rates

New York's ZEC program is identical in structure to the more prevalent RPS. Both the ZEC program and RPSs:

- require state-regulated utilities to acquire credits in proportion to their retail sales;
- are premised on the state's preference for certain types of generation that are consistent with state environmental goals;
- have cost-containment mechanisms to protect consumers; and
- substantially influence the prices of credits.

On this last point, appellants' idealized vision of REC markets as purely competitive imagines that REC prices are "essentially determined by supply and demand of renewable energy." *Brief at 41*. In reality, state policies and wholesale rates influence REC prices.

Many energy credit programs allow utilities to pay alternative compliance payments (ACPs) in lieu of surrendering RECs to regulators. ACPs are typically set administratively and act as a ceiling on REC prices. The Lawrence Berkeley National Laboratory has comprehensively analyzed the costs and benefits of RPSs in a series of reports. Its 2017 annual report concludes, "REC prices are a function of ACP rates and current/expected supply-demand balance."<sup>20</sup>

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<sup>20</sup> Galen Barbose, Lawrence Berkeley National Lab, "U.S. Renewables Portfolio Standards: 2017 Annual Status Report," Jul. 2017, at p. 30, <https://perma.cc/VXK6-RGTQ>.

The “supply-demand balance” is, of course, also influenced by the number of credits utilities must acquire under state law. The Berkeley Lab also reports that seventy to ninety percent of new renewable energy generation that came online in 2016 in the Northeast, Mid-Atlantic, and West serve demand created by RPS programs. REC prices are thus a function of state-created demand and limited by administratively set alternative compliance payment rates.

Wholesale power prices are an important factor too. In theory, REC prices should approximate the difference between a renewable generator’s development costs and the revenue it receives for its wholesale energy and capacity sales. But teasing out the precise effect that state policy and FERC-regulated wholesale rates have on REC prices involves complex calculations, and we are not aware of any definitive conclusions.<sup>21</sup> Suffice it to say, REC prices and wholesale power prices are interrelated to varying degrees in different markets.

New York sets ZEC prices with a straightforward formula. The initial price is based on the social cost of carbon, an objective estimate of the damages associated with an incremental increase in carbon emissions. The ZEC price thus approximates the actual benefits of the program, rather than being a function of state-created demand and supply constrained by state-set price caps. To protect consumers, New York may adjust the ZEC price downward, if wholesale rates are projected to increase, to ensure that total costs remain reasonable.

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<sup>21</sup> *But see* Kyle E. Binder, et al., “Price Interaction in State Level Renewable Energy Credit Trading Programs,” *THE ELECTRICITY JOURNAL* (May 2016) (concluding that an increase in electricity prices results in a small decrease REC prices).



Mandates that utilities purchase RECs or ZECs can affect wholesale markets, as can other state programs. By providing generators with an additional product to sell, state-created credits have the effect of “enlarging the supply of capacity.” *PPL Energyplus v. Solomon*, 766 F.3d 241, 255 (3d Cir. 2014). “But the law of supply-and-demand is not the law of preemption. When a state regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation invalid.” *Id.* (citing *Northwest Central Pipeline v. State Corp. Comm’n of Kansas*, 489 U.S. 493, 514 (1989)).

## **II. APPELLANTS’ READING OF THE FPA EXPANDS FERC’S JURISDICTION AND DENIES FERC THE AUTHORITY TO HARMONIZE ITS REGULATION WITH STATE PROGRAMS**

Appellants assert that New York’s ZEC program is preempted because it “provide[s] for additional payments to producers ‘in connection with’ their sale of electricity into the wholesale market.” *Brief at 30, 32, 40*. This novel reading of the FPA vastly expands FERC’s rate regulation authority and denies FERC the opportunity to determine whether particular state energy initiatives are consistent with the “congressionally designed interplay between state and federal regulation,” *Hughes*, 136 S.Ct. at 1300.

It is settled law that states “may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain.” *Id.* at 1298. Thus, states may “specify[] the sizes and types of generators that may bid” in to a utility procurement for energy and capacity, *Allco Finance Ltd.*, F.3d at 101,

and may “develop whatever capacity resources they wish, and [] use those resources to any extent that they wish.” *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 98 (3d Cir. 2014). In such cases, it is “squarely within FERC’s jurisdiction” to “approv[e wholesale market] rules that prevent the state’s choices from adversely affecting wholesale capacity rates.” *Id.*

As appellees highlight, there is a pending complaint before FERC about revising wholesale market rules to account for New York’s ZECs. In addition, FERC hosted a two-day technical conference in May 2017 on harmonizing its regulation with state programs.

Appellants would effectively strip FERC of its discretion to draw on its expertise as a market regulator to account for and accommodate state energy credit programs, as it has done in numerous proceedings. Moreover, while cutting off FERC’s options regarding energy credits, appellants would add to FERC’s regulatory burden by forcing it to regulate environmental emission allowances and various financial products.

#### A. Appellants Ask the Court to Question Long-Standing FERC Practice

FERC has never suggested that the FPA preempts state energy credit programs. To the contrary, FERC has repeatedly accommodated utility compliance with RPSs and concluded in various contexts that it does not have jurisdiction over energy credits. The parties discuss FERC’s *WSPP* order. Below, we highlight numerous other FERC orders

that facilitate compliance with state energy credit programs or that disclaim jurisdiction over energy credits.

In proceedings about market rules, FERC has approved tariff provisions designed to accommodate state RPSs. Earlier this year, FERC drew a distinction between its “responsib[ility] for maintaining well-functioning markets” and state “jurisdiction over generation . . . renewable resource targets and renewable portfolio standards.”<sup>22</sup> In that order, FERC found that an ISO New England tariff provision that exempted renewable resources from certain bidding rules “balances our responsibility to promote economically-efficient prices, while accommodating states’ ability to pursue legitimate policy objectives.”<sup>23</sup> FERC said that while it “must be mindful of state regulatory actions that impinge on FERC-jurisdictional market mechanisms to set price,” it did not identify RPS laws as being among those state actions.

FERC has approved transmission tariffs for projects aimed at facilitating utility compliance with RPSs. For instance, FERC approved a California ISO transmission rate, concluding that it would lead to the construction of new renewable resources to meet the state’s RPS. FERC observed that these new resources would benefit utilities through “fuel supply diversity, reduced price volatility and an enhanced ability [ ] to cost-effectively meet their RPS requirements.”<sup>24</sup>

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<sup>22</sup> *ISO New England*, 158 FERC ¶ 61,138 at P 9 (2017).

<sup>23</sup> *Id.* at P 68; *see also New York Indep. Sys. Operator*, 122 FERC ¶ 61,211 at P 112 (2008); *New York Pub. Serv. Comm’n. v. New York Indep. Sys. Operator*, 153 FERC ¶ 61,022 at P 51 (2015).

<sup>24</sup> *California Indep. Sys. Operator*, 119 FERC ¶ 61,061 at P 86 (2007); *see also California Indep. Sys. Operator*, 118 FERC ¶ 61,226 at PP 6, 14 (2007); *S. California Edison*, 121

FERC transmission rules also express its policy of accommodating state energy credit programs. In Order No. 1000, which reformed regional transmission planning, FERC found that utilities should “better identify transmission solutions for reliably and cost-effectively integrating . . . renewable energy resources needed to fulfill Public Policy Requirements such as the renewable portfolio standards” and ordered utilities to consider how these laws affect transmission needs.<sup>25</sup> In another rule, FERC ordered utilities to amend generator interconnection rules, in light of increasing requests driven by RPS laws.<sup>26</sup> Elsewhere, FERC ordered utilities to remove technical barriers to the integration of intermittent renewable energy resources in part because RPS laws were driving increased demand and accentuating the need for reform.<sup>27</sup>

In proceedings about the Public Utility Regulatory Policies Act of 1978 (PURPA), FERC has concluded that it does not have jurisdiction over the sale of RECs. PURPA’s relevant provisions, codified as part of the FPA, require utilities to purchase energy from certain renewable generators.<sup>28</sup> In 2003, FERC held that in implementing PURPA “a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, [and] that requirement

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FERC ¶ 61168 at PP 3, 6, concurrences (2007); *Int’l Transmission Co.*, 120 FERC ¶ 61,220 at PP 23–25 (2007); *Midcontinent Indep. Sys. Operator*, 156 FERC ¶ 61,235 at P 190 (2010).

<sup>25</sup> Order No. 1000, 136 FERC ¶ 61,051 at P 81 (2010); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 89–91 (D.C. Cir. 2014).

<sup>26</sup> Order No. 792, 145 FERC ¶ 61,159 at P 25 (2013).

<sup>27</sup> Order No. 764, 139 FERC ¶ 61,246 at PP 19–21 (2012).

<sup>28</sup> 16 U.S.C. § 824a–3.

must find its authority in state law.”<sup>29</sup> In another order about PURPA, FERC stated that its prior orders “ha[ve] made clear that states have the authority to regulate RECs.”<sup>30</sup> Reviewing FERC orders on this topic, this Court concluded that FERC has “not evince[d] an intent to occupy the relevant field—namely, the regulation of renewable energy credits.” *Wheelabrator Lisbon, Inc.*, 531 F.3d at 190.

In orders approving a utility merger, FERC drew a distinction between selling RECs and selling products that are subject to its jurisdiction, noting that while one company “has engaged in sales of renewable energy credits, it has not executed any jurisdictional sales under its market-based rate authority.”<sup>31</sup>

These orders demonstrate that FERC has repeatedly sought to accommodate, rather than frustrate or preempt, state energy credit programs, and it has consistently disclaimed jurisdiction over energy credits. Appellants’ reading of the FPA, if accepted, would upend FERC’s long-standing efforts to harmonize its regulatory mandate with state policies that advance legitimate goals. Even if FERC could assert jurisdiction over energy credits, appellants’ reading of the FPA would deny the Commission the opportunity to exercise its “discretion to decline to assert such jurisdiction . . . in part because of the complicated nature of the jurisdictional issues.” *New York*, 535 U.S. at 28.

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<sup>29</sup> *American Ref-Fuel Company*, 105 ¶ FERC 61,004 at P 3 (2003); *Morgantown Energy*, 139 FERC ¶ 61,066 (2012).

<sup>30</sup> *Windham Solar*, 156 FERC ¶ 61,042 at P 4 (2016).

<sup>31</sup> *Aircraft Services Corp.*, 122 FERC ¶ 62,118 (2008); *Smoky Hills Wind Project II*, 125 FERC ¶ 62,286 (2008).

Instead, appellants propose to create a regulatory gap, in which a free market caricature would set boundaries on how each state achieves the traditional goals of utility regulation. Appellants propose to cut off state authority to enforce energy credit programs, while also leaving FERC no clear authority to mandate that utilities purchase energy credits. Such an excessively broad claim of exclusive jurisdiction ignores that FERC itself has adopted a pragmatic approach to managing any potential conflicts between these state programs and its wholesale market regulation. FERC’s approach “makes federal and state powers ‘complementary’ and ‘comprehensive,’ so that ‘there [will] be no gaps for private interests to subvert the public welfare.’” *Electric Power Supply Association*, 136 S.Ct. at 780 (citation omitted).

In asking this Court to expand FERC’s exclusive field, appellants request a far more sweeping judicial assertion of preemption than the *Hughes* Court endorsed, where FERC had approved wholesale market rules that the state circumvented and the district court had made factual findings. If FERC has any jurisdiction over these kinds of state initiatives, it is as a practice “affecting” wholesale rates (16 U.S.C. §824d, e), and not under the agency’s exclusive obligation to set wholesale rates. FERC has considerable discretion in deciding whether and how to exercise this jurisdiction (*see id.* at 779 approving of FERC’s “notable solicitude toward the States”). To the extent that FERC’s eventual decision about ZECs raises jurisdictional concerns, such matters are best addressed under conflict preemption principles.

## B. Expanding FERC's Exclusive Field to Preempt Energy Credit Programs Invites FERC Regulation of Emission Allowances and Financial Products

Appellants entirely ignore the consequences of their proposed expansion of FERC's exclusive regulatory field. In addition to threatening state authority over energy credit programs, appellants raise potential conflicts between FERC and the Commodity Futures Trading Commission (CFTC) and could require FERC to regulate environmental emission allowances. In doing so, they propose to destabilize how energy and financial industries and regulators understand key jurisdictional issues.

Entities that buy and sell electricity at wholesale trade a variety of financial instruments to hedge the volatility of electricity prices. For example, an electricity seller that sells its output to the NYISO may enter into a contract with a financial institution that exchanges the variable payments from the NYISO for a schedule of fixed payments. Payments received by the electricity seller from the financial institution are, under appellants' reading, received "in connection with" a wholesale sale. Appellants provide no limiting principle that could prevent this kind of swap contract from falling under FERC's jurisdiction.

FERC has never asserted jurisdiction over such financial contracts that do not result in physical delivery of electricity. The 2010 Dodd-Frank Act sowed confusion about whether FERC or the CFTC have jurisdiction over particular financial products and required the two commissions to enter an agreement. Three years after the statutory

deadline, FERC and the CFTC signed a memo outlining how they would resolve jurisdictional conflicts. Appellants' proposed expansion of FERC's field would revive jurisdictional questions and could resurrect tensions between the two regulatory bodies.

Emission allowances could also be subject to FERC's exclusive rate regulation authority under appellants' theory. Electric generators subject to an emission allowance program<sup>32</sup> must surrender an allowance for each ton (or other amount) of pollution emitted. Under many programs, generators must pay the state or some other seller for allowances. Under appellants' theory, such payments might be made "in connection with" wholesale sales and thus FERC jurisdictional.

Ultimately, as with ZECs, if these kinds of programs are somehow inconsistent with FERC's market regulation under the FPA, preemption should be approached as a form of conflict preemption. Such a determination is properly made in the first instance by FERC, not by a court giving exclusive jurisdiction to a federal agency under field preemption principles.<sup>33</sup>

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<sup>32</sup> States administer emission allowance programs to comply with federal Clean Air Act requirements and meet greenhouse gas emission goals.

<sup>33</sup> *Amici* do not take a position on the *Armstrong* argument. Our concern is pragmatic: In comparison to FERC, courts have less institutional capacity to resolve these fact-intensive, policy-laden issues.



## CONCLUSION

For the reasons discussed, the Court should reject appellants' reading of the Federal Power Act.

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November 22, 2017

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## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and the Second Circuit's Local Rule 29 because this brief contains 6,536 words, as determined by Microsoft Word 2016, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Dated: November 22, 2017

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## **CERTIFICATE OF SERVICE**

I, Ari Peskoe, hereby certify that on this 22nd day of November, 2017, a true and correct copy of the foregoing Brief was served on all counsel of record in this appeal via email.

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