17-2654-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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,

(For Continuation of Caption See Inside Cover)

On Appeal from a Final Judgment of the United States District Court
for the Southern District of New York

Amici Curiae Brief of Natural Resources Defense Council and Environmental Defense Fund in Support of Defendants-Appellees

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Dated: November 22, 2017

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

Intervenor-defendants-appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for *amici curiae* state as follows:

Natural Resources Defense Council, Inc. is a non-profit organization based in New York. It is not a publicly held corporation, and has no outstanding stock shares or other securities in the hands of the public. It does not have any parent company, and no companies have a ten percent or greater ownership interest in it.

Environmental Defense Fund is a non-profit organization based in New York. It is not a publicly held corporation, and has no outstanding stock shares or other securities in the hands of the public. It does not have any parent company, and no companies have a ten percent or greater ownership interest in it.

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INTEREST OF AMICI CURIAE

Amici curiae Environmental Defense Fund (EDF) and Natural Resources Defense Council (NRDC) are national non-profit environmental advocacy organizations. Curbing climate change and building the clean energy future are among both organizations' top institutional priorities. Amici participated extensively in the administrative proceedings before the New York Public Service Commission (the Commission) that led to the adoption of the Clean Energy Standard Order on August 1, 2016. *See* N.Y. Pub. Serv. Comm'n, Case 15-E-0302, *Order Adopting a Clean Energy Standard* (Aug. 1, 2016), A-80 (CES Order). All parties have consented to the filing of this brief.

Amici strongly support the state's right to combat climate change and protect public health through policies designed to reduce harmful carbon emissions as rapidly as feasible. New York's CES Order contains a suite of policies aimed at making New York a leader in decarbonizing the electricity sector, and protecting the environment and public health. First, the CES Order adopts the state's "goal that 50% of New York's electricity is to be generated by renewable sources by 2030." *Id.* at 2, A-86. Nuclear power does not qualify for participation in this "50 by 30" renewables program. *Id.* at 16, A-100. Second, the CES Order establishes the goal of reducing

carbon dioxide and other greenhouse gas emissions in the State by 40% by 2030. *Id.* at 2, A-86. The Order creates a separate and distinct Zero Emissions Credit Program (ZEC Program) that requires utilities and other electricity providers to purchase credits from nuclear power plants that meet a "public necessity" standard—meaning that they provide public policy benefits to the state that must be preserved in furtherance of this goal. *Id.* at 124, A-208. The Commission assigns values to these Zero Emissions Credits (ZEC) by using a formula that accounts for the greenhouse gas emissions avoided when electricity is generated by nuclear power, as opposed to fossil fuel generation that would otherwise be needed if nuclear generation facilities were to abruptly retire. *Id.* at 129, A-213.

Amici take no joint position on nuclear power,[1] but agree with Defendants that the state acted within its lawful authority in adopting the ZEC Program. They

[1] 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. For background on NRDC's stance on nuclear power, see NRDC, *NRDC Policy Basics: Nuclear Energy* (2013), https://www.nrdc.org/sites/default/files/policy-basics-nuclear-energy-FS.pdf. EDF supports the ZEC Program to the extent that production of power with zero carbon emissions will prevent backsliding of carbon dioxide emissions between 2017 and 2029 while the state expands many-fold its large-scale renewables capacity to meet its 50 by 2030 renewables goals.

file this brief to protect and preserve this well-established state public policy authority, which is essential to states' ability to protect their citizens' health and welfare.[2]

SUMMARY OF ARGUMENT

Plaintiffs' challenge to the ZEC Program depends upon overbroad theories of preemption that are inconsistent with the careful delineation of federal and state responsibilities in the Federal Power Act (FPA), 16 U.S.C. § 824 *et seq.*, and with federal court precedent applying the FPA. Plaintiffs' position, if adopted by the Court, would create widespread uncertainty over state clean energy and related clean air programs. States draw upon this authority to promote the development and use of renewable energy and other clean technologies that, among other things, contribute to reductions in emissions of carbon dioxide, a primary cause of harmful anthropogenic climate change.

Under the FPA, states have express authority to regulate utilities and to determine the appropriate energy resource mix. The Federal Energy Regulatory Commission (FERC), whose role in the regulation of the electric sector is carefully defined

[2] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person or entity, other than amici, has contributed money that was intended to fund preparing or submitting the brief.

by the FPA, has long recognized states' "traditional" authority over "utility generation and resource portfolios." FERC Order No. 888, 61 Fed. Reg. 21,540, at 21,626 n.544 (May 10, 1996). States may, for example, require utilities to purchase power from the supplier of a particular type of resource, *see S. Cal. Edison Co.*, 70 FERC ¶ 61,215 (1995), or require utilities to purchase credits reflecting the public policy or environmental attributes of renewable energy generation, *see WSPP, Inc.*, 139 FERC ¶ 61,061, at PP 23-24 (2012). As discussed in detail below, Supreme Court precedent interpreting FPA jurisdiction leaves ample room for states to act even where such action touches on areas of federal regulation. *See infra* pages 6-14.

Relying on this reserved authority, at least twenty-nine states and the District of Columbia have adopted Renewable Portfolio Standards to achieve state public health and environmental goals.[3] Countless other state programs advance clean energy, reduce harmful pollution, and protect human health and the environment in

[3] *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

various additional ways.[4] It is critical that states continue to have the authority to adopt energy policies to combat climate change and reduce dangerous pollutants that threaten human health and a livable environment. We urge the Court to employ the workable framework for FPA jurisdiction articulated by the Supreme Court and affirm the district court's ruling that the ZEC Program is not preempted.

Similarly, under the dormant Commerce Clause, states retain the right and responsibility to craft public policy in furtherance of their citizens' well-being. Acting upon clear and extensive evidence as to the harms associated with carbon emissions from fossil-fuel generation and the risks of climate change for the state, New York structured the ZEC Program to build upon its existing and ongoing efforts to promote low- and zero-polluting generation, and to protect public health and the environment. Plaintiffs' frustrations with the ZEC Program's design do not change these legitimate concerns, nor do they form a basis for a valid dormant Commerce Clause claim.

[4] The Database of State Incentives for Renewables & Efficiency compiled by the N.C. Clean Energy Technology Center lists over 500 different state regulatory policies and financial incentives for clean energy technologies. *See* DSIRE, http://www.dsireusa.org (last accessed November 21, 2017).

ARGUMENT

I. The ZEC Program is not preempted by the FPA

In enacting the FPA and the analogous Natural Gas Act, "Congress meant to create a comprehensive and effective regulatory scheme' of dual state and federal authority." *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 631 (1972) (quoting *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n*, 332 U.S. 507, 520 (1947)).[5] Federal authority was meant to be "complementary" to state power such that together they are "comprehensive," and provide for "no gaps," *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 780 (2016) (*EPSA*) (quoting *La. Power & Light Co.*, 406 U.S. at 631).

Consistent with this principle, the Supreme Court has interpreted the FPA in a manner that preserves traditional state authority over the electricity sector and promotes the ability of regulators to address policy challenges. The Court's recent decisions in *EPSA* and *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) (*ONEOK*), articulate a practical framework for state and federal regulatory collaboration in the

[5] Although *Louisiana Power & Light* and other cases cited herein 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 v. Talen Energy Mktg.*, 136 S. Ct. 1288, 1298 n.10 (2016). FERC administers both laws.

increasingly integrated energy sector. Later, in *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016), the Supreme Court applied this framework and left room for states to carry out actions, like establishing the ZEC Program, to achieve a desired mix of generating resources.

A. Under the FPA, states retain their traditional authority to regulate the generation of energy

The FPA grants FERC jurisdiction over interstate wholesale electricity prices, while states retain jurisdiction over other energy transactions. FERC has the authority to ensure that the "rates" paid "for or in connection with the transmission or sale of electric energy" are "just and reasonable." 16 U.S.C. § 824d(a); *see also id.* § 824e(a).[6] FERC is also authorized "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 "facilities used for the generation of electric energy," and over "any other sale of electric energy," 16 U.S.C.

[6] 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.

§ 824(b)(1), including retail sales (*i.e.*, sales to end-use customers). *See EPSA*, 136 S. Ct. at 766.

"[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). This Court has recognized a state's authority "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 Cir. 2013) (internal quotation marks omitted); *see also Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 86 (2d Cir. 2017) (holding that a Connecticut long-term renewables procurement program is not preempted by the FPA). States may also direct planning and resource decisions through other means. For example, states may require utilities to purchase Renewable Energy Credits (RECs), which, like ZECs, reflect various attributes of non-carbon emitting electricity generation that the state deems valuable, separate and apart from its value as electric energy. *See Wheelabrator Lisbon, Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008) ("RECs are inventions of state property law . . . "); *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004, at P 23 (2003)

("States, 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. The ZEC Program is a valid regulation of the environmental externalities of electricity generation and is not preempted by federal law

The ZEC Program is a valid use of states' reserved authority under the FPA; it does not disregard FERC's rate-setting decisions, and it is not preempted by federal law. Plaintiffs' principal argument, that ZECs represent a payment "in connection with" a wholesale sale of electric energy subject to FERC's exclusive jurisdiction, *see* Plaintiffs' Br. 29, misinterprets *Hughes*, the case on which their argument relies. ZECs compensate generators for emissions avoidance, they are based on *production* of energy (which causes the avoidance), and they are not linked to energy *sales*. The ZEC Program therefore falls squarely within states' traditional authority over generation and environmental regulation.

In arguing that credits received for the generation of electricity under the ZEC Program are payments made "in connection with" FERC-jurisdictional sales, Plaintiffs rely upon a comparison between the ZEC Program and the Maryland program that the Supreme Court held was preempted in *Hughes*. *See* Plaintiffs' Br. 31-40. This comparison, however, is not supported by *Hughes.*

FERC's authority to ensure that rates paid "for or in connection with the transmission or sale of electric energy" are "just and reasonable," 16 U.S.C. § 824d(a), does not extend to every type of payment or economic credit received by an electricity generator. Statutory phrases such as "in connection with" require "a non-hyperliteral reading" to be consistent with the FPA's proper scope. *EPSA*, 136 S. Ct. at 774. Indeed, a phrase like "'in connection with' provides little guidance without a limiting principle consistent with the structure of the statute and its other provisions." *Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013); *see also EPSA*, 136 S. Ct. at 774 (citing *Maracich*).

As State Defendants and Intervenors point out, *Hughes*' conclusion that the payments provided through the Maryland program set rates "for or in connection with" wholesale electricity sales expressly depended upon the fact that the Maryland program's payments were conditioned on the plant's "clearing" the wholesale auction, meaning the plant was required by the state to have made a specific FERC-jurisdictional wholesale sale. State Defendants' Br. 32; Intervenors' Br. 34-35. In fact, *Hughes* is even narrower than described by State Defendants and Intervenors, because it *also* depended on the payments being (1) made after and in conjunction with such specific sales, *and* (2) structured such that it completely replaced the rate

FERC had set for that sale with an entirely different rate set by the state.[7] No unbundled sale of non-electricity attributes (like ZECs or RECs) was involved. Rather, the Maryland program "operate[d] within the auction." 136 S. Ct. at 1299. As the Court determined, Maryland's program re-set the price of the capacity itself, pure and simple, in contravention of FERC's exclusive jurisdiction to set rates "for or in connection with" interstate wholesale electricity sales. *Id.* at 1297 (quoting 16 U.S.C. § 824d(a)).

The "fatal defect" described by *Hughes*, *id.*, was fatal only in the context of the Maryland program's other features. A market-clearing requirement on its own would not "disregard" a wholesale rate established by FERC. For that to happen, the state must adjust the rates for specific sales so as to override FERC's already approved prices. *See id.* at 1299 ("We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC."). States have long regulated

[7] Notably, because *Hughes* addressed payments made in conjunction with specific wholesale sales in the manner outlined above, it is consistent with FERC's *WSPP* decision, which held that RECs sold separately and apart from wholesale electricity are not made "for or in connection with" such sales. *WSPP*, 139 FERC ¶ 61,061, at PP 23-24 (2012).

wholesale purchasing behavior by retail utilities, through integrated resource planning and other mechanisms. *See New York v. FERC*, 535 U.S. 1, 24 (2002) (noting that the FPA does not encroach on states' control over such matters as "integrated resource planning," or "utility buy-side and demand-side decisions" (quoting FERC Order No. 888, 61 Fed. Reg. at 31,782, n. 544)); *see also Allco*, 861 F.3d at 99-100 (distinguishing between state actions that disregard a FERC-approved rate, as in *Hughes*, and state buy-side regulations intended to facilitate contracts that are subject to subsequent FERC review).[8]

Unlike Maryland's program in *Hughes*, nothing about the ZEC Program set rates "for or in connection with the transmission or sale of electric energy." Once a ZEC generator sells its energy at wholesale auction, that sale price is fixed, unadjusted by any "contract for differences." *Cf. Hughes*, 136 S. Ct. at 1294-95. The price of ZECs is not tied to any sale, but rather is based on the social cost of carbon, an economic estimate of the damage done by carbon dioxide emissions. It can be ad-

[8] We urge the Court to take care not to cast doubt on these longstanding state activities through an unwarranted expansion of *Hughes*' holding, which did not preempt state regulations of bilateral wholesale transactions that do not disregard FERC rates, as Maryland's program did. *See* 136 S. Ct. at 1295.

justed upward in future years based on projected increases in the Social Cost of Carbon and downward based on the amount by which *projected* wholesale revenues exceed an established target. CES Order at 151 & App. E, A-235, 254.

Such an economic credit is not a payment made for or in connection with a specific energy or capacity sale. FERC has explained that "[i]f a state chooses to create . . . separate commodities" to value "environmental externalities," "[these commodities] are not compensation for capacity and energy." *Cal. Pub. Utilities Comm'n*, 133 FERC ¶ 61,059, at P 30 n.62 (2010). FERC also held in *WSPP* that unbundled RECs do not directly affect wholesale rates, much less constitute a payment "in connection with" a FERC-jurisdictional sale. *WSPP, Inc.*, 139 FERC at P 24 (2012) ("[T]he charge for the unbundled RECs is not a charge in connection with a wholesale sale of electricity.").[9] FERC's decision in *WSPP* evaluated RECs owned by roughly 300 different utilities that originated from programs across a range of

[9] While Plaintiffs are correct that *WSPP* clarified that FERC may have jurisdiction over other products that "directly affect" FERC-jurisdictional rates, they confuse the significance of the decision: FERC determined that the "unbundled" RECs did not "directly affect" FERC-jurisdictional rates *because* "[s]imilar[]" to emissions allowances addressed by a prior FERC decision, their "sale or transfer occurs independent of a sale of electric energy for resale in interstate commerce." 139 FERC at P 23.

states, including in regions where then-current FERC rules mandated that the energy associated with those RECs be sold in wholesale markets.[10]

Plaintiffs argue that setting ZEC prices with reference to projected wholesale revenue does "precisely what *Hughes* forbids." Plaintiffs' Br. 38. But *Hughes*, a self-described "limited" decision, did not preclude states from considering any information related to wholesale markets when regulating the retail sales and power generation facilities over which they have reserved authority. 136 S. Ct. at 1299. This Court has held that a state may adjust retail rates to account for a utility's revenue from FERC-jurisdictional wholesale sales; doing so does not regulate or set a rate for those wholesale sales, even though the state's decisions may affect a utility's total revenue base. *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 754 F.2d 99, 103-05 (2d Cir. 1985) (just as FERC may "take into account activities it cannot regulate in setting rates for activities that it may regulate," so may states consider FERC's regulatory actions in deciding matters within their own jurisdiction).[11]

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[10] *See Order Terminating West-Wide Must-Offer Requirements*, 157 FERC ¶ 61,051 (2016) (eliminating a requirement to sell electricity in wholesale markets that applied to all generation in the western half of country at the time *WSPP* was decided).

[11] Plaintiffs also unsuccessfully argued in district court that the ZEC Program was field-preempted because it directly affected wholesale rates. *See* District Court Op.

C. Finding the ZEC Program preempted by the FPA would undermine states' clean energy policies

A ruling denying New York's authority to enact the ZEC Program could jeopardize far more than just the nuclear plants that New York is seeking to preserve: It would cast a pall of uncertainty over a wide range of long-standing and effective strategies states have traditionally employed to promote the use of clean energy and further the welfare and well-being of their citizens.

Plaintiffs concede that REC programs are not preempted. *See* Plaintiffs' Br. 40-44. It follows from this concession that Plaintiffs' broad arguments against the ZEC Program must also fail.

Like ZECs, nearly all renewable portfolio standards (RPS) programs, which states employ to increase production of energy from renewable sources, and generation-based tax credits depend upon the production of electricity from the relevant facilities. Such a condition is necessary in order to drive the emissions outcomes and other public policy outcomes desired by states. To hold that payments conditioned

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at 22-23, SPA 22-23. Plaintiffs have abandoned this argument on appeal. FERC's jurisdiction over practices directly affecting interstate wholesale rates is not exclusive. The Supreme Court's opinions in *EPSA*, 136 S. Ct. 775, 77, and *ONEOK*, 135 S. Ct. at 1599-600, make clear that FERC and the states may regulate practices directly affecting rates in an overlapping manner.

upon production are preempted would effectively neutralize states' important role in determining the generation mix, a role preserved by the FPA.

Like ZECs, RPS programs and other renewables policies operate against the backdrop of FERC's rules regarding wholesale market participation. Plaintiffs advert to those rules when they characterize the ZEC Program as "available only to generators that sell in wholesale auction markets." Plaintiffs' Br. 41. As the district court recognized, however, the CES Order does not require wholesale market participation. District Court Op. at 19-20, SPA 19-20. Finding state law preempted based on generators' business decisions to sell into the wholesale market would upset states and FERC's settled understanding of the FPA's careful apportionment of overlapping energy regulatory authority between them. Indeed, even in states where FERC imposes requirements concerning wholesale market participation, state law is not automatically preempted as a result. For example, PJM Interconnection, a regional transmission organization for thirteen states and the District of Columbia, introduced a must-offer requirement in 2006,[12] states supported the decision, which

[12] *See PJM Interconnection, LLC*, 115 FERC ¶ 61,079 (2006).

was understood to have no bearing on the validity of the many then-existing state RPSs in the PJM region.[13]

Plaintiffs' unwillingness to grasp the internal inconsistency of their position highlights the complexity of the energy sector and the degree to which their sweeping preemption arguments could, if accepted, undermine vital energy and environmental policies. Even a decision grounded in Plaintiffs' narrowest argument, based on the ZEC Program's cost containment feature, would sow immense confusion for states in carrying out their regulatory role. As described above, this feature adjusts *ZEC prices*, not wholesale rates, and pushes them only down and not up, based on composite price forecasts but not actual sales. Plaintiffs' suggestion that a program which includes a price adjustment mechanism based on *forecasts* is impermissible and greatly overreads *Hughes* (*see supra* I.B) and has no tenable limiting principle.

Below, we provide the Court with background on the wide range of lawful state clean energy programs. We urge the Court to take care not to inject uncertainty around these programs in affirming the district court. State policies to advance clean

[13] *See* 73 Pa. Cons. Stat. § 1648.3 (enacted 2004); N.J. Admin. Code § 14:8-2.8 (effective 2004); Md. Pub. Utils. § 7-701 *et seq*. (enacted 2004); Del. Code Ann. 26 § 351 *et seq*. (enacted 2005); D.C. Code § 34-1431 *et seq*. (enacted 2005).

energy technologies such as onshore and offshore wind, solar, and energy storage take a wide variety of forms. Even within the narrow category of REC-based RPS programs, there is wide variation. *See Allco*, 861 F.3d at 93 ("[D]ifferent states define RECs differently, focusing on various attributes which they deem to be especially relevant.").[14]

Plaintiffs' assertion that "REC prices are essentially determined by supply and demand of renewable energy," Plaintiffs' Br. 41, overlooks the many RPS programs which include cost control measures. For programs that use RECs, one approach to cap prices is to permit the use of Alternative Compliance Payments (ACPs) in lieu of buying RECs. ACP pricing methodologies vary, and include fixed statutory

[14] *U.S. Renewables Portfolio Standards: 2016 Annual Status Report*, *supra* note 3, at 6 (detailing "major variations across states" in RPS design). The Center for Robust Decisionmaking on Climate and Energy Policy has developed a portal that summarizes certain features of many different state RPS policies, available at http://rpscalc.rdcep.org/.

prices,[15] or linkage to a percentage of REC value[16] (which may vary based on revenues generators recover from wholesale markets[17]). Other programs control costs by limiting total REC payments to a certain percentage of a utility's revenues,[18] retail rates,[19] bills,[20] or wholesale energy procurement costs,[21] or by allowing a utility to forego purchasing energy from a renewable facility where the costs exceed those of procurement from another resource by a specified percentage.[22] States also use their traditional authority to determine the prudence of bundled wholesale contracts when

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[15] *See, e.g.*, 225 Mass. Code Regs. 14.08; 65-407; Me. Code R. Ch. 311, § 3 (setting a fixed rate pursuant to RPS statute).

[16] *See, e.g.*, 73 Pa. Stat. Ann. § 1648.3(f)(4) (setting a solar-specific ACP at 200% the value of solar RECs).

[17] REC prices are generally dictated in part by the cost of producing environmental benefits from eligible renewable generators. Depending on the RPS structure in a given state, a generator earning more revenue in the wholesale markets may be able to offer REC sales at lower prices because it needs less money to cover the costs of production.

[18] *See, e.g.*, N.M. Admin. Code § 17.9.572.12.

[19] *See, e.g.*, Kan. Admin. Regs. 82-16; Mo. Rev. Stat. § 393.1030(2)(1).

[20] *See, e.g.*, Colo. Rev. Stat. § 40-2-124(1)(g).

[21] *See, e.g.*, 26 Del. Code Regs. § 363(f); Ohio Rev. Code Ann. § 4928.64(C)(3).

[22] *See* Mont. Code Ann. §69-3-2007(2).

those costs are passed on to retail customers, and to exempt utilities from obligations where contracts are not prudent.[23]

While many RPS programs and other state policies foster new renewable generators, they can also be concerned with preserving existing renewable generators that would otherwise retire or deliver their benefits elsewhere.[24] RPS programs may provide different levels of support to different technologies (providing greater support to emerging technologies that are less commercially viable, for example),[25] and states may select eligible REC participants through Requests for Proposals.[26]

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[23] *See* Nev. Rev. Stat. Ann. § 704.7821(2)(c), (6), (7) (providing for review of contracts); *see also Ky. W. Va. Gas Co. v. Pa. Publ. Util. Comm'n*, 837 F.2d 600 (3d Cir. 1988) (affirming states' authority to review contracts for prudence in regulating retail rates).

[24] *See* Edward Holt, Clean Energy States Alliance, CESA State RPS Policy Report: Increasing Coordination and Uniformity Among State Renewable Portfolio Standards 9 (2008) (explaining that state RPS requirements can vary based on whether the state has "a desire to support existing resources"), available at http://www.cesa.org/assets/Uploads/Resources-pre-8-16/CESA-Holt-RPS-policy-report-dec2008.pdf.

[25] *See, e.g.*, N.J. Rev. Stat. Ann. § 48:3-87 (providing a separate requirement for "solar electric power generators").

[26] *See Allco*, 861 F.3d 82 (evaluating such a program).

RPS programs are not limited to creating RECs. Many facilitate the formation of long-term power purchase agreements, such as Connecticut's program recently determined by this Court to be in compliance with the FPA. *See Allco*, 861 F.3d at 97-101. Similar frameworks will likely prove particularly effective at catalyzing off-shore wind and energy storage technologies.[27]

Indeed, anything but a decision affirming the district court and carefully avoiding restricting state authority could create a regulatory no-man's-land. States may be reluctant to adopt measures promoting clean energy and protecting citizens' health and environment for fear of preemption, and FERC may be reluctant to do the same for fear of expanding the preemptive scope of its policies. The FPA was designed to avoid such a jurisdictional gap. As the *EPSA* Court observed, Congress's "precise[]" intent was to "to eliminate vacuums of authority over the electricity mar-

[27] California and Massachusetts, for example, have both adopted energy storage procurement mandates. *See* Cal. Pub. Util. Code § 2836; An Act Relative to Energy Diversity, Chapter 188 of the Acts of 2016 § 15(b), *available at* https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter188 (which directs Department of Energy Resources to consider a storage target).

kets." 136 S. Ct. at 780. The ZEC Program is a permissible use of the States' reserved authority under the FPA, and we urge the Court to affirm the district court's judgment upholding the program.

II. The NY ZEC program does not violate the dormant Commerce Clause

States have longstanding authority to craft policies that further environmental and public health goals. State policies aimed at improving air quality, environment, and human health through cleaner energy are classic exercises of this authority. Courts have rejected dormant Commerce Clause challenges in this area as thinly-veiled attempts to second-guess state policy.[28] The Commerce Clause does not restrict the use of state authority to regulate emissions in the manner New York has done here.

A. States have longstanding authority to address environmental and public health risks, including those related to energy

The dormant Commerce Clause is principally driven "by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't of Rev. of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486

[28] *See, e.g. Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1173 (10th Cir. 2015) (Gorsuch, J.); *Allco*, 861 F.3d at 107-108.

U.S. 269, 273–74 (1988)). It does not extinguish the states' right and responsibility, with "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotation marks omitted).

New York has a long history of furthering its citizens' welfare through crafting environmental and public health policies.[29] The CES Order was adopted to enable New York to achieve its ambitious goals of a 40 percent reduction in greenhouse gas emissions and a 50 percent renewable generation supply by 2030. The CES Order's REC and ZEC Programs work in tandem to reduce pollution from fossil fuel emissions that cause climate change and other serious public health concerns. The ZEC Program seeks to avoid the collective emission of over fifteen million tons of carbon dioxide per year by rewarding nuclear generation assets for their carbon-free attributes. CES Order at 19, A-103.

The validity of the state's objective is strengthened and informed by the robust body of evidence, technical analysis, and scientific study that makes clear the acute

[29] *See e.g.* Arthur C. Stern, *History of Air Pollution Legislation in the United States*, 32 J. Air Pollution Control Ass'n 44, 46 (1982) (noting New York's air quality control legislation, passed in 1961, was one of the nation's first such laws).

nature of New York's concern about the effects of pollution and climate change. As the U.S. Global Change Research Program's recent Climate Science Special Report noted, available scientific evidence shows "human activities, especially emissions of greenhouse gases, are the dominant cause of the observed warming since the mid-20th century."[30] There is now "broad consensus that the further and the faster the Earth system is pushed towards warming, the greater the risk of unanticipated changes and impacts."[31] Such changes are projected to include rising sea levels and increases in extreme weather events and heatwaves.[32]

The CES and ZEC program is expressly designed to mitigate these risks posed to New York citizens from the health impacts of harmful air pollution and climate change. These are legitimate and non-discriminatory objectives. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-74 (1981) (upholding geographically

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[30] U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment*, Executive Summary, https://science2017.globalchange.gov/chapter/executive-summary/ ("For the warming over the last century, there is no convincing alternative explanation supported by the extent of the observational evidence.")

[31] *Id.*

[32] *Id.*

neutral environmental regulation even though in-state industry incidentally benefited).

The Second Circuit's recent decision in *Allco* makes clear that New York acted within long-established authority as a sovereign state. The NY ZEC program is based on historic trading activity and explicitly does not select generators based on their geographical location. CES Order at 124 (noting eligibility is "regardless of the location of the facility"). The CES Order's eligibility criteria for ZECs —like Connecticut's RECs—was "in response to, rather than a cause of" FERC's own geographic distinctions, as they "piggyback[] on top of the geographic lines drawn by [NYISO]." *Allco*, 861 F.3d at 106-07. Even crediting Plaintiffs' assertion that in-state generators are more likely to qualify for ZEC payments, a simple difference in the effect of a law on in-state and out-of-state businesses does not render a state law unconstitutional. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978).

As in *Allco*, Plaintiffs here seek to compare apples and oranges, contrary to basic dormant Commerce Clause principles. Courts have long held that "any notion of discrimination assumes a comparison of substantially similar entities," and thus only "similarly situated" firms should be compared for the Commerce Clause analysis. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997); *see also Allco* 861 F.3d

at 106 (noting Connecticut's "legitimate interest in promoting increased production of renewable power generation in the region, thereby protecting its citizens' health, safety, and reliable access to power" warrants "treat[ing] [REC-eligible] generators and [plaintiff's] generator as dissimilar for dormant Commerce Clause purposes"). But Plaintiffs' power plants are not "similarly situated" with ZEC-eligible generators, because the distinction between non-nuclear and nuclear plants—for ZEC eligibility—is based upon legitimate state environmental and health concerns. ZECs are worth less than RECs under New York's Clean Energy Standard, reflecting the state's reasonable judgment that renewable generation has more non-energy benefits that nuclear generation. To require states to regulate different "types of entities equally would misread the dormant Commerce Clause and intrude on a regulatory sphere traditionally occupied by Congress and the States." *Gen. Motors Corp.*, 519 U.S. at 313 (Scalia, J. concurring). Plaintiffs' preference for a different state policy is no grounds for a dormant Commerce Clause challenge.

B. The dormant Commerce Clause is not a license to second-guess legitimate state policy designs

The Supreme Court has long recognized the importance of state authority to craft public policy; the dormant Commerce Clause is not a license to question such policy judgements. The dormant Commerce Clause likewise "does not elevate free

trade above all other values," *Maine v. Taylor*, 477 U.S. 131, 151 (1986), nor does it protect "the particular structure or methods of operation" of a particular market, *Exxon Corp*., 437 U.S. at 127.

Plaintiffs' preference for alternative designs should have no bearing upon a dormant Commerce Clause analysis. The ZEC program is focused specifically upon zero-carbon attributes from nuclear facilities. The CES Order includes a number of other important programs designed to promote clean energy resources—all in furtherance of New York's greenhouse gas emission reduction goals and to protect public health and the environment.

This goal could be designed and implemented through a variety of potential mechanisms; the legitimate choice New York made here, however, does not offend the dormant Commerce Clause. New York, like all states, enjoys great flexibility in responding to problems of public policy. *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 443, (1960). Minimizing New York's carbon dioxide, sulfur dioxide, nitrogen oxides, and particulate matter emissions that imperil public health and the environment is an entirely valid, classic state objectives. New York has the discretion to choose the policy mechanisms to achieve that end.

CONCLUSION

The judgment of the district court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P.29(a)(5) because this brief contains 5,690 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This statement is based on the word count function of Microsoft Office Word 2016.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14 point Times New Roman font for the main text and 14 point Times New Roman font for footnotes.

Dated: November 22, 2017

/s/Thomas Zimpleman
Thomas Zimpleman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 22, 2017, I caused the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

/s/Thomas Zimpleman
Thomas Zimpleman