UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

-against-

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

Defendants.

Docket No. 1:16-CV-8164

(VEC/KNF)

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

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Defendants—the Chairman and members of the Public Service Commission of the State of New York (Commission)—move to dismiss the Complaint (Dkt. 1) for failure to state a claim. Fed. R. Civ. P. 12(b)(6).

INTRODUCTION

New York concluded that it must reduce greenhouse gas (GHG) emissions and other environmental harms of producing electricity to serve New Yorkers. To that end, the Commission adopted a "Clean Energy Standard" (CES)[1] with two main, interrelated goals: (1) promoting the development of substantial quantities of new electric generation facilities that rely on renewable resources and (2) maintaining, while the renewable build out occurs, a large base of zero-emission generation that is provided by certain nuclear plants at risk of retiring. To accomplish these goals, the CES Order compensates non GHG-emitting energy resources for the beneficial environmental attributes of the energy they produce. Renewable resources are compensated at market-based prices. The nuclear plants are compensated at prices calculated by the Commission based on the federal estimate of the social cost of carbon. The Commission found both steps to be in the public interest and essential to achieving the state's overall objective: transforming the state's energy supply to include significantly more environmentally-friendly resources.

Plaintiffs[2] own fossil fueled electric generation facilities that emit significant quantities of GHG and other harmful air pollutants. While they do not challenge the renewable-energy portion of the CES Order, Plaintiffs claim the Federal Power Act (FPA, 16 U.S.C. §§ 791a-825r) and U.S. Constitution require New York to let the nuclear plants shut down—and let GHG and other

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[1] The Commission's August 1, 2016 "Order Adopting a Clean Energy Standard" (CES Order) is available at https://perma.cc/MX4U-F2GU, and its appendices are available at https://perma.cc/KZ4V-LRN7. For the Court's convenience, a complete copy of the CES Order and its appendices is attached to this memorandum.

[2] Plaintiffs are Coalition for Competitive Electricity, Dynegy Inc., Eastern Generation, LLC, Electric Power Supply Association, NRG Energy, Inc., Roseton Generating LLC, and Selkirk Cogen Partners, L.P.

emissions surge—because the Plaintiffs would benefit from higher wholesale electricity prices that might result from the retirements. Plaintiffs allege that New York's plan to pay certain nuclear plants for the zero-emission attributes of the energy they produce is field-preempted (Count I) and conflict-preempted (Count II) and violates the dormant Commerce Clause (Count III). They seek declaratory and injunctive relief.

The Complaint should be dismissed under Rule 12(b)(6). Counts I and II should be dismissed because neither the Constitution's Supremacy Clause nor the FPA affords plaintiffs a private right of action to pursue those claims in court, and the FPA forecloses resort to this Court's equitable power in lieu of a cause of action. The FPA creates an interlocking, collaborative federalism framework in which States regulate the physical and environmental aspects of electricity generation, as well as electricity sales to end users, while the Federal Energy Regulatory Commission (FERC) exercises exclusive authority over sales for resale (i.e., wholesale sales). 16 U.S.C. § 824(b)(1). The FPA establishes a comprehensive administrative scheme enabling potential plaintiffs to pursue FPA-based claims (including preemption claims) before the agency, and gives FERC alone the power and the discretion to go to court to enforce the FPA when necessary. This regime precludes private parties from pursuing FPA-based preemption claims in federal district courts. Questions about whether a state program usurps or interferes with FERC's wholesale market regulation must be addressed to FERC, as their resolution entails the exercise of FERC's discretionary, policy-making powers, which are not judicially administrable.

The Court also should dismiss Plaintiffs' preemption claims (Counts I and II) and dormant Commerce Clause claim (Count III) because the facts alleged in the Complaint, even if true, would not show a violation of the FPA or the dormant Commerce Clause. As both courts and FERC recognize, the FPA preserves state authority to regulate electric generation facilities

and to create and regulate commerce in the environmental benefits of those facilities. That is exactly what the CES Order does. The CES Order neither intrudes upon (Count I) nor interferes with (Count II) FERC's regulation of wholesale electric sales, and neither discriminates against nor burdens out-of-state commerce (Count III).

BACKGROUND

"[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. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). The Commission's reasons for issuing the CES Order lie at the core of state police power. Producing electricity by combusting fossil fuels is a major source of GHG and other emissions, which drive destructive climate change and other adverse environmental and public health outcomes.[3] While New York's generation mix already is among the Nation's cleanest,[4] electricity production and delivery still accounts for nearly one fifth of New York's GHG emissions.[5] The New York State Energy Plan (SEP)—developed collaboratively by an array of State agencies, with stakeholder and public input—sets forth a comprehensive plan to build a clean, resilient, and affordable energy system for New Yorkers. The 2015 SEP requires the state to attempt to achieve, by 2030: (1) the production of 50 percent of electricity from renewable energy sources; (2) a 23 percent increase in energy efficiency; and (3) a 40 percent reduction in GHG emissions from 1990 levels. *See* 2015 SEP, Overview at 2, https://perma.cc/

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[3] Besides carbon dioxide (CO_2), burning fossil fuels produces nitrogen oxides, sulfur dioxide, and particulate matter, which contribute to respiratory and cardiovascular ailments. *See* CES Order at 3. CO_2 and other GHGs contribute to climate change, which causes "sea level rise, heat waves, and extreme weather events, [as well as] massive economic and lifestyle disruption from damage to agriculture, water resources, public health, energy and communication systems, and the natural ecosystems that define and support communities." *Id.* at 4.

[4] New York's rate of CO_2 emissions from electricity generation has dropped 42 percent since 2000. New York Independent System Operator, *Power Trends 2016: The Changing Energy Landscape* at 36, https://perma.cc/4SBC-5C4C (*Power Trends 2016*).

[5] New York State Energy Research and Development Authority, *New York State Greenhouse Gas Inventory and Forecast: Inventory 1990-2011 and Forecast 2012-2030, Final Report* at 11, Table S-1, https://perma.cc/T6FP-NBFK (April 2014, Revised June 2015).

E5P3-K5XG. In December 2015, Governor Andrew Cuomo directed the Department of Public Service to propose a CES that would convert the SEP goals into enforceable requirements. *See* CES Order at 6.

The CES Order fulfills that directive by means of two main programs. The first is a Renewable Energy Standard (RES) that requires "load serving entities" (LSEs)—entities that serve end-use electricity customers—to meet their needs by procuring increasing percentages of new renewable resources. *See id.* at 14. Renewable resources that commence operation after January 1, 2015 will create one "Renewable Energy Credit" (REC) for every megawatt-hour of electric energy they produce. *Id.* at 16. LSEs can comply with the RES requirements by purchasing RECs or by making an alternative compliance payment. *Id.*

The second component (which the CES Order refers to as "Tier 3") complements the RES by preserving at-risk, zero-emission nuclear resources while renewable construction ramps up. The Commission identified three nuclear power plants that had made verifiable historic contributions to New York's clean energy supplies and were at risk of imminent retirement.[6] Collectively, these plants produce roughly 27,600 gigawatt-hours of carbon-free electricity each year (*id.* at 127)—an amount equal to 50 percent of the electricity consumed annually in New York City (*see Power Trends 2016* at 8)—and avoid the emission of fifteen million tons of CO_2 annually, among other pollutants, based on the state's current fuel mix. CES Order at 19. If the nuclear plants were to retire before the renewable build-out occurs, the resulting gap in the state's power supply would lead to a surge in GHG emissions as fossil-fuel-fired generators fill that gap.

[6] *Id.* at 125-126. The plants are the James A. FitzPatrick Nuclear Generating Facility, the R.E. Ginna Nuclear Power Plant, and one of the two Nine Mile Point Nuclear Station units. *Id*. The Commission found that the Indian Point nuclear generation facility also had made verifiable historic contributions of clean energy consumed in New York, but would not be eligible to sell Zero-Emissions Credits because its zero-emissions attributes were not at risk. *Id.* at 125 n.85.

Id. at 128.[7] The retirement of even *one* at-risk nuclear unit would cause the loss of more carbon-free electricity (approximately 7,000 gigawatt-hours annually) than is expected to be produced by all of the renewable resources in the New York Renewable Portfolio Standard program (6,241 gigawatt-hours annually) for which the New York State Energy Research and Development Authority (NYSERDA) has either contracted or encumbered funds.[8]

The Commission determined that there were no feasible alternatives that could replace the nuclear plants' zero-emission attributes in the short run if the at-risk nuclear plants were to retire. The Commission already is attempting to maximize energy efficiency in New York, and concluded that it is "unrealistic to assume that sufficient *additional* energy efficiency measures could be identified and implemented in time to offset" the loss of 27,600 gigawatt-hours of carbon-free nuclear energy. CES Order at 126-27 (emphasis added). Similarly, as the state already is "pursuing new renewable resources at an ambitious pace," the Commission found it is "not realistic" to think that "sufficient *additional* renewable resources" could be developed in time to offset the loss of carbon-free nuclear energy. *Id.* at 127 (emphasis added). Thus, losing the at-risk nuclear facilities before new renewable resources could be developed would "significantly increase[] air emissions due to heavier reliance on existing fossil-fueled plants or the construction of new gas plants to replace the supplanted energy." *Id.* at 19; *see also id.* at 128. Those increased emissions would continue until the renewable and efficiency build out could catch up, and the damage would be ongoing and largely irreversible.[9]

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7 Overreliance on natural gas would also reduce New York's fuel diversity, making the state more vulnerable to shortages and the resulting price spikes. *Id.*

8 New York State Energy Research and Development Authority, *New York State Renewable Portfolio Standard Annual Performance Report through December 31, 2015, Final Report* at 9, Table 1, https://perma.cc/G926-FBXB (March 2016). A power plant's instantaneous electric output is measured in megawatts. *See generally* Union of Concerned Scientists, *How is Electricity Measured?*, https://perma.cc/VNA8-7DX6 (last visited Dec. 1, 2016). Its output over time is measured in megawatt-hours. *Id.* A thousand megawatt-hours equals a gigawatt-hour. *Id.*

9 Once developed, new renewable resources can avoid additional future emissions, but cannot neutralize the ef-

To avoid these harms, the CES Order created new "Zero-Emission Credits" (ZECs) to be sold by the eligible nuclear plants to NYSERDA. Each megawatt-hour of energy the plants produce will also create one ZEC,[10] up to a cap based on the plants' historic energy production. CES Order at 144-45. All entities serving end-use electricity consumers in New York will buy from NYSERDA their proportionate share of the ZECs. *Id.* at 149-50. Consistent with the program's purpose as a bridge to a 50-percent-renewable energy supply, the program will last twelve years—from 2017 through 2029. *Id.* at 156. While the supported nuclear plants will not count toward New York's 50-percent-renewable goal (*id.* at 66), they will prevent the state from backsliding on GHG emissions while new renewable resources are developed. *See id.* at 77-78.

ZEC prices, which are set in six two-year tranches, will be based on the U.S. Interagency Working Group's projected "social cost of carbon" (SCC),[11] minus an estimate of the revenues the nuclear plants will receive through the Regional Greenhouse Gas Initiative (RGGI).[12] Because there are few nuclear plants eligible for ZECs and the plants may be under common ownership, it was infeasible to allow the market to set ZEC prices. *See* CES Order, App. E at 4. Thus, ZECs are priced by the Commission in accordance with the carbon-free attributes of nuclear

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fects of GHGs emitted before they were developed.

[10] "'Zero-Emissions Credit' or 'ZEC' means credit for the zero-emissions attributes of one megawatt-hour of electricity production by an eligible Zero Carbon Electric Generating Facility which credit is purchased by NYSERDA or a Load Serving Entity to reduce carbon consumption by retail electric consumers in New York State." CES Order, App. E at 1.

[11] The Social Cost of Carbon is "an estimate of the economic damages associated with a small increase in carbon dioxide (CO_2) emissions, conventionally one metric ton, in a given year. This dollar figure also represents the value of damages avoided for a small emission reduction (i.e., the benefit of a CO_2 reduction)." U.S. EPA, *The Social Cost of Carbon*, https://perma.cc/TE5G-D45W (last visited Nov. 30, 2016).

[12] CES Order at 134. RGGI (https://www.rggi.org/) is a cooperative effort among nine states to cap emissions from the electric power sector and issue a limited number of tradable allowances authorizing a regulated power plant to emit one short ton of CO_2. Individual CO_2 budgets in each RGGI state together create a regional market for CO_2 allowances. When an emitting generator buys an RGGI CO_2 allowance, the price it pays for the allowance internalizes a portion of the social cost of carbon. Proceeds can be invested in clean energy facilities, such as the nuclear plants. As the CES Order explains, however, the RGGI program is not sufficient to meet New York's 50 percent renewables and 40 percent GHG reduction goals (CES Order at 22), and changing RGGI to achieve more ambitious goals "is not within the State's unilateral control" (*id.* at 133).

generation. After the first two-year period, ZEC prices will decline if certain electric energy and capacity price forecasts increase. *Id.* at 138-139. The adjustment is based on changes in forward-looking price forecasts, including energy-price forecasts for a part of the state in which no ZEC recipient is located. *Id.* This ensures that the ZEC program remains affordable for consumers even when electricity prices are expected to increase.

Several parties filed requests for rehearing, which remain pending before the Commission. On November 30, 2016, two petitioners filed a state-court challenge to the CES Order.[13]

ARGUMENT

Plaintiffs lack a preemption cause of action because there is no private right of action under the FPA and the statutory scheme forecloses resort to the Court's equitable powers. Substantively, the CES Order is a straightforward exercise of state authority to regulate generation facilities and their environmental impacts, and Plaintiffs have not shown discrimination under the dormant Commerce Clause.

I. PLAINTIFFS LACK A PREEMPTION CAUSE OF ACTION, AND CANNOT INVOKE EQUITABLE JURISDICTION IN LIEU OF ONE.

Counts I and II (¶¶ 76-92) should be dismissed because Plaintiffs lack a cause of action to bring FPA-based preemption claims in federal district court. In *Armstrong v. Exceptional Child Center, Inc.*, the Supreme Court held that the Supremacy Clause "does not create a cause of action." 135 S. Ct. 1378, 1383 (2015). It instead "instructs courts what to do when state and federal law clash." *Id.* Raising preemption claims in federal court requires either: (i) an express or implied private right of action under the allegedly preemptive federal statute; or (ii) a showing that the court can act pursuant to its equitable power to enjoin the alleged unlawful action. Each of

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[13] *Hudson River Sloop Clearwater, Inc. v. N.Y. Pub. Serv. Comm'n*, No. 7242-2016 (N.Y. S. Ct. Albany Cty. filed Nov. 30, 2016).

these inquiries is a question of Congressional intent.[14] As Plaintiffs allege no private right of action under the FPA, their preemption claims turn on whether this Court's equitable jurisdiction can be invoked—which itself depends on whether Congress expressly or implicitly "inten[ded] to foreclose equitable relief" to private parties under the statute. *Armstrong*, 135 S. Ct. at 1385 (quotation omitted).[15]

In *Hughes v. Talen Energy Marketing, LLC*, the Court assumed without deciding that plaintiffs alleging FPA violations could seek relief in federal court. 136 S. Ct. 1288, 1296 n.6 (2016).[16] At argument, Justice Breyer questioned the case's posture because "there isn't" a "Supremacy Clause private right of action" and the Court did not have the benefit of "FERC's opinion" except "through the [Solicitor General]."[17] In fact, there is no constitutional, statutory, or equitable basis for private parties to pursue FPA preemption claims in federal district court. Plaintiffs' recourse is to FERC.

A. There is no express or implied FPA private right of action.

The Supreme Court has held that the FPA provides no private right of action. The statute sets "standard[s] for [FERC] to apply and, independently of Commission action, *creates no right which courts may enforce*." *Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (emphasis added).

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14 "'The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.'" *Republic of Iraq v. ABB AG*, 768 F.3d 145, 170 (2d Cir. 2014) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)).

15 And, as Plaintiff NRG told the Northern District while opposing a different post-*Hughes* FPA preemption suit, each of the two inquiries is a "pure legal question" that "can and should be resolved without the need for discovery." Letter Brief of Dunkirk Power, LLC at 3, *Entergy Nuclear Fitzpatrick, LLC v. Zibelman*, No. 15-cv-230 (DNH/TWD) (N.D.N.Y. dismissed Nov. 18, 2016), Dkt. 102.

16 The Court decided *Armstrong* after the lower court proceedings in *Hughes* were complete, and the *Hughes* defendants did not preserve the defense that plaintiffs lacked a cause of action.

17 Oral Arg. Tr. 24:3-11 (U.S. S. Ct. Feb. 24, 2016) (Breyer, J.), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-614_g2hk.pdf.

Decades after *Montana-Dakota*, Congress created a private right of action in a single, circumscribed section of the FPA not relevant here. The Public Utility Regulatory Policies Act (PURPA),[18] which amended the FPA to include provisions relating to cogeneration and small renewable power projects, provides an express cause of action to challenge certain state conduct regarding those facilities. 16 U.S.C. § 824a-3(h)(2)(B). Congress's decision to create a private right to enforce PURPA, but not the FPA generally, suggests that the omission was purposeful, and cuts against inferring a right of action. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) ("[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.") (quotations omitted). Further, the only time Congress authorized a suit for violations of PURPA (not the FPA), it required plaintiffs first to exhaust their administrative remedies. 16 U.S.C. § 824a-3(h)(2)(B); *Allco Fin. Ltd. v. Klee*, 805 F.3d 89, 91-92 (2d Cir. as amended Dec. 1, 2015). To allow Plaintiffs to proceed here would be to infer from the FPA's silence an implied right broader than the express cause of action Congress created in PURPA. There is no basis to do so.[19]

B. The FPA implicitly forecloses private actions for equitable relief.

Plaintiffs seek to invoke the Court's equitable power to enjoin New York's allegedly preempted action. Dkt. 1, ¶ 22 (citing *Ex parte Young*, 209 U.S. 123 (1908)). That gambit fails because "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Armstrong*, 135 S. Ct. at 1385. In *Armstrong*, the Court found evidence of intent to foreclose equitable relief where the federal statute at issue—a

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[18] Pub. L. No. 95-617, 92 Stat. 3117 (1978).

[19] *See also DiLaura v. Power Auth. of N.Y.*, 982 F.2d 73, 81 (2d Cir. 1992) (Winter, J., concurring) ("no federal private right of action for injunctive relief to be inferred from the [FPA's] silence"). "[N]either the statutory language nor the legislative history of [16 U.S.C.] § 803(c) reveals any congressional intent to create a new private cause of action against FERC licensees." *Id*. at 78.

rate regulation provision of the Medicaid Act—provided an administrative relief process based upon a "judgment-laden standard" entrusted to the Secretary of Health and Human Services. *Id.* The same considerations apply as forcefully to the FPA.

1. The FPA's administrative enforcement provisions show Congress's intent to foreclose private enforcement actions.

The "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Armstrong*, 135 S. Ct. at 1385 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290). The FPA contains a comprehensive administrative enforcement scheme. All rates for sales subject to FERC's jurisdiction are to be filed with FERC. 16 U.S.C. § 824d(c). FERC may suspend and examine new or changed rates to ensure they are just and reasonable and not unduly preferential or discriminatory. *Id.* §§ 824d(d), (e). Interested parties can intervene and oppose utility rate filings. 18 C.F.R. § 385.214. Any person may file a complaint seeking changes to any existing "rate [or] charge . . . collected by any public utility for any . . . sale subject to [FERC] jurisdiction," or to "any rule, regulation, practice, or contract affecting such rate [or] charge," that the complainant believes to be "unjust, unreasonable, unduly discriminatory or preferential." 16 U.S.C. § 824e(a). If FERC agrees, then "it *must* take remedial action." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 773-74 (2016) (*EPSA*). Further, "[a]ny person" may file a complaint regarding "anything done or omitted to be done by any [regulated entity] in contravention of" the statute (16 U.S.C. § 825e), or may file a petition asking FERC to issue a declaratory order. 18 C.F.R. § 385.207. FERC has ruled on FPA preemption claims brought to its attention. *E.g.*, *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047, *granting clarification and dismissing reh'g*, 133 FERC ¶ 61,059 (2010), *reh'g denied*, 134 FERC ¶ 61,044, P 30 (2011).[20]

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[20] *See also New York v. FERC*, 535 U.S. 1, 18 (2002) (in regulating unbundled retail transmission FERC lawfully acted under FPA "in an area of pre-existing state regulation"); *Albany Eng'g Corp. v. FERC*, 548 F.3d 1071, 1079 (D.C. Cir. 2008) (vacating FERC order because FERC failed to recognize that the FPA preempted state assessments

FERC also has ample tools to remedy violations. FERC may "perform any and all acts" it finds "necessary or appropriate to carry out" the FPA's provisions. 16 U.S.C. § 825h. Of special relevance here, the FPA specifically empowers FERC—"in its discretion"—to bring an action in federal district court against "any person" to enforce compliance with the FPA and enjoin any acts that violate it or obtain a writ of mandamus compelling compliance. *Id.* § 825m(b). Congress afforded these explicit rights to FERC, committed exercise of them to FERC's discretion, said nothing about suits by private plaintiffs, and instead provided for such entities to seek relief from and through the agency. *Armstrong*, 135 S. Ct. at 1389 (Breyer, J., concurring).[21] Plaintiffs should not be able to end run the scheme Congress created by invoking this Court's equitable powers. The statutory scheme is powerful, if not dispositive, evidence that Congress intended to foreclose such actions.[22]

2. The FPA's provisions are judgment-laden and judicially unadministrable.

In *Armstrong*, the Court observed that it "is difficult" to "imagine a requirement broader and less specific than" one mandating that state plans be "consistent with efficiency, economy,

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at issue).

[21] *See also Friends of E. Hampton Airport, Inc. v. Town of E. Hampton*, 152 F. Supp. 3d 90, 104 (E.D.N.Y. 2015) (Secretary of Transportation's "exclusive[]" authority in Airport and Airway Improvement Act's "comprehensive administrative enforcement scheme" precluded equitable private cause of action to enforce the statute), *aff'd in part, vacated in part on other grounds*, Nos. 15-2334-cv(L), 15-2465-cv(XAP), 2016 WL 6543356 (2d Cir. 2016). In *Friends*, plaintiffs did not appeal—and so the Second Circuit left in place—the district court's determination that the Airport and Airway Improvement Act foreclosed federal court suits alleging preemption by that statute. *Friends of E. Hampton Airport*, 2016 WL 6543356, at * 6-7. The Second Circuit addressed a different federal statute, the Airport Noise Control Act, and found it allowed private enforcement because it contains no comprehensive administrative enforcement scheme and was judicially administrable. *Id.* at *9. As explained in the text, the FPA provides a comprehensive scheme of enforcement and judicially un-administrable standards more like the Airport and Airway Improvement Act.

[22] *Armstrong* did not decide whether the existence of the Medicaid enforcement scheme, by itself, might preclude equitable relief, because that scheme "when combined with the judicially unadministrable nature of [the substantive law]" unquestionably did. *See* 135 S. Ct. at 1385. The same is true here. Nonetheless, it is worth noting that other cases have found that express statutory enforcement schemes can preclude equitable relief. *Seminole Tribe v. Florida*, 517 U.S. 44, 73-75 (1996) ("refus[ing] to supplement" the Indian Gaming Regulatory Act's "carefully crafted and intricate remedial scheme" with *Ex parte Young* actions); *Friends of E. Hampton Airport, Inc.*, 152 F. Supp. 3d at 104.

and quality of care." 135 S. Ct. at 1385. The FPA has a broader, less specific requirement: that wholesale electricity rates be "just and reasonable." As the Supreme Court has explained, "[s]tatutory reasonableness is an abstract quality," and "reduc[ing] [that] abstract concept . . . to concrete expression" requires the "exercise of [FERC's] judgment, in which there is some considerable element of discretion." *Mont.-Dakota Utils*., 341 U.S. at 251; *see also Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008) (The FPA's "'just and reasonable' [requirement] is obviously incapable of precise judicial definition, and [the courts] afford great deference to [FERC's] rate decisions.").

The gravamen of Plaintiffs' preemption claim is that ZECs will "disrupt the economically efficient function of the FERC-approved . . . market auctions" (Dkt. 1, ¶ 4) and undermine FERC's ability to use auctions to set a "just and reasonable rate" via the auctions' "single clearing price" (*id.* ¶¶ 44, 81-83, 84-92). Without acknowledging it, Plaintiffs effectively ask this Court to exercise rate-making judgments and to answer a question that Congress meant for FERC: whether auction prices affected by the participation of generators receiving ZECs would be unjust and unreasonable.

To the extent there is any tension between federal and state policies, the FPA empowers FERC—not the courts—to resolve it. FERC is actively regulating in this area, and recently rejected a complaint seeking to exclude other state-subsidized generation from the regional wholesale market on grounds of alleged unjust price suppression. *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,214 (2015), *reh'g pending*. Having this Court entertain Plaintiffs' FPA claims would defeat the statutory exercise of FERC's expertise, and would undermine the uniform decision-making that is crucial to federal energy policy.

II. PLAINTIFFS' PREEMPTION CLAIMS (COUNTS I AND II) FAIL AS A MATTER OF LAW.

Plaintiffs argue (Dkt. 1, ¶ 7) that "[t]he ZEC program is unlawful because it operates in the area of FERC's exclusive jurisdiction, and federal law thus preempts it." But FERC itself has made clear that its exclusive jurisdiction does not encompass state-created compensation for the environmental attributes of electricity generation. Nor do States intrude into FERC's sphere by preserving continued operation of power plants with favorable emissions profiles, even though the state action alters the supply available to the FERC-regulated markets and may (if FERC allows it) indirectly affect wholesale market prices.

A. States regulate the sale of unbundled environmental attributes of electricity generation; FERC regulates the energy sales.

"Dual sovereignty" is a "defining feature" not only of our Nation's "constitutional blueprint," *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002), but also the FPA. FERC has exclusive authority over sales of electric energy for resale in interstate commerce. 16 U.S.C. § 824(b)(1); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). The FPA simultaneously "places beyond FERC's power, and leaves to the states alone, the regulation of 'any other sale.'" *EPSA*, 136 S. Ct. at 766 (quoting 16 U.S.C. § 824(b)(1)). States also retain exclusive jurisdiction over "facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1). The CES Order exercises these reserved state powers by paying renewable generators and nuclear generators for the environmental benefits of operation.

Like RECs, ZECs are "state-created and state-issued instruments certifying that electric energy was generated pursuant to certain requirements and standards." *WSPP Inc.*, 139 FERC ¶ 61,061, P 21 (2012). And like RECs, ZECs are "inventions" of state law whereby "energy attributes are 'unbundled' from the energy itself and sold separately." *Wheelabrator Lisbon, Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008). When a generator sells a

ZEC or REC independently from the associated energy—that is, when it sells the ZEC or REC to an entity other than the electricity buyer—that sale of attributes is an "other sale," which the FPA excludes from FERC's jurisdiction. 16 U.S.C. § 824(b)(1). As FERC has held, RECs "do[] not constitute the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce," and, thus, "RECs and contracts for the sale of RECs are not . . . facilities subject to [FERC's] jurisdiction under [16 U.S.C. § 824(b)(1)]." *WSPP*, 139 FERC ¶ 61,061, P 21.

While the FPA gives FERC authority over interstate wholesale sales and "practices affecting" such sales (16 U.S.C. § 824(b)(1)), FERC has construed that to encompass only RECs that are "bundled" and sold together with the associated energy as "part of the same transaction." *WSPP*, 139 FERC ¶ 61,061, P 24. FERC has held that sales of environmental attributes on an "unbundled" basis, separate from the associated energy sale, "do[] not affect wholesale electricity rates" (*id.*) and "fall outside [FERC's] jurisdiction under . . . the FPA." *Id.* P 18.[23]

Neither Congress nor FERC has "evince[d] an intent to occupy the relevant field—namely, the regulation of renewable energy credits." *Wheelabrator*, 531 F.3d at 190. To the contrary, FERC has acknowledged that state law governs the creation and conveyance of RECs. *Id.* Because "RECs are created by the States[,] . . . States . . . have the power to determine who owns the REC in the initial instance, and how they may be sold or traded." *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004, P 23 (2003), *reh'g denied*, 107 FERC ¶ 61,016 (2004); *see also Windham Solar LLC*, 156 FERC ¶ 61,042, P 4 (2016); *Morgantown Energy Assocs.*, 139 FERC ¶ 61,066, P 46

[23] Not coincidentally, this distinction between "bundled" and "unbundled" sales of rights associated with the production of electricity is the same jurisdictional line that applies to sales of "emissions allowance[s]" by fossil-fuel generators like those operated by Plaintiffs. *Id.* P 23; *Edison Elec. Inst.*, 69 FERC ¶ 61,344, at 62,289 (1994) ("[J]ust as a sale or transfer of fuel supplies by a public utility is not subject to direct Commission review under section 205 when the sale or transfer occurs independent of a sale of electric energy for resale in interstate commerce, we . . . agree with [Edison Electric Institute] that a sale or transfer of emissions allowances does not constitute a sale of electric energy for resale.").

(2012). Such decisions are not preempted by federal law. *Wheelabrator*, 531 F.3d at 190; *see also id.* at 189 n.10; *Morgantown Energy Assocs. v. Pub. Serv. Comm'n*, No. 2:12-cv-6327, 2013 WL 5462386 (S.D. W. Va. Sept. 30, 2013).

Plaintiffs' attempts to distinguish ZECs from RECs fail. Plaintiffs argue that "[f]ederal law authorizes States to provide a different level of compensation to certain types of renewable generators, but makes no such allowance for States to set the level of compensation for nuclear generators." Dkt. 1, ¶ 50 (citing PURPA). But FERC regulates wholesale electricity sales—not a generator's total "compensation"—and has held already that state laws regarding the sale of unbundled RECs do not intrude on that authority. The same reasoning applies to ZECs. State authority to create and regulate the sale of unbundled RECs or ZECs is grounded in state police powers, and does not depend on PURPA. *Wheelabrator*, 531 F.3d at 190; *Am. Ref-Fuel*, 105 FERC ¶ 61,004, PP 4, 23. This observation also disposes of Plaintiffs' other purported distinctions. It does not matter that "under the PSC's REC program, RECs are created by all qualified renewable generators, without regard to economic need," or that "RECs are publicly traded" (Dkt. 1, ¶ 51). Both ZECs and RECs are creatures of state law, and may be tailored as the state deems appropriate. No federal law requires New York's ZEC and REC programs to be structured identically, or prohibits New York from focusing its ZEC program on nuclear facilities at risk of retiring but essential to retain.[24]

Plaintiffs also overlook important aspects of the renewable energy and ZEC programs. Both provide financial support for the environmental attributes of carbon-free technologies. NYSERDA procurement of Tier 1 RECs supports development of *new* renewable resources on

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[24] Plaintiffs' comment that "Congress had provided renewable generators with tax incentives," Dkt. 1, ¶ 50, is true but irrelevant. The federal incentives for renewable energy do not purport to preempt states from supporting other non-emitting generation resources.

the premise that there is an economic need for support to induce construction. Tier 1 allows competition among qualified renewable resources to set prices for RECs, while potential developers determine whether those prices would sufficiently support construction.[25] Tier 3 ZECs, on the other hand, support *existing* nuclear resources in need of financial support to continue operations, based on administrative determinations that those plants are at risk. Tier 2 similarly supports existing renewable resources that "but for the maintenance contracts [would] cease operations and no longer produce positive emission attributes." CES Order at 117. While it had no federal obligation to do so, New York treated existing renewable and nuclear generation comparably—both support programs require showings of financial need.

B. Federal law allows states to subsidize preferred generation resources.

Plaintiffs complain that ZEC payments will support continued operation of eligible nuclear facilities notwithstanding "that wholesale market price signals are indicating that these units should be retired." Dkt. 1, ¶ 59. But as the United States told the Supreme Court earlier this year, "States are free to require procurement of new generation resources," and presumably to support the retention of existing ones, "even if the price signals in the regional wholesale capacity market indicate that no [such] resources are needed." Brief for the United States as *Amicus Curiae* at 33, *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (Jan. 2016) (No. 14-614), https://perma.cc/4ELB-QKCU (U.S. Br.).

It is settled law that States oversee the generating resource mix serving their citizens and may influence that mix by subsidizing preferred resources. The Supreme Court has acknowledged that States "characteristically" govern the "[n]eed for new power facilities, their economic feasibility, and [retail] rates and services." *Pac. Gas & Elec. Co. v. State Energy Res. Conserva-*

[25] Tier 1 RECs provide new renewable resource developers "sufficient certainty that they will successfully earn a return on their . . . long-lived capital investment necessary to construct and operate a generation facility, [through] a long-term contract or other durable mechanism providing reasonably certain terms . . . ." CES Order at 99.

tion & Dev. Comm'n, 461 U.S. 190, 205 (1983). Likewise, States traditionally regulate generation facilities, "integrated resource planning and utility buy-side" decisions, and "utility generation and resource portfolios." *New York,* 535 U.S. at 24 (quoting FERC). They do so through a variety of means, including supporting the economic viability of preferred resources through RECs and similar measures. Currently, at least twenty-nine states and the District of Columbia have enacted enforceable REC programs or similar laws,[26] which "set[] a minimum requirement for the share of electricity to be supplied from designated renewable energy resources," often tailoring the requirement "to best fit the State's particular resource base or local preferences."[27] Such programs aim to increase the demand for preferred resources and provide compensation via REC sales for the environmental benefits they provide.

The law is clear: "[S]tates remain free to subsidize the construction of [preferred] generators," while FERC regulates how those resources participate in wholesale markets and affect wholesale prices. *New England Power Generators Ass'n v. FERC*, 757 F.3d 283, 291 (D.C. Cir. 2014); *New England States Comm. on Elec. v. ISO New England Inc.*, 142 FERC ¶ 61,108, at 61,490 (2013) (LaFleur, Comm'r, concurring) ("[S]tates have the unquestioned right to make policy choices through the subsidization of capacity"), *reh'g denied*, 151 FERC ¶ 61,056 (2015).[28] Here, New York's decision to compensate eligible resources for their environmental attributes to promote investment in such resources is a traditional exercise of powers the FPA re-

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[26] *See* U.S. Energy Information Administration, *Annual Energy Outlook 2016* at LR-11, Report No. DOE/EIA-0383(2016), www.eia.gov/outlooks/aeo/pdf/0383(2016).pdf (last visited Dec. 1, 2016).

[27] *See* U.S. Energy Information Administration, *Most States Have Renewable Portfolio Standards*, Today in Energy (Feb. 3, 2012), http://www.eia.gov/todayinenergy/detail.cfm?id=4850 (last visited Dec. 1, 2016).

[28] *See also ISO New England Inc.*, 155 FERC ¶ 61,023, P 23 (2016) (exempting certain renewable resources favored by state policy from wholesale market offer rules because FERC balances multiple concerns, including "accomodat[ing] the ability of states to pursue their policy goals"), *appeal pending*; *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, P 143 (acknowledging state rights "to pursue legitimate policy interests"), *on reh'g*, 137 FERC ¶ 61,145, P 3 (2011) ("[S]tates and localities have their own policies and objectives," which may not be reflected in the wholesale market design and with which FERC intends not to "unreasonably interfere").

serves to the States. As one of the Plaintiffs recently told the Supreme Court, "states have an 'array of tools' at their disposal for achieving legitimate goals," including appropriate "subsidies" and "renewable *or other fuel-based standards*."[29] That is exactly what New York has done: it opted to support continued use of a particular carbon-free fuel, as an interim measure, using one of the "'array of tools' at [its] disposal for achieving legitimate goals." *Id.*

C. The FPA does not preempt state generation-support programs simply because they affect wholesale supply.

The FPA reserves to States the authority to support specific generation facilities because of their environmental attributes. Such actions will affect the pool of resources available to supply power—that is the FPA-sanctioned purpose of *all* such programs—but doing so does not, by itself, trigger preemption. "[T]he law of supply-and-demand is not the law of preemption." *PPL EnergyPlus*, *LLC v. Solomon*, 766 F.3d 241, 255 (3d Cir. 2014). "[S]tates' regulatory choices accumulate into the available supply transacted through the interstate market," and while FERC has exclusive control over interstate rates, that "does not carry with it exclusive control over any and every force that influences interstate rates." *Id.* States may "forbid new entrants," "require retirement of existing generators," "limit new construction to . . . environmentally-friendly units, or . . . take any other action in their role as regulators of generation facilities," which choices "affect the pool of bidders" in wholesale electricity markets and "in turn affect[] the market clearing price" to the extent FERC allows. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009). In short, "[s]tates . . . may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain" (*Hughes*, 136 S. Ct. at 1298), while FERC decides how and to what extent such state actions affect wholesale prices.

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[29] Brief of the Electric Power Supply Ass'n, the Edison Electric Institute, and PJM Power Providers Group, Inc. as *Amici Curiae* in Support of Respondents at 19-20, *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (Jan. 19, 2016) (Nos. 14-614, 14-623) (emphasis added), https://perma.cc/Y2L5-MTFJ.

Because New York "regulate[d] within the domain Congress assigned" to it (*id.*), Plaintiffs' preemption claims fail.

D. *Hughes* does not preempt environmental attribute sales.

Plaintiffs seek to portray the CES Order as similar to the Maryland program addressed in *Hughes*. *E.g.*, Dkt. 1, ¶ 7. But the two programs are fundamentally different. Maryland's program did not involve payment for environmental attribute sales. It involved payment for sales of electric energy and capacity into a regional wholesale auction—at prices different than the FERC-approved auction prices.

In *Hughes*, Maryland sought to develop new, in-state natural-gas-fired electric generation facilities by soliciting proposals from generation developers, accepting one, and directing LSEs to enter into a twenty-year pricing contract called a "contract for differences" with the winning developer. 136 S. Ct. at 1294. The contracts did not provide for the developer to sell the new facility's capacity and energy to the LSEs. *Id.* at 1295. Rather, they required the developer to sell the output of the new resource directly into a regional wholesale electricity market, while guaranteeing the developer a different price. *Id.* The contracts "require[d the developer] to . . . offer [the] Facility's output into the PJM Markets,"[30] "dictate[d] the manner in which [the developer] participate[d] in the PJM Markets," "mandate[d] a financial settlement only if [the developer] clear[ed] the [auction] in any given year," and "determine[d] the amount of settlement based on [the developer's] physical energy and capacity sales into the PJM Markets." *PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 835 (D. Md. 2013) (quotations omitted), *aff'd*, 753 F.3d 467 (4th Cir. 2014), *aff'd sub nom. Hughes*. The contracts "exchanged the unknown or variable energy prices received in the PJM Markets for the fixed contract price." *Id.* at 833.

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[30] PJM (which stands for "Pennsylvania-New Jersey-Maryland"), the Mid-Atlantic region counterpart to the New York Independent System Operator (NYISO), operates the transmission grid and administers wholesale electric power markets in thirteen states and the District of Columbia.

On review, the Supreme Court held that Maryland's program impermissibly "set[] an interstate wholesale rate" by "requir[ing] [the developer] to participate in the [regional wholesale] capacity auction" while "guarantee[ing] [that the developer would receive] a rate distinct from the clearing price for its interstate sales of capacity [in that auction]." *Hughes*, 136 S. Ct. at 1297. The Court tread carefully, however, heeding Justice Sotomayor's caution that preemption inquiries related to collaborative federalism laws like the FPA "are particularly delicate" (*id.* at 1300). The Court confined its opinion to addressing a single "fatal defect" in Maryland's program, which is not present here: the condition that the developer would not receive the contract price unless its bids to sell capacity and energy in the PJM auctions were accepted. *Id.* at 1299.

The Court distinguished carefully between programs like Maryland's that operate "within the [wholesale] auction" (*id.* at 1299), and those like the CES Order that operate outside the auction. The Court emphasized that "[n]othing in [its] opinion should be read to foreclose" other measures States might employ to "encourage development of new or clean generation" including "direct subsidies," so long as they are "'untethered'" to a generator's wholesale auction participation. *Id.* (quoting Brief for Respondents at 40). Plaintiffs seize on the Court's use of the word "untethered," positing several ways in which the CES Order allegedly is "tethered"—a more accurate word might be "related"—to the auctions operated by the NYISO. *E.g.*, Dkt. 1, ¶ 67. But the Court's holding is as clear as it is narrow: "So long as a State does not condition payment of funds on capacity clearing [a regional wholesale] auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable." *Hughes*, 136 S. Ct. at 1299.[31]

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[31] *See also id.* at 1292 (explaining that Maryland's program was invalid because it "condition[ed] receipt of . . . subsidies on the new generator selling capacity into a FERC-regulated wholesale auction."); U.S. Br. at 17 ("State subsidization, *combined with state-mandated bidding and clearing*" in the wholesale auction, raises preemption concerns) (emphasis added).

Plaintiffs do not allege that the CES Order conditions ZEC payments on the nuclear plants' bidding into or clearing any NYISO auction. Nor could they plausibly make such an allegation. ZEC payments, like REC payments, are tied to the generation of electric energy by facilities with specified attributes. CES Order at 106 ("one REC created for each one [megawatt-hour] generated by an eligible facility"); *id.* at 145 (ZECs paid "on a per unit output basis" up to an annual 27,618,000 megawatt-hour cap based on historic output). What matters is that electricity is *produced*—not how it is *sold*. Neither RECs nor ZECs are conditioned upon a wholesale sale.

Plaintiffs seek to get around this fact by alleging that, as a practical matter, "[a]ll electricity produced by these nuclear generators must be sold *directly or indirectly* in the NYISO auctions, as there are no alternative markets." Dkt. 1, ¶ 64 (emphasis added). But even taking that inaccurate assertion as true, it is insufficient to bring this case under *Hughes*. Plaintiffs acknowledge that "New York [retail electric suppliers] can meet their capacity obligations . . . through bilateral contracts with generation-owners." Dkt. 1, ¶ 35. In other words, generators—including ZEC-receiving nuclear generators—may sell electricity to a retail supplier who could use it to satisfy its obligations in the NYISO auctions. Those bilateral sales occur outside of the "bid and clear" auction markets, and *Hughes* expressly distinguished such arrangements. 136 S. Ct. at 1299 (distinguishing "traditional bilateral contracts," which "transfer ownership of capacity [or energy] from one party to another outside the auction," so that buyers may then sell the purchased capacity or energy on their own account—arrangements the auctions have "long accommodated").

In this case, the CES Order is doubly safe. First, ZEC and REC revenues are not dependent on sales directly into the NYISO auctions, and thus lack the "fatal defect" (136 S. Ct. at 1299) that triggered *Hughes* preemption. Second, ZECs and RECs do not set prices for any

wholesale energy or capacity sale at all. They provide compensation for the unbundled environmental attributes of energy produced by an eligible generator—regardless of how the energy is disposed of.

III. PLAINTIFFS' DORMANT COMMERCE CLAUSE ARGUMENTS FAIL AS A MATTER OF LAW.

In the litigation leading to *Hughes*, two district courts rejected dormant Commerce Clause challenges to state generation-support programs. This Court should do the same.

As a threshold matter, New York's creation of commerce in new intangible property, ZECs, reflecting the environmental and fuel-diversity benefits of the nuclear energy on which the state historically has relied, is "not the kind of action with which the Commerce Clause is concerned." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 805, 807 (1976) (program subsidizing in-state commerce to remedy a local environmental problem did not violate Commerce Clause); *see also id.* at 815-816 (Stevens, J., concurring) ("[T]he Commerce Clause surely does not impose on the States any obligation to subsidize out-of-state business."); *cf. McBurney v. Young*, 133 S. Ct. 1709, 1720 (2013) ("Insofar as there is a 'market' for public documents in Virginia, it is a market for a product that the Commonwealth has created and of which the Commonwealth is the sole manufacturer."). As the Court explained, the dormant Commerce Clause does not apply when the state enters "into the market as a purchaser, in effect, of a potential article of interstate commerce." *Id.* at 808. Nor does it apply when the state itself creates a market where none previously existed. That is why another district court in this Circuit recently dismissed on 12(b)(6) grounds a dormant Commerce Clause challenge to Connecticut's REC program. *Allco Fin. Ltd. v. Klee*, Nos. 3:15-cv-608 (CSH), 3:16-cv-508 (CSH), 2016 WL 4414774, at *23-24 (D. Conn. Aug. 18, 2016) (because "Connecticut created the . . . market for RECs," it was "not obligated to spread the benefit . . . to states that do not also bear the . . . cost of the subsidy, which is ultimate-

ly paid by Connecticut ratepayers."), *appeal docketed*, No. 16-2946 (2d Cir. Aug. 23, 2016). The same reasoning bars Plaintiffs' Commerce Clause challenge here.

Even where the dormant Commerce Clause applies, it restricts only state action that "(1) clearly discriminates against interstate commerce in favor of intrastate commerce, (2) imposes a burden on interstate commerce incommensurate with the local benefits secured; or (3) has the practical effect of 'extraterritorial' control of commerce occurring entirely outside the boundaries of the state in question." *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 90 (2d Cir. 2009) (quotations omitted). None of these concerns apply here. As explained above, the ZEC program seeks to retain the zero-emissions nuclear power on which New York historically relied, as a bridge to a renewables-heavy future power supply. ZECs are available to any nuclear plant, wherever located, that historically provided energy to New York and is now at risk of retiring because of insufficient revenues. *See* CES Order at 50. Plaintiffs construe this as favoring "specified New York nuclear facilities" (Dkt. 1, ¶ 98); but not all in-state nuclear facilities are eligible for ZECs,[32] and Plaintiffs identify no out-of-state facilities that would be ZEC-eligible.

Plaintiffs complain (Dkt. 1, ¶ 98) that the ZEC program "is not even-handed with respect to other technologies that could produce carbon-free electricity." This ignores Tiers 1 and 2 of the CES Order, which support new and at-risk, existing *renewable* (i.e., non-nuclear) resources. The differences among Tiers 1, 2, and 3 are justified by differences in the supported resources' benefits, needs, and ownership concentration. But even if Plaintiffs were correct that the Commission had not regulated "even-handed[ly]" as between renewable and nuclear generation, it would not implicate Commerce Clause concerns. The Constitution forbids discrimination against interstate commerce—not geographically neutral distinctions among technologies. *Minnesota v.*

[32] The Commission concluded, for example, that Indian Point's zero-emission energy was not at risk.

Clover Leaf Creamery Co., 449 U.S. 456, 473 (1981) (State could ban plastic milk containers even though the producers of those containers were all of out of state and most suppliers of alternative containers were in-state). Even where facially neutral regulation produces "beneficial side effects" for in-state industry, those benefits do not justify plaintiffs' characterizations of the regulations as "protectionist" (*e.g.*, Dkt. 1, ¶ 96) or allow courts to second-guess a state's avowed environmental purpose. *Minnesota*, 449 U.S. at 463 n.7; *see also Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1089 (9th Cir. 2013) ("[D]istinctions that benefit in-state producers" can be acceptable if justified by reasons not "based on state boundaries alone").

Plaintiffs likewise fail to show a violation under *Pike v. Bruce Church*, *Inc.*, 397 U.S. 137 (1970). *Pike* prohibits facially neutral actions that impose *disparate* burdens on out-of-state interests that are "clearly excessive in relation to the putative local benefits" (*id.* at 142). *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 192 (2d Cir. 2007) ("To prove that a state law . . . fails the *Pike* balancing test, a plaintiff must at least show that the law has a disparate impact on interstate commerce.") (quotation omitted); *Nat'l Paint & Coatings Ass'n v. Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995) ("No disparate treatment, no disparate impact, no problem under the dormant commerce clause."); *Jones v. Schneiderman,* 974 F. Supp. 2d 322, 350 (S.D.N.Y. 2013) (dismissing *Pike* challenge to state ban on in-state activities that applied equally to instate and out-of-state interests). The disparate burden on interstate commerce must be "actual," rather than hypothetical. *N.Y. State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994). Here, Plaintiffs identify no disparate burdens on in-state and out-of-state interests. The facilities ineligible for ZECs—non-nuclear resources, profitable nuclear facilities (those not at risk of retiring), and potential new nuclear plants—are all ineligible regardless of their location.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint with prejudice.

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