17-2654-cv

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

COALITION FOR COMPETITIVE ELECTRICITY, *et al.*

Plaintiffs-Appellants,

v.

AUDREY ZIBELMAN, *et al.*,

Defendants-Appellees.

On Appeal from a Final Judgment of the United States District Court
for the Southern District of New York, No. 16-cv-8164

**BRIEF OF *AMICI CURIAE*
AMERICAN PETROLEUM INSTITUTE AND NATURAL GAS SUPPLY ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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October 20, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and the corresponding Circuit Rule, American Petroleum Institute (API) states that it is a not-for-profit trade association based in Washington, D.C. charged with promoting the interests of its over 625 members in the United States. API is not a publicly held corporation. It has no parent companies, and no companies have a ten percent or greater ownership interest in API.

Pursuant to Federal Rule of Appellate Procedure 26.1 and the corresponding Circuit Rule, Natural Gas Supply Association (NGSA) states that it is a non-for-profit trade association based in Washington, D.C. that represents the interest of natural gas producers and marketers in the United States. NGSA is not a publicly held corporation. It has no parent companies, and no companies have a ten percent or greater ownership interest in NGSA.

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API	American Petroleum Institute
CCE or Plaintiffs-Appellants	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.
CCE Br.	Brief for Plaintiffs-Appellants filed in Case No. 17-2654 on October 13, 2017
CES Order	State of New York Public Service Commission, Order Adopting A Clean Energy Standard (Aug. 1, 2016)
Decision	*Coal. for Competitive Elec., et al. v. Zibelman*, No. 16 CV 8164, 2017 WL 3172866, (S.D.N.Y. July 25, 2017)
FPA	Federal Power Act, 16 U.S.C. § 824 *et. seq.*
FERC	Federal Energy Regulatory Commission
ICE	Intercontinental Exchange, Inc.
NGA	Natural Gas Act, 15 U.S.C. § 717 *et. seq.*
NGSA	Natural Gas Supply Association
NYISO	New York Independent System Operator, Inc.
NYGATS	New York Generation Attribute System
NYSERDA	New York State Energy Research and Development Authority
PURPA	Public Utilities Regulatory Policy Act of 1978

INTRODUCTION AND STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The American Petroleum Institute (API) and Natural Gas Supply Association (NGSA) (collectively, *Amici*) are two of the largest national trade associations for the natural gas industry, representing members engaged in all aspects of supply and delivery of natural gas to electricity generators nationwide. Natural gas is now the leading fuel source for electricity generation in the United States, with natural-gas fired generators providing over a third of the nation's electricity supply in 2016.[2] Accordingly, *Amici* are uniquely situated to provide insight into the significant adverse impacts of the District Court's erroneous decision on the nation's organized wholesale energy markets and the natural gas industry supplying those markets. *Amici* timely notified counsel of record for all parties that they intended to submit this brief. All parties consented to the filing.

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[1] Pursuant to Local Rule 29.1(b), *amici* affirm that no party's counsel authored the brief in whole or in part; that no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

[2] About 33.8 percent of the current U.S. electricity generation is fired by natural gas. *See* U.S. Energy Information Administration, Short-Term Energy Outlook, *at* https://www.eia.gov/outlooks/steo/data/browser/#/?v=23&f=A&s=&start=2012&end=2018&map=&ctype=linechart&maptype=0&id=&linechart=CLTOCON_EL_US~NGTOCON_EL_US~PATOCON_EL_US.

API has more than 625 members, including natural gas producers, gathering and processing facility operators, intra- and inter-state pipeline companies, natural gas marketers, and operators of liquefied natural gas (LNG) import and export facilities in the United States and around the world, as well as owners, operators, and manufacturers of essential technology and equipment used all along the natural gas value chain. API is charged with, among other things, representing its members' interests in all administrative and legal proceedings that impact the natural gas supply and delivery chain, including cases involving the exclusive authority of the Federal Energy Regulatory Commission (FERC) to regulate wholesale and interstate energy markets under the Federal Power Act, 16 U.S.C. § 824 *et seq*. (FPA) and its companion statute, the Natural Gas Act, 15 U.S.C. § 717 *et seq*. (NGA).

Founded in 1965, NGSA is the only national trade association that solely focuses on producer-marketer issues related to the downstream natural gas industry. NGSA maintains a narrow but deep focus on the regulatory issues that affect natural gas producer-marketers and has been involved in a substantive manner in every one of FERC's significant natural gas rulemakings since FERC's creation in 1977, including the restructuring of the natural gas industry though Orders Nos. 436, 636 and 637. NGSA has consistently advocated for well-functioning wholesale markets for natural gas and electricity; policies that support market transparency, efficient nomination, and scheduling protocols; just and reasonable transportation rates; non-preferential terms and conditions of transportation services; and the removal of barriers to developing needed natural gas infrastructure. NGSA has a long-established commitment to ensuring a public policy environment that fosters a growing, competitive market for natural gas.

The United States is in the midst of an energy renaissance, which has transformed the country from a projected major natural gas importer to a net natural gas exporter, with abundant supplies of natural gas, in the span of a few short years. Natural gas, when used to fuel electricity generation, offers substantial benefits over other fossil fuels, including lower greenhouse gas and other harmful air emissions, low cost, and a reliable and integrated nationwide delivery system. Indeed, it is the overwhelming market advantages offered by natural gas that have spurred the nuclear energy industry to seek unprecedented and blatantly discriminatory subsidies from various states through direct intervention in the design and operation of the organized wholesale electricity markets. The nation's suppliers, transporters, and purchasers of low-cost, natural gas used for electricity generation should not be intentionally and unduly disadvantaged in the organized wholesale electricity markets due to such state policies. And the problem is compounded if, as the District Court held, regulated entities are no longer allowed to bring suits in equity to enforce the exclusive authority of the FERC to regulate wholesale sales and the transmission of electricity in interstate commerce.

SUMMARY OF ARGUMENT

The New York Zero Emission Credit (ZEC) program, despite its name, is not a program primarily intended to abate greenhouse gas emissions or the impacts of climate change on New Yorkers. Rather, it unlawfully requires New York rate-payers to subsidize a handful of privately-held nuclear generating units,[3] undermining competition in wholesale markets and discriminating against natural-gas-fired generators supplied by *Amici*'s member companies. Any environmental benefits of the program are incidental and seemingly unrelated to its true purpose. The FPA preempts New York's discriminatory intervention in the wholesale power markets, regardless of intent, and the District Court's order dismissing Plaintiffs-Appellants' Complaint accordingly should be reversed.

Amici support the arguments of Plaintiffs-Appellants[4] that the ZEC program impermissibly impinges on FERC's exclusive authority under the FPA to regulate

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[3] The Indian Point nuclear plant was excluded from the program. CCE Br. at 11.

[4] Plaintiffs-Appellants 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. (collectively "CCE").

the "rates and charges made, demanded, or received … for or *in connection with*" wholesale sales. *Hughes v. Talen Energy Marketing*, 136 S. Ct. 1288, 1292 (2016) (emphasis added); 16 U.S.C. § 824d(a); CCE Br. at 29-30. Further, *Amici* agree that the *effect* of the ZEC program is to impermissibly favor incumbent nuclear plants over other more efficient generation suppliers in organized energy markets, contrary to the FPA. *Id.* at 31.

Contrary to the District Court's mistaken decision, the ZEC program requires participation in the wholesale markets as a condition of receipt of the ZEC subsidy – both as a practical matter, and as an express, formal *requirement* of the standard form contracts used by New York to implement the program. And ZEC prices are set *based on* projected wholesale market prices. This renders the program's design and effect on wholesale markets indistinguishable from the Maryland program the Supreme Court struck down in *Hughes*, 136 S. Ct. at 1292, because the program: (1) requires participation in the wholesale markets as a condition of the subsidy; (2) guarantees that the in-state nuclear generators will receive a different price than they would otherwise obtain in FERC-regulated wholesale markets, and (3) directly affects wholesale power prices by artificially reducing the price at which the in-state nuclear generators will bid power into the wholesale market.

Further, unlike the programs upheld by this Court in *Allco Fin. Ltd. v. Klee*, 861 F.3d 82 (2d Cir. 2017), the New York ZEC program does not involve traditional bilateral contracts conducted outside of wholesale market auctions, nor are the ZEC program contracts subject to review by FERC for consistency with the FPA's "just and reasonable" standard.

The District Court also misapplied the Supreme Court's decision in *Armstrong v. Exceptional Child Ctr., Inc*., 135 S. Ct. 1378 (2015), which provides that where the relevant statute does not expressly prohibit suits in equity, Congress may nevertheless demonstrate an implicit intent to foreclose such suits where two tests are met: (1) the statute establishes a distinct "sole remedy" through which the administering agency enforces the relevant provision; *and* (2) the law presents a "judicially unadministrable" standard. The District Court correctly concluded that the FPA does not satisfy the second part of this test, but the court failed to recognize that *both* parts of the *Armstrong* two-part test must be met to imply Congressional intent to foreclose suits at equity. This alone is sufficient basis for reversal. In any event, the District Court also misapplied the first ("sole remedy") part of the *Armstrong* test, wrongly concluding that Congress, by enacting a private cause of action to address failure to meet distinct and specific requirements of the Public Utilities Regulatory Policy Act of 1978 (PURPA), demonstrated an intent to preclude suits at equity to enforce the FPA's grant of exclusive jurisdiction to FERC over interstate wholesale ratemaking. But PURPA was enacted decades after the FPA, did not amend the FPA, and the PURPA cause of action relied on by the District Court has nothing to do with FERC's exclusive ratemaking jurisdiction under the FPA.

Finally, strong policy reasons counsel in favor of reversing the District Court's decision. Many large power-consuming states are pursuing or considering programs similar to the program at issue here, which would invite a patchwork of subsidy programs that interfere with wholesale markets. Further, if allowed to stand, the District Court's decision would foreclose equitable relief under the FPA and its companion statute the NGA – a result that conflicts with decades of precedent and FERC's own view of equity jurisdiction under these statutes.

ARGUMENT

I. THE NEW YORK ZEC PROGRAM UNDERMINES WHOLESALE ELECTRICITY MARKETS DESIGNED TO SUPPORT FUEL-NEUTRAL, LEAST-COST SUPPLY OF ELECTRICITY

Before the FPA became law, most electricity was sold by vertically integrated largely local monopoly utilities that built, owned and operated power plants, transmission lines, and local delivery systems. State regulators had authority over intrastate sales and retail rates, but states were precluded from regulating the *interstate* sale of electricity. *Pub. Utils. Comm'n v. Attleboro Steam*

& Elec. Co., 273 U.S. 83 (1927). Congress passed the FPA in 1935 to close the gap with regard to regulation of the wholesale sale of electricity in interstate commerce and ensure that monopoly wholesale suppliers were regulated in order to keep prices competitive and avoid "economically inefficient behavior." *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 394 (1983). Three years later, Congress passed the NGA "to protect the consumers' interests against exploitation at the hands of natural gas companies." *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 612 (1944). Together, the statutes give FERC exclusive jurisdiction over wholesale sales of electricity and transmission of electricity and natural gas in interstate commerce, tasking FERC with ensuring that jurisdictional rates are just and reasonable and not unduly discriminatory. This history further explains why the FPA and NGA are read in *pari materia*. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

Under the FPA, FERC has fostered the development of fuel-neutral, open-access, auction-based regional wholesale electricity markets which operate pursuant to complex rules (embodied in tariffs filed with and accepted by FERC) designed to ensure workable competition in those markets and the reliable operation of the electric grid. The organized electricity markets were established under the exclusive jurisdiction of FERC on the basis that one electric generating resource should not be unduly favored over another based on generation technology or fuel type, and these markets are intentionally designed to select the *lowest cost* resources needed to meet demand. This market structure is intended to provide the appropriate economic signals to wholesale market participants, who on this basis determine whether and how to invest in new resources, or alternatively, retire uneconomic resources. It encourages fair competition, and selects the least-cost supply options for meeting the nation's electricity needs – benefitting the ultimate consumer consistent with the mandate of Congress in the FPA. *See, e.g.*, *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶ 61,071, at P 1 (2008) ("National policy has been, and continues to be, to foster competition in wholesale electric power markets.").

Large-scale subsidy programs for a narrow set of nuclear generators (three in the case of the New York ZEC program) artificially inhibit the economically efficient functioning of organized wholesale markets and undermine FERC's ability to properly regulate them. Further, establishment of precedent that would allow a patchwork of differing state subsidy programs tethered to wholesale markets, each designed to promote state-specific goals (or state-specific economic interests), would disrupt the wholesale energy markets and undermine FERC's ability to carry out its statutory function.

II. THE NEW YORK ZEC PROGRAM IS PREEMPTED BY THE FPA UNDER THE SUPREME COURT'S DECISION IN *HUGHES*

New York's ZEC program is contrary to the fundamental policies upon which the FPA is based and impermissibly intrudes on FERC's wholesale ratemaking authority. As set forth below, New York's ZEC program is functionally indistinguishable from the program struck down in *Hughes*, and accordingly is preempted by the FPA.

The Supreme Court in *Hughes* concluded that the FPA preempted a Maryland regulation that sought to promote the development of new generation resources through a "contract for differences" subsidy mechanism. This mechanism provided such resources a "guarantee[d] . . .rate distinct from the clearing price for its [] sales" in FERC-approved organized markets. 136 S. Ct. at 1290. The Court held that, "[b]y adjusting an interstate wholesale rate [for electricity], Maryland's program invade[d] FERC's regulatory turf." *Id.* at 1297. Key to the Court's conclusion was the fact that the Maryland program did not operate through a "traditional bilateral contract" that would be subject to FERC's review for reasonableness under the FPA. *Id.* at 1295**.** Rather, the state program mandated that the generators and the load serving entities "exchange money based on the cost of . . . sales" to the regional transmission organizations charged with administering the wholesale market (PJM in that case). *Id.* at 1291. The Court suggested that other measures might be permissible, but only if they were "untethered to a generator's wholesale market participation." *Id.* at 1299.

Contrary to the District Court's analysis, the New York ZEC program is indistinguishable in all material respects from the Maryland program struck down in *Hughes*. First, the New York ZEC price mechanism directly "tethers" the ZEC-based subsidy to wholesale market rates because the subsidy payment is determined based on the rates that the subsidized nuclear generators expect to receive for sales in the NYISO markets (these expected rates are based on futures-based price indices for transactions in the NYISO markets). The ZEC subsidy is paid per megawatt hour of associated nuclear generation output and is calculated by taking a base amount, determined to be the "social cost of carbon,"[5] subtracting certain additional revenues already recovered by the nuclear generators as a result of the Regional Greenhouse Gas Initiative,[6] and then subtracting a specified "price

[5] *See* State of New York Public Service Commission, Order Adopting A Clean Energy Standard (CES Order) (Aug. 1, 2016) at 130-35, 136-38, *at* https://www.nyserda.ny.gov/All-Programs/Programs/Clean-Energy-Standard. The social cost of carbon is intended to be a measure, in dollars, of the long-term damage done by a ton of carbon dioxide emissions in a given year. The CES Order provides a formula for converting this metric into dollars per mega-watt hour of generation output based on an estimated marginal carbon emissions rate per megawatt hour for the expected generation resource mix.

[6] The Regional Greenhouse Gas Initiative is a multi-state, market-based regulatory mechanism (commonly called a "cap and trade" scheme) that requires fossil-fueled

adjustment." Of critical importance, this "price adjustment" is *calculated based on the projected wholesale prices* a ZEC-subsidized nuclear generator would expect to receive for sales in the NYISO's wholesale energy and capacity markets.[7] As projected wholesale prices decrease, the price adjustment and the resulting amount of ZEC subsidy payments correspondingly increase, and vice versa. ZEC subsidy payments therefore are directly tethered to wholesale market prices; and they function, as intended, to compensate for changes in the wholesale prices that these subsidized nuclear generators would otherwise expect to receive for sales in the NYISO markets.[8] The result, like Maryland's contract for differences struck down in *Hughes*, is to ensure a guaranteed minimum rate for the qualifying in-state generators distinct from the rates they would otherwise receive for sales in the FERC-regulated wholesale markets. Further, the ZEC subsidy directly affects prices in the NYISO markets by changing what the subsidized nuclear generators can economically bid into those markets – resulting in an estimated depression of

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power plants to obtain and "retire" tradeable credits corresponding to their carbon dioxide emissions.

[7] Specifically, the price adjustment is calculated by the amount that independently published forecasts of energy and capacity prices in the NYISO markets will exceed $39/megawatt hour. CES Order at 138.

[8] FERC's *State Policies and Wholesale Markets Operated by ISO New England Inc., New York Independent System Operator, Inc., and PJM Interconnection, L.L.C.* proceeding is further evidence of the tethered nature of these programs. *See* https://www.ferc.gov/CalendarFiles/20170523170542-AD17-11-000PostTC.pdf.

prices in those markets by $15 billion over 12 years, with adverse effects on natural gas-fired generators and other market participants. Decision at *4 (citing Complaint ¶ 47).

Second, contrary to the District Court's conclusion, the New York ZEC program requires the subsidized nuclear generators that are the beneficiaries of the program to participate in the NYISO markets. As a practical matter, these plants do participate, and have no economic alternative but to participate, in these markets – as CCE's brief clearly and conclusively demonstrates. CCE Br. at 32-33. The New York Public Service Commission (PSC) thus had no need to *require* participation in the NYISO markets. Given this practical reality, the absence of such an express requirement in the CES Order does not meaningfully distinguish the instant case from *Hughes* – and therefore cannot shield the program from preemption under the FPA. Though deliberately crafted to get around the "tethering" test under *Hughes* by parties that stand to benefit[i] from the ZEC program, it is ultimately a distinction without a difference.

In any event, the standard form contracts that New York has used to implement the ZEC program make clear that the program *does expressly require* the beneficiary nuclear generators to participate in the NYISO markets as a condition of selling their ZECs in exchange for ZEC subsidy payments. Under the

ZEC program, the New York State Energy Research and Development Authority (NYSERDA) purchases ZECs from the owners of each of the subsidized nuclear generators and NYSERDA, in turn, sells the ZECs to load serving entities (LSEs). NYSERDA offers the nuclear generators long-term purchase contracts for their ZECs "in accordance with the price, contract period and other terms specified in this Order." CES Order at 156-57. NYSERDA and the owners of the three subsidized nuclear plants entered into standardized 12-year term contracts for the purchase and sale of ZECs (hereinafter, ZEC Contracts).[9] Two of these standardized contracts have been made public through Securities and Exchange Commission filings[10] and this Court accordingly can take judicial notice of them.

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[9] *See* New York Public Service Commission, "Order Approving Administrative Cost Recovery, Standard Agreements and Backstop Principles," Case 15-E-0302 (Nov. 17, 2016) (Standard Agreements Order), Appendix, Agreement For The Sale of Zero-Emissions Energy Certificates, Recitals ("WHEREAS, the [ZEC program] directs[NYSERDA] to offer long-term contracts for the purchase of [ZECs] from the FitzPatrick, Ginna and Nine Mile Point generating facilities in accordance with the price, contract period and other terms specified in the CES Order; and WHEREAS, [NYSERDA] has entered contracts for the purchase of ZECs from the FitzPatrick, Ginna and Nine Mile Point generating facilities") *at* https://www.nyserda.ny.gov/All-Programs/Programs/Clean-Energy-Standard/REC-and-ZEC-Purchasers.

[10] *See* ZEC Standard Contract By And Between NYSERDA And Nine Mile Point Nuclear Station, LLC (Nov. 18, 2016), *at* https://www.sec.gov/Archives/edgar/data/1109357/000119312516772311/d298852dex101.htm; ZEC Standard Contract By And Between NYSERDA And R.E. Ginna Nuclear Power Plant, LLC (Nov. 18, 2016), *at*

See, e.g., *Silsby v. Icahn*, 17 F. Supp. 3d 348, 354 (S.D.N.Y. Apr. 30, 2014) (quoting *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773-74 (2d Cir. 1991)).

Under the ZEC Contracts, the subsidized nuclear generators must sell their generation output in the NYISO markets as a condition of creating and selling their ZECs to NYSERDA – because their ZECs are created and tracked based solely on metered electricity generated and sold and settled through the NYISO markets. This is how it works: Under the ZEC Contracts, NYSERDA must purchase ZECs created and tracked through the New York Generation Attribute System (NYGATS). NYGATS is an "online certificate-tracking system created pursuant to state law that records information about electricity generated, imported, and consumed within New York State. . . . Using unique serial numbers, NYGATS can issue, track, and manage energy attribute certificates," including ZECs.[11] These transactions are governed by the NYGATS Operating Rules promulgated by NYSERDA.[12] Under the NYGATS Operating Rules, the three subsidized nuclear generators eligible for ZECs are "NYISO Generators," defined as generators

https://www.sec.gov/Archives/edgar/data/1109357/000119312516772311/d298852dex102.htm.

[11] New York Generation Attribute Tracking System (NYGATS), *at* https://www.nyserda.ny.gov/All-Programs/Programs/NYGATS.

[12] CES Order at 106 & Appendix C; *see also* NYGATS Operating Rules, Version 1.0 (March 29, 2016), *at* https://www.nyserda.ny.gov/-/media/Files/Programs/NYGATS/Operating-Rules.pdf.

whose output is measured and reported by the NYISO.[13] Under the ZEC Contracts, ZECs are created in the nuclear generators' accounts in NYGATs – and sold to NYSERDA – based on the relevant nuclear generator's generation output measured at the "Facility Revenue Meters," in accordance with the NYGATS Operating Rules.[14] Under each of the ZEC Contracts, "Facility Revenue Meters" are defined to refer to specific meters at the relevant nuclear generator that are designated by NYISO for measuring the generator's *generation output scheduled, sold and settled through the NYISO's wholesale markets*.[15]

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[13] This can be shown in part by the fact that the ZEC Contracts identify the three plants by their NYISO identification numbers (known as the point ID or "PTID"), which under NYGATS Operating Rules means that they are NYISO Generators. *See* ZEC Contracts, Article I; *see also* NYGATS Operating Rules, Section 17 (definition of "NYISO Generator") & Sections 1.1, 4.1, 4.4.1, 4.5, 5.1.1, 5.2, 5.3, 5.6, 5.7, 9.1, 9.2.3. NYISO Generators are distinguished from other categories of generators located in New York who may not be selling any or all of their generation output into the NYISO markets, such as "New York Behind-the-Meter Generators" or "NYISO Generators Also Serving On-Site Loads".

[14] ZEC Contracts, Section 2.2. ZEC Sales & Section 3.1 ZEC Qualification.

[15] ZEC Contracts, Article I. "Facility Revenue Meters" is referenced in the NYGATS Operating Rules as the plant's "Revenue-Quality Meter." Under the NYGATS Operating Rules, the Revenue-Quality Meter for a NYISO Generator "is any meter that is accepted by NYISO for settlements." NYGATS Operating Rules, Section 5.3. Revenue Metering Standards. The NYISO, in turn, accepts meters for settlements that are used "for conducting accurate financial settlements of the [NYISO]-administered wholesale electric energy markets." NYISO, Manual 25: Revenue Metering Requirements Manual (Dec. 2016) , Section 1, *at* http://www.nyiso.com/public/webdocs/markets_operations/documents/Manuals_and_Guides/Manuals/Administrative/rev_mtr_req_mnl.pdf.

Because the ZEC Contracts require that ZECs be created in the generator's NYGATS account based on sales into the NYISO markets (as measured by these revenue meters), New York's implementation of the CES Order makes participation in the NYISO markets a condition of receipt of ZECs. While the District Court did not consider these contracts or their bearing on the application of the "tethering" test under *Hughes*, they are public and further demonstrate why the Complaint in this proceeding was prematurely and improperly dismissed. (And wholly absent from the ZEC Contracts, of course, are the words "greenhouse gas emissions" and "climate change.")

Contrary to the District Court's reading, this Court's decision in *Allco* is distinguishable. *Allco* involved challenges to two Connecticut programs – an FPA preemption challenge to a program for state procurement of renewable generation and the second focusing on the state's renewable portfolio standard. In upholding dismissal of the preemption challenge, this Court focused on the fact that the state procurement program relied on traditional bilateral contracts for the wholesale sale of electric energy between generators and LSEs, which were independent of sales in an organized, auction-based wholesale market, such as the NYISO markets, and were subject to FERC reasonableness review. 861 F.3d at 90-91. Here, by contrast, the ZEC Contracts between the generators and NYSERDA are not traditional bilateral contracts for the wholesale sale of electric energy and are not subject to FERC reasonableness review. Further, as explained above, the ZEC program – unlike the procurement program in *Allco* – sets prices based on changes in projected wholesale market prices and requires participation in the NYISO's organized, auction-based wholesale markets (both as a practical and a formal matter).

The District Court was also wrong to equate ZECs with renewable energy credits (RECs). First, unlike ZECs, REC prices are determined by the supply of, and demand for, the underlying environmental attributes of renewable generation. They are not based on wholesale electricity prices. Further, the NYGATS Operating Rules make clear that the generation output associated with RECs, unlike the nuclear generation output associated with ZECs, do not have to be sold in the NYISO markets or any other wholesale market.[16]

For the reasons set forth above, New York's ZEC program is preempted by the FPA as interpreted by *Hughes* and the District Court's decision to the contrary accordingly should be reversed.

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[16] NYGATS Operating Rules, Section 17 (definition of "Other New York Generators"); *see also* NYGATS Operating Rules, Sections 1.1, 4.1, 4.4.1, 4.5, 5.1.1, 5.2, 5.3.

III. PRIVATE SUITS IN EQUITY ARE NOT BARRED UNDER THE FPA

The District Court's holding — that Congress's enactment of a specific, unrelated cause of action under PURPA demonstrated an intent to foreclose Plaintiffs-Appellants' right to bring a suit at equity to enforce the FPA — misapplied *Armstrong* and was based on several fundamental errors. First, contrary to the District Court's mistaken reading, *both* elements of *Armstrong*'s two-part test must be satisfied to find that Congress implicitly foreclosed private suits at equity under the FPA. The District Court correctly held (though for the wrong reasons) that the FPA does not meet the second part of the *Armstrong* test. The FPA clearly provides a "judicially administrable" standard governing this suit, as the Supreme Court's decision in *Hughes*, this Court's decision in *Allco*, and many other cases demonstrate. This should have ended the Court's inquiry. But in any event, the FPA satisfies *neither* requirement of the test. The District Court erred egregiously in its application of *Armstrong*'s first prong – holding that Congress's enactment of a specific remedy for a particular provision of PURPA, an entirely separate statute enacted over 40 years after the FPA, somehow implies that Congress provided a distinct "sole remedy" for enforcement of the FPA, and therefore meant to foreclose private suits at equity seeking relief from actions that are preempted under the FPA. That was clear error and is independent grounds for reversal.

A. Both Parts of *Armstrong's* Two Part Test Must Be Met to Find the FPA Precludes Private Suits at Equity

The parties do not dispute that courts may "adjudicate[] requests for equitable relief" and "may issue an injunction upon finding the state regulatory actions preempted." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. at 1384, 1390. And the FPA clearly does not *expressly* preclude suits such as this. The sole question before this Court is whether Congress in the FPA *implicitly* foreclosed this suit, based on the two-part test identified by the Supreme Court in *Armstrong*: namely, whether (1) Congress in the statute established a distinct "sole remedy" on the part of the administering agency to enforce the provision, implying an intent to preclude private suits at equity, and (2) whether the FPA sets forth a "judicially unadministrable" standard suitable for FERC to apply, rather than a court. *Armstrong*, 135 S. Ct. at 1385.

Justice Scalia's opinion in *Armstrong* makes clear that the Court's decision was predicated on satisfaction of *both* parts of this two-part test *combined*. In *Armstrong*, Medicaid providers sued the State of Idaho, challenging the state's Medicaid reimbursement plan on the grounds that it violated § 30A of the Medicaid Act, which establishes broad and complex substantive requirements for such plans.[17] In finding this suit to be foreclosed, Justice Scalia first emphasized that the "sole remedy" Congress provided for violation of § 30A was the Secretary of Health and Human Services' authority to withhold Medicaid funds from the offending state, indicating an intent to preclude alternative remedies. Justice Scalia emphasized that "[t]he provision for the Secretary's enforcement by withholding funds might not, *by itself*, preclude the availability of equitable relief…. But it does so when combined with the judicially unadministrable nature of § 30A's text." *Id*. (citations omitted) (emphasis in original). He went on to conclude: "The sheer complexity associated with enforcing § 30A, *coupled with* the express provision of an administrative remedy . . . shows that the Medicaid Act precludes private enforcement of § 30A in the courts." *Id*. (emphasis added).

Armstrong was a 5-4 decision in which Justice Breyer's concurrence was required for a majority. Justice Breyer concurred in part with Justice Scalia's opinion and concurred in the judgment, concluding that "*several characteristics of the federal statute before us, when taken together*, make clear that Congress

[17] Medicaid is a federal–state program that subsidizes the states' provision of medical care to low-income individuals. Section 30(A) of the Medicaid Act requires that state Medicaid plans contain methods and procedures to ensure that reimbursement rates for health care providers are "consistent with efficiency, economy and quality of care and are sufficient to enlist enough providers . . . such that care and services are available to the general population in the geographic area…." 42 U.S.C. § 1396a(a)(30)(A).

intended to foreclose" a private suit at equity challenging the state action at issue in that case. *Id.* at 1388 (emphasis added). Justice Breyer placed special emphasis on the fact that the provision at issue, Section 30(A) of the Medicaid Act, includes "broad and nonspecific" standards to the setting of rates. *Id.* He underscored that hearing private suits at equity to enforce the Act's substantive rate-setting standard would require courts to "engage in direct rate-setting." *Id.* at 1389 (citation omitted). He judged it unlikely that Congress intended to allow suits that would require judges to engage in such a fraught exercise, and found such suits unnecessary where, under the statute, the Secretary of Health and Human Services could simply "withhold federal funds" to compel State compliance with the law. *Id.*

Under *Marks v. United States*, 430 U.S. 188, 193 (1977), where the Justices fail to converge on a single majority rationale, the "holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. at 193 (citation omitted). Justice Breyer's opinion represents the narrowest ground for *Armstrong*'s holding. But regardless, whether the Court applies Justice Breyer's concurrence or Justice Scalia's two-part test, there is no question that *at least* the two requirements Justice Scalia identified must be satisfied to find an implied statutory foreclosure of private suits at equity.

B. The District Court Erred in Holding That PURPA's "Sole Remedy" Implies an Intent to Foreclose Private Suits at Equity Under the FPA

The District Court erroneously concluded that the "sole remedy" language in PURPA compels dismissal of Plaintiffs-Appellants Complaint. The District Court's analysis begins on the right foot, correctly concluding that the FPA's enforcement provisions are similar in scope to the statute at issue in *Friends of East Hampton Airport*. In that case, this Court held that the Airport Noise and Capacity Act of 1990 (ANCA) – a federal law controlling noise levels at airports – did not preclude a private suit at equity challenging on preemption grounds a local law limiting aircraft operations. *Town's Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 145 (2d Cir. 2016). ANCA authorized the Secretary of Transportation "to seek and obtain legal remedies the Secretary considers appropriate, including injunctive relief," but did not expressly authorize private suits at equity. *Id.* (citing 49 U.S.C. § 47533(3)). This Court concluded, however, that the fact that Congress "conferred such broad enforcement authority on the [Federal Aviation Administration], and not on private parties, does not imply its intent to bar such parties from invoking federal jurisdiction where, as here, they do so not to enforce the federal law themselves, but to preclude a municipal entity from subjecting them to local laws enacted in violation of federal requirements." *Id.* at 146 (citations omitted). *See also Tohono O'odham Nation v.*

Ducey, 130 F. Supp. 3d 1301, 1314-16 (D. Ariz. 2015) (notwithstanding that a statute created three specific causes of action, suits at equity may not be foreclosed under *Armstrong* because the statue did not evince Congress' intent to "exclude all other types of action," including equitable remedies).

To be sure, where a state impinges on FERC's exclusive wholesale ratemaking authority, FERC may bring an action in federal court for injunctive relief. 16 U.S.C. § 825m(a). But as Plaintiffs-Appellants emphasize, the FPA expressly confers federal jurisdiction over "all" suits in equity, which encompasses private suits such as that now before this Court. CCE Br. at 23 (citing 16 U.S.C. § 825p). This is a far cry from the "sole remedy" Congress provided under the Medicaid Act provisions at issue in *Armstrong*.

The District Court, however, mistakenly concluded that Congress demonstrated its intent to foreclose this suit by enacting, as part of PURPA, a private right of action to enforce a PURPA provision that requires State public utility commissions to adopt certain rules promulgated by FERC to promote cogeneration and small power production. 16 U.S.C. § 824a-3(h)(2)(B). But PURPA, including the section in question, was enacted over four decades after the FPA and did not amend the FPA. *See* Pub. L. No. 95–617, 92 Stat 3117 (1978). And the PURPA provision at issue has no connection to the FPA's grant of

FERC's exclusive jurisdiction over interstate wholesale rates. Congress's provision for private enforcement of an unrelated provision in a different statute, enacted decades later, cannot possibly be taken to demonstrate Congressional intent to foreclose this suit. The District Court's conclusion to the contrary defies logic and all conventions of statutory interpretation.

C. Enforcement of FERC's Exclusive Ratemaking Authority Under the FPA Is "Judicially Administrable"

With regard to the second part of the *Armstrong* test, the District Court reached the right conclusion for the wrong reason. The District Court correctly held that the FPA's requirement that wholesale rates be "just and reasonable" (16 U.S.C. § 824e(a)) is not "judicially unadministrable." But the FPA's substantive "just and reasonable" ratemaking standard is not the requirement on which this suit is premised. Plaintiffs-Appellants challenge New York's ZEC program on the grounds that it seeks to adjust wholesale rates in violation of FERC's exclusive ratemaking authority. *See* 16 U.S.C. § 824(b)(1). Their suit does not ask or require the Court to evaluate the justness and reasonableness of wholesale rates as affected by the program, or to find that this program is preempted because it results in wholesale rates that are not just and reasonable.

There can be no question that the FPA's grant of exclusive authority to regulate "the sale of electric energy at wholesale in interstate commerce," 16

U.S.C. § 824(b)(1), does not present a "judicially unadministrable" standard. The Supreme Court thoroughly interpreted and applied precisely this standard in its recent decision in *Hughes*, 136 S. Ct. at 1299. Further, over the past three decades, dozens of federal court decisions – including from the Supreme Court– have interpreted the scope of FERC's ratemaking authority. *See* CCE Br. at 4, 21. In short, the federal courts plainly are quite capable of administering the FPA standard at issue in this case.

FERC's exclusive *jurisdiction* over wholesale ratemaking under the FPA is in no way analogous to Section 30(A) of the Medicaid Act, which is a highly complex, substantive rate-setting provision. Section 30(A) mandates that a state plan for medical assistance "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan. . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care . . . ." 42 U.S.C. § 1396a(a)(30)(A). Evaluation of the provision's substantive provisions as against state law would require deep policy expertise in the complex underlying markets. As Justice Scalia emphasized, "[i]t is difficult to imagine a requirement broader and less specific than § 30(A)'s mandate that state plans provide for payments that are 'consistent with efficiency, economy, and quality of care,' all the while 'safeguard[ing] against unnecessary utilization of . . . care and services." *Armstrong*, 135 S. Ct. at 1385 (citations omitted). Here, by contrast, the Court need only speak to the jurisdictional parameters of FERC's exclusive ratemaking authority under the FPA to determine whether a state law impermissibly sets or adjusts a wholesale rate in contravention of that authority. This is exactly the type of question that courts routinely resolve – as the Supreme Court and other decisions cited above make plain.

IV. FAILURE TO REVERSE THE DISTRICT COURT WILL UNDERMINE THE FEDERAL ENERGY REGULATORY SCHEME AND CONFLICTS WITH FERC'S INTERPRETATION OF ITS JURISDICTION

The District Court's decision would throw open the door to an ever-growing patchwork of discriminatory state intervention in wholesale markets solely to benefit a few discrete stakeholders, severely hampering the efficient functioning of the nation's energy markets. A number of other large power-consuming states are considering nuclear subsidy programs similar to the New York program challenged here, including Connecticut, New Jersey, Ohio, and Pennsylvania; and one state, Illinois, has already enacted one. If private parties are barred from bringing suits at equity to enforce FERC's exclusive ratemaking authority, this will invite expanded state intervention designed to disadvantage *Amici's* members – the low-cost natural gas fired generators and their fuel suppliers operating all across the U.S. FERC simply does not have the resources to police this activity.

FERC must "ensure 'just and reasonable'… [] rates" and its critical role is "break[ing] down regulatory and economic barriers that hinder a free market in wholesale electricity." *Morgan Stanley Capital Grp. Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U. S. 527, 532, 536 (2008) (quoted in *F.E.R.C. v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 768 (2016), *as revised* (Jan. 28, 2016)). This is no small task. Preclusion of private suits at equity would undermine FERC's ability to effectively carry out this charge. FERC has broad responsibilities, finite resources, and a backlog of pending cases – some of which involve approvals for badly needed pipeline infrastructure, including in New York State, and directly affect *Amici's* members. And because the NGA is generally interpreted *in pari materia* with the FPA, and NGA precedent has been invoked routinely in the underlying proceeding, a finding here that private suits in equity are precluded under the FPA would certainly invite litigation as to whether a similar limitation applies under the NGA.

Perhaps for this reason, it is not surprising that FERC, post-PURPA, citing this Court's own precedent (and that of many other Circuits over the decades), interprets the FPA to allow such suits. An "entity that believes it is harmed by a state's action that conflicts with the Federal Power Act may pursue its claim in state or federal court…." Brief of Respondent FERC at 36, *City of Orangeburg v. FERC*, No. 15-1274 (D.C. Cir. June 21, 2016).[18] Given extensive precedent allowing private actions at equity under the FPA, and the deference that is due to FERC as the entity charged by Congress with administering the FPA, this reading of the statute is entitled to respect. *SEC v. Rosenthal*, 650 F.3d 156, 160 (2d Cir. 2011) ("[agency] position adopted in the course of litigation … [should] be followed to the extent persuasive"); *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 411 (2d Cir. 2005) (agency interpretations advanced in litigation may be given deference); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001), on reconsideration,. 451 F.3d 77 (2d Cir. 2006) (an "agency['s] position should be followed to the extent persuasive" (quoting *United States v. Mead*, 121 S. Ct. 2164, at 2175–76 (2001) (citing

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[18] *Citing Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84 (2d Cir. 2012) (reviewing grant of summary judgment in suit seeking declaratory judgment that a state assessment was pre-empted by the FPA); *Ky. W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 837 F.2d 600 (2d Cir. 1988) (reviewing order denying utility company's request for declaratory relief from an order issued by state PUC). *See also AEP Tex. N. Co. v. Tex. Indus. Energy Consumers*, 473 F.3d 581 (5th Cir. 2006) (reviewing grant of summary judgment in action seeking declaratory judgment that a state PSC's actions were preempted by the FPA); *N. Nat. Gas Co., v. Iowa Utils. Bd.*, 377 F.3d 817 (8th Cir. 2004); *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 911 F.2d 993 (5th Cir. 1990) (claiming FPA preempted the order of a local retail ratemaking body).

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))); *see also Lopez v. Terrell*, 654 F.3d 176, 185 (2d Cir. 2011) (finding agency's approach valid pursuant to *Skidmore* deference).

Simply put, Congress never intended FERC bear the sole responsibility for policing legislative and regulatory activities in fifty states with differing, often competing, economic and policy goals. Rather, it charged FERC with ensuring fair, open, equitable, competitive and cost effective wholesale markets. And where, as here, no injunction has issued (and even if one were imposed, New York has other less intrusive means for achieving its state-specific goals, CCE Br. at 49), Plaintiffs-Appellants case should be allowed to proceed.

CONCLUSION

For the foregoing reasons, the Court should reverse the determination of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and the corresponding Circuit Rule, I hereby certify that the foregoing brief was produced using the Times New Roman 14-point typeface and contains 6,987 words.

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2017, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the CM/ECF system, which sends a Notice of Electronic Filing to all counsel of record.

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