

Evolving Energy Federalism: Zero Emissions Credits and Opportunities in State Energy Policy

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I. INTRODUCTION

Courts traditionally view regulation of the energy sector as a dual federalism framework in which a “bright line” separates sovereignty of the states from the power reserved to federal regulators. In particular, the Federal Power Act (FPA) grants the Federal Energy Regulatory Commission (FERC) authority over wholesale electricity markets.¹ Courts generally interpret this authority over wholesale markets as exclusive, which ensures the federal government and states occupy different fields of the electric industry. States retain authority in fields that bookend FERC’s power over wholesale markets— electric power generation on one side and retail sales of electricity on the other.

Over time, changing technology and markets complicated the energy sector, which in turn has blurred the formerly “bright lines” between not only power generation and wholesale markets, but also between wholesale markets and the retail sector. Recent United States Supreme Court (the Court) decisions recognize this reality, and lower courts accordingly adapted their approach to issues energy federalism. In short, courts have deemphasized the traditional dual federalism framework in favor of a cooperative federalism approach.² In two 2016 decisions—*FERC v. Electric Power Supply Association (EPSA)* and *Hughes v. Talen Energy Marketing, LLC*—the Court took a pragmatic approach to energy regulation at the boundaries of state and federal authority.³ *EPSA* dealt with federal authority at the interface of wholesale and retail markets, whereas *Hughes* dealt with the interaction between state regulation of power generation and federal regulation of wholesale markets.

The Court’s decisions in both *EPSA* and *Hughes* emphasize a cooperative federalism approach to the energy field given the increasingly inextricable link between power generation, wholesale markets, and retail sales of electricity. As a result of this trend, lower courts are likely to exercise more caution in finding state policy actions preempted by the FPA. While the Court in *Hughes* did just that—invalidated a state regulation due to FPA preemption—it cautioned lower courts to narrowly interpret its ruling.

In the wake of *EPSA* and *Hughes*, two recent district court cases and their subsequent appeals help flesh out the contours of preemption at the intersection of states’ authority to regulate power generation and FERC’s authority to regulate wholesale power markets. Both district court cases address state authority to create and administer Zero Emissions Credit

1. Federal Power Act, 16 U.S.C. § 824 (1935).

2. See Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399 (2016).

3. *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2016); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016).

(ZEC) programs, which are meant to subsidize and extend the operating life of aging and uneconomic nuclear power plants.⁴

In *Village of Old Mill Creek v. Star*, plaintiffs challenged a ZEC program created when the Illinois Legislature passed the Future Energy Jobs Act.⁵ In *Coalition for Competitive Electricity, Dynegy Inc. v. Zibelman*, plaintiffs challenged a ZEC program created by the New York Public Service Commission (PSC) when it adopted a Clean Energy Standard (CES) Order.⁶ Judges in both district court cases upheld the state ZEC programs when they found the ZEC programs were not preempted by the FPA.⁷ Both decisions also withstood scrutiny on appeal when the Second (*Village of Old Mill Creek*) and Seventh (*Coalition for Competitive Electricity*) Circuits affirmed the lower court rulings.

Part II of this Article briefly reviews how the electric sector functions and its substantial evolution over the last few decades. Part III discusses the traditional dual federalism approach to regulation in the energy sector and how the 2016 Supreme Court decisions transitioned the regulatory scheme towards a cooperative federalism framework. Part IV analyzes the ZEC cases and addresses the lower and appellate courts' rationales in *Village of Old Mill Creek* and *Coalition for Competitive Electricity*, with focus on the preemption analyses under *EPSA* and *Hughes*. Finally, Part V discusses implications of the 2016 Supreme Court cases, the ZEC cases, and recent FERC actions related to state policies designed to encourage new or clean power generation.

II. THE ELECTRIC SECTOR

For most of the last century, the electric sector functioned in a uniform and predictable manner. Municipal or investor-owned utilities (MOUs or IOUs, respectively) produced power in large generating facilities and subsequently transmitted and distributed that electric power to retail consumers. These utilities operated as regulated, vertically integrated

4. ZECs are state-created tradable commodities which represent the environmental attributes of one megawatt-hour of nuclear power generation. *Zero Emission Credits*, NUCLEAR ENERGY INST. 3 (Apr. 2018), <https://www.nei.org/CorporateSite/media/filefolder/resources/reports-and-briefs/zero-emission-credits-201804.pdf> [<https://perma.cc/4QYD-7EGW>].

5. *Village of Old Mill Creek v. Star*, Nos. 17-CV-1163 & 17-CV-1164, 2017 WL 3008289 (N.D. Ill. 2017), *aff'd*, 904 F.3d 518 (7th Cir. 2018).

6. *Coal. for Competitive Elec., Dynegy Inc. v. Zibelman*, 272 F. Supp. 3d 554 (S.D.N.Y. 2017), *aff'd*, 906 F.3d 41 (2d Cir. 2018).

7. *See infra* Part IV.

monopolies in confined geographic areas.⁸ Beginning with the Public Utility Regulatory Policies Act of 1978 (PURPA), this structure started to change. Congress enacted PURPA to encourage efficient cogeneration (the use of heat from industrial processes to generate electricity) and small renewable generation facilities (with capacity less than 80 megawatts (MW)).⁹ As implemented by states, PURPA-related programs certified qualifying facilities (QFs) to generate power and then required utilities to purchase the power.¹⁰ Each purchase price was set at a state-determined rate that constituted the utilities' avoided cost of producing the power themselves.¹¹

In contrast, the monopoly model did not obligate utilities that owned transmission and distribution networks to allow independent power producers (IPPs) open access to utilities' systems. The Energy Policy Act of 1992 gave FERC the authority to grant such access to transmission lines.¹² In 1996, FERC issued Order 888 which mandated open access to transmission networks.¹³ These changes allowed IPPs to proliferate, and they now operate nationwide. In some states, regulators required vertically integrated IOUs to divest their generating assets in the name of market competition.¹⁴ When FERC passed Order 2000 in the year 2000, it encouraged, but did not require, the creation of nonprofit entities to manage wholesale markets and electric grid operations. These nonprofit entities are known as Regional Transmission Organizations (RTOs) or Independent System Operators (ISOs).¹⁵ Seven such entities now manage their respective regions around the country, encompassing the most populated areas of the United States in their aggregated geographic area.¹⁶

Although these developments primarily affected the regulatory boundary between power generation and wholesale sales of electricity, recent technological developments also altered the landscape of the retail energy sector. For

8. Robert R. Nordhaus, *The Hazy "Bright Line": Defining Federal and State Regulation of Today's Energy Grid*, 36 ENERGY L. J. 203, 207 (2015) ("Utilities were largely vertically integrated. Power flowed from large central-station generating facilities through high-voltage transmission systems either for sale at wholesale to other utilities or for delivery through local distribution facilities to end-users").

9. FED. ENERGY REG. COMM'N, DIV. OF ENERGY MKT. OVERSIGHT OFF. OF ENF'T, ENERGY PRIMER: A HANDBOOK OF ENERGY MARKET BASICS 39 (2015).

10. *Id.*

11. *Id.*

12. *Id.*

13. Fed. Energy Regulatory Comm'n, 61 Fed. Reg. 21540-01 (May 10, 1996).

14. *See generally*, Severin Bornstein & James Bushnell, *The U.S. Electric Industry After 20 Years of Restructuring*, 7 ANN. REV. ECON. 437, 443 (2015) (discussing restructuring of ownership of generation assets and "the divestiture of much of the existing generation fleet previously owned by IOUs in restructured states . . .").

15. Fed. Energy Regulatory Comm'n, 65 Fed. Reg. 12088-01 (Mar. 8, 2000); Rossi, *supra* note 2, at 423.

16. Rossi, *supra* note 2, at 423.

example, distributed generation or distributed energy resources (DER), such as rooftop solar photovoltaic (PV), effectively turns traditional consumers into small generators.¹⁷ When distributed generators produce more energy than they consume, utility companies must buy the excess, rendering these consumers wholesale producers.¹⁸ Additional developments now occur with demand-side management wherein utilities pay customers to reduce demand at periods of peak load.¹⁹ This is often viewed as beneficial to utilities due to high marginal prices they must typically pay to produce power in times of peak demand.²⁰ Developments like DER and demand-side management have disrupted traditional energy markets and further obscured the boundary between the traditionally distinct retail and wholesale sectors.

III. FROM DUAL FEDERALISM TO COOPERATIVE FEDERALISM

As discussed above, changes in the electric sector throughout the past several decades blurred the traditional lines between power generation, wholesale markets, and the retail sector. Courts demonstrated recognition of this with rulings that gradually shifted away from a dual energy federalism approach toward a cooperative federalism framework. This section first explains the history of courts' bright line approach to determine FERC's and states' respective regulatory spheres. It then addresses the shift to a cooperative federalism framework with an in-depth discussion of Court's decisions in *EPSA* and *Hughes*.

A. *The Traditional Dual Federalism Framework*

Congress passed the FPA in 1935 to address regulatory gaps in the electric sector caused by the federal government's lack of express authority to regulate interstate energy markets.²¹ Though it took years before Congress passed the FPA, these regulatory issues were brought to the forefront in the 1920s when the Court decided *Public Utilities Commission v. Attleboro*

17. Bornstein & Bushnell, *supra* note 14, at 461.

18. OWEN ZINAMEN, ET AL., GRID-CONNECTED DISTRIBUTED GENERATION: COMPENSATION MECHANICS BASICS, NAT'L RENEWABLE ENERGY LAB. 7 (2017) ("The [distributed generation] system exports all electricity directly to the utility grid, and the system owner is compensated at a predetermined and typically fixed sell rate either through utility bill credits or in cash.").

19. Rossi, *supra* note 2, at 444–46.

20. *Id.*

21. *Id.* at 408.

*Steam & Electric Co.*²² The case involved a Rhode Island utility that had a twenty two-year electric supply contract with Attleboro, a Massachusetts company. Attleboro sued after the Rhode Island utility company received approval for a rate increase by the Rhode Island Public Utilities Commission. The Supreme Court found that neither Massachusetts nor Rhode Island had authority to regulate the rate for the interstate contract—only Congress may do so.²³ This regulatory void between interstate energy contracts became known as the “Attleboro gap,” and it was a significant motivation in passing the FPA.²⁴

For many decades after Congress passed the FPA, the Supreme Court analyzed energy regulation under a dual federalism framework in which it relied on a judicially-determined bright line to separate federal and state jurisdiction.²⁵ Courts treated state and federal spheres of regulatory power as exclusive wherein federal regulators occupied the entire sphere of wholesale electricity sales.²⁶ In practice, however, courts were often forced to resort to case-by-case analyses of how state and federal energy regulations interacted to determine whether a state law was preempted.²⁷ Thus, the bright line notion provide something of a fiction, but courts still appealed to bright line and formalistic applications of field preemption.²⁸ That said, recent Supreme Court decisions more definitively moved energy federalism in a new direction.

B. The Move to Cooperative Federalism

The traditional dual federalism framework in the electric sector is in a state of deterioration.²⁹ The industry fundamentally changed in the last several decades and, in the process, blurred the lines between traditional divisions of power generation, wholesale sales, and retail services. For example, the electric grid now functions bi-directionally with distributed generation.³⁰ Further, traditionally passive consumers of electricity may now participate in and affect energy markets through both power generation and demand response programs.³¹ The latter inserts customers directly into wholesale markets. Such developments undermine the traditional dual

22. Pub. Util. Comm’n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 88 (1927).

23. *Id.* at 90.

24. Rossi, *supra* note 2, at 409.

25. *Id.* at 414.

26. *Id.*

27. *Id.* at 421.

28. *Id.*

29. See, e.g., Hannah J. Wiseman, *Moving Past Dual Federalism to Advance Electric Grid Neutrality*, 100 IOWA L. REV. BULL. 97–100, 107–08 (2015).

30. E.g., OWEN ZINAMEN, ET AL., *supra* note 18.

31. *Id.*

federalism framework and demand a more flexible conception of state and federal authority under the FPA.

The Supreme Court met this conceptual challenge in 2016 when it decided *EPSA* and *Hughes*. In *EPSA*, the Court upheld a FERC rule that required wholesale market operators to compensate demand response providers at the same rate as power generators.³² The Court found that FERC acted within its authority and that the rule did not regulate retail prices, despite having some effect on them.³³ In *Hughes*, the Court invalidated a Maryland law designed to encourage in-state generation facilities after it found the law effectively set prices for a wholesale energy market, thus “disregarding” the market-set price.³⁴ While *EPSA* and *Hughes* dealt with different boundaries of federal and state authority—the former with the intersection of wholesale and retail markets and the latter with the intersection of wholesale markets and power generation—*EPSA* nevertheless affected the Court’s analysis in *Hughes*, as described below.³⁵

I. FERC v. Electric Power Supply Association (EPSA)

EPSA involved a dispute over the regulation of demand response—a practice where market operators or utilities pay retail customers to *not* use energy during specified times.³⁶ Demand response is typically used during periods of peak demand—for instance, on the hottest summer days when consumers’ air conditioning use leads to some of the highest electric loads of the year. By paying customers to reduce consumption, market operators can provide cheaper and more reliable energy than if they were required to produce additional energy supply to meet peak demand.³⁷ The FERC rule at issue in *EPSA* required market operators to compensate for demand response at the same rate at which they compensate for additional energy production.

Justice Kagan set the tone in the Court’s majority opinion when she immediately acknowledged that the statutory division between wholesale and retail sales, “generates a steady flow of jurisdictional disputes because—in point of fact if not of law—the wholesale and retail markets in electricity

32. Elec. Power Supply Ass’n, 136 S. Ct. 760, 766–67, 784 (2016).

33. *Id.* at 784.

34. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298–99 (2016).

35. Additionally, Part IV, *supra*, discusses how lower courts interpret and consider the two cases together in breaking down the traditional bright line barriers of dual federalism.

36. Elec. Power Supply Ass’n, 136 S. Ct. at 767.

37. FED. ENERGY REG. COMM’N, *supra* note 9, at 44.

are inextricably linked.”³⁸ *EPSA* first required the Court to decide whether FERC had authority to regulate demand response, so it was key for the majority to immediately acknowledge the close relationship between markets. In finding FERC had authority to regulate demand response, the Court looked to the FPA which specifies that FERC’s authority extends to any rule or practice “affecting” wholesale electricity rates.³⁹ This aspect of the case turned on how to define FERC’s “affecting” jurisdiction and how it applied to FERC’s rule regarding demand response compensation. The Court adopted the D.C. Circuit’s, “common-sense construction of the FPA’s language, limiting FERC’s ‘affecting’ jurisdiction to rules or practices that ‘directly affect the [wholesale] rate.’”⁴⁰ The Court noted this pragmatic approach was necessary to keep the statute from assuming “near-infinite breadth.”⁴¹

The Court then applied this newly clarified “direct effect” test and found the demand response commitments in FERC’s rule easily met the standard.⁴² However, because the FPA reserves to states the authority to regulate all retail sales, the Court had to further determine whether FERC’s demand response compensation rule improperly regulated retail sales. The Court determined FERC’s rule did not improperly regulate retail sales, even if it had a substantial effect on such sales.⁴³ The Majority noted that in a modern economy, wholesale and retail markets will inevitably affect one another, so will regulations in these sectors necessarily will, too.⁴⁴ Thus, the FERC rule permissibly governed a practice directly affecting wholesale rates, and the incidental effect on retail rates was immaterial.

Finally, Justice Kagan discussed a particular feature of FERC’s demand response compensation rule which gave states the ability to prohibit consumers from making demand response bids in the wholesale market.⁴⁵ Justice Kagan explicitly called the rule a, “program of cooperative federalism, in which the [s]tates retain the last word.”⁴⁶ However, the Court was silent in regard to the use of dual federalism as an organizing principal for these jurisdictional issues.

The Court justified its conclusion that FERC acted within its authority when it noted the contrary view would conflict with the FPA’s fundamental

38. Elec. Power Supply Ass’n, 136 S. Ct. at 766.

39. *Id.* at 767.

40. *Id.* at 774 (quoting Cal. Indep. System Operator Corp. v. FERC, 372 F.3d 395, 402 (2004)).

41. *Id.*

42. *Id.* at 774–74.

43. *Id.* at 776.

44. *Id.*

45. This feature effectively provided states an opportunity to opt out of the FERC demand response compensation rule.

46. Elec. Power Supply Ass’n, 136 S. Ct. at 780.

purpose of providing just and reliable electricity: “FERC set the terms of transactions occurring in the organized wholesale markets, so as to ensure the reasonableness of wholesale prices and the reliability of the interstate grid—just as the FPA contemplates.”⁴⁷ Such emphasis on the FPA’s purpose further demonstrates the Court is willing to consider legislative intent in energy sector regulation, rather than opting for strict textual interpretations of power divisions in this context. *EPSA* strongly influenced the Court in *Hughes*, which addressed the federal-state regulatory boundary on the other side of wholesale sales: the line between power generation and wholesale markets.

2. *Hughes v. Talen Energy Marketing, LLC*

In *Hughes*, the Court determined the FPA preempted a Maryland law designed to encourage new electricity generation in the state.⁴⁸ The Maryland program provided subsidies to new power generators but conditioned receipt of these subsidies on the new generator’s ability to sell its capacity into a FERC-regulated capacity market.⁴⁹

The Maryland Public Service Commission (PSC) promulgated a Generation Order that solicited and accepted a bid for a new gas-fired power plant.⁵⁰ The State required load-serving entities (LSEs)—utilities that supply electricity to retail customers—to enter into a 20-year contract with the winner of the bid, CPV Maryland, LLC (CPV). The arrangement was structured as a “contract for differences” wherein CPV would bid its capacity into the PJM capacity market.⁵¹ If the bid was accepted and the market clearing price was below the price guaranteed in the 20-year contract, Maryland LSEs would be required to pay CPV the difference and pass the cost on to Maryland consumers or “end-users” of this electricity.⁵² If the market clearing price exceeded the amount guaranteed in the 20-year contract,

47. *Id.* at 784.

48. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016).

49. *Id.* A capacity market is a type of wholesale electricity market based on power generators guaranteeing to provide a certain amount of generating capacity in the future, regardless of whether it is called upon to actually produce power. *See generally* Adam James, *Explainer: How Capacity Markets Work*, ENERGY NEWS NETWORK (June 17, 2013), <https://energynews.us/2013/06/17/midwest/explainer-how-capacity-markets-work/> [https://perma.cc/Y6LL-T5YM].

50. *Hughes*, 136 S. Ct. at 1294.

51. *Id.*

52. *Id.* at 1295.

CPV would pay the difference to the LSEs.⁵³ For CPV to receive any payments, its bids had to clear the PJM capacity auction.⁵⁴

The Court found that Maryland's program functionally set the rate CPV received for sales in the PJM auction.⁵⁵ The Court determined the program, "contraven[ed] the FPA's division of authority between state and federal regulators."⁵⁶ The problem, the Court reasoned, was that by guaranteeing CPV a certain rate for capacity sales regardless of the market clearing price, Maryland *disregarded* a rate that FERC deemed *per se* just and reasonable by operation of the PJM auction.⁵⁷ Under Supreme Court precedent, "[s]tates interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable, even when [s]tates exercise their traditional authority over retail rates or, as here, in-state generation."⁵⁸

If the Court ended its analysis there, it would have left open the door to preemption because many subsidies states might pay to power generators could be perceived as functionally setting the rate the generator receives. Doing so may easily cause generators to disregard wholesale rates. However, in the final paragraph of its opinion, the Court expressly tried to limit the scope of its holding:

Our holding is limited: We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC. We therefore need not and do not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector. Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures "untethered to a generator's wholesale market participation." *So long as a State does not condition payment of funds on capacity clearing the auction*, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable.⁵⁹

In Justice Sotomayor's concurrence, she described the FPA as a collaborative federalism statute that, "envisions a federal-state relationship marked by interdependence."⁶⁰ She cautioned that, "[p]reemption inquiries related to such collaborative programs are particularly delicate."⁶¹ Justice Sotomayor further emphasized the Court, "rightly recognizes the importance of protecting the

53. *Id.*

54. *Id.* PJM Interconnection is the region's RTO.

55. *Id.* at 1296.

56. *Id.* at 1296-97.

57. *Id.*

58. *Id.* at 1299 (citing *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956 (1986); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 373 (1988)).

59. *Id.* (internal citations omitted, emphasis added).

60. *Id.* at 1300.

61. *Id.*

[s]tates' ability to contribute, within their regulatory domain, to the [FPA's] goal of ensuring a sustainable supply of efficient and price-effective energy."⁶²

Although Justice Sotomayor's concurrence is non-binding, it is nonetheless illustrative of the demonstrable shift in how the Court views the regulatory framework in the energy sector. As with Justice Kagan's majority opinion in *EP SA*, Justice Sotomayor's concurrence in *Hughes* rejected a formalistic approach to preemption and the divisions of state and federal jurisdiction. Justice Sotomayor's concurrence showed unequivocally that she abandoned any notions of dual federalism in favor of collaborative energy regulation, and she further suggested courts should tread lightly in their preemption inquiries going forward. Justices Kagan and Sotomayor emphasized in their respective analyses the importance of scrutinizing the purposes of both the FPA and the regulation at issue. Further, it is important to note Justice Sotomayor's concurrence in *Hughes* because the district court judges in the ZEC cases seem to regard her words as clear and strong declarations of a new direction in energy federalism.

IV. ZERO EMISSIONS CREDITS AND FEDERAL PREEMPTION

EP SA and *Hughes* emphasize the interrelated nature of wholesale markets with retail sales and power generation, as well as the cooperative nature of contemporary energy federalism. That said, the Court in both cases ruled in favor of federal authority. The Court demonstrably did so in *Hughes* when it found preemption of state action related to power generation.⁶³ So, while aspects of *EP SA* and *Hughes* suggest that states may enjoy some latitude when they implement programs that affect wholesale markets, the decisions themselves do not strongly declare this. Rather, the extent of this latitude will be determined by subsequent cases brought in response to state programs or laws that affect wholesale markets in various ways. The two challenges to state ZEC programs discussed in this section help clarify state policy latitude and map the direction future cases may take. Judges in these cases, at both district and circuit court levels, took cues from the Supreme Court's focus on the purpose of the FPA in *EP SA* and *Hughes*. In particular, the opinions highlighted Justice Sotomayor's suggestion in *Hughes* that a court should use, "the purpose of the [FPA] as the 'ultimate touchstone' of its

62. *Id.*

63. *Id.* at 1299. *See also supra* text accompanying notes 55–58.

preemption inquiry, rather than resting on generic preemption frameworks unrelated to the [FPA].”⁶⁴

A. Village of Old Mill Creek v. Star

In *Village of Old Mill Creek*, two sets of plaintiffs—electricity customer groups and an industry group representing competitive power producers—challenged the creation of a ZEC commodity that subsidized nuclear power generation in Illinois.⁶⁵ The 2016 Future Energy Jobs Act, an amendment to the Illinois Power Agency Act, established ZECs as tradable credits which represented the environmental attributes of one MW-hour of energy from a zero emission facility (defined as a nuclear facility in the statute).⁶⁶ The program grants ZECs to certain qualifying nuclear power facilities, and electric utilities must then purchase ZECs from these facilities and pass the costs on to their retail customers. Additional revenue from the sale of ZECs enables these nuclear facilities to bid into wholesale market auctions at prices lower than they otherwise would without ZEC sales. Plaintiffs in *Village of Old Mill Creek* argued the FPA preempted the Illinois ZEC program.⁶⁷

The district court tackled the preemption inquiry in two steps: it first employed the “field preemption” test, and then it applied the “conflict preemption” test, devoting the bulk of its analysis to the former.⁶⁸ “Field preemption” of a state law occurs when the law regulates within a field that Congress intended be occupied exclusively by the Federal Government.⁶⁹ State laws are “conflict preempted” when the regulation at issue actually conflicts with federal law.⁷⁰ In analyzing the field preemption claim, the court cited *EPSA* to emphasize that wholesale markets have natural and inevitable consequences on retail markets.⁷¹ Although *EPSA* addressed the issue of FERC encroaching on state authority, the court in *Village of Old Mill Creek* reasoned that this encroachment analysis applied equally in the opposite direction—state regulations may also affect federally regulated wholesale markets.⁷²

The *Village of Old Mill Creek* court also cited *Hughes* when it distinguished the Illinois ZEC program from the Maryland law at issue in *Hughes*; qualifying nuclear facilities in Illinois may receive ZECs even if they neither clear nor

64. *Id.* at 1300 (emphasis added, internal citations omitted).

65. *Village of Old Mill Creek v. Star*, 2017 WL 3008289, at *1.

66. *Id.* at *3.

67. *Id.* at *10.

68. *Id.*

69. *Id.* at *10.

70. *Id.*

71. *Id.* at *12 (citing *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 776 (2016)).

72. *Id.*

participate in the capacity auction.⁷³ The court reasoned that, in reading *EPSA* and *Hughes* together, “preemption applies whenever a tether to wholesale rates is indistinguishable from a direct effect on wholesale rates.⁷⁴ The qualifier ‘direct’ is important; the court concluded that influencing the market by subsidizing a participant, without subsidizing the actual wholesale transaction itself, is indirect and thus not preempted.”⁷⁵

The court in *Village of Old Mill Creek* also compared ZECs to the more common state energy commodity known as renewable energy credits or certificates (RECs). In an earlier adjudication, FERC held that when RECs are “unbundled” (i.e., sold independently of electricity), REC sales fall outside of FERC’s jurisdiction.⁷⁶ The court in *Village of Old Mill Creek* found FERC’s reasoning persuasive in that environmental attributes of power generation may be unbundled from the sale of electricity, thus avoiding FPA preemption.⁷⁷

In sum, the court found the FPA did not preempt the Illinois state program under a theory of field preemption because the ZEC transactions were sufficiently separate from wholesale energy auctions. In conclusion, the court noted, “*Hughes* should not be extended to invalidate laws that do not include an express condition, but that in practice (when combined with other market forces) have the effect of conditioning payment on clearing the wholesale auction.”⁷⁸ This is a fairly narrow distinction from *Hughes* but one in which the court seemed confident in light of its ultimate holding. In particular, the court’s parting sentiment for *Hughes* specified, “[s]o long as a [s]tate does not condition payment of funds on capacity clearing the auction, the [s]tate’s program would not suffer from the fatal defect that renders Maryland’s program unacceptable.”⁷⁹

The *Village of Old Mill Creek* court also briefly addressed conflict preemption when it asked whether the state program did “clear damage” to the goals of federal legislation.⁸⁰ The court cited Justice Sotomayor’s

73. *Id.* at *13.

74. *Id.* The court’s use of the word “tether” here is in reference to *Hughes*, which suggested states were free to encourage production of new or clean generation through measures, “untethered to a generator’s wholesale market participation.” *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016). The *Hughes* plaintiffs attempted to use the “tethering” language to frame their preemption argument. *Id.*

75. *Village of Old Mill Creek*, 2017 WL 3008289, at *13.

76. *WSPP, Inc.*, 139 F.E.R.C. ¶ 61,061 (Apr. 20, 2012).

77. *Village of Old Mill Creek*, 2017 WL 3008289, at *13.

78. *Id.*

79. *Hughes v. Talen Energy Mktg., LLC*, 136 U.S. 1288, 1299 (2016).

80. *Village of Old Mill Creek*, 2017 WL 3008289, at *14.

Hughes concurrence which cautioned courts, “not to confuse congressionally designed interplay between regulations for impermissible tension that requires preemption.”⁸¹ The court found that while subsidizing nuclear power via ZECs may distort the wholesale market, FERC has authority to address the issue and had not yet chosen to do so. Thus, because FERC could intervene if it determined the program undermined just and reasonable wholesale rates, there could be no conflict.⁸² Consequently, the district court granted defendants’ motions to dismiss the suit. Plaintiffs subsequently appealed.

B. *Village of Old Mill Creek on Appeal*

On appeal in the Seventh Circuit, the case became known as *Electric Power Supply Association v. Star*.⁸³ A three-judge panel at the Seventh Circuit expressed concern that FERC had not weighed in on whether the Illinois ZEC program interfered with federal authority and therefore asked FERC to file an amicus curiae brief.⁸⁴ FERC obliged and filed a brief in support of the defendants-respondents, asserting the ZEC program was not preempted under *Hughes*.⁸⁵ Like the lower court, FERC reiterated that the program did not require participation in the FERC-regulated wholesale market and emphasized that any, “spillover, indirect effect [of the policy] on wholesale electricity markets . . . does not warrant preemption.”⁸⁶ FERC further highlighted that the two nuclear plants at issue that would be eligible to receive ZECs sold electricity outside of the wholesale auctions through bilateral contracts.⁸⁷

FERC also noted in its brief that several plaintiffs in the case filed a related administrative complaint with FERC, which was pending resolution at the time FERC filed its brief in the case.⁸⁸ In the related FERC administrative hearing, plaintiffs alleged PJM’s failure to address “price suppressive” effects of state policies supporting certain types of energy generation—the Illinois ZEC program included—constituted unjust and unreasonable rates under the FPA.⁸⁹ FERC noted that after it issued an order on that (or any other) proceeding,

81. *Id.*

82. *Id.*

83. *Elec. Power Supply Ass’n v. Star*, 904 F. 3d 518 (7th Cir. 2018).

84. *Id.* at 522.

85. Brief for the U.S. and FERC as Amici Curiae in Support of Defendants-Respondents and Affirmance, *Elec. Power Supply Ass’n v. Star*, 904 F.3d 518 (7th Cir. 2018) (No. 05-2433).

86. *Id.* at 7.

87. *Id.* at 11.

88. *Id.* at 4–5; *Calpine Corp. v. PJM Interconnection, LLC*, 163 F.E.R.C. ¶ 61,236 (June 29, 2018).

89. Brief for the U.S. and FERC, *Elec. Power Supply Ass’n v. Star*, 904 F.3d 518 (7th Cir. 2018) (No. 05-2433), *supra* note 85, at 4–5.

any aggrieved party would be able to seek rehearing in front of FERC and ultimately dispute any FERC-issued order in the courts.⁹⁰

In its brief, FERC agreed with the district court’s arguments and succinctly stated FERC’s views on the role of preemption in modern energy jurisprudence as follows:

Hughes joins a line of prior [Supreme] Court decisions that, in the context of energy regulation, interpret the law on preemption with some measure of modesty. In those cases, the Court found that incidental effects of state regulation on matters of federal concern do not rise to the level of preempting those state laws—what matters, in terms of the constitutional preemption concern, is whether the challenged state laws *target* those areas reserved by Congress for federal regulation.⁹¹

FERC explained to the Seventh Circuit that it, “need not, and should not, resort here to the extraordinary and blunt remedy of preemption.”⁹² FERC thus seemed to suggest states have wide latitude to regulate power generation without facing preemption, specifically because FERC may exercise its authority under the FPA to address any state policy which might render wholesale markets unjust or unreasonable.⁹³

The Seventh Circuit, in affirming the district court, frequently referenced both *Hughes* and the FERC amici brief, as well as FERC’s decisions regarding the administrative proceeding discussed in its brief. Specifically, in the FERC proceedings, PJM sought to institute new rules in its capacity auction that would alter how state-supported generators, like those receiving ZECs or REC’s, could bid.⁹⁴ FERC did not approve PJM’s proposal and instead opened a new hearing, *Calpine Corp. v. PJM Interconnection, LLC*, to determine if and what changes should be instituted in the PJM market.⁹⁵

FERC discussed how PJM might address the price-distorting effects of state subsidies for specific resources. Specifically, FERC proposed a two-part solution to address the problem while respecting states’ ability to regulate power generation. First, FERC proposed a more expansive minimum offer price rule (MOPR), which functionally created a price floor in capacity markets.⁹⁶

90. *Id.* at 6 (citing 16 U.S.C. § 8251(a)). *See also* 16 U.S.C. § 8251(b) (providing for judicial review of any FERC-issued order).

91. Brief for the U.S. and FERC, Elec. Power Supply Ass’n v. Star, 904 F.3d 518 (7th Cir. 2018) (No. 05-2433), *supra* note 85, at 18.

92. *Id.* at 20.

93. *Id.*

94. 163 F.E.R.C. ¶ 61,236, at ¶¶ 4, 14.

95. *Id.* at ¶¶ 7–8, 63. As of this writing, the FERC paper hearing concerning PJM rules for state subsidies of specific resources is ongoing.

96. *Id.* at ¶¶ 157–58.

Second, FERC proposed a Fixed Resource Rate (FRR) alternative rule, which would allow load-serving entities to remove a specific resource type (e.g., nuclear plants supported by ZECs) and its corresponding load from the capacity market.⁹⁷ FERC noted these proposed changes would, “essentially create a bifurcated capacity construct.”⁹⁸

Although the *Village of Old Mill Creek* plaintiffs insisted FERC’s actions were evidence of preemption, the appellate court disagreed. Rather, FERC’s actions were evidence of an appropriate regulatory interplay between states and FERC when state policies affect interstate sales. Citing *Hughes*, the court noted that such effects, “do not lead to preemption; they are instead an inevitable consequence of a system in which power is shared between state and national governments.”⁹⁹ Echoing FERC’s brief, the Seventh Circuit concluded that any final decision from FERC would be subject to judicial review: “[t]he need to make adjustments in light of states’ exercise of their lawful powers does not diminish the scope of those powers.”¹⁰⁰

C. Coalition for Competitive Electricity, Dynegy Inc. v. Zibelman

As part of a comprehensive effort to address greenhouse gas (GHG) emissions, the New York Public Service Commission (PSC) issued a Clean Energy Standard (CES) Order creating ZECs, which—like ZECs in Illinois’ program—represent the environmental attributes of nuclear power generation.¹⁰¹ Under the program, nuclear generators are eligible for ZECs if they make a showing of “public necessity,” meaning that the facility’s revenues, “are at a level that is insufficient to preserve the zero-emission environmental values or attributes historically provided by the facility.”¹⁰² The New York State Energy Research and Development Authority (NYSERDA) purchases the ZECs from qualifying facilities, thus subsidizing ZEC production.¹⁰³ The ZECs are then sold to load-serving entities (LSEs), which are required to buy an amount proportional to the amount of energy their customers consume—as in Illinois, these costs may then be passed on to customers.¹⁰⁴

97. *Id.* at ¶¶ 60–61. PJM’s existing FRR allows utilities to opt out of the capacity market if they are able to meet their power demand with their own generation resources, but it requires removing one’s entire generation footprint. *See id.* at ¶ 160.

98. *Id.* at ¶ 161.

99. *Elec. Power Supply Ass’n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018).

100. *Id.*

101. *Coal. for Competitive Elec., Dynegy Inc. v. Zibelman*, 272 F. Supp. 3d 554, 560–61 (S.D.N.Y. 2017).

102. *Id.* at 562.

103. *Id.* at 561–62.

104. *Id.* *See also* *Village of Old Mill Creek*, 2017 WL 3008289, at *1.

Plaintiffs in *Coalition for Competitive Electricity* argued the FPA preempted New York’s ZEC program.¹⁰⁵ In rejecting this argument, the district court relied on *Hughes* when it noted the “ultimate touchstone” in considering the FPA’s preemptive effect is Congress’s purpose in enacting the law.¹⁰⁶ The court first considered the field preemption issues before it turned to conflict preemption.

The court began its analysis of the field preemption claim by declaring the FPA a “paragon of cooperative federalism,” quoting Justice Sotomayor’s concurrence in *Hughes*.¹⁰⁷ Plaintiffs recognized the significant role of *Hughes* in this realm and therefore framed their argument in the language of that case. Plaintiffs contended that even if nuclear generators were not required to participate in the wholesale market, the ZEC program was still “tethered” to the wholesale auction because nuclear generators who received ZECs would of course sell their power into wholesale markets.¹⁰⁸ Unfortunately for plaintiffs, the district court was unconvinced by this argument. The court noted, “nuclear generators receive ZECs for their zero-emissions production of energy and not for the sale of that energy into the wholesale market.”¹⁰⁹ The CES Order itself mentioned neither wholesale auctions nor whether generators must sell into the auctions. The court also relied on the fact that “ZEC sales and wholesale sales of energy or capacity are entirely separate transactions . . . and neither one [is] conditioned on the other,” like the payments were in *Hughes*.¹¹⁰

Similar to the court in *Village of Old Mill Creek*, the court in *Coalition for Competitive Electricity* noted plaintiffs were unable to distinguish ZECs from RECs, and FERC concluded the latter fell outside its jurisdiction in *WSPP*.¹¹¹ For the court, plaintiffs’ failure to distinguish ZECs from RECs was the, “death knell for [p]laintiffs’ field-preemption argument.”¹¹² The district court found both ZECs and RECs of credits to be legally indistinguishable in terms of their effects on wholesale auctions. If the court found the REC program was not preempted—as FERC held in *WSPP*—then, likewise, the court could not find the ZEC program preempted either.¹¹³

105. *Id.* at 569.

106. *Id.* at 567 (citing *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016)).

107. *Id.* (citing *Hughes*, 136 U.S. at 1297).

108. *Id.* at 569–70.

109. *Id.* at 570.

110. *Id.* at 572 (emphasis added).

111. *Id.* at 573 (citing 139 F.E.R.C. ¶ 61,061, at ¶¶ 18, 21, 24).

112. *Id.*

113. *Id.* at 573–74.

The court next analyzed the conflict preemption claim. Plaintiffs alleged the ZEC program interfered with FERC’s intent to base wholesale auctions on market-based principles designed to encourage efficient generation.¹¹⁴ In response, the court explained that even if efficient generation was one of FERC’s goals, the ZEC program presented no conflict. By incentivizing clean energy, the ZEC program would minimize environmental damage caused by generating electricity with fossil fuels.¹¹⁵ The court contended this would in fact be a *more efficient* outcome when it further explained that the ZEC program functioned to correct market failures and enhance social welfare.¹¹⁶ The court also reasoned that FERC may intervene if it thought the ZEC program interfered with its objectives.¹¹⁷

D. Coalition for Competitive Electricity on Appeal

On appeal, the Second Circuit affirmed the district court’s decision.¹¹⁸ The court began its review by noting the FPA establishes a “collaborative scheme” between the states and the federal government in the regulatory field of electricity generation.¹¹⁹ When it addressed field preemption, the Second Circuit looked to the narrow holding in *Hughes* and relied on similar reasoning as the district court and courts in the Illinois ZEC case.¹²⁰ The court noted that unlike the program in *Hughes*, nuclear plants’ ability to receive ZECs in the instant case was not contingent on participation in wholesale electricity markets.¹²¹ Like the Seventh Circuit, the Second Circuit noted the possibility of ZEC plants operating outside of wholesale markets altogether through direct sales to individual consumers.¹²²

The Second Circuit further distinguished *Hughes* when it addressed the pricing mechanism employed by the New York ZEC program. New York’s ZEC program set ZEC prices in two-year increments wherein prices remained fixed for that two-year period—this effectively sets a cap on ZEC prices so they do not fluctuate according to the wholesale clearing price.¹²³ New York ZEC prices are initially based on the social cost of carbon and adjusted based on forecast wholesale prices.¹²⁴ This pricing method contrasts with the “contract for differences” approach in *Hughes*, wherein the mechanism

114. *Id.* at 577.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Coal. for Competitive Elec., Dynegy Inc. v. Zibelman*, 906 F.3d 41, 46 (2d Cir. 2018).

119. *Id.*

120. *Id.* at 52.

121. *Id.*

122. *Id.*

123. *Id.* at 51.

124. *Id.*

directly insulated a power generator from wholesale market fluctuations.¹²⁵ Moreover, ZEC prices in New York’s program may adjust based on the amount of renewable energy generation in the state’s energy mix, thus reflecting the purpose of New York’s program: to use nuclear power as a bridge to a renewable energy future.¹²⁶

In rejecting plaintiffs’ conflict preemption claim, the Second Circuit found the ZEC program did not do clear damage to federal energy goals.¹²⁷ Plaintiffs argued that to keep otherwise uneconomic plants running resulted in distorted prices, and it thwarted FERC’s goal to maintain an efficient wholesale market. The court noted, however, that FERC previously sanctioned state programs that increased capacity or impact wholesale market prices, as long as the states acted within their jurisdiction.¹²⁸ The Second Circuit then concluded: “[t]hus, states may grant loans, subsidies or tax credits to particular facilities on environmental or policy grounds, including when that makes clean generation more competitive in a cost comparison with fossil-fueled generation or allows states to affect the price.”¹²⁹

V. IMPLICATIONS FOR STATE POLICIES IN POWER GENERATION

The entire energy sector is in a state of transition. The widespread desire to decarbonize electricity production resulted in states’ exploration of policies designed to rapidly reduce GHG emissions. This is particularly true in the face of continued federal inaction on price determinations or GHG regulations.¹³⁰ State renewable clean energy goals, along with challenges presented by intermittent renewables, have states pursuing a wide variety of technologies and policies—from DERs, battery storage, and demand side management, to feed-in-tariffs and renewable portfolio standards (RPS), ZEC and REC programs, and more.¹³¹ Such innovative,

125. See *supra* text accompanying notes 51–54.

126. See *Coal. for Competitive Elec., Dynegy Inc.*, 906 F.3d at 47–48 (explaining the price of ZECs in New York may be reduced in part by entry of new sources of renewable generation, “reflecting the reduced value of nuclear plants if renewable generation gains steam.”).

127. *Id.* at 57.

128. *Id.* at 56.

129. *Id.* at 57 (internal citations omitted).

130. See Brad Plumer, *A ‘Green New Deal’ Is Far From Reality, but Climate Action Is Picking Up in the States*, N.Y. TIMES (Feb. 8, 2019), <https://www.nytimes.com/2019/02/08/climate/states-global-warming.html> [<https://perma.cc/ZMS2-AMZQ>].

131. See STATE RENEWABLE ENERGY RESOURCES, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/statelocalenergy/state-renewable-energy-resources> [<https://perma.cc/7PGW->

yet sweeping changes disrupt the energy system and do not seamlessly fit within traditional sectoral divisions of the electric industry.¹³² This presents unique challenges for contemporary regulation in the energy sector.

As noted above, a hallmark of the Court's jurisprudential era of dual federalism was a bright line rule that separated federal and state regulatory authority. The Court's recent shift toward a cooperative federalism framework better accommodates the dynamic and evolving energy sector.¹³³ Throughout this shift, the Court urged lower courts to be especially cautious in their preemption inquiries, which in turn granted states a wide berth to experiment with ways to encourage new or clean power generation. Courts in the ZEC cases heeded the Supreme Court's instructions and refused to find field preemption merely because state policies *could* have a significant effect on wholesale markets.¹³⁴ Because both the Seventh and Second Circuits affirmed the district courts' rulings on the state ZECs programs, it seems unlikely the Supreme Court will take up the ZEC issue.

The circuit courts' analyses in both ZEC cases centered on FERC's authority to take countervailing actions if it found the programs undermined its mandate to ensure just and reasonable wholesale rates.¹³⁵ For example, at the time of this writing, FERC has an ongoing hearing to address the impacts of state policies on PJM's capacity market.¹³⁶ While any final order may impact what programs states may implement, FERC remains committed, at least in its language, to preserving state authority to regulate power generation.¹³⁷

WYKN] (providing background on different technologies and policies available to states pursuing clean energy policies or initiatives).

132. *E.g.*, *A Strategic Overview of the Global Energy Markets*, WORLD ENERGY MKTS. OBSERVATORY 21 (Perry Stoneman, et al. eds., 20th ed. 2018), <https://www.capgemini.com/wp-content/uploads/2019/03/World-Energy-Markets-Observatory-2018v1.pdf> [<https://perma.cc/Z5U4-N5EA>].

133. *See generally*, Daniel A. Lyons, *Protecting States in the New World of Energy Federalism*, 67 EMORY L. J. 921 (2018) (discussing the new age of concurrent jurisdiction in energy regulation and suggesting ways states may preserve authority in energy policy decisions).

134. *See supra* Part IV.

135. *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018); *Coal. for Competitive Elec., Dynegy Inc. v. Zibelman*, 272 F. Supp. 3d 554, 577 (S.D.N.Y. 2017).

136. *See* Gavin Bade, *PJM Aims for Middle in Defense of Capacity Market Plan at FERC*, UTIL. DIVE (Nov. 8, 2018), <https://www.utilitydive.com/news/pjm-aims-for-middle-in-defense-of-capacity-market-plan-at-ferc/541762/> [<https://perma.cc/9DUY-ZZL6>]; Gavin Bade, *PJM to Ask FERC to Invalidate Its Energy Market Rules After Stakeholder Impasse*, UTIL. DIVE (Feb. 15, 2019), <https://www.utilitydive.com/news/pjm-to-ask-ferc-to-invalidate-its-energy-market-rules-after-stakeholder-imp/548585/> [<https://perma.cc/RL8G-493E>].

137. This is so at least in regard to preserving state authority when state regulations do not "target" areas reserved by Congress for federal regulation. *E.g.*, Brief for the U.S. and FERC, *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018) (No. 05-2433), *supra* note 85, at 18.

In *Calpine Corp.*, the ongoing FERC hearing focused on state subsidy impacts on the capacity market, FERC noted that its proposed rule changes, “in no way divest[] the states in the PJM region of their jurisdiction over generation facilities. States may continue to support their preferred types of resources in pursuit of state policy goals.”¹³⁸ Some commentators suggested FERC’s proposed bifurcated system—with a reduced capacity market and resource-specific FRR alternatives—benefits states interested in renewable resources because it may provide states with more options through which to procure their respective loads.¹³⁹ Specifically, FERC’s proposed system might allow LSEs to bilaterally contract for renewables, or any other state-supported resource, for only a portion of their load.¹⁴⁰ Furthermore, any FERC order the states perceive as undermining states’ ability to regulate generation facilities will be subject to judicial review, as the courts in the ZEC cases noted.¹⁴¹

Energy law scholar Jim Rossi argues that, in light of *Hughes*, the key inquiry for a preemption issue is whether a state law *targets* a federal regulation.¹⁴² The thrust of Rossi’s argument is that states should have the ability to pursue any number of measures designed to address energy attributes—like carbon emissions or environmental benefits that FERC-regulated wholesale markets do not price—as long as they do not target, and thus directly conflict with, a “federal regulatory initiative.”¹⁴³

Rossi’s view aligns with both the district and circuit courts’ views in *Coalition for Competitive Electricity*, where, for instance, the judges found

138. *Calpine Corp. v. PJM Interconnection, LLC*, 163 F.E.R.C. ¶ 61,236 at ¶ 158.

139. See Gavin Bade, *How FERC’s ‘unprecedented’ PJM order could unravel capacity markets*, UTIL.DIVE (July 3, 2018), <https://www.utilitydive.com/news/how-fercs-unprecedented-pjm-order-could-unravel-capacity-markets/527053/> [<https://perma.cc/8AB6-YW5S>].

140. *Id.*

141. See, e.g., *Elec. Power Supply Ass’n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) (“Once the Commission reaches a final decision in the ongoing proceeding, the adequacy of its adjustments will be subject to judicial review; the need to make adjustments in light of states’ exercise of their lawful powers does not diminish the scope of those powers.”).

142. Rossi, *supra* note 2, at 450 (“... in assessing preemption the Court’s decision[] in . . . *Hughes* show[s] that the key inquiry is whether a state law targets a federal regulation.”) (citing *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 (2016)). FERC also used this specific “target” language in its amici brief to the Seventh Circuit. See Brief for the U.S. and FERC, *Elec. Power Supply Ass’n v. Star*, 904 F.3d 518 (7th Cir. 2018) (No. 05-2433), *supra* note 85, at 7 (arguing in part the Illinois ZEC program was not preempted because “the Illinois ZEC is ‘targeted’ at an attribute of generation resources over which Illinois has regulatory authority.”).

143. Rossi, *supra* note 2, at 450–51.

no conflict between FERC’s operation of the wholesale energy market and the New York PSC’s choice to price environmental attributes to make up for the wholesale market’s failure to do so.¹⁴⁴ Rossi emphasizes that courts must focus on whether a preemption finding, “advances or hinders the statutory purpose of avoiding a regulatory no man’s land in energy markets—a question entirely ignored by previous precedents that embrace dual sovereignty.”¹⁴⁵ This view squares with the Court’s opinions in *EPSA* and *Hughes* which both emphasized the FPA’s underlying purpose of as the key to any preemption analysis in this context. Notably, judges in the *ZEC* cases echoed this reasoning as well.¹⁴⁶

In the closing paragraph of the *Hughes* opinion, the Court listed a number of ways states may encourage new or clean generation. These include tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, and re-regulation of the energy sector.¹⁴⁷ According to the Court, as long as any subsidies payment was not conditioned on a bid clearing a wholesale auction, such policies would not run afoul of *Hughes*.¹⁴⁸ Based on recent cases, states would benefit if their respective new or clean generation policies clarify that such policies target power generation or retail services, and that effects on wholesale markets are merely incidental, rather than the aim of the policies.

States may also encourage renewable energy through feed-in tariffs (FITs). FITs require utilities to purchase renewable power at a fixed, presumably above-market rate.¹⁴⁹ Felix Mormann, a faculty fellow at Stanford’s Steyer-Taylor Center for Energy Policy and Finance, suggests the state level is the best regulatory match for FIT programs, as PURPA already grants states with much of the authority necessary to implement FIT programs.¹⁵⁰ PURPA allows states to require utilities to purchase electricity that particular qualifying-facility renewable generators feed into the grid.¹⁵¹ Because states also have jurisdiction over retail electricity rates, they can help utilities recoup costs

144. *Coal. for Competitive Elec., Dynegy Inc. v. Zibelman*, 906 F.3d 41, 57 (2d Cir. 2018).

145. Rossi, *supra* note 2, at 451.

146. *See, e.g., Coal. for Competitive Elec., Dynegy Inc. v. Zibelman*, 272 F. Supp. 3d 554, 567 (2017) (“In considering a federal law’s preemptive effect, ‘the ultimate touchstone’ is Congress’s purpose in enacting the law.”) (citing *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016)).

147. *Hughes*, 136 S. Ct. at 1299.

148. *Id.*

149. *Feed-In Tariff: A Policy Tool Encouraging Deployment of Renewable Electricity Technologies*, U.S. ENERGY INFO. ADMIN. (May 30, 2013), <https://www.eia.gov/todayinenergy/detail.php?id=11471> [<https://perma.cc/3Q4E-554A>].

150. Felix Mormann, *Clean Energy Federalism*, 67 FLA. L. REV. 1621, 1653 (2015) (citing 16 U.S.C. § 824a-3 (2012); 18 C.F.R. §§ 292.303(c), 292.306(a) (1985)).

151. *Id.* at 1653.

through surcharges or a system benefits charge.¹⁵² However, FIT programs based on PURPA would be limited to QFs (small power generation facilities of 80 MW or less).¹⁵³

Alternatively, states may consider mandated long-term bilateral contracts for large renewable generators as a more comprehensive program with effects similar to FITs. A mandated contract would bypass wholesale market auctions entirely, thus preventing conflict like that in *Hughes* between state regulation of in-state power generation and federal regulation of wholesale markets.¹⁵⁴ In *Hughes*, the Court distinguished traditional bilateral contracts for capacity from the “contract for differences” in Maryland’s energy policy, where payment under the “contract for differences” was contingent on capacity market participation.¹⁵⁵ As the *Hughes* Court noted, bilateral contracts for electricity do not present such conflicts because FERC may still review the rate for reasonableness.¹⁵⁶ Still, neither FERC nor courts seem to value energy attributes like zero emissions.¹⁵⁷ Thus, if a state policy is clear in how and why the state chooses to value a non-market energy attribute, it will likely pass scrutiny.

Although some states demonstrated interest in aggressive pursuits for decarbonization of electricity production, this is certainly not true of all states. Further, states’ policy latitude in the wake of *EPSA* and *Hughes* is not limited to renewable energy. For example, nothing would prevent a state from subsidizing coal or natural gas generators in the name of reliability, jobs, or local industry.¹⁵⁸ Thus, the cooperative federalism framework itself is neutral and fuel source agnostic.

152. *Id.* (citing 18 C.F.R. § 292.303(a) (1985)).

153. *Id.* (citing 16 U.S.C. § 824a-3 (2012)).

154. *See supra* text accompanying notes 55–58.

155. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1294–95 (2017).

156. *Id.* at 1292–93.

157. *E.g.*, Thaddeus Swanek, *FERC Looks At Ways to Compensate Plants for Their Resiliency*, NUCLEAR ENERGY INST., <https://www.nei.org/news/2018/ferc-looking-ways-compensate-plants-resiliency> [<https://perma.cc/649V-ME3L>] (discussing FERC plans to reward plants with 90-day on-site fuel stores for “reliability” purposes and states’ concerns this initiative will replace clean energy plants with fossil fuel plants “mak[ing] it almost impossible to reach [states’] clean energy goals.”).

158. *See Rossi, supra* note 2, at 453 (noting that federal regulation of power grid reliability functions as a floor, above which that states can enact more rigorous reliability standards).

VI. CONCLUSION

It is impossible to predict the significance or permanency of the Supreme Court's shift toward cooperative energy federalism. However, *EPSA* and *Hughes* seem to mark a turning point in energy industry regulation. These cases reject a dual federalism framework characterized by jurisdictional bright lines and instead emphasize the cooperative nature of state and federal energy regulation, as well as the purpose of the FPA. By following the Court's model, lower courts may avoid field preemption analyses altogether. Though judges in the two ZEC cases conducted field preemption inquiries, they were fairly hostile to a strict division of regulatory fields and instead followed the Court's cooperative federalism directives in *EPSA* and *Hughes*. Of course, a shift in the Court's balance and views may drive energy regulation in the other direction, rendering *EPSA* and *Hughes* somewhat anomalous in the Court's jurisprudence. That said, changes in the energy sector suggest this is unlikely, as technological shifts continue to accelerate the interconnectedness of state and federal regulation.¹⁵⁹

The Court's recent decisions have one overarching positive implication for states: they *should* enjoy more leeway to experiment with policies designed to promote new or clean power generation, as courts are now less likely to find preemption of such policies. The ZEC cases illustrate this, though only time and additional cases will demonstrate the true significance of this shift to a cooperative energy federalism.

FERC also has a significant role to play in the cooperative federalism framework, and it may act to either enhance or restrict the paths opened by the courts' shift. So far, FERC demonstrated restraint in not intervening with recent state policies that value energy attributes, even when the policies impact wholesale energy markets.¹⁶⁰

Together, the recent Supreme Court cases, subsequent lower court decisions, and FERC's regulatory and administrative activities all suggest states may now pursue their energy policy goals with more confidence than in recent past—particularly without fear of a definitive preemption ruling if FERC challenges such policies in court. With action on climate change ever more pressing to many state legislatures, state energy policies will likely continue to put these regulatory shifts to the test.

159. See Lyons, *supra* note 133.

160. FERC's final order in the ongoing matter related to PJM's capacity markets has the potential to undermine this. Still, FERC operated collaboratively in other contexts with policies like demand response and net energy metering in which FERC offered states the option of either opting out of the relevant FERC rules or approaching regulation in a different manner. See FERC, 2018 ASSESSMENT OF DEMAND RESPONSE AND ADVANCED METERING 25–27 (Nov. 2018), <https://www.ferc.gov/legal/staff-reports/2018/DR-AM-Report2018.pdf> [<https://perma.cc/YX5Q-D8LW>].