

# Preemptive Attack: California’s SB 100, The FPA, and Combating Climate Change

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## INTRODUCTION

The United States contributes fifteen percent of the world's greenhouse gas (GHG) emissions while making up only four percent of the world's population.<sup>1</sup> In recent years, the United States has made progress towards reducing the amount of GHGs we put into the atmosphere. However, there is the fear that the current administration is attempting to curtail regulations.

In 1935, the federal government passed the Federal Power Act creating two distinct jurisdictions over the energy market.<sup>2</sup> This was in response to a gap in jurisdictional coverage between the states and federal government known as the Attleboro Gap.<sup>3</sup> Interstate wholesale sales were to be regulated by the Federal Power Commission (now known as the Federal Energy Regulatory Commission (FERC)), and states would control energy generation, siting, and most importantly retail sales.<sup>4</sup> For eighty-one years this dual sovereignty model governed how electric energy distribution was managed throughout the country.

In 2016, the Supreme Court ruled on two cases that changed the way we look at the divide between federal and state power in the energy industry. First, *FERC v. EPSA* established a new “bright line” rule and expanded federal authority to regulate energy markets by preempting a state challenge to a FERC order that “affected” retail sales.<sup>5</sup> Then, *Hughes v. Talen* further extended federal authority by ruling that a state's attempt to interfere within the sphere of FERC regulatory authority was preempted.<sup>6</sup> The new concurrent jurisdiction approach to energy regulation seems here to stay. Two circuit courts recently applied *EPSA* and *Hughes* finding regulations enacted by the two states were not preempted by the FPA.<sup>7</sup> This solidifies the new concurrent jurisdiction model *EPSA* and *Hughes* laid out.

States have increasingly enacted legislation to help combat climate change especially through GHG emission regulation. The Renewable Portfolio

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1. United States Environmental Protection Agency, *Global Greenhouse Case Emissions Data*, <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data> [https://perma.cc/KGP4-MZLA] (last visited Oct. 10, 2018).

2. Federal Power Act, 16 U.S.C. §§ 791a-828c (2012).

3. See Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927).

4. 16 U.S.C. § 824a.

5. See *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016) (hereinafter *FERC v. EPSA*).

6. *Hughes v. Talen Energy Mktg.*, 136 S. Ct. 1288, 1297 (2016).

7. See generally *Coalition for Competitive Elec. v. Zibelman*, No. 17-2654, at \*1 (2d Cir. Sept. 27, 2018); *Elec. Power Supply Ass'n v. Star*, No. 17-2433, 2018 WL 4356683, at \*1 (7th Cir. Sept. 13, 2018).

Standards (RPS) is a main method used by states.<sup>8</sup> An RPS is a state-mandated percentage of electric energy that must be supplied to retail customers by renewable sources.<sup>9</sup> California recently passed SB 100, which increased the percentage requirements of RPSs through 2045. Most notably, SB 100 mandates 60 percent renewable energy sources by 2030, and 100 percent by 2045. California is the second state in the country, after Hawaii, to create a mandate of 100 percent renewable energy.<sup>10</sup>

In an administrative climate hostile to regulation combating climate change, California's desire to push the envelope and make meaningful attempts to curb climate change is noble. However, its effort leaves the state open to federal challenges of preemption under the FPA, possibly leading to a one step forward two steps back precedent that would change states' ability to combat climate change.

## I. PREEMPTION IN THE ENERGY MARKET

### A. *The Supremacy Clause*

Article VI, paragraph 2 of the U.S. Constitution states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . ."<sup>11</sup> Under the Supremacy Clause, federal law preempts contrary state law. Preemption can be subdivided into two subcategories: (1) express preemption, and (2) implied preemption.<sup>12</sup> Express preemption occurs when Congress expressly states that a certain law preempts state law.<sup>13</sup> Implied preemption occurs when it can be inferred from the language of the statute that Congress intended to preempt state law.<sup>14</sup> Implied preemption can be broken down into two further categories: field and conflict preemption.<sup>15</sup> Field preemption is implied when Congress

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8. See Ivan Gold & Nidhi Thakar, *A Survey of State Renewable Portfolio Standards: Square Pegs for Round Climate Change Holes?*, 35 WM. & MARY ENVTL. L. & POL'Y REV. 183, 185 (2010).

9. *Id.*

10. Act of Sept. 10, 2018, ch. 312, § 1, 2018 Cal. Legis. Serv. (WEST) (to be codified at CAL. PUB. UTIL. CODE §§ 399.11, 399.15, and 399.30, and to add Section 454.53).

11. U.S. CONST. art. VI, para. 2.

12. See Jennifer Ko, Comment, *The Nuclear Option: What Can States Do To Encourage Clean Energy After Hughes and EPSA?*, 166 U. PA. L. REV. 1267, 1274 (2018) (discussing the different types of preemption).

13. *Id.*

14. *Id.*

15. *Id.*

has legislated so extensively in an area as to occupy the entire field.<sup>16</sup> Conflict preemption is either direct or implied when there is a conflict between federal and state law as to not allow the observance of one without coming into conflict with the other.<sup>17</sup> In either case, express or implied, the court has stated that “the purpose of Congress is the ultimate touchstone in every pre-emption case.”<sup>18</sup>

Recently, field preemption was used to determine the proper balance between federal and state laws in the energy market—first under the FPA, and second under the Natural Gas Act.<sup>19</sup> The Supreme Court has ruled that when determining field preemption, the question hinges on whether “the target at which the state law aims” is under FERC’s exclusive jurisdiction.<sup>20</sup> Therefore, field preemption under the FPA is not only determined by Congress’s exclusive legislation, but also by the target of the state law. This paper will look exclusively at preemption under the Federal Power Act in the context of recent laws passed in California.

### *B. The Federal Power Act*

Passed in 1935, the FPA was enacted to fill a gap in jurisdictional coverage in the energy market. In 1927, the Supreme Court ruled in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.* that states had no regulatory authority over interstate commerce by electric utilities.<sup>21</sup> However, at that time there was no federal agency created by Congress to regulate the interstate energy market. The gap in regulation became known as the “Attleboro Gap.”<sup>22</sup> Congress enacted the FPA to fill this gap and regulate interstate energy markets. In the FPA, Congress gave authority to the Federal Power Commission (now known as FERC) to regulate interstate wholesale energy sales.<sup>23</sup>

While the FPA grants FERC jurisdiction over interstate and wholesale power sales, the authority does not extend to “any other sale of electric

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16. *Id.*

17. *Id.*

18. *Hughes v. Talen Energy Mktg.*, 136 S. Ct. 1288, 1297 (quoting *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008)).

19. *See id.*; *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015).

20. *Oneok*, 135 S. Ct. at 1599.

21. *See generally* *Pub. Utils. Comm’n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927).

22. Scott Jacobson, Note, *Dual Sovereignty Is Out, Time for Concurrent Jurisdiction to Shine*, 42 WM. & MARY ENVTL. L. & POL’Y REV. 627, 629 (2018).

23. 16 U.S.C. § 824 (2012) (In 1935 when the FPA was enacted the regulatory agency granted authority over the interstate wholesale markets was the Federal Power Commission).

energy.”<sup>24</sup> Section 201(a) of the FPA states that federal regulation authority “extend[s] only to those matters which are not subject to regulation by the States.”<sup>25</sup> Further, sections 205 and 206 grant FERC exclusive authority to regulate commerce and rates within interstate wholesale sales and the transmission of such electricity within the interstate market.<sup>26</sup>

Under the Supremacy Clause, the Supreme Court held that the FPA as enacted by Congress created a “bright line” separation of federal and state jurisdiction.<sup>27</sup> Federal jurisdiction covered the rates, terms, and provisions of all wholesale sales or transmission of electricity within the interstate market.<sup>28</sup> Covered under this federal jurisdiction is FERC’s authority to determine and establish reasonable wholesale rates. As stated in *Mississippi Power & Light*, “FERC has exclusive authority to set and to determine the reasonableness of wholesale rates.”<sup>29</sup> However, per section 201(a), all other regulations are reserved to the states.<sup>30</sup>

### C. Recent Supreme Court Decisions

#### 1. The 2016 FERC v. EPSA Decision

In 2016, the Supreme Court altered the “bright line” separating federal and state authority by expanding federal authority over energy regulation in *FERC v. EPSA*.<sup>31</sup> In 2011, FERC issued Order 745, which attempted to “ensure ‘just and reasonable’ wholesale rates by requiring market operators to appropriately compensate demand response providers and thus bring about ‘meaningful demand-side participation’ in the wholesale markets.”<sup>32</sup> More simply, this rule required demand response resources to be allowed to compete in wholesale markets. Demand response is a method of encouraging people to conserve energy during peak consumption time, or when the grid is strained.<sup>33</sup> Generally, the cost of compensating consumers

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24. *Id.* § 824(b)(1).

25. *Id.* § 824(a).

26. *Id.* § 824(d)–(e).

27. Fed. Power Comm’n v. S. Cal. Edison Co., 376 U.S. 205, 215–16 (1964).

28. Steven Ferrey, *Supreme Court Shifts Supremacy Doctrine-Preempting State Sustainability?*, 50 Ariz. St. L.J. 523 (2018).

29. Miss. Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 371 (1988).

30. See 16 U.S.C. § 824(a) (2012).

31. FERC v. EPSA, 136 S. Ct. at 774.

32. *Id.* at 771.

33. See *id.* at 770.

for their energy conservation is less than building or buying emergency energy to supply additional power at peak usage times.<sup>34</sup>

FERC Order 745 required Regional Transmission Organizations (RTOs)<sup>35</sup> and Independent System Operators (ISOs)<sup>36</sup> to accept market bids from demand response resources and in return compensate their bids the same as if the RTO or ISO had purchased power from a power generation source.<sup>37</sup> Under cooperative federalism, FERC Order 745 allows state regulators to prohibit their customers from bidding on demand response in the wholesale market.<sup>38</sup> However, demand response marketing is a method of conserving energy by customers, not a sale of energy in the interstate wholesale market regulated by the FPA, meaning that FERC did not have jurisdiction under section 201 of the FPA. Instead, FERC relied on sections 205 and 206, which states that: (1) regulation on “[a]ll rates and charges made, demanded, or received . . . shall be just and reasonable”; and (2) if FERC finds “any rate . . . unjust, unreasonable, unduly discriminatory . . . the Commission shall determine the just and reasonable rate.”<sup>39</sup> The courts have traditionally allowed FERC to interpret sections 205 and 206 to allow regulations that affect wholesale rates, even if those actions also impact retail customer rates.<sup>40</sup>

The Supreme Court in *EPSA* held that demand response bids and participation directly impact wholesale sales and are within FERC’s jurisdiction.<sup>41</sup> However, this reversed the Appeals Court decision that found, “[i]n ‘luring . . . retail customers’ into the wholesale market, and causing them to decrease ‘levels of retail electricity consumption,’ the rule engages in ‘direct regulation of the retail market.’”<sup>42</sup> The Supreme Court found this unpersuasive and reversed, moving the “bright line” separating federal and state regulatory authority, and stating: “We afford great deference to the Commission in its rate decisions.”<sup>43</sup> Further, the Court found: “Compensation for demand response thus directly affects wholesale prices. Indeed, it is hard to think of a practice that does so more.”<sup>44</sup>

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34. See Ferrey, *supra* note 28, at 515.

35. An RTO coordinates, controls, and monitors a multistate electric grid. Due to the transfer energy between states, FERC has authority to regulate RTOs. RTOs operate solely within the wholesale market.

36. An ISO is similarly to an RTO but can incorporate only one state as in California-ISO (CAISO), or between multiple states. Usually much smaller than an RTO.

37. Ferrey, *supra* note 28, at 525.

38. Ferrey, *supra* note 28, at n.56.

39. 16 U.S.C. § 824(d)–(e) (2012).

40. Ferrey, *supra* note 28, at 525.

41. FERC v. EPSA, 136 S. Ct. at 773.

42. *Id.*

43. *Id.* at 782 (quoting *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 532 (2008)).

44. *Id.* at 775.

The Court went further in holding that FERC did not intend to directly regulate retail markets by allowing states to prohibit demand response participation:

[T]hat veto gives States the means to block whatever “effective” increases in retail rates demand response programs might be thought to produce. Wholesale demand response as implemented in the Rule is a program of cooperative federalism, in which the States retain the last word. That feature of the Rule removes any conceivable doubt as to its compliance with § 824(b)’s allocation of federal and state authority.<sup>45</sup>

This extended the “bright line” to include the sense of concurrent jurisdiction. *EPSA* effectively created a “blurred line” of regulatory authority that distinguishes between the effect of the Rule and the intent of its passing. The Court held that, “[i]n promoting demand response, FERC did no more than follow the dictates of its regulatory mission to improve the competitiveness, efficiency, and reliability of the wholesale market.”<sup>46</sup>

Justice Kagan stated for the majority, “although (inevitably) influencing the retail market too, the Rule does not intrude on the States’ power to regulate retail sales.”<sup>47</sup> *EPSA* expanded federal authority to allow regulation if a rule “inevitably” influences the retail market. The Court’s expanded concurrent jurisdiction holding granted FERC almost unlimited power to regulate markets because in our interconnected market system almost any action by FERC would influence the retail market and is now allowed under the FPA.

## 2. *The Hughes v. Talen Decision*

After *EPSA*, another case in 2016 moved the now mythical “bright line” or at least what was left of it. *Hughes v. Talen* struck down a state law for interfering with FERC regulatory authority in the wholesale market.<sup>48</sup> The case dealt with an attempt by the Maryland legislature to provide incentives for a new power plant.<sup>49</sup> Maryland required Load Serving Entities (“LSE”s)<sup>50</sup> to enter into a twenty-year contract with the energy generator.<sup>51</sup> However,

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45. *Id.* at 780.

46. *Id.* at 779.

47. *Id.* at 784.

48. *See generally* *Hughes v. Talen*, 136 S. Ct. 1288 (2016).

49. *Id.* at 1299.

50. LSEs are the energy distributors that purchase wholesale energy from RTOs/ISOs and then sell this energy to retail customers.

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

the “contract for differences” did not transfer ownership to the LSE, but rather allowed the energy generator to sell on the wholesale market while guaranteeing the contract price instead of the auction price set by FERC.<sup>52</sup>

The Supreme Court struck down the Maryland law. The Court held that the law interfered with the wholesale market rates set by FERC through the PJM energy market<sup>53</sup> because the “contract for differences” allowed for a circumvention of the wholesale rates, allowing Maryland to interfere with the wholesale market.<sup>54</sup> The Court stated, “Maryland’s program sets an interstate wholesale rate, contravening the FPA’s division of authority between state and federal regulators.”<sup>55</sup> The Court found that the contract for differences was tethered to the wholesale market, and thus impeded upon FERC’s authority.<sup>56</sup>

However, the Court explained that the *Hughes* decision was narrow, and the legislation was rejected “only because it disregards an interstate wholesale rate required by FERC.”<sup>57</sup> Further, the Court left the door open for states to effectuate further legislation. The Court concludes the opinion with “[n]othing in this opinion should be read to foreclose Maryland and other States from encouraging production of new clean generation through measures ‘untethered to a generator’s wholesale market participation.’”<sup>58</sup> While *Hughes* once again expanded federal authority over energy wholesale markets, Justice Ginsburg’s conclusion leaves room for states to regulate energy markets so long as they are “untethered” to wholesale markets. Interpreting what “untethered” meant to the wholesale market was left to the lower courts to decide and in 2018 two appeals courts weighed in.

## B. Recent Circuit Court Decisions

### 1. The EPSA v. STAR Decision

On September 13, 2018, the Seventh Circuit upheld Illinois’ power to enact state regulation in the energy market. *EPSA v. Star* leans heavily on *Hughes* and Justice Ginsburg’s interpretation of state power.<sup>59</sup> The case arose out of Illinois’ “enacted legislation subsidizing some of the state’s

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52. *Id.*

53. PJM is an RTO that manages a competitive wholesale electricity market and coordinates the transmission of wholesale electricity over a thirteen-state region in the eastern United States. FERC, Electric Power Markets: PJM, <https://www.ferc.gov/market-oversight/mkt-electric/pjm.asp?csrt=8202829176814192347> (last visited Nov. 17, 2018).

54. *Id.* at 1299.

55. *Hughes*, 136 S. Ct. at 1297.

56. *See id.*

57. *Id.* at 1299.

58. *Id.* at 1299.

59. Elec. Power Supply Ass’n v. Star, 904 F.3d 518, 523 (7th Cir. 2018).



nuclear generation facilities, which the state fears will close.”<sup>60</sup> Illinois favored these producers by creating a “zero emission credit” (ZEC), a sellable commodity by low carbon emitting power producing power plants.<sup>61</sup> High carbon power plants (e.g. coal or gas power plants) would then be required to purchase ZECs to offset “the social cost of carbon.”<sup>62</sup> Illinois derived the cost of each ZEC from a federal working group’s calculation that was linked to a “market price index” derived from the annual average energy prices in wholesale market auctions.<sup>63</sup>

The issue in *Star* arose with the setting of the price of a ZEC because “the price-adjustment aspect of the state’s system leads to preemption by the Federal Power Act because it impinges on the FERC’s regulatory authority.”<sup>64</sup> The impingement was that the ZEC system “indirectly regulates the auction by using average auction prices as a component in a formula that affects the cost of a credit.”<sup>65</sup>

The Seventh Circuit found that Illinois did not overstep its authority with the ZEC system. First, FERC determined, through an amicus brief, that the “program does not interfere with interstate auctions and is not otherwise preempted.”<sup>66</sup> Next, the court went on to interpret *Hughes* to create a line “between state laws whose effect depends on a utility’s participation in an interstate auction (forbidden) and state laws that do not so depend but that may affect auctions (allowed).”<sup>67</sup> The circuit court held that because Illinois’ ZEC program was “untethered to a generator’s wholesale market participation,” the state was free to create this regulation.<sup>68</sup> Finally, the court held that powers reserved to the states under the FPA may affect interstate sales; however, “[t]hose 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.”<sup>69</sup>

*EPSA v. Star* seems to give some power back to the states to create regulations that might affect the wholesale market. However, the reliance by the circuit court on dicta by Justice Ginsburg might leave the case open

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60. *Id.* at 521.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 521.

65. *Id.* at 522.

66. *Id.*

67. *Id.* at 523.

68. *Id.*

69. *Elec. Power Supply Ass’n*, 904 F.3d at 524.

to challenge in the Supreme Court, and with the current makeup of the Court, this seems more likely than not.

## 2. *The Coalition for Competitive Electricity v. Zibelman Decision*

Two weeks later, the Second Circuit Court ruled on a similar ZEC program in New York. The New York ZEC system was challenged on both field preemption and conflict preemption grounds after the district court dismissed the case on a 12(b)(6) ruling.<sup>70</sup> The Second Circuit also relied on *Hughes* and the principle of a “tether” when reaching its decision.<sup>71</sup>

*Coalition for Competitive Electricity v. Zibelman* arose out of a challenge to New York’s ZEC program, alleging the ZECs influenced the prices that result from a wholesale auction system created by FERC, and the program influenced when energy generators should close.<sup>72</sup> New York’s ZEC program aimed to prevent nuclear generators (which do not release carbon dioxide) from retiring before other renewable energy generators can be placed on the grid to supply retail customers with energy.<sup>73</sup> In the New York system, ZECs are a subsidy provided to select plants to adjust for the “social cost of carbon” provided by the wholesale auction operator based on the plant meeting specific criteria.<sup>74</sup> This subsidy was challenged on the grounds that the ZEC program was both field and conflict preempted by FERC’s authority over wholesale prices.<sup>75</sup>

The Second Circuit Court disagreed and ruled that, based on the recent *Hughes* decision, New York’s ZEC program was not field preempted because the program was not tethered to the wholesale prices, as they were in *Hughes*.<sup>76</sup> The Court held,

[T]hat tying retail prices (which are under state jurisdiction) to estimates of wholesale revenues (which are under FERC’s) is permissible because there is ‘a distinction between’ a state impermissibly ‘regulating [wholesale] sales’ and a state ‘reflecting the profits from a reasonable estimate of those sales’ when acting within its jurisdiction.<sup>77</sup>

Further, there was “no support” that “tethers the ZEC plants receipt of ZECs to participation in the wholesale markets—the ‘fatal defect’ that doomed

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70. *Coalition for Competitive Elec. v. Zibelman*, 906 F.3d 41, 46 (2nd Cir. 2018); Fed. R. Civ. P. 12(b)(6).

71. *Zibelman*, 906 F.3d at 46.

72. *Id.* at 46.

73. *Id.* at 47.

74. *Id.* at 47.

75. *Id.* at 48.

76. *Id.* at 51.

77. *Id.*

the contract-for-differences program in *Hughes*.<sup>78</sup> Lastly, the Court held that “even though the ZEC program exerts downward pressure on wholesale electricity rates, that incidental effect is insufficient to state a claim for field preemption under the FPA.”<sup>79</sup>

The conflict preemption claim was also found without merit. The FPA sets clear lines between state and federal jurisdiction when it comes to wholesale rates. The New York ZEC program was created in a “statutorily-defined manner, regardless of whether or how the electricity is ultimately sold.”<sup>80</sup> The intent of the ZEC program was to regulate production of energy and not to conflict with FERC’s authority of wholesale markets. Therefore, no conflict preemption exists unless it can be shown to “cause clear damage to federal goals.”<sup>81</sup> The circuit court found that the effect on the market was “at best” incidental by way of New York’s regulation on producers.<sup>82</sup> In the end, the circuit court held that the ZEC program did not cause clear damage to federal goals, and thus there was no claim to conflict preemption.

The New York ZEC program once again shows that there is still a place for state regulation in energy markets. However, once again the opinion leaned heavily on dicta from *Hughes* and used a subsidy program that was expressly invited in the opinion. The “blurred lines” created by *EPSA* and *Hughes* have been walked back a little by the two circuit courts so far. But it has yet to be seen if either will stand a challenge in the Supreme Court.<sup>83</sup>

## II. THE FPA AND THE WHOLESALE MARKET

### A. *Historical “Bright-Line” Separation*

The FPA traditionally set a “bright-line” separation between federal and state regulation of energy markets. Section 201 of the FPA establishes “federal regulation of matters relating to generation . . . [or] transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce . . . .”<sup>84</sup> FERC therefore has exclusive

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78. *Id.* at 52.

79. *Id.* at 54.

80. *Id.* at 54.

81. *Id.* at 56.

82. *Id.* at 57.

83. At present, there is no circuit split enticing the Supreme Court to take up the issue.

84. 16 U.S.C. § 824(a) (2012).

authority to regulate electricity “transmitted from a State and consumed at any point outside thereof,” or energy sold for resale.<sup>85</sup>

All other sales of energy outside of this express authority, such as retail sales, are reserved to the states to regulate energy siting regulation, or sources of energy for retail customers.<sup>86</sup> Congress intended for the two spheres of authority to be easily separated and the structure of the electric utility industry matched those spheres, hence the intended “bright line” in the regulatory scheme.

Sections 205 and 206 of the FPA provide for how rates are determined. Sections 205 and 206 state, “[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale . . . shall be just and reasonable,” and if a rate is “unjust, [or] unreasonable . . . the Commission shall determine the just and reasonable rate.”<sup>87</sup>

Sections 201, 205, and 206 have been the vehicle chosen to challenge FERC and state regulatory overreach. In *EPSA* and *Hughes*, as explained above, the Supreme Court upheld challenges to each of these sections, expanding the interpretation of federal authority. As discussed below, the interplay between the FPA and the Public Utility Regulatory Policies Act (PURPA) will be an important aspect of states ability to effectuate climate change policy in the future.

### *B. Repercussions of Arlington v. FCC*

In 2013, Supreme Court changed the way federal agencies interpret their jurisdictional authority. In *Arlington v. FCC*, the Court held that *Chevron*<sup>88</sup> deference applies not only to the way the court interprets regulations, but also to the way the agency interprets the scope of its own statutory authority.<sup>89</sup> The Court ruled, “[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.”<sup>90</sup>

Going forward, federal agencies, or independent regulatory agencies like FERC, are “now allowed to determine the jurisdictional scope of their

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85. *Id.* § 824(c)–(d).

86. *Id.* § 824(a).

87. *Id.* § 824(d)–(e).

88. *Chevron* held that a court should give deference to an agency’s interpretation of regulation if: (1) Congress’s intent was ambiguous as to the statute’s requirements; and (2) the agency’s interpretation of the statute was reasonable and permissible. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

89. *See Ferrey, supra* note 28, at 527; *see also City of Arlington v. FCC*, 569 U.S. 290 (2013).

90. *City of Arlington v. FCC*, 569 U.S. at 296.

own authority, both substantively and procedurally.”<sup>91</sup> This creates an interpretive “do loop” where an agency determines if a regulatory order is within its authority to determine if it is within the agency’s authority to include such regulations as it just determined were within its authority to create. *Arlington* stands for the expansion of *Chevron* deference the Court must afford to federal agencies to determine not only their substantive authority, but now also their jurisdictional scope. What this means in the energy regulatory realm has yet to be seen, as there have yet to be any challenges to federal scope overreach. But the decision is in line with the holding in *EPISA* and could have significant implications for states down the road.

### C. State Regulatory Authority

FPA Section 201 extends federal regulation “only to those matters which are not subject to regulation by the States.”<sup>92</sup> And while the *Hughes* decision preempted Maryland’s attempt to regulate wholesale sales, the opinion ended with a glimmer of hope for the States: “[n]othing 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.’”<sup>93</sup> In the two 2018 ZEC cases, the circuit courts have sustained preemption challenges both using the “untethered” language from *Hughes*.<sup>94</sup>

A 2010 challenge to California’s feed-in-tariff system,<sup>95</sup> before FERC, reiterated states’ authority to regulate within their borders when the regulation does not cross the line into federal interstate wholesale sales.<sup>96</sup> California enacted the feed-in-tariff system as part of its renewable energy program which was supposed to promote renewable generation.<sup>97</sup> FERC found that the part of the law that required state utilities to make wholesale purchases at more than FERC authorized rates was preempted. However, FERC also

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91. Ferrey, *supra* note 28, at 527.

92. 16 U.S.C. § 824(a) (2012).

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

94. See *Coalition for Competitive Elec. v. Zibelman*, 906 F.3d 41, 46 (2d Cir. 2018); *Elec. Power Supply Ass’n v. Star*, 904 F.3d 518, 523 (7th Cir. 2018); *Hughes*, 136 S. Ct. at 1290.

95. A feed-in tariff is an offer of a guaranteed contract to an eligible renewable energy generator allowing for a predictable revenue stream over a specified time period with specified operating conditions.

96. CAL. PUB. UTILS. COMM’N, 132 FERC ¶ 61,047, 1–2 (2010).

97. *Id.*

made clear that only the federal government could regulate wholesale rates between states.<sup>98</sup> This allowed California to regulate within its borders and provide incentives for market participation via requirements to purchase power at rates different than the FERC approved rates.<sup>99</sup>

The *EPSA* and *Hughes* decisions upheld preemption of state regulation because the states impermissibly interfered with the wholesale markets; however, the Court left the door open for substantial state regulation. Under *EPSA*, the Court tied the limit of state’s authority to regulate energy markets to that which directly affect the wholesale market.<sup>100</sup> A state regulation that directly affects the wholesale market is wholly within FERC’s jurisdiction.<sup>101</sup> However, when the state regulation only incidentally affects wholesale markets, the state is provided greater deference in its ability to create regulation.<sup>102</sup> *Hughes*, while extending federal authority to regulate, also provided a guide to the states. States may create regulations to encourage clean energy generation if those regulations are “untethered to a generator’s wholesale market participation.”<sup>103</sup>

While these two Supreme Court decisions left some room for state regulation, they both stand for the idea that the “bright line” separation between federal and state authority is blurred. The new idea of concurrent jurisdiction is one that affords great deference to federal authority. On the other hand, the two most recent circuit court decisions seem to walk back federal authority and base their rulings on the most expansive language in *Hughes* and provide the states with the most regulatory authority. The Supreme Court has not yet weighed in on either case, so only time will tell if the circuit courts’ line of reasoning will be upheld.

### III. SB 100: CALIFORNIA’S MOST RECENT ATTEMPT TO COMBAT CLIMATE CHANGE

The 100 Percent Clean Energy Act of 2018 (SB 100) was enacted on September 10, 2018 and set a new standard regarding California’s commitment to renewable energy.<sup>104</sup> In 2002, California passed its first Renewable Portfolio Standard (“RPS”) bill (“SB 1078”) and has amended

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98. *Id.* at 25–26.

99. *See id.*

100. *FERC v. EPSA*, 136 S. Ct. at 774.

101. *Id.*

102. *See id.*

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

104. Act of Sep. 10, 2018, ch. 312, § 1, 2018 Cal. Legis. Serv. (WEST) (to be codified at CAL. PUB. UTIL. CODE §§ 399.11, 399.15, and 399.30, and to add Section 454.53).

the requirements several times since then.<sup>105</sup> The most recent amendment requires 100 percent renewable resources by 2045.<sup>106</sup>

SB 100 creates a progressive approach to reaching the 100 percent standard by 2045. Additionally, the statute requires retail sellers and public utilities to procure a minimum quantity of electricity from eligible renewable energy resources, so that the total kilowatt-hours sold to retail customers achieves 44% of retail sales by December 31, 2024, 52% by December 31, 2027, and 60% by December 31, 2030.<sup>107</sup>

SB 100 intends to extend and expand policies established by the California RPS program.<sup>108</sup> The legislation creates an RPS program to gradually shift California's energy resources to renewable sources to help fight climate change.<sup>109</sup> Public Utilities Code Section 399.11(b) establishes the intent of the statute: "achieving the renewables portfolio standard through the procurement of various electricity products from eligible renewable energy resources. . ."<sup>110</sup> The first two stated goals of SB 100 are: "(1) [d]isplacing fossil fuel consumption within the state; and] (2) [a]dding new electrical generating facilities in the transmission network within the WECC service area."<sup>111</sup> The intent of SB 100 is important in determining further preemption challenges which are discuss below.

Public Utilities Code Section 399.15(b)(2)(C) states, "[r]etail sellers shall be obligated to procure no less than the quantities associated with all intervening years by the end of each compliance period."<sup>112</sup> This section expressly states that the statute applies to retail sellers and is an attempt to stave off preemption challenges. However, depending on the implementation plan, this may not be enough. There are still issues that may arise from the language of SB 100 that will be explored below.

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105. Act of Sept. 12, 2002, ch. 516, 2002 Cal. Legis. Serv. (WEST) (to be codified at CAL. PUB. UTIL. CODE §§ 387, 390.1, 399.25, and 399.11).

106. Act of Sept. 10, 2018, ch. 312, § 1, 2018 Cal. Legis. Serv. (WEST) (to be codified at CAL. PUB. UTIL. CODE §§ 399.11, 399.15, and 399.30, and to add Section 454.53).

107. *Id.*

108. Act of Sept. 10, 2018, ch. 312, § 1, 2018 Cal. Legis. Serv. (WEST) (to be codified at CAL. PUB. UTIL. CODE §§ 399.11, 399.15, and 399.30, and to add Section 454.53).

109. *Id.*

110. CAL. PUB. UTIL. CODE § 399.11(b) (2018).

111. *Id.*

112. CAL. PUB. UTIL. CODE § 399.15(b)(2)(C) (2018).

#### IV. SB 100: PREEMPTED OR COOPERATIVE FEDERALISM?

The following sections discuss whether SB 100 is preempted or is a new era of cooperative federalism between the state and federal government. Section A argues how FERC has authority to regulate direct effects on wholesale sales, and how this authorization might lead to preemption challenges to SB 100. Section B argues how PURPA might be a pathway or a hurdle for states to effectuate their climate change policy. And finally, Section C argues for the states authority to regulate retail markets considering how the regulation will affect the wholesale market.

##### *A. FERC's Authority to Regulate Direct Effects on Wholesale Sales*

Enacted by thirty states over the past decades, Renewable Portfolio Standards (“RPS”) create a more robust and diverse energy source for the modern electric grid.<sup>113</sup> Now RPS programs are the leading way that states are combating climate change.<sup>114</sup> California enacted its first RPS program in 2002 and since then has increased the proportional allocation of renewable sources through SB 100 in 2018.<sup>115</sup> As stated above, SB 100 mandates 100 percent renewable sources by 2045, and possibly the more important standard of 60 percent by 2030.<sup>116</sup>

FERC has the authority to regulate the interstate energy wholesale market through the FPA. This “bright line,” as previously discussed, has been expanded by the Supreme Court to allow for regulation by FERC, as long as the regulation does not have a direct effect on the retail market.<sup>117</sup> The Courts expansion could have a major impact on states’ ability to implement new RPS regulations. An RPS program mandating more energy production from renewable sources could directly affect prices set on a wholesale market. The requirement of certain levels of renewable energy production could increase the cost of the wholesale market price, especially through the auction market. As the Supreme Court has explained “[t]he FPA ‘leaves no room either for direct state regulation of the prices of interstate wholesales’ or for regulation that ‘would indirectly achieve the same result.’”<sup>118</sup> Even

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113. See Gold & Thakar, *supra* note 8, at 189.

114. *Id.*

115. Act of Sept. 12, 2002, ch. 516, 2002 Cal. Legis. Serv. (WEST) (to be codified at CAL. PUB. UTIL. CODE §§ 387, 390.1, 399.25, and 399.11); Act of Sept. 10, 2018, ch. 312, § 1, 2018 Cal. Legis. Serv. (WEST) (to be codified at CAL. PUB. UTIL. CODE §§ 399.11, 399.15, and 399.30, and to add Section 454.53).

116. Act of Sept. 10, 2018, ch. 312, § 1, 2018 Cal. Legis. Serv. (WEST) (to be codified at CAL. PUB. UTIL. CODE §§ 399.11, 399.15, and 399.30, and to add Section 454.53).

117. See FERC v. EPSA, 136 S. Ct. at 774.

118. Brief for Plaintiffs-Appellants at 40, Coalition for Competitive Elec. v. Zibelman, 906 F.3d 41 (2d Cir. 2018) (No. 17-2654-cv) (quoting FERC v. EPSA, 136 S. Ct. at 780).



though the express intent of the RPS program is to apply to retail sales of energy, the true purpose of the program is to displace “dirty” energy generators out of the market even if those generators are cheaper. The Court in *Hughes* held, “[s]tates may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC’s authority over interstate wholesale rates.”<sup>119</sup> Because the intent or purpose of the RPS program is to displace market participation, the program can be seen to directly affect FERC’s authorized wholesale market, prompting preemption challenges.

For example, a state mandates 100 percent renewable energy sources sold within the retail market. If energy generators selling the energy to wholesale distributors do not meet the “clearing price” on the auction market, and therefore are not bidding in a normal open market system, there would be an effect on the wholesale market price due to the state regulation. Because of the state mandate of 100 percent renewable resources, energy generators would have to be allowed to participate in the wholesale market even though they did not meet the clearing price, therefore increasing the overall market price, and forcing the purchase of wholesale energy at inflated prices created by state policy. The RPS program is “tethered” to the wholesale market in that it is directly related to the state’s mandate of 100 percent renewable sources forcing utilities to participate in the wholesale market; therefore, having an impermissible direct effect on the market itself. This would result in a similar situation created in *Hughes*, which the Supreme Court found was preempted by the FPA and FERC’s authority. In *Hughes*, Maryland “require[d]” the seller to “offer [the] Facility’s output into the PJM Markets,” which was found to be a tether to the wholesale market and preempted under the FPA.<sup>120</sup> The state’s 100 percent RPS standard would now have a direct effect on FERC’s authorized wholesale price, and the RPS would be “tethered” to the wholesale market, triggering a strong preemption challenge.

Under sections 205 and 206 of the FPA, FERC has the authority to determine “just and reasonable” rates within the interstate wholesale market.<sup>121</sup> In *Hughes*, the district court observed, “[w]hile Maryland may retain traditional state authority to regulate the development, location, and type of power plants within its borders . . . the scope of Maryland’s power is necessarily

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119. *Hughes*, 136 S. Ct. at 1298.

120. *PPL EnergyPlus LLC v. Nazarian*, 974 F. Supp. 2d 790, 821, 835 (D. Md. 2013), *aff’d*, 753 F.3d 467 (4th Cir. 2014), *aff’d sub nom. Hughes*, 136 S. Ct. at 1292.

121. *See* 16 U.S.C. § 824(d)–(e) (2012).

limited by FERC's exclusive authority to set wholesale energy and capacity prices."<sup>122</sup> This reaffirms FERC's exclusive authority to authorize the energy prices within the wholesale market, and as seen in the *Arlington* decision FERC can now determine the extent of the scope of this authority.<sup>123</sup> Therefore, FERC can determine if it is within its exclusive authority to authorize a rate in the wholesale market, and FERC can determine the scope of its reach to determine what constitutes the authorizing of a rate in the wholesale market. Additionally, FERC can determine that RPS programs dictating a given allocation of renewable resources de facto authorizes a wholesale price and preempt a state's attempt at RPS standards under section 205 and 206 of the FPA to determine the "just and reasonable" rate in the wholesale market.

A state cannot effectively dictate the rate that generators will receive in connection with energy in wholesale sales through state policies that dictate participation in the wholesale market. In *Hughes*, the contract-for-differences was an "attempt to augment those rates, by requiring purchasers in the wholesale market to pay additional amounts to sellers for the wholesale electricity they purchase, [and] is necessarily an attempt to change the rate that FERC has approved."<sup>124</sup> SB 100 effectively attempts to change the rate approved by FERC, by requiring 100 percent renewable sources with no regard to the effects this will have on prices in the wholesale market due to possibly cheaper forms of energy production. By requiring the generators to sell their energy into the California Independent System Operator's wholesale market, SB 100 would create a mechanism "setting" the rate the wholesale market would have to accept because of the 100 percent renewable requirement; essentially commandeering the wholesale market price. Because of the potential to have substantial and direct effects on the wholesale market authorized by FERC, there is a strong case for SB 100's preemption.

#### *B. PURPA and FPA's Scope*

The Public Utilities Regulatory Policies Act (PURPA) of 1978 was implemented to encourage energy conservation, increased efficiency in electric facilities and resources, equitable retail rates, expeditious development of small-scale hydroelectric energy, and conservation of natural gas while

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122. *Hughes*, 136 S. Ct. at 1295 (quoting *Nazarian*, 974 F. Supp. 2d at 829).

123. *See City of Arlington*, 569 U.S. at 296.

124. Brief for Plaintiffs-Appellants at 40-41, *Coalition for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2nd Cir. 2018) (No. 17-2654-cv).

ensuring equitable rates.<sup>125</sup> One of the methods PURPA uses to accomplish these goals is establishing new classes of generating facilities that would receive special rates and regulatory treatment, known as Qualifying Facilities (“QF”s).<sup>126</sup> There are two main classes of QF’s: small power production facilities, and cogeneration facilities.<sup>127</sup> 18 C.F.R. sections 292.203, and 292.204 govern the size and fuel use that certifies the small production QFs.<sup>128</sup> To qualify a small production energy facility’s “power production capacity . . . may not exceed 80 megawatts.”<sup>129</sup> There is a further restriction on the fuel type that qualifies, “[t]he primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources, or any combination thereof, and 75 percent or more of the total energy input must be from these sources.”<sup>130</sup>

The relationship between the FPA and PURPA is spelled out in section 16 U.S.C. 824(a)-3, which states that utilities must be able to sell electric energy to small production QF and must purchase electric energy from these same QFs.<sup>131</sup> PURPA is a substantial reason that renewable small production facilities have been successful so far. The law requires that utilities buy and sell power with these QFs, allowing them to become players in the market.<sup>132</sup> Further, the rates shall be just and reasonable, and non-discriminatory against the small production QFs.<sup>133</sup> This allows these QFs to fully participate on a level playing field with larger utilities.

With respect to SB 100, PURPA will be a strong ally in the goal of bringing 100 percent renewable resources to the grid by 2045. To meet this goal, new electric facilities will need to be brought online and integrated into the grid. Small production facilities offering renewable energy will be the most likely candidate to accomplish these goals. The interplay between PURPA and the FPA will require the utilities to purchase energy from the small production QFs, enhancing the ability to meet the 100 percent renewable resource goal by 2045.

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125. Fed. Energy Regulatory Comm’n, *What is a Qualifying Facility?*, FERC.GOV, <https://www.ferc.gov/industries/electric/gen-info/qual-fac/what-is.asp> [https://perma.cc/RE29-HZRQ] (last visited Oct. 26, 2018).

126. *Id.*

127. *Id.*

128. 18 C.F.R. §§ 292.203 to .204 (2010).

129. *Id.* § 292.204(a).

130. *Id.* § 292.204(b).

131. 16 U.S.C. § 824a-3(a) (2012).

132. *Id.*

133. *Id.* § 824a-3(b).

Under section 824a-3(b)(2), the rate that a QF receives shall not “exceed[s] the incremental cost to the electric utility of alternative electric energy.”<sup>134</sup> Incremental cost of alternative energy is defined as “the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.”<sup>135</sup> This may be a future hurdle for SB 100. If the wholesale price of energy resources such as natural gas continues to be lower than those of renewable, PURPA and the FPA could be used to derail the renewable energy efforts based on a “just and reasonable” rate position, and under the incremental cost section.

However, FERC issued a ruling in 2011 that negates this possible reading of “incremental cost of alternative energy.”<sup>136</sup> FERC issued a Clarification Order on CPUC’s authority in California to determine rates under PURPA.<sup>137</sup> FERC explains that it is up to states to determine the sources that go into “avoided cost” calculations, “where a state requires a utility to procure energy from generators with certain characteristics, generators with those characteristics constitute the sources that are relevant to the determination of the utility’s avoided cost for that procurement requirement,”<sup>138</sup> and that “an avoided cost rate may also reflect a state requirement that utilities purchase their energy needs from, for example, renewable resources.”<sup>139</sup> Therefore, “in theory a utility might have a cheaper source of . . . energy available to it, in calculating an avoided cost rate a state may properly look at the actual sources of . . . energy available to the electric utility, rather than at some theoretical source, which is not permitted by state law, that may be cheaper.”<sup>140</sup> The Order gives authority to states to regulate procurement requirements from QFs, and authorizes RPS programs that might have an indirect effect on the wholesale market.

### *C. State Authority to Regulate Retail Sales Under Concurrent Jurisdiction*

There is a presumption that a federal statutory scheme does not preempt state laws (especially when the statutory scheme separates federal and state roles). Where “coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the

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134. *Id.* § 824a-3(b)(2).

135. *Id.* § 824a-3(d).

136. California Public Utilities Commission, 134 FERC ¶ 61,044 (2011); 16 U.S.C. § 824a-3(b)(2).

137. California Public Utilities Commission, 134 FERC ¶ 61,044 (2011).

138. *Id.* at 15.

139. *Id.* at 16.

140. *Id.*

case for federal pre-emption becomes a less persuasive one.”<sup>141</sup> Further, the “presumption against preemption of state laws dictates that a law must do ‘major damage’ to clear and substantial federal interests before the supremacy clause will demand that state law surrenders to federal regulation.”<sup>142</sup> When the FPA was enacted by Congress it expressly divided the roles between federal and state powers. SB 100 and California’s RPS program fall within the realm of state power envisioned under the FPA. The RPS program does not “directly intervene” or “stand as an obstacle” to the FPA and should not be preempted.<sup>143</sup> Additionally, SB 100 has only an “incidental effect” on FERC’s authority to regulate wholesale sales and is not “tethered” to the wholesale market.<sup>144</sup>

The FPA gives states the authority to regulate “new power facilities, their economic feasibility, and [retail] rates and services.”<sup>145</sup> The FPA expressly states that FERC “shall not have jurisdiction . . . over facilities used for the generation of electric energy.”<sup>146</sup> In *Oneok, Inc. v. Learjet, Inc.*, the Court upheld a state regulation against a preemption challenge because it merely “affected” FERC’s wholesale rates.<sup>147</sup> The Court stated this rule would go against the states’ authority in the FPA.<sup>148</sup>

The RPS system is within the states’ authority under the FPA. California created SB 100 to fight climate change and better the health and safety of its residents, a power traditionally read to be wholly within a state’s police power. Section 399.11(b)(3)-(4) states the goal as, “(3) [r]educing air pollution, particularly criteria pollutant emissions and toxic air contaminants, in the state[, and] (4) [m]eeting the state’s climate change goals by reducing

141. *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (citing *New York State Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973)).

142. Brief for California et al. as Amici Curiae Supporting Appellees at 3-4, *Elec. Power Supply Ass’n v. Star*, 904 F.3d 518 (7th Cir. 2018) (Nos. 17-2443, 17-2445) (quoting *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1050 (7th Cir. 2013)).

143. *Hughes*, 136 S. Ct. at 1297; *Oneok*, 135 S. Ct. at 1595.

144. *Hughes*, 136 S. Ct. at 1298-99.

145. Brief for California et al. as Amici Curiae Supporting Appellees at 6, *Coalition for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018) (No. 17-2654) (quoting *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 205 (1983)).

146. 16 U.S.C. § 824(b)(1) (2012).

147. Brief for California et al. as Amici Curiae Supporting Appellees at 7, *Coalition for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018) (No. 17-2654) (quoting *Oneok*, 135 S. Ct. at 1600-1601).

148. *Id.*

emissions of greenhouse gases associated with electrical generation.”<sup>149</sup> Allowing the state to regulate power generation for environmental benefits is critical for a state to meet its objectives to protect the environment, health, and safety of its lands and citizens. Therefore, SB 100’s RPS mandate is not preempted under the FPA because it seeks to regulate energy generation within the authority expressly granted to states under the FPA.

Using the same scenario from above, the RPS program would be only an “incidental effect” on the wholesale market price system.<sup>150</sup> As seen with the two circuit court ZEC cases, when a state tries to regulate energy production and the effect of the state regulation affects the wholesale market in an incidental way, the courts have consistently upheld the state regulation.<sup>151</sup> Further, as discussed above with respect to PURPA, states can dictate renewable resource allocation from QFs. A state can overcome the “avoided cost” requirement of PURPA through RPS programs. The incremental cost of energy that SB 100 requires is measured against the cost of other renewable resources, or QF, in California, not potentially cheaper forms of energy not permitted under state law.

SB 100 does not create an RPS program that is “tethered” to the wholesale market to preempt it under the FPA.<sup>152</sup> The Court in *Hughes* defined “tethered” as “condition[ing] payment of funds on capacity clearing the auction.”<sup>153</sup> California’s RPS program through SB 100 does not create a pricing regime that is tethered to the wholesale market. In fact, there is no pricing regime or mention of any wholesale rate auction at all in SB 100.<sup>154</sup>

States have the authority to “encourage production of new or clean generation.”<sup>155</sup> The RPS program does nothing more than encourage the states to seek new and clean forms of electric generation for environmental protection, an area traditionally left to state regulation. SB 100 and the RPS program encourages the production of renewable energy, an act within the authority granted to states in the FPA. The RPS program does not displace wholesale pricing and is therefore not tethered to the wholesale market to create a preempted activity.

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149. CAL. PUB. UTIL. CODE § 399.11(b)(3)-(4) (2018).

150. See *Hughes*, 136 S. Ct. at 1298.

151. See generally *Elec. Power Supply Ass’n v. Star*, (7th Cir. 2018); *Coalition for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018).

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

153. Brief for California et al. as Amici Curiae Supporting Appellees at 11, *Coalition For Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018) (No. 17-2654) (quoting *Hughes*, 136 S. Ct. at 1299).

154. See CAL. PUB. UTIL. CODE § 399.11 (2018); CAL. PUB. UTIL. CODE § 399.15 (2018); CAL. PUB. UTIL. CODE § 399.30 (2018); CAL. PUB. UTIL. CODE § 454.53 (2018).

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

Incidental impact on wholesale pricing does not prompt preemption either. SB 100 directs California to source electric energy from an increasing amount of renewable resources through 2045, which will have only incidental impact on the wholesale market due to the higher availability of energy sources. California argues this fact in its Amicus Brief to the Second Circuit concerning the New York ZEC program: “merely because the supply of electricity available . . . was increased, placing a downward pressure on wholesale prices,”<sup>156</sup> the incidental effect on wholesale prices did not amount to regulation of the wholesale market.<sup>157</sup> The economic realities of supply and demand should only amount to an incidental effect on wholesale markets. The *Allco* court went on to opine that under *Hughes* an incidental effect on wholesale prices does not amount to regulation of interstate wholesale sales.<sup>158</sup> Thus, the RPS program under SB 100 is not preempted by doing much the same, while encouraging further development of renewable energy sources, and directing that California shift all retail electric consumption to renewable resources by 2045; California has only incidentally effected wholesale sales. As ruled in *Hughes*, a state may regulate “within the domain Congress assigned to them, even when their laws incidentally affect areas within FERC’s domain.”<sup>159</sup>

## V. CONCLUSION

SB 100 and the California RPS aim to combat climate change by mandating 100 percent renewable energy to retail customers by 2045. The FPA gives FERC the authority to regulate interstate wholesale markets, and leaves to states the regulation of power generation and resource allocation. *EPSA* held that electric markets are not “hermetically sealed” from one another with regards to federal and state regulations.<sup>160</sup> RPS programs’ success depends on the ability of states to regulate the production of energy, which is necessary for environmental policies desired by states. To hold that RPS programs, especially SB 100, are preempted due to their effects on wholesale

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156. Brief for California et al. as Amici Curiae Supporting Appellees at 11, *Coalition for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018) (No. 17-2654); see also *Allco Finance Ltd v. Klee*, 861 F.3d 82, 100 (2d Cir. 2017).

157. *Id.*

158. *Id.*

159. *Hughes*, 136 S. Ct. at 1298.

160. *FERC v. EPSA*, 136 S. Ct. at 776.

markets would effectively neutralize the states' ability to enact climate change policies.

Going forward, the states can use the lessons of *EPSA*, *Hughes*, *Star*, and *Zibelman* to encourage state regulation of renewable energy allocation. The Supreme Court has expanded federal authority over energy regulation but leaves a glimmer of hope to the states. Two circuit courts latched onto this opening to uphold state regulation over ZEC programs expanding the tools states can use to effectuate clean energy generation. Going forward, California's success in regulating energy policies, especially through RPS programs, will depend on future courts interpreting the new standard of concurrent jurisdiction.