

## *Numerous Parties Support U.S. Supreme Court Review of Nuclear Subsidies that Undermine Wholesale Electricity Markets*

*In January, EPSA and others petitioned the U.S. Supreme Court to review two lower court cases upholding nuclear subsidy programs based on Zero Emissions Credit (ZEC) payments to uneconomic nuclear units in New York ([2<sup>nd</sup> Circuit](#)) and Illinois ([7<sup>th</sup> Circuit](#)). Both lower court opinions erroneously interpret the Supreme Court's unanimous decision in *Hughes v. Talen* which found that certain state actions unlawfully interfere with FERC's exclusive jurisdiction over interstate wholesale electricity markets under the Federal Power Act. The following filed briefs with the U.S. Supreme Court supporting EPSA's petition: (1) PJM's [Independent Market Monitor](#); (2) a group of seven [Energy Economists](#), including Dr. William Hogan and Dr. Roy Shanker; (3) [API and NGSA](#); (4) and, a [group of industrial energy customers](#). The following are key arguments that these parties made supporting review of the lower court opinions (citations deleted).*

### ➤ *The Lower Courts Misread *Hughes v. Talen**

“The Market Monitor agrees with Petitioners’ identification and explanation of the core error of the lower courts’ decisions: a reading that “exalts form over substance.” The decisions entirely rely on a misreading of *Hughes v. Talen* to prohibit only an explicit displacement of federal jurisdiction over federal wholesale ratemaking. Such a reading “effectively confines *Hughes* to its facts.” Legislators can easily contravene FERC’s authority over wholesale rates by artful description or avoiding description of the mechanism rather than transparent statutory language. An explicit tether like that appearing in *Hughes* is easily avoidable, as the ZECs programs at issue here illustrate....

“If *Hughes*’ proper and reasonable demarcation of federal and state jurisdiction over the nation’s interconnected wholesale power market is not confirmed, it will mean the end of a major federal regulatory initiative. It may effectively end federal control over the interstate wholesale power markets, contrary to the jurisdictional framework in the Federal Power Act. The record shows that FERC has gone out its way to accommodate the states. How have the states accommodated FERC? If anything, Petitioners understate the risk. The public will be ill served if regulation through competition survives in name only. There is an important public interest in uniform regulation of the bulk power grid.” *IMM Brief* at pp. 4-5

“The courts of appeals sought to distinguish the ZEC subsidies adopted by Illinois and New York from the contract-for-differences subsidy adopted in Maryland. From an economic point of view, however, those distinctions are without substance. As with the Maryland program, the ZECs pay favored generators a subsidy based on their wholesale market participation, thereby guaranteeing them a price that is different from the price set in the auction. Although there are differences in the details of the price-setting mechanisms employed by the subsidy programs, those differences are largely irrelevant to their basic design and purpose.” *Energy Economists’ Brief* at pp 10-11

“To be sure...many of the policy concerns implicated by the ZEC programs reflect that the **result** of the program is to preserve uneconomic generation resources, discouraging development of competing and more efficient alternative resources...By guaranteeing ZEC recipients a rate for the wholesale power sold in FERC-regulated markets that is different from the rate set at auction, the ZEC programs have the same economic characteristics as the program found to be preempted in Hughes.” *API/NGSA Brief* at p. 13

“By influencing offers and distorting prices in the wholesale electricity markets, the ZEC programs will interfere with efficient market entry and exit decisions by power generators and other market resources, like demand response. Aside from setting the amount paid and received by buyers and sellers, the clearing price in these wholesale electricity auctions “identif[ies] need for new generation.” *Industrial Customers’ Brief* at p. 10

### ➤ **ZEC Programs Distort Prices and Undermine Markets**

“State subsidies for favored resources like the ZEC program at issue here go beyond what can be successfully accommodated. Subsidies are contagious. Subsidies for one uneconomic resource suppress prices for others leading to more requests for subsidies. Left unrestrained, state subsidies will eventually supplant FERC’s competition based regulatory model.” *IMM Brief* at p. 5

“ZEC program subsidies therefore suppress the market-clearing price for energy in the wholesale market. FERC-sanctioned auctions are designed to produce just-and-reasonable rates. This just-and-reasonable result, however, can happen only if price signals provide accurate information leading excess or uneconomic generation to exit the market in response to prices that are too low to justify their continued operation.” *Energy Economists’ Brief* at pp. 15-16

### ➤ **ZEC Programs May Undermine Efforts to Support Clean Energy Sources and Technologies**

“The subsidies here are based loosely on the “social cost of carbon,” and, at first blush, that might seem to make some sense. But it does not. For one thing, there is no assurance that the generating resources that the nuclear generators will displace are carbon-emitting: on the contrary, the distorted market may discourage entry of clean energy sources and thereby perpetuate carbon emissions. It also may discourage conservation, and indeed encourage greater consumption, due to lower wholesale prices, resulting in greater amounts of generation from less “clean” resources.” *Energy Economists’ Brief* at p. 20

### ➤ **ZECs are Distinct from RECs**

“RECs were created primarily to recognize the environmental attributes of wind, solar, and other renewable generation types. A REC is traded and sold as a separate commodity in an open market. Thus, the holder of a REC at any time may be a market participant that is not a renewable energy resource. In contrast, ZECs are ad hoc income guarantees and bailouts provided only to existing eligible nuclear generating units that are uneconomic in wholesale electricity markets. Specifically established for nuclear energy production, and ostensibly based on a construct of the “social cost of carbon,” ZECs are calibrated to backfill the difference between wholesale market revenue and the claimed revenue requirement of particular uneconomic nuclear units. While RECs are traded on an open market among various market participants, ZECs are state-mandated payments from customers in that state to specific qualifying nuclear units.” *Industrial Customers’ Brief* at p. 20