IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 17-2654

COALITION FOR COMPETITIVE ELECTRICITY, ET AL.,
PLAINTIFFS-APPELLANTS,

V.

AUDREY ZIBELMAN, ET AL.,
DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, NO. 1:16- CV-8164, ET AL., HON. VALERIE E. CAPRONI, PRESIDING

AMICUS BRIEF OF THE INDEPENDENT MARKET MONITOR FOR PJM IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF AMICUS CURIAE

The Market Monitor has no financial interest in the outcome of this proceeding (other than as a retail consumer). The Market Monitor represents the public interest objectively and independently of the FERC, the market operator and market participants, including Plaintiffs.[1]

The petition for review in this case concerns a complaint filed by the Coalition for Competitive Electricity explaining that New York has unlawfully intruded on the exclusive authority of the Federal Energy Regulatory Commission ("FERC") over the sale of electric energy at wholesale in interstate commerce under the Federal Power Act ("FPA"), 16 U.S.C. § 824(b)(1) ("Complaint").

The New York Independent System Operator, Inc. ("NYISO"), and similar organized wholesale markets are regulated by the FERC under an approach that relies on regulation through competition to ensure the lowest possible wholesale electricity prices for consumers. Competition means that decisions about whether to enter the market, to exit the market and to remain in the market are made by suppliers based on market fundamentals. Potential and existing suppliers must

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[1] The Market Monitor states, per Rule 29 of the Federal Rules of Appellate Procedure, that no counsel for either party authored this brief in whole or in part. No person or entity made a monetary contribution to this brief's preparation and submission.

believe that the market fundamentals will determine the success or failure of their investment or they will not invest, the market will not sustain adequate supply, and the federal regulatory approach will fail. The ZEC subsidy is incompatible with the competition-based market design, undercuts market fundamentals, threatens the foundations of competitive markets and interferes with the federal regulatory scheme.

The ZEC subsidy originates from the fact that competitive markets result in the exit of uneconomic and uncompetitive generating units. The ZEC subsidy would provide subsidies to specific, uneconomic generating units. Regardless of the specific rationales offered for the subsidies, the proposed solution for the selected generating units is to provide out of market subsidies in order to keep uneconomic units in the market.

The Market Monitor for PJM and market monitoring units for other Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs") are established by the FERC to monitor each organized electric wholesale market and to protect the public interest in regulation through competition.[2] The Market Monitor is responsible to independently and objectively monitor "[a]ctual or potential design flaws in the PJM Market Rules,""[s]tructural problems in the

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[2] *See* 18 CFR § 35.28.

PJM markets that may inhibit a robust and competitive market," and "[t]he potential for a Market Participant to exercise market power or violate any of the PJM or FERC Market Rules." The issues raised in this case have important and direct implications for these areas of responsibility because the ZEC subsidy will harm the competitive market by changing the incentives of nuclear plant owners to behave competitively, deterring competitive investment and distorting market outcomes.

SUMMARY OF ARGUMENT

The order granting the motion to dismiss the complaint in this case is based on improper findings of fact and misapplication of the law of preemption.

The core finding of fact in this case is whether or not an improper tether exists between the state program subsidizing certain nuclear units and federal regulation of the wholesale rates received by those units. The complaint provides ample support for the existence of a material tether. The existence of a tether is plain in the details of New York's subsidy program. The District Court should have conceded to plaintiffs the core fact that a tether exists at this stage of the proceeding. Instead, the District Court determined that there is no tether. The order also makes other improper findings of fact against plaintiffs.

The District Court fails to properly apply the most recent and the most applicable precedent, the Supreme Court's decision in *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016). *Hughes* is controlling. The facts in that case and in this case are very similar. Careful analysis of the subsidies program shows that it operates in the same way as the contract for differences in *Hughes*. The issues presented are the same, and the legal outcome should be consistent. The District Court interprets *Hughes* unduly narrowly and misapplies it to the facts of this case. The District Court relies excessively on prior case law that involves circumstances substantially different from the circumstances involved in this case.

To extent that *Hughes* conflicts with prior guidance from the Supreme Court, *Hughes* supersedes those cases. There is no way to distinguish *Hughes* from this case and to consistently apply the law of preemption, and yet that is precisely what the District Court attempts to do. The order should be reversed.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY RELIES ON FINDINGS OF FACT ADVERSE TO PLAINTIFFS.

The District Court properly observes that "[i]n deciding the motions to dismiss, the Court accepts as true the facts alleged in the Complaint and draws all reasonable inferences in Plaintiffs' favor," citing *Koch v. Christie's Intern*, PLC, 699 F.3d 141, 145 (2d Cir. 2012). Order at 3 n.2. The Order improperly ignores this rule and dismisses the Complaint on the basis of adverse and incorrect findings of fact.

Plaintiffs allege that New York "has taken action to alter what the state views as unsatisfactory consequences of the prices set by the wholesale markets under FERC's exclusive jurisdiction." Complaint at para. 47. An order of the New York Public Service Commission creates a Zero Emissions Credit ("ZEC") subsidy ("ZEC Order"), [3] which operates as "a mechanism to provide out-of-market funding to Ginna, Fitzpatrick and Nine Mile Point" and "serves to keep the uneconomic capacity and energy from these specific units in the FERC-regulated wholesale markets, notwithstanding the fact that wholesale market price signals are indicating that these units should be retired." Complaint at paras. 58–59. The

[3] Order Adopting a Clean Energy Standard, New York P.S.C. Case No. 15-E-0302 (August 1, 2016).

Coalition for Competitive Electricity alleges that, "by artificially retaining the otherwise uneconomic nuclear units, the PSC is using the ZEC subsidy to exert a large depressive effect on energy and capacity prices." *Id*.

These questions of fact are significant because the Supreme Court relied on such findings in *Hughes*, where it held that a state program was preempted by federal wholesale rate regulation because the program "disregards an interstate wholesale rate required by FERC" and includes a "tether" to "wholesale market participation."[4] *Hughes* is rooted in a line of Supreme Court cases providing that "the Court must consider the target of the state law." Order at 16, citing *Oneok*, 134 S. Ct. at 1599.

The requirements to receive a ZECs subsidy and the mechanics for calculating ZECs reveal that the ZEC subsidy disregards and is tethered to the wholesale rate. Payment of the ZEC subsidy occurs only if the ZEC Plant produces electricity. The level of the ZEC subsidy varies with the wholesale rate. ZEC Order at 144–146.

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[4] *Hughes* at 1299. The Supremacy Clause of the U.S. Constitution (art. 6, cl. 2), provides that federal law preempts state law, rendering it inoperative, (1) when the express language of a federal statute declares that preemption; (2) when Congress intends the federal government to occupy a field exclusively, such as when the federal regulatory scheme is so pervasive that it may be assumed Congress "left no room for the States to supplement it"; or (3) when state law actually conflicts with federal law because it is impossible to comply with both, or because state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Electric Co.*, 496 U.S. 72, 78–79 (1990) (citations and internal quotation marks omitted).

The Order determines that the ZEC subsidy is about creating "credits for environmental attributes" that are "unbundled from wholesale sales for energy or capacity." Order at 25–26. In order for the three nuclear plants receiving a ZEC subsidy ("ZEC Plants"), to create a basis for receiving an environmental attribute credit, they must operate and sell their output in the market and displace the output and the emissions associated with the output of other plants. No displacement can occur without the ZEC Plants' participation in the market. The level of the environmental attribute credit is directly and explicitly tied to the price in the wholesale power market and reaches a level of zero when the price in the wholesale power market reaches a defined level, regardless of the asserted environmental benefits.

Producing energy at a nuclear plant unambiguously means selling the output into the NYISO wholesale energy market. No alternative scenario is available and no alternative scenario has been suggested. The state subsidy is explicitly tethered to participation in the wholesale energy market by requiring sales of power into the market. The state subsidy explicitly disregards the wholesale power price by linking the level of the ZECs subsidy to the market price of energy and guaranteeing a level of revenue in excess of the market level.

The rationale for targeting the wholesale rate is significant primarily because it shows that the rate was targeted and not just incidentally affected. The ZEC

subsidy should be preempted regardless of its goals. *Hughes* makes plain that even legitimate objectives do not excuse states intruding on wholesale ratemaking. *See Hughes* at 1298 ("States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates"). *Hughes* rejects state intrusion in wholesale ratemaking even if the state action has legitimate ends.

The level of the ZEC subsidy is explicitly tethered to the wholesale rate and targets the wholesale rate. In order to establish eligibility to receive the ZEC subsidy, a facility must demonstrate "the degree to which energy, capacity and ancillary services revenues project to be received by the facility are at a level that is insufficient to provide adequate compensation to preserve the zero-emission environmental values or attributes historically provided by the facility" [emphasis added]. ZEC Order at 124. The ZEC subsidy is not fixed based on the independent and absolute value of the environmental or other attributes of the targeted units but is tied to a determination that the wholesale rate is inadequate. The subsidy is a simple contract for differences against the wholesale market price of power. The subsidy targets a total amount of compensation to the nuclear power plants equal to the subsidy plus the current wholesale market price of power, including the price in both the energy market and the capacity market. As the wholesale price of power increases, the subsidy decreases so that total compensation remains constant. The

gross value of the ZEC subsidy for the first two years, through March 31, 2019, is $17.48 per MWh, and is adjusted thereafter based on revised forecasts of NYISO prices. *Id*. at 20.

The level of the ZEC subsidy is tethered to and disregards the federal regulated wholesale prices, raising the price that ZEC Plants receive for their output and changing market incentives in ways that distort market outcomes. When federally regulated wholesale prices rise to a specified level under the program, the ZEC subsidy disappears.

ZEC units are required to produce power at historic levels in order to receive it. Output at less than historic levels is subject to the "appropriate financial consequences." *Id*. at 144–146.

Both of the features that were the basis for a finding of preemption in *Hughes*, disregarding the wholesale price and a requirement for market participation, are features of the ZEC subsidy. There is an explicit tether between the ZEC subsidy and federally regulated wholesale energy prices. Disregarding the wholesale rate and the tether to market participation are the core factual issues in this case. The question of whether the ZEC subsidy disregards wholesale market prices and creates a tether to wholesale market prices are matters of fact that must be conceded to the Coalition for Competitive Electricity in deciding on a motion to

dismiss. The Coalition for Competitive Electricity is entitled to an opportunity to prove these facts, which would support its legal claim for relief under *Hughes*.

The Order should have accepted the Coalition for Competitive Electricity's proposed finding of fact that a tether exists in resolving the motion, but instead, it relies on incorrect findings of fact adverse to plaintiffs: "Here, a ZEC is available based on the environmental attributes of the energy production—specifically, for the generators' production of zero-emissions energy—without consideration of the generators' participation in the auction." Order at 21–22. The Order finds, "The CES Order itself does not require the nuclear generators to sell into the NYISO auction." *Id*. at 20. The Order finds no disregarding of the wholesale rate, stating "the ZEC program does not adjust or 'set' the amount of money that a generator receives in exchange for the generator's sale of energy or capacity into the auction." Order at 23. These findings are contrary to the facts, and are inappropriate at this early stage of the proceeding. The ZEC program does set the amount of money that a generator receives in return for required participation in the wholesale power market. In addition, the Order confuses cost of service ratemaking at the retail level with market-based ratemaking at the wholesale level. The ZEC subsidy is directed at wholesale market prices, which are set by the operation of competition and markets and not by administrative formulas that

"establish the amount of money a consumer will hand over in exchange for power." Order at 22, quoting *FERC v. EPSA*, 136 S. Ct. 760, 777 (2016).

The Order also makes improper findings of fact on other issues. For example, the finding that ZECs "represent environmental benefits of nuclear power generation" is a finding of fact that Plaintiffs challenge with contrary evidence. *Id*.; *see* Complaint at paras. 57–61. The Court finds, "The death knell for Plaintiffs' field-preemption argument is their failure to distinguish ZECs from RECs." Order at 32. Plaintiffs provide evidence that materially distinguishes state renewable energy credits (RECs) from ZECs. Complaint at paras. 50–53. At this stage of the proceeding an adverse finding of fact cannot properly be the "death knell" for a well supported factual claim. The explicit purpose of the ZEC subsidy is to reverse the outcome of the NYISO wholesale power market. Competition in the NYISO wholesale power market has resulted in lower prices. Owners of the identified nuclear power plants were not satisfied with the revenue they earned from the lower, competitive wholesale power prices. The ZEC subsidy is designed to reverse the outcome of the wholesale power markets, guarantee a payment equal to the subsidy amount plus the current market price, and require the identified nuclear power plants to continue to operate. Disregarding and tethering are clear and unambiguous.

II. THE DISTRICT COURT MISAPPLIES THE LAW PROTECTING FEDERAL JURISDICTION OVER WHOLESALE ENERGY MARKETS.

The Supreme Court's decision in *Hughes* is the controlling law in this case.[5] *Hughes* is the Supreme Court's last word on what state programs are preempted by federal regulation of wholesale markets. The facts and circumstances in *Hughes* are very similar to the facts and circumstances here. *Hughes* specifically concerns federal regulation as it affects an organized wholesale power market. *Hughes* concerns the same fundamental issue that this case presents: whether a state program that disregards wholesale rates required by FERC and is tethered to the FERC regulated markets is preempted. *Hughes* found that such state programs are preempted.

The ZEC subsidy should be found preempted consistent with *Hughes* because the holding in *Hughes* squarely applies. Even if it did not, the ZEC subsidy should still be found preempted consistent with the fundamental rationale in *Hughes*.

The Order improperly looks past *Hughes* to prior decisions that upheld state programs because the effects on federal regulation were determined to be targeted at matters properly within the scope of state authority and determined not to be

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5 *See also PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014) (finding a New Jersey program that subsidized new entry preempted under circumstances nearly identical to *Hughes*).

targeted at wholesale rate regulation. Those cases found that the effects on the federally regulated wholesale rates were incidental and indirect. The facts in those cases are distinguishable from the facts and circumstances of this case and *Hughes*. To the extent that older cases conflict with *Hughes*, *Hughes* is controlling. The District Court either improperly ignores *Hughes* or it interprets the decision unduly narrowly and without regard to its logic and its impact on prior decisions.

Hughes found the state program preempted because it "disregards an interstate wholesale rate required by FERC" and receipt of the subsidy was tethered to "wholesale market participation." *Hughes* at 1299. The policy rationale for state action did not matter in *Hughes*. *See Hughes* at 1298 ("States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates, as Maryland has done here.") *Hughes* held that when a state program "disregards an interstate wholesale rate required by FERC" and receipt of the subsidy is tethered to "wholesale market participation," there is sufficient basis for finding that the state program is preempted. *Hughes* at 1299.

The failure to properly apply *Hughes* stems partly from the failure to apply a straightforward reading of the requirements of the New York ZEC subsidy program. Even if the requirements were ambiguous, it is evident in the justification

for the program that there is an unwillingness to accept the level of compensation the ZEC Plants receive under FERC regulated rates.

The order defines the target compensation as wholesale market prices, including both energy and capacity, plus a subsidy of $17.48 per MWh (adjusted every two years). ZEC Order at 20. The goal of the ZEC subsidy is to set the level of compensation for the energy from two nuclear power plants that rely on the wholesale power market for compensation. FERC is setting what it considers the just and reasonable price for wholesale power for these units. That is a FERC decision. New York is disregarding the interstate wholesale rate required by FERC.

By artificially offsetting the outcome of the wholesale power market, the program is designed to keep the defined units operating. The energy from these plants will suppress the wholesale price of energy, affecting the market outcome for all other power plants.

There is no material difference in wholesale power market impact between subsidies for uneconomic entry (*Hughes*) and subsidies for uneconomic avoidance of exit (this case). *See Hughes* at 1293 (“The capacity auction serves to identify need for new generation: A high clearing price in the capacity auction encourages new generators to enter the market, increasing supply and thereby lowering the clearing price in same-day and next-day auctions three years' hence; a low clearing price discourages new entry and encourages retirement of existing high-cost

generators.”). There is no material difference between a requirement that a nuclear plant “produces” electricity to receive subsidies and a requirement that a combined cycle plant clear capacity in an auction in order to receive subsidies. *Id*. In both cases, there is a market participation requirement. There is no material difference between providing a subsidy directly linked to the interstate wholesale capacity market (*Hughes*) and providing a subsidy directly linked to the interstate wholesale energy and capacity market (this case).

Revenues from the capacity market and the energy market together create the opportunity for the recovery of the costs of generating plants. These are markets. When competitive prices result in units becoming uneconomic, the units exit the market. Subsidies received under the ZEC subsidy are specifically calibrated to avoid that result for the ZEC Plants.

The ZEC Plants are nuclear units, which cannot operate in a manner that avoids wholesale sales and use of the interstate transmission network. The units involved in the *Hughes* case were combined cycle units (CCs). Relative to nuclear units, CCs require less capital investment per MW and can increase or decrease output in response to prices. Capacity market revenues are a larger share of total revenues for CCs than for nuclear units. Energy market revenues are a larger share of total revenues for nuclear units than for CCs. The subsidies in this case are energy market revenues tied to the production of energy and defined as the shortfall of

desired revenues compared to the revenues from both energy and capacity markets. The state subsidies in *Hughes* focused on the capacity market, but the energy market and the capacity market are designed to work together to provide incentives to generating units. The state subsidies in *Hughes* affected wholesale energy prices as well as capacity prices. There is no material difference between the way wholesale prices in PJM were targeted in *Hughes* and the way wholesale prices in NYISO are targeted in this case. The law establishing the kinds of state action that constitute preemption in *Hughes* must be consistently applied across different unit types. The goal of the subsidies in both cases is to achieve a target level of revenue for the subsidized units so that they are not dependent on wholesale power market prices.

Hughes' finding of preemption is consistent with and complements earlier Supreme Court cases that found and that did not find preemption. In each case, the Court distinguishes the finding based on a finding of fact improperly adverse to plaintiffs. In *Oneok*, the Supreme Court found that state action was not preempted. *Oneok*'s finding was based on a determination that state action "was not *aimed directly at* wholesale sales" and was aimed at "subjects left to the States to regulate" [emphasis in original]. *Oneok* at 1599–1600.

The Order determined that *Rochester Gas & Electric Corp. V. PSC,* 754 F.2d 99 (2nd Cir. 1985), "forecloses Plaintiffs' attempt to hook preemption to price,"

explaining that decision "found 'a distinction between, on the one hand, regulating [wholesale] sales, and on the other, reflecting the profits from a reasonable estimate of those sales in jurisdictional rates.'" Order at 19. This 1985 case predates the restructuring of the wholesale markets for competition, the context that the Supreme Court directly addresses in *Hughes*. After restructuring and the establishment of NYISO in 1999, New York does not rely on cost of service ratemaking to determine wholesale power rates. *Rochester* concerns cost of service rates, which are developed through an administrative process that does not rely on markets to ensure that rates are lawful. *Rochester* concerned estimating earnings under a wholesale cost of service rate in order to accurately determine a retail cost of service rate. *Rochester* has nothing whatsoever to do with the rates, or, really, "competitive prices," determined through markets and competition. Market-based rates mean that the public now relies on markets reflecting the supply and demand fundamentals to determine a just and reasonable rate. Market-based rates remain regulated rates, of course, but the role of the government now is primarily to ensure that the rates reflect competition. *Rochester* is irrelevant to this case, in contrast to *Hughes*, which is directly relevant.

The ZEC subsidy requires the ZEC Plants to operate and to sell power in the wholesale power markets and pays them a subsidy based on the level of prices in the wholesale power market. *See* ZEC Order at 124, 144–146. This is a contract for

differences. The higher the market prices, the lower the subsidy, until the subsidy reaches zero. If ZECs really were compensation for reduced carbon emissions service considered apart from energy prices, then the ZEC Plants would receive the same compensation regardless of the level of wholesale energy market prices.

III. FERC RELIES ON COMPETITIVE WHOLESALE POWER MARKETS TO PRODUCE JUST AND REASONABLE RATES.

FERC did not directly present its views on the complaint to the District Court. However, in response to a request from the Supreme Court, FERC stated its position:

> If a state-supported bid clears the auction market when it would not have done so without the state support, another unsupported bid (which otherwise would have cleared) may not clear. And lower market-clearing prices that result from the state-supported generators' participation affect all participants in the PJM market and suppress the price signals that would otherwise indicate a need for new capacity… [B]y requiring the selected generators to bid their capacity into and clear the Commission-approved PJM auction, the programs directly interfere with the competitive market mechanisms that the auction uses to set wholesale capacity rates… In *Oneok*, the Court … explained that whether a state regulation falls within the preempted field depends on 'the target at which the state law aims.' [citation omitted]. The Court concluded that, unlike state regulations that are 'aimed directly at * * * wholesales for resale,' [citation omitted], the plaintiffs' state antitrust claims were not preempted because antitrust laws "are not aimed at natural-gas

> companies in particular, but rather all businesses in the marketplace…[6]

The Market Monitor does not speak for FERC, but it was created by FERC to monitor "[s]tructural problems in the PJM Markets that may inhibit a robust and competitive market." OATT Attachment M § IV.B.3. Subsidies designed to forestall the exit of units in response to market signals have the same impact on wholesale power markets as subsidies designed to create new entry. If programs like the ZEC subsidy are not preempted, they will eventually preempt competitive wholesale power markets. By suppressing the price of energy, the ZEC subsidy will make other nuclear plants, and plants based on other technologies, less economic, leading to further requests for subsidies. If successful in New York and Illinois, where an order similar to the Order in this case is pending appeal, nuclear plant owners will seek subsidies for other nuclear plants, including plants in PJM.[7] The impact will be to reduce energy prices in the wholesale power market below the competitive level and provide a rationale for the owners of other affected

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6 Brief of the United States as Amicus Curiae, U.S. S. Ct. Case No. 14-614 (September 2015).

7 *See* Amicus Brief of the Independent Market Monitor for PJM in Support of Plaintiffs-Appellants, EPSA v. Star, Case No. 17-2445 (7th Cir. Sept. 11, 2017); Exelon, Exelon to Retire Three Mile Island Generating Station in 2019, which can be accessed at <*http://www.exeloncorp.com/newsroom/exelon-to-retire-three-mile-island-generating-station-in-2019*> (May 30, 2017) ("Exelon Corporation today said it will prematurely retire its Three Mile Island Generating Station (TMI) on or about September 30, 2019, absent needed policy reforms.").

nuclear power plants to seek subsidies. Price suppression also negatively affects coal and gas fired power plants. Subsidies are contagious. As the effect grows and the negative impact on energy market prices is amplified, this will lead to requests for subsidies for coal plants and eventually gas plants. To the extent that a market design, like the design in NYISO and PJM, relies on competitive markets to provide price signals to investors in existing plants and to investors considering entering the market, it will be highly sensitive to such impacts.

Because the outcome of court cases challenging state subsidies like the ZEC subsidy are uncertain, FERC must consider expanding its existing rules against subsidies for new units to address subsidies for existing units in order to preserve competitive market outcomes. Currently, there are at least two proceedings before the FERC where the agency is confronting the issue of how the markets can be protected against intrusive state actions. In a complaint proceeding initially filed in response to a proposal that Ohio subsidize economically distressed coal units, that was later expanded to include the ZEC subsidy, the FERC is considering expanding the Minimum Offer Price Rule (MOPR) so that it also covers subsidies for existing units, such as the ZEC units.[8] The MOPR in its current form (the same

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[8] *See, e.g.,* Comments of the Independent Market Monitor for PJM, FERC Docket No. EL16-49-000 (April 11, 2016); PJM OATT Attachment DD § 5.14(h).

PJM market rule discussed in *Hughes* at 1298 & n.11) only addresses subsidies for new gas fired units. NYISO has a minimum offer price rule for new units similar to PJM's and may also need to be expanded to cover subsidies to enable existing units.[9] FERC has also initiated a rulemaking to consider how to address the issue at the national level.[10]

That defensive rules are under consideration is not a basis to determine that the there is no preemption. That FERC proceedings are underway to address subsidies for existing units in addition to new units constitutes evidence that the ZEC subsidy intrudes on FERC regulatory authority and should be preempted by such authority. If there were no intrusion, then no defensive rule would be needed. The discussions at FERC have illustrated that is difficult if not impossible to create market rules to fully offset the impact of subsidies and retain wholesale market prices based on competitive market fundamentals. The FERC should not have to engage in the lengthy processes underway in an effort to offset the ZEC subsidy and other state subsidy schemes.

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9 *See* NYISO Market Administration and Control Area Services Tariff § 23.4; PJM Open Access Transmission Agreement Attachment DD § 5.14(h).

10 See State Policies and Wholesale Markets Operated by ISO New England Inc., New York Independent System Operator, Inc., and PJM Interconnection, L.L.C., Notice of Technical Conference, FERC Docket No. AD17-11-000 (March 3, 2017).

The District Court refuses to find that the ZEC subsidy "suffer[s] from *Hughes*'s "fatal defect" because the ZEC program "does not condition capacity transfers on [the wholesale] auction." Order at 22, citing *Allco Fin. Ltd. v. Klee*, 861 F.3d 82 (2nd Cir. 2017). The District Court states, citing *Allco*, "the purchase or sale of ZECs, like the contracts at issue in the Connecticut program, reflect transactions that occur "independent of the auction." The District Court has it backwards. The bilateral contracts for renewables at issue in *Allco* were subject to FERC review, and therefore FERC had opportunity to ensure that their terms are consistent with its regulatory goals. 861 F.3d at 99–100. The Connecticut program did not compel particular terms and conditions to the contracts, including price. *Id*. at 100. The allegation in *Allco* concerned only the incidental effect on wholesale prices. *See id*. at 101. The facts in *Allco* materially differ from the facts in this case, where the FERC will not review the level or other terms for ZEC subsidies. The concern in this case is not an incidental effect on prices, it is the disregarding of NYISO's rate and the determination of a subsidy rate for specific plants in the NYISO that is directly tied to the NYISO wholesale power price.

In *Hughes*, the Supreme Court agreed with FERC that "requiring the selected generators to bid their capacity into and clear the Commission-approved PJM

auction, the programs directly interfere with the competitive market mechanisms."[11] Moreover, *Hughes* plainly states that FERC is not required to develop rules to protect its regulatory approach from interference. *Hughes* held that preemption doctrine protects the exclusive jurisdiction of the Commission, explaining "Maryland cannot regulate in a domain Congress assigned to FERC and then require FERC to accommodate Maryland's intrusion" (citing *Northwest Central* at 518 ("The NGA does not require FERC to regulate around a state rule the only purpose of which is to influence purchasing decisions…"). *Hughes* at 1298 n.11. The "market distortion" that the District Court concedes exists (Order at 34) "caused by subsidizing nuclear power" must be eliminated by finding the subsidies program preempted.

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[11] Hughes at 1299 ("We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC. … 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.").

CONCLUSION

The Market Monitor respectfully requests that the court consider the arguments raised on brief and reverse the Order.

Dated: October 23, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Local Rule 29.1(c), the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief was prepared using a proportionally spaced typeface (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 4,822 words. This certificate was prepared in reliance on the word-count function of the word processing system (Microsoft Word 2010) used to prepare this brief.

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EXHIBIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COALITION FOR COMPETITIVE ELECTRICITY, *et al.*, Plaintiffs-Appellants, v. AUDREY ZIBELMAN, *et al.*, Defendants-Appellees	)	Case No. 17-2654

MOTION OF THE INDEPENDENT MARKET MONITOR FOR PJM FOR LEAVE TO FILE AMICUS BRIEF OUT-OF-TIME

Monitoring Analytics, LLC, acting in its role as the Independent Market Monitor for PJM ("Market Monitor"), moves for leave to file the attached brief (Exhibit A) as amicus curiae supporting the appeal of Coalition For Competitive Electricity et al. of an order dismissing its complaint of the United States District Court for the Southern District of New York, Case No. 16-cv-08164 (VEC), issued July 25, 2017 ("Order").

Because briefs were due Friday, October 20, 2017, and could not be filed until Monday, October 23, 2017, the Market Monitor requests leave to file one business day out-of-time. The Market Monitor relies on the CM/ECF filing system and could not obtain verification authorizing counsel to file using that system after business hours on October 17, 2017. Because the Market Monitor made its views

know in pleadings before the lower court and filed this motion and attached brief before close of business on Monday, October 23, 2017, the next business day, accepting this filing out-of-time will not prejudice any party.

In support of this motion, the Market Monitor states:

1. The Market Monitor has no financial interest in the outcome of this proceeding. The Market Monitor represents the public interest objectively and independently of the Federal Energy Regulatory Commission ("FERC" or "Commission"), the market operator and market participants, including Plaintiffs. The Market Monitor's interest is to promote and protect the PJM competitive wholesale electric power markets.

2. This case concerns a complaint filed by the Coalition For Competitive Electricity explaining that New York has unlawfully intruded on the exclusive authority of the FERC over the sale of electric energy at wholesale in interstate commerce under the Federal Power Act ("FPA"), 16 U.S.C. § 824(b)(1) ("Complaint"). The Coalition for Competitive Electricity explains that the provisions for Zero Emissions Credits ("ZEC") subsidies promulgated by the New

York Public Service Commission are preempted because they intrude into FERC's exclusive jurisdiction over wholesale power transactions.[1]

3. PJM Interconnection, L.L.C. ("PJM"), operates a centrally dispatched, competitive wholesale electric power market that, as of December 31, 2016, had installed generating capacity of 182,449 megawatts (MW) and 986 members including market buyers, sellers and traders of electricity in a region including more than 65 million people in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia. PJM is interconnected with the New York Independent System Operator, Inc. ("NYISO"), which is also a centrally dispatched, competitive wholesale electric power market.

4. PJM and NYISO are regulated by the FERC under an approach that relies on regulation through competition to ensure the lowest possible electricity prices for consumers. Competition means that decisions about whether to enter the market, to exit the market and to remain in the market are made by suppliers based on the market fundamentals. Potential and existing suppliers must believe that the market fundamentals will determine the success or failure of their investment or

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[1] *See* Order Adopting a Clean Energy Standard, New York P.S.C. Case No. 15-E-0302 (August 1, 2016).

they will not invest, the market will not sustain adequate supply, and the federal regulatory approach will fail. The ZEC Subsidies Program is incompatible with NYISO's market design and interferes with the federal regulatory scheme.

5. The Market Monitor for PJM and market monitoring units for other Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs") are established by the FERC to monitor each organized electric wholesale market and to protect the public interest in regulation through competition.[2] The Market Monitor is responsible to independently and objectively monitor "[a]ctual or potential design flaws in the PJM Market Rules;""[s]tructural problems in the PJM markets that may inhibit a robust and competitive market;" and "[t]he potential for a Market Participant to exercise market power or violate any of the PJM or FERC Market Rules."[3]

6. The Market Monitor has actively participated in a number of matters involving owners of units seeking subsidies to counter market signals and forestall retirement of financially distressed units or to enable uneconomic new entry under

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2 *See* 18 CFR § 35.28.

3 *See* PJM Open Access Transmission Tariff ("OATT") Attachment M § IV.B.2–4.

various pretexts.[4] The Market Monitor was granted leave to participate as amicus curiae in both the case subject to appeal here and in a case in the U.S. District Court for the Northern District of Illinois that is now subject to an appeal in the United States Court of Appeals for the Seventh Circuit, concerning substantially identical issues. *See* Notification of Docket Entry, Doc. 90, EPSA v. Star, No. 1:17-cv-01164 (April 26, 2017); Order [Granting Motion to File Amicus Brief].

7. The Market Monitor respectfully submits that its proposed brief will assist the Court in understanding the issues in this case.

8. The Market Monitor submits that the filing of its brief at this stage in the proceedings will not affect the existing briefing schedule, prejudice the parties, or delay the Court's resolution of this matter.

9. The Market Monitor states, per Rule 29 of the Federal Rules of Appellate Procedure, that no counsel for either party authored this brief in whole or

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[4] *See*, *e.g.*, Amicus Brief of the Independent Market Monitor for PJM in Support of Plaintiffs-Appellants, EPSA v. Star, Case No. 17-2445 (7th Cir. Sept. 11, 2017); Proposed Amicus Brief of the Independent Market Monitor for PJM Opposing Defendants' Motion to Dismiss and Supporting Plaintiffs' Motion for Preliminary Injunction, U.S.D.C. for the Northern Dist. of Ill. Case No. 1:17-cv-01164-VEC (April 24, 2017); Brief of Amicus Curiae Monitoring Analytics, LLC, Acting in Its Capacity as the Independent Market Monitor for PJM, in Support of Plaintiffs, U.S.D.C. for the Southern Dist. of N. Y. Case No. 1:16-cv-08164-VEC (Jan. 9, 2017); Brief of Amicus Curiae Monitoring Analytics, LLC, Acting in Its Capacity as the Independent Market Monitor for PJM, in Support of Respondents, *Hughes, et al. v. Talen Energy Marketing, LLC, et al.*, U.S. S. Ct. Case No. 14-614 (January 19, 2016).

in part. No person or entity made a monetary contribution to this brief's preparation and submission.

10. For the foregoing reasons, the Market Monitor respectfully requests the Court's leave to file the attached amicus brief in support of the Coalition For Competitive Electricity's appeal.

CONCLUSION

The Market Monitor respectfully requests that the court grant it leave to file the attached brief of amicus curiae.

Respectfully submitted,

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October 23, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on October 23, 2017, the above motion was filed with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing (NEF) to the appropriate counsel.

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 17-2654 Caption [use short title] Coalition For Competitive Elec, et al v. Zibelman, et al

Motion for: Leave to File a Brief of Amicus Curiae Out-of-Time

Set forth below precise, complete statement of relief sought:

Leave to file a brief of amicus curiae

Leave to file brief one business day out-of-time (due Fri. 10/20, filing Mon. 10/23)

MOVING PARTY: Monitoring Analytics, LLC (not party) **OPPOSING PARTY:** Zibelman et al., Exelon

☐ Plaintiff ☐ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: **OPPOSING ATTORNEY:** Peter Hopkins, et al., Matthew Price

[name of attorney, with firm, address, phone number and e-mail]

Jeffrey W. Mayes, General Counsel, Monitoring Analytics, LLC

2621 Van Buren Ave., Ste. 160, Eagleville, PA 19403

(610) 271-8053; jeffrey.mayes@monitoringanalytics.com

Court- Judge/ Agency appealed from: USCS SDNY/Valerie E. Caproni

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

Jeffrey W. Mayes **Date:** 10/23/2017 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

NOTICE OF APPEARANCE FOR SUBSTITUTE, ADDITIONAL, OR AMICUS COUNSEL

Short Title: Coalition for Competitive Electricity v Zibelman Docket No.: 17-2654

Substitute, Additional, or Amicus Counsel's Contact Information is as follows:

Name: Jeffrey W. Mayes

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Appearance for: Monitoring Analytics, LLC, (Independent Market Monitor for PJM)
(party/designation)

Select One:

☐ Substitute counsel (replacing lead counsel: _____)
(name/firm)

☐ Substitute counsel (replacing other counsel: _____)
(name/firm)

☐ Additional counsel (co-counsel with: _____)
(name/firm)

☑ Amicus (in support of: Coalition for Competitive Electricity)
(party/designation)

CERTIFICATION

I certify that:

☐ I am admitted to practice in this Court and, if required by Interim Local Rule 46.1(a)(2), have renewed my admission on _____ OR

☑ I applied for admission on October 23, 2017.

Signature of Counsel: Jeffrey W. Mayes

Type or Print Name: Jeffrey W. Mayes