No. 18-879

IN THE

Supreme Court of the United States

ELECTRIC POWER SUPPLY ASSOCIATION
AND NRG ENERGY, INC.,

Petitioners,

v.

JOHN B. RHODES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR *AMICI CURIAE*
AMERICAN PETROLEUM INSTITUTE AND
NATURAL GAS SUPPLY ASSOCIATION
IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The American Petroleum Institute (API) and Natural Gas Supply Association (NGSA) (collectively, *amici*) are two of the largest national trade associations for the natural gas industry, representing members engaged in all aspects of supply and delivery of natural gas to electricity generators nationwide. Clean-burning natural gas is now the leading fuel source for electricity generation in the United States, with natural gas fired generators providing approximately one third of the Nation's electricity supply in 2017.[2] *Amici* are therefore uniquely situated to provide insight into the significant adverse effects the Second Circuit's erroneous decision will have on the Nation's organized wholesale energy markets.

API has more than 625 members, including natural gas producers, gathering and processing facility operators, intra- and inter-state pipeline companies, natural gas marketers, and operators of liquefied natural gas import and export facilities in the United States and around the world, as well as owners, operators,

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[1] In accordance with Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and that no party or counsel other than the *amici curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. As required by Supreme Court Rule 37.2(a), counsel for all parties were notified of an intent to file this brief at least ten days in advance its filing. Counsel for petitioners and for respondents have filed with this Court notices of blanket consent to the filing of *amicus* briefs.

[2] U.S. Energy Info. Admin., *FAQ: What is U.S. electricity generation by energy source?* (Oct. 29, 2018), https://www.eia.gov/tools/faqs/faq.php?id=427&t=3.

and manufacturers of essential technology and equipment used all along the natural gas value chain. Additionally, some API members also own and operate gas-fired merchant power generation in wholesale markets across the United States. API is charged with, *inter alia*, representing its members' interests in all administrative and legal proceedings that affect the natural gas supply and delivery chain, including cases involving the exclusive authority of the Federal Energy Regulatory Commission (FERC) to regulate wholesale and interstate energy markets under the Federal Power Act and its companion statute, the Natural Gas Act.

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

The United States is in the midst of an energy renaissance, which has transformed the country from a projected major natural gas importer to a net natural gas exporter, with abundant supplies of natural gas, in the span of a few short years. Natural gas, when used to fuel electricity generation, offers substantial benefits over other fossil fuels, including lower greenhouse gas and other harmful air emissions, low cost, and a reliable and integrated nationwide delivery system. Indeed, it is the overwhelming market advantages offered by natural gas that have spurred the nuclear energy industry to seek unprecedented and blatantly discriminatory subsidies from various States in the form of direct intervention in the design and operation of the organized wholesale electricity markets. The Nation's suppliers, transporters, and purchasers of low-cost natural gas used for electricity generation should not be intentionally and unduly disadvantaged in the organized wholesale electricity markets due to such state policies that distort the market and imperil the long-term stability of the Nation's energy supply.

SUMMARY OF ARGUMENT

Congress could not have been clearer in assigning to FERC *exclusive* authority over wholesale rates in the energy market. The Federal Power Act authorizes FERC to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). The Federal Power Act further mandates that FERC "shall" preempt "any rule, regulation, practice, or contract affecting" a rate within the Commission's jurisdiction that "is unjust, unreasonable, unduly discriminatory or preferential." 16 U.S.C. § 824e(a). FERC regulates wholesale rates using a market-based scheme that encourages efficiencies in the production and sale

of power—including by signaling when new generators should enter the market and when existing generators should exit the market—and that sends reliable signals to investors about which generators (or types of generators) are efficient operators in the market.

Although States remain free to regulate generation facilities and retail sales of energy, they are precluded by the Supremacy Clause, U.S. Const. art. VI, cl. 2, from countermanding or otherwise effectively adjusting wholesale rates that FERC has deemed just and reasonable. But state-subsidy programs like New York's so-called zero-emission credit program do exactly that. By directly tethering the amount of the subsidy to the market wholesale rate, New York guarantees to three select generators (all owned by the same corporation) an effective wholesale price that is different from the wholesale price established through FERC-approved wholesale auctions. New York may or may not have valid reasons for wishing to prop up these particular non-competitive electricity generators—but they cannot pursue those policy aims by substituting their judgment about the amount those generators should receive at wholesale for FERC's assessment of what is just and reasonable.

ARGUMENT

The Second Circuit erred in holding that New York's zero-emission credit (ZEC) program is not preempted by the Federal Power Act (FPA or Act), 16 U.S.C. § 791a *et seq*. The Act grants to FERC exclusive authority to regulate wholesale energy markets, including by setting or approving wholesale rates that the Commission determines are just and reason-

able. FERC employs a market-based approach to setting and approving such rates, in pursuit of the related goals of increasing the efficiency of the market and decreasing energy costs for consumers. When a State subsidizes a favored generator (or type of generator) by guaranteeing an effective wholesale price that is different from the price approved by FERC, it distorts the wholesale market and undermines federal energy policy in an area exclusively within the purview of federal regulators. This Court should grant the petition for a writ of certiorari to correct the Second Circuit's error.[3]

I. New York's ZEC Program Is Incompatible With Federal Energy Policy Governing Wholesale Markets.

In the decades since the Federal Power Act (and its companion statute, the Natural Gas Act, 15 U.S.C. § 717 *et seq.*) was enacted, the energy market in the United States has undergone a transformation—and so has federal energy policy. Because New York's ZEC program significantly undermines modern federal energy policy, it should be preempted, and the United States' support for it and similar programs should be rejected.

A. When the FPA was enacted in 1935, "most electricity was sold by vertically integrated utilities that had constructed their own power plants, transmission lines, and local delivery systems." *New York v. FERC*, 535 U.S. 1, 5 (2002). Not surprisingly, under

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[3] *Amici* also support the cert. petition filed in *Electric Power Supply Ass'n v. Star*, No. 18-868 (filed Jan. 7, 2019), which seeks review of a similar decision from the Seventh Circuit, upholding a similar ZEC program operated by Illinois.

that monopolist regime, "[c]ompetition among utilities was not prevalent." *Ibid.* Since that time, "the number of electricity suppliers has increased dramatically" as "[t]echnological advances have made it possible to generate electricity efficiently in different ways and in smaller plants." *Id.* at 7.

In the early decades of regulation under the FPA, FERC "reviewed and set tariff rates" (*i.e.*, rate schedules) "under the 'cost-of-service' method, which ensures that a seller of electricity recovers its costs plus a rate of return sufficient to attract necessary capital." *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 530, 532 (2008). "In recent decades," in contrast, "the Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity" by "promot[ing] competition in those areas of the industry amenable to competition, such as the segment that generates electric power." *Id.* at 535-536. By "forego[ing] the cost-based rate-setting traditionally used to prevent monopolistic pricing," FERC "instead undertakes to ensure 'just and reasonable' wholesale rates by enhancing competition." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 768 (2016) (*EPSA*). In its mandated role as the arbiter of which wholesale rates are just and reasonable, FERC has thus shifted its focus from "the costs that each market participant incurs" to the value to the market of the service each participant provides. *Id.* at 772.

One of the vital tools FERC uses to maximize efficiency in the market is competitive wholesale auctions. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1293 (2016); *see* Pet. App. 7a. In FERC-approved

wholesale auctions, generators bid to sell their electricity at the lowest price they would be willing to accept either immediately (in same-day or next-day auctions) or at a future date (in capacity auctions, which ensure the availability of electricity at a specified point in the future). The auction administrator stacks the bids from lowest to highest until it can cover the required amount of electricity—and then every generator in that stack receives the highest bid in the stack (the "clearing price"). *Hughes*, 136 S. Ct. at 1293. Some generators—like the generators that benefit from New York's ZEC program—offer their entire supply at whatever the clearing price is determined to be (or offer it at zero dollars, the functional equivalent). Those generators are known as "price takers." *Id.* at 1293-1294. Wholesale auctions serve important functions, including establishing a market-based rate that is fair and ensuring stability in the supply of electricity. Just as important, capacity auctions "identify [the] need for new generation." *Id.* at 1293. "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." *Ibid.*

When a state program, including a subsidy program, "has the effect of disrupting the competitive price signals that [a FERC-approved wholesale auction] is designed to produce"—signals that investors, generators, wholesale purchasers, and other States together rely on ensure sufficient capacity—that program is preempted. *Hughes*, 136 S. Ct. at 1296 (citation omitted). In *Hughes*, Maryland's program was

preempted because it had the effect of "adjusting an interstate wholesale rate" to ensure that a new-entrant generator received a specified level of compensation for its wholesale contributions. *Id.* at 1297. The same is true of New York's ZEC program, which effectively adjusts the wholesale rates set at FERC-approved auctions to ensure that favored nuclear generators receive *more* than the clearing price for the electricity they sell in those auctions. The court of appeals held that New York's program walked right up to the preemption line without crossing it because New York (unlike Maryland) does not *require* the subsidized generators to sell their electricity in FERC-approved wholesale auctions. Pet. App. 22a. But that is a distinction without a difference in this context. First, the amount of the subsidy is *directly* tied to wholesale market prices, thereby making crystal clear that the subsidy is intended to make up for any shortfall in covering costs that would result from ordinary participation in the wholesale auctions. Second, as a practical matter, the favored generators have no choice but to participate in FERC-approved wholesale auctions in order to sell their electricity. *See* Pet. 4, 11-12.

The effect of New York's program on wholesale markets is the same as the improper effect of Maryland's program: it encourages a subsidized generator to "bid its capacity into the auction at the lowest possible price" when doing so would not make economic sense in the absence of the auction-linked subsidy. *Hughes*, 136 S. Ct. at 1295. The artificially low bids that result from (indeed, are intended by) New York's program "throw[] the auction's market-based price-setting mechanism out of balance." *Id.* at 1294. Like Maryland's program, it must therefore be preempted.

B. In the Seventh Circuit, the United States and FERC filed an invited *amicus* brief defending the validity (and lack of preemption) of Illinois' comparable ZEC program. Gov't Br., *Village of Old Mill Creek v. Star*, 904 F.3d 518 (7th Cir. 2018) (Nos. 17-2433, 17-2445), *petition for cert. pending*, No. 18-868 (filed Jan. 7, 2019). In its brief, the government seized on the fact that the Illinois program (like the New York program at issue here) does not *require* subsidized generators to bid their electricity in FERC-approved auctions to explain why it is not preempted. Because "the object of the subsidy is the 'participant,' not the 'actual wholesale transaction,'" the government explained, *id.* at 10, it fell outside FERC's exclusive domain. That argument is wrong and should be rejected—both because it defies common sense and because it is contrary to decades of established federal energy policy.

FERC has clearly articulated the importance of using a market-based approach to setting wholesale rates. The Commission's approach to regulation in this area has been "guided by the first principles of capacity markets":

> A capacity market should facilitate the robust competition for capacity supply obligations, provide price signals that guide the orderly entry and exit of capacity resources, result in the selection of the least-cost set of resources that possess the attributes sought by the markets, provide price transparency, shift risk as appropriate from customers to private capital, and mitigate market power. Ultimately, the purpose of basing capacity market constructs on these principles is to produce a level of investor confidence that is sufficient

> to ensure resource adequacy at just and reasonable rates.

ISO New England Inc., 162 FERC ¶ 61,205, at ¶ 21 (2018) (footnote omitted). And, as this Court has explained, the clearing price established through a capacity auction directly affects the clearing prices established in same-day and next-day auctions. *Hughes*, 136 S. Ct. 1293. Because New York's ZEC program (and programs like it) undermine FERC's guiding market-based principles in significant ways, they are preempted.

Out-of-market support that is tied to auction clearing prices disrupts efficient market signals about when new generators should enter the market and when existing generators should leave. Because a program such as New York's artificially boosts the effective auction price for favored generators, it has the effect of artificially deflating auction clearing prices—because those favored generators can bid their electricity at zero dollars regardless of their costs of production. When a clearing price is low because less efficient generators are subsidized through out-of-market payments, more efficient generators may be encouraged to leave the market, leaving consumers to ultimately pay higher prices than the market would otherwise support. As the Commission has explained as recently as six months ago, a final clearing price that reflects such subsidized payments to generators that would not otherwise clear the market "fail[s] to provide a useful signal to market participants regarding whether a resource will clear the market or whether new entry or retirement is needed." *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236, at

¶ 65 (2018). Such a disruption to ordinary market signals can "jeopardiz[e]" a "capacity market's ability to ensure resource adequacy going forward." *Ibid.* In other words, the "price distortions" that result from this type of out-of-market state support "compromise the capacity market's integrity." *Id.* at ¶ 150; *see id.* at ¶ 156 ("[O]ut-of-market payments by certain . . . states have reached a level sufficient to significantly impact the capacity market clearing prices and the integrity of the resulting price signals on which investors and consumers rely to guide the orderly entry and exit of capacity resources.").

Just as important, FERC has explained that the market distortions caused by programs like New York's erode investor confidence, thereby imperiling the long-term stability of energy markets. The "price distortions" created by out-of-market state support "create significant uncertainty, which may further compromise the market, because investors cannot predict whether their capital will be competing against resources that are offering into the market based on actual costs or state subsidies." *Calpine*, 163 FERC ¶ 61,236, at ¶ 150. When price signals suggest that the market would "buy capacity from higher cost resources than actually clear the market," it is "more difficult for investors to gauge whether new entry is needed, or at what price that new entry will clear [a] capacity market and receive a capacity commitment." *Id.* at ¶ 65. As the Commission has explained, "[t]he long-term viability of [wholesale] market[s] demands an assurance of competitive offers from new entrants." *PJM Power Providers Grp. v. PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at ¶ 2 (2011). Investing in

new electricity generators is a significant undertaking, dependent on long-term revenue projections. When traditional market signals are distorted or disrupted by out-of-market payments, the resulting "[e]rosion of investor confidence can prevent" a region "from attracting investment in new and existing non-state-supported resources when investment is needed, or can lead to excessive costs for consumers as capacity sellers include significant risk premiums in their offers." *ISO New England*, 162 FERC ¶ 61,205, at ¶ 24.

Programs like New York's have an adverse effect on consumers. The Commission has lamented that some out-of-market subsidy programs like New York's are "significant enough to affect the price in the market." *Calpine*, 163 FERC ¶ 61,236, at ¶ 151. In particular, FERC has explained that the comparable ZEC subsidies in Illinois are high enough to allow favored high-cost generators—generators that would be "uncompetitive resources" without the subsidy—to bid their electricity at zero dollars when "a competitive offer would be significantly higher than zero." *Ibid.* Although the short-term effect of such subsidies will be a suppression of wholesale prices, *id.* at ¶ 154, even that benefit may not carry through to consumers, who are required to pay for the subsidy that causes the price suppression, Pet. App. 8a. The long-term effect, however, will be an increase in wholesale and retail prices—because the subsidies' distortion of the wholesale market will permit favored "uneconomic" "resources, which should consider retiring, based on their costs" to "displace resources that can meet" the necessary "capacity needs at a lower overall cost." *Calpine*, 163 FERC ¶ 61,236, at ¶ 154. Permitting programs like New York's ZEC program to continue therefore

undermines FERC's fundamental goals of "promot[ing] competition and help[ing] American consumers gain access to reliable and affordable energy." *Apache Corp. v. FERC*, 627 F.3d 1220, 1221 (D.C. Cir. 2010) (Kavanaugh, J.).

Congress has also mandated that the Commission "shall" intervene to countermand any state practice that is "unduly discriminatory or preferential." 16 U.S.C. § 824e(a). And the Commission has explained that an out-of-market subsidy is in fact "unjust and unreasonable, and unduly discriminatory or preferential" when "a resource receiving out-of-market payments" "benefit[s] from its participation in [a wholesale] market, by not competing on a comparable basis with competitive resources." *Calpine*, 163 FERC ¶ 61,236, at ¶ 66. The Commission further explained that such subsidies are "unjust and unreasonable and unduly discriminatory" because they cause "unreasonable price distortions and cost shifts" by "keep[ing] existing uneconomic resources in operation, or . . . support[ing] uneconomic entry of new resources, regardless of the generation type or quantity of the resources supported by such out-of-market support." *Id.* at ¶ 150.

Finally, FERC has warned that out-of-market subsidies like New York's will create a vicious cycle that over time will fully erode the Commission's regulatory scheme. As subsidies artificially suppress auction prices, FERC has explained, "more generation resources lose needed revenues, increasing pressure on states to provide out-of-market support to yet more generation resources that states prefer, for policy reasons, to enter the market or remain in operation." *Calpine*, 163 FERC ¶ 61,236, at ¶ 2. And "[w]ith each sub-

sidy, the market becomes less grounded in fundamental principles of supply and demand." *Ibid.* That consequence directly conflicts with FERC's exclusive jurisdiction over wholesale electricity markets.

In short, FERC has consistently concluded that out-of-market support for uneconomic generators conflicts with FERC's authority over wholesale rate-setting when that support effectively increases the wholesale compensation of power from preferred generators, thereby distorting market prices and market signals. That view of federal energy policy is consistent with this Court's decisions addressing preemption in this area. The primary mechanism FERC uses "for keeping wholesale natural-gas [and electricity] rates at a reasonable level" is "the competitive marketplace." *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1597 (2015).[4] When a state law "target[s]" that regulatory mechanism by intentionally distorting normal market competition in a wholesale auction, *id.* at 1599, it is preempted. The Court recently explained in *EPSA*—in the course of upholding FERC's use of a tool to stabilize capacity during high-demand times—that it would "conflict with the Act's core purposes" to "prevent[] all use of a tool that no one . . . disputes will curb prices and enhance reliability in the wholesale electricity market." 136 S. Ct. at 773. Surely, then, it must conflict with the Act's core purposes to *permit* use of a tool that has and will continue to predictably increase prices and erode reliability in the wholesale electricity market.

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[4] *Oneok* was a case about the Natural Gas Act—but this Court routinely relies on Natural Gas Act cases in determining the scope of the FPA, and vice versa. *Hughes*, 136 S. Ct. at 1298 n.10.

The United States' recent argument to the contrary is inconsistent with its long-established approach to wholesale markets and with federal energy policy more generally. And its explanation of that reversal in position—without rulemaking or agency adjudication—does not hold water. The government insists that, because programs like New York's do not require the favored generators to participate in wholesale auctions, they do not fall within the preemption sphere identified in *Hughes*. It is true that the Court stated in *Hughes* that the "fatal defect" of the Maryland program was its "condition[ing] payment of funds on capacity clearing the auction." 136 S. Ct. at 1299. But that is not the same as saying that a similar subsidy that does not expressly require participation in wholesale auctions—but applies to generators whose only option is to participate in wholesale auctions—would not be preempted. In fact, the Court expressly declined to resolve whether Maryland's program was preempted "because it interferes with the [FERC-approved wholesale] auction's price signals." *Id.* at 1299 n.13. In his concurring opinion, Justice Thomas explained that (like New York's ZEC program), "[u]nder Maryland's program, [a favored generator] is entitled to receive, for its wholesale sales into [a FERC-approved wholesale] auction, something other than what FERC has decided that generators should receive." *Id.* at 1301. That type of subsidy is preempted, he explained, because it "is a regulation of wholesale sales: By 'fiddling with the effective . . . price' that [the favored generator] receives for its wholesale sales, Maryland has 'regulate[d]' wholesale sales 'no less than does direct ratesetting.'" *Ibid.* (quoting *EPSA*, 136 S. Ct. at 787) (ellipses and second set of brackets

in original); *accord id.* at 1300 (Sotomayor, J., concurring) ("Maryland, however, has acted to guarantee [the favored generator] a rate different from FERC's 'just and reasonable' rate and has thus contravened the goals of the Federal Power Act. Such actions must be preempted.") (internal citation omitted).

New York's ZEC program closely tracks the Maryland program found to be preempted in *Hughes*. It also operates as the flip side of the preempted coin at issue in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988). There, the Mississippi Supreme Court ordered the state regulator to use its authority to set retail prices that would implement its own assessment of what constituted a just and reasonable wholesale rate—including by capping the amount of wholesale costs a wholesaler-as-seller could recover at retail. *Id.* at 365-369. In other words, the state court held that the State could use its authority to effectively impose a *lower* wholesale rate by preventing wholesalers from recovering the full amount of the actual wholesale rate approved by FERC. This Court reversed. That exercise of authority was preempted, the Court explained, because "[w]hen FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering costs of paying the FERC-approved rate." *Id.* at 372 (citation omitted). The flip side is true here—a State is using its authority to effectively impose a *higher* wholesale rate by granting a subsidy in an amount tied to the actual wholesale rate approved by FERC. That exercise of authority is just as impermissible: "A State must . . . give effect to Congress' desire to give FERC plenary

authority over interstate wholesale rates, and to ensure that States do not interfere with this authority." *Id.* at 373 (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986)).

In sum, this Court should reject the United States' new-found embrace of out-of-market subsidies that grant effective wholesale rates to particular generators that are different from the clearing price established at a FERC-approved wholesale auction. Congress has not granted FERC any discretion to permit States to intrude to some degree on the Commission's sphere of exclusive authority. Congress has imposed a duty—not the discretion—to step in when a State intrudes on the arena of wholesale rate-setting. *EPSA*, 136 S. Ct. at 774.

II. States Remain Free To Implement Their Energy Policy Preferences Through Regulation Of Generation And Retail Sales.

If this Court holds, as it should, that New York's ZEC program is preempted, the State will still have a host of means through which to implement its energy policy preferences, including its preference that certain nuclear generators remain in the market. As was true in *Hughes*, a finding of preemption here should not "be read to foreclose" "States from encouraging production of new or clean generation through measures untethered to a generator's wholesale market participation." 136 S. Ct. at 1299 (internal quotation marks omitted). Where, as here, that encouragement comes in the form of a subsidy that is directly tied to wholesale auction rates—and that applies only to generators that have no choice but to sell their electricity in such auctions—it is preempted. But the Commission has elsewhere made clear that many

other avenues remain open to States that wish to prop up favored types of generators, whether they be renewable forms of energy like wind and solar or more traditional forms like nuclear or coal. *E.g.*, *Calpine*, 163 FERC ¶ 61,236, at ¶ 158 ("States may continue to support their preferred types of resources in pursuit of state policy goals."). In particular, the Commission has explained that States "may seek to encourage renewable or other types of resources through their tax structure, or by giving direct subsidies." *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, ¶ 62,080 (1995). For example, a State "may impose a tax or other charge on all generation produced by a particular fuel, and thus increase the costs which would be incurred by utilities in building and operating plants that use that fuel." *Ibid.* "Conversely, a state may also subsidize certain types of generation" through "tax credits." *Ibid.* (emphasis omitted). A State may use its taxing and spending powers to influence which generators enter or retire from the market—by, *e.g.*, incentivizing the construction of new facilities, limiting new construction to certain types of energy resources, and requiring the retirement of particular generators or types of generators. And, where circumstances permit, a State may influence retail customers' buying decisions by offering tax incentives to purchase electricity from certain types of providers.

The Commission has acknowledged that a State's "[u]se of the tax structure" in those ways "may allow states to affect the price of renewables or other alternatives": "By imposing a tax on fossil generators or by giving a tax incentive to alternative generation, states may allow the alternative generation to be more com-

petitive in a cost comparison with fossil-fueled generation." *S. Cal. Edison*, 71 FERC at ¶ 62,080. But the Commission's explanation illustrates why those means of support are different in kind from the subsidy at issue here. Although "[a] state may, through state action, influence what costs are incurred by the utility," a State "may not" employ means that have the effect of "adjust[ing] the bids of potential suppliers by imposing environmental adders or subtractors that are not based on real costs that would be incurred by utilities." *Ibid.*

To be sure, those permissible forms of state-provided assistance to particular kinds of generators will have an effect on the wholesale market because they will reduce the net operating costs and/or the amount of capital investment a new or existing generator needs to recover in order to be profitable. But that type of assistance is within the State's traditional sphere of regulation because it is directed to generation (or possibly to retail prices), not to wholesale prices or to the wholesale market more generally. Once a generator bids its electricity at a wholesale auction, a State may not take the further step of propping up a preferred generator with a program that effectively adjusts the wholesale price that generator will receive. When a generator chooses to participate in a wholesale auction, it must abide by FERC's rules.

A State may not adopt a policy that either directly regulates wholesale prices or "would indirectly achieve the same result." *EPSA*, 136 S. Ct. at 776 (quoting *N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 91 (1963)). Because New York's ZEC program does exactly that, the Second Circuit erred in holding that it is not preempted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the decision below reversed.

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