

906 F.3d 41

United States Court of Appeals, Second Circuit.

COALITION FOR COMPETITIVE ELECTRICITY, DYNERGY INC., Eastern  
Generation, LLC, Electric Power Supply Association, NRG Energy, Inc.,  
Roseton Generating LLC, Selkirk Cogen Partners, L.P., Plaintiffs-Appellants,

v.

Audrey ZIBELMAN, in her Official Capacity as Chair of the New York Public Service Commission, Patricia  
L. Acampora, in her Official Capacity as Commissioner of the New York Public Service Commission, Gregg  
C. Sayre, in his Official Capacity as Chair of the New York Public Service Commission Diane X. Burman, in  
her Official Capacity as Commissioner of the New York Public Service Commission, Defendants-Appellees,  
Exelon Corp., R.E. Ginna Nuclear Power Plant LLC, Constellation Energy Nuclear  
Group, LLC, Nine Mile Point Nuclear Station LLC, Intervenor-Defendants-Appellees.

No. 17-2654-cv

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August Term 2017

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Argued: March 12, 2018

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Decided: September 27, 2018

#### Synopsis

**Background:** Group of electrical generators and trade groups of electrical generators brought action against members of New York Public Service Commission (PSC) alleging that state's zero emissions credit (ZEC) program, which subsidized qualifying nuclear power plants, was preempted by Federal Power Act (FPA) and violated dormant Commerce Clause. Nuclear generators intervened. The United States District Court for the Southern District of New York, Caproni, J., 272 F.Supp.3d 554, dismissed complaint, and plaintiffs appealed.

**Holdings:** The Court of Appeals, Dennis Jacobs, Circuit Judge, held that:

ZEC program's incidental effect on wholesale electricity rates was insufficient to state claim for field preemption under FPA;

ZEC program was not conflict preempted by FPA; and

plaintiffs lacked standing to assert claim that ZEC program violated dormant Commerce Clause.

Affirmed.

**Procedural Posture(s):** On Appeal; Motion to Dismiss for Failure to State a Claim.

Appeal from the United States District Court for the Southern District of New York

#### Attorneys and Law Firms

Donald B. Verrilli, Jr., Munger Tolles & Olson LLP, Washington, DC; Henry Weissmann, Fred A. Rowley, Jr., Mark R. Yohalem, Munger, Tolles & Olson LLP, Los Angeles, California; Jonathan D. Schiller, David A. Barrett, Boies Schiller Flexner LLP, New York, New York; Stuart H. Singer, Boies Schiller Flexner LLP, Fort Lauderdale, Florida, for Plaintiffs-Appellants.

Scott H. Strauss (Peter J. Hopkins, Jeffrey A. Schwarz, Amber L. Martin, on the brief), Spiegel & McDiarmid LLP, Washington, DC; Paul Agresta, General Counsel, John Sipos, Deputy General Counsel, John C. Graham, Public Service Commission of the State of New York, Albany, New York, for Defendants-Appellees.

Matthew E. Price (David W. DeBruin, Zachary C. Schauf, William K. Dreher, on the brief), Jenner & Block LLP, Washington, DC, for Intervenor-Defendants-Appellees.

Aaron M. Panner, Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C., Washington, DC, for amici curiae Energy Economists, in support of Plaintiffs-Appellants.

Ben Norris, American Petroleum Institute, Washington, DC; Dena Wiggins, Natural Gas Supply Association, Washington, DC, for amici curiae American Petroleum Institute, Natural Gas Supply Association in support of Plaintiffs-Appellants.

Jeffrey W. Mayes, General Counsel, Monitoring Analytics, LLC, Eagleville, Pennsylvania, for amicus curiae Independent Market Monitor for PJM, in support of Plaintiffs-Appellants.

Ari Peskoe, Harvard Law School Environmental Policy Initiative, Cambridge, Massachusetts, for amici curiae Electricity Regulation Scholars in support of Defendants-Appellees.

Richard L. Revesz (Bethany A. Davis Noll, Avi Zevin, on the brief), Institute for Policy Integrity at New York University School of Law, New York, New York, for amicus curiae Institute for Policy Integrity, in support of Defendants-Appellees.

Thomas Zimpleman (Miles Farmer, on the brief), Natural Resources Defense Council, Washington, DC; Michael Panfil, Environmental Defense Fund, Washington, DC, for amici curiae Natural Resources Defense Council, Environmental Defense Fund, in support of Defendants-Appellees.

Jonathan M. Rund (Ellen C. Ginsberg, on the brief), Nuclear Energy Institute, Washington, DC, for amicus curiae Nuclear Energy Institute, in support of Defendants-Appellants.

Clare E. Kindall, Assistant Attorney General (Seth A. Hollander, Assistant Attorney General, on the brief), for George Jepsen, Attorney General of Connecticut, New Britain, Connecticut; M. Elaine Meckenstock, Deputy Attorney General (Kathleen A. Kenealy, Chief Assistant Attorney General, Robert W. Byrne, Senior Assistant Attorney General, Sally Magnani, Senior Assistant Attorney General, Gavin G. McCabe, Supervising Deputy Attorney General, Melinda Piling, Deputy Attorney General, Myung J. Park, Deputy Attorney General, Dennis L. Beck, Jr., Deputy Attorney General, on the brief), for Xavier Becerra, Attorney General of California, Oakland, California, for amici curiae States of California, Connecticut, Illinois, Massachusetts, New York, Oregon, Vermont, and Washington, in support of Defendants-Appellees.

Samuel T. Walsh, Harris, Wiltshire & Grannis LLP, Washington, DC, for amici curiae Independent Economists, in support of Defendants-Appellees.

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