

# Renewable Energy in the Courts

Melissa Powers

Jeffrey Bain Faculty Scholar & Professor of Law  
Director, Green Energy Institute  
Lewis & Clark Law School

## Overview of Focus

- I. Preemption Under Federal Power Act
- II. Commerce Clause Challenges
- III. PURPA Litigation
- IV. A Few Interesting State Cases

## Preemption after *Hughes v. Talen*

- *Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288 (2016)
  - Supreme Court invalidated state-mandated “contract for differences”
    - Required retail utilities (load-serving entities, or LSEs) to enter into PPA with new generators to buy power at specified rates
    - Generators then bid into wholesale markets - would receive \$ from LSEs only if cleared markets
      - Amount LSEs paid or received was based on recovery in wholesale markets
  - Court: violates FERC’s exclusive authority over wholesale sales and could harm the market dynamics

3

## Preemption after *Hughes v. Talen*

- What are the limits of *Hughes v. Talen*? - the ZEC cases
  - *Coalition for Competitive Energy, Dynergy Inc. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018) & *Electric Power Supply Assn. v. Star*, 904 F.3d 518 (7th Cir. 2018)
  - New York and Illinois laws that are designed to keep nuclear plants online, at least until renewables can replace them
  - Require utilities to buy “ZECs” (zero-emission credits) from nuclear generators
    - Rates for ZECs based on social cost of carbon, adjusted for forecasted market rates

4

## Preemption after *Hughes v. Talen*

- The ZEC cases
  - Both courts: ZECs are distinct from CfDs at issue in *Talen* and do not interfere impermissibly with FERC-regulated markets
  - Although nuclear generators will need to clear market to earn ZECs, the value of ZECs is not directly linked to the actual market clearing price
    - Nuclear plants bid in at zero (are price-takers), so are not lowering their bids to clear the markets
    - Impacts on market prices and thus effects on generators will be indirect
  - ZEC prices, while calculated based on forecasted market rates, are not impermissibly linked to markets

5

## Preemption after *Hughes v. Talen*

- Implications for renewables
  - FERC allows wholesale markets to accommodate state policy preferences (including renewable portfolio standards and REC transactions)
  - NextEra Energy Resources, LLC v. FERC, 898 F.3d 14 (D.C. Cir. 2018)
    - Upheld FERC's approval of ISO-NE's market rules exempting renewables from minimum offer price rule that otherwise sets a price floor in forward capacity markets in part out of respect for state policy preferences
- Cert. petition filed in *EPSA v. Star* (7th Cir. decision) on Jan. 8, 2019

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Renewable Energy in the Courts

Also available as part of the eCourse

[2019 Renewable Energy Law eConference](#)

First appeared as part of the conference materials for the  
2019 Renewable Energy Law session

"Renewable Energy: Updates from the Courts"