



Second Circuit follows lead of Seventh: Nuke subsidies upheld

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On September 27, 2018, the Second Circuit Court of Appeals issued its decision in *Coalition for Competitive Electricity v. Zibelman*, 2nd Cir. No. 17-2654, 2018 U.S. App. LEXIS 27605 (Sep. 27, 2018). This decision, which follows the Seventh Circuit's [decision](#) in *Elec. Power Supply Assn. v. Anthony M. Star*, summarized [here](#), is the second decision in the span of two weeks to affirm a state's subsidization of nuclear generation facilities. As in *Star*, the principal issue in *Zibelman* was whether the Federal Power Act, specifically [16 U.S.C. § 824\(b\)\(1\)](#), which provides that the Federal Energy Regulation Commission (FERC) is to regulate the sale of electricity in interstate commerce, and the states are to regulate local distribution and the facilities used to generate power, preempts a state law that seeks to subsidize some of the state's nuclear generation facilities in the form of zero emission credits (ZEC) credits. Following the Seventh Circuit's lead, the Second Circuit held that the state program was not preempted by the Federal Power Act; however, the decision differed in two main respects.

First, the court analyzed both implied preemption doctrines — field preemption and conflict preemption — and expressly ruled the state program was not preempted under either doctrine. As it relates to the field preemption argument, “a state law is preempted if ‘Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law.’” The court held that the state law was not field preempted by the Federal Power Act, because (1) the sale of the ZEC credits do not occur in wholesale markets, so FERC's jurisdiction is not implicated; (2) the incidental effect that the ZEC credit program has on wholesale electricity rates is not sufficient to cause preemption under the doctrine; and (3) FERC itself has confirmed that renewable energy credit (REC) systems fall within the jurisdiction of the states, RECs and ZECs share many characteristics, and the plaintiffs did not “persuasively explain why FERC's holding regarding RECs does not apply equally to ZECs.”

As to conflict preemption, a state law is preempted when “compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.” In relation to this doctrine, the court held that “the ZEC program does not cause clear damage to federal goals,” and, therefore, the plaintiffs “have failed to state a plausible claim for conflict preemption.” In reaching its conclusion, the court principally relied on the “background assumption that the [Federal Power Act] establishes a dual regulatory system between the states and federal government” and that “FERC itself has sanctioned state programs that increase capacity or affect wholesale market prices, so long as the states regulate matters within their jurisdiction.”

Second, the court held that the plaintiffs-appellants did not have standing to assert the argument that the state program violated the Dormant Commerce Clause. Although the plaintiffs raised arguments that the ZEC program was “deliberately propping up the in-state [nuclear facilities] via a distortion of the interstate energy market” and inflicting an undue burden on interstate commerce, the court did not reach the merits of those arguments, because, in the court’s view, the plaintiffs lacked standing to bring the claim. The court reasoned that the plaintiffs lack standing, because the “asserted injuries are not traceable to the alleged discrimination against out-of-state entities, but (rather) arises from their production of energy using fuels that New York disfavors.”

The outcome here is particularly important because, as of now, two federal circuit courts of appeal have declared that ZEC programs do not run afoul of federal law. Such rulings open the door for state legislators across the country to establish programs in their states to subsidize nuclear generation facilities.

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