



“Staying Nuclear”?: Legal Challenges to State Subsidies for Aging Nuclear Power Plants and Related FERC Actions

March 26, 2021

Nuclear power plants can produce large amounts of electricity with relatively low greenhouse gas (GHG) emissions, potentially assisting the United States in reducing such emissions. But the U.S. nuclear power industry [faces a number of challenges](#), including high operating and maintenance costs; aging plants; competition from natural gas and renewable energy sources; and lawsuits from labor and environmental groups, among others. According to the U.S. Nuclear Regulatory Commission, 21 nuclear power reactors are [currently undergoing decommissioning](#) in the United States; [two reactors](#) are currently under construction.

The federal government provides [some financial support](#) to the nuclear energy industry in the form of tax credits and other measures. But states have also increasingly sought to subsidize nuclear power plants that operate within their jurisdictions to preserve existing nuclear generation capacity and the jobs and tax base they provide to local communities. For example, under a [2018 law](#), the New Jersey Board of Public Utilities [may issue](#) state-created Zero Emissions Credits (ZECs) to eligible nuclear power plants. [ZECs](#) are state-created, state-issued subsidy instruments that represent the value of nuclear power generation’s low GHG emission attributes. Participating nuclear power plants receive ZEC payments for qualified electricity generation from electric distribution utilities because state laws require utilities to purchase credits at a state-determined price. The New Jersey program, like [similar programs](#) in other states such as Connecticut, Illinois, and New York, is intended to preserve existing nuclear generation capacity in the state, thereby reducing greenhouse gas emissions.

This Legal Sidebar examines key recent circuit court decisions related to state subsidization of the nuclear power industry and litigation against the Federal Energy Regulatory Commission (FERC)’s subsequent orders expanding the Minimum Offer Price Rule (MOPR) in the PJM Interconnection. For an overview and analysis of challenges facing the nuclear energy industry, see this [CRS Report](#).

Congressional Research Service

<https://crsreports.congress.gov>

LSB10585

Federal Court Decisions Upholding State Subsidies

During the past few years, state credit programs in Illinois and New York have faced legal challenges from electrical generators that use fossil fuels. Plaintiffs have argued that state subsidies infringe upon federal authority and distort the wholesale electric power markets by providing a competitive advantage to in-state nuclear power generators at the expense of other wholesale market participants. However, in [two cases](#) decided in September 2018, federal circuit courts of appeals (circuit courts) upheld state subsidies for nuclear power plants, suggesting that such programs do not run afoul of federal law so long as they do not require generators to participate in wholesale markets as a condition for receiving the subsidy.

In *Coalition for Competitive Electricity v. Zibelman*, the Second Circuit Court of Appeals [affirmed](#) a federal district court’s decision dismissing a challenge to New York’s ZEC program. Electrical generators and trade groups representing the generators challenged the program, arguing that: (1) the FPA and FERC’s jurisdiction over regional wholesale electric power markets preempt the state program; and (2) the program violates the dormant aspects of the U.S. Constitution’s Commerce Clause by unconstitutionally discriminating against interstate commerce.

With regard to the plaintiffs’ preemption claims, the court wrote that the FPA “establishes a collaborative scheme between the states and federal government to regulate electricity generation” and that states retain the authority to regulate facilities’ production of energy and the retail sale of electricity. Consequently, because FERC’s jurisdiction extends only to rules or practices that *directly* affect wholesale rates, the states retain authority to legislate to achieve environmental goals, even if such actions *indirectly* affect the rates. Quoting from the Supreme Court’s decision in *Hughes v. Talen Energy Marketing LLC*, the Second Circuit wrote that states may encourage clean energy generation by offering credits for the environmental attributes of electrical power generation so long as the states do not condition receipt of the subsidies on a generator’s participation in wholesale power markets. The court found there was not a sufficient “tether” between New York’s ZEC program and the wholesale market. For similar reasons, the court held that New York’s program was not preempted by any conflict with a federal objective.

With respect to the plaintiffs’ dormant Commerce Clause claim, the court held that the plaintiffs lacked [Article III standing to sue](#), [noting](#) they did not own any nuclear power plants. Consequently, their alleged injuries were not traceable to New York’s program, even if the program favored in-state generators. In other words, even if the court ordered New York to grant the same subsidies to out-of-state nuclear power plants—a step the state had already contemplated—the plaintiffs would still suffer injury in the wholesale markets from the “general market-distorting effects of the ZEC program.” The court wrote that the plaintiffs’ alleged injuries stemmed from “their production of energy using fuels that New York disfavors”—that is, the subsidies themselves—rather than the possibility that those subsidies discriminated against out-of-state power plants.

The same month the Second Circuit issued its decision in *Zibelman*, the Seventh Circuit Court of Appeals affirmed a lower court’s dismissal of a similar challenge to Illinois’s credit program. In *Electric Power Supply Ass’n v. Star*, the Seventh Circuit [affirmed](#) the district court’s grant of summary judgment to the defendants. Echoing the Second Circuit, the court held that a state may enact measures to encourage new or clean generation, provided such measures are not “tethered” to the generator’s participation in the wholesale markets. In addition, the court rejected the plaintiffs’ dormant Commerce Clause challenge because Congress specifically authorized states to regulate local generation and the subsidy produced no overt discrimination against interstate commerce.

In April 2019, the Supreme Court [declined to hear appeals](#) of these two circuit court decisions, allowing the lower court rulings that upheld the state subsidy programs to stand.

FERC's Expansion of the Minimum Offer Price Rule in the PJM Interconnection

Following the circuit courts' decisions rejecting challenges to state credit programs, FERC declined to approve a compliance filing made by the nation's largest wholesale power market, the PJM Interconnection. In FERC's view, the filing did not mitigate the alleged negative impacts of state subsidies for certain electric power generators on the effectiveness of wholesale capacity markets. In June 2018, FERC opened a proceeding to explore changes to the auction process. The resulting [FERC orders](#) required the expansion of the MOPR in the PJM Interconnection to establish a new price floor for offers into the wholesale forward capacity market from a wider variety of generators that receive state subsidies, including some nuclear power plants. FERC's order was intended to mitigate lower market prices that may result from state subsidies for certain electrical generators. FERC's ruling affects subsidies for new capacity offered in the forward capacity market, which means that existing facilities with subsidies are not subject to the new rule.

In April 2020, New Jersey, Maryland, and several other entities [filed a petition for review](#) of the FERC orders in federal court, arguing the orders prevent the states from regulating the production and retail sale of electricity to achieve environmental objectives and would increase costs to consumers, among other things. The litigation, which was transferred to the Seventh Circuit Court of Appeals, remains ongoing. Some states have apparently [threatened to withdraw](#) from the PJM capacity market if the FERC orders are not overturned. It is also possible that, under the Biden Administration, a change in leadership at FERC may [lead to a review](#) of the PJM MOPR order or its implementation.

Implications for Congress

Two circuit court decisions dismissing challenges to state subsidies for nuclear power plants suggest that states likely have broad legal authority to regulate the production and retail sale of electricity to achieve environmental objectives, even if such policies indirectly affect wholesale market prices. As some commentators have [noted](#), the rulings support the legality of state renewable energy credit (REC) programs that rely upon a similar mechanism. Nonetheless, FERC's orders requiring the expansion of the MOPR for the PJM Interconnection demonstrate that, although federal law may not preempt state credit programs, federal regulation may minimize the impact of such programs by mandating a price floor for offers from state-subsidized generators. It remains to be seen whether the FERC orders will affect states' ability to implement ZECs for nuclear generation effectively in the PJM capacity market.

Congress has several options to address state nuclear subsidies. Congress could enact legislation that would preempt—or, alternatively, preserve—state credit programs. Congress might also consider legislation to establish a federal credit program for preserving existing nuclear generation. For example, a bipartisan group of senators introduced the [American Nuclear Infrastructure Act](#) in the 116th Congress, which included provisions to preserve existing nuclear energy generation by compensating companies for lost revenues that resulted from electricity market prices. The legislation was not enacted. Alternatively, Congress could await further developments in administrative and judicial forums at the federal and state levels.

Author Information

Brandon J. Murrill
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.