

# The March of Renewables: States Get the Green Light

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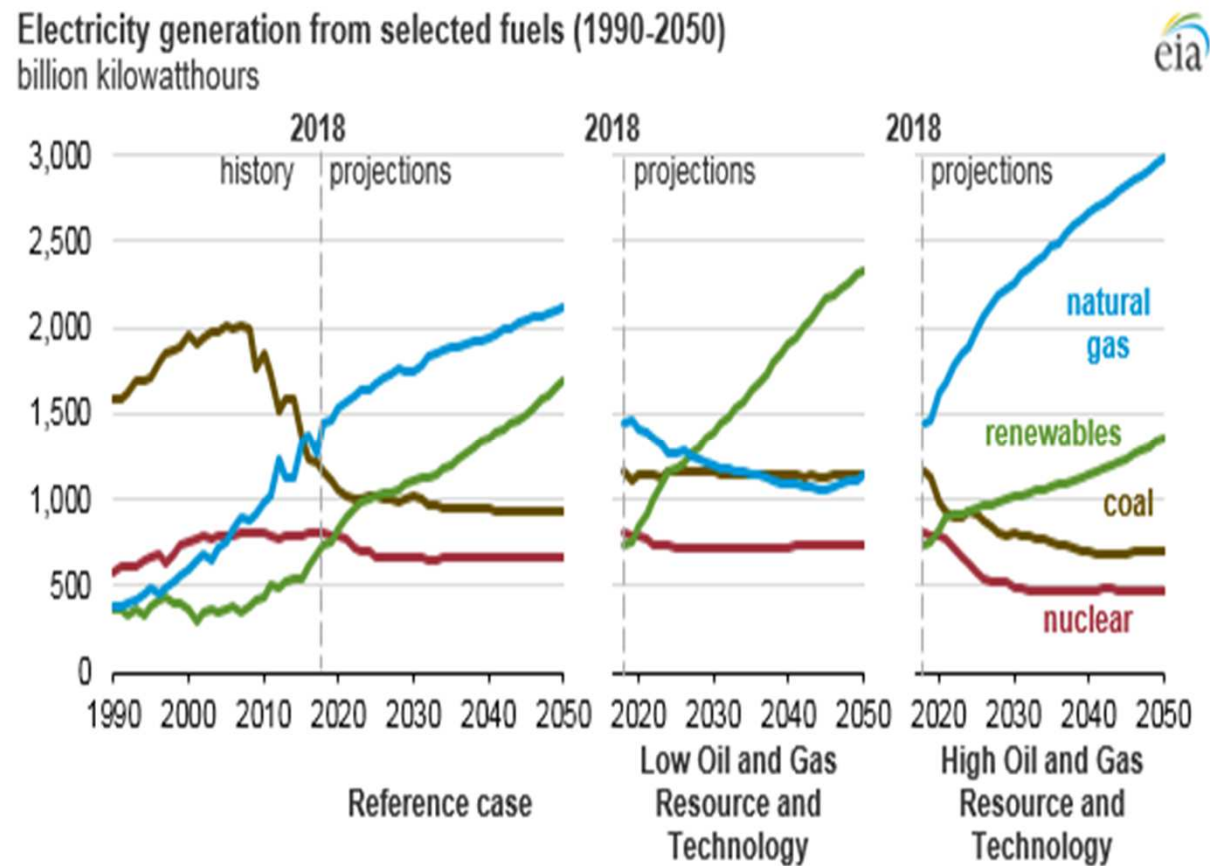
# Spoiler Alert!

- The Supreme Court permits states to subsidize their preferred generation source
  - *Electric Power Supply Ass'n v. Star*, 904 F. 3d 518 (7<sup>th</sup> Cir. 2018), *reh'g denied* (Oct. 9, 2018), *cert. denied* No. 18-868, 2019 WL 133642 (U.S. Apr. 15, 2019) (upholding Illinois's ZEC program)
  - *Coalition for Competitive Electricity, et al. v. Zibelman*, 906 F. 3d 41 (2d Cir. 2018), *cert. denied sub nom. Elec. Power Supply Ass'n v. Rhodes*, No. 18-879, 2019 WL 145344 (U.S. Apr. 15, 2019) (upholding NY's ZEC program)

# Key Trends

## Trend #1: Low natural gas prices

- Natural gas surpassed coal in 2016 at the fuel most used to generate electricity in the U.S.



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# Key Trends

## *Trend #2: U.S. Nuclear Plants At Risk of Early Closure or Retirement*

- More than 1/3 of existing plants, ~22% of total U.S. nuclear capacity, are unprofitable or scheduled to close (*Union of Concerned Scientists*)
- Carbon emissions from the generation sector could rise by as much as 4-6% by 2035

# Key Trends

## *Trend #3: President Trump's Policies Seek to Expand the Supply of Oil and Gas*

- April 10, 2019 Executive Orders
  - Executive Order on energy infrastructure and economic growth
    - Section 401 Clean Water Act certification
    - Safety regulation of LNG facilities
      - LNG transport by truck
    - DOL review of ERISA plans' investment in the energy sector
      - Fiduciary review of ESG policies on proxy voting
    - Renewal or reauthorization for ROW
  - Executive Order on Border Crossings
    - Revises the process for development and issuance of Presidential permits involving infrastructure permitting at border crossings

# The Perspective of State Government

- States have passed laws or regulations to subsidize nuclear generation
  - Enacted
    - New York
    - Illinois
    - New Jersey
    - Connecticut
  - Under consideration
    - Pennsylvania
    - Ohio
- States are concerned about:
  - Loss of jobs
  - GHG emissions
  - Impact on ratepayers

# So, What's the Problem?

## *Cooperative Federalism*

- The Federal Power Act
  - FERC
    - Regulates sales of electric energy at wholesale, 16 U.S.C. § 824(a)
    - Ensures that wholesale rates are “just and reasonable,” 16 U.S.C. § 824d(a)
  - States
    - Have exclusive jurisdiction over:
      - “Any other sale of electric energy,” most notably, retail sales
      - “Facilities used for the generation of electric energy,” 16 U.S.C. § 824(b)(1)
- *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016)
  - MD can encourage construction of new in-state generation, but not by means of a “contract for differences” that intrudes on FERC’s authority over interstate wholesale rates

# So, What's the Problem?

- State subsidies for renewables and nuclear may encroach on FERC's authority by:
  - Reducing the price of their offers into interstate wholesale capacity auctions
  - Causing lower auction clearing prices
  - Preventing uneconomic baseload units (i.e., nuclear plants) from retiring
  - Deterring new entrants from entering the market



*Electric Power Supply Ass'n v. Star*, 904 F. 3d 518 (7<sup>th</sup> Cir. 2018), *reh'g denied* (Oct. 9, 2018), *cert. denied* No. 18-868, 2019 WL 133642 (U.S. Apr. 15, 2019) (upholding Illinois's ZEC program)

- Challenge to ZECs in Illinois' Future Energy Jobs Bill
  - Legislation was passed to preserve the Clinton and Quad Cities nuclear power plants from closure
  - Utilities were required to purchase ZECs from the winning zero emission facilities
    - Although price of a ZEC was initially based on the social cost of carbon emissions, in later years it was tied to an index derived from the PJM wholesale auctions

# *Electric Power Supply Ass'n v. Star*

## EPSA's claims:

- Price adjustment aspect was preempted by the Federal Power Act because it impinges on FERC's authority to regulate the auction markets
- Favoritism toward Illinois nuclear plants violates dormant Commerce Clause
- FERC's *amicus curiae* position:
  - Requested by 7<sup>th</sup> Circuit, in part because of concern over the doctrine of primary jurisdiction
  - FERC and the U.S. filed a joint brief concluding that the Illinois program did NOT interfere with interstate auctions and was NOT preempted

# *Electric Power Supply Ass'n v. Star*

## *What else was in the Illinois FEJB?*

- \$750 million in low income programs
- \$360 million for:
  - Low income solar programs
  - Job training for foster children and ex-offenders
- \$180 million enhancement to the state's RPS program (increasing to \$220 million per year)

# *Electric Power Supply Ass'n v. Star*

- Holding:
  - No preemption of state law because ZECs are “untethered to a generator’s wholesale market participation”
  - Because states retain authority under the FPA over power generation, a state policy that affects price by increasing the quantity of power available for sale is not preempted by federal law
  - On dormant Commerce Clause, no overt discrimination against interstate commerce
    - Illinois regulation extended only to plants within its borders

*Coalition for Competitive Electricity, et al. v. Zibelman*, 906 F. 3d 41 (2d Cir. 2018) (upholding NY's ZEC program), *cert. denied sub nom. Elec. Power Supply Ass'n v. Rhodes*, No. 18-879, 2019 WL 145344 (U.S. Apr. 15, 2019)

- In August 2016, NY Public Service Commission (PSC) issued the Clean Energy Standard (CES) Order
  - Plan to reduce GHG by 40 percent in 2030
  - RECs for wind and solar; ZECs for participating nuclear power plants
  - 3 nuclear power plants qualified—FitzPatrick, Ginna, and Nine Mile Point

# *Coalition for Competitive Electricity, et al. v. Zibelman*

## Key Features of New York's ZEC program

- ZEC price is based on social cost of carbon, as determined by a federal interagency task force
- Recalculation of ZEC price every two years would be based on forecasts of wholesale prices
- Although 3 nuclear plants selected initially, other facilities, including facilities located outside NY, might be selected in the future

# *Coalition for Competitive Electricity, et al. v. Zibelman*

## Holding:

- New York schemes avoids (or skirts) the *Hughes* prohibition
  - ZEC price is based on an independent variable (the social cost of carbon)
  - Price may be fixed below the cost of carbon, but only on the basis of *forecasts*, which FERC does not regulate
    - No true-up or reconciliation of forecasts with actual rates
  - ZEC price adjusts based on the amount of renewable energy generation in NY
  - State may consider wholesale prices so long as it does not set them
  - Generators receiving ZECs are not required to make wholesale sales or participate in the wholesale auctions

# The Green Light

## *States Are Leading the Battle Against Climate Change*

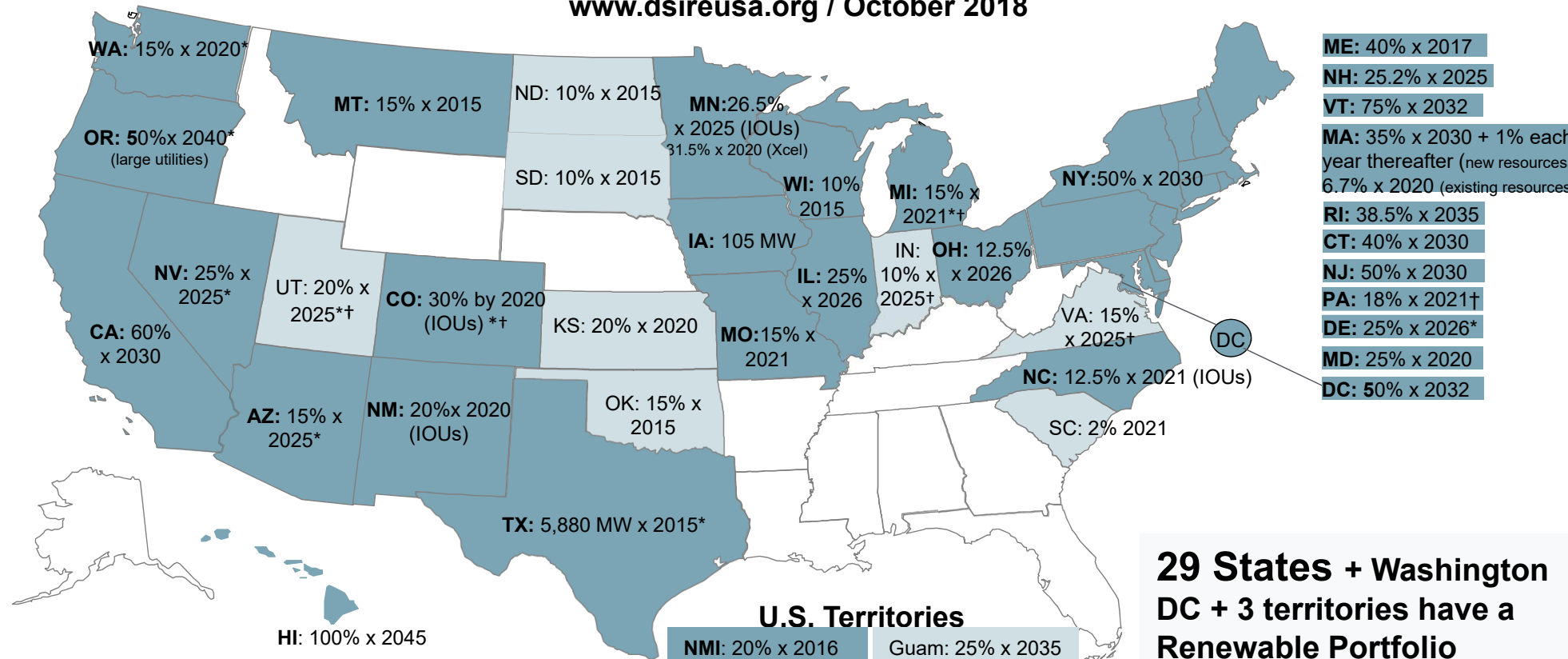
- Regional Greenhouse Gas Initiative (“RGGI”)
  - “Cap and trade” for CO<sub>2</sub> emissions
  - Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont
- Renewable Portfolio Standards (“RPS”)
  - 29 States, Washington, D.C., and 3 territories
  - Creates Renewable Energy Credits (“RECs”)



# The Green Light

## Renewable Portfolio Standard Policies

www.dsireusa.org / October 2018



**29 States + Washington DC + 3 territories have a Renewable Portfolio Standard**  
*(8 states and 1 territories have renewable portfolio goals)*

- Renewable portfolio standard
- Renewable portfolio goal
- \*** Extra credit for solar or customer-sited renewables
- †** Includes non-renewable alternative resources



# The Green Light

- 100% Renewable State-Level Legislation
  - Passed
    - California (SB 100)
      - 100% carbon-free by 2045, 60% renewable by 2030
    - New Mexico (Energy Transition Act)
      - 100% carbon free by 2045, 50% renewable by 2030
    - Hawaii
      - 100% renewable by 2045, 40% by 2030, 70% by 2040
    - Puerto Rico (PS 1121)
      - 100% renewable by 2050 and 40% by 2025
      - Ban on new coal-fired plants after 2028
      - Expedited interconnection for solar systems
      - Streamlined permitting of utility-scale ground-mounted solar

# The Yellow Light – Caution!

*Calpine Corporation, et al. v. PJM Interconnection L.L.C.*, 163 FERC ¶ 61,236

- Consolidated three proceedings for a paper hearing:
  - Calpine Complaint against PJM
    - Alleged that PJM's Tariff is unjust and unreasonable because it does not address the impact of subsidized existing resources on the capacity market
    - Granted, in part, by FERC in its June 29, 2018 decision
  - PJM's filing of proposed revisions to its Tariff
    - Designed to address the price suppressing effects of state out-of-market support
    - Rejected by FERC in its June 29, 2018 decision
  - Newly-established FERC proceeding under FPA Section 206 to consider a proposed alternative approach

# *Calpine Corporation, et al. v. PJM Interconnection L.L.C.*, 163 FERC ¶ 61,236

## Key findings and conclusions:

- States are providing meaningful out-of-market support to nuclear and renewable resources
  - State supports are projected to increase substantially in the future
- Subsidies allow resources to suppress clearing prices in the PJM capacity auctions, rendering the rate unjust and unreasonable

# TAKEAWAYS

- States have legal authority under the FPA to favor nuclear and renewable generation
- State support can be expected to grow, bolstered by a coalition of nuclear, environmental and low income advocates
- FERC will modify market design of the capacity auction
  - Impact on competitive balance remains to be seen

# Questions and Contact Info

Any questions?

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