17-2654-cv

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COALITION FOR COMPETITIVE ELECTRICITY, *et. al.*

Plaintiffs-Appellants,

v.

AUDREY ZIBELMAN, in her official capacity as Chair of the New York Public Service Commission,

Defendant-Appellee,

and

PATRICIA L. ACAMPORA, GREGG C. SAYRE, and DIANE X. BURMAN, in their official Capacities as Commissioners of the New York Public Service Commission,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AMICUS CURIAE BRIEF OF THE AMERICAN WIND ENERGY ASSOCIATION IN SUPPORT OF NEITHER PARTY

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CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, the American Wind Energy Association ("AWEA") declares as follows. AWEA is a non-profit trade association representing a broad range of entities with a common interest in encouraging the expansion and facilitation of wind energy resources in the United States. AWEA does not have a parent corporation or issue stock, and no publicly held company owns a 10 percent or greater interest in it.

/s/ Julia Dreyer
Julia Dreyer

Dated: October 20, 2017

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the American Wind Energy Association ("AWEA"), is a non-profit national trade association representing a broad range of entities with the common purpose of encouraging the expansion and facilitation of wind energy resources in the United States. *Amicus Curiae* represents the interests of wind turbine manufacturers, component suppliers, construction firms, project developers, project owners and operators, financiers, researchers, renewable energy supporters, utilities, marketers, customers, and their advocates. Through, among other things, participation as *Amicus Curiae* in state and federal courts, *Amicus Curiae* seeks to promote wind energy as a renewable, low-cost source of electricity for consumers. This case raises issues that could have a profound and direct impact on the interests of the wind industry. *Amicus Curiae* files this brief in compliance with Federal Rule of Appellate Procedure 29 and Local Rule 29.1 of the United States Court of Appeals for the Second Circuit.[1]

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amicus* certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no persons other than *amicus* contributed money intended to fund the preparation or submission of the brief.

Although *Amicus Curiae* takes no position as to the merits of this case, we respectfully submit this brief to apprise this Court of issues in which the wind industry has a significant interest apart from the immediate interests of the parties to this litigation. *Amicus Curiae* has an interest in this case because state-conducted resource procurement efforts for renewable energy could be called into question if the Court applies an unnecessarily broad rationale in reaching a verdict that strikes down the New York zero-emission credits ("ZEC") program. If the Court does strike down the New York ZEC program, the Court should be careful to distinguish the validity of state-conducted renewable energy programs as compared to the New York ZEC program. If not, the Court's decision reversing the lower court could substantially interfere with the implementation of valid state programs designed to meet important environmental and public policy goals through renewable energy deployment.

SUMMARY OF ARGUMENT

States often seek to maintain diverse generation resource options through, among other things, directing long-term resource planning. Pursuant to such planning, states commonly intend to encourage the deployment of renewable energy technologies. If the Court invalidates the New York ZEC program, given the legal and factual differences in the way in which ZECs and typical renewable energy programs operate, the Court should do so without undermining the ability of New York, as well as other states, to meet renewable energy policy goals.

The district court assumed that renewable energy credits ("RECs") are similar to ZECs, in that they both purport to provide compensation for the environmental attributes of certain generation sources, specifically noting that RECs were legally legitimate and thus ZECs should be as well.[2] The Plaintiffs also addressed the issue of the legitimacy and comparability of commonly traded RECs[3] vis-à-vis ZECs. However, for the reasons discussed herein, ZECs are not comparable to RECs; in fact, the two concepts are more dissimilar than similar. As such, the New York ZEC program is readily distinguishable from the

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[2] *See* Op. 26, ECF 160.

[3] RECs are used to help achieve renewable energy goals or renewable portfolio standards ("RPSs"). REC programs are established through state legislation requiring that a certain percentage of retail customers' load is supplied by renewable resources, often termed "eligible technologies." Although the definition of eligible technologies varies from state to state, most states allow suppliers to satisfy their RPS commitments by procuring RECs (representing the environmental attributes from one megawatt-hour of generation) delivered from wind, solar photovoltaic, solar thermal, ocean, tidal, biomass, low-impact hydro and geothermal resources.

REC programs enacted in many states and any decision by the Court to strike down the New York ZEC program should be narrowly construed so as to not call into question such valid programs.

Under typical REC constructs, credits are traded through market-based systems (similar to commodity markets) and awarded to generators with certain environmental attributes as an incentive to develop and produce certain types of new energy resources. Specifically, most REC programs are market-based, are not tied to the wholesale price of electricity, are not tied to the economic viability of a resource, and can be traded across state lines. In contrast, ZECs are not market-based, are directly tied to wholesale energy prices (*i.e.*, based on wholesale energy price forecasts), are only available to otherwise uneconomic resources, and are limited to certain existing in-state resources.

The structure of the Federal Power Act ("FPA") and the relevant case law—including, and especially, the Supreme Court's recent ruling in *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (U.S. 2016) ("*Hughes*")—leave no doubt that the New York REC program is a permissible exercise of traditional state authority to oversee utilities' resource mix. RECs do not disturb the Federal Energy Regulatory Commission's ("FERC") exclusive federal jurisdiction over wholesale rates. Indeed, RECs have long been found to be creatures of state law and outside of FERC's jurisdiction, provided they are sold separately from energy.

The New York REC program is a state-created program designed to encourage the development of renewable energy and does not impede or affect any national market. Instead, the program creates environmental compliance instruments to further legitimate state environmental, public health, and energy policy goals. It is a valid exercise of the state's authority to direct the resource mix of its regulated utilities and does not improperly permit the state to set or fix wholesale electric rates – areas within the exclusive jurisdiction of FERC. Moreover, New York is but one of many states and localities that have adopted valid REC programs pursuant to their authority over utility planning.

Because ZECs are plainly distinguishable from RECs, if the Court strikes down the New York ZEC program, it should do so in manner that does not call into question REC policies. In other words, if the

Court were to issue an unnecessarily sweeping rationale for striking down the New York ZEC program, numerous other state efforts to regulate their electricity resource and supply portfolio (*e.g.*, those that encourage the deployment of renewable energy) would be called into question. Such a decision could, in turn, have negative consequences for the ability of states to meet their renewable energy goals through RECs. Therefore, if the Court agrees with Plaintiffs-Appellants that ZECs are unconstitutional, AWEA urges the Court to narrowly tailor its decision to the specific facts presented in the case and provide clear guidance in its opinion so that it does not unnecessarily call into question state-mandated renewable procurements that are lawful exercises of state authority.

ARGUMENT

States' well-established authority over utility resource mix is explicitly recognized as a part of state jurisdiction under the FPA. 16 U.S.C. §791, *et seq*. Although the FPA does not permit states to actually set rates for wholesale energy or capacity, *see Hughes*, 136 S. Ct. at 1298, states have always carried out regulations within their own sphere of jurisdiction that indirectly affect wholesale rates. Like the majority of states, New York has adopted RPS requirements that mandate a minimum quantity of the retail electricity sales that must be provided by renewable energy resources. For the reasons discussed below, the REC program enacted by New York is fundamentally different from the ZEC program at issue. To the extent this Court finds that the New York ZEC program infringes on FERC's exclusive jurisdiction to set wholesale energy rates, it should do so without undermining the REC programs that New York and many other states have enacted.

I. RECs Are Distinct from ZECs and Thus Their Constitutionality Should Not Be Implicated by a Ruling in Favor of Plaintiffs-Appellants.

A. FERC Has Specifically Disclaimed Jurisdiction over RECs.

FERC's authority to determine just and reasonable wholesale rates exists alongside states' "traditional" authority over "the regulation of utilities" within their jurisdiction. *See Ark. Elec. Coop. Corp. v. Ark. PSC*, 461 U.S. 375, 377 (1983). States' authority includes the power "to direct the planning and resource decisions of utilities under [the state's] jurisdiction," such as by "order[ing] utilities to . . . purchase renewable generation." *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d

393, 417 (2d Cir. 2013) (internal quotation marks omitted); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (observing that under the Atomic Energy Act, passed after the FPA, "[s]tates retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns.").

FERC views state resource planning decisions, including mandates that require local utilities to supply energy to retail customers from renewable energy resources in furtherance of local environmental goals, as outside of its jurisdictional purview. *See S. Cal Edison Co.,* 71 FERC ¶ 61,269 at 62,080 (1995); *see also, Midwest Power Sys. Inc.,* 78 FERC ¶ 61,067 at 61,246 (1997). FERC has also concluded that states can direct utilities to procure RECs where the environmental attributes associated with the REC are both valued and traded separately from the underlying energy itself. *S. Cal. Edison Co. I*, 70 FERC ¶ 61,215 at 61,676 (states may "diversify their generation mix to meet environmental goals in a variety of ways," including by "requir[ing] a utility . . . to purchase power from the supplier of a particular type of resource."). When those credits are "unbundled" (*i.e.*, sold separately from the electricity itself), FERC has held that they are subject to regulation by states, not FERC. *See WSPP*, 139 FERC ¶ 61,061 at 61,426 (2012); *see also Wheelabrator Lisbon, Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008) (noting that "RECs are inventions of state property law"); *Am. Ref-Fuel Co.*, 105 FERC ¶ 61,004 at 61,007 (2003) ("states, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded."). Indeed, FERC's purview related to RECs extends only to bundled sales of energy and RECs together, as the value of bundled RECs "directly affects" wholesale rates. *See Southern Cal Edison Co.*, 71 FERC ¶ 61,269 at 62,076 (1995); *see also Midwest Power Sys. Inc.*, 78 FERC ¶ 61,067 at 61,246 (1997). Nuclear and other non-renewable resources are not entitled to the same treatment under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3(h).

In short, unlike the ZEC program, FERC has specifically disclaimed jurisdiction over RECs and the state instruments that create them. *See WSPP*, 139 FERC at 61,426.

B. REC Programs Use Market-Based Mechanisms to Determine Prices through Competitive Bidding.

The percentage of retail load specified in a state's RPS legislation establishes the market size for RECs; the higher the percentage, the greater the number of RECs that must be purchased. Suppliers that are unable to procure enough RECs to meet the RPS pay a penalty, generally termed an "Alternative Compliance Payment." Effectively, the RPS sets the size of the REC market. Supply and demand fundamentals in the state's REC market then establish the resulting REC price.

REC programs use market-based mechanisms (*i.e.*, mechanisms with actual price competition between alternative suppliers of renewable energy) to incentivize new entry and innovation at the least cost. RECs are traded through a market-based system[4] and awarded to generators with certain environmental attributes as an incentive to develop and produce certain types of recently developed energy resources. The fact that RECs can generally be traded (often on exchanges) allows utilities to meet their renewable obligations more

[4] The U.S. Circuit Court of Appeals for the Tenth Circuit has previously determined that the states are permitted to establish these local markets for renewable energy through RPS standards. *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015).

cost-effectively. Because RECs are market driven, renewable energy owners are still exposed to market risks.

The price of RECs is also not tied in any way to wholesale electricity prices. As discussed further below, states do not use REC price formulas that directly change the value of RECs based on estimates of wholesale market prices. Rather, RECs are typically competitively traded outside of wholesale energy markets, so their value varies based on supply and demand for RECs, not electricity. REC programs also generally are not linked to the economic viability of a resource, can usually be traded across state lines, and do not limit eligibility to suppliers whose wholesale market revenues are less than their costs.

In contrast to typical REC programs, the ZEC program is not market-based. Moreover, the ZEC program is tied to the cost of wholesale energy prices; is only available to existing resources that, through their market participation, have proven to be uneconomic; and is only available to certain in-state resources. ZEC prices are not market prices and are not determined by competitive bidding of alternative suppliers for electricity generated with zero emissions.

Indeed, ZEC program participants do not submit supply offers based on price, but rather they submit detailed cost information. The ZEC program also insulates the selected uneconomic nuclear owner from market risks via "make-whole" payments that insulate the resource from market prices by providing a guaranteed minimum revenue stream.

C. RECs Are Not Tied to Wholesale Market Prices.

Unlike RECs that are procured through competitive retail processes, the ZEC holder is guaranteed a minimum payment for its wholesale energy irrespective of the rate established by FERC. The ZEC price is set relative to wholesale power prices in a manner that amounts to a wholesale power price floor for the selected nuclear generators. The fact that ZEC prices are a function of wholesale power price forecasts is a critical distinction between ZECs and RECs.

Specifically, where REC prices are established by unrelated market outcomes, the price of ZECs is established prospectively by a formula that rises and falls relative to wholesale power prices. The value of the ZEC decreases when the average wholesale power price forecasts in wholesale markets exceed a specified baseline in the legislation.

Pursuant to this calculation, ZECs ensure that the holder receives at least a specified floor for each megawatt-hour of energy delivered to the wholesale market from the state unless wholesale prices are expected to exceed levels that the state has determined are necessary to sustain the contracted nuclear asset.

In comparison to the ZEC program, REC prices do not have an explicit or direct tie to wholesale power price forecasts, as in the case of the ZEC price-setting mechanism. Rather, REC prices are created by a wide range of REC market dynamics.[5] Unlike the price of ZECs, which are established by the change in forward wholesale power prices relative to a historic test year, competition for RPS market-share among REC suppliers determines REC prices. Prices generally rise when the quantity of RECs is scarce relative to RPS demand and vice versa, irrespective of prices for wholesale power. This is fundamentally different than the ZEC pricing mechanism.

D. The ZEC Program Could Perpetuate Energy Price Suppression Now and over the Long Term.

[5] These include: (1) the level of REC demand (*i.e.*, the RPS percentage of retail load as established by the state legislature); (2) the Alternative Compliance Payment set by the state legislature or state regulatory authority; and (3) the level of REC supply, which is determined by the number and performance of renewable resources in a state or region.

As competitive wholesale market conditions are no longer conducive to the profitability of the nuclear units in question, the ZEC program in effect allows these units to fully recover their costs, up to certain limits. In contrast, RECs are short-term – annual or shorter – and do not provide any such guarantee of return.

E. RECs Are Created by All Qualified Renewable Generators and Intended to Stimulate New Investment.

RECs are generally created by all qualified renewable generators, without regard to economic need, and thus the program encourages many participants. In contrast, only existing nuclear plants that would cease to operate without the subsidy are eligible to receive ZECs. In fact, the New York ZEC program provides subsidies to just one company for years.

REC programs are also designed to help states in implementing their RPS programs in furtherance of achieving environmental objectives by stimulating new investment or the development of new technologies, like renewable energy. Thomas White International, *The Green Report* (Jan. 5, 2011), *available at* www.thomaswhite.com/globalperspectives/promote-renewable-energy-buy-an-rec/. To that end, REC programs have been successful in encouraging early adoption of new technologies, thereby enabling subsequent cost reductions and cost efficiencies with increased scale and innovations. *Id.* In other words, RECs support nascent renewable energy technologies while encouraging investment and innovation.

On the other hand, the New York ZEC program is aimed at preserving older in-state nuclear generating units even though those units have long been in the market. The ZEC payments are designed to protect the nuclear facilities from their wholesale revenues falling below the level that New York believes is necessary to sustain the nuclear asset. The New York ZEC legislation is intentionally designed to supplement wholesale prices signals only when those prices would otherwise indicate that the nuclear resources should retire. The ZEC is indexed to wholesale power price forecasts, and starts with a base subsidy amount of $17.48 per megawatt-hour of energy produced and sold into the wholesale market. No other wholesale market participants receive this price stability.

II. An Overly Broad Ruling Is Unnecessary and Could

Jeopardize Dozens of State Renewable Energy Laws and the Public Policy Goals Dependent upon Them.

For the reasons discussed above, a ruling against the New York ZEC program that is overly broad (*i.e.*, focused beyond the ZEC program) and would affect REC programs is unnecessary. Such a ruling could threaten existing state actions to incentivize renewables and chill the adoption of new state policies, impeding the ability of states to meet their environmental goals, to the country's great and lasting harm.

The states' ability to design programs to incentivize the development of specific energy resources is well established. For instance, twenty-nine states and the District of Columbia have enacted enforceable RPSs or similar laws, often tailoring the requirements to best fit the state's particular resource base or local preferences.[6] Many states also conduct some form of long-term procurement planning to meet renewable energy needs, including mandated purchases. This underscores the need for the Court to provide clear guidance in its opinion if it reverses the lower court so that it does not unnecessarily

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[6] American Wind Energy Association, AWEA state RPS Market Assessment 2016 (Sept. 14, 2016).

call into question renewable electricity programs that are lawful exercises of state authority.

The following state programs exemplify just a handful of the important state actions that could be put in jeopardy by an unduly sweeping ruling in this case:

- Rhode Island's Affordable Clean Energy Security Act authorizes its utility to participate in multi-state or regional efforts to procure clean energy resources using long-term contracts.[7]
- Massachusetts' recently enacted Energy Diversity Act requires state utilities to solicit proposals for long-term contracts from clean energy resources.[8]
- Nevada has required electric utilities serving densely-populated counties to retire at least 800 megawatts of coal-fired generation and to construct, acquire, or contract for replacement capacity, including at least 350 megawatts of renewable-energy facilities.[9]

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[7] 39 R.I. Gen. Laws § 39-31-1, *et. seq*. (2015).
[8] Ch. 188 of the Mass. Acts of 2016.
[9] Nev. Rev. Stat. § 704.7316 (2013).

- Regulators required Georgia Power to procure 525 megawatts of new solar generation by competitive solicitation, using an independent bid evaluator per Commission rules.[10]

CONCLUSION

For the foregoing reasons, if the Court finds the New York ZEC program to be unconstitutional, it is critical that it draw a bright-line distinction between that program and a state ordering utilities to purchase energy from renewable energy resources. This will prevent unintended consequences to legitimate state efforts to promote renewable generating resources for achieving environmental objectives.

Dated: October 20, 2017

Respectfully submitted,

/s/ Julia Dreyer
Julia Dreyer

[10] Final Order, *In re Ga. Power Co.'s 2013 Integrated Resource Plan*, No. 36498, slip op. at 18 (Ga. Pub. Serv. Comm'n July 11, 2013), *available at* http://goo.gl/trbZkA.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4093 words (as counted by Microsoft Word), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

/s/ Julia Dreyer
Julia Dreyer

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2017, the motion of the American Wind Energy Association for Leave to File Brief Amicus Curiae in Support of Neither Party were electronically filed with the Clerk of the Court using the CM/ECF system. I certify that all parties are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted,

/s/ Julia Dreyer
Julia Dreyer