

No. 20-2195

**United States Court of Appeals
for the First Circuit**

SIERRA CLUB; NATURAL RESOURCES COUNCIL OF MAINE; APPALACHIAN
MOUNTAIN CLUB,

Plaintiffs - Appellants,

v.

U.S. ARMY CORPS OF ENGINEERS; COLONEL JOHN A. ATILANO, II, Commander and
District Engineer, in his official capacity; JAY L. CLEMENT, Senior Project
Manager, in his official capacity,

Defendants - Appellees,

CENTRAL MAINE POWER COMPANY,

Intervenor-Defendant - Appellee.

ON APPEAL FROM DECEMBER 16, 2020 ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MAINE, No. 2:20-cv-00396-LEW

**BRIEF FOR CALPINE CORPORATION, NEXTERA ENERGY
RESOURCES, LLC, AND VISTRA CORP. AS AMICI CURIAE IN
SUPPORT OF APPELLANTS AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Movant-*Amici Curiae* (Plaintiffs - Appellants) Calpine Corporation, NextEra Energy Resources, LLC, and Vistra Corp. provide the following disclosure statements.

Calpine Corporation certifies that it is a privately held Delaware corporation engaged through various subsidiaries in the development, financing, acquisition, ownership, and operation of independent power production facilities, and the wholesale and retail marketing of electricity in the United States and Canada. Calpine is one of the largest generators of electricity from natural gas and geothermal resources in the United States, with robust commercial, industrial, and residential retail operations in key competitive power markets, including the markets operated by the Independent System Operator of New England (ISO-NE). CPN Management, LP owns 100 percent of the common stock of Calpine Corporation. Volt Parent GP, LLC is the General Partner of CPN Management, LP. Energy Capital Partners III, LLC owns the controlling interest in Volt Parent GP, LLC.

NextEra Energy Resources, LLC certifies that it is the largest generator of renewable energy from the wind and sun in the world, and its subsidiaries and affiliates are indirect subsidiaries and affiliates of NextEra Energy, Inc., a publicly-held energy and utility holding company. In addition, ownership interests in certain of NextEra Energy, Inc.'s subsidiaries and affiliates are held by NextEra Energy

Partners, LP, a publicly-held growth-oriented limited partnership formed by NextEra Energy, Inc. The following subsidiaries and affiliates of NextEra Energy, Inc. have issued publicly-held securities: Florida Power & Light Company, NextEra Energy Partners, LP, and NextEra Energy Capital Holdings, Inc. No other parents, affiliates, or subsidiaries of NextEra Energy Resources, LLC are publicly-held or publicly-traded. To the best of NextEra Energy Resources' knowledge, no publicly-held company can exercise 10 percent or greater of the voting power in NextEra Energy, Inc., and no publicly-held company can exercise 10 percent or greater of the voting power in NextEra Energy Partners, LP other than NextEra Energy, Inc.

Vistra Corp. certifies that it is a leading, Fortune 275 integrated retail electricity and power generation company, with retail and generation operations in 20 states and the District of Columbia, including six of the seven competitive power markets in the United States. Vistra is the largest competitive power generator in the United States, with a diverse portfolio of natural gas, nuclear, solar, and battery storage facilities as well as being a large purchaser of wind power. To the best of Vistra's knowledge, no publicly held company can exercise 10 percent or greater of the voting power in Vistra Corp.

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STATEMENT REGARDING IDENTITY AND INTEREST OF AMICI CURIAE, CONSENT TO FILE, AUTHORSHIP OF BRIEF, AND FINANCIAL CONTRIBUTIONS THERETO

Amici curiae Calpine Corporation, NextEra Energy Resources, LLC, and Vistra Corp. (“*Amici*”) are three of the nation’s largest power producers and providers of retail electricity. Together, *Amici’s* and their corporate affiliates’ generation assets comprise nearly 10 percent of all installed power generating capacity in the United States, with approximately 116,000 MW of generation in operation or under construction. Through each of their respective retail affiliates, *Amici* also serve more than 12 million combined residential and commercial customer accounts. *Amici* operate an increasingly diverse range of generating assets, including nuclear, solar, wind, battery storage, geothermal and fossil plants, with operations at scale in all major U.S. competitive power markets.

Amici are committed to providing reliable and affordable power to the electricity grid from an increasingly cleaner generation portfolio, in support of their own and their customers’ objectives to reduce greenhouse gas (“GHG”) emissions and thereby mitigate climate change. *Amici* are fulfilling their commitments by increasing the volume of electricity they produce from renewable and other low-emitting resources, and by advocating for implementation of technically sound GHG reduction policies. *Amici* possess significant experience in constructing and operating the renewable and low-emitting resources needed to displace existing

higher-emitting fossil generation and thereby reduce GHG emissions across the interconnected electricity grid.

Amici submit this brief based on their concerns that the District Court’s December 16, 2020, Order denying Plaintiffs’ motion for a preliminary injunction erroneously relied upon the purported GHG reduction benefits attributable to Central Maine Power Company’s transmission project (the “Project”) in its assessment of the public interest factor. In this brief, *Amici* describe why, based on their understanding of market dynamics within the northeastern United States and Canada, Hydro-Québec’s delivery of electricity from its system to New England over the Project amounts to nothing more than “resource shuffling” and provides no cognizable GHG emission reduction and no benefit to the public or the climate.

Plaintiff - Appellants consent to *Amici’s* filing this brief. Defendants - Appellees and Intervenor-Defendant - Appellee consent to *Amici’s* filing of this brief so long as it is timely and conforms to all relevant rules.

No party or party’s counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. No person or entity, other than *Amici*, has contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

In its December 16, 2020, Order denying a preliminary injunction to suspend work on the Project while Plaintiffs’ challenges to the Project’s compliance with requirements of the Clean Water Act and National Environmental Policy Act proceeded, the District Court relied upon purported GHG reduction benefits attributable to the Project in its assessment of the public interest factor. *See* Order at 48-49.¹ Specifically, the District Court cited conclusions of the Maine Public Utilities Commission that the Project will “benefit Maine in a variety of ways, including by . . . reducing regional greenhouse gas emissions.” *Id.* at 49. This reasoning was in error. The Project is likely to result in *no* overall reduction in GHG emissions across the interconnected electricity grid, but will merely result in a reshuffling of zero-carbon power supplied by existing resources in Québec, to new customers in New England. Redirecting power from existing resources that currently serve Québec and neighboring markets to New England does nothing to reduce overall GHG emissions because the demand previously met by those resources will be backfilled by higher-emitting resources. Because there is no mechanism to account for where or how that backfilled power is actually produced,

¹ Order on Motion to Supplement or Amend Complaint and Motion for Preliminary Injunction, *Sierra Club, et al. v. U.S. Army Corps of Engineers, et al.*, Case No. 2:20-cv-00396-LEW, ECF No. 42 (D. Me. Dec. 16, 2020). *See* Addendum to Appellants’ Opening Brief, *Sierra Club, et al. v. U.S. Army Corps of Engineers, et al.*, Case No. 20-2195 (1st Cir. Feb. 2, 2021).

the Project's purported GHG reductions are illusory and should not have factored in the District Court's decision to deny the preliminary injunction.

ARGUMENT

I. GHG Emission Reductions Resulting from Resource Shuffling are Illusory and Do Nothing to Mitigate Climate Change

Electricity is a unique, entirely fungible product. When electricity is created by a generator, it is transmitted to an electricity grid that is broadly interconnected across regions. Upon entering the grid, electricity from a particular generator becomes indistinguishable from electricity circulating the grid from other generators. In addition, electricity largely remains a real-time product, meaning that supply from generators and demand from consumers must constantly be balanced at all times by grid operators, who call on generators to increase and decrease generation on a minute-by-minute basis to ensure the grid remains synchronized and the lights remain on. In this way, the electricity grid constitutes a zero-sum system, such that, when generation decreases from one generator, it must be instantaneously matched by an increase from another generator.

The same principle holds true when power from an existing generation resource is contractually reassigned to a new customer. The demand previously served by that resource must be met by other sources of generation on the electricity grid. This unavoidable consequence has important implications for efforts to reduce GHG emissions. When power generated from an *existing* zero-emitting resource on

the grid is contractually redirected and attributed to a different customer, it does not necessarily result in a net reduction in GHG emissions. Rather, the demand previously served by the zero-emission resource must now be “backfilled” by other existing resources on the grid. Reassignments of this nature are known as “resource shuffling.” Although the new customer may claim to have reduced its own GHG emissions, the reduction is illusory, unless it also accounts for any net emissions impacts attributable to the backfilling resources.

By contrast, when new, incremental renewable and zero-emitting resources are added to the grid, their generation directly displaces the operation of existing power plants. In the case of the power market serving New England, where fossil generation remains the largest source of electricity supply, displacement of existing generation by new zero-emitting resources results in a real and measurable reduction in GHG emissions.

Utilities and jurisdictions may claim to reduce their GHG emissions when they first contract with an existing, low-emitting resource. But, unless they fully account for the net impacts attributable to the sources of power that fill the demand previously met by the existing resource, their claims are ultimately meaningless on the whole as a matter of science, given the global nature of climate change and worldwide diffusion of GHG emissions from all sources, regardless of location, throughout the Earth’s atmosphere. In sum, unlike the addition of brand new, lower-

emitting resources that actually reduce the amount of time that existing, higher-emitting resources run, resource shuffling results in no overall change in GHG emissions, has no effect on atmospheric concentrations of GHGs and, accordingly, does nothing to mitigate climate change.

II. GHG Emission Reductions Attributed to the Project Represent a Quintessential Example of Resource Shuffling

The Project is proposed as a means of delivering power from Hydro-Québec's existing hydroelectric resources to customers in Massachusetts. For the reasons discussed below, such deliveries represent a classic example of resource shuffling and would result in no legitimate GHG emission reduction.

First, Hydro-Québec's current electrical generating capacity is not transmission-constrained. This means that Hydro-Québec already can sell any excess generation it may have via exports to adjacent markets.² Thus, the Project does not remove any bottleneck that precludes Hydro-Québec from selling all of the hydropower it can produce, but merely allows Hydro-Québec to access more lucrative markets in Massachusetts.

Second, Hydro-Québec has openly acknowledged that it will construct *no* new incremental clean energy resources to supply energy to New England. *See* New

² *See* Hydro-Québec, Hydro-Québec: North America's Leading Provider of Clean Energy, <https://www.hydroquebec.com/clean-energy-provider/> (last visited Feb. 8, 2021) (describing Hydro-Québec's existing interconnections and export capacity).

England Clean Energy Connect: 100% Hydro, Section 83D Request for Proposal Application Form, at 63 (July 27, 2017) (“All of the hydroelectric generation units that comprise the HQ Hydropower Resources are in operation and, therefore, have already been constructed.”).³ Because power from these resources is already being generated and serving consumer demand in Québec and neighboring markets, redirecting that power to Massachusetts will cause the demand previously served by Hydro-Québec’s resources to be backfilled by other sources of generation. Unless that redirection were coupled with the addition of new zero-carbon resources (which it is not), the demand previously served by the redirected power will be met by higher emitting resources. Depending upon where those resources are located, the end result will either be “no net impact” or “an increase in total carbon emissions.” Energyzt Report at 32. In sum, the Project can claim no cognizable reduction in GHG emissions.⁴

³ Available at: <https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/9718019>. See also Energyzt, Greenwashing and Carbon Emissions: Understanding the True Impacts of New England Energy Connect, at 3-4 (Oct. 2018), <http://www.nrcm.org/wp-content/uploads/2018/10/ENERGYZTreportNECECImpacts.pdf> (“Energyzt Report”).

⁴ Regulators in other states have reached similar conclusions for comparable project proposals. See State of New Hampshire Site Evaluation Committee, Decision and Order Denying Application for Certificate of Site and Facility, Docket No. 2015-06, at 161 (Mar. 30, 2018), https://www.nhsec.nh.gov/projects/2015-06/orders-notices/2015-06_2018-03-30_order_deny_app_cert_site_facility.pdf (“[N]o actual greenhouse gas emission reductions would be realized if no new source of

Third, and finally, although the Massachusetts request for proposals (“RFP”) that selected the Project actually required qualifying deliveries of electricity to be “incremental,” incrementality was defined solely in the context of deliveries *into New England*. This in no way ensured that generation of zero-carbon power actually increases on a net, grid-wide basis; rather, it allows Hydro-Québec to divert clean energy from the existing markets it serves to New England instead.⁵ As previously explained, such diversions will inevitably cause the load previously being served by Québec’s hydroelectric resources to be backfilled by higher-emitting market power. As a consequence, while deliveries of zero-carbon power over the Project may enable New England states to account for a paper reduction in GHG emissions, that reduction is the product of resource shuffling and ultimately illusory.

III. Emission Reductions Attributed to Deliveries Over the Project Are Unverifiable And Warrant No Recognition

The contracts executed for delivery of power from Hydro-Québec’s system over the Project provide no mechanism to identify and protect against resource

hydropower is introduced and the power delivered by the Project to New England is simply diverted from Ontario or New York.”).

⁵ See, e.g., Mass. Dep’t Pub. Utils., Docket Nos. 18-64, 18-65, 18-66, Testimony of Dean M. Murphy (“Murphy Testimony”), at 14-15 (Dec. 21, 2018), <https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/10195907> (Mass. Attorney General’s technical expert, noting that “[i]ncrementality is defined in the RFP only with respect to deliveries into New England” and that Hydro-Québec can accomplish this “by reducing its exports to other neighboring regions rather than by increasing clean energy generation overall” in which case “global GHG emissions would not necessarily be reduced.”).

shuffling or to account for the offsetting emissions increases occurring in other jurisdictions as a result of such shuffling behavior. While the contracts impose minimal requirements that electrons must be “tagged” as originating from a specific hydroelectric facility, that does nothing to mitigate resource shuffling concerns because it does not track Hydro-Québec’s total system-wide dispatch decisions. *See also* Energyzt Report at 20. Without visibility into those dispatch decisions, Hydro-Québec remains free to “tag” such deliveries as delivered from its hydroelectric resources, while importing power from elsewhere to meet demand within its own system. Further, “under the terms of the contracts with Massachusetts utilities, Hydro-Québec would not be precluded from purchasing energy from other markets to sell directly into [the Project]” *Id.* at 35. The net result is that “total carbon emissions in other markets could increase to a level that any reduction in New England carbon emissions would be negated or even exceeded.” *Id.*

Within standard GHG accounting regimes, offsetting increases occurring in other jurisdictions are commonly referred to as “leakage.” *See* Mass. Gen. Laws ch. 21N, §§ 1, 5 (defining “leakage” as “the offset of a reduction in emissions of greenhouse gases within the commonwealth by an increase in emissions of greenhouse gases outside the commonwealth,” and requiring the Massachusetts Executive Office of Energy and Environmental Affairs to monitor and report periodically on whether state actions taken to reduce GHG emissions “minimize

leakage.’’). In regulatory proceedings concerning the Massachusetts Department of Public Utilities’ approval of the contracts, the Massachusetts Attorney General filed expert testimony, raising the specter of leakage and concluding that diversions of power from Hydro-Québec over the Project “would effectively substitute fossil generation in other regions for fossil generation in New England, shifting emissions from one region to another, without causing a material decrease” Murphy Testimony at 15. The Attorney General’s expert also offered recommendations for changes to the contracts that might mitigate those concerns. *Id.* at 17.

Despite those concerns being raised and Massachusetts law that affirmatively requires monitoring for leakage (Mass. Gen. Laws ch. 21N, §5), no mechanisms were added to the contracts to account for leakage or otherwise prevent resource shuffling. In the absence of such mechanisms, the Project’s emission reduction claims are meritless and should have been accorded no weight by the District Court in denying a preliminary injunction.

CONCLUSION

The purported GHG emission reductions attributed to deliveries facilitated by the Project are illusory and result in no real reduction of GHG emissions to the atmosphere. The District Court’s reasoning that such reductions would serve the public interest was therefore in error. Such reductions should not have factored into the District Court’s assessment of the public interest in denying Appellants’

requested preliminary injunction and the Court should therefore reverse the District Court's decision.

Dated: February 8, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the length limit requirements of Federal Rule of Appellate Procedure 29(a)(5) and the Court's Order filed January 15, 2021 (Doc #00117693279), because the brief is 11 pages in length, less than half of the 30-page maximum length authorized by the Court for principal party briefs in its Order, and contains 2,297 words as counted by the word-processing system used to prepare the brief (Microsoft Word 2016), less than half of the 13,000 words authorized for principal party briefs under Federal Rule 32(a)(7)(B).

The foregoing brief also complies with the line spacing, typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(4), 32(a)(5) and 32(a)(6) because this brief has been prepared in proportionally spaced, 14-point Times New Roman typeface with double-spaced text using Microsoft Word 2016.

/s/ Kevin Poloncarz
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CERTIFICATE OF SERVICE

On February 8, 2021, a copy of the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the Court's appellate CM/ECF system, which accomplishes service on all registered parties. All attorneys listed below are registered to receive service through the Court's CM/ECF system and will receive service by electronic means pursuant to Rule 4 of this Court's Rules Governing Electronic Filing:

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