THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

COALITION FOR COMPETITIVE ELECTRICITY, DYNERGY INC., EASTERN GENERATION, LLC, ELECTRIC POWER SUPPLY ASSOCIATION, NRG ENERGY, INC., ROSETON GENERATING LLC, and SELKIRK COGEN PARTNERS, L.P.,	
Plaintiffs	Case No. 1:16-cv-8164 (VEC)
v.	**AMICUS CURIAE BRIEF OF PAT WOOD, III AND PETER A. BRADFORD**
AUDREY ZIBELMAN, in her official Capacity as Chair of the New York Public Service Commission; and PATRICIA L. ACAMPORA, GREGG C. SAYRE, and DIANE X. BURMAN, in their official Capacities as Commissioners of the New York Public Service Commission	
Defendants	

WOOD AND BRADFORD'S AMICUS BRIEF

The proposed *Amici* submit this brief in the above-referenced proceeding to oppose dismissal and assist the Court regarding critical issues of fact and law relating to the case. On August 1, 2016, the New York Public Service Commission ("PSC") issued its "Order Adopting a Clean Energy Standard," which includes a Zero-Emissions Credit ("ZEC") program for certain uneconomic nuclear plants. The regulation will go into effect on April 1, 2017, and provide billions of dollars of subsidies, under 12-year contracts, to up to four uneconomic nuclear generation facilities in New York in order to assure their continued operation.[1]

[1] Case 15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard*, Department of Public Service Staff, Responsive Proposal for Preserving Zero-Emissions Attributes

The *Amici* support New York State's policies to reduce carbon dioxide ("carbon") emissions; however, aspects of the state's efforts will needlessly undermine the federally regulated competitive electricity markets that have, for two decades, maintained reliability and stimulated major cost reduction and vast technological innovation. In their respective terms of service as energy regulators, the *Amici* were actively involved with the establishment and evolution of these competitive markets and have worked closely with customer, industry, environmental, governmental and non-governmental interests to balance the various economic, environmental and legal interests. Non-discrimination and the harmonizing of environmental protection with efficient pricing have been core principles of these efforts. Any state seeking to reduce carbon emissions from transactions directly impacting wholesale markets must do so in a manner that encourages reductions from all resources on a non-discriminatory basis. This is borne out in other states and jurisdictions that use Renewable Energy Credits, which differ significantly from the PSC's program.

Pursuant to the rules of the court, Pat Wood III, former chair of the Federal Energy Regulatory Commission and the Public Utility Commission of Texas, and Peter A. Bradford, former chair of the New York and Maine utility regulatory commissions and former commissioner of the U.S. Nuclear Regulatory Commission, hereby comment in opposition to the motions to dismiss filed by the defendants.

THE AMICI

MR. PAT WOOD, III served as chairman of the FERC from 2001 until 2005. From 1995 until 2001, Mr. Wood chaired the Public Utility Commission of Texas. Mr. Wood currently serves as the non-executive Chairman of the Board of Directors of one of the plaintiffs, Dynegy Inc.

MR. PETER A. BRADFORD chaired the New York Public Service Commission from 1987 until 1995. He also chaired the Maine Public Utilities Commission in the 1970s and 1980s and was a Nuclear Regulatory Commissioner between 1977 and 1982. He has taught courses entitled "Nuclear Power and Public Policy (at Vermont Law School) and "Energy Policy and Environmental Protection" (at the Yale School of Forestry and Environmental Studies).

ARGUMENT

I. THE PSC'S PROGRAM WILL CAUSE DIRECT HARM TO THE MARKETS

Today's power markets are in part the result of nuclear power's past economic excesses. In the 1970s and 1980s, nine-figure nuclear plant construction cost overruns and plant cancelations that outnumbered completions led to substantial public discontent with a system that provided virtually assured large rate increases to recover all costs associated with construction that state regulators had deemed necessary. Beginning with the Public Utilities Regulatory Policy Act of 1978, Congress, FERC and many states sought to create power markets in which the lowest cost generation or energy efficiency solutions would be the ones actually chosen, and the risks of cost overruns and mismanagement would be shifted from customers to those in the industry better able to assess and manage them.

These market forces have lowered generation costs, improved plant operations and fostered innovation of many sorts. Nuclear plant operations were significantly improved to confront the prospect of competition, with plant availability rising from about 75% in the mid-1980s to over 90% by 2000 and costs falling significantly. For a time, nuclear plants were highly profitable and a source of low cost electricity with relatively stable cost characteristics.

The last five years have reversed this apparently happy union of nuclear power with competitive power markets. As the nuclear plants aged, required maintenance and capital

investments caused operating costs to rise. At the same time, costs from competitive resources have fallen. Demand for electricity has also fallen, due in part to dramatic advance in energy efficiency technology and competitiveness. These developments appear likely to keep market prices below levels that some nuclear plants can meet well into the future[2].

New nuclear power has been priced out of power markets completely. In a development unforeseen as recently as five years ago, even operating reactors have been compelled to close because they could not compete. The nuclear industry has come to realize that it cannot thrive under today's competitive conditions and has commenced an all-out political effort to subvert competition with governmentally imposed subsidies as well as other legislative and regulatory actions. If this effort succeeds, the industry will thwart the very market-oriented reforms that were called into being in response to its past history of economic waste.

The Federal Energy Regulatory Commission's ("FERC's") website expresses the *Amici*'s perspective succinctly:

> "National policy for many years has been, and continues to be, to foster competition in wholesale power markets. In each major energy bill over the last few decades, Congress has acted to open up the wholesale electric power market by facilitating entry of new generators to compete with traditional utilities. As the third major federal law enacted in the last 30 years to embrace wholesale competition, the Energy Policy Act of 2005 strengthened the legal framework for continuing wholesale competition as federal policy for this country." [3]

A key feature of wholesale competition has been the conclusion that power generation is not a natural monopoly. Prices will therefore be set by competitive forces rather than by regulation. Meanwhile, because power delivery is still a natural monopoly, the national

[2] As of 2012 the U.S. had 104 operating nuclear power plants. None had closed in more than a decade. Since then, one new plant has commenced operation. Six have closed. Somewhere between 12 and 20 are estimated to be at risk of closing before 2030 without state imposed subsidies. Most of these are in regions served by FERC-regulated power markets.

[3] Federal Energy Regulatory Commission (Oct. 21, 2014), https://www.ferc.gov/industries/electric/indus-act/competition.asp

transmission system remains under FERC's rate and service regulation, while the distribution systems are for the most part regulated by the states.[4] In its landmark 1996 Order No. 888, the FERC acted to remedy discriminatory use of the transmission grid by vertically-integrated electric utilities, which tended to favor the dispatch of their own generation over that owned by others. The FERC primarily achieved this by ordering open access use of the transmission system by all qualified wholesale market participants.[5] To enforce this, it encouraged utilities to turn over the operation of their transmission systems to FERC-regulated regional transmission organizations (RTO) such as the New York Independent System Operator.[6] Over two-thirds of the nation's power generation sales (by economic measure) take place under the control of such organizations.[7] As a result of this open access mandate and its successful implementation, regional wholesale energy markets have developed over time. These markets generally include auction-based markets for generation capacity, for energy and for ancillary services (such as black-start capability, load following and reserves). Load management and energy efficiency have become substantial market participants.

A significant portion of FERC's present-day workload involves overseeing these markets, both through development and refinement of balanced market rules and by active market oversight and enforcement of these rules. Because federal law recognizes the

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[4] *See* "Electricity Transmission: A Primer" by Matthew H Brown and Richard P. Sedano, https://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/primer.pdf.

[5] Order No. 888: Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888- B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

[6] Order No. 2000: Regional Transmission Organizations, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), order on reh'g, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC, 272 F.3d 607 (D.C. Cir. 2001).

[7] "While major sections of the country operate under more traditional market structures, two-thirds of the nation's electricity load is served in RTO regions." Federal Energy Regulatory Commission, https://www.ferc.gov/market-oversight/mkt-electric/overview.asp.

corresponding role of states in regulating the retail sales of power (as opposed to the wholesale sales of power), the FERC and states generally work collaboratively to ensure that competitive markets work well to balance the need of customers and power providers while protecting the environment.[8] Disputes over the precise line between state and federal jurisdiction have waxed and waned for the last century and will not be resolved in this proceeding. However, one need not draw definitive lines to see that the ZEC program unnecessarily undermines the federally regulated power markets.

On occasion, the balancing that enables effective competition has come under political pressure, especially in recent years as lower gas prices, lower demand and rising operating costs have threatened the viability of some existing nuclear power plants. Nuclear industry attacks on power markets that do not value nuclear power's fuel diversity and grid support characteristics adequately are a staple of industry speeches, articles and conferences, as are thinly veiled warnings of great harm to state job and tax well-being if plants must close.[9]

This pressure can be manifested through interference in the independence of the system operator, through passage of anticompetitive state laws and/or through adoption of anticompetitive regulations, including large subsidies. The New York PSC's ZEC program is such a manifestation.[10] It seeks to, and inevitably will, change the results of the FERC-regulated

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[8] *See, e.g.*, "FORMATION AND NURTURE OF A REGIONAL STATE COMMITTEE" by William H. Smith, Jr., Energy Law Journal 28:185 (2005).

[9] For a recent example among a great many similar pronouncements, see Nuclear Energy Institute CEO Maria Korsnik, "NEI to NY Assembly: Support Nuclear Energy for Clean Air, High-Quality Jobs" https://www.nei.org/News-Media/Media-Room/News-Releases/NEI-to-NY-Assembly-Support-Nuclear-Energy-for-Clea.

[10] In a report to the PJM Independent System Operator, the entity that oversees the extensive PJM market that adjoins New York to the south and west, the market monitor (a FERC-required market safeguard) recently noted as to very similar subsidies in the PJM markets, "These subsidies are not accurately characterized as state subsidies. These subsidies were all requested by the owners of specific uneconomic generating units in order to improve the profitability of those specific units. These subsidies were not requested to accomplish broader social goals. Broader social goals can all be met with market based mechanisms available to all market participants on a competitive basis and without discrimination." Market Analytics, "State of the Market Report for PJM", March 9, 2017, p. 2, http://www.eenews.net/assets/2017/03/10/document_pm_06.pdf.

market-based auction system in the New York region, both by altering the nuclear owner's position in the markets and by preserving otherwise uneconomic units.. In so doing, the ZEC program is likely to undermine the basic market function of compelling the retirement of uneconomic generating units to make way for more efficient technologies.

The New York PSC's ZEC program runs afoul of the fundamental tenets of the wholesale markets, which were, under federal law, constructed, designed and embraced by states like New York to deliver the lowest-cost electricity to customers in a fair, transparent and unbiased fashion. The amount of electricity covered is large. The wholesale price impacts will be direct and substantial. The history of the program shows that its purpose is not just (or even primarily) the preservation of the low carbon attributes of nuclear generation.[11]

Specific nuclear generating plants are entitled to ZECs on the basis of several criteria. Among these is that the plant owner is receiving "inadequate compensation to assure that the zero-emission attributes of the facility will be preserved" (order at p. 125). This standard evolved from a staff proposal for PSC-mandated subsidy when the PSC finds that the FERC-regulated wholesale market price is "insufficient to provide adequate compensation" to those plants (order, p. 124). The amount of the ZEC subsidies is subject to adjustment each two years, based on the social cost of carbon adjusted for, inter alia, forecast energy and capacity prices (order, p. 131); in other words, the actual value of a ZEC is tethered in part to the price of electricity in the FERC-regulated wholesale market. Nuclear plants in New York that are receiving adequate compensation from the market are not eligible for the ZEC program (order, p.

[11] A December 2, 2015 press release headlined "Governor Cuomo Directs Department of Public Service to Begin Process to Enact Clean Energy Standard" stated, "Additionally, the Governor has directed the Department of Public Service to develop a process to prevent the premature retirement of safe, upstate nuclear power plants during this transition…The early closure of those plants would result in increased carbon pollution from fossil fuel generators, reduced fuel diversity and unstable electric prices, as well as job losses and economic distress in Upstate communities.", https://www.governor.ny.gov/news/governor-cuomo-directs-department-public-service-begin-process-enact-clean-energy-standard.

125, note 85), despite the fact that those plants are producing the same zero-carbon emissions electricity. Nonnuclear generation plants that emit no CO2 cannot get zero emission credits.

By subsidizing the operation of a plant that has become uneconomic, other, more efficient plants are dispatched less often and may themselves need to shut down if they cannot meet the market price without benefit of a ZEC. Investment in new plants may be discouraged even if the plant would emit little or no CO2 because the plant cannot expect to bid successfully against an existing nuclear plant that need not cover all of its operating costs in the prices that it bids. A company receiving a subsidy does not behave like an unsubsidized business. Because it is being "made whole" by a PSC-calculated amount of money, it can offer its product at below-market prices to ensure that product is sold. This will deliberately depress wholesale prices, which will result in a mix of energy resources that will be less economically efficient than if the markets were allowed to work as designed. This type of subsidy, which clearly is not related solely to carbon emissions even in New York and which may not be related to them at all elsewhere, has the potential to unravel US power markets altogether.[12]

The New York ZEC program is intended to defeat the plant-closing verdict of the FERC-regulated markets as to some or all of the four nuclear units. New York has the power to procure or incentivize low emission and zero emission energy sources beyond those that would become available through the FERC-regulated markets, but procuring such clean energy is not what the ZEC program actually does. The ZEC program is designed to assure plant operation for at least 12 years despite the absence of any showing that any or all of the plants can pass a zero carbon market test for that 12 year period. In place of such a market test, which the PSC could

[12] Indeed, the PJM Market Monitor echoes exactly this concern in its recent report, "Wholesale power markets in the U.S. face new challenges that potentially threaten the viability of competitive markets. . . . Once the decision is made that market outcomes must be fundamentally modified, it will be virtually impossible to return to markets. . . . The subsidy model is inconsistent with the PJM market design and inconsistent with the market paradigm and constitutes a significant threat to both." Market Analytics, "State of the Market Report", note 3 above, p. 1.

clearly have demanded, the PSC has substituted a set of governmental price prophesies of a sort that—no matter how skillfully performed—have a notoriously poor track record, so poor where nuclear power performance is concerned that their expensive collapses are one of the principal causes of the transition to competitive generation markets in the 1990s.

In the absence of such a market demonstration of need for each and all of the units, the imposition of so large a bloc of uneconomic capacity (the four nuclear units have a total capacity of 3350 MW, which produced 19.8% of New York's total 2016 generation) on the wholesale markets has a clear and unacceptable anti-market impact.

II. THE ZEC PROGRAM IS NOT COMPARABLE TO REC PROGRAMS

Supporters of the ZEC program argue that the ZECs are needed to offset various failures of existing markets, including their failure to reflect the value of reducing carbon emissions. The *Amici* agree that it is important to incorporate carbon reduction values into energy markets, but care must be taken by states to harmonize their measures with the efficient working of the FERC-regulated markets. This is where the ZEC program falls short.

New York and the other supporters of the ZEC program argue that they are comparable to commonly traded Renewable Energy Credits ("RECs"). RECs are used in numerous jurisdictions to help achieve renewable energy goals or renewable portfolio standards ("RPSs"). Under typical RPS programs, RECs are traded through market-based system and awarded to generators with certain environmental attributes as an incentive to develop and produce certain types of recently developed energy resources.[13] REC programs are market-based, not tied to the wholesale cost of electricity, 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 the cost of

[13] "State Renewable Portfolio Standards and Goals," National Conference of State Legislatures http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx (Dec. 28, 2016).

wholesale energy prices, are only available to otherwise uneconomic resources, and are only available to certain in-state resources.

III. CONCLUSION

As *Amici* have noted above, a core principle underlying competitive wholesale power is nondiscrimination. The New York ZEC program is in direct conflict with this principle. It will impede the long-term functioning of the FERC-jurisdictional wholesale markets, and erode investor and customer confidence in these markets. ZECs are not comparable to RECs, in fact, the two concepts are more dissimilar than similar. The motions to dismiss should be denied.

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Respectfully submitted,

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