

Clean Sweep for Clean Energy: New York Prevails in Fight over Nuclear Subsidies

July 25, 2017 | *Peter J. Hopkins, Jeffrey A. Schwarz, Scott H. Strauss*

In a July 25 ruling, Judge Valerie Caproni of the U.S. District Court for the Southern District of New York [dismissed a challenge](#) to the component of New York's "Clean Energy Standard" offering subsidy payments, known as "zero-emissions credits" or ZECs, to certain at-risk, zero-emission nuclear resources. The ZECs are intended to assist in keeping the plants online, thereby preserving their zero-emissions attributes, until additional renewable resources can be built to meet New York's aggressive clean-energy goals.

The plaintiffs, a group of fossil-fueled generating companies and trade associations, alleged in their complaint that the ZEC program was preempted by the Federal Power Act and violated the dormant Commerce Clause. On Tuesday, the district court dismissed the complaint in its entirety, upholding New York's ZEC program as constitutional.

The decision is the latest in a set of recent federal court cases construing the line between federal and state energy regulators after the Supreme Court's decision in *Hughes v. Talen Energy Marketing LLC*. In *Hughes*, the Supreme Court held that a Maryland program incentivizing the construction of new electric generation was preempted by the Federal Power Act because it premised payments to the generator on the successful completion of sales into a FERC-jurisdictional wholesale capacity market.

Judge Caproni construes that holding narrowly, finding that "by establishing a program that does not condition or tether ZEC payments to wholesale auction participation, New York has successfully threaded the needle left by *Hughes* that allows States to adopt innovative programs to encourage the production of clean energy."

The decision is a victory for New York and other states that have undertaken to combat climate change through state-created clean energy programs.

Spiegel attorneys Scott H. Strauss, Peter J. Hopkins, Jeffrey A. Schwarz and Amber L. Martin represented the defendants in the litigation — the Chairman and members of the New York Public Service Commission. Messrs. Strauss, Hopkins and Schwarz also represented the petitioners in *Hughes v. Talen Energy Marketing, LLC*.

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