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New York Prevails in Defense of Zero-Emission Credits

September 27, 2018 | *Scott H. Strauss, Peter J. Hopkins, Jeffrey A. Schwarz*

On September 27, 2018, in *Coalition for Competitive Electricity et al. v. Zibelman et al.*,* the Second Circuit upheld New York's zero-emissions credits (ZECs) program, a component of its Clean Energy Standard and larger energy reform plan to reduce greenhouse gas emissions 40% by 2030. New York's ZEC program aims to preserve the continued operation of nuclear generators, which do not emit carbon dioxide, until renewable sources of energy can meet a greater percentage of the state's energy needs. The ZEC price is based on the social cost of carbon, and is set by the New York Public Service Commission every two years. Qualifying nuclear generators are awarded a ZEC for each MWh of electricity they generate (subject to a cap), in addition to whatever revenues the facility receives for selling the electricity.

Plaintiffs, a group of generators and generator trade groups, alleged that the program was preempted by FERC's authority over wholesale electricity sales and contrary to the U.S. Constitution's Commerce Clause. Spiegel attorneys Scott Strauss, Peter Hopkins, and Jeffrey Schwarz defended the ZEC program, and moved to dismiss the complaint. A key question was how to interpret and apply the U.S. Supreme Court's 2016 decision in *Hughes v. Talen Energy Marketing, LLC*, in which attorneys Strauss, Hopkins, and Schwarz defended a Maryland generation-support program. In its July 2017 ruling, the U.S. District Court of the Southern District of New York read *Hughes* as a narrow limitation of broadly preserved state power to choose the technologies and fuels used to produce electricity for state energy consumers.

Ruling on Plaintiffs' appeal, the Second Circuit agreed with the district court that New York's ZECs are not "field preempted." Unlike the program in *Hughes*, New York did not require generators to participate in a FERC-regulated wholesale electricity market and did not guarantee receipt of a rate for wholesale sales distinct from the wholesale market clearing price. The court also upheld ZECs against "conflict preemption" claims because the program did not cause clear damage to FERC's goals of using auctions to set wholesale prices. The court recognized that FERC's reliance on wholesale auctions operates against a "background assumption that the [Federal Power Act] establishes a dual regulatory system between the states and federal government and that the states engage in public policies that affect the wholesale markets." The court found it unnecessary to consider the dormant Commerce Clause arguments, because the plaintiffs lacked standing to bring the claim.

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*Spiegel & McDiarmid LLP attorney Scott H. Strauss argued the case for the Chairman and members of the New York Public Service Commission, with Spiegel attorneys Peter J. Hopkins and Jeffrey A. Schwarz on the brief.

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