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Supreme Court Declines to Hear Appeal of New York Subsidies Case

April 15, 2019 | Scott H. Strauss, Peter J. Hopkins, Jeffrey A. Schwarz

On April 15, the U.S. Supreme Court denied a petition for writ of *certiorari*, thereby ending a constitutional challenge brought by a group of fossil?fueled generators against New York State's zero-emissions credits (ZECs) program. The ZEC program provides production?based subsidies to certain financially challenged nuclear plants, to keep those plants operating until new renewable electricity supplies can meet a greater percentage of the state's energy needs. The ZEC program is part of the state's "Clean Energy Standard," an initiative designed to reduce New York's greenhouse gas emissions 40% by 2030.

The Supreme Court declined to review a Second Circuit decision upholding the ZEC program in *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41 (2d Cir. 2018). The Petitioners, who want to see the nuclear plants retire so that their facilities can run more often and earn greater revenues, sued in federal district court arguing that the New York program was field- and conflict?preempted. Petitioners claimed that the ZEC program was akin to a Maryland generation?support program which the Supreme Court struck down on preemption grounds in Hughes v. Talen Energy Marketing, LLC, 136 S. Ct. 1288 (2016). The Second Circuit affirmed a district court ruling dismissing the complaint. The district court found no statutory or equitable basis for plaintiffs to bring their Federal Power Act preemption claims in court, holding that relief must be sought instead from the Federal Energy Regulatory Commission. The district court also dismissed because it found, on the merits, no basis for finding either field or conflict preemption or a violation of the Dormant Commerce Clause. The Second Circuit affirmed the dismissal on the merits. With the Supreme Court's action, the Second Circuit ruling stands.

Spiegel & McDiarmid LLP attorneys Scott H. Strauss, Peter J. Hopkins and Jeffrey A. Schwarz represented New York in all phases of the case. You may read New York's opposition to the writ of *certiorari* at the link below. The case is *Electric Power Supply Association v. Rhodes*, No. 18-879. The same three attorneys also represented the State of Maryland before the Supreme Court and Fourth Circuit in *Hughes v. Talen Energy Marketing.*

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