

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

COALITION FOR COMPETITIVE ELECTRICITY,
DYNEGY INC., EASTERN GENERATION, LLC,
ELECTRIC POWER SUPPLY ASSOCIATION, NRG
ENERGY, INC., ROSETON GENERATING LLC, and
SELKIRK COGEN PARTNERS, L.P.,

Plaintiffs,

-v-

AUDREY ZIBELMAN, in her official capacity as
Chair of the New York Public Service Commission,
PATRICIA L. ACAMPORA, GREGG C. SAYRE, and
DIANE X. BURMAN, in their official capacities as
Commissioners of the New York Public Service
Commission,

Defendants.

Case No. 1:16-CV-8164-VEC

**ENVIRONMENTAL DEFENSE
FUND'S PROPOSED BRIEF OF
AMICUS CURIAE IN REPLY
TO
PLAINTIFFS' MEMORANDUM
IN OPPOSITION
TO MOTIONS TO DISMISS**

ENVIRONMENTAL DEFENSE FUND
257 PARK AVENUE SOUTH
NEW YORK, NEW YORK 10010
TEL.: (212) 505-2100

Environmental Defense Fund (“EDF”) respectfully submits this proposed brief of *amicus curiae* in reply to plaintiffs’ *Memorandum in Opposition to Defendants’ Motions to Dismiss* (“Memorandum in Opposition”) filed by and on behalf of plaintiffs Coalition for Competitive Electricity, Dynegy Inc., Eastern Electric Generation, LLC, Electric Power Supply Association, NRG Energy, Inc., Roseton Generating LLC, and Selkirk Cogen Partners, L.P. (“Plaintiffs”).

In their Memorandum in Opposition, Plaintiffs, by implication, repeatedly denigrate the ZEC program’s purpose or target of combatting climate change by preventing backsliding on the State’s greenhouse gases (“GHG”) emissions reductions while it builds up its renewables capacity. Although Plaintiffs’ Memorandum in Opposition does not, and could not, plead any facts that would raise any doubt about the importance of combatting climate change, or the finding of the Clean Energy Standard Order (“Order”) that the ZEC program assists in that effort, Plaintiffs’ framing repeatedly insinuates that the environmental purpose of the ZEC program is somehow suspect. Plaintiffs use phrases such as:

- “In 2016, claiming to ‘protect the environment,’ the New York Public Service Commission (‘PSC’) entered an order (the ‘ZEC Order’)...,” Memorandum in Opposition at 1;
- “... the result in *Hughes* would have been the same had the subsidy been labeled an ‘environmental credit’ instead of a price subsidy...,” Memorandum in Opposition at 3;
- “Thus, even if the ZEC program was enacted for valid environmental reasons,...,” Memorandum in Opposition at 20;
- “The Maryland and New Jersey programs would still be unconstitutional if the states had ‘creatively refashioned’ the subsidies as ‘environmental credits,’” Memorandum in Opposition at 22; and

- The ZEC program “is not saved by the purported laudatory environmental purpose that Defendants assert”, Memorandum in Opposition at 30.

Without actually asserting that avoiding backsliding on greenhouse gas emissions reductions is unimportant, through these phrases Plaintiffs casually and by innuendo undermine the significance of this anti-backsliding program as a protective measure with respect to the climate change threat, as though the state’s interest in preventing CO₂ emissions might not be a legitimate environmental purpose. This proposed reply brief focuses only on this narrow and critical issue - that the underlying environmental impetus behind the state policy response is vital, scientifically based, and urgent. Our sole purpose is to ensure that the dismissive comments of Plaintiff are viewed in the context of the relevant scientific facts.

The fundamental purpose of the ZEC program as stated in the Order is to prevent State power sector CO₂ emissions from increasing over the next few years, while the State is pursuing its ambitious program to increase renewables capacity and generation. Although Plaintiffs intimate otherwise, they do not, and cannot, genuinely dispute that this purpose is vital, or that the ZEC program advances it. And if there had been any question as to whether this purpose was profoundly important and legitimate when this case was filed, the release over the past two weeks of four official national scientific reports from respected climate science agencies and one international science agency, reporting that 2016 was the hottest year of record following the two other hottest years of record in 2014 and 2015, or in the case of one of the four with 2015 one of the two hottest years on record, with anthropomorphic GHG emissions largely responsible, would have put that question to rest. These reports underscore the fundamental legitimacy and profound purpose of the defendants’ ZEC program.

Citations to these reports and key quotations concerning their conclusions follow:

NASA and NOAA:

- Slides from the NASA and NOAA news conference entitled “Annual Global Analysis for 2016” presented by Gavin A. Schmidt, Director, NASA’s Goddard Institute for Space Studies, and Derek Arndt, Chief, Monitoring Branch, NOAA’s National Centers for Environmental Information (January 18, 2017),

https://www.nasa.gov/sites/default/files/atoms/files/noaa-nasa_global_analysis-2016.pdf,

and press release entitled “NASA, NOAA Data Show 2016 Warmest Year on Record Globally” (NASA, 18 Jan. 2017. Web. 23 Jan. 2017),

<https://www.nasa.gov/press-release/nasa-noaa-data-show-2016-warmest-year-on-record-globally>, that includes the following statements:

- “Globally-averaged temperatures in 2016 were 1.78 degrees Fahrenheit (0.99 degrees Celsius) warmer than the mid-20th century mean. This makes 2016 the third year in a row to set a new record for global average surface temperatures.”
- “Because weather station locations and measurement practices change over time, there are uncertainties in the interpretation of specific year-to-year global mean temperature differences. However, even taking this into account, NASA estimates 2016 was the warmest year with greater than 95 percent certainty.”
- “The planet’s average surface temperature has risen about 2.0 degrees Fahrenheit (1.1 degrees Celsius) since the late 19th century, a change driven largely by increased carbon dioxide and other human-made emissions into the atmosphere.”

- NASA Goddard Institute for Space Studies DATASET: GISTEMP Team, 2017: *GISS Surface Temperature Analysis (GISTEMP)*. Dataset accessed 2017-01-25 at <https://data.giss.nasa.gov/gistemp/>.
- NOAA release entitled "2016 marks three consecutive years of record warmth for the globe", NOAA, January 18, 2017. Web. January 23, 2017. <http://www.noaa.gov/stories/2016-marks-three-consecutive-years-of-record-warmth-for-globe>. Its findings include:
 - "... the 2016 globally averaged surface temperature ended as the highest since record keeping began in 1880, according to scientists from NOAA's National Centers for Environmental Information (NCEI)."
 - "The globally averaged sea surface temperature was the highest on record, 1.35 degree F above average."
 - "The globally averaged land surface temperature was the highest on record, 2.57 degrees F above average."
 - "The average Arctic sea ice extent for the year was 3.92 million square miles, the smallest annual average since record-keeping began in 1979."

Britain's Met Office Hadley Center (the UK's national weather service) release captioned:

"2016: One of the Warmest Two Years on Record." *Met Office*. Met Office, January 18, 2017. Web. 23 Jan. 2017. <http://www.metoffice.gov.uk/news/releases/2017/2016-record-breaking-year-for-global-temperature>. Statements include:

- "Provisional full-year figures for global average near-surface temperatures confirm that last year, 2016, was one of the warmest two years on record, nominally exceeding the record temperature of 2015. When viewed alongside

2015, the two years are the warmest in an annual series of figures that starts in 1850.

- “A particularly strong El Niño event contributed about 0.2C to the annual average for 2016, which was about 1.1C above the long term average from 1850 to 1900. However, the main contributor to warming over the last 150 years is human influence on climate from increasing greenhouse gases in the atmosphere.”

- Met Office Hadley Centre observations datasets

<http://www.metoffice.gov.uk/hadobs/hadcrut4/data/current/download.html>

National Meteorological Agency of Japan:

Release "Global temperature for 2016 to be the highest since 1981 (preliminary)" (full report to be released in February). Japanese Meteorological Agency, December 21, 2016, Web. January 23, 2017. http://ds.data.jma.go.jp/tcc/tcc/news/press_20161221.pdf. It includes the following statement:

- “The annual anomaly of the global average surface temperature for the year 2016 (i.e. the combined average of the near-surface air temperature over land and the sea surface temperature) is estimated at +0.46°C* above the 1981-2010 average, likely to become the warmest record for the 126-year period since 1891.”

World Meteorological Organization press released entitled “WMO confirms 2016 as hottest year on record, about 1.1 degree C as hottest year on record, about 1.1 degree C above pre-industrial era.” Published January 18, 2017, Press Release Number: 1/2017.

<https://public.wmo.int/en/media/press-release/wmo-confirms-2016-hottest-year-record-about-11%C2%B0c-above-pre-industrial-era>

These reports describe very real environmental impacts to the Earth as a result of greenhouse gas emissions which have already occurred, are worsening and urgently need to be addressed. To the extent that Plaintiffs' Memorandum in Opposition serves to undermine that reality, the scientific findings cited above in this reply brief should serve as an antidote.

Dated: New York, New York
January 27, 2017

Respectfully Submitted,

/s/ James T. B. Tripp

James T. B. Tripp

Elizabeth B. Stein

Michael Panfil

Environmental Defense Fund

257 Park Avenue South

New York, New York 10010

Tel: (212) 505-2100

Fax: (212) 505-2375

E-mail: jtripp@edf.org

E-mail: estein@edf.org

E-mail: mpanfil@edf.org

CERTIFICATE OF SERVICE

This is to certify that on this 27th day of January, 2017, a true and correct copy of the ENVIRONMENTAL DEFENSE FUND'S PROPOSED BRIEF OF AMICUS CURIAE IN REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS is being served on the following counsel via ECF/PACER.

Stuart Harold Singer
Boies, Schiller & Flexner LLP (FL)
401 East Las Olas Boulevard
Suite 1200
Fort Lauderdale, FL 33301

William Thomas Dzurilla
Boies, Schiller & Flexner LLP (FL)
401 East Las Olas Boulevard
Suite 1200
Fort Lauderdale, FL 33301

Jonathan David Schiller
Boies, Schiller & Flexner LLP
575 Lexington Avenue
New York, NY 10022

Jeffrey Alan Schwarz
Spiegel & McDiarmid
1875 Eye Street NW
Washington, DC 20006

Peter Hopkins
Spiegel & McDiarmid, LLP
1875 Eye Street NW Suite 700
Washington, DC 20006

Scott Harris Strauss
Spiegel & McDiarmid, LLP
1875 Eye Street, NW Suite 700
Washington, DC 20006

Jonathan D. Feinberg
State of New York, Department of Public
Service
Three Empire State Plaza
Albany, NY 12223

David A. Barrett
Boies, Schiller & Flexner LLP (NYC)
575 Lexington Avenue
New York, NY 10022

Amber Martin
Spiegel & McDiarmid LLP
1875 Eye Street Nw, Suite 700
Washington, DC 20006

Jessica Bell
Spiegel & McDiarmid LLP
1875 Eye Street Nw, Suite 700
Washington, DC 20006

John Calvin Graham
New York State Department of Public
Service
3 Empire State Plaza, 17th Floor
Albany, New York 12223

Matthew E. Price
Jenner & Block, LLP (DC)
1099 New York Avenue, N.W.
Suite 900
Washington, DC 20001-4412

Elizabeth Austin Edmondson
Jenner & Block LLP (NYC)
919 Third Avenue, 37th Floor
New York, NY 10022

Zachary C. Schauf
Jenner & Block, LLP (DC)
1099 New York Avenue, N.W.
Suite 900
Washington, DC 20001-4412

William K. Dreher
Jenner & Block, LLP (DC)
1099 New York Avenue, N.W.
Suite 900
Washington, DC 20001-4412

Salomon Tsimi Menyeng
Nys Department of Public Service
3 Empire State Plaza
Albany, NY 12223

Nancy Sharman Marks
Natural Resources Defense Council, Inc.
40 West 20th Street
New York, NY 10011

Jeffrey Whitehouse Mayes
Monitoring Analytics, LLC
2621 Van Buren Avenue
Eagleville, PA 19087

Katherine Desormeau
Natural Resources Defense Council
11 Sutter Street, 21st Floor
San Francisco, CA 94101

Miles Belin Farmer
Natural Resources Defense Council, Inc.
40 West 20th Street
New York, New York 10011

Dated: January 27, 2017

/s/ James T. B. Tripp