

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

CASE 15-E-0302 – In the Matter of the Implementation of a Large-Scale
Renewable Program

**NATURAL RESOURCES DEFENSE COUNCIL RESPONSE TO
PETITION FOR RECONSIDERATION**

November 14, 2016

Pursuant to Title 16, Section 3.7(c) of the New York Code of Rules and Regulations, Natural Resources Defense Council (NRDC) hereby responds to the Application for Rehearing of Castleton Commodities International LLC (Castleton), filed on August 31, 2016, in the above-referenced proceeding. On August 1, 2016, the New York Public Service Commission (PSC) promulgated the Order Adopting a Clean Energy Standard, Case 15-E-0302 (Aug. 1, 2016) (CES Order). Contrary to Castleton's assertions, the PSC possessed the authority under state law to adopt all aspects of the CES Order, and this authority is not preempted by the Federal Power Act.

During the notice and comment process in advance of the Commission's issuance of the CES Order, NRDC, together with other organizations in the Clean Energy Organizations Collaborative, filed comments in support of the proposed requirement that 50% of the state's electricity must be supplied by renewable generation resources.¹ At the same time, we opposed including the Zero Emissions Credits (ZECs) program supporting certain nuclear energy reactors in New York in the Clean Energy Standard.² We underscored that nuclear energy is neither clean nor renewable and did not belong in the Clean Energy Standard program.³ NRDC strongly believes that renewable resources like wind and solar, combined with investments in energy efficiency, are the foundation of New York's clean energy future. Nevertheless, despite our opposition on policy grounds to including the ZEC program in the Clean Energy Standard, we reject Castleton's broad arguments that the PSC lacks legal authority to adopt the program, or that it is preempted by federal law from doing so. While Castleton only seeks rehearing on the ZEC program and does not claim to challenge the CES's 50% by 2030 renewables requirement, under the logic of the overly broad preemption arguments that Castleton puts forward here, renewable energy programs in states across the country could be called in to question.⁴

¹ Case 15-E-0302, *Comments of the Clean Energy Organizations Collaborative* (Apr. 22, 2016); Case 15-E-0302, *Supplemental Reply Comments of the Clean Energy Organizations Collaborative* (May 13, 2016); Case 15-E-0302, *Supplemental Comments of the Clean Energy Organizations Collaborative* (July 15, 2016).

² See Case 15-E-0302, *Comments of the Clean Energy Organizations Collaborative in Response to the Commission's February 24 Order Further Expanding the Scope of Proceeding* (July 8, 2016). The CES Order nevertheless ultimately did include a requirement that the state's load serving entities acquire ZECs generated by certain nuclear facilities. Herein, we refer to that requirement and related portions of the CES Order as the "ZEC program."

³ See *id.*

⁴ For example, a similar argument is being advanced to challenge a Connecticut program directing regulated utilities in that state to enter into long-term renewables power purchase agreements. See Emergency Motion for an Injunction Pending Appeal, *Allco Finance Ltd. v. Klee*, Case No. 16-2946 (2d Cir., Oct. 3, 2016), available at <https://statepowerproject.files.wordpress.com/2014/03/allco-motion-for-injunction.pdf>.

As detailed in NRDC’s prior comments, the PSC possesses both express and implicit authority under state law to undertake a range of activities to regulate the state’s energy resource mix, including the ability to require the state’s electric distribution companies to enter into long-term power purchase agreements (PPAs) for renewable energy.⁵ For example, the PSC can take action to ensure “the preservation of environmental values and the conservation of resources”⁶ and to achieve goals in the State Energy Plan.⁷ Similar legal principles also make clear that the PSC has the authority to adopt the ZEC program. The PSC, having found the ZEC program necessary to achieve both of these statutory mandates, acted well within its authority under state law.

Nor does the Federal Power Act preempt the PSC’s authority to implement a long-term PPA requirement as part of the Clean Energy Standard. Castleton’s argument to the contrary relies on a misreading of the U.S. Supreme Court’s recent decision in *Hughes v. Talen Energy Marketing, LLC*.⁸ As NRDC explained in detail in prior comments,⁹ and as the PSC already correctly explained in the CES Order, the Supreme Court’s decision in *Hughes* dictates only that states may not enact policies that “disregard[.]” FERC-approved wholesale rates—something a renewables PPA requirement does not do.¹⁰ Indeed, the Supreme Court emphasized the “limited” nature of its holding and made clear that it “reject[ed] Maryland’s program *only* because it disregards an interstate wholesale rate required by FERC.”¹¹ The ZEC program, in contrast, does not “disregard[.]” a FERC-approved wholesale rate.¹² Rather, it provides for payments for generation attributes that are in addition to the FERC-approved NYISO market rates for energy and capacity that the plants also receive, and therefore does not suffer from the defect that invalidated Maryland’s “contract for differences” program. The PSC’s order is fully consistent with the Federal Power Act and with the Supreme Court’s decision in *Hughes*.

In sum, while NRDC disagrees with the inclusion of the ZEC program in the CES on policy grounds, our conviction regarding the importance of preserving the state’s authority to enact clean energy policies compels us to respond to Castleton’s petition. All aspects of the CES

⁵ See Case 15-E-0302, *Supplemental Memorandum of the Natural Resources Defense Council* (July 8, 2016).

⁶ N.Y. Pub. Serv. Law § 5(2) (McKinney 2016).

⁷ N.Y. Energy Law § 6-104(5)(b) (McKinney 2016).

⁸ 136 S. Ct. 1288 (2016).

⁹ Case 15-E-0302, *Supplemental Memorandum of the Natural Resources Defense Council* (July 8, 2016).

¹⁰ *Hughes*, 136 S. Ct. at 1299; see also CES Order at 68-69.

¹¹ *Hughes*, 136 S. Ct. at 1299 (emphasis added).

¹² *Id.*

Order fall well within the state's established authority under the Public Service Law and the Federal Power Act.

Respectfully submitted,

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