

# Jurisdictional Challenges to New York’s Clean Energy Standard

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## I. NEW CLEAN ENERGY STANDARD CHALLENGED

On August 1, 2016, the New York Public Service Commission (“PSC”) issued an Order Adopting a Clean Energy Standard (“CES Order”),<sup>1</sup> the most comprehensive and ambitious clean energy mandate in the state’s history.<sup>2</sup> In accordance with the statutory obligation that agency actions must be reasonably consistent with the most recent State Energy Plan (“SEP”), the CES Order adopts the SEP goal that fifty percent of New York’s electricity is to be generated by renewable sources by 2030 as part of a strategy to reduce statewide greenhouse gas emissions by forty percent by 2030.<sup>3</sup> As expected, fossil fuel generation interests mounted challenges to the CES Order, touting concerns over, among other issues, eligibility standards, procedural deficiencies, and jurisdictional competency. On December 15, 2016, the PSC issued an Order on Petitions for Rehearing<sup>4</sup> that summarily dismissed these concerns, subject to some changes to the CES Order with respect to eligibility requirements. This Field Report focuses on the challenge to the PSC’s jurisdictional competency in enacting the CES Order, which petitioners have analogized to Maryland’s regulatory program, struck down by the U.S. Supreme Court in *Hughes v. Talen Energy Marketing, LLC*<sup>5</sup> for being preempted by the

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1. Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Order Adopting a Clean Energy Standard, 331 P.U.R.4th 357 (Aug. 1, 2016) [hereinafter Order Adopting Clean Energy Standard].

2. Press Release, Governor’s Press Office, Governor Cuomo Announces Establishment of Clean Energy Standard that Mandates 50 Percent Renewables by 2030 (Aug. 1, 2016), <https://www.governor.ny.gov/news/governor-cuomo-announces-establishment-clean-energy-standard-mandates-50-percent-renewables> [<https://perma.cc/79YJ-CFEE>].

3. Order Adopting Clean Energy Standard, *supra* note 1, at 1.

4. Proceeding on Motion of the Commission to Implement A Large-Scale Renewable Program and a Clean Energy Standard, Order on Petitions for Rehearing, 2016 WL 7367192 (Dec. 15, 2016) [hereinafter Order on Petitions for Rehearing].

5. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016).

Federal Power Act (“FPA”).<sup>6</sup> On March 29, 2017, the U.S. District Court for the Southern District of New York held oral argument on the challenge in *Coalition for Competitive Electricity v. Zibelman*.<sup>7</sup>

## II. ELEMENTS OF THE CES ORDER

The CES Order implements two major components to achieve its renewable energy goal: the Renewable Energy Standard (“RES”) and the Zero-Emissions Credit Requirement (“ZEC”). The RES requires every load serving entity (“LSE”)—organizations that deliver electricity to retail consumers—to financially support new renewable generation resources through the procurement of renewable energy credits from such facilities coming online after January 1, 2015 or to make alternative compliance payments to the New York State Energy Research and Development Authority (“NYSERDA”). The RES also includes a maintenance program that requires distribution utilities, on behalf of all retail customers, to continue financially supporting the maintenance of certain existing at-risk small hydro, wind, and biomass generation facilities. The ZEC imposes an obligation on each LSE to financially support the preservation of existing at-risk nuclear facilities through the purchase of zero-emission credits from NYSEDA in proportion to its load. The zero-emission credits will be sold by qualifying nuclear facilities through multi-year contracts and priced by NYSEDA in accordance with a formula that considers the social cost of carbon, subject to adjustments every two years.<sup>8</sup>

## III. THE PREEMPTED MARYLAND REGULATORY PROGRAM

The jurisdictional challenge to the CES Order is grounded on the premise that it improperly regulates the wholesale market for electricity, which is exclusively within the jurisdiction of the Federal Energy Regulatory Commission (“FERC”). Under the FPA, FERC has exclusive authority to regulate the sale of electric energy at wholesale in interstate commerce. FERC regulates the auction of electricity, whereby LSEs and energy generators bid to regional transmission organizations and independent system operators for the purchase or sale of electricity. In regulating these auctions,

6. 16 U.S.C. §§ 791a–828c (2012).

7. *Coal. for Competitive Electricity v. Zibelman*, No. 1:16-cv-08164 (S.D.N.Y. filed Oct. 19, 2016).

8. Order Adopting Clean Energy Standard, *supra* note 1, at 14–20.

FERC is not to favor certain types of generators, but to ensure that the clearing price is a just and reasonable price that an efficient market would produce.<sup>9</sup>

The petitioners mounting the challenge seek to analogize the CES Order to Maryland's regulatory program, which sought to encourage development of new in-state generation by giving new suppliers longer fixed payment contracts unavailable to the existing suppliers. To accomplish this, the Maryland program obligated the state's LSEs to enter into twenty-year pricing contracts with new generators whereby the LSEs would make up the price difference if the capacity sold by such generators did not reach a certain clearing price in the auction regulated by FERC. This effectively provided a price guarantee to these generators and encouraged them to bid their capacity into the auction at the lowest possible price. The U.S. Supreme Court in *Hughes* ruled that the Maryland program invaded FERC's "regulatory turf" by adjusting the interstate wholesale rate. The Court stated that the FPA disallows both direct and indirect state regulation over interstate wholesale prices.<sup>10</sup> However, the Court went on to limit its holding, stating that its ruling does

not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector. . . . So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable.<sup>11</sup>

#### IV. THE JURISDICTIONAL CHALLENGE TO THE CES ORDER

The petitioners in *Coalition for Competitive Electricity* claim that the ZEC directly inserts the PSC into the administration of the wholesale market by modifying the prices received by the nuclear plants from wholesale sales; directing state LSEs as to what power sources to purchase from, in what quantities, and how much to pay for such power in the wholesale markets; and interfering with the normal functioning of the wholesale markets for both capacity and

9. *Hughes*, 136 S. Ct. at 1292–94.

10. *Id.* at 1297.

11. *Id.* at 1299.

energy. Furthermore, the petitioners contend that the PSC has overstepped its authority by acting in an area preempted by federal law and has unconstitutionally burdened interstate commerce.<sup>12</sup>

The PSC denies this characterization of the ZEC and contends that the program does not establish wholesale energy or capacity prices, but only establishes pricing for attributes completely outside of the wholesale commodity markets regulated by FERC. The PSC states that the ZEC addresses well-recognized externalities often associated with electricity generation but not considered by the wholesale market.<sup>13</sup> In the CES Order, the PSC contended that renewable energy credits are a commodity created by states, and thus are not within the wholesale sale of electricity governed by FERC. The PSC also argues that the CES Order only relates to retail sales of electricity and carbon-free energy generation attributes, areas over which the PSC has well-established jurisdiction.<sup>14</sup> Furthermore, the PSC denied that the ZEC impinges upon in-state commerce, as it does not require specific power purchases, nor is it tied to the wholesale market.<sup>15</sup>

## V. CONCLUSION

Whether or not the CES Order only establishes prices addressing externalities outside of the wholesale markets or whether it interferes with wholesale prices, and thus impinges on FERC's exclusive jurisdiction over those markets, will be a hotly debated issue in *Coalition for Competitive Electricity et al. v. Zibelman et al.* As the PSC gets ready for the long legal battle ahead, the outcome will have important implications for the future of renewable energy in the state of New York. While the Trump administration is focused upon deregulation at the cost of environmental protection, it will be up to states such as New York to lead with effective regulations to combat climate change by minimizing its carbon footprint through measures like the CES Order.

12. Order on Petitions for Rehearing, *supra* note 4, at 23.

13. *Id.* at 25–26.

14. Order Adopting Clean Energy Standard, *supra* note 1, at 67–69.

15. Order on Petitions for Rehearing, *supra* note 4, at 26.