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 MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)**

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

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Environmental Defense Fund ("EDF") respectfully submits this Memorandum of Law in support of its motion to dismiss the Complaint, 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"), for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. PRELIMINARY STATEMENT

The actions that are the subject of the Complaint comprise part of the Order Adopting a Clean Energy Standard (the "CES Order") of the New York Public Service Commission (the "Commission") on August 1, 2016. The CES Order in its entirety is an effort by the Commission to effectuate certain environmental goals adopted by the State of New York through its State Energy Plan ("SEP"): specifically, "the SEP goal that 50% 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 40% by 2030." CES Order at 2.

"In furtherance of that goal, and mindful of the Commission's role as a State regulator sharing jurisdiction with the federal government," the Commission established a Clean Energy Standard ("CES") that included numerous, varied components, including a Renewable Energy Credit ("REC") program designed to support a major expansion of wind and solar capacity in the State and a Zero Emissions Credit ("ZEC") program designed to prevent the closure of upstate nuclear power plants by recognizing and providing compensation for their attribute of emitting zero carbon and other air pollutants. CES Order at 2, 13–14. Both programs leverage market structures as well as regulatory obligations of distribution utilities. The Complaint challenges a single aspect of the CES Order, namely the ZEC program, the "Tier 3" subsidies to upstate nuclear generation. Compl. 2 n.1.[1]

The Complaint alleges that the ZEC program is impermissible due to alleged effects on interstate markets. Plaintiffs argue, first, that the relevant actions are field preempted by the Federal Power Act ("FPA"), 16 U.S.C. § 791a *et seq*., under the Supremacy Clause, U.S. Const. art. VI, cl. 2; second, that they are conflict preempted by the FPA under the Supremacy Clause; and third, that they are invalid under the dormant Commerce Clause. *See id.* art. I, § 8, cl. 3.

In the CES Order, the Commission describes the role of states as "laboratories of democracy" that are "demonstrating through retail electric power market innovation various mechanisms available to encourage clean energy. Today at least twenty-nine states, including New York, serve this public interest through resource portfolio standards." CES Order at 9. In fact, the state actions that are the subject of this case are well within the traditional scope of authority that states have long been understood to possess in pursuit of their environmental and clean energy goals. The challenged ZEC program falls comfortably within this firmly rooted sphere of state activity. It is well established that the cooperative federalism underpinnings of the FPA allow for such programs, and that they are neither field-preempted nor conflict-preempted. It is also well established that where such programs do not discriminate against out-of-state resources, the dormant Commerce Clause poses no barrier.

The challenged actions do not encroach impermissibly on the statutory authority of the Federal Energy Regulatory Commission ("FERC") under the FPA, nor do they violate the

[1] Plaintiffs use the defined term "ZEC Order" with the intention of limiting their claim to Tier 3 subsidies for nuclear generation. However, because the Complaint also defines "ZEC Order" to refer to the entire CES Order, Compl. 2 n.1, we will instead refer to the CES Order consistently as the "CES Order," and will refer to the portion of the CES Order at issue in the Complaint as the "ZEC program".

dormant Commerce Clause. For these reasons, the Complaint fails to state a claim upon which relief can be granted, and should be dismissed.

II. RULE 12(B)(6) STANDARD FOR DISMISSAL

"Federal Rule of Civil Procedure 12(b)(6) provides for dismissal upon a plaintiff's 'failure to state a claim upon which relief can be granted.'" *Eyal R.D. Corp. v. Jewelex N.Y. Ltd.*, 784 F. Supp. 2d 441, 446 (S.D.N.Y. 2011) (quoting Fed. R. Civ. P. 12(b)(6)). "To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must allege sufficient facts, taken as true, to state a plausible claim for relief." *Johnson v. Priceline.com, Inc.*, 711 F.3d 271, 275 (2d Cir. 2013) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)). A complaint has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Sykes v. Bank of Am.*, 723 F.3d 399, 403 (2d Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

To determine plausibility, courts employ a "two-pronged approach." *Iqbal*, 556 U.S. at 679. First, while a court must accept all allegations as true, this principle "'is inapplicable to legal conclusions' and 'threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678). That is, the court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678–79. Conclusory statements cannot "substitute for minimally sufficient factual allegations." *Paycom Billing Servs. v. Mastercard Int'l, Inc.*, 467 F.3d 283, 289 (2d Cir. 2006) (internal quotation marks omitted); *see Amron v. Morgan Stanley Inv. Advisors Inc.*, 464 F.3d 338, 344 (2d Cir. 2006) (noting that "bald assertions and conclusions of law will not suffice to defeat a motion to dismiss") (internal quotation marks omitted). Second, "a court should determine whether the 'well-pleaded factual allegations,' assumed to be true, 'plausibly give rise to an entitlement to relief.'" *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (quoting *Iqbal*, 556 U.S. at 679).

When presented with a motion to dismiss, a "district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable LLC*, 622 F.3d 104, 111 (2d Cir. 2010).

III. ARGUMENT

A. Plaintiffs Have Not Stated a Claim for Relief in Count I, Field Preemption Under the Supremacy Clause

Plaintiffs allege that the New York ZEC program is "field preempted." Compl. 34–36. Specifically, Plaintiffs argue that the ZEC program is field preempted as "(a) FERC has exclusive jurisdiction to set wholesale prices . . . and (b) the ZEC program interferes with FERC's exclusive jurisdiction over wholesale prices." Compl. 36. Yet Plaintiffs' allegations rest upon a mischaracterization of FPA preemption that conflicts with cases cited in the Complaint. Plaintiffs do not state a claim upon which this Court may provide relief.

1. Plaintiffs' Sweeping Reading of *Hughes v. Talen* Is at Odds with that Case's Narrow Decision

Plaintiffs' allegations are founded upon three recent Supreme Court cases, each of which is mischaracterized in Plaintiffs' Complaint. Plaintiffs rely most heavily on *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016) ("*Hughes*"). Plaintiffs claim the case "held that state subsidies to electricity generators are unconstitutional if 'tethered' to FERC-regulated wholesale electricity prices." Compl. 28. Yet the quoted "tether[ing]" language upon which

Plaintiffs rely does not exist in this opinion, nor does such a sweeping holding. Indeed, the only language in the decision similar to that misquoted by the Plaintiffs appears in a paragraph that explicitly and emphatically *circumscribes* the holding of the decision, and specifically leaves open a wide range of state measures to encourage new or clean forms of electricity generation:

> Our holding is limited: We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC. We therefore need not and do 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. Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures untethered to a generator's wholesale market participation.

Hughes, 136 S. Ct. at 1299 (internal quotation marks omitted).

Plaintiffs' mischaracterization is not only clerical, but substantive, replacing a decision narrowly tailored to the specific state program at issue with an expansive conclusion. The Court went to great lengths to limit the holding in *Hughes* to the facts at issue. The underlying action in *Hughes* involved a state-mandated contract for differences ("CFD") that did "not transfer ownership of capacity from one party to another outside the auction." *Id.* at 1291. The CFD, moreover, conditioned payment upon the generator's bids clearing the wholesale capacity market, with an *after auction* payment adjustment based on the results of the wholesale capacity market auction. That is, the program in *Hughes* required a generator to bid into the wholesale capacity market and only then, *following the auction*, replaced the auction price with a wholly different price. This complete and total usurpation of FERC's authority over wholesale rates without transfer of ownership of energy or capacity was the particular and narrow focus of the court.

The ZEC program does not change, in any way, the auction result after the fact. That is, the program does not directly target or supplant the rate for the sale of capacity or energy. Instead, the ZEC program establishes a credit based on a known and specific value, the Social Cost of Carbon ("SCC"), prior to and separate from any wholesale energy or capacity auction. The SCC was established by the federal Interstate Working Group on the Social Cost of Carbon ("USIWG"), CES Order at 49, 134, and the credit prices are based on updated SCC estimates established by the USIWG in 2015, CES Order, app. E at 4–5. The credit reflects an environmental attribute provided by those assets: the attribute of generating electricity with zero emissions, an attribute which is of considerable value in light of the State's policy of reducing greenhouse gas emissions by 40% by 2030. CES Order at 2, 5. Thus the credit itself has value, reflective of this environmental attribute and state policy, and established prior to and without subsequent adjustment after wholesale auction results.[2]

Unlike in *Hughes*, New York's program thus does not "disregard" a wholesale "just and reasonable" rate; rather, it creates a credit reflective of environmental value, priced based on the Social Cost of Carbon, and in furtherance of state public policy. This credit compensates the generators for the environmental attribute of being zero carbon-emitting – an attribute that is separate from energy itself, which is the service for which the wholesale markets optimize quantities and prices. The credits are, moreover, a discrete thing of value, which are purchased from the generators as part of the ZEC program. Unlike in *Hughes*, where no ownership was transferred, generators here sell the credits reflecting the environmental attribute through the

[2] In later tranches of the program, the Social Cost of Carbon will be higher (because the social cost of carbon increases over time), while downward adjustments of the credit value are possible if, at the commencement date of those tranches, market compensation available to generation from the applicable resources is forecast to be higher than a reference price. However, the credit's basic value reflects the environmental attribute and state policy and is stable over the duration of any 2-year tranche–not adjusted based on actual market outcomes.

New York State Energy Research and Development Authority to load serving entities. The load serving entities will use the credit to comply with the regulatory requirements established in the CES Order.

2. Plaintiffs Substitute the FPA's Collaborative Federalism Underpinnings with a Bright-Line Distinction at Odds with Applicable Precedent

Plaintiffs' remaining allegations rest upon the misplaced assumption that jurisdictional authority between state and federal entities is neatly and perfectly divided. Here, Plaintiffs suggest that U.S. Supreme Court cases create a bright jurisdictional line, with Federal law exclusively occupying the "entire field of wholesale electricity sales," Compl. 35, and, although unstated in the Complaint, state jurisdiction neatly retained over "any other sale of electric energy" including retail sales. 16 U.S.C. § 824(b)(1). This is a fundamental mischaracterization of the sector's regulatory framework.

Applicable case law makes clear that the FPA is founded on collaborative federalism. *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760 (2016) ("*EPSA*") states that "[t]he Act makes federal and state powers 'complementary' and 'comprehensive,' so that 'there [will] be no "gaps" for private interest to subvert the public welfare.'" *Id.* at 780 (quoting *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 631 (1972)). In *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015), ("*Oneok*") the Court likewise rejected a bright-line distinction, stating "[p]etitioners and the dissent argue that there is, or should be, a clear division between areas of state and federal authority . . . . But that Platonic ideal does not describe the . . . regulatory world."[3] *Id.* at 1601 (citation omitted). Justice Sotomayor's concurrence in *Hughes* reiterates

[3] *Oneok v. Learjet* centered upon a Natural Gas Act claim, not the Federal Power Act. However, "the relevant provisions of the two statutes are analogous," and courts have "routinely relied on NGA cases in determining the scope of the FPA, and vice versa." *Hughes*, 136 S. Ct. at 1298 n.10.

this commitment to collaborative federalism in the oversight of electricity markets, explaining the FPA's "collaborative" nature requires that courts "must be careful not to confuse the congressionally designed interplay between state and federal regulation . . . for impermissible tension that requires pre-emption under the Supremacy Clause." *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (internal quotation marks and citation omitted). "[I]n short, the Federal Power Act, like all collaborative federalism statutes, envisions a federal-state relationship market by interdependence." *Id.*

Plaintiffs initially state that the applicable inquiry for whether a state program offends the FPA's collaborative federalism framework is a determination based on "the *target* at which the state law *aims*" and whether the law directly affects the rate in question. *Oneok*, 135 S. Ct. at 1599. Yet even if *Oneok* were to apply, Plaintiffs disregard their own stated inquiry, substituting a bright-line test, simply stating that "the ZEC program interferes with FERC's exclusive jurisdiction over wholesale prices by affecting the behavior of participants." Compl. 36.

But simply considering whether state action "affects" participants is not the court-endorsed inquiry. As stated in *EPSA*, "[i]t is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other." 136 S. Ct. at 776. And New York's authority over "facilities used for the generation of electric energy," as provided by FPA § 201(b), 16 U.S.C. § 824(b)(1), is likewise well-established, with *New York v. FERC*, 535 U.S. 1, 24 (2002) affirming state authority to regulate "utility generation and resource portfolios." Likewise, *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U.S. 515, 525 (1945), emphasized that the FPA is "drawn as to be a complement to and in no sense a usurpation of State regulatory authority and contain throughout directions to the Federal Power Commission to receive and consider the views of State commissions." Thus, the ZEC program's "target," generation facilities, is well within New York's purview and authority in effectuating state environmental policy. As such, plaintiffs do not state a claim upon which this Court may provide relief.

B. Plaintiffs Have Not Stated a Claim For Relief in Count II, Conflict Preemption under the Supremacy Clause

Plaintiffs allege that the ZEC program is "conflict preempted." Compl. 36–39. However, Plaintiffs do not state a claim upon which this Court may provide relief. Specifically, Plaintiffs argue that the ZEC Order is conflict preempted as "any state law or regulation is 'conflict preempted' and thus invalidated if it conflicts with federal law or frustrates the purpose of a federal law . . . [and that] FERC . . . has determined that market-based processes . . . . ..are the best way to bring more efficient, lower cost power to the Nation's electricity consumers." *Id.* 36–7. For reasons similar to those discussed in the prior section, Plaintiffs' allegations rest upon a portrayal of FPA preemption that conflicts with case law.

Under Plaintiffs' analysis, any state action that affects FERC's market-based processes would be conflict preempted. Plaintiffs offer no limiting principle, instead only gesturing at the general conflict preemption doctrine. Yet, as stated above, federal and state jurisdiction are "not hermetically sealed" and a bright jurisdictional drawing line is a "Platonic ideal [that] does not describe the . . . regulatory world." *EPSA*, 136 S. Ct. at 776; *Oneok*, 135 S. Ct. at 1601. Plaintiffs conflate "congressionally designed interplay between state and federal regulation" for "impermissible tension that requires pre-emption under the Supremacy Clause" and ignore the fact that courts recognize that transactions that occur at one level will "have natural consequences" at another. *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring); *EPSA*, 136 S. Ct. at 776.

Indeed, the volume of court decisions and FERC's own rulings consistently uphold states' traditional authority to craft material environmental policy and law. *See, e.g., Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009); *S. Cal. Edison Co.*, 71 FERC ¶ 61,269 at 62,076 (1995). FERC has likewise disclaimed jurisdiction over Renewable Energy Credits ("RECs") when sold independently – as ZECs are here – from wholesale sales, stating that an "unbundled REC transaction does not affect wholesale electricity rates, and the charge for the unbundled RECs is not a charge in connection with a wholesale sale of electricity." *WSPP, Inc.*, 139 FERC ¶ 61,061 at 61,426 (2012). Rather than acknowledging this longstanding recognition of state authority, Plaintiffs attempt to broaden the narrowly tailored decision in *Hughes* so as to suggest a prohibition upon any state action that may, no matter how indirectly, run up against an imagined bright line. As the federal agency and the courts have both recognized the permissibility of state programs of this nature, the New York ZEC program cannot be conflict preempted. Thus, Plaintiffs' Complaint fails to state a claim upon which this Court may provide relief.

C. Plaintiffs Have Not Stated a Claim for Relief in Count III under the Dormant Commerce Clause

Plaintiffs allege that the ZEC program is invalid under the dormant Commerce Clause, U.S. Const. art. I, § 8, cl. 3. However, Plaintiffs do not state a claim upon which this Court may provide relief. Plaintiffs argue that "[t]he ZEC Order is directly discriminatory . . . . The program is not even-handed with respect to other technologies that could produce carbon-free electricity and with respect to out-of-state generation." Compl. 41. Plaintiffs alternatively argue that "[e]ven if the ZEC program is not deemed discriminatory, it is still invalid under the Commerce Clause because it imposes market-distorting burdens on interstate and international commerce that far outweigh the purported local benefits." *Id.*

The dormant Commerce Clause is "driven by concern about 'economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't of Rev. of Ky. v. Davis*, 553 U.S. 328, 338 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988)). In determining whether a state action is discriminatory under the dormant Commerce Clause, "similarly situated" firms should be compared. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997).

The ZEC program, as part of the CES Order, is crafted with respect to a particular resource type and to effectuate state environmental policy, just as other programs that are a part of the CES Order are designed with respect to other particular resources and for the same state policy rationale. Because the dormant Commerce Clause is driven by concern about measures that protect in-state economic interests at the expenses of out-of-state competitors, the Complaint's assertion that "[t]he program is not even-handed with respect to other technologies that could produce carbon-free electricity," Compl. 41, is a nonsequitur; the fact that different resource types are not eligible for the ZEC credit is of no consequence to a dormant Commerce Clause claim. Indeed, New York has a number of programs, each centered upon particular technologies and specific aims, including and as illustrated by the REC program noted in Plaintiffs' Complaint. Compl. 9.

New York policy choices as to particular technologies are of little consequence to dormant Commerce Clause analysis. Rather, the dormant Commerce Clause requires that companies must be considered against "similarly situated" companies. *Tracy*, 519 U.S. at 298. In this context, "similarly situated" companies would be nuclear generators. Plaintiffs do not allege any out-of-state nuclear generator is currently selling into New York and subject to discriminatory impact; indeed, Plaintiffs do not even allege that such a resource exists. The ZEC program, moreover, leaves open the door for participation by out-of-state resources that meet the eligibility requirements, stating the credits are based in part on "the verifiable historic contribution the facility has made to the clean energy resource mix consumed by retail consumers in New York State *regardless of the location of the facility*." CES Order at 214, app. E (emphasis added).

Allegations of market distortion fail for this same reason. The ZEC program treats "similarly situated" resources in the same way, and despite a general allegation that "other technologies" should be included in the program, the Complaint identifies no out-of-state competitor that would be harmed. And as held in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978), the dormant Commerce Clause "protects the interstate market, not particular interstate firms." Thus the relevant inquiry is whether the ZEC program distorts the market in favor of New York resources and undermines out-of-state resources. This is not the case; although particular "firms" may not be eligible for the ZEC program, this ineligibility is due to resource profile, not out-of-state location. In- and out-of-state resources are treated equally in this respect - the same resources are included and excluded regardless of location.

That the ZEC program does not discriminate nor distort interstate markets is inherent in its design, as it is made to effectuate particular purpose, that purpose being to ensure achievement of state environmental policy goals and specifically a carbon reduction goal. The record is clear on this fact, and Plaintiff's conclusory statement that "[t]he ZEC Order is purely protectionist in nature, enacted for political reasons to save jobs" is no "substitute for minimally sufficient factual allegations." *Paycom Billing Servs.*, 467 F.3d at 289 (internal quotation marks omitted). Rather, the Commission's record is replete with study, findings, and analysis founded upon a need to ensure the state's environmental goals are met—the ZEC program is designed to "prevent backsliding from the State's efforts to limit greenhouse gas emissions." CES Order at 119. The "value of avoided carbon emissions is most accurate if tied to the value of the avoided external damage," *id.* at 150, and the SCC is the best available estimate of such avoided external damage. Without the ZEC program "the added emissions would complicate the State's compliance federal carbon standards." *Id.* at 128. In any event, Plaintiffs admit in the subsequent paragraph of the Complaint that the ZEC Program's purpose is to reduce carbon emissions, stating "[a]lthough the reduction of carbon emission is important, this can be achieved by more effective means." Compl. 40.

Plaintiffs, by general reference to the Constitution and vague allegation of market distortion, fail to state a claim upon which this Court may provide relief.

IV. CONCLUSION

For the foregoing reasons, EDF's motion to dismiss should be granted in its entirety.

Dated: New York, New York
December 9, 2016

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

*Application *pro hac vice* pending

CERTIFICATE OF SERVICE

This is to certify that on this 9th day of December, 2016, a true and correct copy of the PROPOSED INTERVENOR-RESPONDENT EDF'S NOTICE OF MOTION 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

Dated: December 9, 2016

/s/ James T. B. Tripp