SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

LISA THRUN, JUDITH FORD, and AVA ASHENDORFF,	:	
	:	Index No.
Plaintiffs,	:	
- against -	:	
ANDREW M. CUOMO, AS GOVERNOR OF THE STATE OF NEW YORK; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; and NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY,	:	
Defendants.	:	

COMPLAINT

1. Plaintiffs Lisa Thrun, Judith Ford, and Ava Ashendorff (together, "Plaintiffs"), residents of the State of New York and purchasers of electricity in New York, bring this constitutional and legal challenge to New York State's implementation of the "Regional Greenhouse Gas Initiative" ("RGGI"), an unprecedented taxation and revenue distribution program that has neither been voted on nor approved by the New York State Legislature. Defendants' creation and implementation of a massive regulatory scheme to reduce "greenhouse gas" emissions through an artificially contrived "cap and trade" program advances no public interest, but does impose a substantial tax on electricity purchasers in New York. RGGI represents a major public policy in New York that may only be lawfully established by the New York State Legislature as the democratically-elected representatives of New York residents.

2. Plaintiffs seek declaratory and injunctive relief to vindicate their right not to be taxed without representation. Coercive taxes may only be levied upon New Yorkers where the

New York State Legislature first approves such a measure. Extreme environmental policies that impose significant costs on New York residents and businesses should be adopted (if at all) by a clear and unequivocal mandate imposed through the State Legislature. Such programs may not be imposed by executive fiat and the arbitrary action of administrative agencies that have substituted unauthorized interstate compacts for the proper exercise of legislative policymaking authority.

3. In December 2005, the then-Governor of New York entered into a multi-state agreement to implement RGGI, by which the member states seek to limit and ultimately reduce emissions of carbon dioxide ("CO_2") within their respective territories. With the exception of New York, each of the RGGI states explicitly enacted or modified legislation to provide for the creation and implementation of RGGI. Only New York implemented RGGI through the actions of unelected and virtually unaccountable bureaucrats, without any statutory or other legal authority, and without the consent or authorization of the State Legislature, in violation of the separation of powers doctrine under the New York State Constitution. Make no mistake, there is no enabling legislation providing for the creation and implementation of RGGI in New York.

4. RGGI is a multi-state compact among ten northeastern States (the "Compact States"), including New York.[1] In RGGI, the Compact States agreed they would not await Federal action to implement a coordinated, nationwide program to control greenhouse gases, but

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[1] On May 26, 2011, New Jersey's Governor Chris Christie announced that New Jersey will pull out of the cap-and-trade program by the end of 2011, concluding that "RGGI does nothing more than tax electricity, tax our citizens, tax our businesses, with no discernable or measurable impact upon our environment" and that the program as a whole was "a failure." *See* Mireya Navarro, *Christie Pulls New Jersey From 10-State Climate Initiative,* THE NEW YORK TIMES, May 26, 2011. According to one New Jersey environmental official, RGGI "did not reduce a 'single pound' of carbon emissions and amounted to nothing more than a tax ...." Christopher Baxter, *Top DEP Aide Tells N.J. Assembly Regional Climate Change Program Was Ineffective,* N.J. REAL-TIME NEWS, June 13, 2011, http://www.nj.com/news/index.ssf/2011/06/top_dep_aide_tells_nj_assembly.html. In March 2011, New Hampshire's House of Representatives, the third largest legislative body in the world, voted to end the state's participation in RGGI. New Hampshire's Representative Jim Garrity referred to RGGI as a "hidden carbon tax that's passed on to electric ratepayers." *See* Amy Quinton, *Three States Consider Withdrawal From* RGGI, April 7, 2011 (www.nhpr.org/three-states-consider-withdrawal-rggi).

instead undertook joint efforts to limit or reduce greenhouse gas emissions within the ten-state area, through a "cap and trade" control program. As part of their compact, unelected representatives designated by each of the Compact States created and agreed to model rules, under which they would jointly and concurrently impose a "cap" or limit on emissions of CO_2 within the territory of the Compact States. The unelected representatives of the states allocated to each of the Compact States a proportional share of the overall cap. To maintain total annual emissions of CO_2 within the cap, each Compact State issues each year a number of "allowances" (tradable certificates allowing the emission of one ton of CO_2 that year) equal to the State's specific cap for that year. Under the RGGI model rule as adopted by the Compact States, including New York, electricity generating facilities with capacities greater than 25 Megawatts that burn carbon or hydrocarbon fuels must possess allowances to equal their CO_2 emissions for that year. Upon information and belief, without these allowances, electricity generators must cease to generate electricity, and must close.

5. New York's unauthorized, unlawful, and unconstitutional participation in RGGI has generated enormous tax revenues for the State – *in excess of $321 million to date* in the three years since it was improperly implemented – while imposing what amounts to an impermissible and unauthorized tax on electricity purchasers in New York. Those purchasers and ratepayers were always intended to bear the full costs of the program through pass-through charges from their electricity providers and have borne the costs of the cap and trade program since its inception in New York. As implemented in New York, RGGI is plainly a revenue raising measure in the nature of a tax that is designed to raise funds to advance various legislatively-unapproved policy goals entirely unrelated to the administration of the RGGI program. Although the funds raised by RGGI were initially intended to promote so-called "green

initiatives," to date, at least *$90 million* has already been diverted from RGGI's stated goal of reducing greenhouse gas emissions to reducing New York State's general budget deficit.

6. RGGI also places no limitation on the importation of electricity from producers in states that do not participate in RGGI and thus creates an economic incentive for electricity distributors within the RGGI states to import electricity or relocate their generating facilities (and the jobs they provide) outside of New York rather than suffer the compliance costs imposed by RGGI. RGGI has no effect on non-Compact States and, thus, forces New York and other Compact States to bear higher economic costs while electricity generators in neighboring states continue to emit greenhouse gases that will necessarily impact New York and the other Compact States. Thus, while the artificially imposed "cap" on CO_2 emissions imposed by unelected New York bureaucrats may be met, it will have no discernable effect on atmospheric concentrations of greenhouse gases, but it will likely have an adverse economic impact on New York's economy.

7. The United States Constitution (Article IV) requires that New York, like all American states, be constituted as a "republican" form of government. *See* U.S. Const., Article IV, Section 4. Having thrown off one monarch (*i.e.*, George III, the King of England), the framers of the American Constitution understood the importance of guaranteeing to its citizens that they be governed by state governments (such as New York) in the form of a republic, which means essentially by a state government in which the "We the People" retain supreme control over the government. Unlike a monarchy where a king has the power to deprive his citizens of their property through, among other things, the imposition of tax burdens, a republican form of government exists where the people are *represented* via elected *representatives*. Attempts by unelected bureaucrats to usurp this authority via executive fiat are improper, unlawful, and unconstitutional. New York law recognizes this guarantee of a "republican" form of government

as reflected by the structure of the form of state government created by the New York State Constitution.

8. The New York Constitution provides for a strict separation of powers between the Executive and the Legislative branches, granting to the Legislative branch the sole authority to set policy and to approve and adopt agreements or lawful compacts with other states. Only the State Legislature, and then only in compliance with the relevant constitutional provisions, may impose taxes and make major public policy changes. And only the Legislature may cause the appropriation of state funds. Although the Governor's signature is required for a legislative act to become law, New York's constitutional framework requires that all legislation and all tax measures be initiated, debated, and passed by the Legislature, composed of representatives of all regions of the state, before the Governor gets the opportunity to weigh in through the veto process. As implemented, New York's participation in RGGI (i) imposes an unauthorized and unlawful tax on purchasers of electricity in New York by executive fiat and without proper legislative authorization, (ii) creates an unauthorized spending program giving tremendous discretion to a public benefit corporation to disburse hundreds of millions of dollars (with little involvement, authorization or appropriation by the State Legislature) in violation of the New York Constitution, and (iii) lacks the Congressional authorization constitutionally required for a multi-state compact in violation of the United States Constitution.

NATURE OF THE ACTION

9. Plaintiffs seek a declaration that New York's entry into and continued implementation of the RGGI program without the express and unequivocal consent or authorization of the New York State Legislature was *ultra vires*, unlawful, and without effect; that the promulgation of the RGGI regulations by the New York State Department of

Environmental Conservation ("the Department of Environmental Conservation") and the New York State Energy Research Development Authority ("NYSERDA") resulted in the imposition of, among other things, an unlawful tax on electricity purchasers in New York State, and are void, in violation of law, and in excess of lawful authority; and that RGGI constitutes a multistate compact which has not been authorized by the United States Congress and is void under the Compact Clause of the United States Constitution. Plaintiffs also seek to enjoin the enforcement of RGGI in New York and enjoin the participation of the Department of Environmental Conservation, NYSERDA and New York State in the RGGI auction programs (as described).

THE PARTIES

10. Plaintiff Lisa Thrun is a resident of the State of New York residing in Clarence, New York. Plaintiff Lisa Thrun, a ratepayer and consumer of electricity in New York, is also a wife, mother, and owner of a small business.

11. Plaintiff Judith Ford is a resident of the State of New York residing in Clintonville, New York. Plaintiff Judith Ford, a ratepayer and consumer of electricity in New York, is also a wife, mother, and owner of a small business.

12. Plaintiff Ava Ashendorff is a resident of the State of New York residing in Chesterton, New York. Plaintiff Ava Ashendorff, a ratepayer and consumer of electricity in New York, is also a wife, mother, and owner of a small business.

13. Each Plaintiff has a basis for standing as purchasers and ratepayers of electricity who have suffered and continue to suffer an "injury in fact" distinct from the general public. Each Plaintiff is being uniquely punished and damaged by unelected bureaucrats who have imposed upon them an unauthorized electricity tax in order for Plaintiffs to be able to heat their

homes and operate their businesses. RGGI specifically and undeniably deprives Plaintiffs of their constitutional and legally protected rights, including their right to property and their right not be taxed without representation. And, as residents of New York, Plaintiffs are entitled to act to vindicate constitutional and legal wrongs perpetrated by a state executive branch and state administrative agencies defended by the state Attorney General's office, which suffers from an inevitable and unavoidable conflict of interest given that the Attorney General is duty-bound to defend the state against challenges to the executive branch. Plaintiffs also have common-law taxpayer standing to challenge the constitutionality of RGGI where, as here, the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of governmental actions.

14. Defendant Andrew M. Cuomo is the current Governor of the State of New York. His principal office as Governor is located at the Executive Chamber, State Capitol, Albany, New York, 12224. Governor Cuomo is being sued in his official capacity and/or as successor to former Governor George Pataki, who implemented RGGI.

15. Defendant the Department of Environmental Conservation is a New York State regulatory agency with its principal offices located at 625 Broadway, First Floor, Albany, New York 12233-1550. The New York Legislature has by law given the Department of Environmental Conservation certain authority to regulate the emission of air pollutants within New York, in accordance with the policies established by the State Legislature. The Governor has designated the Department of Environmental Conservation as the regulatory authority implementing RGGI within New York, but the Department of Environmental Conservation has not been granted any such authority by the New York Legislature.

16. Defendant NYSERDA is a New York State public benefit corporation with its principal offices located at 17 Columbia Circle, Albany, New York 12203-6399. NYSERDA conducts programs to fund and otherwise support economic development projects. Under the regulations issued to implement RGGI in New York, NYSERDA receives all allowances issued by the Department of Environmental Conservation (without legislative authority), submits those allowances to a centralized auction, receives all revenues from the sale of the allowances, and expends all revenues generated by auctioning New York allowances. The New York Legislature has not granted to NYSERDA the legal authority required for it to receive allowances under RGGI, to auction or sell allowances under RGGI, to receive revenue from the sale and auction of allowances under RGGI, or to expend or distribute all of the revenues received from the auction or sale of allowances under RGGI.

JURISDICTION AND VENUE

17. This Court has personal and subject matter jurisdiction over this suit for equitable and legal relief pursuant to New York Civil Practice Laws and Rules ("CPLR") § 3001 and N.Y. Const. Art. VI, § 7a, and its inherent authority.

18. Venue is proper under CPLR §§ 503 and 505(a).

How the RGGI Program Works

19. As admitted by the Compact States on RGGI's official website and in other publications, RGGI "is the nation's first mandatory market-based program to reduce emissions of carbon dioxide." (*See* www.rggi.org/docs/RGGI_Fact_Sheet.pdf.) Under the Memorandum of Understanding ("MOU") by which they formed RGGI, the Compact States committed to make concerted and coordinated efforts to limit and ultimately to reduce the emission of greenhouse gases within their geographic territory. The Compact States undertook their joint

and concerted agreement rather than waiting for Federal action to establish a national program to control greenhouse gases across all the states and regions. In the MOU executed by the New York Governor agreeing to RGGI, the Compact States set forth goals and established certain procedures and structures to develop and implement the program.

20. Upon information and belief, pursuant to the MOU, the Compact States created a single regional "cap and trade" control mechanism, under which the total level of emissions of CO_2 from electric generating facilities within the Compact States would be limited (*i.e.*, the "cap"). It was also determined that the "cap" would be reduced over time. To implement and enforce the cap, the Compact States are each allocated a portion of the overall cap. Each Compact State, in turn, must issue a number of "allowances" (tradable certificates allowing the emission of a specified quantity of CO_2) equal to the State's allocation of the total cap for that year. Facilities that emit CO_2, and are subject to the program are required to acquire sufficient allowances to equal their actual CO_2 emissions. The certificates are "tradable" across the entire Compact state region, ostensibly to permit more efficient facilities to profit from their ability to control or reduce emissions. However, this arrangement also allows other market participants, including speculators not in the energy generation business, to profit from the tradable allowances.

21. Upon information and belief, the Compact States, in order to implement the MOU and the cap and trade program, formed a "Working Group" made up of unelected representatives from the affected regulatory agencies in each State. The Working Group, through its efforts and the suggestions and actions of consultants hired by it, developed a model rule (the "Model Rule") for implementation by the Compact States. Each Compact State agreed to promulgate its own regulations matching the Model Rule. Each Compact State, except New York, obtained express

statutory authorization from their respective elected legislatures to implement the RGGI cap and trade program and to implement the Model Rule. Upon information and belief, at no time prior to or since the inception of RGGI, has the New York State Legislature authorized New York's entry into the MOU, authorized the regulatory program embodying the promulgation or implementation of the Model Rule, authorized the issuance or auctioning of allowances (the cost of which is passed along as a hidden tax on all New York electric ratepayers in their electric bills), or authorized the receipt, distribution or, with limited exception, the use of the massive amount of revenue generated by the auctioning of allowances.

22. Initially, the Model Rule and the Working Group contemplated that allowances would be allocated to operators of electric generating facilities through an allocation mechanism to be determined. However, upon information and belief, the Compact States determined that a centralized auction process would be used to distribute allowances. All Compact States would periodically contribute all of the allowances allocated to them into a single auction pool, and there would be periodic auctions at which all allowances would be purchased by bidders at a single market clearing price established for that auction. Upon information and belief, any person can participate in the auctions, buy allowances, and use, trade sell, or retire them in order to reduce the total amount of CO_2 that can be emitted in the Compact States.

New York Accepts and Implements RGGI Without Legislative Approval

23. The MOU and the Model Rule specifically contemplate that each Compact State would seek and obtain all authority necessary under applicable state law to conduct the program contemplated by the Model Rule. New York, unlike all the other participating States, did not obtain statutory authorization from the State Legislature, but implemented the program by promulgation of executive agency regulations and executive fiat only.

24. The decision by Defendants not to submit RGGI to a vote by the New York Legislature demonstrates that they knew such a radical tax program would never pass muster with New York's elected officials and their constituents. Such an intentional effort to avoid putting RGGI to a clear and unambiguous "up or down" vote by New York's elected representatives is *prima facie* evidence that the New York RGGI program is illegal and *ultra vires*.

25. Upon information and belief, in promulgating the RGGI regulations, the Department of Environmental Conservation unilaterally decided that CO_2 is an air pollutant subject to regulation under the Department of Environmental Conservation's statutory authority to regulate air pollution. Upon information and belief, the New York Legislature has never determined that CO_2 is an air pollutant nor has it directed or authorized the Governor, the Department of Environmental Conservation or NYSERDA to take actions to control CO_2 emissions, nor has it articulated a policy to prevent global climate change or approved the regulatory means to achieve that end. The Department of Environmental Conservation's public policy decision was unwarranted and unlawful.

26. Upon information and belief, the Department of Environmental Conservation and NYSERDA promulgated regulations to create a system under which the Department of Environmental Conservation would create and issue New York's allocated share of allowances, and NYSERDA would sell them and receive all the proceeds from their auction. *See generally*, 6 NYCRR Part 242 ("CO_2 Budget Trading Program"); 21 NYCRR Part 507 ("CO_2 Allowance Auction Program"). Under these rules, the Department of Environmental Conservation issues allowances and places them exclusively in an "account" managed by NYSERDA. NYSERDA in turn contributes the allowances in the account to the centralized RGGI auction process as it

occurs. All of the proceeds from the sale of New York's allowances in each auction flow back to the NYSERDA account. With limited exceptions, NYSERDA distributes the monies received as a result of an auction for any purpose in its sole discretion. Because the structure of the auction results in a single uniform "market clearing" price, all available allowances for the particular auction are sold at that price, and New York allowances may be sold to persons inside or outside New York State, and to persons who may or may not be owners or operators of affected facilities, including Wall Street speculators.

27. Under the regulations promulgated by the Department of Environmental Conservation to implement RGGI in New York, each electric generating facility in New York that is larger than 25 Megawatts in generating capacity and which emits CO_2, is subject to the RGGI requirements. Upon information and belief, each such station must have one allowance for each ton of CO_2 emitted during the relevant time period. To acquire the allowances, each source is required either to purchase them during the auction process, or to later trade for or buy them, paying the price set by the trading counterparty. Each such source must have a compliance account under the Department of Environmental Conservation and is required to have in its account the appropriate number of allowances for each year to cover the source's emissions for the relevant year.

28. As part of its promulgation of the RGGI rules, the Department of Environmental Conservation stated that the program is expressly premised on the assumption that electric generating facilities will include the cost of allowances in the rates charged for the electricity that they generate. Upon information and belief, for every facility subject to RGGI, the cost to purchasers of electricity produced at the facility is increased by the cost of all allowances the facility is required to purchase. Upon information and belief, as a result of the operation of a

market process conducted by the New York Independent System Operator ("NYISO"), this increased cost is reflected in the price charged for electricity by virtually all generators, allowing them an opportunity to recover the cost of allowances. Generators who do not need allowances (*e.g.*, nuclear or hydroelectric generators), and generators located outside of New York who are not bound by RGGI, may in fact see their revenues and gross profits rise because they do not have to bear the cost of the allowances.

29. Upon information and belief, electricity providers in New York acquire the electricity needed to serve electric demand through the NYISO market process. The market establishes a "clearing price" for electricity based on bids submitted by generators. That clearing price is then generally paid for all electricity in that hour, except for power subject to pre-existing contractual arrangements. Upon information and belief, the clearing price is set by the electricity generators that burn fossil fuels (and therefore emit CO_2), which are required to purchase RGGI allowances. Upon information and belief, since these units are required to purchase and have sufficient RGGI allowances for their emissions, the market clearing price for electricity in each hour reflects the cost of the CO_2 allowances regardless of the method by which it is produced.

30. Upon information and belief, while any particular unit may have higher or lower allowance costs than the marginal unit and may have higher or lower costs of generation overall, the marginal unit, and therefore the market clearing electricity price, will necessarily include allowance costs. The general electricity market operated by the NYISO thus assures that those generators who receive the NYISO market price will have an opportunity to recover allowance costs. These costs are passed on to electricity purchasers by those electric utilities that provide retail electric service.

31. Because all affected producers of electricity throughout the ten-state region must acquire allowances, and because the auctions allow speculative traders or others to bid for and acquire allowances, the allowance auctions generate substantial revenue. The revenues attributable to New York's allowances flow exclusively to NYSERDA, reflect the auction price, and bear no relation to the Department of Environmental Conservation's or NYSERDA's administrative and enforcement costs for the RGGI program.

32. As of the date of this filing, RGGI has held twelve centralized auctions.[2] Upon information and belief, based on the results of those twelve auctions, NYSERDA has received more than $321 million ($321,611,071.27) since the RGGI program was implemented,[3] and NYSERDA has disbursed all of those funds.

33. Most recently, New York participated in auctions held on March 9 and June 8, 2011. NYSERDA submitted nearly 16 million (15,911,200) allowances to the March 9, 2011 auction.[4] At that auction, the market clearing price (*i.e.*, the price at which all allowances in the auction were sold) was $1.89 per ton.[5] As a result, as proceeds from that single auction, NYSERDA received more than $30 million ($30,072,168) to be disbursed by NYSERDA.[6]

34. Upon information and belief, NYSERDA submitted nearly 5 million (4,902,762) allowances to the June 8, 2011 auction.[7] At that auction, the market clearing price was $1.89 per

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2 *See* http://www.rggi.org/docs/NY_Proceeds_by_Auction.pdf.

3 *Id.*

4 *Id.*

5 *See* http://www.rggi.org/market/co2-auctions/results.

6 *See* http://www.rggi.org/docs/NY_Proceeds_by_Auction.pdf.

7 *Id.*

ton.[8] As a result, as proceeds from that single auction, NYSERDA received more than $9 million ($9,266,220.18) to be disbursed by NYSERDA.[9]

35. Upon information and belief, for the period September 25, 2008 (the debut of the RGGI CO_2 allowance auctions) through December 31, 2010, NYSERDA received $282,272,683 million from the auction of allowances.[10] Of that amount, 7.3% (or approximately $20 million) was spent on program administration costs, which included 4.7% for program administration, 1.2% for the State Cost Recovery Fee, 0.8% for New York's *pro rata* share of ongoing RGGI, Inc., operating costs through 2011, and 0.6 % for RGGI, Inc. start-up costs.[11] Upon information and belief, the remainder (92.7%) of approximately $282 million dollars, was largely used or disbursed by NYSERDA at its discretion. Significantly, 31.8% (or approximately $90 million) of the revenues generated during the period September 25, 2008 through December 31, 2010 was allocated to reducing New York State's deficit as part of an emergency deficit reduction plan enacted in 2009, and not invested in programs that reduce energy costs for purchasers or that work toward building a clean energy economy.[12]

36. Upon information and belief, NYSERDA will receive proceeds from the sale of allowances after June 2011. Under the regulations promulgated by the Department of Environmental Conservation and NYSERDA without any approval or action by the New York Legislature, NYSERDA will have largely unfettered discretion to disburse all such revenues it receives.

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8 *See* http://www.rggi.org/market/co2-auctions/results.

9 *See* http://www.rggi.org/docs/NY_Proceeds_by_Auction.pdf.

10 *See* http://www.rggi.org/docs/Investment_of_RGGI_Allowance_Proceeds.pdf at 10.

11 *Id.* at 12, n. xiii.

12 *Id.* at 12, n. xiv.

37. In a deregulated electricity market such as exists in New York, electricity generators generally pass on the value of allowances as a cost of generation. Thus, electricity purchasers in New York ultimately bear the compliance costs of the RGGI cap and trade program.

38. Upon information and belief, even before RGGI was implemented, New York had the country's fourth highest total energy cost and average retail electricity rates. On average, New York purchasers pay 62% more for retail electricity than do purchasers elsewhere in the United States. *See* The Public Policy Institute of New York, Inc., *Average Retail Price of Electricity* (Mar. 2007) (showing that U.S. average residential rates were $10.22, compared to an average New York residential rate of $16.59, and that U.S. average total rates were $8.77, compared to average New York rates of $14.54), available at http://www.ppinys.org/reports/jtf/electricprices.html.

39. There is no dispute that RGGI has increased retail electricity prices in New York. The RGGI Compact States have concluded that, "[o]n average, the cap on CO_2 emissions accounted for 0.24 to 0.61% of average residential electricity bills across the 10-state region in 2010" and that, "[b]ased on typical household electricity usage, that translates into 46 cents per month for residential consumers." *See* Fact Sheet: The Regional Greenhouse Gas Initiative (RGGI) (http://www.rggi.org/docs/RGGI_Fact_Sheet.pdf). This is roughly equal to the "GRT [gross receipts tax] and other tax surcharges" imposed every month on the average Consolidated Edison Company of New York ("Con Edison") residential consumer bill. http://www.coned.com/customercentral/threebill_D19_ResDual.asp

40. The New York State Legislature did not authorize the entry into the MOU by the then-Governor, and has not properly authorized, approved or consented to RGGI or the MOU at any time since the execution of the MOU.

41. The New York State Legislature has not properly authorized the Department of Environmental Conservation to levy a hidden tax on every electricity purchase in New York by creating a tradable allowance program to control greenhouse gases, nor authorized the Department of Environmental Conservation specifically to regulate emissions of CO_2 by electric generating plants.

42. The New York Legislature has not properly authorized or set as state policy the RGGI Model Rule as implemented by the Department of Environmental Conservation.

43. The New York Legislature has not properly authorized the Department of Environmental Conservation to issue greenhouse gas allowances, and has not authorized the Department of Environmental Conservation to issue the allowances to NYSERDA for sale in a centralized auction.

44. The New York State Legislature has not properly authorized NYSERDA to sell greenhouse gas allowances, has not authorized NYSERDA to sell allowances in an auction, and has not authorized NYSERDA to receive auction revenues.

45. The New York Legislature has not appropriated or otherwise established a policy for the use of all of the funds received by the State of New York as a result of the sale of allowances.

46. The New York State Legislature has not properly authorized the issuance of what amounts to a tax on purchasers of electricity in New York who ultimately bear the costs of all RGGI allowances purchased by electricity generators in New York.

47. The New York Legislature has not properly authorized the participation of any state administrative agency in the implementation of the RGGI program, including but not limited to specifically the issuance and sale of allowances, and the receipt and use of the proceeds from the sale of allowances. In fact, the only greenhouse gas legislation passed by the New York State Legislature – a bill to fund an environmental task force to review greenhouse gas policies – was vetoed in January of 2007 by then-Governor Eliot Spitzer. Tellingly, since January 2009 (and following the first and second RGGI auctions held on September 25 and December 17, 2008, respectively), the New York State Legislature has considered legislation concerning the very program at issue here, including an act to amend the environmental conservation law in relation to regulating the emissions of carbon dioxide by electric generating facilities. Upon information and belief, no such change in legislation has occurred.

48. New York's entry into the RGGI program plainly committed New York to an environmental regulation and taxation scheme that radically changes the electricity generation industry and saddles New York citizens with hundreds of millions of dollars in hidden taxes. Defendants have impermissibly usurped the policy-making authority of the New York State Legislature and created a burdensome and improper tax that bears no relationship to the cost to administer and enforce the RGGI program. RGGI, as adopted and implemented in New York, is an unprecedented example of taxation without representation, imposed by executive fiat and the arbitrary and capricious actions of administrative agencies that have substituted unauthorized interstate compacts for the proper exercise of discretion.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

THE NEW YORK RGGI PROGRAM IS *ULTRA VIRES*

49. Plaintiffs reallege and incorporate herein the allegations contained in paragraphs 1 through 48 of this Complaint as if set forth fully herein.

50. Article III of the New York State Constitution vests the Senate and the Assembly with the legislative power of the State, while Article IV vests the executive power in the Governor. Article VI vests the court system with the judicial power. The New York Court of Appeals has held that these separate grants of power to each of the coordinate branches of government imply that each branch is to exercise power within a given sphere of authority, and that the separation of powers requires that the Legislature make the critical public policy decisions, while the executive branch's responsibility is to implement and enforce those public policy decisions.

51. The then-Governor of New York executed the MOU without the consent or authorization of the New York Legislature, and has never obtained the appropriate consent or authorization of the New York Legislature to the policies and requirements set forth in the MOU or in the Model Rules, regulations, or other provisions of RGGI. At the time of the execution of the MOU, the State Legislature had not established – and at no time since the execution of the MOU has the New York Legislature established – a state policy that would: (i) regulate emissions of greenhouse gases from electric generating facilities; (ii) require or allow the use of a tradable allowance program to regulate emissions of greenhouse gases from electric generating facilities; (iii) require or allow the Department of Environmental Conservation to issue allowances to NYSERDA; (iv) require or allow NYSERDA to sell allowances through a centralized auction; (v) require or allow NYSERDA to receive the proceeds of an auction of

allowances; or (vi) require or allow NYSERDA to disburse all of the proceeds received as a result of an auction of allowances. The entry by the then-Governor into RGGI, the determination under RGGI to address issues of regulating greenhouse gases through a cap and trade program and the sale of allowances, and the manner in which the proceeds of allowance sales would be received and disbursed by the State, necessarily made fundamental policy choices that epitomize "legislative power."

52. Decisions involving licensing, taxation, and the promulgation of regulations and programs involving the expenditure of State tax revenues require a balancing of differing interests; a task the multimember, representative Legislature is entrusted to perform under New York's constitutional structure. The RGGI program is in violation of the separation of powers established by the New York Constitution, is beyond the lawful power of the Governor and the agencies administering it, is *ultra vires*, and is without proper basis in the laws of New York.

53. New York agencies may only act in accordance with the authority granted to them and cannot promulgate rules or create taxes or fees that are not contemplated or authorized by the State Legislature.

54. Neither the Department of Environmental Conservation nor NYSERDA has statutory authority to control CO_2 admissions through a cap and trade program, to regulate the interstate trading of allowances on an auction market, or to impose and operate a revenue program related to allowances.

55. NYSERDA, a public benefit corporation under Article 8, Title 9 of the New York State Public Authorities Law, was created by the New York State Legislature with "specific powers." PAL § 1850, *et seq.* NYSERDA's governing statutes make no reference to any authority that allows NYSERDA to administer or participate in an auction of CO_2 allowances.

Further, the Department of Environmental Conservation is also not authorized by statute to transfer emission permits to NYSERDA for sale.

56. By creating the allowance auction accounts and selling allowances, receiving and then disbursing the proceeds of the allowance auction, all without any appropriate authorization from the New York Legislature and without an appropriation of the funds received, NYSERDA and the Department of Environmental Conservation have created a tax and revenue program which has not been authorized by the New York Legislature and which ultimately results in higher prices (*i.e.*, higher taxes) for electricity for purchasers of electricity in New York.

57. The regulations promulgated by NYSERDA and the Department of Environmental Conservation, the participation of the Department of Environmental Conservation and NYSERDA in the issuance and sale of allowances, the transfer by NYSERDA of allowances to a centralized auction, the receipt by NYSERDA of revenues from the auction of allowances, and the disbursement of proceeds of allowance auctions by NYSERDA, are all without lawful authority and in violation of law.

SECOND CLAIM FOR RELIEF

THE NEW YORK RGGI PROGRAM IMPOSES AN IMPERMISSIBLE TAX NOT AUTHORIZED BY THE STATE LEGISLATURE

58. Plaintiffs reallege and incorporate herein the allegations contained in paragraphs 1 through 57 of this Complaint as if set forth fully herein.

59. The current RGGI provisions promulgated by the Department of Environmental Conservation and NYSERDA create an unconstitutional tax under the New York Constitution. In New York, taxes can only be created by the State Legislature.

60. The authority to raise massive tax revenues is confined to the Legislature because it is well understood that the "power to tax" is the "power to destroy." The decision to tax or punish certain behavior by the taxing power is the exclusive power of the Legislature.

61. Upon information and belief, the RGGI auction generates hundreds of millions of dollars of revenue based on a market clearing price, unrelated to any costs of administration and enforcement. The program was created by executive agency rules, without State legislation.

62. Upon information and belief, the market clearing price is determined by the market and is not tied to administrative or enforcement costs, which NYSERDA has estimated will only be 10% of the revenues generated in the auction. The revenues generated to date, already in excess of $321 million, have been collected by NYSERDA and largely distributed at NYSERDA's discretion.

63. Upon information and belief, neither NYSERDA nor the Department of Environmental Conservation is authorized by the Legislature to create a tax that generates annual revenues that exceed administrative costs. The generation of revenue under RGGI creates an impermissible administrative taxation regime in violation of the New York State Constitution, and is in violation of law.

64. That administrative tax is passed on to purchasers of electricity in New York in the form of higher prices. The imposition of that tax without authorization from the Legislature is unconstitutional and unlawful.

65. RGGI as implemented is plainly a revenue raising measure in the nature of a tax imposed without proper legislative authorization.

THIRD CLAIM FOR RELIEF

THE NEW YORK RGGI PROGRAM, AS IMPLEMENTED, IS ARBITRARY AND CAPRICIOUS

66. Plaintiffs reallege and incorporate herein the allegations contained in paragraphs 1 through 65 of this Complaint as if set forth fully herein.

67. The Department of Environmental Conservation and NYSERDA acted arbitrarily by adopting the MOU and Model Rule through an impermissible delegation of authority, surrendering their discretion to an interstate group that promulgated the MOU and Model Rule.

68. The RGGI regulations are arbitrary and capricious because they do not limit the amount of CO_2 that may be emitted from New York power plants that can comply with the program by purchasing sufficient allowances to equal their actual emissions.

69. The Department of Environmental Conservation acted arbitrarily by determining that the allocation of allowances be accomplished by auction rather than by other means, and in a manner which imposes costs unrelated to compliance and enforcement. In particular, the Department of Environmental Conservation acted arbitrarily by surrendering its discretion in favor of adherence to the Model Rule, ignored substantial issues and otherwise promulgated rules that are unreasonable.

FOURTH CLAIM FOR RELIEF

RGGI IS AN IMPERMISSIBLE AGREEMENT IN VIOLATION OF THE COMPACT CLAUSE OF THE UNITED STATES CONSTITUTION

70. Plaintiffs reallege and incorporate herein the allegations contained in paragraphs 1 through 69 of this Complaint as if set forth fully herein.

71. The Constitution provides that "[n]o State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State" (the "Compact Clause"). The

Compact Clause prohibits the formation of agreements or compacts that may increase states' political power and encroach upon Federal power.

72. To show "encroachment" on Federal supremacy, the Compact Clause does not require a court to find that state action is fully preempted by Federal law. The pertinent inquiry is one of *potential*, rather than actual, impact upon Federal supremacy.

73. RGGI is a multi-state agreement, created without Congressional approval, by which participating states obligate themselves to meet a set of common rules and shared limitations and compliance requirements.

74. The RGGI is an impermissible compact among the ten Compact States in violation of the Compact Clause.

75. Contrary to the plain requirement of the Compact Clause, the MOU among the ten Compact States has not been submitted to or approved by Congress.

76. RGGI encroaches upon the supremacy of the Federal government to regulate interstate emission limits under the Clean Air Act. RGGI impermissibly enlarges the Compact States' political influence over environmental issues, specifically the regulation of greenhouse gases, without the express authorization of the United States Congress.

77. RGGI also encroaches upon Federal supremacy by creating incentives for the increase of greenhouse gas emissions in states outside of the RGGI area, and thus interferes with Federal authority regarding interstate effects of emissions of pollutants.

78. RGGI further encroaches upon the exclusive authority of the United States to regulate interstate commerce in electricity, specifically the wholesale sale and transmission of electricity under the Federal Power Act ("FPA").

79. The FPA provides the Federal Energy Regulatory Commission ("FERC") with exclusive jurisdiction over the "transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). FERC's exclusive authority under the FPA to regulate the wholesale transmission and wholesale rates preempts any state regulation in these areas.

80. RGGI encroaches upon Federal authority because it has the potential for conflicting or interfering with Congress's objective of creating a consistent, national policy for wholesale electricity rates and transmissions. RGGI further interferes and conflicts with FERC's goals of developing competitive interstate wholesale markets and ensuring that undue discrimination does not occur in the provision of jurisdictional services.

81. RGGI also encroaches upon Federal supremacy because it has the potential to encroach on the exclusive authority of the United States to regulate interstate commerce. The Compact States, including New York, have recognized that, to accomplish the objectives of the RGGI compact, RGGI will have to address how to limit the importation of low-cost electricity from outside the RGGI states, which comes from generating sources that are not subject to RGGI limits on their CO_2 emissions or the associated cost of required "allowances" (commonly referred to as "leakage"). Thus, RGGI has the potential to encroach on the exclusive authority of the Federal government to regulate interstate commerce.

82. Congress has the power to regulate emissions and establish interstate emission limits, which it has expressly chosen not to do. RGGI's regulations impermissibly encroach on Federal supremacy and interfere with the Federal interest in climate policy and Federal interest in regulating CO_2.

83. RGGI further encroaches on the Federal government's exclusive power over the conduct of foreign policy. The Compact States, including New York, have been engaged in discussions with foreign nations, which discussions have as their objective an international agreement on control of greenhouse gases and the price of electricity.

WHEREFORE, Plaintiffs request that this honorable Court enter an Order granting them the following declaratory and other relief:

1. Declaring that the entry by New York State into (and its continued participation in) the RGGI program without the express and unequivocal legislative consent or approval of the State Legislature was *ultra vires*, unlawful, and without effect;

2. Declaring that the promulgation of the RGGI regulations by the Department of Environmental Conservation and NYSERDA was *ultra vires*, in excess of lawful authority, and those regulations are void;

3. Declaring that the promulgation of the RGGI regulations by the Department of Environmental Conservation and NYSERDA has created an unlawful tax, in violation of law, in excess of lawful authority, and those regulations are void;

4. Declaring that the promulgation of the RGGI regulations by the Department of Environmental Conservation and NYSERDA is arbitrary, capricious, in violation of lawful authority, and those regulations are void;

5. Declaring that the RGGI MOU is a multistate compact which has not been authorized by the United States Congress and is void under the Compact Clause of the United States Constitution;

6. Enjoining permanently the enforcement by the Department of Environmental Conservation of its RGGI regulations and enjoining permanently the participation of the

Department of Environmental Conservation, NYSERDA and New York State in the RGGI programs; and

7. Granting such other, further or additional relief as justice requires.

Dated: June 27, 2011
New York, New York

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