STATE OF NEW YORK SUPREME COURT
COUNTY OF SARATOGA

INDECK CORINTH, L.P., **Petitioner/Plaintiff,** **- against -** **DAVID A. PATERSON, as Governor, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY, and NEW YORK STATE PUBLIC SERVICE COMMISSION,** **Respondents/Defendants.**	**Index No.: 369/2009** **RJI No.: 2009/0369** **Hon. Thomas D. Nolan, Jr.**

MEMORANDUM OF LAW OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN PETROLEUM INSTITUTE, AMERICAN COALITION FOR CLEAN COAL ELECTRICITY, AND COALITION FOR TAX TRANSPARENCY IN SUPPORT OF PETITIONER/PLAINTIFF INDECK CORINTH, L.P.

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Dated: May 19, 2009

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I. Introduction and Summary

Amici curiae the Chamber of Commerce of the United States of America ("Chamber"), the American Petroleum Institute ("API"), the American Coalition for Clean Coal Electricity ("ACCCE"), and the Coalition for Tax Transparency ("CTT") hereby file this brief in support of the challenge by Indeck Corinth, L.P. ("Indeck"), to the State of New York's implementation of the Regional Greenhouse Gas Initiative ("RGGI"). Amici curiae represent a broad spectrum of businesses that will be adversely affected by the significantly higher costs and impaired reliability of electricity that will result from imposition of higher taxes on American businesses through state and regional climate change programs such as RGGI. Imposition of these costs on businesses and, ultimately, consumers is entirely unjustifiable. Even full implementation of RGGI, within New York or even throughout the 10-state region constituting the RGGI interstate compact, will have no discernible effect on atmospheric concentrations of greenhouse gases ("GHGs") or on any effects of climate change that may be manifested in the United States or the rest of the world.

As Indeck explains in its Memorandum of Law, New York's implementation of RGGI is unlawful because it has not been approved or authorized by the Legislature. Indeed, as Indeck also explains, RGGI, as implemented in New York by extra-statutory executive agency action, is an unlawful and *ultra vires* tax measure. Moreover, even if RGGI were properly authorized by the Legislature, which it is not, it would remain unlawful because it violates the Compact Clause of the United States Constitution and is preempted as a result of federal regulatory authority over both the sale in interstate commerce of electricity at wholesale rates and the interstate transmission of electricity. Amici file this brief in support of Indeck's challenge to provide further information to the Court on these critically important constitutional and public policy

issues and to demonstrate that RGGI's negative effects will be far broader than those suffered by Indeck.

II. Statement of Interest

Amicus curiae Chamber is the world's largest business federation, representing 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. More than 96% of the Chamber's members are small businesses with 100 employees or fewer. As the voice of business, the Chamber's core purpose is to fight for free enterprise before Congress, the White House, regulatory agencies, the courts, the court of public opinion, and governments around the world. To that end, the Chamber files amicus curiae briefs in cases that raise issues of vital concern to the nation's business community.

Amicus curiae API is the only national trade association that represents all aspects of America's oil and natural gas industry. API's 400 corporate members, from the largest major oil company to the smallest of independents, come from all segments of the industry. They are producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry.

Amicus curiae ACCCE is a partnership of the industries involved in producing electricity from coal, including the coal, rail, and electricity generating industries. ACCCE advocates public policies that advance environmental improvement, economic prosperity, and energy security. Coal provides half of America's electricity and must continue to be part of a balanced energy mix. ACCCE believes that the robust utilization of coal -- America's most abundant energy resource -- is essential to providing affordable, reliable electricity for millions of U.S. consumers and a growing domestic economy. ACCCE is committed to continued and enhanced U.S. leadership in developing and deploying new, advanced clean coal technologies that protect and improve the environment.

Amicus curiae CTT is a coalition of electric generating companies sharing a common interest in avoiding an illegal, *ad hoc*, or piecemeal approach within the United States to any potential mandatory regulatory controls on GHG emissions, including carbon dioxide, to address global climate change. A purpose of CTT is to oppose mandatory regulation of GHG emissions through means other than legislation expressly enacted by Congress for that specific purpose or international agreements entered into by the federal government for that specific purpose. The Coalition's position is that if any mandatory regulation of GHG emissions is to occur within the United States to address climate change, it must occur nationally in a uniform (and legal) manner.

Members of amici curiae include businesses that generate, import, or consume electricity in or into New York State or other RGGI signatory states and other nearby states, and businesses that supply fuel to electric generators in the RGGI region. Members of amici and their customers face an ever-growing public demand for new and affordable power.[1] RGGI dramatically raises the cost of electricity in the region by regulating (*e.g.*, taxing) carbon dioxide emissions from certain fossil-fuel fired power plants in the region, including plants in New York. RGGI imposes an additional layer of regulatory controls on electric generating companies, many of which are multistate entities that may face varying standards and control requirements at state, regional, and federal levels. RGGI-generated increases in electricity costs, and decreases in the reliability of the electricity supply, will be borne by the public, including by members of amici. RGGI also increases the cost of generating electricity through the combustion of fossil fuels by

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[1] Electricity demand is expected to grow 26% in the next 20 years. ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, ANNUAL ENERGY OUTLOOK 2009 WITH PROJECTIONS TO 2030 (2009) at 71, *available at* http://www.eia.doe.gov/oiaf/aeo/pdf/0383(2009).pdf.

requiring allowances to cover the carbon dioxide emissions that result from the generation of power using coal, natural gas, and oil.

III. Argument

A. RGGI Imposes an Impermissible Tax Unauthorized by the Legislature.

As Indeck observes, every state participating in RGGI *except* New York has enacted legislation authorizing the program, including provisions for a cap-and-trade program for carbon dioxide emissions, other compliance requirements, auctions of carbon dioxide emission allowances, and use of auction proceeds. Only New York has implemented RGGI solely through executive action, imposing millions of dollars of costs on businesses and consumers while generating enormous revenues for the State government. Indeed, as Indeck notes, one of the *purposes* of RGGI is to have allowance costs, in the form of a tax, passed along to consumers of electricity -- *i.e.*, to the public -- in the form of higher prices. *See* Memorandum of Law of Respondents/Defendants David A. Paterson, New York State Department of Environmental Conservation and New York State Energy Research and Development Authority ("NY Resp. Br.") at 12 (New York ratepayers to bear "most of the compliance costs" of the State's RGGI implementation).

New York's implementation of RGGI clearly constitutes a tax. Imposition of that tax without legislative authorization is unconstitutional. N.Y. CONST. art. III, § 1; *id.* art. XVI, § 1; *Yonkers Racing Corp. v. State of New York*, 516 N.Y.S.2d 283, 284 (2d Dept. 1987) (tax must be authorized "by clear statutory mandate").[2] In New York, the power to tax lies exclusively with

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[2] For similar reasons, the decision of defendant Governor Paterson to join and implement RGGI without first securing legislative authority and the Governor's delegation of authority to defendant New York Department of Environmental Conservation ("NYDEC") and defendant New York State Energy Research and Development Authority ("NYSERDA") are both improper and unauthorized. Such "critical policy decisions" are the province of the legislature. *See Bourquin v. Cuomo*, 628 N.Y.S.2d 618, 620 (1995); N.Y. CONST. art. IV. Moreover, agencies,

the legislature and may not be delegated to administrative agencies. *See Greater Poughkeepsie Library Dist. v. Town of Poughkeepsie*, 601 N.Y.S.2d 94, 97 (1993); *Phillips v. Town of Clifton Park Water Auth.*, 730 N.Y.S.2d 565, 566 (3d Dept. 2001).

Although the legislature may delegate to administrative agencies the power to set and to collect licensing and regulatory fees, *see American Ass'n of Bioanalysts v. Axelrod*, 484 N.Y.S.2d 288, 290-91 (3d Dept. 1985), the revenues created by New York's implementation of RGGI are not in the nature of fees. The test for whether revenue collected by an administrative agency, such as the auction fees collected by NYSERDA, constitutes a fee or a tax is to compare the costs of administration with the revenue received.[3] That these agencies may generally be authorized in their charters to implement environmental programs does not change the fact that, through New York's RGGI implementation, they are raising revenues for other programs, such as energy efficiency and clean energy technology, without legislative authorization.[4] Where "the sums collected through a licensing or regulatory measure exceed the cost of administration, then it can be deemed a revenue act [*i.e.*, a tax] regardless of its label."[5] *Mobil Oil Corp. v. Town of*

"as creatures of the Legislature within the executive branch, can act only to implement their charter as it is written and as given to them." *Tze Chun Liao v. New York State Banking Dep't*, 549 N.Y.S.2d 373, 375 (1989).

[3] Defendants argue that NYSERDA may properly expend RGGI-generated revenues because NYSERDA already funds various other energy efficiency and similar programs. N.Y. Resp. Brf. at 56-58. Defendants fail, however, to supply any further information as to the nature of, and authority for, these programs. Most importantly, defendants fail to describe the funding mechanism by which NYSERDA receives any funds that it disburses and whether such funding includes appropriations from the legislature. Regardless, NYSERDA's activities in other contexts are not relevant to determining whether RGGI itself is lawful.

[4] *See* N.Y. COMP. CODES R. & REGS. tit. 21, § 507.4(d), AR 127 at 5; *see also* RGGI, Memorandum of Understanding (2005) ("MOU"), at 6, 11, AR 245 at 6, 11; AR 8 at 3; AR 15; AR 16; AR 17; *see also* NY Resp. Br. at 13-14, 22-23.

[5] Defendants rely on *People ex rel. Einsfeld v. Murray*, 44 N.E. 146 (1896), to suggest that the intent behind the imposition of costs determines whether such cost constitutes a tax or a fee.

Huntington, 380 N.Y.S.2d 466, 474 (Sup. Ct. Suffolk County 1975); *see also ATM One LLC v. Inc. Vill. of Freeport*, 714 N.Y.S.2d 721, 722 (2d Dept. 2000); *New York Tel. Co. v. City of Amsterdam*, 613 N.Y.S.2d 993 (3d Dept. 1994); *C.I.D. Landfill, Inc. v. New York State Dep't of Envtl. Conservation*, 561 N.Y.S.2d 936, 937 (4th Dept. 1990); *Albany Area Builders Ass'n v. Guilderland*, 534 N.Y.S.2d 791, 794-95 (3d Dept. 1988), *aff'd*, 547 N.Y.S.2d 627 (1989); *Orange & Rockland Utilities, Inc. v. Clarkstown*, 444 N.Y.S.2d 670, 671 (2d Dept. 1981); *Nitkin v. Adm'r of Health Services Admin.*, 399 N.Y.S.2d 162 (Sup. Ct. New York County 1975), *aff'd*, 55 A.D.2d 566 (1st Dept. 1976), *aff'd*, 43 N.Y.2d 673 (1977).[6]

As Indeck states, auction revenues received by New York have already exceeded $87.96 million and are forecast to exceed $149 million through 2009 alone. Compared to a liberal (*i.e.*, possibly high) estimate of the administrative costs of the program, approximately $2.13 million

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N.Y. Resp. Br. at 60. This case is inapposite; intent is not a relevant factor. *Einsfeld* addressed whether a statute enacted by the state legislature imposed a tax subject to a provision of the State constitution requiring the assent of two-thirds of the legislature or if it were instead an excise tax not subject to this requirement. 44 N.E. at 149. The present case is readily distinguishable: the program was not enacted by the legislature and the claim that it comprises an unlawful tax arises under a different constitutional provision than the one at issue in *Einsfeld*. Moreover, the overwhelming weight of the relevant case law indicates that the proper standard for distinguishing between taxes and fees does not involve assessment of legislative, or in this case administrative, intent. See infra at 5-6.

[6] Other state courts have reached similar conclusions. *See, e.g.*, *Dawson v. Sec'y of State*, 739 N.W.2d 339, 352 (Mich. Ct. App. 2007) ("Where revenue generated by a regulatory fee exceeds the cost of regulation, the fee is actually a tax in disguise." (internal quotation omitted)); *Brooks v. Nixon*, 128 S.W.3d 844, 850 (Mo. 2004) ("[I]n the event the fee charged exceeds the amount of estimated actual costs . . . that excess cannot fairly be characterized as a permissible 'user fee.'"); *Isaac v. City of Los Angeles*, 77 Cal. Rptr. 2d 752, 759 (Cal. Ct. App. 1998) ("[R]egulatory fees must not exceed the reasonable cost of the services necessary for the activity for which the fee is charged and for carrying out the purpose of the regulation; they may not be levied for unrelated purposes."); *Audubon Ins. Co. v. Bernard*, 434 So.2d 1072, 1075 (La. 1983) ("[T]he police power may be exercised to charge fees to persons receiving grants or benefits not shared by other members of society. . . . But if revenue is the primary purpose for an assessment and regulation is merely incidental, or if the imposition clearly and materially exceeds the cost of

per year, it is clear that revenues bear no reasonable relationship to the costs of the program and therefore cannot constitute a valid regulatory fee.[7] *Revised Regulatory Impact Statement*, Administrative Record ("AR") 10 at 55-56 (Sept. 8, 2008); s*ee also* NYDEC, THE PROPOSED AUCTION OF 100% OF THE EMISSIONS ALLOWANCES: FREQUENTLY ASKED QUESTIONS at 2, AR 205 at 2 (Jan. 29, 2007) ("Frequently Asked Questions"). Indeed, auction prices are set at a "market clearing price" for all RGGI states participating in an auction, Frequently Asked Questions at 27-28, AR 205 at 27-28, and thus have absolutely no connection to implementation costs.

Thus, RGGI as implemented in New York plainly is a revenue raising measure in the nature of a tax. New York itself has admitted that the cost of administering the program will be capped at 10% of the revenue generated by the program and that RGGI's purpose is to raise revenues to accomplish other purposes beyond simply paying program costs. *Assessment of Public Comments: Comments Received from October 24, 2007 to December 24, 2007*, AR 17 at 171-72; *see* supra note 4. In fact, in any state that participates in the RGGI compact and that auctions most or all of the allowances allocated to that state, the state's share of the auction revenue can be expected to exceed substantially the program's administrative costs in that state. That is, in fact, one of the main functions of an auction -- to raise revenues that can be used to meet the state's desire for funds to advance various policy goals, such as promoting renewable or low-carbon energy sources and other means of energy generation and use or other as-yet-

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regulation or conferring special benefits upon those assessed, the imposition is a tax." (citations omitted)).

[7] This estimate was reached by summing the individual costs calculated by NYSERDA, as described in the *Revised Regulatory Impact Statement*.

undefined goals.[8] *See* supra note 4. Whatever the value of these policy goals, New York may not seek raise and disburse revenue to effectuate them without proper legislative authorization.[9] *See Phillips*, 730 N.Y.S.2d at 566-67.

B. RGGI Violates the Compact Clause of the United States Constitution.

Even if New York's implementation of RGGI were not void as an unauthorized tax or *ultra vires* action, it would nevertheless run afoul of the Compact Clause of the United States Constitution, which provides that "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . ." U.S. CONST. art. I, § 10, cl. 3. 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. Because RGGI encroaches upon federal supremacy, it constitutes an unconstitutional multi-state compact.[10]

[8] Defendants argue that because funds derived from the RGGI program will not be deposited in the State's general fund, it does not impose a tax. NY Resp. Br. at 62. Defendants overestimate the importance of this factor. Indeed, in the two cases they cite for this proposition, it is clear that the determinative factor was not the fund into which monies were deposited, but that such monies would not be used "as an integral part of the regulation *and to cover the cost of regulation*." *Health Services Medical Corp. v. Chassin*, 668 N.Y.S.2d 1006, 1010 (Sup. Ct., Onondaga Co. 1998), *aff'd*, 259 A.D.2d 1053 (4th Dept. 1999) (internal quotations and citations omitted) (emphasis added). The fact that RGGI-related funds will be deposited into their own account does not alter the fact that they will be expended to effectuate policies unrelated to the administration of the RGGI program.

[9] In addition, as Indeck notes, public authorities such as NYSERDA are prohibited from levying taxes and can only charge fees proportionate to the services provided by the authority. *See* N.Y. PUB. AUTH. LAW § 1120-d(20); *Phillips,* 730 N.Y.S.2d at 566.

[10] RGGI, as an interstate compact entered into by the Governor of New York without legislative authority, also constitutes illegal policymaking under New York law. *See* N.Y. ENVTL. CONSERV. § 19-0301(2)(d) (requiring "interstate air pollution control compacts or agreements" to be submitted to the legislature for ratification). Moreover, the decision by executive authority, through NYDEC and NYSERDA regulations, to bind New York to an overall shared allocation and auction is unlawful because agency rulemaking cannot delegate the legislature's licensing

1. The Test for a Compact Clause Violation

Historically, courts have identified three categories of interstate compacts that may be subject to the Compact Clause's limitations: (1) compacts to resolve state boundary disputes; (2) compacts to institutionalize one-time interstate projects, such as building a bridge; and (3) compacts to create ongoing administrative agencies and regulatory programs addressing interstate (or potentially international) issues.[11] RGGI falls clearly within the third category.

Under the Supreme Court's interpretation of the Compact Clause, not all interstate agreements require congressional approval. *Virginia v. Tennessee*, 148 U.S. 503, 517-21 (1893). Rather, the Court has held that the Compact Clause applies only to "the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *Id.* at 519. Congressional approval is required where an interstate agreement will result in "the increase of the political power or influence of the States affected, and thus encroach . . . upon the full and free exercise of Federal authority." *Id*. at 520; *see also U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 479 n.33 (1978) (holding that relevant test for Compact Clause violation is whether a multi-state agreement presents "a threat of encroachment or interference [with the just supremacy of the United States] through enhanced state power. . . ."); *id.* at 475; *New York v. Trans World Airlines, Inc.*, 728 F. Supp. 162, 183 (S.D.N.Y. 1990) ("[T]he Compact Clause applies only where the challenged interstate agreement embraces actions a state could not take acting

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and permitting authority to another state, absent legislative consent. *See Fink v. Cole*, 302 N.Y. 216, 224-25 (1951); N.Y. CONST. art. III, § 1.

[11] *See* Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 3-4 (1997); *see also* Note, *Charting No Man's Land: Applying Jurisdictional and Choice of Law Doctrines to Interstate Compacts*, 111 HARV. L. REV. 1991, 1992 (1998).

alone."). One way a compact could enhance state power would be to allow two or more states to obtain joint power over interstate commerce that neither could have gained individually. *U.S. Steel*, 434 U.S. at 474-75.

Significantly, 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. "Encroachment" under the Compact Clause instead occurs in the presence of merely *potential* impacts on federal supremacy. This means that the Compact Clause does not require that federal and state laws conflict, as required in the preemption context, but rather that the Clause protects federal supremacy from the *potential* for such conflicts in the future. *U.S. Steel,* 434 U.S. at 472 (The "pertinent inquiry is one of potential, rather than actual, impact upon federal supremacy."); *see also id.* at 484 & n.5 (White, J., dissenting).[12]

Thus, the pivotal question is whether RGGI aggrandizes state power and authority in derogation of federal supremacy. As shown below, RGGI violates the Compact Clause because it encroaches on federal control over interstate commerce, and in particular interstate commerce in the wholesale sale and transmission of electricity.

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[12] As Justice White explained in his dissent in *U.S. Steel*, under the majority's decision, the Compact Clause means that "some actions which would be permissible for individual States to undertake are not permissible for a group of States to *agree* to undertake." 434 U.S. at 482 (White, J., dissenting) (emphasis in original). Justice White further explained that "States may legislate in interstate commerce until an actual impact upon federal supremacy occurs. . . . For States acting in concert, however, . . . 'potential . . . impact upon federal supremacy' is enough to invoke the [Compact Clause's] requirement of congressional approval." *Id.* at 484. Justice White specifically compared the lesser standard applicable to action pursuant to state compacts to preemption jurisprudence governing the actions of individual states, noting that "[t]he frequent circumstance of potential impact would make that standard unworkable in the Commerce Clause context since the result is pre-emption of state effort; but . . . [in the Compact Clause context] that standard is not nearly so obstructive." *Id.* at 484 n.5 (White, J., dissenting). Thus, consistent with Justice White's understanding of the majority opinion, the Compact Clause analysis does not require congressional preemption of state action through traditional express, conflict, or field preemption mechanisms applicable in the single state setting.

2. RGGI Aggrandizes State Power and Authority.

Through its regional cap-and-trade program, RGGI exerts state powers and authorities over interstate commerce in a way that an individual state, acting alone, could not. Indeed, this appears to be one of RGGI's purposes. States, on their own, certainly have authority to regulate air pollution within their borders, including from stationary sources under their jurisdictions. *See* Clean Air Act § 116, 42 U.S.C. § 7416 (retention of state authority to impose emission controls stricter than those required by the federal Clean Air Act). But RGGI is intended to address a problem far different from localized, within-state air pollution. RGGI seeks instead to mitigate global climate change believed to be caused (at least in part) by worldwide anthropogenic emissions of GHGs. Although one state acting individually, or even several states acting collectively, cannot control global GHG emissions or affect global climate change appreciably, the RGGI signatories sought to make an impact by banding together, setting a common goal (compliance with a regional, multi-state emission cap), and agreeing to allocate portions of that cap to each of the participating states. The program would be made administratively and financially feasible by the adoption of a common currency -- RGGI allowances -- fungible in all signatory states. These allowances would be pooled by the states and sold in a collective auction, administered by a common regional body,[13] to provide revenues for each state to use as it sees fit.

The RGGI states, including New York, could not have adopted such a comprehensive program individually. First, any one state could not regulate emissions from other states' electric generating sources. That would exceed a state's authority to regulate pollutant emissions within

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[13] The signatory states agreed to form a regional entity, called RGGI, Inc., to perform administrative functions for the joint enterprise, including implementing the auctions. MOU at 7-8, AR 245 at 7-8.

its borders. Indeed, given the interconnectedness of the region's electricity grid, with power generated in one state often sold to consumers in the others, the RGGI states sought to maximize their ability to control emissions within the region (and to minimize "leakage"[14] of emissions) by coordinating and combining their regulatory efforts. *See generally* RGGI, Potential Emissions Leakage and the Regional Greenhouse Gas Initiative (RGGI): Final Report of the RGGI Emissions Leakage Multi-State Working Group to the RGGI Agency Heads (2008) ("RGGI Leakage Report"), AR 24-2 (noting coordinated effort to monitor and address leakage and making specific policy recommendations for uniform implementation). Second, they determined that administration and compliance could be effectively managed, and associated costs could be reduced, through the collective program. In fact, the RGGI states envisaged the program as enhancing the region's economy, at the expense of other regions. MOU at 2, AR 245 at 2. Thus, the very purpose of RGGI was to ensure collective, uniform regulation of GHG emissions in the region through common action.

RGGI aggrandizes state power and authority and does so in a way that the RGGI states, including New York, would not have been able to accomplish individually. These states' collective assertion of regulatory authority encroaches on the exclusive authority of the United States to regulate interstate commerce in electricity, specifically the wholesale sale and transmission of electricity, and therefore violates the Compact Clause.

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[14] "Leakage" is the term used to describe the phenomenon by which emitting activities, and hence emissions, "relocate" from regulated to unregulated jurisdictions. In the RGGI context, emission caps within the RGGI region will increase the cost of electricity generated in RGGI states relative to electricity generated outside the RGGI region. RGGI caps will likely result in increased electricity imports from non-regulating states, thereby at least partly offsetting any emission reductions within the RGGI region. *See* infra at 19, 25-26 and note 22.

3. RGGI Encroaches on Federal Supremacy over Interstate Commerce in Wholesale Electricity, Which Is Governed by the Federal Power Act.

As an unauthorized interstate compact, RGGI is unconstitutional because, as explained below, it encroaches on the federal government's exclusive jurisdiction to regulate interstate wholesale sales and transmission of electricity under the Federal Power Act ("FPA").[15] 16 U.S.C. §§ 791a-828c. The FPA provides the Federal Energy Regulatory Commission ("FERC") with exclusive jurisdiction over "transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce."[16] *Id.* § 824(b)(1). FERC's primary responsibility with respect to wholesale transmission and sales is to ensure "just and reasonable" rates. *Id.* § 824d(a). FERC accomplishes this task, in significant part, by requiring wholesale sellers to file a rate schedule that is subject to FERC approval.[17] As the Supreme Court has explained, Congress in passing the FPA

> meant to draw a bright line easily ascertained, between state and federal jurisdiction. . . . This was done in the [FPA] by making FPC [the Federal Power Commission, FERC's predecessor] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.

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[15] Although this brief, like Indeck's, addresses the FPA in the context of the Compact Clause, *see* Indeck Brief at 36, the FPA presents an independent basis for holding, under the Supremacy Clause of the U.S. Constitution, that New York's regulation of GHG emissions through implementation of RGGI is unconstitutional.

[16] *New York v. FERC*, 535 U.S. 1, 6-14 (2002) (discussing the reach of FERC's jurisdiction under the FPA).

[17] FERC employs either a cost-based or a market-based analysis to determine whether rates meet this standard. *See, e.g.*, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008), *clarified*, 124 FERC ¶ 61,055 (2008) (July 17 Clarification Order), *order on reh'g and clarification*, 125 FERC ¶ 61,326 (2008) (Order 697-B).

FPC v. S. Cal. Edison Co., 376 U.S. 205, 215-16 (1964).

FERC's exclusive authority under the FPA to regulate wholesale transmission and wholesale rates preempts any state regulation in these areas.[18] *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988); *see also S. Cal. Edison*, 376 U.S. at 216; *United States v. Pub. Util. Comm'n*, 345 U.S. 295, 299 (1953). Under Supreme Court precedent, RGGI may be preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[19] The Compact Clause can also bar RGGI if the Court finds that RGGI encroaches on federal authority because it has the *potential* for conflicting or interfering with Congress' objectives of creating a consistent, national policy for wholesale electricity rates and transmission. *See U.S. Steel*, 434 U.S. at 472; *see also* supra note 12.

The tension between the FPA and state law examined in *California v. FERC*, 495 U.S. 490 (1990), is particularly instructive on this issue. In that case, the U.S. Supreme Court held that the FPA preempted state law regarding hydroelectric licensing. FERC had granted a license under the FPA to a hydroelectric generating facility and, among other things, required that the licensee comply with minimum flow requirements established in the proceeding. California required the licensee to meet its more stringent minimum flow requirements. The Court first observed that "Congress clearly intended a broad federal role in the development and licensing of hydroelectric power," but found that it had to inquire further to determine whether this

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[18] This exclusive authority does not, however, extend to retail matters, such as generation and distribution of electric power that take place wholly intrastate. *See Conn. Light & Power Co. v. FPC*, 324 U.S. 515, 523 (1945); *Cities of Batavia v. FERC*, 672 F.2d 64, 68 n.2 (D.C. Cir. 1982) (FERC regulates wholesale transactions; states regulate retail transactions).

[19] *Michigan Canners & Freezers Ass'n Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

particular case supported federal preemption. *Id.* at 496. The Court held it did, explaining that the state requirements

> cannot be given effect and allowed to supplement the federal flow requirements. A state measure is "pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."

California, 495 U.S. at 506 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

Similarly, RGGI interferes and conflicts with FERC's goals of developing competitive wholesale markets and ensuring that undue discrimination does not occur in the provision of jurisdictional services.[20] Pursuant to their joint, regional implementation efforts, most states in the RGGI compact, including New York, are now participating in a collective multi-state auction in which all or nearly all of the state-allocated allowances are auctioned to the highest bidder. As explained below, the auctioning of a vast majority of the allowances will impose higher costs on the fossil-fuel fired generation and will thus affect the interstate market price of wholesale power throughout the RGGI region, including New York.

Within the RGGI region, some wholesale power prices are set by markets operated by regional transmission organizations ("RTOs") or independent system operators ("ISOs"). Such markets are administered through FERC-approved market rules and procedures contained in FERC-approved tariffs. 16 U.S.C. § 824d(a) ("All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy

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[20] *See, e.g.*, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

subject to the jurisdiction of [FERC], and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.”). Three RTOs/ISOs in the region -- the New York Independent System Operator, Inc. (“NYISO”), ISO-New England (“ISO-NE”), and the PJM Interconnection L.L.C. (“PJM”) -- administer energy, capacity, and ancillary services markets in the regions in which they operate. The RTOs/ISOs conduct wholesale power auctions that match bids for the sale of electricity with offers for the purchase of electricity. The market-clearing prices that result from the matching of bids and offers set the price for the electricity product being sold in an auction. In such auctions, electricity suppliers have a compelling economic incentive to bid (*i.e.*, offer to sell their electricity) at the level of their marginal costs to produce the electricity so that they will be selected to operate whenever the market-clearing price set by the RTOs/ISOs through the auction process makes it profitable to do so. This in turn gives every supplier incentive to strive to lower its costs to be competitive, thus maximizing system efficiency.

Electric generating units subject to RGGI will have to purchase allowances to cover their carbon dioxide emissions. This will result in those electric generating units having higher electricity production costs, which will be reflected in higher bid prices (*i.e.*, offers for sale of wholesale electricity) being submitted to the RTOs/ISOs to ensure the cost of allowances is covered. If electricity demand for wholesale electricity is high enough, those generating units could be selected by the RTOs/ISOs for dispatch, thus setting a higher market-clearing price than if such RGGI costs were not imposed. These additional costs associated with RGGI result from a state-created process that does not reflect the true marginal costs of the affected units. When this occurs, the clearing price for wholesale electricity is artificially inflated because of the RGGI

allowances and is at odds with the federal goal set forth in the FPA that wholesale prices be determined by the marginal costs of meeting load in a given interval.

The clearing price for wholesale electricity that is set by the RTOs/ISOs is set at the highest level of the bids accepted and that price is paid to *all* generators that are dispatched, regardless of their individual marginal costs or their bids in that particular market auction. Electric generators that do not incur RGGI costs will receive the inflated higher clearing prices set by the units that do have to comply with RGGI and will not be subject to the same incentives to reduce their costs. In this way, RGGI interferes with FERC's authority over wholesale electricity sales in interstate commerce. *See* Steven Ferrey, *Carbon and the Constitution: State GHG Policies Confront Federal Roadblocks*, PUBLIC UTILITIES FORTNIGHTLY, Apr. 2009, at 42-43 (Attachment A to this Memorandum).

Indeed, RGGI's very purpose is to manipulate the price and dispatch of power in interstate commerce to reach desired policy goals. RGGI participants, including New York, have candidly stated that the rationale for auctioning up to 100% of RGGI-allocated allowances is to increase the cost of carbon-dioxide-emitting power generation, meaning that that generation will be less competitive in the wholesale electricity bidding process, and to raise substantial revenue. *See, e.g.*, NYDEC, Notice of Pre-Proposal of New York RGGI Rule (2006), AR 94 at 2-3 (stating that purpose of auction is to prevent affected electric generators from receiving excessive rates of return under FERC-approved market-based rates). The effect of RGGI is to influence the market-clearing prices that result from wholesale electricity markets operated by RTOs and ISOs in the Northeast in ways that do not reflect the true marginal costs of the generation available to supply electricity demand. Therefore, RGGI operates in a way that frustrates

achievement of FERC's goal of creating competitive wholesale markets that maximize economic efficiency.

Moreover, courts have rejected attempts by an individual state indirectly or directly to promote low-carbon-dioxide-emitting electricity production through measures that contravene the provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3. *See Indep. Energy Producers Ass'n Inc. v. Cal. Pub. Utilities Comm'n*, 36 F.3d 848 (9th Cir. 1994) (rejecting the state public utility commission's claim of authority to establish a premium price for renewable low-carbon power projects); *see also S. Cal. Edison Co.*, 70 F.E.R.C. ¶ 61,215 (1995) (refusing to permit higher price set by California for renewable low-carbon electric power supply sources). RGGI states seek to accomplish the same objective from the other side -- discouraging high-carbon generation by increasing its cost. But the constitutional infirmity is the same -- state manipulation of wholesale electricity prices to advance policy purposes outside the federal regime -- and is, in fact, compounded by the use of an unauthorized interstate compact to achieve those purposes.

Therefore, RGGI violates the Compact Clause because it aggrandizes state power and authority in a manner that encroaches on and interferes with -- or has the potential to interfere with -- a federal supremacy interest -- Congress' determination through the FPA to vest FERC with exclusive authority to regulate interstate wholesale sales and transmission of electricity.

4. RGGI Encroaches on Congress's Authority To Regulate Interstate Commerce.

RGGI also encroaches on the exclusive authority of the United States to regulate interstate commerce. U.S. CONST. art. I, § 8, cl. 3. That RGGI has the *potential* to encroach on the federal government's exclusive authority to regulate interstate commerce violates the

Compact Clause.[21] *U.S. Steel*, 434 U.S. at 472. RGGI states, including New York, have recognized that, to accomplish the objectives of the RGGI compact, RGGI will have to address how to limit importation of low-cost generation from outside of the RGGI region, which comes from generating sources that are not subject to RGGI limits on their carbon dioxide emissions (commonly referred to as leakage).[22] *See, e.g*., RGGI Leakage Report, AR 24-2 (detailing various methods of addressing leakage, including "carbon adder" and emissions rate mechanisms and capping emissions associated with serving load, methods that would be designed to discourage importation by RGGI states of "uncapped," non-RGGI emissions). Thus, it is clear that RGGI has the *potential* to encroach on the exclusive authority of the federal government to regulate interstate commerce, and as a result, RGGI violates the Compact Clause.

5. RGGI Encroaches on the Federal Government's Conduct of Foreign Policy.

Finally, RGGI aggrandizes state power and authority that encroaches upon the federal government's foreign policy powers. RGGI is currently working closely with foreign nations to prepare for those nations' membership in RGGI or their political subdivisions. *See* Indeck Brief at 35 n.8. That the RGGI states, including New York, are engaged in discussions with foreign nations, which discussions have as their objective an international agreement on control of GHGs

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[21] New York's argument that Indeck's Commerce Clause argument is unripe, NY Resp. Br. at 70, misses the point. Where a Commerce Clause violation must be actual to preempt state action, a Compact Clause violation requires a different standard -- it is sufficient that state action has the potential to interfere with a federal supremacy interest. *See* supra note 12 and accompanying text.

[22] The fact that the RGGI compact already has a regional working group designing methods to address leakage shows that the potential to interfere with interstate commerce is not merely speculative, but real. The RGGI states recognize that they will have to address leakage to make the program work and will inevitably need to take some kind of action in the near future that will burden disproportionately interstate commerce or result in extraterritorial regulation. *See* RGGI Leakage Report at 41-42, AR 24-2 at 41-42 (listing initial policy recommendations to mitigate leakage and finding that continued monitoring and evaluation of leakage are needed).

(and the price of electricity), encroaches on the federal government's exclusive power over the conduct of foreign policy. U.S. CONST. art. I, § 8, cl. 3 (The Congress shall have the Power . . . To regulate Commerce with foreign Nations"); *id.*, art. II, § 2 (setting forth the Executive's role as Commander in Chief to make treaties and to appoint ambassadors).

6. RGGI Is Not Authorized by the CAA.

Section 102(c) of the Clean Air Act, 42 U.S.C. § 7402(c), does not provide authorization for an interstate compact such as RGGI. That provision states in relevant part:

> The consent of the Congress is hereby given to two or more States to negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States, for (1) cooperative effort and mutual assistance for the prevention and control of air pollution and the enforcement of their respective laws relating thereto, and (2) the establishment of such agencies, joint or otherwise, as they may deem desirable for making effective such agreements or compacts. No such agreement or compact shall be binding or obligatory upon any State a party thereto unless and until it has been approved by Congress.

RGGI is far different from what is contemplated in section 102(c). RGGI goes well beyond inter-state cooperation and assistance to address localized pollution through the respective states' laws and programs. Rather, RGGI's objective is to address the international issue of global atmospheric concentrations of GHGs, a matter on which a handful of states can have little or no impact, given global emissions of these gases.

Moreover, as discussed above, RGGI is intended to be more than a non-binding mutual cooperation agreement. Although the original RGGI Model Rule may not have been binding on states and states can opt out of RGGI, the intent of the MOU signed by New York and other RGGI states was to follow the basic principles of the model rule and adopt binding requirements that would result in the establishment of a regional program that would govern the operation of sources going forward. That is exactly what has happened: RGGI states have adopted common regulatory elements, set a regional target, established regional allowance based on that target,

allocated those allowances among the states, and established and implemented a common auction system. Thus, the Model Rule, in effect, binds the RGGI states through common underlying elements and a joint cap and trade system. As New York admits, the State adopted major regulatory provisions as proposed in the Model Rule, such as the agreed cap applicable to New York, creation of allowances, and adoption of three year compliance periods. NY Resp. Br. at 9, 13.

Now that the Model Rule has been implemented throughout the region and in New York, RGGI has established a "valuable, marketable asset," NY Resp. Br. at 62, the creation of allowances fully fungible within the region for purposes of complying with each state's requirements. Such a program, which has already sold allowances at several regional auctions, cannot be unwound overnight by the withdrawal of member states. In short, RGGI is simply too closely integrated and dependent on the joint implementation of common elements to be considered non-binding, especially in comparison to the fully voluntary cooperative programs envisioned by CAA section 102 to address localized air pollution.

That Congress saw a need to address compacts in the context of interstate pollution in the Clean Air Act shows that Congress understood such compacts can implicate constitutional concerns. The fact that Congress limited its approval to wholly voluntary and non-binding compacts addressing localized pollution concerns confirms the illegality of the RGGI compact.

C. Important Public Policies Would Be Advanced by Recognizing RGGI's Constitutional Invalidity.

Recognition by this Court of the constitutional problems associated with RGGI would advance several important public policies. State programs, including regional programs, that regulate GHG emissions impose substantial costs without any evidence of a discernible effect on global climate change. As New York states, these costs will be borne by New York ratepayers.

N.Y. Resp. Brf. at 12. In addition, the problem of leakage associated with state and regional programs further limits their effectiveness. State programs such as RGGI that limit GHG emissions harm the economy, punishing households and businesses with higher electricity prices and impaired electric reliability, while yielding no environmental benefit. A patchwork of state GHG regulatory programs throughout the United States therefore is an inefficient approach to managing GHG emissions. Any approach to address GHG emissions and the issue of global climate change needs to be national in scope.

1. RGGI Imposes Substantial Costs Without Any Evidence that It Will Have A Discernible Effect on Global Climate Change.

Perhaps the most compelling policy argument against RGGI is the simple fact that it will not produce any measurable environmental benefits that could justify *any* costs, let alone the substantial costs it will impose in New York and the region. First, the RGGI states have failed to produce compelling evidence that RGGI will have any appreciable effect on global climate change. On the contrary, the available scientific evidence indicates that even if states reduce emissions to the RGGI targets, RGGI will fail to achieve any consequential positive impact on global climate change. This failure is due to the minuscule size of the contribution from the electric generating sources regulated under RGGI to global GHG concentrations.[23] Further,

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[23] In 2004, the RGGI states emitted about 164 million metric tons of carbon dioxide. *See* RGGI, Historical Emissions (Feb. 2009), *available at* http://www.rggi.org/states/historical_emissions. In the same year, sources in the United States emitted about 5,973 million metric tons of carbon dioxide. EIA, Emissions of Greenhouse Gases in the United States 2004, at 19 (Dec. 2005), *available at* http://www.eia.doe.gov/oiaf/1605/archive/gg05rpt/pdf/057304.pdf. United States emissions of carbon dioxide constituted 22% of global emissions. EIA, Greenhouse Gases, Climate Change, and Energy (May 2008), *available at* http://www.eia.doe.gov/bookshelf/ brochures/greenhouse/Chapter1.htm. This means that carbon dioxide emissions from the RGGI states comprised only 0.602% of global carbon dioxide emissions in 2004. Notably, this percentage is for total emissions from *all* sources in the RGGI states, not just the amount emitted by the electric generating plants regulated by RGGI, which would be only a fraction of that total. Even if the RGGI states managed to eliminate their carbon dioxide emissions, it is not credible to conclude that result would meaningfully affect global climate change.

continuing increases of GHG emissions in non-regulating jurisdictions, particularly in countries other than the United States, will offset any GHG reductions that occur because of RGGI. *See* GLOBAL CARBON PROJECT, CARBON BUDGET AND TRENDS 2007 (Sept. 2008), *available at* http://www.globalcarbonproject.org/carbonbudget/07/index.htm (indicating that China overtook the U.S. as the largest emitter of carbon dioxide in 2006 and that emissions from other developing countries are growing rapidly, outpacing growth in the U.S. and other developed nations). A number of studies, discussed below, confirm that state and regional actions will have very little (if any) effect on global climate change.

Although there is no comprehensive analysis of the impacts RGGI might have on global climate change, there are studies that examine the impact of emission reductions in two RGGI states. Specifically, studies of Maryland and New Hampshire demonstrate that their compliance with RGGI will result in no measurable environmental benefits. For example, the study of Maryland's emissions found that if the state immediately ceased all anthropogenic carbon dioxide emissions, now and forever, "the rate of year-over-year growth in global carbon dioxide emissions (primarily fueled by massive emissions increases in China) would completely subsume Maryland's total contribution in just one month's time." Science and Public Policy Institute, *Observed Climate Change and the Negligible Global Effect of Greenhouse-gas Emission Limits in the State of Maryland* (Aug. 2008), *available at* http:// scienceandpublicpolicy.org/images/stories/papers/originals/Maryland_Climate_Change.pdf. The same is true of New Hampshire's program to implement RGGI; independent analysis has established that a complete cessation of all anthropogenic carbon dioxide emissions in the state would be "subsumed by global greenhouse gas emissions increases (primarily from China and India) in only one week's time, and would produce no detectable or scientifically meaningful

impact on local, regional, or global climate." Science and Public Policy Institute, *Observed Climate Change and the Negligible Global Effect of Greenhouse-gas Emission Limits in the State of New Hampshire* (July 2008), *available at* http://scienceandpublicpolicy.org/images/stories/papers/originals/chip_newhampshire_report.pdf. RGGI cannot be expected to mitigate appreciably any global climate change.

Finally, consideration of the estimated effects of the Western Climate Initiative ("WCI") -- a proposed regional GHG program in the western United States that was modeled on RGGI and applies to 20% of the nation's economy -- is also instructive. WCI, WCI DESIGN RECOMMENDATIONS FOR THE WCI CAP-AND TRADE PROGRAM at 1 (Sept. 23, 2008), *available at* http://www.westernclimateinitiative.org/ewebeditpro/items/O104F19865.PDF. Analysis of this program indicates the WCI, even though it would cover a larger region and would require greater emissions reductions, would be just as ineffective as RGGI states' programs at addressing global climate change. An assessment of the WCI region's contribution to global climate change using the equations and methods for calculating emission impacts used by the Intergovernmental Panel on Climate Change[24] ("IPCC") concluded that reducing WCI member states' GHG emissions in accordance with the program's stated goals would result in reductions in the GHG equivalent of 383 million metric tons of carbon dioxide emissions between 2012 and 2020. This reduction would result in an overall shift in global atmospheric GHG concentrations in the year 2100 from 550 parts per million ("ppm") to about 549.869 ppm. According to IPCC formulas, therefore, WCI would be incapable of decreasing overall temperatures by more than about *one ten thousandth* of one degree Celsius. WESTERN BUSINESS ROUNDTABLE, ANALYSIS, COMMENTS

[24] The IPCC is an intergovernmental body established by the World Meteorological Organization and the United Nations Environment Programme. It publishes assessments of the state of climate science on a regular basis, most recently in 2007.

AND CONSTRUCTIVE SUGGESTIONS TO THE WESTERN CLIMATE INITIATIVE: IDEAS FOR REDUCING GHG EMISSIONS WHILE "KEEPING THE LIGHTS ON" AND THE ECONOMY GROWING IN THE WEST at 65-69 (Feb. 2009), *available at* http://www.westernroundtable.com/Portals/1/Docs/WCI_Analysis_FINAL.pdf. Clearly, this result is imperceptible and cannot justify the burdens imposed by RGGI.

2. RGGI's "Leakage" Will Further Limit the Program's Effectiveness.

As discussed above, "leakage" is the term used to describe the phenomenon whereby GHG-emitting sources, and thus GHG emissions, move from the regulating jurisdiction, such as the RGGI region, to non-regulating jurisdictions to avoid emission caps and their associated costs. Leakage can be exacerbated due to the fact that the regulating region will have economic incentives to increase its imports of electricity from unregulated sources because of the associated cost savings, yielding little if any emission decrease over a broader region.

Studies have demonstrated that leakage has occurred under regulatory programs conceptually similar to RGGI, and RGGI member states have recognized that leakage will likely be a problem for the program. *See, e.g.*, R. Becker and V. Henderson, *Effects of Air Quality Regulations on Polluting Industries*, JOURNAL OF POLITICAL ECONOMY, Vol. 108 No. 2 (2000) (Attachment B to this Memorandum); MOU at 9-10, AR 245 at 9-10. One study of California's contemplated intrastate GHG cap-and-trade program estimated that it would result in leakage of over 60% of emissions to other jurisdictions. M. Fowlie, *Incomplete Environmental Regulation, Imperfect Competition, and Emissions Leakage* (2007) (Attachment C to this Memorandum). Another analysis found that even a five-state cap-and-trade program would result in substantial leakage. J. Bushness, C. Peterman, and C. Wolfram, *California's Greenhouse Gas Policies: Local Solutions to a Global Problem? CSEM Working Paper 166*, Center for the Study of

Energy Markets, University of California Energy Institute (2007), *available at* http://www.ucei.berkeley.edu/PDF/csemwp166.pdf. To the extent emitters and emissions move from the RGGI region to other jurisdictions not subject to RGGI requirements, or that electricity from other states without RGGI caps flows into the RGGI region, RGGI states, and consumers in those states, will incur all of the substantial costs of regulation without successfully reducing emissions even by the limited amounts the program contemplates.

3. While Yielding No Perceptible Environmental Benefit, RGGI Will Harm the Economy and Punish Households and Businesses with Higher Prices and Impaired Electric Reliability.

a. Studies of RGGI Underestimate Its Substantial Costs.

As part of their initial planning for RGGI, member states contracted with consultants to analyze RGGI's potential effects on retail electricity prices and economic activity in the region. RGGI has released summaries of the methods and results of the analyses that evaluated generation and dispatch in the electricity sector and wholesale electricity pricing in the region under different proposed emissions caps. The outputs from this model were then run through a model of the RGGI regional economy to determine retail prices for electricity and overall economic impact in the region. Generally, this analysis concluded that the cap-and-trade component of the program would have a small negative economic impact. *See* RGGI, REGIONAL GREENHOUSE GAS INITIATIVE FACTSHEET at 2, *available at* http://www.rggi.org/docs/RGGI_Executive%20Summary_4.22.09.pdf. Studies prepared by two individual member states -- Maryland and New Hampshire -- reached generally similar conclusions. New Hampshire, however, concluded that RGGI's costs would primarily be borne by electricity customers. UNIVERSITY OF NEW HAMPSHIRE, ECONOMIC IMPACT IN NEW HAMPSHIRE OF THE REGIONAL GREENHOUSE GAS INITIATIVE (RGGI): AN INDEPENDENT ASSESSMENT at 4 (Jan. 2008), *available*

at http://des.nh.gov/organization/divisions/air/tsb/tps/climate/rggi/documents/unh_rggi_study.doc.

Specifically, New Hampshire found that the costs of RGGI would increase the electric utility bills of New Hampshire customers by $20 million at a $2 carbon dioxide allowance price in 2009, rising to $88 million at an $8 allowance price by 2018. New Hampshire noted, however, that allowance prices as modeled in its economic assessment could be significantly underestimated. (In fact, in the third RGGI auction (and the first of 2009), 2009-vintage allowances (*i.e.*, allowances first usable to cover emissions in 2009) sold at $3.51 per allowance, significantly above the $2 price assumed by New Hampshire.)[25] Higher prices, such as allowance prices between $12 and $18 in 2018, would increase electricity rates by approximately 9.9% that year. *Id*. at 4-5.

Independent analyses of state and regional programs similar to RGGI suggest that the methodologies used to examine the costs of RGGI significantly understate the program's costs.[26] First, as noted by economist Dr. Robert N. Stavins of Harvard University in his study examining the economic impacts of California's comparable GHG regulatory program, Cal. Health & Safety Code §§ 38501-38599, "bottom-up" models, such as the one used to evaluate RGGI, are

[25] 2012-vintage allowances sold at a clearing price of $3.05. *See* RGGI, STATES RELEASE RESULTS OF THIRD AUCTION FOR RGGI CO_2 ALLOWANCES at 1 (Mar. 20, 2009), *available at* http://www.rggi.org/docs/Auction%203%20News%20Release%20MM%20Report.pdf.

[26] Even before RGGI was implemented, New York had the country's fourth highest total energy costs and average retail electricity rates. New York consumers pay 62% more for retail electricity than do consumers 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 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. As noted above, RGGI will result in even higher energy prices, adding substantial stress to consumers already facing a prolonged economic recession.

unreliable in this context and substantially underestimate the cost of GHG emission mitigation policies. Stavins et al., *Too Good To Be True? An Examination of Three Economic Assessments of California Climate Change Policy* at 15 (Mar. 2007) (hereinafter "Stavins"), *available at* http://www.rff.org/documents/RFF-DP-07-12.pdf. A similar analysis of California's program by the Electric Power Research Institute ("EPRI") confirms that studies such as those conducted by RGGI and its members underestimate costs. EPRI, PROGRAM ON TECHNOLOGY INNOVATION: ECONOMIC ANALYSIS OF CALIFORNIA CLIMATE INITIATIVES: AN INTEGRATED APPROACH, VOL. 1 SUMMARY FOR POLICYMAKERS, Final Report (June 2007), *available at* http://mydocs.epri.com/ docs/public/000000000001014641.pdf. Both studies found that methodologies similar to those used by RGGI states failed to account accurately for effects on trade balances, electricity rates, and the increased costs of goods and raw materials resulting from energy price increases, among other things. *Id.* at 1-7, 3-3; Stavins at 8.

Indeed, even Maryland's optimistic analysis concluded that RGGI would result in reduced coal- and natural gas-fired electricity generation in Maryland, reduced exports of electricity from Maryland, and increased reliance on power imports from other states. Maryland also found that RGGI would result in reduced investment in new generation capacity in the state by nearly 45% by 2025, and that profits of existing electric generators would fall by 13% by 2010 and 12% by 2025, compared to the baseline. UNIVERSITY OF MARYLAND, CENTER FOR INTEGRATIVE ENVIRONMENTAL RESEARCH, ECONOMIC AND ENERGY IMPACTS FROM MARYLAND'S POTENTIAL PARTICIPATION IN THE REGIONAL GREENHOUSE GAS INITIATIVE at 4 (Jan. 2007), AR 190 at 4.

Dr. Stavins points out that the type of economic analysis RGGI members use to support the notion that the program will result in net benefits systematically overestimates the value of

energy savings measures. Stavins at 15, 19. As with Stavins' analyses of California's program, these analyses of RGGI's economic impacts employ flawed methodologies, underestimate and omit significant costs, and fail to assess accurately the value of energy efficiency programs. *See* Lisa Petraglia and Dwayne Breger, *Economic Development Research Group*, *Economic Impacts of RGGI under the Proposed SWG Package Scenarios* (Sept. 21, 2005), *available at* http://www.raabassociates.org/Articles/remi_results_9_21_05.ppt.

b. RGGI Will Undermine Electric Reliability.

RGGI implementation in New York and the entire RGGI region, with its attendant costs, could not come at a worse time. NYISO and ISO-NE have warned for several years that the region may face a power shortage. NYISO in 2007 warned that, beginning in 2011, reliable electricity supplies will be imperiled without new sources of energy. NYISO, COMPREHENSIVE RELIABILITY PLANNING PROCESS (CRPP) 2007 RELIABILITY NEEDS ASSESSMENT, Mar. 16, 2007, *available at* http://www.nyri.us/pdfs/Reference/2007_RNA.pdf. NYISO further found that programs such as RGGI (even before the RGGI states decided to auction most of the allowances, a step that made RGGI even more stringent and costly) "will place increasing economic pressure on older generating plants as they incur costs to meet these requirements." *Id.* at 18. In 2008, NYISO again analyzed RGGI's effect on energy supply reliability in New York, concluding that RGGI creates the risk that generators could not obtain sufficient allowances "to meet bulk power system electricity needs and also comply with the RGGI program."[27] NYISO, FINAL REPORT, 2008 RELIABILITY NEEDS ASSESSMENT, SUPPORTING DOCUMENTS, AND LIST OF APPENDICES FOR THE 2008 COMPREHENSIVE PLANNING PROCESS, Dec. 10, 2007, *available at* http://www.nyiso.

[27] According to the North American Electric Reliability Corporation's report entitled 2007 LONG-TERM RELIABILITY ASSESSMENT: 2007-2016 at 11 (Oct. 2007), *available at* http://www.nerc.com/files/LTRA2007.pdf., ISO-NE, NYISO, and PJM will, between 2009 and 2012, all drop below the target capacity margin levels required to meet summer peak load electricity demand.

com/public/webdocs/services/planning/reliability_assessments/2008_RNA__Supporting_FINAL_REPORT_12_12.pdf.

By requiring nearly 100-percent auction of allowances and permitting any party to bid for allowances allocated to New York and other RGGI states, the RGGI program can only make it more difficult for in-state generators subject to RGGI to secure sufficient allowances to produce power to meet the growing need for reliable electricity.[28] Moreover, the ability of non-regulated entities, such as out-of-state generators, brokers, financial institutions, and others to participate in the auction creates an added risk of market speculation and manipulation that could further affect pricing.

In addition, RGGI implementation will necessarily shift reliance from higher-carbon-emitting fuels like coal to lower-emitting fuels such as natural gas. Increased reliance on natural gas increases the vulnerability of the entire Northeast to interruptions in fuel supply and delivery. *See, e.g.*, ISO-NE REPORT, POWER GENERATION AND FUEL DIVERSITY IN NEW ENGLAND: ENSURING POWER SYSTEM RELIABILITY at 1 (Aug. 2005) (recognizing risk to reliability arising from increased reliance on gas), *available at* http://www.masstech.org/renewableenergy/public_policy/DG/resources/2005-08-25_iso-ne_diversity-reliability.pdf; NYISO, THE COMPREHENSIVE RELIABILITY PLAN 2007 at 55 (Sept. 18, 2007) (concluding that new gas-fired plants should be constructed with the ability to co-combust alternative fuels to maintain fuel diversity and

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[28] Amici curiae submit that the reliability analysis conducted by the New York State Department of Public Service ("NYSDPS") -- which found that, for the four coal and five oil/gas facilities analyzed, RGGI implementation would result in net revenue reductions that increase over time but that reliability would not be substantially impaired -- is inadequate for a number of reasons, but perhaps most significantly because it fails to consider that a 100% auction would remove allowances from circulation. *See* NYSDPS, DPS Staff Analysis of the Proposed RGGI Program's Impact on Select Coal and Gas/oil-fired Generating Facilities (Jan. 9, 2007). Amici are unaware of any publicly available comprehensive reliability analysis by NYSDPS, NYDEC, or NYSERDA that takes into account RGGI's important auction feature.

reliability), *available at* http://www.nyiso.com/public/webdocs/services/planning/reliability_assessments/crp_report_091807_final.pdf; *see also* NYISO, BREAK-EVEN ANALYSIS OF THE SENSITIVITY OF NYISO FOSSIL GENERATING UNITS TO VARIATIONS IN THE COSTS OF CO_2 ALLOWANCES AND FUEL at 10-12 (July 26, 2007) (concluding that the viability of existing oil-fired generating units, on which NYISO depends to support day-to-day operations of the NYISO system, will be challenged by implementation of RGGI), *available at* http://www.nyiso.com/public/webdocs/committees/bic_miwg/meeting_materials/2007-07-31/MIWG_RGGI_break_even_analysis_73107.pdf.

4. A Patchwork of State and Regional Programs Is an Inefficient Approach to Managing GHG Emissions.

Overlapping state and federal regulation can impose significant economic burdens on businesses and households for a number of reasons. For example, in its assessment of state and federal roles in regulating GHG emissions, the U.S. House of Representatives Energy and Commerce Committee noted that "a patchwork of State or local programs" could result in "inefficient or wasteful resource allocation," lending support for a conclusion that an exclusively federal GHG cap-and-trade program would be more appropriate. U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON ENERGY AND COMMERCE, CLIMATE CHANGE LEGISLATION DESIGN WHITE PAPER: APPROPRIATE ROLES FOR DIFFERENT LEVELS OF GOVERNMENT at 22 (Feb. 2008), *available at* http://www.nrc-recycle.org/Data/Sites/1/Climate%20Change/US%20House%20Climate%20Change%20White%20Papers%203.pdf. The Committee's analysis found that, in general, a burden on interstate commerce is "most likely to be a problem for products that are sold across State lines, such as transportation fuel." *Id*. Like transportation fuel, electricity, the primary target of the RGGI program, is sold across state lines.

The inefficiencies inherent in overlapping state and federal GHG cap-and-trade programs have been thoroughly assessed. As stated by Professor Jonas Monast, co-director of the Climate Change Policy Partnership at Duke University:

> From an economic efficiency perspective, a single, national market provides covered entities with the broadest range of options for complying with a cap on GHG emissions. With greater flexibility to seek low cost emission reductions and potentially lower transaction costs, the overall cost of climate regulation for consumers would be reduced.

Jonas Monast, *Integrating State, Regional, and Federal Greenhouse Gas Markets: Options and Tradeoffs*, 18 DUKE ENVTL. L. & POL'Y F. 329, 333 (Spring 2008) (internal citations omitted), *available at* http://www.law.duke.edu/shell/cite.pl?18+Duke+Envtl.+L.+&+Pol'y+F.+329+pdf. The accuracy of this conclusion is borne out by an exhaustive analysis performed by Harvard's Dr. Stavins on behalf of the Brookings Institution. *See* Robert N. Stavins, *A U.S. Cap-and-Trade System to Address Global Climate Change* (Oct. 2007) (hereinafter "Stavins 2007"), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2007/10climate_stavins/10_climate_stavins.pdf. As Dr. Stavins notes:

> [T]he stakes associated with [GHG emission reduction] policy design are significant. . . . In the case of climate change, choosing an inferior approach could be exceptionally costly: the difference between a cost-effective approach and an inferior one could be as great as $150 billion annually (1 percent of today's GDP), or $1.8 trillion over a decade (Repetto 2007). And because of the unique characteristics of the climate change problem, simply relying on existing and familiar policy models will not lead to the best solutions.

Id. at 7. Dr. Stavins has explained that state and regional programs such as RGGI are, from a policy standpoint, inferior to a uniform, federal cap-and-trade program. *See* Robert N. Stavins, *Comments on the Recommendations of the Market Advisory Committee to the California Air Resources Board,* "*Recommendations for Designing a Greenhouse Gas Cap-and-Trade System for California*," at 15 (June 15, 2007) (stating that, for economic reasons, California's cap-and-

trade program should be "discontinued as an independent regulatory system" in favor of a unitary, federal program), *available at* http://ksghome.harvard.edu/~RStavins/Monographs_&_Reports/Stavins_Comments_on_Draft_MAC_Report.pdf. In his study of RGGI, Dr. Stavins stated that an "economy-wide, national, upstream cap-and-trade system . . . could take the place of any regional, state, and local systems so as to avoid duplication, double counting, and conflicting requirements." Stavins 2007 at 27 (internal citations omitted).

Dr. Stavins has also noted several flaws in RGGI's design that make it especially problematic. Specifically, he points to four overarching problems with RGGI's design:

> First is the leakage problem, which is potentially severe for any state or regional program, particularly given the inter-connected nature of electricity markets (Burtraw, Kahn, and Palmer 2005). Second, the program is downstream for just one sector of the economy, and so very limited in scope. Third, despite considerable cost uncertainty, a true firm safety-valve mechanism was not adopted. Instead, there are trigger prices that allow greater reliance on offsets and external credits in the expectation that these can increase supply. Fourth, as mentioned above, the program limits the number and geographic origin of offsets.

Robert N. Stavins, *Appendix to: A U.S. Cap-and-Trade System to Address Global Climate Change -- Applications of Cap-and-Trade Mechanisms* at 7 (Oct. 2007), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2007/10climate_stavins/10climate_stavins_appendix.pdf.

Further inefficiencies will result simply from the existence and implementation of competing and inconsistent programs. Firms doing business within a complex mix of state, regional, and federal jurisdictions will incur additional, unnecessary costs due to the need to satisfy multiple layers of, and potentially conflicting, legal requirements.

For all of these reasons, if RGGI remains in place, it will impose significant additional costs for little or no environmental benefit.

IV. Conclusion

For the reasons stated above and by Indeck in its brief, this Court should hold New York's regulations implementing RGGI invalid and void *ab initio* as contrary to New York law and the United States Constitution.

Respectfully submitted,

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Dated: May 19, 2009

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