SUPREME COURT OF THE STATE OF NEW YORK
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:_____ RJI No:_____ **VERIFIED JOINT PETITION AND COMPLAINT**

PETITION AND COMPLAINT

Petitioner Plaintiff Indeck Corinth, L.P. ("Indeck") brings this joint Petition and Complaint, seeking declaratory and injunctive relief, to redress irreparable injuries that Indeck will otherwise suffer as a direct result of the unauthorized, unlawful, arbitrary and discriminatory program by which the defendant New York state agencies have determined to implement the "Regional Greenhouse Gas Initiative" ("RGGI"), a multi-state agreement by which the member States seek to limit and ultimately reduce emissions of carbon dioxide ("CO_2") within their territory. The then-Governor of New York entered into the RGGI Agreement in December of 2005, without any statutory or other authority, and without the consent or concurrence of the State Legislature, in violation of separation of powers under the New York Constitution. As a result, New York's participation in RGGI is unauthorized and unlawful. Moreover, RGGI, as the defendants have determined to implement it, (i) would impose an unauthorized and unlawful tax by executive fiat and without proper legislative authorization, (ii) would create an unauthorized spending program giving unfettered discretion to a public benefit corporation to

disburse hundreds of millions of dollars with no involvement, authorization or appropriation by the State Legislature in violation of the New York Constitution, (iii) would impose an unfair and discriminatory cost upon Indeck, while preventing Indeck from having a fair opportunity to recover that cost, (iv) lacks the Congressional authorization constitutionally required for a multi-state compact in violation of the United States Constitution, and (v) arbitrarily and unlawfully discriminates against Indeck. Because the defendant Governor and the defendant agencies never obtained authorization from the New York State Legislature for the program, and surrendered the proper scope of their own discretion to an unlawful multistate compact, a laudable policy goal of controlling greenhouse gas emissions has been perverted such that clean, low emitting generating stations will suffer financial and other injuries, emissions will likely increase, and electricity costs to New York and other consumers will rise.

For and as its joint Petition and Complaint, Indeck states as follows:

NATURE OF THIS ACTION

1. In this joint Petition and Complaint, Indeck seeks review of the actions and inactions of the Governor of New York, the New York State Department of Environmental Conservation ("DEC"), New York State Public Service Commission ("PSC"), and the New York State Energy Research Development Authority ("NYSERDA") in promulgating rules to implement New York State's undertakings in RGGI.

2. As admitted by DEC on its own website and in public announcements, RGGI is a multi-state compact among ten northeastern States (the "Compact States"), including New York. In RGGI, the Compact States agreed they would not await a proper Federal program to control greenhouse gases, but instead undertook joint efforts to limit or reduce greenhouse emissions within the ten state area, through a "cap and trade" control

program. As part of their compact, representatives of the Compact States created and agreed to model rules, under which they would jointly and concurrently impose a cap on emissions of carbon dioxide, a greenhouse gas, within the territory of the Compact States. The 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, in turn, will issue 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, electric generating units greater than 25 Megawatts that burn carbon or hydrocarbon fuels must possess sufficient allowances to equal its CO_2 emissions for that year.

THE PARTIES

3. Plaintiff Indeck Corinth, L.P. is a duly formed and existing Delaware limited partnership, authorized to conduct business in New York. Indeck owns and operates the Corinth Generating Station ("Corinth Station"). Indeck Corinth, L.P. has its principal place of business at the Corinth Generating Station, 24 White St, Corinth, New York 12822-1301. Corinth Station uses natural gas, a clean burning fuel, to produce steam and electricity, and is one of the lowest emitting, most efficient generating stations in New York. Because Corinth Station produces both electricity and useful thermal energy in an efficient manner, Corinth Station is a "qualifying facility" under the Public Utility Regulatory Policies Act ("PURPA"), as amended. As a "qualifying facility" or "QF", Corinth Station is entitled to certain benefits defined by Federal law, including rights to contract for the sale of its power under rates and terms established by state regulatory

authority. As an electric generation facility located in New York State, Corinth Station is subject to RGGI and the New York regulations implementing RGGI.

4. Defendant David A. Paterson 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.

5. Defendant DEC 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 DEC certain authority to regulate emission of air pollutants within New York, in accordance with the policies established by the State Legislature. The Governor has designated DEC as the regulatory authority implementing RGGI within New York, but DEC has not been granted any such authority by the New York Legislature.

6. 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 will initially receive all allowances issued by DEC, submit those allowances to the centralized auction, receive all revenues from the sale of the allowances, and expend or disburse all revenues generated by the auction's sale of New York allowances. NYSERDA has not been granted any authority by the New York Legislature to receive allowances under RGGI, to auction or sell allowances under RGGI, to receive revenue from the sale or auction of

allowances under RGGI, or to distribute the revenues received from the auction or sale of allowances under RGGI.

7. Defendant PSC is a New York state regulatory agency located at 3 Empire State Plaza Albany, New York 12223-1350. The PSC regulates retail electrical rates, and under PURPA, establishes the rates at which qualifying facilities sell the power they generate. The PSC set the rates and terms under which Indeck sells the electric power generated at the Corinth Station.

JURISDICTION AND VENUE

8. 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") Art. 30 § 3001; Art. 78 §§ 7801-7806; State Administrative Procedure Act ("SAPA"), Art. 2 § 205; and N.Y. Const. art. VI, § 7a.

9. Venue is proper under CPLR Art. 5 § 506(b). Indeck and the Corinth Station, subject to the state regulatory action and the site of the material events, are both located in Saratoga County.

Overview of the RGGI Program

10. As admitted by DEC in its official website and other publications, RGGI is a compact among ten states in the Northeastern United States. 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 emissions 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.

11. 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 stations within the relevant geographic area would be limited (the "cap") and that level 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 the relevant pollutant) equal to the State-specific cap for that year. Facilities that emit the pollutant, and were subject to the program, are required to acquire sufficient allowances to equal their actual emissions. The certificates would be "tradable" across the entire ten state region, to allow efficient facilities to profit from their ability to control or reduce emissions, and to allow others to speculate or profit on emission levels and the "value" of the tradable allowances. While the Compact States have agreed to limit emissions from facilities within the RGGI region, the program does not limit demand for electricity, and emissions will likely increase in other states and areas in order to provide electricity to New York and other RGGI Compact States. The RGGI program imposes no actual limit on total emissions of greenhouse gases in relation to electricity used by residents and businesses within the RGGI area.

12. The Compact States, in order to implement the MOU and the cap and trade program, formed a Working Group made up of representatives from the affected regulatory agencies in each State. The Working Group, through its efforts and the suggestions and action 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 to implement the RGGI cap and trade program and to implement the Model Rule. At no time, prior to or since the inception of RGGI, has the New York State Legislature authorized the entry into the MOU, authorized the regulatory program embodying the promulgation or implementation of the Model Rule, or authorized the receipt, distribution or other use of the funds required to implement RGGI or raised by its auction program.

13. Initially, the Model Rule and the Working Group contemplated that allowances would be allocated to sources, through an allocation mechanism to be determined. However, at the urging of some stakeholders and on the basis of analysis by consultants, very late in the process of developing the Model Rule, 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 available for general use into a single auction pool, and there would be auctions at which allowances would be purchased by bidders at a single market clearing price established for that auction. Any person could participate in the auctions, seeking to buy allowances to use, to trade or sell, or to retire them in order to reduce the total amount of CO_2 that can be emitted in the Compact States.

New York's Implementation of RGGI

14. 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 has determined to implement the program by promulgation of executive agency regulations and executive fiat only. DEC and NYSERDA promulgated regulations to create a system under which DEC would create and issue New York's allocated share of allowances, and NYSERDA would sell them and receive all proceeds. 6 NYCRR Part 242 ("CO_2 Budget Trading Program"); 21 NYCRR Part 507 ("CO_2 Allowance Auction Program"). Under these rules, DEC will issue allowances and place them exclusively in an "account" managed by NYSERDA. NYSERDA in turn will contribute the allowances in the account to the centralized 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. Under the promulgated rules and without any legislative authority, NYSERDA will distribute the monies received as a result of the auction for any purposes in its sole and unfettered 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 within or without the State, and to persons who may or may not be owners or operators of affected facilities.

15. As of the date of this filing, RGGI has held two centralized auctions. NYSERDA submitted more than twelve million (12,000,000) allowances to the second auction, which was held in December 2008. At that auction, the market clearing price (i.e., the

price at which all allowances in the auction were sold) was $3.38 per ton. As a result, as proceeds from that single auction, NYSERDA is scheduled to receive $41,986,904, to be disbursed by NYSERDA at its unfettered discretion, with no authorization or appropriation by the New York Legislature. Based on the results of the two auctions held to date, and the remaining allowances in NYSERDA's account that will be sold at future auctions, NYSERDA has predicted that it will receive more than $144 million in 2009, to be disbursed by NYSERDA at its unfettered discretion, with no authorization or appropriation by the New York Legislature. Market observers generally predict that the market clearing price will increase in future auctions, and that as a result, NYSERDA will in future years receive more than $144 million in auction proceeds, all to be disbursed by NYSERDA at its unfettered discretion, with no authorization or appropriation by the New York Legislature.

16. The New York State Legislature did not authorize the entry into the RGGI MOU by the then Governor, and has not authorized, approved or consented to the RGGI MOU at any time since the execution of the MOU. The New York State Legislature has not authorized DEC to create a tradable allowance program to control greenhouse gases, nor authorized DEC specifically to regulate emissions of CO_2 by electric generating plants. The New York Legislature has not authorized or set as state policy the RGGI Model Rule as implemented by DEC. The New York Legislature has not authorized DEC to issue greenhouse gas allowances, and has not authorized DEC to issue all such allowances to NYSERDA, for sale in a centralized auction. The New York State Legislature has not authorized NYSERDA to sell greenhouse gas allowances, has not authorized NYSERDA to sell allowances in an auction, and has not authorized NYSERDA's receipt of auction

revenues. The New York Legislature has not authorized the distribution of proceeds of the sale of allowances by NYSERDA, and the New York Legislature has not appropriated or otherwise established a policy for the use of funds received by the State of New York as a result of the sale of allowances. The New York Legislature has not 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. Then Governor Spitzer issued the veto, which subsequently has not been overridden by the New York Legislature.

17. Under the regulations promulgated by DEC to implement RGGI in New York, each electric generating station in New York that is larger than 25 Megawatts in generating capacity and which emits CO_2, is subject to RGGI requirements. 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 buy them during the auction process, or to later trade for or buy them, paying the price set by the trade counterparty. Each such source must have a compliance account under DEC and is required to have in its account the appropriate number of allowances of the proper year to cover the source's emissions for the relevant time period.

18. As part of its promulgation of the RGGI rules, DEC stated that the program is expressly premised on the assumption that electrical generation sources will include the cost they incur to acquire allowances in the rates charged for electricity they generate. In general,

for the unit producing the marginal supply, the cost to produce electricity will increase by the cost of allowances. As a result of the operation of a market process conducted by the New York Independent System Operator ("NYISO"), this increased cost will be reflected in the price received by virtually all generators, allowing them an opportunity to recover the cost of allowances. Indeed, generators who do not need allowances (*e.g.*, nuclear or hydro-electric generators), and generators located outside of the RGGI area who are not bound by RGGI but who bid to serve the New York market, simply as a function of the NYISO market process, will see their revenues and gross profits rise by an amount equal to the cost of the allowances, even though they will not bear that cost.

19. In general, load serving entities 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. It is anticipated that the market clearing price will be set by the marginal units that burn fossil fuels, which are required to purchase RGGI allowances. Since these units are required to purchase and have sufficient RGGI allowances for their emissions, the market clearing price for electricity in each hour will likely reflect the cost of the CO_2 allowances.

20. 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, it is expected that the marginal unit, and therefore the market clearing electricity price, will include allowance costs. The general electricity market operated by the NYISO thus assures that those generators who receive the NYISO market price will have a fair opportunity to recover

allowance costs. Those costs in turn will be passed on to consumers of electricity by those electric utilities that provide retail electric service.

21. Because all affected sources throughout the ten State region must acquire allowances, and because the auction could allow speculative traders or others to bid for and acquire allowances, it is estimated that the allowance auction will generate substantial revenue. These revenues as related to allowances created and issued by DEC will flow exclusively to NYSERDA, will reflect the auction price, and bear no relation to DEC's or NYSERDA's administrative and enforcement costs for the RGGI program. NYSERDA participated in an auction held in December 2008, and NYSERDA is scheduled to participate in additional auctions in March 2009 and thereafter. On information and belief, NYSERDA will receive proceeds from the sale of allowances in those auctions. As a result of its providing allowances to the centralized auctions and the sale of those allowances through the auctions, NYSERDA will likely receive approximately $144 million dollars in proceeds of allowance sales in 2009. It is also expected that the market clearing price will rise in subsequent years, creating a larger revenue stream. Under the regulations promulgated by DEC and NYSERDA, without any approval or action by the New York Legislature, NYSERDA will have unfettered discretion, not controlled by any direct legislative authority or limitations, to disburse all such revenues it receives.

22. NYSERDA estimates the administrative and enforcement costs of the RGGI program to be roughly 10% of the revenue generated. The remainder, 90% of approximately $144 million dollars in 2009 alone and such increased or additional sums as it receives in future years, will be used or disbursed by NYSERDA at its sole discretion.

The Corinth Station

23. The Corinth Station is a natural gas fired combined cycle turbine. In operation, natural gas is burned and the hot exhaust gases spin a turbine, producing electricity. That same hot exhaust gas is then directed through a heat exchanger, generating useful steam and additional electricity. As a natural gas fired generator, Indeck is subject to RGGI and will be required to purchase sufficient allowances to cover its annual emissions of CO_2. The Corinth Station is among the very cleanest, lowest emitting, most efficient generating stations in New York.

24. Because it meets certain standards for the efficient production of both electricity and useful thermal energy, Corinth Station is also a QF under PURPA. PURPA established a Federal policy to encourage the development and operation of facilities that produce both electricity and useful thermal energy ("cogeneration facilities").

25. In order to promote the use of efficient sources of energy production, QFs enjoy certain benefits under Federal and State laws, including the right to sell energy and capacity at the local or purchasing utility's "avoided cost" under terms and conditions set by the state electric regulatory authority. Under Federal law, the avoided cost, *i.e.*, the rate which Indeck is generally entitled by law to receive, is defined as "the incremental cost to an electric utility of electric energy or capacity which, but for the purchase from the QF, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6). Federal law requires avoided cost rates be made available to QFs. The actual avoided cost rates are established under State authority. In New York, the PSC is responsible for setting that avoided cost rate.

26. Indeck sells its electric output under a long term, fixed price contract. The contract was executed in 1989 with Consolidated Edison Company ("Con Edison"). The terms of this contract were effectively directed by the PSC, as the PSC has final approval rights over contracts for the purchase of electricity by Con Edison from a QF. As such, the contract was approved by the PSC in 1990.

27. When the Indeck-Con Edison contract negotiated in 1989, the PSC sought to foster the creation of long term contracts by QFs. The PSC particularly valued stability in the rates, and as part of that policy, the PSC strongly discouraged "reopeners" that would allow the power contract price to be adjusted in the future to reflect any significantly changed circumstances.

28. Indeck, still under the long term contract with Con Edison, will be required under DEC RGGI regulations to purchase allowances either directly from the auction or from a third-party trader. Under the RGGI program and the DEC regulatory analysis issued in support of the RGGI regulations, the cost of the allowance was intended to be "passed through" to purchasers of power and to be reflected in the ultimate consumer cost of power. Contrary to that intent, Indeck is prohibited from passing through the cost of its allowances. The PSC has refused to consider updating the contract terms required by the PSC prior to its approval of the contract more than 18 years ago, in order to allow Indeck to pass the allowance costs through, as intended by RGGI and the DEC regulatory analysis.

29. As a result of the fixed price of the contract between Indeck and Con Edison, the lack of a "reopener" clause and the refusal of DEC to provide for a separate allocation of

allowances or a cost pass through, Indeck, contrary to RGGI and the requirements of PURPA, has no opportunity to recover the direct cost of obtaining the required allowances.

Procedural History

30. During the rulemaking process used by DEC and NYSERDA, Indeck and other similarly situated QFs actively participated and properly raised for agency consideration the issues raised by this joint Petition and Complaint. The agencies received comments specifically raising the issue that the New York Legislature had not authorized the RGGI program, had not authorized the sale of allowances, and had not authorized NYSERDA's receipt and distribution of auction revenues. Indeck specifically raised the issue that the proposed auction methodology imposed on it, and a few additional similarly situated entities, a significant new operating cost that could not be recovered. Furthermore, Indeck, a supporter of the RGGI program, made several different proposals by which this circumstance would be addressed, including an allocation of allowances or a mechanism to allow cost pass-through.

31. Despite Indeck's repeated requests, PSC instructed DEC that PSC was unwilling to mandate a pricing change in the electricity contract to accommodate the dramatically increased cost that Indeck would bear, and which would be imposed by agency rules.

32. DEC's rules do have a limited "safety valve" allocation of allowances to plants subject to long term fixed price contracts, but that program fails to set aside enough allowances to permit all affected facilities subject to long term contracts to receive the allowances necessary to operate, and fails to assure that such facilities adversely affected by the PSC

refusal to direct cost pass-through will have a fair opportunity to obtain allowances or to recover the cost of allowances necessary to operate.

33. Indeck does not oppose addressing greenhouse gas emissions through a properly designed, non-discriminatory national program. Indeck has made repeated reasonable attempts to resolve the issue imposed by a discriminatory combination of long term contract dictated by the PSC and the current RGGI regulations imposed by DEC and NYSERDA. However, none of these agencies, despite being repeatedly alerted to the fact that the RGGI regulations unfairly prevent Indeck from the opportunity to recover the allowance cost without any reason, has been willing to make simple adjustments to the regulations to address their disproportionate impact on Indeck. Accordingly, Indeck is forced to bring this action to obtain redress.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
THE NEW YORK RGGI PROGRAM IS ULTRA VIRES

34. Plaintiff realleges and incorporates herein the allegations contained in paragraphs 1 through 33 of this joint Petition and Complaint as if set forth fully herein.

35. Article III of the 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 and 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 policy decisions, while the executive branch's responsibility is to implement those policies.

36. The Governor of New York executed the RGGI MOU without the consent or authorization of the New York Legislature, and has never obtained the consent or authorization of the New York Legislature to the policies and requirements set forth in the RGGI 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 RGGI MOU has the New York Legislature established, a state policy that would: (i) regulate emissions of greenhouse gases from electric generation facilities; (ii) require or allow the use of a tradable allowance program to regulate emissions of greenhouse gases from electric generation facilities; (iii) require or allow DEC 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 the proceeds received as a result of a sale of allowances. The entry by the then Governor into the RGGI Compact, 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 proceeds of allowance sales would be received and disbursed by the State, necessarily make fundamental policy choices that epitomize "legislative power." Decisions involving licensing, taxation and the promulgation of regulations and programs involving the expenditure of State funds 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 (*i.e.*, is *ultra vires*), and is without proper basis in the laws of New York.

37. 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 Legislature.

38. Neither DEC 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.

39. 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.

40. Under the State Administrative Procedure Act, CO_2 allowances under RGGI are considered licenses or permits. SAPA § 102(4). NYSERDA does not have statutory authority to engage in licensing of any kind and is only authorized to sell real and personal property RGGI regulations specifically state that the allowances are "authorizations to emit" and are not a property or property right. Licensing cannot be considered an implied power as it is not essential to the purpose for which NYSERDA was created.

41. DEC is also not authorized by statute to transfer emission permits to NYSERDA for sale. DEC's authorizing regulations consider the RGGI allowances as "minor permits" requiring various mandatory procedures. 6 NYCRR § 621(g)(2); ECL § 70-0111. The

current RGGI regulations do not meet those requirements either procedurally or substantively.

42. By creating the allowance auction accounts and selling allowances, receiving and then disbursing the proceeds of the allowance auction, all without any authorization from the New York Legislature and without an appropriation of the funds received, NYSERDA and DEC have created a tax and revenue program which has not been authorized by the New York State Legislature.

43. The regulations promulgated by NYSERDA and DEC, the participation of DEC and NYSERDA in the issuance and sale of allowances, the transfer by NYSERDA of allowances to a centralized auction, the receipt of NYSERDA of revenues from the auction of allowances, and the disbursement of proceeds of allowance auctions by NYSERDA are all *ultra vires*, without lawful authority, and in violation of law.

SECOND CLAIM FOR RELIEF
THE NEW YORK RGGI PROGRAM IMPOSES AN IMPERMISSIBLE AGENCY TAX NOT AUTHORIZED BY THE STATE LEGISLATURE

44. Plaintiff realleges and incorporates herein the allegations contained in paragraphs 1 through 43 of this joint Petition and Complaint as if set forth fully herein.

45. The current RGGI provisions promulgated by DEC and NYSERDA create an unconstitutional administrative tax under the New York Constitution. In New York, taxes can only be created by the State Legislature. State agencies like DEC and public benefit corporations like NYSERDA may not create, impose or establish a tax, nor arrogate to themselves State revenues.

46. 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.

47. The market clearing price is determined by the market and is not tied to administrative or enforcement costs, which NYSERDA estimates will only be 10% of the revenues generated in the auction. The revenues generated, estimated to be close to $144 million dollars annually and likely to increase, are to be collected by NYSERDA and distributed at NYSERDA's sole discretion.

48. Neither NYSERDA nor DEC 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.

THIRD CLAIM FOR RELIEF
THE NEW YORK RGGI PROGRAM, AS IMPLEMENTED, IS ARBITRARY AND CAPRICIOUS

49. Plaintiff realleges and incorporates herein the allegations contained in paragraphs 1 through 48 of this joint Petition and Complaint as if set forth fully herein.

50. DEC 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, DEC acted arbitrarily by surrendering its discretion in favor of adherence to a model rule, ignored substantial issues and evidence in the record, and otherwise promulgated rules that are unreasonable.

51. DEC acted arbitrarily by determining to impose costs on facilities like Indeck, without a mechanism to assure cost recovery as is generally required and contemplated by RGGI.

52. DEC and NYSERDA acted arbitrarily by adopting the RGGI MOU and Model Rule through an impermissible delegation of authority, surrendering their discretion to an interstate group that promulgated the RGGI MOU and Model Rule.

53. DEC, NYSERDA and PSC acted without sound basis in reason and without regard to fact, including the impact of the auction process of QFs operating under fixed price contracts, when it adopted the RGGI Model Rule.

FOURTH CLAIM FOR RELIEF
PURPA AND FERC REGULATIONS PREEMPT INCONSISTENT REGULATIONS

54. Plaintiff realleges and incorporates herein the allegations contained in paragraphs 1 through 53 of this joint Petition and Complaint as if set forth fully herein.

55. Pursuant to PURPA Section 210(f), New York State is required properly to implement PURPA via the New York State agency or agencies having regulatory authority over electrical utilities. 16 U.S.C. § 824a-3(f).

56. DEC's, NYSERDA's and PSC's regulations implementing RGGI are inconsistent with PURPA and FERC's policy and practice of ensuring that QFs receive the full avoided cost.

57. New York State's failure to ensure that utilities pay QFs for energy at a rate equal to the utilities' full avoided cost represents a failure to comply with the Federal regulations implementing PURPA.

58. State regulations inconsistent with the terms, policies and practices of PURPA and their implementing regulations, must yield to the Federal requirements. DEC's, NYSERDA's and PSC's RGGI regulations impose price terms that are preempted by Federal law and regulation.

FIFTH CLAIM FOR RELIEF
THE RGGI MOU IS AN IMPERMISSIBLE AGREEMENT OF THE STATES IN VIOLATION OF THE COMPACT CLAUSE OF THE UNITED STATES CONSTITUTION

59. Plaintiff realleges and incorporates herein the allegations contained in paragraphs 1 through 58 of this joint Petition and Complaint as if set forth fully herein.

60. The RGGI MOU is an impermissible compact among ten Northeastern States in violation of the United States Constitution Compact Clause. U.S. Const., Art. 1, §10, cl. 3. Although the MOU is an agreement among States, it has never been approved by Congress.

61. The RGGI MOU among the ten Compact States 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.

62. The RGGI MOU creates 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.

63. Congress has the power to regulate emissions and establish interstate emission limits, which it has expressly chosen not to do. RGGI's supplemental regulations are stricter than Federal regulations promulgated by the United States Environmental Protection

Agency and thus, impermissibly encroach on Federal supremacy and interfere with the Federal interest in climate policy and Federal interest in regulating a national and international pollutant.

SIXTH CLAIM FOR RELIEF
NEW YORK'S IMPLEMENTATION OF THE RGGI PROGRAM VIOLATES INDECK'S DUE PROCESS AND EQUAL PROTECTION RIGHTS

64. Plaintiff realleges and incorporates herein the allegations contained in paragraphs 1 through 63 of this joint Petition and Complaint as if set forth fully herein.

65. Indeck has been impermissibly adversely affected by DEC, NYSERDA and PSC's decision to participate in RGGI and implementation of regulations that fail to allow Indeck to recover costs imposed by such regulations. Moreover, Indeck has been impermissibly adversely affected by the same agencies' refusal to direct that Indeck have a fair opportunity to recover such costs.

66. PSC, through regulation and approval of the long term contract approved in 1990 between Indeck and Con Edison, had a legal obligation to insure that Indeck, as a QF, would recover the full avoided cost payment for power pursuant to PURPA and the FERC regulations promulgated thereunder. Indeck relied on such obligation when entering into the contract with Con Edison.

67. New York State's adoption of RGGI, combined the implementation of their regulations under the RGGI cap and trade program by DEC and NYSERDA, effectively bars Indeck from recovering the full avoided costs for power it produces.

68. DEC, NYSERDA and PSC, through the RGGI regulations, allow the costs of the allowance program to be passed through to all customers for all entities except Indeck and several other qualifying facilities subject to long term fixed price contracts. By requiring Indeck to incur the allowance program cost without assuring Indeck has a fair opportunity to recover the costs they have imposed, DEC, NYSERDA and PSC have impermissibly adversely affected Indeck in violation of Indeck's due process rights under the United States Constitution.

69. DEC, NYSERDA and PSC have impermissibly treated Indeck differently from other similarly situated pollutant sources in violation of 42 U.S.C. § 1983 and Indeck's Equal Protection rights under the United States Constitution.

70. DEC, NYSERDA and PSC have knowingly refused to create a mechanism to allow Indeck the opportunity to recover the RGGI program's allowance costs, while allowing other similarly situated pollutant sources the opportunity to recover the avoided costs of producing electricity.

71. This unfair treatment and discrimination, which has repeatedly been brought to the attention of DEC, NYSERDA and PSC, is arbitrary, capricious and an abuse of discretion.

WHEREFORE Indeck requests that this honorable Court grant it Declaratory and Injunctive Relief, finding and determining that:

1. The entry into the RGGI program without the consent or approval of the State Legislature was *ultra vires*, unlawful and without effect.

2. The promulgation of the RGGI regulations by DEC and NYSERDA was *ultra vires*, in excess of lawful authority and those regulations are void.

3. The promulgation of the RGGI regulations by DEC and NYSERDA have created an unlawful tax, in violation of law, in excess of lawful authority, and those regulations are void.

4. The promulgation of the RGGI regulations by DEC and NYSERDA is arbitrary, capricious, in violation of lawful authority, and those regulations are void.

5. 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.

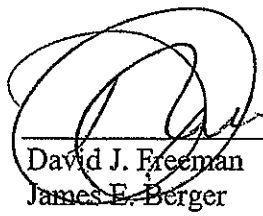
6. The RGGI regulations as promulgated by DEC and NYSERDA, in light of PSC's refusal to mandate a fair opportunity to recover Indeck's costs, violate PURPA.

7. The RGGI regulations as promulgated by DEC and NYSERDA, in light of PSC's refusal to mandate a fair opportunity to recover Indeck's costs, are in violation of Indeck's rights to due process of law under the United States Constitution and the New York State Constitution, and unlawfully and improperly discriminate against Indeck, and are void.

8. Enjoining the enforcement by DEC of its RGGI regulations against Indeck, and enjoining the participation of DEC, NYSERDA and New York state in the RGGI auction programs.

And that the Court grant such other, further or additional relief as justice requires.

Dated: January 29, 2009
New York, New York

By: 

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