

FOR IMMEDIATE RELEASE
January 29, 2009

Contact: Peter A. Barden
518.788.7003
pbarden@mercuryllc.com

Indeck Energy Sues State Questioning Legality of Regional Greenhouse Gas Program

Supplier of clean energy believes the program discriminates against generators bound by long term contracts

Saratoga Springs, New York—Indeck Energy, owner of the Indeck-Corinth Generating Station in Corinth, New York filed a lawsuit in Saratoga County Supreme Court today challenging the legal authority of the Governor, the Department of Environmental Conservation (DEC) and the New York State Energy and Research Development Authority to impose, without legislative or other proper basis, a costly pollution control scheme under the Regional Greenhouse Gas Initiative, a multi-state compact designed to reduce carbon emissions in the Northeast.

“We support the intent of the RGGI program to reduce greenhouse gas emissions and to mitigate the effects of global warming,” said Indeck president Gerald F. DeNotto. “We simply believe the program as implemented by DEC and NYSERDA is flawed. The regulations arbitrarily discriminate against a few electric generators that are bound by long term fixed price contracts. We made our case during the stakeholder process, in written testimony and in meetings with state officials. No changes were made. Regrettably, there was no choice but to file this lawsuit.”

Since 1985, Indeck Energy has developed or invested in clean energy facilities worldwide. In addition to its Corinth plant, Indeck has developed, and now owns and operates, a variety of power plants. It is currently developing renewable energy plants including new solar, biomass and wind generation units.

“Indeck Energy’s business is developing and operating clean, low-emitting sources of energy,” added DeNotto. “To make these investments, there must be a level regulatory playing field. New York’s version of RGGI levies a ‘RGGI tax’ on electric generators. Most generators have a fair opportunity to recover that tax by passing through the cost. But our Corinth plant will be left with a heavy cost of the allowance tax, and no opportunity to recover it. Unaltered, this program will cost Indeck millions of dollars that otherwise could be invested in new sources of clean power.”

Through the RGGI program, ten Northeastern states created a joint, regional “cap and trade” emission control scheme to limit and ultimately reduce CO₂ emissions within the region. Each of the ten states was allocated a portion of the overall cap. Under the RGGI scheme, each state issues a number of “allowances” (tradable certificates allowing the emission of one ton of CO₂) equal to each state’s specific cap for that year, and sells those allowances in a joint auction. All the auction revenues are paid to the states, which use the funds as they see fit. Affected generation facilities must acquire sufficient allowances to equal their actual emissions. While RGGI seeks to reduce CO₂ emissions in the ten state region, it is likely to foster increases in emissions outside the ten state area, and raise the costs of electricity for consumers in the region.

Indeck's Corinth power plant is a 128 megawatt combined-cycle unit fueled by clean natural gas. Combined-cycle units are particularly clean and efficient because they utilize more of the combustion energy to produce electricity, and also produce useful heat or steam as a byproduct.

Indeck signed a long term contract with Consolidated Edison in 1989 to sell the output of the facility at a fixed price. The contract did not contemplate a program like RGGI, and the New York Public Service Commission, which approved the contract in 1990, strongly discouraged a re-opener that could have allowed for the recovery of costs arising from dramatically changed laws.

Virtually all other generating facilities subject to RGGI have a fair opportunity to recover the costs of RGGI allowances. Even dirtier units will be allowed to recover their costs, while Indeck-Corinth's clean unit can never recover the additional cost under the current RGGI program.

The lawsuit specifically challenges the DEC's and NYSERDA's legal authority to establish the program without state legislation. New York is the only state in the RGGI program to create its program exclusively by executive action, without legislative authority. The suit also challenges the participating RGGI states' ability to enter in to a multi-state "compact" without an act of Congress. Under the RGGI auction program, DEC will issue millions of allowances to NYSERDA, which will sell them in the RGGI auction. NYSERDA will likely receive more than \$140 million in 2009 alone from the sale of allowances, and will disburse those proceeds with no legislative authority or control. Those costs will be passed on to New York consumers.

The filing states:

"Petitioner Plaintiff Indeck Corinth, L.P. ("Indeck") brings this action 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 (CO₂) within their territory. RGGI was agreed to by the Governor of New York, without any statutory or other authority, and without the consent or concurrence of the State Legislature, in violation of the separation of powers under the New York Constitution and 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 an executive agency 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 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."

The lawsuit is brought to redress constitutional and other violations of law, and also seeks review of the DEC and NYSERDA regulations under state law Article 78. Article 78 sets a 4-month time period to seek review of the regulations, which became final October 8, 2008. Even though Indeck remains open to a reasonable solution by the state, it was required to file the lawsuit at this time to retain its legal options.

"From the beginning, we wanted only for our plant to be treated fairly, and to have the same opportunity to recover the costs of RGGI that other generators are given," said DeNotto. "We've tried to work with the state from the very beginning of the process to resolve this issue. We remain committed to that goal."

###