

No. ____

**IN THE
SUPREME COURT OF THE UNITED STATES**

ELECTRIC POWER SUPPLY ASSOCIATION, and NRG ENERGY, INC.,
Petitioners,

v.

JOHN B. RHODES, in his official capacity as Chair of the New York Public Service Commission, GREGG C. SAYRE, in his official capacity as Chair of the New York Public Service Commission, DIANE X. BURMAN, in her official capacity as Commissioner of the New York Public Service Commission, JAMES S. ALESI, in his official capacity as Commissioner of the New York Public Service Commission, and EXELON CORP., R.E. GINNA NUCLEAR POWER PLANT LLC, CONSTELLATION ENERGY NUCLEAR GROUP, LLC, NINE MILE POINT NUCLEAR STATION LLC

Respondents.

**APPLICATION TO THE HON. RUTH BADER
GINSBURG FOR AN EXTENSION OF TIME WITHIN
WHICH TO FILE A PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

1. Pursuant to Supreme Court Rules 13(5), 22, and 30(3), Electric Power Supply Association, and NRG Energy, Inc., (“Petitioners”) hereby move for an extension of time of 12 days, to and including January 7, 2019, for the filing of a petition for a writ of certiorari.

2. The Second Circuit rendered its decision on September 27, 2018 (Exhibit 1).

3. Unless an extension is granted, the deadline for filing the petition for

certiorari will be December 26, 2018.

4. Petitioner is filing this application at least ten days before that date.

See Sup. Ct. R. 13(5).

5. This Court has jurisdiction under 28 U.S.C. § 1254(1).

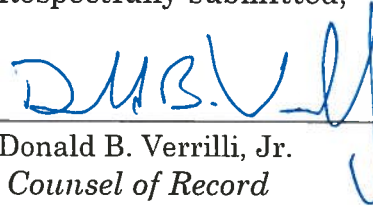
6. This case presents a question of exceptional importance to the regulation and efficient functioning of wholesale energy markets in the United States: Whether the Federal Power Act, 16 U.S.C. § 791a *et seq.*, as interpreted by this Court in *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016), preempts only state regulations that explicitly require sellers of electricity at wholesale to participate and clear prices in wholesale auctions authorized by the Federal Energy Regulatory Commission, or whether the statute also preempts state regulations that do not formally mandate participation and price-clearing in the wholesale market, but nonetheless “guarantee” a seller will receive “a certain rate ... regardless of the clearing price” in connection with the sale of electricity at wholesale, 136 S. Ct. at 1298–99. The United States Court of Appeals for the Second Circuit read this Court’s opinion in *Hughes* as preempting only state regulations that contain a formal requirement that wholesale electricity sellers are preempted by the Federal Power Act. By defining the boundary of exclusive federal authority as narrowly as it did, the court of appeals has opened the door to all manner of parochial state schemes to subsidize the wholesale revenues of favored generators. If left uncorrected by this Court, that ruling will result in a fundamental transfer of regulatory authority away from the federal government and its policy of relying on market forces to set just and reasonable wholesale rates and send economically

efficient signals regarding market entry and exit.

7. Good cause exists for this application. Applicants intend to file a petition for certiorari in *Electric Power Supply Association, et al. v. Star, et al.*, 904 F.3d 518 (7th Cir. 2018), which raises the same set of issues as will the petition in the instant case. That petition is due on January 7, 2019. The extension requested in this application will align the schedule for the two petitions, so that they may be considered together. Additionally, undersigned counsel has significant litigation commitments both before and after the end-of-year holidays. These include a brief due in the United States Court of Appeals for the Federal Circuit on December 18, 2018, a brief in the United States Court of Appeals for the Ninth Circuit that is presently due on January 13, 2019, and other matters.

For the foregoing reasons, Petitioner requests that an extension of time to and including January 7, 2019 be granted, within which time Petitioner may file a petition for a writ of certiorari.

Respectfully submitted,



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December 14, 2018