

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF YATES

In the Matter of the Application of
GREENIDGE GENERATION LLC,

Petitioner-Plaintiff,

Index No. 2024-5221
Hon. Vincent M. Dinolfo

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

- against -

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, and
ACTING COMMISSIONER SEAN MAHAR,
In his Official Capacity as Acting Commissioner,

Respondents-Defendants,

SENECA LAKE GUARDIAN, THE COMMITTEE
TO PRESERVE THE FINGER LAKES,
and SIERRA CLUB,

Intervenors-Respondents.

**INTERVENORS-RESPONDENTS' MEMORANDUM OF LAW IN RESPONSE TO THE
INDEPENDENT POWER PRODUCERS OF NEW YORK AND THE BUSINESS
COUNCIL OF NEW YORK STATE, INC.'S PROPOSED AMICUS FILINGS**

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TABLE OF CONTENTS

PRELIMINARY STATEMENT..... 1

ARGUMENT..... 1

 I. Proposed Amici Raise Duplicative Arguments that Are Already Addressed by the Parties.
 2

 II. The Business Council Raises New, Speculative Arguments Not Before the Court..... 2

 III. IPPNY’s Non-Specific Reliability Arguments Are Not Useful to the Court. 4

CONCLUSION..... 6

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Colgate-Palmolive v Erie County</i> , 39 AD2d 641 [4th Dept 1972]	1, 3
<i>Columbus Monument Corp. v City of Syracuse</i> , 73 Misc 3d 967, [Sup Ct Onondaga County 2021]	1
<i>Lazette v Bd. of Educ. Hudson City Sch. Dist.</i> , 35 NY2d 272 [1974]	1, 2, 3
<i>Rourke v N.Y. State Dept. of Corrs. Serv.</i> , 159 Misc 2d 324 [S Ct Albany County 1993]	1, 2
Statutes	
ECL 75-0103[13]	3
ECL 75-0109[3][e]	3

PRELIMINARY STATEMENT

Intervenors-Respondents, Seneca Lake Guardian, Committee to Preserve the Finger Lakes, and Sierra Club (hereafter “Intervenors”), hereby submit their Memorandum of Law in response to the proposed amicus filings of the Independent Power Producers of New York (“IPPNY”) and The Business Council of New York State, Inc. (hereafter “Business Council”). On October 10, IPPNY submitted their Memorandum of Law of Proposed Amicus Curiae (hereafter “IPPNY Amicus Br.”). On October 15, Business Council submitted their Affidavit in Support of Motion Seeking Leave to Appear as Amicus Curiae (hereafter “Pokalsky Aff.”).

ARGUMENT

Proposed Amici IPPNY and Business Council raise speculative, overbroad arguments that do not assist the Court. While Amici are to “call the court’s attention to law or facts or circumstances in a matter . . . that might otherwise escape its consideration,” they may not, as proposed amici have done here, raise arguments that are duplicative of what has already been submitted by Greenidge. *Columbus Monument Corp. v City of Syracuse*, 73 Misc 3d 967, 971, [Sup Ct Onondaga County 2021]; *see also Rourke v N.Y. State Dept. of Corrs. Serv.*, 159 Misc 2d 324, 327 [S Ct Albany County 1993] (denying amicus as the issues brought forth had “been fully and ably presented” by the parties). In addition, proposed amici raise completely new issues when instead they “must accept the case before the court with issues made by the parties.” *Columbus Monument Corp.*, 73 Misc 3d at 971; *see also Lazette v Bd. of Educ. Hudson City Sch. Dist.*, 35 NY2d 272, 282 [1974] (“An amicus has no status to present new issues in a case”); *Colgate-Palmolive v Erie County*, 39 AD2d 641 [4th Dept 1972] (“only the issues raised by the parties may be considered”). For these reasons, and the additional reasons set forth below, the Court should disregard the proposed amicus filings of IPPNY and Business Council.

I. Proposed Amici Raise Duplicative Arguments that Are Already Addressed by the Parties.

While amicus submissions are meant to provide the Court with guidance, both IPPNY and Business Council submissions focus on repeating many of Greenidge’s arguments. Both proposed amicus filings argue that Climate Leadership and Community Protection Act (“CLCPA”) Section 7(2) does not confer denial authority, as does Greenidge. *See Pokalsky Aff.*, NYSCEF Doc. No. 124 at 7-8, ¶¶ 23-27; IPPNY Amicus Br., NYSCEF Doc. No. 94 at 4; Greenidge’s Memorandum of Law, NYSCEF Doc. No. 3, at 20-30 (“Greenidge Br.”). Indeed, some paragraphs of Business Council’s filing directly quote from Greenidge’s Memorandum of Law. *Compare Pokalsky Aff.* ¶ 24 with Greenidge Br. at 23; *Compare Pokalsky Aff.* ¶ 27 with Greenidge Br. at 26. Many other paragraphs from Business Council’s submission also closely resemble Greenidge’s arguments. *Compare Pokalsky Aff.* ¶¶ 25-26 with Greenidge Br. at 25. Since these issues have already been “fully and ably” presented by the Parties, the Court should disregard proposed amici’s regurgitation of Greenidge’s argument. *Rourke v N.Y. State Dept. of Corr. Servs.*, 159 Misc 2d 324, 327 [S Ct Albany County 1993].

II. The Business Council Raises New, Speculative Arguments Not Before the Court.

Business Council raises new issues that have not been raised by any existing party and should be disregarded by the Court. *See Lazette v Bd. of Educ. Hudson City Sch. Dist.*, 35 NY2d 272, 282 [1974] (“an *amicus* has no status to present new issues in a case”). Business Council offers “expectation[s] that facilities with Title V and state facility air permits” will be subject to future “cap and invest” requirements. Pokalsky Aff. at 15. No existing party has raised an argument regarding the application of New York State’s Cap and Invest program, perhaps because no regulations have yet been proposed for the “cap and invest” program, let alone issued

in final form.¹ Business Council concedes as much.² Therefore, it is irrelevant if the program eventually adopted may ensure “consistency” under CLCPA Section 7(2).³ The Court should not consider new arguments regarding regulations that do not exist. *Colgate-Palmolive v Erie County*, 39 AD2d 641 [4th Dept 1972].

Business Council next introduces new, purported concerns around “leakage” of businesses to other states, which should not be considered as a matter of law (*Lazette*, 35 NY2d at 282), and also are without merit.⁴ There is no requirement under Section 7 of the CLCPA for an agency to consider leakage, nor does the CLCPA prohibit leakage of emissions outright. On the contrary, the language of the CLCPA recognizes that some leakage is likely to occur and requires that measures are taken to “minimize” leakage. ECL 75-0109[3][e]; ECL 75-0103[13]. DEC has no obligation under the CLCPA to consider leakage at this stage and certainly not in a way as broadly and vaguely defined as proposed by Business Council.

Further, leakage is factually irrelevant because Greenidge can continue its operations in New York State by drawing electricity from the grid to mine cryptocurrency. Intervenors-Respondents’ MoL in Opp. to TRO/PI, NYSCEF Doc. No. 109, at 13-14. Choosing instead to

¹ New York State, Cap-and-Invest, <https://capandinvest.ny.gov/> [last accessed Oct. 23, 2024] (“Current Stage” has not yet reached “Issue Regulatory Proposal”).

² Greenidge’s emissions will “ultimately be regulated” under cap and invest, Pokalsky Aff. at 8, “when and if adopted”, *id.* at 15; Department is “developing regulations”, *id.* at 8.

³ On the contrary, both the Department and the New York State Energy Research and Development Authority’s (“NYSERDA”) Preliminary Scenario Analyses slides from the January 26, 2024, webinar show that none of their models for the Cap & Invest program suffice to reduce emissions in line with the GHG reduction mandates of the CLCPA. See DEC and NYSEDA, *NYCI Preliminary Scenario Analyses* at 15, 24, <https://capandinvest.ny.gov/-/media/Project/CapInvest/Files/2024-01-26-NYCI-Preproposal-Analysis-Webinar.pdf> [Jan. 26, 2024] (agencies’ projections for GHG reductions compared against what’s necessary for 2030).

⁴ While Greenidge discussed leakage in a footnote (Greenidge Br. at 17, n.13), this issue was not properly brought by the Parties in the underlying proceedings as an issue to be adjudicated, as described in the State’s briefing (State’s Memorandum in Opposition to the Petition/Complaint and Greenidge’s Motion for a Preliminary Injunction, NYSCEF Doc No. 97 at 30-31 (“NYAG Br.”)) and Intervenors briefing (Intervenors’ Br. at 30-32) and has been waived.

move out of state would be a business decision that is not a part of DEC's permit decision under review before this Court.

Following Business Council's arguments could result in every state agency being unable to make any determinations under the CLCPA simply because it may or may not result in a company possibly leaving New York State, but with no evidence. The Legislative intent, through the direct language of the CLCPA and the Legislature's passage of a two-year moratorium on fossil-fueled behind-the-meter cryptocurrency mining operations, is clear: the Legislature has prioritized advancing the CLCPA's requirement to reduce emissions.

III. IPPNY's Non-Specific Reliability Arguments Are Not Useful to the Court.

IPPNY alleges that DEC's denial of Greenidge's air permit is arbitrary as the Facility "*may* be needed to maintain the reliability of the electric system," citing no document or other evidence. Affidavit of Gavin J. Donohue, NYSCEF Doc. No. 93 at 3 ("Donohue Aff.") (emphasis added); *see also* IPPNY Amicus Br. at 2. Instead of providing evidence specific to the plant, IPPNY cites Greenidge's own legal briefing (IPPNY Amicus Br. at 2, 6,) or various broad studies, including NYISO's 2024 Draft Reliability Needs Assessment ("RNA"), a state-wide, preliminary assessment that it is planning for the year 2034. IPPNY Amicus Br. at 6; Donohue Aff. at 4. These newly-presented studies do not change the fact that Greenidge failed to meet its burden of proof to provide any form of evidence on reliability to DEC at any stage of the application process or through the years long adjudicatory process. *See* NYAG Br. at 20-22; Intervenor-Respondents' Memorandum of Law in Opposition to Petitioner-Plaintiff's Petition/Complaint, NYSCEF Doc. No. 119 at 24, 26 ("Intervenors' Br."). IPPNY is merely attempting to supplement Greenidge's own vague reliability assertions with its own lack of specific evidence. The Court's concern here is with the facts of the present case and the record before the administrative agency, which demonstrate that the Facility's increase in operations and

emissions violates the CLCPA and that the Greenidge has failed to meet its burden of proof. *See* Intervenor’s Br. at 5, tbl. 1. As such, IPPNY’s arguments are not useful to the Court and should be disregarded.

While IPPNY attempts to raise alarmist arguments that DEC’s application of CLCPA Section 7(2) could result in a “potential for blackouts,” there is no basis in fact for this assertion. IPPNY Amicus Br. at 4. IPPNY cites a draft powerpoint from NYISO that is not in the record and consists of preliminary analyses that are not specific to the Facility and that are subject to change. A deactivation review is the proper method to determine a reliability need and Greenidge has yet to initiate that review, a choice it has consciously made. *See* Intervenor’s Br. at 16-18; Affirmation of Lisa K. Perfetto, NYSCEF Doc. No. 110, Ex. 8.


DEC’s action on one permit for one facility in one area of the state, whose increased operations are not driven by grid service and are fundamentally inconsistent with the CLCPA, does not jeopardize generation and the electric grid in all of New York, nor could it. IPPNY’s own language demonstrates this lack of evidence for their alarmist arguments – using verbs like “might” and “could” and “sends a signal” – and at this late date such arguments are not helpful to the Court.

CONCLUSION

For the foregoing reasons, the proposed amici submissions of IPPNY and Business Council should be disregarded by the Court as unhelpful to the Court.

Dated: October 24, 2024
New York, NY

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RULE 202.8-b CERTIFICATION

Pursuant to the Uniform Civil Rules for the Supreme Court & County Court,
Rule 202.8-b, I hereby certify that the foregoing brief contains 1,598 words as calculated by the
word-processing system used to prepare the document, excluding the caption, tables, and
signature block, and therefore complies with the word limit.

Dated: October 24, 2024
New York, NY

A handwritten signature in black ink, appearing to read "L. R. D.", is written over a horizontal line.