

## Fictional Credits or Progressive Action? Seattle Utility's Greenhouse Gas Offset Program Goes to Court

by Laura H. Kosloff and Slayde Hawkins

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*Editors' Summary: Several cities have developed innovative initiatives to combat global warming in the absence of concerted federal regulatory action. One such city is Seattle, Washington. In April 2000, the city directed its municipal utility, Seattle City Light, to achieve zero net greenhouse gas emissions through efficiency, renewable energy, and offsets. In July 2001, City Light became the first U.S. utility to commit to reaching zero net greenhouse gas emissions. Yet this program has not come without its challenges. In this Article, Laura Kosloff and Slayde Hawkins examine City Light's program and the litigation that followed in hopes of providing lessons for other municipalities seeking to address climate change.*

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### I. Introduction

Recently, Mayor Greg Nickels of Seattle, Washington, became one of 10 U.S. mayors who initiated a nationwide mayoral "call to action" to reduce global warming.<sup>1</sup> The U.S. Mayors' Climate Protection Agreement commits participating cities to try to meet or exceed Kyoto Protocol emissions reduction targets, pressure state and federal governments to do the same, and urge U.S. Congress to pass the proposed Climate Stewardship Act, which would create a national emission trading system.<sup>2</sup> The agreement received unanimous support at the National Conference of Mayors in June 2005; as of March 2006, 212 mayors had signed the agreement.<sup>3</sup>

Yet the city of Seattle and its municipal utility, Seattle City Light (City Light), have been at the forefront of municipal climate change mitigation efforts for some time. In April

2000, the Seattle City Council directed City Light to achieve zero net greenhouse gas (GHG) emissions through efficiency, renewable energy, and offsets for GHG emissions from fossil fuels used to meet load growth.<sup>4</sup> In July 2001, City Light became the first U.S. utility to commit to reaching zero net GHG emissions.<sup>5</sup> The utility estimated that this commitment would require about 600,000 tons of offsets per year for the period 2003 to 2005.<sup>6</sup>

City Light's GHG offset program, however, has become the subject of litigation. This Article examines City Light's program and the resultant litigation, and closes with recommendations for others seeking to reduce global warming.

### II. City Light's GHG Activities

In pursuit of climate change mitigation, City Light has proceeded down multiple paths. The utility's environmental policy can be stated as follows:

One policy that has been established for the utility is to provide for the electricity requirements of the city while minimizing the environmental impact. So, to the extent that we own energy or buy energy, an important direction

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1. Greg Nickels et al., Letter to U.S. Mayors, Cities Working Together to Protect Our Air Quality, Health, and Environment: Call to Action (Mar. 30, 2005), available at [http://www.seattle.gov/mayor/climate/PDF/USCM\\_6-page\\_Climate\\_Mailing\\_ALL.pdf](http://www.seattle.gov/mayor/climate/PDF/USCM_6-page_Climate_Mailing_ALL.pdf) (last visited Mar. 7, 2006).
2. Climate Stewardship Act of 2003, S. 139, 108th Cong. (2003); Climate Stewardship Act of 2005, S. 342, 109th Cong. (2005).
3. See Office of the Mayor, *U.S. Mayors Climate Protection Agreement*, at <http://www.ci.seattle.wa.us/mayor/climate/default.htm> (last visited Mar. 15, 2006).

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4. Seattle, Wash., Resolution 30144 (Apr. 10, 2000), available at <http://www.cityofseattle.net/light/conserve/globalwarming/default.asp> (last visited Mar. 21, 2006).

5. Seattle, Wash., Resolution 30359 (July 23, 2001), available at <http://www.cityofseattle.net/light/conserve/globalwarming/default.asp> (last visited Mar. 21, 2006).

6. *Id.* at ¶ 4.a. This estimate was based not on City Light's own GHG emissions (which, as an overwhelmingly hydro-based utility, are negligible), but rather on City Light taking responsibility for the carbon dioxide (CO<sub>2</sub>) emissions associated with electricity purchased from other sources to satisfy demand. The utility's annual emissions have now declined, to about 200,000 metric tons in 2005, largely due to the sale of City Light's share in a coal-fired power plant in Centralia, Washington.

for the utility is to determine what the impacts are, avoid them where possible, minimize them where they can't be avoided, and then try to . . . mitigate for those things that can't be avoided.<sup>7</sup>

As part of its goal to minimize environmental impacts, City Light has committed to investing in renewable energy sources. An example of one City Light renewable resource investment is the Stateline Wind Energy Center, the largest wind farm in the United States. The 660-kilowatt wind turbines have a maximum output of 300 megawatts (MW) of electricity, enough to power 72,000 homes.<sup>8</sup> If natural gas were used to produce the same quantity of power, the power plants would emit about 330,000 tons of carbon dioxide (CO<sub>2</sub>) per year.<sup>9</sup> By purchasing 175 MW from this source, City Light helps avoid these emissions.<sup>10</sup>

Still, a portion of the energy City Light purchases to meet its needs has GHG emissions that must be mitigated in order to reach its net zero GHG commitment. In 2002, Seattle's Office of Sustainability and Environment (OSE) completed an inventory of Seattle's GHG emissions. With this baseline data, City Light began to look for GHG offsets. It signed its first offset contract in 2003, contracting to purchase credits for the GHG reductions achieved via cement material substitution.<sup>11</sup> Subsequently, City Light negotiated to pay for the incremental cost of lower emissions biodiesel (instead of diesel fuel) for use in certain Washington state ferries, King County Metro buses, the city fleet, and garbage collecting and recycling vehicles. City Light and Princess Cruise Lines also signed a contract agreeing that City Light would provide electricity for cruise ships when docked in the Port of Seattle, allowing the ships' diesel engines to be shut off.<sup>12</sup> In each case, City Light is to be given the "credit" for these GHG emissions reductions, even when there is no legally recognized process by which to define and allocate such credits. Finally, in November 2005, City Light signed a contract with DuPont Fluorochemicals for offset purchases, which will result in City Light reaching its "net zero" goal.<sup>13</sup> The contract with DuPont brings City Light's offsets to about 350,000 metric tons for 2005.<sup>14</sup>

7. Deposition of Corrine Grande Kehayes, *Okeson v. City of Seattle*, No. 02-2-05774-8SEA (Wash. Super. Ct. July 20, 2005).

8. Renewable Northwest Project, *Stateline Wind Energy Center: Wind Energy Project*, at <http://www.rnp.org/Projects/stateline.html> (last visited Mar. 7, 2006).

9. *Id.*

10. Database of State Incentives for Renewable Energy, *Washington Incentives for Renewable Energy*, at [http://www.dsireusa.org/library/includes/incentive2.cfm?Incentive\\_Code=WA11R&state=WA&CurrentPageID=1](http://www.dsireusa.org/library/includes/incentive2.cfm?Incentive_Code=WA11R&state=WA&CurrentPageID=1) (last visited Nov. 2, 2005).

11. Seattle, Wash., Ordinance 121062 (Feb. 6, 2003), available at <http://www.cityofseattle.net/light/conserve/globalwarming/default.asp> (last visited Mar. 7, 2006). During the manufacturing of Portland cement, GHGs are generated and released into the atmosphere. The use of blended cements in concrete reduces the amount of Portland cement used in construction, thereby reducing the amount of CO<sub>2</sub> that otherwise would be released.

12. For more information about City Light's offset programs, visit Seattle City Light, *Global Warming*, at <http://www.cityofseattle.net/light/conserve/globalwarming/> (last visited Mar. 7, 2006).

13. Press Release, Seattle City Light, City Light First in Nation to Reach Zero Net Emissions Goal (Nov. 9, 2005), available at <http://www.cityofseattle.net/light/news/newsreleases/detail.asp?ID=5656> (last visited Mar. 7, 2006).

14. City Light's emissions total approximately 200,000 tons per year. The extra amount of offsets will cover the utility should actual 2005

### III. Legal Challenge to City Light Offsets

The case that ultimately challenged City Light's offset program actually began several years before the city of Seattle even became involved with offsets. Six years ago, Seattle transferred the cost of streetlights from the city's general fund to the municipal utility. Because City Light's revenues and expenses are managed separately from the city's general funds as per the utility's enabling statute, this allowed the general funds being saved by Seattle tax revenues to be used for other purposes. In response, four individual ratepayer plaintiffs filed a class action suit against City Light and the city of Seattle arguing that providing streetlights is a governmental function rather than a "proprietary" utility function, and that transferring the responsibility to City Light's ratepayers amounted to an illegal tax. The Washington Supreme Court agreed and forced the city to reimburse City Light for \$25 million and to pay plaintiffs' legal costs.<sup>15</sup>

The same plaintiffs later added other claims to the action, challenging city spending in City Light's "One Percent for Art"<sup>16</sup> program as well as City Light's support of the city's light transit project. The plaintiffs charged that Seattle was using City Light's general fund as a "cash cow" to fund city projects not directly related to the utility's mission.<sup>17</sup> When plaintiffs learned about City Light's funding of biodiesel offset projects, they added these projects to the claims already being litigated. Eventually, this was expanded to include a challenge to City Light's entire offset program.

To our knowledge, utility purchases of GHG offsets have never before been challenged in court. To successfully challenge the use of offsets by an investor-owned utility, a plaintiff probably would have to show damage to the stock price; the amounts to date that private utilities have spent on offsets are probably far too small to make such an argument. With a municipal utility, however, a plaintiff can make a broader argument based on limiting public utility spending and duties to ratepayers. But very few municipal utilities have actually pursued offsets to date, setting the stage for the challenge to City Light.

#### A. Issues in the City Light Lawsuit

The plaintiffs argued that City Light's offset contracts and payments were illegal for three reasons:

(1) Purchasing offsets serves a general government purpose rather than a utility purpose and, thus, should be paid from the city's general fund rather than the City Light fund;

(2) Paying for offsets does not have a sufficiently close nexus to the furnishing of electricity to City Light's

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emissions be higher than forecasted, and they can be used toward offsetting 2006 emissions. *Id.*

15. *Okeson v. City of Seattle*, 150 Wash. 2d 540 (2003).

16. This program requires that 1% of capital improvement project costs for public facilities be dedicated to public art enhancements to the project. The lower court ruled that City Light could not be required to participate in the One Percent for Art program but could spend funds on art. The Washington court of appeals recently affirmed the trial court's decision on the scope of permissible art, but reinstated the One Percent for Art ordinance. *Okeson v. City of Seattle*, 130 Wash. App. 814 (2005).

17. Complaint for Declaratory and Injunctive Relief and Damages at 5, *Okeson v. City of Seattle*, No. 02-2-05774-8SEA (Wash. Super. Ct. Feb. 14, 2002).

customers to constitute a legally permissible expenditure of City Light funds; and

(3) The payments violate the local government accounting statute<sup>18</sup> insofar as they provide a service to the city's general government (helping it combat global warming) without compensation to City Light.<sup>19</sup>

Plaintiffs explicitly did not challenge City Light's right to pursue emissions reduction efforts within its own operations or City Light's ability to contract for external renewable resource acquisitions as part of a net-zero GHG objective.<sup>20</sup> They argued that while GHG emissions *reductions measures* would be permissible, City Light fulfilled a governmental function and discharged an obligation of the city of Seattle by investing in emissions *offsets*, thereby making the expenditure illegal. Essentially, plaintiffs challenged the validity of offsets as an emissions reduction tool, framing the offsets as a "fictional credit."<sup>21</sup> They pursued their arguments in three ways: that the program served a governmental rather than a proprietary function, that the inventory used to calculate the emissions was incorrect, and that the program's use of offsets was invalid.

### 1. Climate Change Mitigation as a Governmental Versus Proprietary Function

The plaintiffs' argument was not primarily an environmental one, but rather a question of municipal utility law—the distinction between "governmental" functions and "proprietary" functions was a key consideration.<sup>22</sup> A governmental function is one performed for the general good; a proprietary function is performed for the benefit or profit of a corporate entity. An electric utility serves a proprietary function because it operates for the good of its customers, not for the good of the general public. The plaintiffs in this case argued that City Light's climate change mitigation program (as distinguished from utility operations overall) was operating for the good of all because it was mandated by the city and, in promoting climate change mitigation, was in the best interest of Seattle at large.<sup>23</sup>

City Light highlighted its ongoing commitment to mitigating the environmental impacts of its operations to show that its actions in eliminating, reducing, and mitigating GHG emissions were not the result of a government mandate. As one city analyst stated in her deposition, "City

Light's mission and goal has always been to provide environmentally sound electricity."<sup>24</sup> The utility did not dispute the close relationship between the governmental and proprietary functions in the municipal context, noting that the Seattle City Council had established—appropriately, as the city's and the utility's governing body—"the policies and the budget under which City Light carries out its proprietary function."<sup>25</sup>

The argument regarding governmental/proprietary distinctions was a difficult case to make for the plaintiffs. Plaintiffs' earlier claims involving municipal street lighting and arts funding were quite different, given that those activities arguably did not involve the core mission of City Light as a utility. Mitigating the environmental impacts of its provision of electricity services to ratepayers, however, does appear to be much more directly connected to the utility's mission. Just as the provision of electricity is a proprietary function because it operates for the good of its customers, it seems reasonable to argue that climate change mitigation should be considered to be a proprietary function because it mitigates for the burden created by those customers, not by the public at large.<sup>26</sup>

### 2. Taking Responsibility for Indirect Emissions

A major element of the case was the question of how City Light's GHG inventory was calculated, with plaintiffs arguing that City Light should only count its direct emissions, namely from City Light's owned generating resources. Companies participating in voluntary GHG reduction programs in the United States, however, have a great deal of flexibility in calculating their GHG inventories, as there are no federal regulatory mandates. There are several GHG emissions protocols in use.

The World Resources Institute/World Business Council for Sustainable Development's GHG Protocol Initiative (GHG Protocol) is one of the most well-known GHG protocols and is widely used by companies around the country.<sup>27</sup> Although the GHG Protocol was not available to those initially designing the City Light GHG inventory, City Light did use the protocol during the course of its inventory pro-

18. WASH. REV. CODE §43.09.210 (2006).

19. Plaintiffs' Motion for Summary Judgment on Remaining Claims at 1, *Okeson v. City of Seattle*, No. 02-2-05774-8SEA (Wash. Super. Ct. Sept. 2, 2005).

20. As plaintiffs stated in their motion for summary judgment:

Plaintiffs are *not* challenging on this motion or in this lawsuit the wisdom or legality of the City's desire to combat global warming by seeking ways to reduce GHG emissions by City agencies or by other parties. Nor are plaintiffs challenging in this lawsuit the legality of any expenditures by City Light to reduce its own GHG emissions. Rather, plaintiffs are challenging expenditures by City Light to pay for *other* parties to reduce *their* GHG emissions.

*Id.* at 2 (emphasis in original).

21. *Id.* at 8, 11.

22. For a discussion of this area of law, see *Okeson v. City of Seattle*, 150 Wash. 2d 540 (2003), and *Tacoma v. Taxpayers of Tacoma*, 108 Wash. 2d 679 (1987).

23. Plaintiffs' Motion for Summary Judgment on Remaining Claims at 13, *Okeson v. City of Seattle*, No. 02-2-05774-8SEA (Wash. Super. Ct. Sept. 2, 2005).

24. Deposition of Lynn Best at 43, *Okeson v. City of Seattle*, No. 02-2-05774-8SEA (Wash. Super. Ct. July 19, 2005).

25. Seattle's Response to Plaintiffs' Motion for Summary Judgment on Remaining Claims at 22, *Okeson v. City of Seattle*, No. 02-2-05774-8SEA (Wash. Super. Ct. Sept. 19, 2005).

26. "There is a direct causal relationship between the electricity generated and delivered to meet City Light customer demands and the emission of greenhouse gases." Declaration of Michael Lazarus re Greenhouse Gas Emissions at 6, *Okeson v. City of Seattle*, No. 02-2-05774-8SEA (Wash. Super. Ct. Sept. 19, 2005). Another interesting argument (although City Light did not use it) would be that ratepayers have an obligation to pay for the *full* cost of the electricity they receive, including payment to cover the burden created by the generation of electricity.

27. The GHG Protocol aims to harmonize GHG accounting and reporting standards internationally to ensure that different trading schemes and other climate related initiatives adopt consistent approaches to GHG accounting. It comprises a broad coalition of private businesses, nongovernmental organizations, governmental agencies, and intergovernmental organizations working to design widely acceptable accounting and reporting standards for GHG emissions. World Resources Institute/World Business Council for Sustainable Development, *GHG Protocol Initiative*, at <http://www.ghgprotocol.org/templates/GHG5/layout.asp?MenuID=849> (last visited Mar. 7, 2006).

cess.<sup>28</sup> OSE created two inventories to calculate GHG emissions: one including all GHGs associated, directly or indirectly, with city operations (the City and Utilities Operations inventory), and one including all GHGs emitted within city limits (the City-wide inventory). In calculating the quantities of GHGs to be mitigated, City Light used the City and Utilities Operations inventory, which included all direct and indirect emissions attributable to City Light activities, including those emissions associated with purchased power to be resold to ratepayers.

Plaintiffs focused on how City Light decided which emissions to include. Certain questions, in particular, were highlighted. For example, why were emissions from purchased power included but not emissions associated with other purchases such as office supplies? Plaintiffs also questioned the inclusion of emissions that seemed incidental; for example, emissions associated with employee airline travel.

The arguments plaintiffs made on this issue were unsound—and surprising at this stage in GHG inventory development. The reasoning behind the emissions calculations is well accepted. As noted above, the inventory practice OSE used followed the GHG Protocol, a widely used and respected accounting standard that has received extensive review and is used by many organizations, including electric utilities, federal government agencies, and state programs. The utility included, for example, electricity imports and exports in its inventory; this practice is encouraged because it more accurately represents the emissions associated with utility activities. Moreover, the emissions inventories may have regulatory and risk implications later if formal emissions mitigation responsibilities are allocated to the purchasing utility.<sup>29</sup> Evolving policy initiatives regarding GHG emissions in the electricity sector agree that total emissions calculations should include emissions associated with the electricity used to meet demand, whether generated or purchased for that purpose.<sup>30</sup> The reasoning is that “capping emissions associated only with ‘owned’ or ‘in-state’ sources would lead to significant ‘emissions leakage,’ whereby utilities might simply acquire high-emission resources (e.g., coal) from other states and result in emissions increases rather than reductions.”<sup>31</sup> Accordingly, at the core of City Light’s inventory approach is the recognition that it is the sources of electricity that matter rather than just the location or technical ownership of the generating facilities.

Plaintiffs’ other challenge to the inventory questioned why certain emissions associated with other purchases—such as office supplies—were not included. The answers given to this particular question ranged from descriptions of a workable boundary, to issues of double counting and verifiability, to discussions of who should be responsible for what emis-

sions. Here, City Light simply had to show that there were reasonable grounds not to include the emissions associated with every sheet of paper used by the utility as part of its inventory. Plaintiffs also framed the inclusion of the GHGs associated with employee air travel as excessive. However, inclusion of the GHGs associated with employee business travel is standard GHG inventory procedure.

### 3. Offsets as the Equivalent of On-System Reductions Under Law and Policy

The final challenge was to the validity of offsets in general. During discovery, the plaintiffs repeatedly framed offsets as a “fictional” credit.

The only thing City Light has received or will receive in return for these expenditures is some fictional “credit” toward meeting the City’s voluntary, self-imposed commitment to reduce GHG emissions as a means of combating global warming. None of these programs generates, conserves or distributes a single watt of electricity to any City Light customer or reduces a single molecule of any greenhouse gas generated by any City Light activity.<sup>32</sup>

Framing emissions credits as “fictional” may have irretrievably harmed the plaintiffs’ cause of action. Emissions credits or offsets as a market mechanism to achieve environmental objectives represent a well-established policy tool in both mandatory and voluntary markets. They have been accepted as part of U.S. environmental policy for at least 20 years.<sup>33</sup> Offsets have been successfully used in a number of pollution control programs, including those regulating sulfur dioxide, lead, and nitrogen oxide emissions.<sup>34</sup>

Yet plaintiffs contended that the city’s GHG offsets were not real. In order to be valid, they argued, GHG offsets had to: (1) be required by state or federal law; (2) provide more or cheaper electricity to ratepayers; or (3) reduce the GHGs emitted by City Light activities.

City Light argued that offsets are a well-accepted equivalent to emissions reductions under U.S. law and policy regimes, and that GHG emissions reduction efforts are particularly well-suited to emissions trading schemes. Offset programs are particularly appropriate for achieving GHG reductions because emissions reductions halfway around the

28. Seattle’s Response to Plaintiffs’ Motion for Summary Judgment on Remaining Claims at 10, *Okeson v. City of Seattle*, No. 02-2-05774-8SEA (Wash. Super. Ct. Sept. 19, 2005).

29. Declaration of Mark C. Trexler re Greenhouse Gas Emissions Mitigation at 10, *Okeson v. City of Seattle*, No. 02-2-05774-8SEA (Wash. Super. Ct. Sept. 19, 2005) [hereinafter Trexler Declaration].

30. See, e.g., CALIFORNIA CLIMATE ACTION REGISTRY, GENERAL REPORTING PROTOCOL (2002), available at [http://198.104.131.213/docs/PROTOCOLS/general\\_reporting\\_protocol\\_102102.pdf](http://198.104.131.213/docs/PROTOCOLS/general_reporting_protocol_102102.pdf) (last visited Mar. 7, 2006).

31. Seattle’s Response to Plaintiffs’ Motion for Summary Judgment on Remaining Claims at 11-12, *Okeson v. City of Seattle*, No. 02-2-05774-8SEA (Wash. Super. Ct. Sept. 19, 2005).

32. Plaintiff’s Motion for Summary Judgment on Remaining Claims at 8, *Okeson v. City of Seattle*, No. 02-2-05774-8SEA (Wash. Super. Ct. Sept. 2, 2005).

33. See, e.g., U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA), EMISSIONS TRADING POLICY STATEMENT (1986) (available from the ELR Guidance & Policy Collection, ELR Order No. AD03217). Tradable permits were under discussion as a possible pollution control strategy for many years even before EPA came out with an officially sanctioned federal statement on the issue. See Jennifer Yelin-Kefer, *Warming Up to an International Greenhouse Gas Market: Lessons From the U.S. Acid Rain Experience*, 20 STAN. ENVTL. L.J. 221, 227 (2001).

34. For history and discussions of these programs and other offset programs that have been explored in this country, see, e.g., David A. Savage & Matthew G. Paulson, *The Advent of Local VOC Cap-and-Trade for Controlling Ozone*, 20 NATURAL RESOURCES & ENV’T 10 (2005); Robert M. Sussman & Jon M. Queen, *EPA’s Mercury Rule-making: Expanding CAA Trading Programs*, 20 NAT. RESOURCES & ENV’T 15 (2005); J.B. Ruhl et al., *A Practical Guide to Habitat Conservation Banking Law and Policy*, 20 NATURAL RESOURCES & ENV’T 26 (2005); and Lynda Hall & Eric Raffini, *Water Quality Trading: Where Do We Go From Here?*, 20 NATURAL RESOURCES & ENV’T 38 (2005).

world have the same effect on the environment as reductions next door; GHGs mix so well in the atmosphere that any given GHG molecule can be anywhere in the world within a week. Because the cost of emissions reductions varies so dramatically around the world, this kind of “locational” flexibility can result in huge economic savings.<sup>35</sup> Essentially, the use of emissions trading allows flexibility, is cost-effective, and has enhanced the achievement of environmental goals. GHG offsets are a key component of most voluntary GHG emissions reduction programs,<sup>36</sup> existing mandatory emissions reduction programs,<sup>37</sup> and most proposed mandatory emissions reduction programs.<sup>38</sup> In addition to both mandatory and voluntary governmental programs, the private sector has been undertaking GHG offset activities for 15 years.<sup>39</sup>

### B. Trial Court Decision

On September 30, 2005, the Washington Superior Court ruled in favor of City Light on the grounds that it doesn't matter where the GHG reduction occurs; if City Light can mitigate its own GHG emissions, a point stipulated to by plaintiffs, it can pay someone else to do so.<sup>40</sup> Judge Sharon S. Armstrong ruled that City Light has the authority to reduce its own emissions.

It can do that by managing its own facilities, its own producing facilities, or it can spend money to have its emissions, its contribution reduced by someone else. This all makes sense only because of the unusual nature of the greenhouse gas canopy; the fact that it is an envelope around the entire globe; that it's not localized; that it does circulate.<sup>41</sup>

Plaintiffs filed a direct appeal to the Washington Supreme Court in November 2005.<sup>42</sup> The appellants maintain that they are not challenging City Light's right to reduce on-system emissions, but only payments to third parties to reduce emissions, i.e., offsets. The appeal argues that delay will allow the GHG offset program to become deeply ingrained in

policy and tempt other officials to “raid utility funds for non-utility purposes.”<sup>43</sup>

### IV. Conclusions and Lessons

City Light describes its mission as “[t]o provide stable, competitively priced and environmentally sound electricity to customers.”<sup>44</sup> The utility states, “we have worked very hard to keep Seattle's electricity affordable, reliable, and environmentally sound. Today Seattle City Light is a recognized national leader in energy efficiency and environmental stewardship.”<sup>45</sup>

The global scientific community has concluded that emissions of CO<sub>2</sub> and other GHGs are contributing to global climate change. Based on scientific confidence in the role of human-induced activities in contributing to global climate change, CO<sub>2</sub> and other GHGs increasingly are recognized as pollutants under international and domestic law and policy. As such, City Light's pursuit of carbon offsets can simply be seen as an expansion of its pre-existing and widely accepted mission of minimizing the utility's environmental footprint. While we wait for regulatory policy to catch up with the science, why would it be inappropriate for private and public entities to take independent action that is consistent with their corporate or governmental missions?

Many companies in this country have seen voluntary efforts to reduce their emissions as a means of moderating the need for or as a means to influence the design of future regulatory programs. Although many investor-owned utilities have pursued carbon offsets, City Light's involvement in the offset field is unusual among municipal utilities. The targeting of City Light in this case, however, may have been more the result of bad luck than because of its leadership role, since plaintiffs had successfully sued City Light for two causes of action unrelated to climate change mitigation.

While a ruling against City Light might not have significant implications for climate change mitigation efforts in this country, it would at a minimum be an inconvenience to climate change mitigation efforts, and would constitute a setback a nascent field doesn't need. The judgment for City Light in this case is the right outcome. The only reason City Light might lose this case at any level is the novelty of the case; players on all sides are coming up to speed on a range of complicated issues. This introduces an element of uncertainty into the arguments and the legal process, which could lead to unexpected results. Even now, it is not clear whether important evidence relating to offsets is in the official record.<sup>46</sup> At the end of the day, mitigating the environmental

35. Trexler Declaration, *supra* note 29, at 6.

36. Reportable GHG emissions reduction “activities may be part of your regular operations, pilot studies, prototype projects, or demonstration projects. They may take place in your community, in your workplace, at a location controlled by a third party, or at a foreign location.” See U.S. DEPARTMENT OF ENERGY, VOLUNTARY REPORTING OF GREENHOUSE GASES UNDER SECTION 1605(b) OF THE ENERGY POLICY ACT OF 1992—GENERAL GUIDELINES (Oct. 2004), available at <http://www.eia.doe.gov/oiaf/1605/1605b.html> (last visited Mar. 7, 2006).

37. See, e.g., Oregon's CO<sub>2</sub> mitigation program (the first in the United States), OR. REV. STAT. §469.503 (2003). Washington recently enacted its own CO<sub>2</sub> reduction mandate for new power plants, a fact that may also have hurt the plaintiffs' arguments. WASH. REV. CODE ch. 80.70 (2006) (Carbon Dioxide Mitigation).

38. Trexler Declaration, *supra* note 29, at 7.

39. The first carbon offset project was initiated in 1989 when AES Corp., a U.S. independent power producer, voluntarily undertook to offset emissions of a planned coal-fired power plant in Connecticut.

40. Okeson v. City of Seattle, No. 02-2-05774-8SEA (Wash. Super. Ct. Sept. 30, 2005).

41. Respondent/Cross Appellant Brief for City of Seattle at 1, Okeson v. City of Seattle, No. 77888-4 (Wash. Mar. 8, 2006) (citing record of proceedings at 32-33). There is no decision; the court ruled in City Light's favor at the hearing on motion for summary judgment.

42. Appellants' Statement of Grounds for Direct Review, Okeson v. City of Seattle, No. 77888-4 (Wash. Nov. 14, 2005).

43. *Id.* at 14. Since City Light cross-appealed on an evidentiary issue, both parties will likely have the opportunity to file reply briefs; briefing should be completed sometime in May 2006. The Washington Supreme Court will then decide whether it will hear this matter or transfer it to the Court of Appeals.

44. Seattle City Light, *About Us: At a Glance*, at <http://www.cityofseattle.net/light/aboutus/> (last visited Mar. 7, 2006).

45. *Id.*

46. In City Light's response to plaintiffs' motion for summary judgment, a large amount of information relating to carbon offsets and climate change mitigation was introduced through several declarations. Plaintiffs challenged these declarations, arguing that the witnesses had not been disclosed in a sufficiently timely manner and that the declarations were hearsay. Motion to Strike Declarations, Okeson v. City of Seattle, No. 02-2-05774-8SEA (Wash. Super. Ct. Sept. 22, 2005). The judge did reject the declarations from persons not previously part of the case. However, previous witnesses and de-

impacts of one's actions is a well-accepted principle as it applies to public and private organizations. Offsets are a well-known means of mitigating a variety of environmental impacts, particularly with respect to air emissions. It is not necessary in justifying such programs to argue that they will materially mitigate climate change itself (as City Light effectively did in arguing that it was trying to protect the state's snow pack). This is a much harder case to make, and one that is farther removed from the accepted environmental obligations of electric utilities.

City Light and the city of Seattle should be applauded for their climate change mitigation efforts. Nevertheless, it is not clear whether this kind of effort toward carbon-neutrality is the most important role that entities such as City Light and the city of Seattle can play.<sup>47</sup> While certainly justified

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ponents relied on materials in the declarations; these materials were not rejected. Thus, it is somewhat unclear what is in the record and what is not.

47. Many states and localities have taken actions to help tackle the problem of climate change. For an assessment of these actions, see Laura H. Kosloff et al., *Outcome-Oriented Leadership: How State and Lo-*

from the standpoint of managing the environmental impacts of electricity consumption, the individual efforts of entities like City Light are mostly symbolic in the larger context of mitigating climate change. What we really need is much better public understanding of climate change science, mitigation, and policy options. Without real public education, we will never generate the political will that is needed to truly address climate change at the national and international levels. But while more and more entities are willing to pursue carbon neutrality, very few have proven willing to engage in systematically educating the public.

That said, organizations such as City Light are somewhat limited in their options on this issue. It would probably be harder to defend an action in which City Light spent money on such an education program, since it is not intuitively clear that educating the public about climate change is a proprietary utility function. As long as plaintiffs such as those in this case are searching for cases to make, companies like City Light do have to choose their path with some care.

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*cal Climate Change Strategies Can Most Effectively Contribute to Global Warming Mitigation*, 14 WIDENER L.J. 173 (2004).