



**Comments by Hudson River Sloop Clearwater, Inc. on
Clean Energy Standard Tier 3 Nuclear Subsidy Petitions for Rehearing**

Re: NY State Public Service Commission Matter Number 15-01168: Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard; Case Number 15-E-0302

Submitted November 14, 2016

Hudson River Sloop Clearwater, Inc. is a 501(c)3 tax exempt nonprofit, member-supported corporation. Clearwater's interest in these proceedings comes from our mission, which is to preserve and protect the Hudson River, its tributaries and related bodies of water and to ensure the well-being of everyone living in its watershed. Clearwater's more than 5,000 members support our mission in their local communities. As an organization, Clearwater works to provide innovative environmental programs, advocacy, and celebrations designed to inspire, educate and activate the next generation of environmental leaders. Clearwater is also a party in the relicensing of Indian Point nuclear power plant, and has actively participated in the NYS Public Service Commission's Reforming the Energy Vision (REV) proceedings since the outset. We thank the Secretary and the Commissioners for allowing us to comment on the Public Service Commission's Clean Energy Standards (CES), with a focus on our very serious concerns about the Tier 3 Nuclear Subsidy.

Procedural Concerns:

State Administrative Procedures Act (SAPA): Clearwater shares with Alliance for a Green Economy (AGREE) and Nuclear Information and Resource Service (NIRS), Castleton Commodities (Castleton), Council on Intelligent Energy & Conservation Policy (CIECP) et al., and the Public Utility Law Project of New York (PULP) the concern that the New York State Public Service Commission (PSC) committed an error of law with regard to the NY State Administrative Procedure Act (SAPA) by not allowing sufficient time for public comment on a ruling of this magnitude. Under SAPA § 202-a(1), a government agency would usually allow a minimum of 45 days for an action of this significance. This action was only allowed 14 days (11 business days). Further, CES Tier 3 changed dramatically from the first (June) version to the second (August) version, which became the PSC's final ruling.

AGREE/NIRS (Filing 365) stated this most clearly:

“On July 8, 2016, the Department of Public Service issued a new proposal for nuclear subsidies. The proposal is a substantial revision as defined by SAPA §102(9) and represented a significant departure from the previous proposal that had been put forth for public comment. Not only did the new proposal include an entirely new formula for calculating the cost of the nuclear subsidies (which raised the projected price exponentially), but also included entirely new policy concepts, such as the designation of ‘public necessity’ for certain nuclear units. ... Thus, the only opportunity afforded parties and the public to challenge the brand new ‘public necessity’ policy proposal, as well as the ‘public necessity’ determination for any particular generator, was during a truncated public comment period.”

AGREE/NIRS (Filing 365) also wrote:

“Fourteen (14) days is a wholly inadequate period of time for parties and the public to analyze the implications of the proposal and to provide meaningful and detailed comment. The comment period

violated the SAPA.

“To make matters even more difficult and unfair, the Staff provided a vague list of criteria that the Commission could use to make a determination of ‘public necessity’ but offered no detailed information for why Staff was proposing that all of the four upstate nuclear reactors meet all of the criteria and would qualify for this designation.

“The new proposal also included an unusually lengthy term of twelve (12) years for the nuclear subsidies with no possibility for interim review, in violation of SAPA §207(4). Finally, it contemplated new eligibility criteria, which would allow the Indian Point nuclear reactors to become potentially eligible for subsidies in the future. Subsidies for Indian Point had never before been proposed or considered previously, and, in fact, the State Energy Plan contemplates the facility’s closure as a public interest benefit.”

PULP (Filing 372) wrote:

“[SAPA’s] forty-five-day notice period is supplemented by the requirement that a notice must contain the text of the proposed rule, or point to a web site where the full text of the rule is posted if it is longer than 2,000 words. Additionally, for those instances where the agency’s provision of process has led to a need to change the proposed rule from its originally proposed language, the agency must post a notice of revised rulemaking with the thirty-day deadline.

“Nowhere in SAPA however is there authorization for ‘add-on’ rules or rules resulting from the ‘logical outgrowth’ of the process since the issuance of a prior notice that did not cover the changes contemplated after substantial change to the proposed rule.”

State Environmental Quality Review Act (SEQRA): Clearwater shares with AGREE/NIRS and CIECP et al. the concern that the Commission committed an error of law with regard to the NY State Environmental Quality Review Act by not considering all reasonable alternatives.

AGREE/NIRS (Filing 365) noted:

“The Commission considered no alternatives to nuclear subsidies, in violation of the State Environmental Quality Review Act (SEQRA), Title 16, Chapter I, CRR-NY §7.3. SEQRA requires an evaluation of ‘all reasonable alternatives’ when an agency action is being considered. Contrary to this law, the Generic Environmental Impact Statement (GEIS) provided in this case considered only two scenarios.

- The ‘no action’ scenario, which would involve allowing nuclear reactors to close as owners deemed them too unprofitable. Under this scenario, the market would determine what resources replaced the power generated by nuclear facilities.
- The subsidizing of nuclear plants as proposed by the Department of Public Service Staff, through which nuclear plants would receive significant subsidies designed to prevent nuclear closures.” ...

“The Commission’s failure to consider alternatives to nuclear subsidies when sufficient information was available on the record is arbitrary and capricious, and would have substantial economic and environmental impacts.”

Failure to notify potentially impacted stakeholders re: eligibility exclusions and limitations. Clearwater agrees with ACE/NY, Brookfield, CH4 Biogas, H.Q. Energy Services (U.S.) Inc. (HQ) and IPPNY that the Commission committed an error of law by failing to notify potentially impacted stakeholders of limitations and exclusions for specific categories of renewable energy generation.

ACE (Filing 369) wrote:

“Tier 2 eligibility should be broadened to include all technology types eligible for Tier 1 that were in operation before 2015. These resources have the same environmental attributes, and their leaving the state would have the same effect on climate goals, local economies, and the achievement of the 50% mandate as other resources included in the CES. Differential treatment of these resources is arbitrary.”

HQ Energy (Filing 360) wrote:

“The Commission’s decision to exclude new storage impoundment hydroelectric power in the CES eligibility is unsupported by record evidence, is arbitrary and capricious, is not the result of reasoned decision-making, and is unduly discriminatory.”

IPPNY (Filing 364) wrote:

“The Commission limited the eligibility for Tier 1 to renewable resources that came into operation on or after January 1, 2015.”

Jurisdictional Considerations: The PSC’s basic jurisdiction is to regulate retail rates for electricity, natural gas and water. In October the Coalition for Competitive Electricity, Dynegy Inc., Eastern Generation LLC, Electric Power Supply Association, NRD Energy Inc., Roseton Generating LLC and Selkirk Cogen Partners LP filed a lawsuit in federal court challenging the NY State Public Service Commission’s plan to subsidize struggling nuclear power plants by raising electric rates by requiring consumers across the state to pay for zero emission credits (ZECs). The coalition said the plan interferes with the Federal Energy Regulatory Commission (FERC)’s jurisdiction to regulate wholesale electric rates.¹

The week before, Public Citizen challenged Energy’s proposed sale FitzPatrick nuclear plant to Exelon, saying their application to FERC failed to include information about the State’s Tier 3 nuclear subsidy, which makes the transaction possible. Public Citizen claims the omission of the subsidy makes the application incomplete. It also said the subsidy could distort the New York electricity market and may violate the NYISO Tariff. The \$110 million sale was dependent on the NY Public Service Commission’s adoption of the zero-emission credit (ZEC) subsidy that pays nuclear generators for their carbon-free attributes. Public Citizen requested that FERC require a market analysis that incorporates the full impact of ZECs and determine if the subsidies conform with FERC rules.² Public Citizen wrote:

“Exelon’s application to acquire FitzPatrick must be considered incomplete because, inexplicably, it fails to incorporate any mention or analysis of New York’s proposed ZEC payment subsidy scheduled only for FitzPatrick and for both of Exelon’s two in-state nuclear facilities. This payment subsidy, estimated at a total of \$8 billion in six two-year increments, will significantly distort the NYISO energy and capacity markets and fundamentally alter the economics of Exelon’s power generation operations in NYISO, including FitzPatrick.

“We believe the structure of the ZEC may conflict with elements of the NYISO ... Tariff, particularly FERC’s mandate for incentives through the NYISO installed capacity market,” the protest continued.

“While the ... proponents claim the ZEC is designed to combat climate change, a realistic analysis shows that the primary purpose of the ZEC is to keep select economically uncompetitive nuclear power plants operating, regardless of the impact on greenhouse gas emissions. And the state’s decision to discriminate between different nuclear generating stations for reasons other than climate change or the environment further complicates the true purpose of this expensive ZEC subsidy.”³

Public Service Law § 5.2: Clearwater shares with, AGREE/NIRS, CIECP, Castleton, Energy Ottawa and New York Association of Public Power (NYAPP) the concern that the New York State Public Service Commission committed an error of law with regard to jurisdictional violations and contradictions.

¹ Lidgett, Adam: “Energy Coalition Sues NY Over Nuclear Plant Subsidies”; Law 360, October 19, 2016.

<http://www.law360.com/articles/853511/energy-coalition-sues-ny-over-nuclear-plant-subsidies>

² Opalka, William: “Public Citizen Challenges NY Nuclear Subsidy, FitzPatrick Sale”; RTO Insider, October 12, 2016.

<https://www.rtoinsider.com/public-citizen-nuclear-power-subsidy-fitzpatrick-32819/>

³ *Op cit.*

The Commission shall encourage all persons and corporations subject to its jurisdiction to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources.⁴

Further, Clearwater shares concerns expressed by AGREE/NIRS, CIEPC and Castleton that CES Tier 3 is the result of overreaching influence of the Governor's authority. It is required by law and critical to the independent functioning of the NYS PSC that it function independently of the Executive Office. In fact, CES Tier 3 also usurps policy function of the NY State Legislature, which was not even consulted on this significant decision.

NYAPP (Filing 366) wrote:

"Absent a modification of State law, which we would not support, the Commission simply has no authority to order actions by the four rural electric cooperatives in New York State."

CIECP (Filing 373) stated:

"The exorbitant subsidies represent a *de facto* overhaul of deregulation and appear to be the product of other activities outside the purview of this proceeding.

"Tier 3 ... represents a dramatic departure from the prior proposal, is internally inconsistent. The rush to approve this Order also appears have been solely for the purpose of enabling Exelon to buy FitzPatrick."

Pre-emption of federal law and unlawful burden on interstate commerce:

Castleton Commodities (Filing 363) wrote:

"...In adopting the ZEC Program, the Commission has acted beyond the scope of its legislatively delegated authority, has acted in an area pre-empted by federal law, has imposed an unlawful burden on interstate commerce and has failed to provide reasoned explanations for discriminating among sources of generation with reduced carbon attributes, for abandoning its commitment to competitive forces to manage the wholesale markets, and for how the Commission will administer the mixed reliance on competition and command and control regulation in the wholesale markets."

Substantive Issues:

Tier 3 nuclear subsidy of the CES Order is uneconomical, poses risks of environmental contamination and may compromise public health and safety: Clearwater shares with AGREE/NIRS, Alliance for Clean Energy (ACE/NY), Brookfield Renewable Energy Group (Brookfield), Castleton, CH4 Biogas (CH4), and CIECP, the concern that the NY State Public Service Commission committed an error of fact with regard to its flawed economic analysis, which the Joint Petition by Entergy and Exelon also addressed, and the PSC's failure to adequately assess potential environmental contamination from planned and unplanned releases of radioactivity, and resulting risks to public health and safety. Specifically it failed to consider the costs and dangers of radioactive waste storage, which will be compounded by an additional 12 years of operation of NY's four remaining nuclear facilities, and the six aging reactors that would continue to generate highly radioactive spent fuel rods. The fuel pools from these reactors are already dangerously overcrowded, and with no national repository on the horizon, this waste will likely be stored on site. Further, CES Tier 3 nuclear subsidy failed to address the need for a protective and cost-effective decommissioning plan or assess the additional decommissioning costs that extending these facilities would incur. Finally, there is no adequate insurance coverage to cover an incident or accident that might result from this action.

AGREE/NIRS (Filing 365) wrote:

"[The CES] is uneconomical and highly inefficient; increases radioactive waste, environmental contamination, and risks to public safety; and it is a waste of public and natural resources.

⁴ New York Public Service Law § 5. Jurisdiction, powers and duties of public service commission
<http://codes.findlaw.com/ny/public-service-law/pbs-sect-5.html#sthash.Ph99QDj4.dpuf>

"The PSC has failed to demonstrate that imposing surcharges of nearly \$8 billion, and potentially up to \$10 billion (if the Indian Point nuclear power station qualifies for the program), on ratepayers throughout the state is in the public interest, consistent with existing statute and policy.

"[The CES] is inconsistent with the Reforming Energy Vision (REV) initiative, which is critical to the state's effort to improve system efficiency, empower customer choice, and encourage greater penetration of clean generation and energy efficiency technologies and practices.

"[The CES] completely contradicts the statement by Richard Kauffman, Chairman of Energy and Finance for New York, that, 'New York is moving to a more market-based, decentralized approach with how it shapes energy policy.' "

Reliance on the Nuclear Regulatory Commission's oversight of nuclear facilities to ensure public health and safety and protect environmental resources: In order to create a 12-year mandatory nuclear subsidy to perpetuate the operation of New York's aging nuclear power plants, the PSC must be relying on the Nuclear Regulatory Commission (NRC) to provide adequate oversight to ensure public health and safety of New York's nuclear fleet. It has been Clearwater's experience that, although this is a reasonable assumption and would indeed be ideal, the NRC has frequently erred on the side of promoting and protecting the nuclear industry at the expense of public health and safety. Clearwater's experience has been more directly with Indian Point than with FitzPatrick, Ginna or Nine Mile Point, but if this experience is any example, the trust of the PSC and other New York agencies in the oversight provided by the NRC may be misplaced.

For example, the recent electrical fire on a cable running between Indian Point's two reactors was yet another of several emergency events at this aging and dangerous nuclear plant, which 20 million people live or work within a 50 mile radius of. Despite the increasing deterioration at Indian Point, the Nuclear Regulatory Commission has repeatedly issued waivers and an exemption regarding electrical wiring and other safety standards. Earlier this year it was discovered that Unit 2 had hundreds of faulty, degraded and missing bolts inside the reactor. The fact that the NRC has not even required Unit 3, which is identical to Unit 2, to be closed for inspection and repair, exemplifies the NRC's lax oversight, which we believe puts industry profits ahead of public health and safety.

In addition to transformer fires, other electrical failures and repeated leaks of radioactive isotopes into the air and the groundwater under the plant, Clearwater believes that it is only a matter of time before a more serious problem occurs. The potential for a catastrophic fuel pool fire caused by overcrowding highly radioactive fuel rods into a space which was only designed hold one quarter of the fuel currently stored there is especially concerning.

Clearwater looks forward to the inspection report by Governor Cuomo's oversight group to shed light on these ongoing problems and to recommend solutions to address these critical threats to the Hudson Valley and greater New York City metropolitan area. Although, because of deregulation, the Commission has no direct jurisdiction over the operation of Indian Point or the three reactors in western New York, the Commission does have an obligation to consider all potential impacts of its ruling with a critical eye.

Inappropriate application of the avoided social cost of carbon: Clearwater agrees with AGREE/NIRS, Castleton and CH4 that the NY State Public Service Commission committed an error of fact with regard to the equations used to calculate the social cost of carbon by equating the cost of carbon abatement with the cost of emissions and Castleton, et al. cited the flaw of comparing the social cost of carbon with the social cost of nuclear generation.

AGREE/NIRS (Filing 365) wrote:

"The [CES] determines the price of ZECs through a formula based on the U.S. Environmental Protection Agency's ('EPA') Social Cost of Carbon ('SC-CO2'). This is a gross misapplication of the SC-CO2, one which will impose an unnecessarily high cost on New York consumers for emissions reduction."

Tier 3 nuclear subsidy favors nuclear over other sources of generation: Clearwater agrees with ACE/NY, Brookfield, CH4, Energy Ottawa, H.Q. Energy Services (U.S.) Inc. (HQ), NYAPP, ReEnergy Holdings, LLC (ReEnergy), RENEW Northeast, Inc. (RENEW), TDI, and New York State Energy Research and Development Authority (NYSERDA) that the NY State Public Service Commission committed an error of fact because the nuclear subsidy discriminates in favor of nuclear power over all other sources of generation and specifically does not equitably compensate renewables. In fact, the nuclear subsidy defined by the PSC as “zero-emission credits” or ZECs dwarfs the subsidy to incentivize new and existing renewable energy credits (RECs) by a ratio of 2:1. Further, Clearwater agrees that there was inadequate inclusion of hydroelectric, biogas, and other renewables to allow load-serving entities (LSEs) to offset their CES obligations. If ZECs are to be included in the CES for nuclear facilities, Ampersand Hydro recommends that all small hydroelectric facilities (5 MW or less) also be eligible for ZECs, as they truly are emission-free. Brookfield objects to the exclusion of large-scale and privately-owned hydro facilities from ZECs, while counting toward the achievement of CES goals without fair compensation.

Brookfield (Filing 368) wrote:

“Currently, the CES Order provides no competitive compensation for existing private hydropower facilities when those same facilities have been a critical component in achieving the energy profile New York currently enjoys in terms of the level of renewable resources as well as the associated decreases in carbon dioxide (“CO2”) emissions and greenhouse gases. In addition, under any circumstance, the Commission should allow Load Serving Entities (“LSEs”) to offset their CES obligations through contracts with privately-owned legacy resources, thus creating additional demand and value for renewable attributes.”

Sale of RECs outside of NY: Clearwater agrees with ACE/NY, Brookfield, Castleton, Energy Ottawa, Independent Power Producers of New York, Inc. (IPPNY) and Transmission Developers, Inc. (TDI) that the NY State Public Service Commission committed an error of fact by not adequately addressing the economic impact of the newly enacted long-term Power Purchase Agreement (PPA) recently adopted in Massachusetts.

Here Clearwater also agrees with ACE/NY and others that the Commission has established a 50% renewable energy generation requirement for New York by 2030 and counts existing renewable resources towards that mandate, but does not compensate them equitably to ensure they are valued competitively with adjacent markets. This should be rectified in Tier 2.

ACE (Filing 369) wrote:

“The Staff LSR [Large Scale Renewables] Options Paper and CES White Paper identified a clear rationale for the adoption of Tier 2 support, including the statement, ‘It is inevitable that in the absence of a New York policy stimulating demand that creates sufficient value for Legacy LSR RECs, the energy and RECs from some or all of the resources are likely to leave the market’ (LSR Options Paper at 115). Again, the Order did not provide evidence to contradict this statement from the LSR Options Paper.”

ACE (Filing 369) wrote:

...” In short, by establishing a 50% by 2030 requirement in New York, and then counting all existing renewable resources towards that 50% mandate, but not providing a mechanism for compensating those existing renewables at a value that is competitive with adjacent markets, the CES Program is creating confusion, market disruption, and unfair complications for existing generators.”

PSC has no authority to claim environmental attributes that belong to generation owners. Finally, Brookfield, Castleton, Energy Ottawa, NYSERDA and IPPNY have stated that the Commission has no authority to claim environmental attributes that belong to generation owners.

Contradictions with REV: REV goals include transitioning to distributed energy resources (DER) and promoting market animation. CES Tier 3 does neither. It subsidizes large, unprofitable, centralized sources of generation, which will require more transmission upgrades, and it interferes with free market functioning by instituting a huge bailout of the nuclear industry as its infrastructure is aging and its operations are increasingly unprofitable. It also

eliminates customer choice by forcing customers to pay for nuclear generation, even if they chose a 100% renewable portfolio. Currently, the nuclear subsidy will be paid for by *all* energy customers, including those purchasing exclusively emission-free renewable energy (wind, hydro/tidal and solar). To be consistent with REV goals, clean energy subsidies provided under CES should only apply to truly emission-free renewable energy and energy efficiency. Clean energy incentives should be designed to minimize carbon emissions by targeting and discouraging energy derived from fossil fuel combustion; however, clean energy credits should not be used to reward aging and unprofitable nuclear plants, which are not truly emission-free.

New York's Tier 3 Nuclear Subsidy is precedent-setting and will likely become a template for other states and may even lead to changes in the US EPA's Clean Power Plan. However it suffers from errors of law and fact, and must be revisited, with all challenges carefully considered, and then modified to ensure public health and safety, to protect the environment, and to promote fairness in the marketplace.

In conclusion, Clearwater opposes the nuclear subsidy included in the NYS Public Service Commission's Clean Energy Standard, because nuclear power is far from clean in its mining, milling, transportation, use and storage. Nuclear plants emit radioactivity into the air, water and ground through planned and unplanned releases. This mandatory 12-year subsidy means that ratepayer dollars that should be going to scale up renewables and energy efficiency are being used to bail out aging, unprofitable and dangerous nuclear plants, which will continue to generate highly radioactive nuclear waste for which there is no safe storage. New Yorkers no longer have a choice to purchase 100% renewable energy, because we will all be forced to pay this nuclear surcharge on our monthly energy bills. This cost will most seriously impact low income ratepayers and businesses operating on a thin profit margin. Furthermore, the jobs argument, which was voiced so urgently by elected officials and others in western New York, overlooks the number of jobs that will be needed for safe decommissioning and the potential for new jobs created by transitioning to a renewable energy economy. At Diablo Canyon, California's last remaining nuclear facility, the Public Utility Commission encouraged a collaborative process which resulted in a joint proposal to phase out this aging nuclear plant by committing to 100% renewable replacement energy, while protecting plant workers by retaining those with critical institutional memory and highly technical knowledge, and retraining and placing those who are not needed for safe decommissioning into new jobs in renewable energy with storage and energy efficiency, which will be created by this agreement. New York needs to create a similarly just transition plan to phase out both nuclear power and fossil fuel generation, not a prolonged nuclear bailout.

Thank you for your consideration of these comments and recommendations.

Sincerely,



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