

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of

HUDSON RIVER SLOOP CLEARWATER, INC., GOSHEN
GREEN FARMS, LLC, TOWN OF NORTH SALEM, NEW
YORK PUBLIC INTEREST RESEARCH GROUP FUND,
INC., NUCLEAR INFORMATION AND RESOURCE
SERVICE, BEYOND NUCLEAR, INDIAN POINT SAFE
ENERGY COALITION, PROMOTING HEALTH AND
SUSTAINABLE ENERGY, INC., GREEN EDUCATION
AND LEGAL FUND, INC., SAFE ENERGY RIGHTS
GROUP, INC., SCOTT CHASE, RICHARD HAMMER,
SCOTT CHASE, RICHARD HAMMER, JOYCE
HARTSFIELD, JOSEPH J. HEATH, WILLIAM MCKNIGHT,
SR., BRUCE ROSEN, GEORGE STADNIK, LYNNE
TEPLIN, ELLEN C. BANKS, CARYL BARON, LINDA
BELISLE, DANIEL BIRN, MIRIAM BLUESTONE, J.
ALLISON CROCKETT, LAURA DEL GAUDIO, ALLEGRA
DENGLER, MICHELLE FREEDMAN, DEAN GALLEA,
VALERIE GILBERT, ALLAN GOLDHAMMER, CARLTON
GORDON, JENNIFER GORMAN, STEVEN L. GOULDEN,
CATHY A. HAFT, RICHARD HAMMER, BRIAN
HOBERMAN, OBIE HUNT, ROBERT V. JACOBSON,
VICKY KAISER, ALVIN KONIGSBERG, JUDITH A.
LASKO, SUSAN D. LEIFER, MIKHAELA MARICICH,
FREDERICK MARTIN, III, PATRICIA MATTESON, JANE
MAYER, JANET MCBRIDE, VALERIE NIEDERHOFFER,
TERESA OLANDER, VICTOR PALIA, CAROLINE
PAULSON, GAIL PAYNE, THOMAS RIPPOLON,
ROSEMARIE SANTIESTEBAN, CHERYL SCHNEIDER,
CAROL SKRYM, MELVYN T. STEVENS, STEVEN
STUART, MONICA WEISS, ERIC WESSMAN, TODD D.
WOLGAMUTH, JUDITH M. ZINGHER,

Petitioners-Plaintiffs,

For a Judgment pursuant to Article 78 of the CPLR,

-against-

Index No. 07242-16

**NOTICE OF AMENDED
VERIFIED PETITION
PURSUANT TO ARTICLE
78 AND COMPLAINT**

NEW YORK STATE PUBLIC SERVICE COMMISSION,
along with KATHLEEN BURGESS in her official capacity as
Secretary, AUDREY ZIBLEMAN in her official capacity as
Chair, PATRICIA L. ACAMPORA, GREGG C. SAYRE, and
DIANE X. BURMAN, in their official capacities as
Commissioners,

Respondents-Defendants,

-and

CONSTELLATION ENERGY NUCLEAR GROUP, LLC,
with Subsidiaries and affiliates EXELON GENERATION
COMPANY, LLC, R.E. GINNA NUCLEAR POWER PLANT,
LLC, NINE MILE POINT NUCLEAR STATION, LLC,
ENTERGY NUCLEAR FITZPATRICK, LLC, ENTERGY
NUCLEAR INDIAN POINT 2, LLC, and ENTERGY
NUCLEAR INDIAN POINT 3, LLC.

Nominal Respondents-Defendants

Index No. 07242-16

**NOTICE OF AMENDED
VERIFIED PETITION
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78 AND COMPLAINT**

PLEASE TAKE NOTICE, that upon the annexed Verified Petition of Petitioners, verified on
the 13th day of January 2017, and all exhibits annexed thereto, application will be made to the
Supreme Court of the State of New York, County of Albany, 16 Eagle Street Albany New York
12207 on the 7th day of April 2017, at 9:30 o'clock in the forenoon, or as soon thereafter as
counsel can be heard, for a judgment granting the relief requested in the Petition as follows:

1. This hybrid proceeding is commenced pursuant to CPLR §3001 and Article 78 of the Civil Practice Law and Rules seeking, *inter alia*:

- a. to rescind, annul, and vacate the Tier 3 portion of the Orders issued by the New York State Public Service Commission dated August 1, 2016 (see attached hereto Exhibit “1”) and November 17, 2016 (see attached hereto Exhibit “2”) and rehearing denial dated December 15, 2016 (see attached hereto Exhibit “3”) which are in violation of law, without jurisdiction, arbitrary and capricious, discriminatory and created up to a \$10 billion subsidy to corporation(s) operating aging nuclear plants in New York State;
- b. a declaratory judgment declaring that a rate-making case in which the beneficiary utilities receive more than \$300,000 or 2.5 % rate increase requires a public hearing;
- c. a declaratory judgment that a rule/rate-making matter must comply with the regulations under State Administrative Procedure Act (“SAPA”); and that the PSC failed to:
 - (i) publish in State Register the significant rule change proposed in the Staff’s Responsive Proposal of July 8, 2016 pursuant to SAPA §202(4-a);
 - (ii) allow 30 days for public comments, pursuant to SAPA §202(4-a);
 - (iii) wait 30 days after close of public comment period prior to issuing an order, pursuant to SAPA §202 (4-a).

(iv) “use words with common and everyday meanings” pursuant to
SAPA §201;


- d. a declaratory judgment declaring that nuclear energy production is not “zero-emissions”, and that the PSC cannot rely on this significant mistake of fact.
2. An award of costs and disbursements of this action against Respondent-Defendants of this action; and
3. Grant such other and further relief as this Court deems just and proper, including but not limited to modification of said Orders.

PLEASE TAKE FURTHER NOTICE, that pursuant to Section 7804(c) of the Civil Practice Laws and Rules (“CPLR”), a Verified Answer and supporting affidavits, if any, must be served at least five (5) days before the return date of this application and that, pursuant to CPLR Section 7804(c), Respondents are directed to file a certified copy of the proceedings to be considered herein.

Dated: Nanuet, New York
January 13, 2017

Respectfully submitted,

ROCKLAND ENVIRONMENTAL GROUP



SUSAN H. SHAPIRO, ESQ.
JOHN PARKER, ESQ.
VICTORINE FROEHLICH, ESQ.
Counsel for Petitioners
75 North Middletown Rd
Nanuet, NY
(845) 371-2100

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of
HUDSON RIVER SLOOP CLEARWATER, INC., et al.

Petitioners-Plaintiffs,

For a Judgment pursuant to Article 78 of the CPLR,

-against-

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NEW YORK STATE PUBLIC SERVICE
COMMISSION, along with KATHLEEN BURGESS in her
official capacity as Secretary, AUDREY ZIBLEMAN in her
official capacity as Chair, PATRICIA L. ACAMPORA,
GREGG C. SAYRE, and DIANE X. BURMAN, in their
official capacities as Commissioners,

SUMMONS

Respondents-Defendants,

-and

CONSTELLATION ENERGY NUCLEAR GROUP, LLC,
with Subsidiaries and affiliates EXELON GENERATION
COMPANY, LLC, R.E. GINNA NUCLEAR POWER
PLANT, LLC, NINE MILE POINT NUCLEAR STATION,
LLC, ENTERGY NUCLEAR FITZPATRICK, LLC,
ENTERGY NUCLEAR INDIAN POINT 2, LLC, and
ENTERGY NUCLEAR INDIAN POINT 3, LLC,

Nominal Respondents-Defendants,

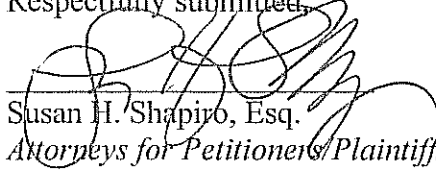
To the Above Named Defendants:

YOU ARE HEREBY SUMMONED to answer the Verified Amended
Complaint in this action and to serve a copy of your Answer, or, if the Verified Amended
Complaint is not served with this Summons, to serve a Notice of Appearance, on the Plaintiffs'

attorneys on or before February 13, 2017 pursuant to a December 21, 2016 Scheduling Stipulation.

In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Verified Complaint.

Dated: Nanuet, New York
January 13, 2017

Respectfully submitted,
By: 
Susan H. Shapiro, Esq.
Attorneys for Petitioners/Plaintiffs
75 N. Middletown Rd.
Nanuet, New York 10954
(845) 371-2100

To:

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New York State Public Service Commission
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Albany, NY 12210
(518) 474-7687

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of

HUDSON RIVER SLOOP CLEARWATER, INC., GOSHEN
GREEN FARMS, LLC, TOWN OF NORTH SALEM,
NUCLEAR INFORMATION AND RESOURCE SERVICE,
BEYOND NUCLEAR, INDIAN POINT SAFE ENERGY
COALITION, PROMOTING HEALTH AND SUSTAINABLE
ENERGY, INC., GREEN EDUCATION AND LEGAL FUND,
INC., SAFE ENERGY RIGHTS GROUP, INC., NEW YORK
PUBLIC INTEREST RESEARCH GROUP FUND, INC.,
SCOTT CHASE, RICHARD HAMMER, SCOTT CHASE,
RICHARD HAMMER, JOYCE HARTSFIELD, JOSEPH J.
HEATH, WILLIAM MCKNIGHT, SR., BRUCE ROSEN,
GEORGE STADNIK, LYNNE TEPLIN, ELLEN C. BANKS,
CARYL BARON, LINDA BELISLE, DANIEL BIRN,
MIRIAM BLUESTONE, J. ALLISON CROCKETT, LAURA
DEL GAUDIO, ALLEGRA DENGLE, MICHELLE
FREEDMAN, DEAN GALLEA, VALERIE GILBERT,
ALLAN GOLDHAMMER, CARLTON GORDON,
JENNIFER GORMAN, STEVEN L. GOULDEN, CATHY A.
HAFT, RICHARD HAMMER, BRIAN HOBERMAN, OBIE
HUNT, ROBERT V. JACOBSON, VICKEY KAISER, ALVIN
KONIGSBERG, JUDITH A. LASKO, SUSAN D. LEIFER,
MIKHAELA MARCICH, FREDERICK MARTIN, III,
PATRICIA MATTESON, JANE MAYER, JANET
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OLANDER, VICTOR PALIA, CAROLINE PAULSON, GAIL
PAYNE, THOMAS RIPPOLON, ROSEMARIE
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SKRYM, MELVYN T. STEVENS, STEVEN STUART,
MONICA WEISS, ERIC WESSMAN, TODD D.
WOLGAMUTH, JUDITH M. ZINGHER,

Petitioners-Plaintiffs,

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NEW YORK STATE PUBLIC SERVICE COMMISSION,
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Chair, PATRICIA L. ACAMPORA, GREGG C. SAYRE, and
DIANE X. BURMAN, in their official capacities as
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Respondents-Defendants,

-and

CONSTELLATION ENERGY NUCLEAR GROUP, LLC,
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**AMENDED VERIFIED
PETITION PURSUANT TO
CPLR ARTICLE 78 AND
COMPLAINT**

The Petitioners HUDSON RIVER SLOOP CLEARWATER, INC., GOSHEN GREEN
FARMS, LLC, TOWN OF NORTH SALEM, NUCLEAR INFORMATION AND RESOURCE
SERVICE, BEYOND NUCLEAR, INDIAN POINT SAFE ENERGY COALITION,
PROMOTING HEALTH AND SUSTAINABLE ENERGY, INC., GREEN EDUCATION AND

LEGAL FUND, INC., SAFE ENERGY RIGHTS GROUP, INC., NEW YORK PUBLIC INTEREST RESEARCH GROUP FUND, INC., SCOTT CHASE, RICHARD HAMMER, SCOTT CHASE, RICHARD HAMMER, JOYCE HARTSFIELD, JOSEPH J. HEATH, WILLIAM MCKNIGHT, SR., BRUCE ROSEN, GEORGE STADNIK, LYNNE TEPLIN, ELLEN C. BANKS, CARYL BARON, LINDA BELISLE, DANIEL BIRN, MIRIAM BLUESTONE, J. ALLISON CROCKETT, LAURA DEL GAUDIO, ALLEGRA DENGLE, MICHELLE FREEDMAN, DEAN GALLEA, VALERIE GILBERT, ALLAN GOLDHAMMER, CARLTON GORDON, JENNIFER GORMAN, STEVEN L. GOULDEN, CATHY A. HAFT, RICHARD HAMMER, BRIAN HOBERMAN, OBIE HUNT, ROBERT V. JACOBSON, VICKEY KAISER, ALVIN KONIGSBERG, JUDITH A. LASKO, SUSAN D. LEIFER, MIKHAELA MARCICH, FREDERICK MARTIN, III, PATRICIA MATTESON, JANE MAYER, JANET MCBRIDE, VALERIE NIEDERHOFFER, TERESA OLANDER, VICTOR PALIA, CAROLINE PAULSON, GAIL PAYNE, THOMAS RIPPOLON, ROSEMARIE SANTIESTEBAN, CHERYL SCHNEIDER, CAROL SKRYM, MELVYN T. STEVENS, STEVEN STUART, MONICA WEISS, ERIC WESSMAN, TODD D. WOLGAMUTH, JUDITH M. ZINGHER, and of and by their Counsel, Susan H. Shapiro, Esq., as and for its Verified Petition, alleges as follows.

SUMMARY OF THE ACTION

1. This action challenges the Tier 3 portion of a Public Service Commission Order issued on August 1, 2016 in Case 15-E-0302 and Case 16-E-0270 (the “*August Order*” attached hereto as “1”) and the subsequent Commission Orders, dated November 17, 2016 (the

“November 17 Order” attached hereto as Exhibit “2”), as well as the Commission Rehearing Denial, Order dated December 15, 2015 (the “December Denial of Petitions for Rehearing” attached herein as Exhibit “3”) (hereinafter collectively referred to as “Tier 3” or “Orders”).

2. The Commission’s adoption of Tier 3 contains many procedural and substantive errors of law and mistakes of fact, numerous assumptions and statements not supported by evidence in the record.

3. Petitioners are challenging Tier 3 because it contravenes the articulated intent of New York’s Reforming the Energy Vision and State Energy Plan represents a major impediment to New York’s transition to a clean energy economy; increases the risks and hazards of New York’s aging nuclear plants; and rests, in its entirety, upon the fallacy that nuclear is “zero-emission.” Nothing in the record shows that there is a public necessity for Tier 3.

4. The Clean Energy Standard (the “*August Order*”) of which Tier 3 is included, as purportedly adopted to meet the goals of Reforming the Energy Vision policy, yet Tier 3 is contrary to the very premise of the *August Order*, as it disrupts the free market by forcing ratepayers to subsidize aging, unprofitable, unsustainable and emission spewing nuclear operations to the tune of a \$7.6 to \$10 billion subsidy program for a period of twelve (12) years (the “Subsidy”). This is one of the largest transfers of wealth from the rate paying public to a single industry in New York State history.

5. The Commission’s behavior throughout the multi-year proceedings leading up to the adoption of the *August Order* followed the strict requirement of rulemaking pursuant to SAPA, including publication of the Commission’s White Paper proposal in the State Register and providing thirty (30) or more days for public comment and hearings. Yet, suddenly on July

8, when the Staff's significantly and materially different Responsive Proposal was issued, the Commission stopped following rulemaking procedural requirements of publication, notice, and comment. The *July 8th Responsive Proposal* contained three significant changes from what had been previously proposed and commented on by the public. On July 8th for the first time:

- Indian Point was included as a potential beneficiary;
- the subsidy calculation was changed from using the operational costs to using a novel and new approach using the “social cost of carbon.”
- the nuclear subsidies, dramatically increased the price tag for nuclear subsidies, and the nuclear subsidies are far greater in comparison to support for renewables and efficiencies contemplated in Tier 1 and Tier 2, combined.

6. In the rush to approve Tier 3, which appears to have been enacted for the benefit a monopolistic industry actor, the Commission failed to comply with the State Administrative Procedures Act (“SAPA”). Whether a rulemaking or ratemaking, the Commission adopted Tier 3 without required public hearing or production of an evidentiary record, thereby preventing meaningful public participation prior to the Commission's Orders for expenditure of billions of their ratepayer dollars.

7. The Commission created Tier 3 is premised on a mistake of fact, as the Commission erroneously created “zero emissions credit.” to subsidize nuclear energy. Nuclear energy is not, nor has it ever been, “emission free” or “zero-emissions”.

8. Adoption of Tier 3 did not comply procedurally, nor substantially with State Environmental Quality Review Act ("SEQRA"). Procedurally, the Commission failed to consider reasonable, cost-effective alternatives, and substantially the Commission did not "identify issues", "take a hard look", or "make a reasoned elaboration" with regard to the costs and environmental impacts of the mandatory twelve (12) year of the "Zero-Emissions Credits ("ZEC"), and inclusion of Indian Point as a beneficiary of the Tier 3 program.

9. Petitioners are only challenging Tier 3 of the Commission's Orders, and are not in any way challenging Tier 1 and Tier 2.

10. Petitioners claim that the Tier 3 requirements are inconsistent with previous Commission Orders, stand in direct conflict with previous and continuing State actions, undermine the Reforming the Energy Vision and disrupt the State's deregulated energy market system.

11. Petitioners claim the Orders create a bizarre and contradictory position on nuclear energy within New York State. For the first time, in the *July 8th Responsive Proposal*, the Commission contemplated inclusion of Indian Point as a potential beneficiary of the nuclear subsidy program. In a further significant departure, Tier 3 undermines New York's efforts in connection with nuclear waste and leak issues at West Valley and Indian Point, including the New York State Department of Environmental Conservation's denial of Clean Water Act permits and the Department of State's denial of Coastal Consistency certification for Indian Point, because of the danger it presents to the environment and to the populations of the Hudson River Valley and New York City. The utter irrationality of the proposition is plain: the Commission

proposed funding a facility which the State of New York has been expending considerable resources to shut down.

12. Petitioners claim Tier 3 is discriminatory, as it requires ratepayers to pay a subsidy to the nuclear industry, even where the ratepayers have previously decided to purchase, and contracted for, their electricity from 100% renewable sources, and it provides a exponentially and proportionally larger amount of funds than those provide to renewable and efficiency technologies supported by Tier 1 and Tier 2.

13. Tier 3 does not meet fundamental requirements of the Public Service Law. Tier 3 is not "just and reasonable. " It is unfairly discriminatory against early adopters of clean energy, and it unfairly discriminates against renewable energy programs in Tier 1 and Tier 2 of the Order.

14. Tier 3 impermissibly creates a deleterious economic and overly burdensome expense to ratepayers, including small businesses, not-for-profits and local governments while rewarding one or two profitable multibillion dollar corporations.

15. Petitioners allege that the adoption of the Tier 3 portion of the Order was unlawful and is unreasonable. Furthermore, the Commission ignored its own procedural laws, which were put in place to protect the public and state resources. Thus, Petitioners are requesting that this Court find that the provisions of Tier 3 of the Orders are null and void.

JURISDICTION OF THE COURT

16. The Court has subject matter jurisdiction under Article 78 of the New York Civil Practice Laws and Rules (“CPLR”) and CPLR §3001, and may exercise personal jurisdiction over the Respondents-Defendants in this matter.

17. Pursuant to CPLR Section 506(b), venue is proper in this Court.

18. No prior application for this and any similar relief with respect to the Orders has been made to this or any other Court, other than in the original Verified Petition in this case, which is being amended by this Amended Verified Petition.

PARTIES

19. Petitioner-Plaintiff, HUDSON RIVER SLOOP CLEARWATER, INC. (“Clearwater”) is a New York Corporation, incorporated in 1966, doing business at 724 Wolcott Avenue, Beacon, New York 12508. It is a 501(c)(3) membership organization, whose purposes include: to defend and restore the Hudson River, one of the great and historic rivers of the United States; to investigate and conduct research into contamination and destruction of the river, its tributaries and similar river systems; to inform the public of such dangers; to assist the public in taking measures to stop such contamination; and to educate and assist the public on the importance of preserving the Hudson River. Clearwater has thousands of members who share in its interests and purposes, and who use the Hudson River for economic, aesthetic, recreational and educational purposes. Indian Point, which is one of the nuclear power plants eligible to receive Tier 3, has a substantial negative impact on the Hudson, killing billions of fish, eggs and larvae a year due to the 2.5 billion gallons per day of water withdrawal for its once-through cooling system. Clearwater and its members are uniquely and negatively impacted by the environmental and community impacts of the Orders because of carbon, heat and other emissions

resulting from the nuclear energy production cycle, as well as routine releases and leaks of radioactive isotopes into the groundwater under Indian Point and into the Hudson River, on which the nuclear plant is located, 25 miles north of New York City. These continued emissions and leaks, and resulting damage, prevent Clearwater from achieving one of its fundamental purposes – to protect and restore the Hudson River. The ongoing degradation of the Hudson River as a result of the continued emissions and releases that the ZEC subsidy supports will make it more difficult for Clearwater to attract support for and participation in their programs, and will distort or impair the content of their education programs. Clearwater and its members are electricity ratepayers who are directly affected by the Orders, and will be forced to pay additional monies to subsidize aging and unsafe nuclear plants; these subsidies can be unduly burdensome to economically challenged and distressed members of Clearwater. Many Clearwater members proactively contract to purchase 100% renewable energy through energy supply companies at a higher cost than members of the general public who do not contract for renewable energy. Clearwater member Lynne Teplin has submitted an affidavit “O”, submitted herewith, that is representative of these Clearwater members. These members will bear an additional surcharge as a result of the Orders, when they already pay a higher premium for energy as a result of their more sustainable choice to contract for 100% renewable energy. Clearwater participated in the Commission process that led to the Orders, by submitting comments, participating in the public hearings, which were held prior to the final version of Tier 3, for which there were no hearings, and continuously raised objections to Tier 3 subsidization of nuclear facilities that would otherwise be economically unsustainable without ratepayer funding.¹ *See Affidavit of David Conover, Interim Director of Clearwater, sworn to on January*

¹ Clearwater has been a party in Entergy’s application for the relicensing of Indian Point Units 2 and 3 in front to

11, 2017, attached as Exhibit "A" to the Affirmation of Susan H. Shapiro, Esq., the "*Shapiro Affirmation*"), submitted herewith.

20. Petitioner-Plaintiff GOSHEN GREEN FARMS, LLC ("Green Farms") is a New York State Limited Liability Corporation, which operates a commercial organic farm at 3317 Route 207 in Goshen, New York, located within the 50-mile radius from Indian Point nuclear reactors, approximately 244 miles from FitzPatrick and 270 miles from Ginna.² As an agricultural business Green Farms is especially vulnerable to potential emissions and bears heightened economic risk. Green Farms is an electricity ratepayer in New York State, which, under Tier 3 of the Orders, will be forced to pay increased utility rates, and be compelled to subsidize nuclear energy in the State. As a small agri-business, increased energy costs negatively impact Green Farms' ability to operate its farm. Green Farms has solar panels and purchases only solar and wind energy, and opposes being forced to pay a surcharge for dangerous, toxic and emission-spewing nuclear energy. Green Farms will be injured as a result of Commission's misleading characterization of nuclear energy as being "zero emissions." Everyday radiation emissions, additional Carbon-14 and climate change due to routine thermal emissions from the nuclear plants--particularly Indian Point--can negatively impact Green Farms' agri-business and its organic farming practices, as well as Green Farms' honeybees, which are critical for pollination. Green Farms submitted written comments in the Commission proceedings that led to the Orders objecting to the inclusion of the Tier 3 nuclear bailout providing the image of a thermal plume being emitted from Indian Point, attached as Exhibit "1"

the Atomic Safety Relicensing Board (ASLB) since the onset of these proceedings in 2007.

² The Chernobyl Exclusion Zone was established soon after the nuclear disaster. The Exclusion Zone now covers an area of 2,600 square kilometers (1,600 square miles).

to Goshen Green Farms affidavit. Green Farms petitioned the Commission for a rehearing, which was denied in the *December Denial of Petitions for Rehearing*. See *Affidavit Susan Hito Shapiro member of Goshen Green Farms, LLC sworn to on January 12*, attached as Exhibit “B” to the *Affirmation of Susan H. Shapiro, Esq., (the “Shapiro Affirmation”)*.

21. Petitioner-Plaintiff the TOWN OF NORTH SALEM (“North Salem”) is a duly incorporated Town under the laws of New York State, located in Westchester County, with offices at 266 Titicus Road, North Salem, New York New York 10560. The Town of North Salem is one of 20 municipalities in Westchester County that joined the Community Choice Aggregation (“CCA”) program, managed by Sustainable Westchester Inc. under New York State’s Reforming the Energy Vision strategy. This program allows Westchester municipalities to contract directly with energy suppliers to realize bulk discounts on retail rates for their constituents, and to choose power from non-renewable or renewable sources. North Salem further chose to purchase 100% renewable power from Constellation Energy under the CCA. As result of these choices, over 80% of the residences in North Salem get 100% renewable power, paying additionally for Renewable Energy Credits (“RECs”) for wind power. Under Tier 3, North Salem residents and small businesses would be required to pay additionally to support aging nuclear plants. In essence, they would be paying RECs for nuclear energy. North Salem has demonstrated its support for the State’s renewable energy goals. To require North Salem or any other municipality in the CCA program that selected renewable energy to pay additional subsidies for nuclear power generation is totally inequitable and flies in the face of the State’s focus on renewable energy. The people and businesses of North Salem are particularly harmed because they will be paying additional monies for subsidies or RECs on nuclear power when they are already paying additionally for RECs for wind power for 100% of their energy needs.

See Affidavit Warren J. Lucas, Supervisor of the Town of North Salem, sworn to on January 11, 2017, attached as Exhibit “C” to the Shapiro Affirmation.

22. Petitioner-Plaintiff NUCLEAR INFORMATION AND RESOURCE SERVICE (“NIRS”) is a California-, Maryland-, and New York-registered corporation doing business at 6930 Carroll Avenue, Suite 340, Takoma Park, Maryland 20912. NIRS is a party to the regulatory proceeding that is the subject of this litigation, New York Public Service Commission Case 15-E-0302, and participated in and provided comment in the proceeding extensively, including filing a petition for rehearing with the Public Service Commission on August 30, 2016. NIRS is an organization open to the general public with over thirty-two thousand members, including over 4,000 residents of the State of New York, all of whom support NIRS’s mission of advocating for the cessation of nuclear power generation, protection of public health and safety with respect to radioactive materials and the operation of nuclear power reactors, and the adoption of renewable energy sources. Some of NIRS’ New York State members are contracted to purchase 100% renewable energy. NIRS advocates for an energy future that is sustainable, benign and democratic, both in New York State, nationally, and internationally. NIRS’s members’ and supporters’ economic and environmental interests are impacted by the *August Order* because it unjustifiably imposes large, direct financial costs on them for many years through surcharges on their electric utility bills, and it imposes large, indirect financial costs on them through surcharges on their local governments’ and school districts’ electric utility bills. In addition, the Orders by information and belief seek to prevent the closure of the nuclear facilities to be subsidized by electric utility customers, resulting in environmental harms and risks to public health and safety for twelve or more years that may otherwise be mitigated by the permanent cessation of operation of those facilities. Those harms and risks include the

generation of radioactive waste in the form of irradiated nuclear fuel rods that will be stored in New York State for many years; the release of radioactive materials into the environment through routine and regular discharges and accidental spills, leaks, and discharges; the destruction of aquatic resources and wildlife through withdrawals of hundreds of thousands to millions of gallons of water each day from Lake Ontario and the Hudson River, and the discharge of hundreds of thousands to millions of gallons of superheated water into Lake Ontario and the Hudson River after having passed through reactors' cooling system; and years of additional risk to life and property from possible nuclear safety failures and catastrophic releases of radiological materials into the environment. *See* Affidavit of Timothy Judson, Executive Director of NIRS sworn to on January 12, 2017, attached as Exhibit "I" to the Shapiro Affirmation

23. Petitioner-Plaintiff BEYOND NUCLEAR is a Maryland registered corporation (originally chartered in California) doing business at 6930 Carroll Avenue, Suite 500, Takoma Park, Maryland. Beyond Nuclear advocates for an energy future that is sustainable, benign and democratic in New York State, nationally and internationally, with a stated purpose "to educate and activate the public about the connections between nuclear power and nuclear weapons and the need to abandon both to safeguard our future." Beyond Nuclear's membership and support base includes a diverse cross-section of New York State residents, most of whom are electricity ratepayers who would be directly affected by the Orders. Beyond Nuclear's members and supporters participated in the proceedings leading to the *August Order* and raised their concerns that Tier 3 would force ratepayers to pay for nuclear power plant subsidies that would allow otherwise economically unsustainable nuclear plants to continue to operate. Given their mission, Beyond Nuclear and its members are uniquely concerned about the environmental and

community impacts from nuclear energy generation, including negative impacts caused by routine emissions and reactor leaks into New York State surface waters and groundwaters, around each of the nuclear generating facilities in the state, and that directly reduce air quality. Beyond Nuclear's members and supporters are impacted by additional electricity costs in New York State that will create deleterious economic impacts and be unduly burdensome to economically challenged and distressed members. *See Affidavit of Kevin Kamps, Radioactive Waste Specialist at Beyond Nuclear*, sworn to on January 10, 2017, attached as Exhibit "H" to *the Shapiro Affirmation*.

24. Petitioner-Plaintiff INDIAN POINT SAFE ENERGY COALITION ("IPSEC") is a New York based nonprofit and nonpartisan coalition of public interest, health advocate, environmental and citizen groups, with offices located at 7 John Dorsey Drive, Cortlandt Manor, New York 10566. Since its founding in 2001, IPSEC has engaged with experts in many disciplines and fought vigorously to reveal the adverse safety, security, environmental, environmental justice, public health and economic costs and risks of the continued operation of Indian Point. Petitioner-Plaintiff PROMOTING HEALTH AND SUSTAINABLE ENERGY, INC. ("PHASE") is a New York State nonprofit corporation. PHASE is a public interest group, which promotes and advocates for public health and sustainable energy, primarily through research and documentation, with offices located at 75 North Middletown Road, Nanuet, New York 10954. Most of the individual New York members of IPSEC and PHASE are electricity ratepayers, and some contract to purchase 100% renewable energy. As a result of the Orders, those purchasing 100% renewable energy will be unfairly deprived of their ability to choose 100% renewable generation, and will be paying an additional surcharge on top of the premium that they pay to obtain 100% renewable energy. IPSEC and its member groups, including

PHASE, submitted numerous comments during the proceedings that led to the Orders, and raised many objections, including designation of nuclear power as “zero-carbon” or “zero-emissions” inasmuch as nuclear generates greenhouse gas emissions, radioactivity emissions, radioactive leak emissions, waste emissions, and heat emissions, as well as the irrational “public necessity” determination formula in the responsive Determination. *See Joint Affidavit of Marilyn Elie on behalf of IPSEC and Michel Lee on behalf of PHASE, sworn to on January 11, 2017, attached as Exhibit “D” to the Shapiro Affirmation.*

25. Petitioner-Plaintiff GREEN EDUCATION AND LEGAL FUND, INC. (“GELF”) is a New York State corporation doing business at 315 Greene Ave. 2B, Brooklyn NY 11238. The organization was incorporated in 1997 under New York’s Not-for-Profit Corporation Law, with its stated purpose, “a) to conduct research, education, charitable and legal efforts in furtherance of the green principles of ecology, grassroots democracy, non-violence, social and economic justice, decentralization, community economics, feminism, respect for diversity, personal and global responsibility, and future focus; b) to provide training and education to individuals to enable them to increase their participation in the democratic process of governance, including developing alternative democratic models for increased citizen and community input into economic and political decisions that impact upon their quality of life; c) to develop and promote alternative models for organizing economic activity, including but not limited to cooperatives, worker ownership, community supported agriculture, monetary systems and Green business principles; d) to receive and administer funds for scientific, educational and charitable purposes.” The Board members of GELF are electricity ratepayers directly affected by the proceeding and the Orders that are the subject of this Petition. GELF has submitted comments and participated in public hearings in the proceedings leading to the *August Order*.

GELF supported increased funds being provided to accelerate the development of renewable energy and energy efficiency in New York State under the Clean Energy Standard and Reforming the Energy Vision, including advocating for a Power Purchase Agreement for off shore wind. GELF opposed the creation of subsidies within *August Order* to support nuclear power. GELF coordinates a statewide campaign to have all of New York State's energy needs to be met by renewable energy by 2030. The *August Order* undercuts such campaign and is discriminatory as it provides far more funding for nuclear subsidies than it does for renewable energy. GELF is also concerned with the Commission public record in this case that identifies nuclear energy as being emission free. The negative climate impacts resulting from the entire nuclear energy cycle for an additional twelve years in New York State will result in cumulative radioactive, greenhouse gas, and thermal emissions contamination that will negatively impact GELF and its members. GELF and its members are uniquely concerned about the negative environmental and community negative impacts from nuclear energy generation that are caused by routine releases and reactor leaks into New York State groundwaters, and which directly reduce air quality. *See Affidavit of Mark Dunlea, Chairperson of GELF, sworn to on December 20, 2016, attached as Exhibit "E" to the Shapiro Affirmation.*

26. Petitioner-Plaintiff SAFE ENERGY RIGHTS GROUP, INC. ("SEnRG") is a New York State corporation doing business at 201 Union Avenue, Peekskill, New York since 2015. SEnRG is a group of engaged citizens working together to protect communities in the Northeast from unsafe energy development and infrastructure. SEnRG seeks and provides information and support to the public, communities, and other organizations regarding safe and healthy energy rights, resources, activities and options. SEnRG and its Board and Officers are electricity ratepayers directly affected by the proceedings and the Orders that are the subject of

this Petition. SEnRG participated in public information sessions, in the proceedings leading to the Commission's *August Order*, where we expressed concerns regarding Tier 3 of the Order that forces electricity ratepayers to pay for a nuclear energy power plant subsidy and bailout for three nuclear facilities that would otherwise be economically unsustainable without such ratepayer funding. The climate changing emissions released into the atmosphere from the entire nuclear energy production cycle – from mining to processing to electricity generation to waste containment – for an additional twelve years in New York State nuclear generating facilities will result in cumulative radioactive, greenhouse gas, and thermal emissions contamination that will negatively impact SEnRG, which is particularly focused on such impacts. SEnRG is impacted by additional electricity costs in New York State that will create deleterious economic impacts and be unduly burdensome to economically challenged and distressed members due to increased costs and toxic burden in New York State caused by increased nuclear waste being produced and stored indefinitely and possibly permanently in New York State. *See Affidavit of Nancy S. Vann, President of SEnRG*, attached as Exhibit “F” to the *Shapiro Affirmation*.

27. Petitioner-Plaintiff the NEW YORK PUBLIC INTEREST RESEARCH GROUP FUND, INC. (“NYPIRG”) is a not-for-profit corporation formed under the laws of New York State in 1976 with corporate headquarters located at 9 Murray Street, Lower Level, New York, New York. NYPIRG works to promote citizen understanding and engagement in policy decisions at the local, state and federal levels of government. NYPIRG has tens of thousands of supporters from across all regions of New York State who are keenly interested in policies affecting the environment, energy, public health and safety, consumer protection, corporate responsibility, and open, accountable and transparent government. Since 2014, NYPIRG has worked to inform and educate New Yorkers about and engage them in New York's Reforming

the Energy Vision initiative and related proceedings to press for a stronger emphasis on reducing greenhouse gas emissions, efficiency and rapid transition to renewable energy. The environmental and public health interests of NYPIRG and its supporters are negatively impacted by climate changing emissions released into the atmosphere from the entire nuclear energy production cycle. NYPIRG and its supporters are electricity ratepayers who are economically impacted by the additional electric costs they will be forced to bear as a result of the mandatory nuclear subsidies, particularly economically challenged and distressed members, who are at risk of utility shutoff at any given time. NYPIRG has submitted formal comments and made statements at public hearings conducted under the Reforming the Energy Vision initiative and its offshoot proceedings, including the Commission process that led to the Orders and it raised objections to inclusion of the nuclear Tier 3 in the Orders. NYPIRG and its members were not given the opportunity to appear at a public hearing regarding the final version of Tier 3, because no such hearings were held. *See Affidavit of Blair Horner, Executive director of NYPIRG*, sworn to on January 11, 2017, attached hereto as Exhibit “G” to the *Shapiro Affirmation*.

28. The following individual Petitioners (“Individual Petitioners”) all currently contract to purchase 100% renewable energy. They have specifically chosen to enter into contracts with renewable energy producers and suppliers at a higher cost for their energy needs than members of the general public who do not contract for renewable energy. Individual Petitioners decided to pay a premium to producers and suppliers of electricity generated with renewable sources, in part, to help support New York’s efforts to increase renewable energy production; and to help New York State reduce harmful emissions from nuclear and fossil fuel energy production to reduce environmental and health impacts and to address climate change. Both nuclear and fossil fuel energy production routinely release emissions. These Petitioners are

committed individuals who are paying a premium for clean energy to help New York State meet its energy goals and now Tier 3 serves to punish them, instead of incentivizing their clean energy choices. These early investors in clean energy, are now, without justification or reason, being forced to finance continued nuclear energy production, which they oppose.

- SCOTT CHASE, residing at 560 Carpenter Hill Road, Pine Plains, New York, 12487 and who currently contracts for 100% renewable energy from Ethical Energy, (See *Affidavit attached as Exhibit J to the Shapiro Affirmation*);
- RICHARD HAMMER, residing at 720 Fort Washington Ave Apt 2S, New York, 10040 and who currently contracts for 100% renewable energy from Green Mountain Energy (See *Affidavit attached as Exhibit K to the Shapiro Affirmation*);
- JOYCE HARTSFIELD, residing at 517 Tall Oaks Drive, Tillson, New York 12486 and who currently contracts for 100% renewable energy from ClearView Electric (See *Affidavit attached as Exhibit L to the Shapiro Affirmation*);
- JOSEPH J. HEATH, residing at 1900 Rittenhouse Square, Tully, New York 13159, who currently contracts for 100% renewable energy from Ethical Electric (See *Affidavit attached as Exhibit Q to the Shapiro Affirmation*);
- WILLIAM MCKNIGHT, SR., residing at 60 Holland Drive, West Hurley, New York 12491, and who currently contracts for 100% renewable energy from American Power & Gas (See *Affidavit attached as Exhibit P to the Shapiro Affirmation*);
- BRUCE ROSEN residing at 600 West End Avenue, Apt 1A1, New York, New York 10024, and who currently contracts for 100% renewable energy from Ethical Energy, (See *Affidavit attached as Exhibit M to the Shapiro Affirmation*);
- GEORGE STADNIK, residing at 2466 44th Street, Astoria, New York, 11103, and who currently contracts for 100% renewable energy from ConEd Solutions, (See *Affidavit attached as Exhibit N to the Shapiro Affirmation*);

- LYNNE TEPLIN, residing at 846 Palmer Road #1A, Bronxville, New York, 10025, and who currently contracts for 100% renewable energy from Ethical Electric, (See Affidavit attached as Exhibit O to the Shapiro Affirmation);

29. The Individuals Petitioners listed below also purchase 100% renewable energy and oppose Tier 3 of the Commission Order, as it unfairly, unjustly and unreasonably forces them to pay a surcharge to subsidize and support nuclear energy production in New York State. Additionally they oppose Tier 3 as it unfairly and prejudicially subsidizes nuclear energy at a significantly higher level than clean renewable energy Tier 1 and Tier 2 of the Order. The following Individual Petitioners are:

- ELLEN C. BANKS, residing at 144 Cottonwood Drive, Williamsville, New York 14221, who currently contracts for 100% renewable energy from Clean Choice Energy;
- CARYL BARON, residing at 243 West 70th Street, New York, New York 10023, who currently contracts for 100% renewable energy from Green Mountain Energy;
- LINDA BELISLE, residing at 46 Willow Way, Stephentown, New York 12168, who currently contracts for 100% renewable energy from Clean Choice Energy;
- DANIEL BIRN, residing at 15 Thames Street, Apt. 2E, Brooklyn, New York 11206, who currently contracts for 100% renewable energy from Community Energy;
- MIRIAM BLUESTONE, residing at 317 Sixth Avenue Brooklyn, New York 11215, who currently contracts for 100% renewable energy from Ethical Electric;
- J. ALLISON CROCKETT, residing at 179 Prospect Place, Brooklyn, New York 11238, who currently contracts for 100% renewable energy from Ethical Electric;
- LAURA DEL GAUDIO, residing at 3881 Sedgwick Avenue, Bronx, New York 10463, who currently contracts for 100% renewable energy from Ethical Electric;

- ALLEGRA DENGLER, residing at 60 Judson Avenue, Dobbs Ferry, New York 10522, who currently contracts for 100% renewable energy from Con Edison Solutions;
- MICHELLE FREEDMAN, residing at 3605 Oak Hill Circle, Rensselaer, New York 12144, who currently contracts for 100% renewable energy from Sterling Planet, through Nat Grid (electricity only);
- DEAN GALLEA, residing at 28 Wildey Street, Tarrytown, New York 10591, who currently contracts for 100% renewable energy from Con Edison Solutions;
- VALERIE GILBERT, residing at 345 East 56th Street, Apt. 10E, New York, New York 10022, who currently contracts for 100% renewable energy from Green Mountain Energy;
- ALLAN GOLDHAMMER, residing at 570 Main Street, Kingston, New York 12401, who currently contracts for 100% renewable energy from Green Mountain Energy;
- CARLTON GORDON, residing at 175 Willoughby Street, Brooklyn, New York 11201, who currently contract for 100% renewable energy from Con Edison Solutions;
- JENNIFER GORMAN, residing at 270 West 119th Street, Apt. 5C, New York, New York 10026, who currently contracts for 100% renewable energy from Green Mountain Energy;
- STEVEN L. GOULDEN, residing at 378 4th Street, Apt. 3, Brooklyn, New York 11215, who currently contracts for 100% renewable energy from Con Edison Solutions;
- CATHY A. HAFT, residing at 115 Willow Street Brooklyn, New York 11201, who currently contracts for 100% renewable energy from Con Edison Solutions;
- RICHARD HAMMER, residing at 720 Fort Washington Avenue, Apt. 2S, New York, New York 10040, who currently contracts for 100% renewable energy from Green Mountain Energy;
- BRIAN HOBERMAN, residing at 765 Amsterdam Avenue, Apt. 10E, New York, New York 10025, who currently contracts for 100% renewable energy from Con Edison Solutions;

- OBIE HUNT, residing at 1150 Grand Concourse, Apt. 6A, Bronx, New York 10456, who currently contracts for 100% renewable energy from Ethical Electric;
- ROBERT V. JACOBSON, residing at 342 Dean Street, Brooklyn, New York 11217, who currently contracts for 100% renewable energy from Constellation Energy;
- VICKEY KAISER, residing at 65 Spring Street, Fredonia, New York 14063, who currently contracts for 100% renewable energy from Community Energy.
- ALVIN KONIGSBERG, residing at 15 Pine Street, Tillson, New York 12486, who currently contracts for 100% renewable energy from Green Mountain Energy;
- JUDITH A. LASKO, residing at 175 West 93rd Street, Apt. 16F, New York, New York 10025, who currently contracts for 100% renewable energy from Con Edison Solutions;
- SUSAN D. LEIFER, residing at 33 Iroquois Road, Pleasantville, New York 10570, who currently contracts for 100% renewable energy from Green Mountain Energy;
- MIKHAELA MARCICH, residing at 371 State Street, Apt. 7, Brooklyn, New York 11217, who currently contracts for 100% renewables from Ethical Electric;
- FREDERICK MARTIN, III, residing at 398 Indian Brook Road, Garrison, New York 10524, who currently contracts for 100% renewable energy from Green Mountain Energy;
- PATRICIA MATTESON, residing at 730 Mohonk Road, High Falls, New York 12440, who currently contracts for 100% renewable energy from Blue Rock Energy;
- JANE MAYER, residing 9 Mercer Street, Middletown, New York 12989, who currently contracts for 100% renewable energy from Clear View Electric;
- JANET MCBRIDE, residing at 174 Hoyt Street, Port Ewen, New York 12466, who currently contracts for 100% renewable energy from Central Hudson Gas & Electric;

- VALERIE NIEDERHOFFER, residing at 430 Jersey Street, Apt. 203, Buffalo, New York 14213, who currently contracts for 100% renewable energy from Cooperative of America;
- TERESA OLANDER, residing at 48 Hickory Hill Lane, Tappan, New York 10983, who currently contracts for 100% renewable energy from Viridian Energy;
- VICTOR PALIA, residing at 35 West Hook Road, Hopewell Junction, New York 12533, who currently contracts for 100% renewable energy from Green Mountain Energy;
- CAROLINE PAULSON, residing at 279 Spring Road, New Paltz, New York 12561, who currently contracts for 100% renewable energy from Green Mountain Energy;
- GAIL PAYNE, residing at 1208 Washington Drive, Centerport, New York 11721, who currently contracts for 100% renewable energy from Community Energy Inc.;
- THOMAS RIPPOLON, 438 Peekskill Hollow Road, Putnam Valley, New York 10579, who currently contracts for 100% renewable energy from Ethical Electric;
- ROSEMARIE SANTISTEBAN, residing at 545 West 111th Street, Apt. 4K, New York, New York 10025, who currently contracts for 100% renewable energy from Ethical Electric;
- CHERYL SCHNEIDER, residing at 119 Creek Locks Road, Bloomington, New York 12411, who currently contracts for 100% renewable energy from Viridian Energy;
- CAROL SKRYM, residing at 305 West 98th Street, Apt. 4S, New York, New York 10025, who currently contracts for 100% renewable energy from Con Edison Solutions;
- MELVYN T. STEVENS, residing at 74 Charles Street, Apt. 2A, New York, New York 10014, who currently purchases for 100% renewable energy from Con Edison Solutions;
- STEVEN STUART, residing at 138 Grassy Swamp Road, Narrowsburg, New York 12764, who currently contracts for 100% renewable energy from Energy Cooperative of America;

- MONICA WEISS, residing at 147-37 Charter Road, Apt. C, Queens, New York 11435, who currently purchases for 100% renewable energy from Ethical Electric;
- ERIC WESSMAN, residing at 723 Pelhamdale Avenue, Pelham, New York 10803, who currently purchases for 100% renewable energy from Con Edison Solutions;
- TODD D. WOLGAMUTH, residing at 304 Zena Road, Kingston, New York 12401, who currently contracts for 100% renewable energy from Clean Choice Energy;
- JUDITH M. ZINGHER, residing at 40 Winthrop Avenue, Elmsford, New York 10523, who currently contracts for 100% renewable energy from Ethical Electric;

30. Respondents NEW YORK STATE PUBLIC SERVICE Commission

(“Commission”) and Kathleen H. Burgess, Secretary in her official capacity as Secretary; Audrey Zibelman in her official capacity as Chair; Patricia L. Acampora, Diane X. Burman, and Gregg C. Sayre in their official capacities as Commissioners, are being sued only in their official capacity, with offices located at the Empire State Plaza Agency Building 3, Albany, NY 12223-1350. The Commission is a New York State agency whose primary mission is to ensure affordable, safe, secure, and reliable access to electric, gas, steam, telecommunications, and water services for New York State’s residential and business consumers, while protecting the natural environment. The Department also seeks to stimulate effective competitive markets that benefit New York consumers through strategic investments, as well as product and service innovations

31. Nominal Respondents, CONSTELLATION ENERGY NUCLEAR GROUP, LLC with subsidiaries and affiliates EXELON GENERATION COMPANY, LLC, R.E. GINNA NUCLEAR POWER PLANTS, LLC and NINE MILE POINT NUCLEAR STATION, LLC;

(“Exelon”) owns and operates Ginna, Nine Mile Point 1 and Nine Mile Point 2 nuclear reactors within New York State .

32. Nominal Respondents, ENTERGY NUCLEAR FITZPATRICK, LLC, ENTERGY NUCLEAR INDIAN POINT 2, LLC, and ENTERGY NUCLEAR INDIAN POINT 3, LLC, (“Entergy”) owns and operates Fitzpatrick, Indian Point 2 and Indian Point 3 nuclear reactors within New York State.

FACTS AND BACKGROUND

Nuclear Reactor Facilities

33. In 1969 and 1988, respectively, Nine Mile 1 and Nine Mile 2 boiling water nuclear reactors began operation in Scriba, New York, on the southeast shore of Lake Ontario. Through the same Constellation Energy Group (“CENG”) joint venture that owns the Robert Emmitt Ginna Nuclear Power Plant (“Ginna”), Exelon has a majority ownership stake in the Nine Mile Point Nuclear Station, consisting of Nine Mile 1 and Nine Mile 2. CENG owns 100% of Nine Mile 1 and 82.00% of Nine Mile 2, providing Exelon with a 50.01% ownership share of Nine Mile 1 and a 41.01% share of Nine Mile 2. The Long Island Power Authority (“LIPA”) retains an 18.00% ownership share of Nine Mile 2. On information and belief, the remaining ownership in these facilities is by Électricité de France, which has 49.99% and 40.99% ownership of Nine Mile Point 1 and Nine Mile Point 2, respectively.

34. In 1970, Ginna – a single pressurized water reactor – opened along the south shore of Lake Ontario, in Ontario, New York. The facility is now owned by a subsidiary of the Constellation Energy Nuclear Group, LLC (CENG), R.E. Ginna Nuclear Power Plant, LLC, which is the licensee of Ginna Nuclear Power Plant (“Ginna”). CENG is a joint venture of

Exelon Corporation, (“Exelon”) and Electricite de France (“EdF”), in which Exelon owns a slight majority share (50.01%).

35. In 1974, the James A. FitzPatrick Nuclear Power Plant (“FitzPatrick”), a single boiling water reactor located in Scriba, New York, on the southeast shore of Lake Ontario was licensed, and in 1975 it began commercial operation. Since 2000, the facility has been owned by Entergy Corp (“Entergy”) whose subsidiary, Entergy Nuclear FitzPatrick, LLC is the licensee and operator of the FitzPatrick. On November 2, 2015, Entergy announced plans to close the FitzPatrick nuclear facility in late 2016 or early 2017³. Within days after Tier 3 was revised, Exelon indicated it would purchase Fitzpatrick if New York State provided financial incentives.⁴

36. Indian Point Energy Center (“Indian Point”) is located on the eastern bank of the Hudson River in Buchanan NY, south of Peekskill, NY and approximately 35 miles north of Midtown Manhattan. Indian Point has three pressurized water reactor units. In September 1962 Indian Point 1 went online; it had a capacity of 275 MW. It was permanently closed in October 1974 due to inadequate emergency cooling that did not meet regulatory standards. On August 1, 1974 Indian Point 2 went online; it has a capacity of 1028 MW and is currently owned by Entergy Nuclear Indian Point 2 LLC. Its license expired on September 28, 2013. On August 30, 1976 Indian Point 3 went online. It has a capacity of 1041 MW and is currently owned by Entergy Nuclear Indian Point 3 LLC. Its license expired on December 12, 2015. Indian Point 2

³ Commission Case #15-E-0640.

⁴ See Joint Application under FPA Section 203 of Entergy Nuclear FitzPatrick, LLC http://elibrary.ferc.gov/idmws/file_list.asp?document_id=14487740.
http://www.syracuse.com/news/index.ssf/2016/07/source_exelon_would_save_fitzpatrick_nuclear_plant_if_state_oks_subsidies.html

and Indian Point 3 continue to operate while the Nuclear Regulatory Commission (“NRC”) considers its application for new twenty (20) year licenses. In the *July 8th Responsive Proposal*, Indian Point was named for the first time as potential beneficiary of the Tier 3 nuclear subsidy which is the subject matter of this action. On January 9, 2017 an agreement was signed by New York State and Entergy to likely close Indian Point 2 and 3, respectively, by 2020 and 2021, but to allow renewal of the licensing for Indian Point 2 to continue until 2024, and licensing of Indian Point 3 by 2025 without opposition.

The Public Service Commission Proceedings

37. On April 25, 2014, prior to the proceedings that are the subject of this Petition, the Commission instituted a proceeding to align electric utility practices and the regulatory CASE 14-M-0101, et al. paradigm with technological advances in information management and power generation and distribution, in a policy initiative referred to as the Reforming the Energy Vision Program to modernize the energy system in New York. “The REV [Reforming the Energy Vision] initiative will lead to regulatory changes that promote more efficient use of energy, deeper penetration of renewable energy resources such as wind and solar, wider deployment of “distributed” energy resources, such as micro grids, roof-top solar and other on-site power supplies, and storage.”⁵ The Reforming the Energy Vision initiative was promoted and heavily publicized as a critical part of an overall effort by the Commission to improve system efficiency, to reduce system costs, to empower customer choice, to promote market animation, and to encourage greater adoption of distributed renewable generation (DRG) and energy efficiency technologies and practices. In the Reforming the Energy Vision, the State

⁵ <http://www3.dps.ny.gov/W/CommissionWeb.nsf/A11/CC4F2EFA3A23551585257DEA007DCFE2?OpenDocument>

committed to actively support and coordinate a wide range of Distributed Energy Resources (DER), e.g., Demand Reduction, Energy Efficiency, and Distributed Generation, to promote resilience and reduce the need for transmission upgrades.

38. On July 11, 2014, after claiming millions of dollars in losses, Exelon announced that it would recommend to its trustees to retire Ginna unless financial assistance was offered to support its continued operation, and Exelon asked New York for state aid to keep the facility open. A temporary financial incentive was provided to Exelon to ensure continued operation of Ginna for the purpose of ensuring system reliability through March 2017, when transmission system upgrades were scheduled to be completed. At that point, the planned upgrades would render Ginna superfluous. Rochester Gas & Electric (“RG&E”) has certified to the Commission that those upgrades are on schedule and will be completed and in service prior to March 2017.

39. On July 11, 2014, Exelon filed a petition with the Commission announcing Ginna was losing money and would likely close without subsidies #14-E-0270.

40. In June 2015, the Commission opened a proceeding entitled “In the Matter of the Implementation of Large-Scale Renewable Program and a Clean Energy Standard (the “*August Order*”), Case No. 15-E-0302 (the “Large Scale Renewable Program”) proceeding(s). There is no mention of the nuclear reactors, or any type of Tier 3 Zero-Emissions Credit (“ZEC” or “Tier 3”) requirement program in the initial notice of the Large Scale Renewal Program proceeding or in the accompanying paper entitled “Large Scale Renewable Energy Development in New York: Options and Assessment,” which was prepared jointly by the Commission’s staff, the New York State Energy Research and Development Authority (“NYSERDA”), and outside consultants.

41. On June 25, 2015 the New York State Energy Planning Board adopted a State Energy Plan with the stated goal that fifty percent (50%) of all electricity used in the state should be generated from renewable energy sources by 2030 (“50 by 30 Renewables Goal”). The State Energy Plan does not mention maintenance, preservation, or promotion of nuclear energy, subsidization of nuclear plants, or any type of ZEC/Tier 3 program.⁶

42. On November 2, 2015, Entergy announced plans to close the FitzPatrick nuclear facility in late 2016 or early 2017.⁷

43. On December 2, 2015, Governor Cuomo issued a letter directing Commission to ensure 50% renewable energy generation by 2030 (“50 x 30”). Additionally, the Governor directed the Department of Public Service (“DPS”) to develop a process to prevent the “premature retirement of safe, upstate nuclear power plants during this transition.”⁸ On January 21, 2016, the Commission expanded the Large Scale Renewables (“LSR”) Proceeding to consider a Clean Energy Standard (the “*August Order*”) in its Order Expanding Scope of the Large Scale Renewables Proceeding and Seeking Comment. The Commission’s Order expanded the scope of the proceeding to consider a *August Order* which would include maintenance support for existing zero-emission generating facilities.⁹

⁶ See Order Expanding Scope of Proceedings and Seeking Comments (1/21/16) available at [http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={C29C66EA-CE42-\\$FD2-B679-19A39E0F1C4F}](http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={C29C66EA-CE42-$FD2-B679-19A39E0F1C4F})

⁷ Commission Case #15-E-0640.

⁸ https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Renewable_Energy_Letter.pdf

⁹ <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7bC29C66EA-CE42-4FD2-B679-19A39E0F1C4F%7d>

44. On January 25, 2016, the Commission's Staff White Paper on Clean Energy Standard ("White Paper") was filed and published in the State Register in accordance with the January 21, 2016 Order.¹⁰ The White Paper proposes that a Nuclear Tier be created within the *August Order* mandate in the form of a separate obligation not associated with the renewable mandate otherwise to be reflected. The Nuclear Tier is intended to provide qualifying nuclear plants with support payments through a MWh production credit system where all Load-Serving Entities (LSEs) would be required to procure a share of the credits from qualifying resources. The White Paper proposed the ZEC requirement be used "based upon the difference between the anticipated operating costs of the units and the forecasted wholesale prices."¹¹

45. On January 26, 2016, a Notice Soliciting Comments and Providing for a Technical Conference and Public Statement Hearings was issued, establishing initial and reply comment periods, which were later extended.¹² Final comments in these proceedings were due July 22, 2016.

¹⁰ January 27, 2016 [SAPA No. 15-E-0302SP1]; March 16, 2016 [SAPA No. 15-E-0302SP2]; April 20, 2016 [SAPA Nos. 15-E-0302SP3 and 15-E-0302SP4] and May 25, 2016 [SAPA No. 16-E-0270SP1]).

¹¹ See Staff White Paper on Clean Energy Standards (1/25/16) at 32, available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B930CE8E2-F2D8-404C-9E36-71A72123A89D%7D>.

¹² A Notice of Comment Period for the Staff White Paper and Cost Study was issued April 8, 2016. On July 8, 2016, a Notice Soliciting Additional Comments was issued regarding Staff's Responsive 28 See Case 15-E-0302, et al., supra, Notice Extending Comment Period (issued March 8, 2016); Notice Extending Reply Comment Period (issued April 29, 2016); Notice Extending Deadline for Comments (issued July 15). CASES 15-E-0302 & 16-E-0270 - Proposal for Preserving Zero-Emissions Attributes.

46. On February 23, 2016, the Commission again expanded CASE 15-E-0302 to consider expedited subsidies for nuclear plants.¹³

47. On February 23, 2016, the Commission held a meeting in the City of New York at which Audrey Zibelman, Chair; and Commissioners Patricia L. Acampora; Gregg C. Sayre; and, Diane X. Burman were in attendance. Chair Zibelman introduced the Order further expanding the scope of the proceeding and seeking comments on the Staff's White Paper saying, "The State's nuclear power plants provide clean, reliable power throughout the year that is free of carbon emissions and contributes significantly to the energy, capacity and reliability needs of the electric system. By this order, the Commission expands the scope of this proceeding to include the consideration of an expedited program to provide financial support for the benefit of the electric system to maintain the viability of certain nuclear power plants that can demonstrate the lack of financial viability absent additional financial support." The Commission also describes and seeks comments on a proposed program to provide such financial support to maintain the viability of nuclear power plants." Written comments were solicited on the proposed expedited program with the deadline of May 2, 2016 for the CASE 15-E-0302.

48. On February 23, 2016, the Draft Supplemental Generic Environmental Impact Statement ("DSGEIS") was issued and published in State Register on February 24, 2016, Resolution Accepting Draft Supplemental Environmental Impact Statement as complete.¹⁴ Throughout the proceeding, whenever a significant document was issued, the Commission

¹³ February 24, 2016 — Order Further Expanding Scope of Proceeding and Seeking Comments <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7bCE6519EE-3330-449E-AC0B-E57B3D85928D%7d>

¹⁴ <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7b3998B18C-D493-447B-8E28-6067D0CFF8B5%7d>

published the required documentation in the State Register and provided time for public comments. Written comments were then solicited on the proposed expedited program on May 2, 2016 for the Case 15-E-0.

49. On February 24, 2016, the Commission approved temporary subsidies for Ginna through a Reliability Support Service Agreement (“RSSA”) that runs from April 1, 2015 through March 31, 2017.

50. On March 31, 2016, for the first time, Exelon indicated it might close Nine Mile Point 1,¹⁵ but never issued formal retirement notice.

51. On April 8, 2016 the Commission Staff’s Cost Study was published in the State Register, with notice of public comment period for White Paper and Cost Study.¹⁶ At that time, comments on the Staff White Paper were set for April 22, 2016; and Cost Study comments on June 6, 2016.

52. On April 19, 2016, Commission published a notice of Public Statement Hearings to be held in 9 locations around the state.

53. On April 19, 2016, the U.S. Supreme Court rendered its decision in *Hughes v. Talen Energy Marketing, LLC* 578 US ____ (2016); 136 S. Ct. 1288 (2016), which held that state subsidies to electricity generators are unconstitutional if “tethered” to FERC- regulated wholesale electricity prices.

¹⁵http://www.syracuse.com/news/index.ssf/2016/03/nine_mile_point_nuclear_plant_faces_financial_peril_exelon_exec_says.html

¹⁶<http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7b47FFD51C-0ED9-4C89-9A4F-CFC71F8A44C3%7d>

54. On April, 22, 2016 the New York State Independent System Operator (“NYISO”) revised its February 11, 2016 Generator Deactivation Notice of FitzPatrick which does not identify a Reliability Need for the 2016-2020 near term period. (See New York State Independent Service Operator, Generator Deactivation Assessment James A. FitzPatrick Nuclear Generating Facility, Original February 11, 2015, Attached hereto as Exhibit “4”).

55. On May 9, 2016, Exelon filed a petition with the Commission, in anticipation of the Clean Energy Standard implementation #16-E-0270, indicating for the first time that the refueling of Nine Mile 1 might be contingent on subsidies¹⁷. To date, neither evidence of financial need nor an audit conducted by the Commission or DPS is publically available. .

56. On May 9, 2016, when Petitioners, AGREE and NIRS requested more detail and information regarding the Tier 3 costs, given how inadequate the Cost Study was on Tier 3.¹⁸ This request went unanswered.

57. On May 23, 2016, the Final Supplemental GSEIS was published, and on June 6, 2016 comments on the Cost Study were due.

58. The *July 8th Responsive Proposal* was issued on the DPS website, but was not published in the State Register,¹⁹ even though it differs significantly from the White Paper and Cost Study. Yet, the public was at first only granted ten (10) to comment, and then after public

¹⁷ Commission Case #16-E-0270

¹⁸ <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={1001340F-1355-4CE4-9E19-4B1CDDA85A8F}>

¹⁹ <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={BBFA4008-FD27-4209-B8E1-AD037578101E}>

outcry the Commission added four (4) more days for public comment. Thus the total public comment period was only fourteen (14) days.

59. *July 8th Responsive Proposal* significantly revised its prior recommendation, changing the formula for determining the amount of the ZEC requirement subsidies based on a novel concept explicitly based upon the Social Cost of Carbon ("SCC").²⁰ Social Cost of Carbon is an instrument utilized by the Environmental Protection Agency ("EPA"), produced through a federal interagency working group, for the purpose of regulatory impact analysis, not to be used for pricing of incentives for emissions abatement.

60. The *July 8th Responsive Proposal* significantly altered the substance and rationale of Tier 3, and drastically increased the amount of the public bailout. In the Staff's original cost estimates, nuclear subsidies ranged from approximately \$59 million to \$658 million over the first six years.²¹ In the significantly revised Responsive Proposal, Commission Staff estimated the cost to be \$953 million for only the first two years. The surcharge to ratepayers is scheduled to escalate from \$17.48 per MWh in 2017-2019 to \$29.15 per MWh in 2027-2029 (depending on energy and capacity price adjustments), locking New York ratepayers into paying for a large nuclear industry subsidy estimated to be \$7.6 billion over the 12 year term of the proposal.²² It

²⁰ See Staff's Responsive Proposal for Preserving Zero Emission Attributes (7/8/16) at 2, *available at* <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7BBBF4008-FD27-4209-B8E1-AD0375810E%7D>.

²¹ "Clean Energy Standard White Paper – Cost Study." Page 84. Published April 8, 2016 by DPS Staff. <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={7B564AD9-E6E9-4FA9-93B6-1AA85B1719E2}>

²² See comments filed by AGREE, NIRS, IPSEC, and Sierra Club: "Comments on behalf of Alliance for a Green Economy, Council of Intelligent Energy & Conservation Policy, Nuclear Information and Resource Service, and Sierra Club-Atlantic Chapter" July 22, 2016. See the Appendix for the calculations. <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={03DADAD2-FFDB-4337-BE6A-DBB4E28A28D2}>.

should be noted that DPS did not provide an estimate of the total cost of the mandatory 12-year subsidy. DPS only published a table of the projected base ZEC prices for each of the six 2-year tranches. NIRS and AGREE were left to derive the 12-year estimate based on that information. NIRS/AGREE estimate, which has been verified by the Public Utility Law Project (PULP) and others, project a total cost to New York ratepayers is estimated to be approximately five (5) to fifty (50) times more than the six (6) proposal evaluated in the cost study.

61. Further, the *July 8th Responsive Proposal*, for the first time, allows the Indian Point nuclear generating facilities to be included in the proposed nuclear subsidy, which could add up to \$2.8 billion to the cost of its proposal, for a potential total of up to \$10.4 billion, which would be funded by ratepayers – including residents of all income levels, large and small businesses, non-profits, and municipalities. In the Mid-Hudson region, this would compound already burdensomely high rates and the Lower Hudson Valley Capacity Zone surcharge, which was applied in 2014 to ensure that there was adequate generating capacity in the Mid-Hudson Region.²³

62. The *July 8th Responsive Proposal* represented a significant departure from the previous January 2016 proposal that had been initially submitted to the public for comment. It included an entirely different formula for calculating the cost of the nuclear subsidies based on the “social cost of carbon”. The Commission’s use of social cost of carbon is contrary to EPA’s intent and to established usage of the SCC, which is as a basis for regulatory evaluation of incremental emissions impacts in regulatory/administrative proceedings.

²³ See Clearwater’s comments on CES dated 7/22/16 and <https://www.savconenergy.com/industry-news/new-york-electric-customers-in-lower-hudson-valley-to-see-huge-spike-in-capacity-prices-8493/>

63. The *July 8th Responsive Proposal*'s new formula raised the projected price by potentially more than an order of magnitude, resulting in deleterious and burdensome increased costs to individual ratepayers, small businesses and local governments along with creating a new and novel designation of certain nuclear power plants as being a "public necessity".

64. The *July 8th Responsive Proposal* further significantly changed and expanded the ambit of Tier 3 recipients to potentially include Indian Point. New York has argued vigorously against the re-licensing of these facilities contending that the aging facility does not meet the regulatory requirements allowing the facility to continue operating.²⁴ Until January 09, 2017 the State of New York had been an active litigant in the NRC proceeding on license renewal during the duration of the proceeding underlying the Commission Order, i.e. on April 2, 2010 the New York State Department of Conservation denied Indian Point Clean Water Act permits authorizing water discharges due to violations of water quality standards thus, effectively denying the facility the 2.5 billion gallons per day of Hudson River water needed to cool the facility during its operations.²⁵

65. On January 9, 2017, "Governor Andrew M. Cuomo today announced the closure of the Indian Point Energy Center by April 2021. The aging 2,000 megawatt nuclear power plant, located 25 miles north of New York City, has presented numerous threats to the safety of over 20 million residents and the environmental health of the area. After extensive litigation and

²⁴ NYS-Contention 5: Challenges Entergy's inspection and monitoring for corrosion or leaks in all buried systems, structures and components that convey or contain radioactive fluids. Docket Nos. 50-247-LR; 50-286-LR ASLBP No. 07-858-03-LR-BD01 DPR-26, DPR-64.

²⁵ See Letter of William Adriance, Chief Permit Administrator of the Department of Environmental Conservation to Dara Gray, Entergy Nuclear Operations, Inc Re: Joint Application for CWA § 401 Water Quality Certification NRC License Renewal – Entergy Nuclear Indian Point Units 2 and 3 DEC Nos.: 3-5522-00011/00030 (IP2) and 3-5522-00105/00031 (IP3) *Notice of Denial*, dated April 2, 2010.

negotiation, Entergy has agreed to end all operations at the facility, with plans to shut down Indian Point Unit 2 as early as April 2020 and Unit 3 in April 2021 – 13 and 14.”²⁶ However, based on the Orders challenged in this matter, Indian Point may be allowed to operate for up to eight (8) more years and become entitled to public subsidies in as little as two (2) years, if it can no longer make enough profit to satisfy its corporate operator. As Indian Point continues to age, its operating costs are likely to continue to escalate. This will make the plant less profitable and likely to become uncompetitive. Even, if operating costs remain stable, adoption of cheaper renewables and efficiency technologies, demand side initiatives, and grid upgrades which that eliminate transmission bottlenecks could easily make Indian Point unprofitable within a couple of years. Under the terms of Tier 3, Indian Point could then qualify for billions of public subsidy and argue that NYSERDA is obligated to enter into a long term purchase agreement. This contradiction to the Governor’s announcement, is evidenced by Entergy announcement that it will request a shorten renewed license term for Indian Point from 2033 and 2035 for Units 2 and 3, respectively, to 2024 and 2025, thus contemplating a total of seven to eight additional years of operation. Thus, the overall scheme established by Tier 3 actually promotes Indian Point’s continued operation and is a significant change with increased significant impact which were never considered in any prior proposals.

66. The significant and substantive changes of the *July 8th Responsive Proposal* were not published in the State Register. After publication only on the Commission website, the Commission ordered a ten (10) day comment period, later extended to fourteen (14) days after parties submitted requests to extend the public comment period to forty-five (45) days, a

²⁶ <https://www.governor.ny.gov/news/governor-cuomo-announces-10th-proposal-2017-state-state-closure-indian-point-nuclear-power>

minimum of thirty (30) days is required pursuant to State Administrative Procedures Acts (“SAPA”). Among significantly changed portions of Tier 3’s ZEC requirement were the estimated \$7.6 billion to \$10.4 billion required ratepayer nuclear subsidy, a higher number of ZECs to be purchased by ratepayers in 2017, a commitment to twelve (12) years of ZEC purchases, insertion into the record of a the unprecedented misapplication of the Social Cost of Carbon (“SCC”) as metric for pricing nuclear subsidies, and insertion into the record of a determination of the “public necessity” determination for particular nuclear facilities.

67. On July 12, 2016, a news report suggested that Exelon would be willing to buy FitzPatrick if the Commission approved subsidies, and that talks between Exelon and Entergy were underway.²⁷

68. On July 12, 2016 Exelon indicated it would purchase Fitzpatrick if New York State provided financial incentives.²⁸

69. On July 22, 2016, only fourteen (14) days after the Staff Responsive Proposal was issued, public comments were due.

70. On, August 1, 2016, only ten (10) days after public comments were received, the Commission adopted by Order the Clean Energy Standard.²⁹

²⁷http://www.syracuse.com/news/index.ssf/2016/07/source_exelon_would_save_fitzpatrick_nuclear_plant_if_state_oks_subsidies.html

²⁸ See Joint Application under FPA Section 203 of Entergy Nuclear FitzPatrick, LLC
http://elibrary.ferc.gov/idmws/file_list.asp?document_id=14487740.
²⁹http://www.syracuse.com/news/index.ssf/2016/07/source_exelon_would_save_fitzpatrick_nuclear_plant_if_state_oks_subsidies.html

71. On August 1, 2016 the Commission Order was adopted which included Tier 3 creating public financial subsidies for continued nuclear facility operations in New York State.

72. On August 1, 2016, just ten (10) days after the public comments period closed on July 22, 2016, and less than statutorily required 30 days waiting period prior to issuance of an Order, the COMMISSION issued the Order which included Tier 3 recommendations contained in the *July 8th Responsive Proposal*, Tier 3 creates a public financial subsidy for financially unsustainable nuclear facility operations in New York State. The Order included a finding of “public necessity” for the Ginna, FitzPatrick and both Nine Mile Point nuclear facilities³⁰ Thus, on information and belief, with a truncated public review of merely fourteen (14) days, the Order authorizes billions in subsidies to inure to the benefit of a single company, Exelon, upon completion of the planned sale of FitzPatrick to Exelon. On August 9, 2016, upon information and belief an agreement was reached for Exelon to buy FitzPatrick.

73. On or before September 1, 2016 multiple parties, including some of the Petitioners, filed Petitions for rehearing or reconsideration. Instead of responding in the required 30 days period, the Commission set another comment period which ended on November 14, 2016.

²⁹ Clean Energy Standard (Case 15-E-0302) Order, approved Aug. 1, 2016, implementing a Clean Energy Standard and a Large-Scale Renewable Program.
<http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B44C5D5B8-14C3-4F32-8399-F5487D6D8FE8%7D> <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={44C5D5B8-14C3-4F32-8399-F5487D6D8FE8}>
with appendices <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={B3777382-228F-4268-A674-6B5B93B8614B}>;

³⁰ Commission *Order* at 128.

74. Petitioners concede that the Commission showed a willingness to hear the public comment for most aspects of the proceeding, however it was unreasonable, arbitrary and capricious and without reason for Tier 3 to be treated differently. Instead of extended or additional comments periods, Tier 3 was rushed through to approval without publication, statutorily required 30 day comment period and waiting periods.

75. Despite, a year earlier Entergy announcing plans to close the FitzPatrick nuclear facility, on November 17, 2016 the Commission ruled to approve the sale of FitzPatrick from Entergy to Exelon, even though the Commission has failed to rule on the rehearing Petitions in a timely manner.

76. On December 15, 2016, the Commission Denied Rehearing Petitions of multiple petitions, some of which were submitted by Petitioners. *December Denial of Petitions for Rehearing*. The Commission denial was based on the Commission determination that there were no issues of fact or law that had been raised. The only rehearing Petition the Commission granted was to the nuclear industry.

77. On January 9, 2017, Indian Point's retirement was announced based on a settlement agreement. Tier 3 creates a window by which ratepayers may be forced throughout New to subsidize the continued operations of Indian Point until 2024 and 2025, if a claim of "need" is made.

FIRST CAUSE OF ACTION

**THE PUBLIC SERVICE COMMISSION ACTED CONTRARY TO LAW WHEN
IT FAILED TO FOLLOW THE REQUIREMENTS OF THE STATE
ADMINISTRATIVE PROCEDURE ACT**

78. Petitioners repeat and re-allege each of the foregoing paragraphs of their Verified Petition as if fully set forth herein.

79. The Public Service Commission incorrectly characterizes its actions regarding the Orders as a “ratemaking.” *December Denial of Petitions for Rehearing* at 33-35. Despite the fact that the scope of the proceedings undertaken in issuing the Orders are regulatory in nature, the Commission’s *December Denial of Petitions for Rehearing* asserted that the proceeding was a ratemaking case as a matter of law and not subject to SAPA §§ 202-a(1), 202(4-a) (a) and 207(4). See *December Denial of Petitions for Rehearing* at 33.

80. The Petitioners challenge the Orders pursuant to CPLR Article 7803(3) – issued in violations of lawful procedure. Further, The State Administrative Procedure Act authorizes a challenge to the Commission Order “to contest a rule on the grounds of noncompliance with the procedural requirements.” See SAPA § 202(8).

81. Regulatory promulgation consistent with the provisions of the New York State Administrative Procedure Act (SAPA) is not a matter which rests within the particular and specialized expertise of any agency. Interpretation of the SAPA is not dependent on an understanding of technical data or underlying operational practices. The statute outlines uniform administrative procedures that state agencies must follow in their adjudicatory, licensing and rule making processes. A courts review in their usual de novo adjudicative function. Since specialized knowledge is not necessarily implicated, a court may use its own competence to decide issues of law raised, since those questions are of ordinary statutory reading and analysis. The principle of deference to an agency's special expertise only applies such expertise is relevant, and does not apply with regarding to procedural compliance.

82. The violations have a profound impact and ability on the public's opportunity to review and comment on the Order directing how multiple billions of dollars of electric ratepayer monies will be spent.

The Commission Proceedings Trigger the Requirements of Both Provisions of SAPA § 102, But Fails to Meet the Requirements of Either Provision.

83. New York State Administrative Procedure Act (SAPA §202) establishes certain minimum procedures that an agency must follow when promulgating regulations, including the requirements that an agency publish in the New York State Register a notice of proposed rulemaking which afford the public an opportunity to submit comments on the proposed rule (SAPA§ 202(1)(f)(v)).

Commission Acted Contrary to Law when it Significantly Changed the Proposed Order Without Publication, Did Not Allow Thirty (30) days for Public Comment and Did Not Wait Thirty (30) Days Prior to adoption of the order as Required by State Administrative Procedure Act ("SAPA") §202 (4-a).

84. SAPA §202 4-a requires that in noticing a revised rule making:

“an agency shall submit a notice of revised rulemaking to the secretary of state for publication in the state register for any proposed rule which contains a substantial revision. The public shall be afforded an opportunity to submit comments on the revised text of a proposed rule. Unless a different time is specified in statute, the notice of revised rule making must appear in the state register at least thirty days prior to the adoption of the rule. The notice of revised rule making shall indicate the last date for submission of

comments on the revised text of the proposed rule . . . *shall be not less than thirty days after the date of publication of such notice.*"³¹ (emphasis added)

85. On January 25, 2016, the Commission Staff filed its White Paper and on Clean Energy Standard, which was published in the State Register and adequate public comment was encouraged and permitted. The *July 8th Responsive Proposal* included a legal obligation that all ratepayers must pay for qualified ZECs, regardless of whether or not they - as personal, small business, not-for-profit or local government consumers of electricity - opt to purchase nuclear energy or other sources of truly zero emissions energy such as renewable wind, solar and hydroelectric power.

86. The public comment period on the initial proposal was extended from March 14, 2016 until April 22, 2016, in order to accommodate a delayed publication of the Staff Cost Study and to allow parties to see the Cost Study before submitting initial comments on the Staff White Paper.³²

87. On July 8, 2016, the Commission Staff issued its Responsive Proposal, which was significantly and dramatically different from the prior published January 25, 2016 Staff White Paper on Clean Energy Standard and the April 8 Cost Study. Upon information and belief the Staff Responsive Proposal was not published in the State Register.

³¹ SAPA § 202(4)(a).

³² <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={CEDA891E-EE9D-4D3D-8F77-06EDCC4F400A}>
<http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={ADF2EA84-B136-41D8-B9E7-9B41D7C80659}>
<http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={47FFD51C-0ED9-4C89-9A4F-CFC71F8A44C3}>
<http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={42AE24A9-5A37-4062-9473-DFFA8653B0C5}>

88. The *July 8th Responsive Proposal* was a “substantial revision” of the Commission staff’s initial White Paper proposal, upon which public comments were received. The Staff Responsive Proposal represented a significant departure from the previously publicly noticed proposal. Not only did the *July 8th Responsive Proposal* include an entirely new formula for calculating the cost of the nuclear subsidies (which raised the projected price exponentially), but it also included entirely new policy concepts, such as the designation of ‘public necessity’ for certain nuclear units and most shocking was the sudden inclusion of Indian Point as a potential recipient of billions of dollars in subsidies.

89. In the *July 8th Responsive Proposal* for the first time it proposed, that the state enter into a mandatory twelve (12) year contract to purchase ZECs from those nuclear plants that were deemed to be a “public necessity.” This proposal for the first time included Indian Point as a potential beneficiary, in the event “public necessity” was found. Commission did not publish and did not provide notice that it was making a switch to the social cost of carbon in calculating the subsidies; or that the Commission was making facility specific determinations as to which reactors would be the initial beneficiaries; or that the surcharge would apply to all ratepayers even those who have chosen to purchase only renewable, clean energy.

The Revised Rulemaking Was Not Published in the State Register

90. The Commission did not publish this revised ruling making set forth in the brand new Responsive Proposal in the State Register. This violation of SAPA §202 4-a barred members of the public from an opportunity to consider or comment on these significantly costly new policy changes. The Commission did not provide an opportunity for the public to be heard

in a meaningful manner and at a meaningful time to address significant and dramatic changes in the Staff's proposal after the public hearing were closed in violation of SAPA §202-4.

91. The July 8 Responsive Proposal was a "substantial revision" of the Commission Staff's initial January White Paper proposal, upon which public comments were originally received. Not only did the July 8th Responsive Proposal change the methodology of establishing the cost of the nuclear subsidies, it did so based entirely on a new and novel application of policy concepts not intended and never before used for the purposes of calculating a nuclear subsidy. The Public Service Law provides guidance regarding what it recognizes as a "major change" triggering public notice requirements before changes could go into effect. In this case, the increase from about \$1,00,000,000 to over \$7 - 11,000,000,000, a dramatic increase and well more the two and a half (2.5%) percent increase, which triggers, in a utility ratemaking context, full public notice requirements. The Commission presented no evidence into the public record identifying the amount of the increase. Despite the absence of the record on the actual amount of the newly calculated subsidy, the Commission's Orders require it be paid by all ratepayers.

92. SAPA §202 4-a requires that in noticing a revised rule making "an agency shall submit a notice of revised rulemaking to the secretary of state for publication in the state register for any proposed rule which contains a substantial revision."

93. Here, the July 8 Responsive Proposal contained numerous entirely new policy concepts, such as the designation of Indian Point as a potential beneficiary and the concept of 'public necessity' for certain nuclear units. It also proposed, for the first time, that the state enter into a 12-year contract to purchase ZECs from those nuclear plants that were deemed to be a "public necessity." Yet, the Commission did not afford parties and the public the statutorily

required thirty (30) day opportunity to review and comment on the brand new ‘public necessity’ components of the Order, as well as the ‘public necessity’ determination for any particular generator, was during the illegally shortened public comment period.

94. It is inarguable that the substantial and meaningful changes should have received a new State Administrative Procedures Act notice rather than being treated like an “add-on.” Add-on or logical outgrowth of a rule specified in the initial notice has not been permitted by New York courts.

The Revised Rulemaking Did Not Allow for Thirty Day Public Comment Period.

95. On July 8, 2016, the Commission announced that the deadline for public comments on the Responsive Proposal would be July 18, 2016. After public outcry, the Commission granted an additional four (4) days. Thus public comments were to be submitted by July 22, 2016, allowing only a total of fourteen (14) days for public comments on the substantially revised Responsive Proposal.

96. The mere 14 days the Commission gave the public to respond to this major and change in New York policy – in the middle of the summer, no less, and with public interest groups having to waste time seeking an extension to the Commission’s initial even shorter 10 day allowance – was grossly inadequate. Commission’s avowed rush to push the subsidy scheme forward to accommodate the supposed financial planning needs of the Exelon corporation constituted a deprivation of the public’s due process rights.

97. The only opportunity afforded parties and the public to review and comment on the brand new ‘public necessity’ components of the Order, as well as the ‘public necessity’

determination for any particular generator, was during the illegally truncated public comment period violated the due process rights of Petitioners and ratepayers throughout the state.

The COMMISSION Did Not Wait Thirty (30) Days Prior to Adopting Order.

98. Furthermore, SAPA §202 4-a requires “the notice of revised rule making must appear in the state register at least thirty days prior to the adoption of the rule.” The Commission did not wait 30 days but instead rushed to issue the Final Order on August 1, 2016, only ten (10) days after the close of the truncated public comment period.

99. Accordingly, Petitioners are entitled to an order reversing, annulling, vacating and/or setting aside the Tier 3 ZEC requirement of the Commission Order, because it was issued in violation of lawful procedure.

If Commission is Correct, and the Orders are a Ratemaking, Administrative Hearings Setting Forth the Justification for the Increases Would Be Required, Particularly for an Increase of this Magnitude.

100. A ratemaking proceeding before the Commission is fairly prescribed by the Public Service Law. When the ratemaking is announced, there would be a need to submit into the record of the proceeding detailed financial information justifying the increase in rates to the ratepayers. The evidence presented by the utility as justification would be subject to full adjudicatory hearings where the public would be allow to examine and cross examine the basis for the changes. Despite the Commission’s assertion that this is a ratemaking proceeding – it provided no such financial justification for the Tier 3 subsidy. Further, it did not even provide to the public any financial analysis or justification for the “public necessity” justification to keep these nuclear generators commercially viable through subsidy. Thus, the proceeding was a

ratemaking in ‘name only’ as the Commission declared in its *December Denial of Petitions for Rehearing*.

101. Further, under analogous provisions of the Public Service Law, if the nuclear reactors were a regulated utility, i.e., if the nuclear generators were a utility, the July 8 Responsiveness proposal would be considered major change to the ratepaying public triggering additional public review and comment. If the proceeding involved a ratemaking change requested by a utility, by way of comparison, it would easily surpass that 2.5 % increase standard that would require more than mere public notice and comment, but would require a public hearing.³³ Public Service Law § 66 states that, for the purpose of this subdivision, ‘major changes’ shall mean an increase in the rates and charges which would increase the aggregate revenues of the applicant more than the greater of three hundred thousand dollars or two and one-half percent, but shall not include changes in rates, charges or rentals (i) allowed to go into effect by the Commission or made by the utility pursuant to an order of the Commission after hearings held upon notice to the public, or (ii) proposed by a municipality.

102. In addition to the significantly increased subsidy charged by Tier 3 to ratepayers, it concluded that the subsidies were a ‘public necessity’ for certain nuclear units. In July, for the first time, the Department of Public Service proposed that the state enter into a twelve (12)-year contract to purchase Zero Emission Credits from those nuclear plants that were deemed to be a “public necessity,” set forth criteria for such designation, and recommended that the Commission make such designation for the four upstate nuclear reactors.

³³ There was no record of the costs to ratepayers associated with Tier 3 in the July 8 Responsiveness Proposal, and thus, the precise increase in terms of percentage are unknown, but the increase from roughly \$ 1 billion to at least \$7.6 billion is a substantial increase in the costs to the ratepaying public.

The July 8 Revised Tier 3 Uses A Different Basis to Calculate the Subsidy, Substantially Increasing the Cost to Ratepayers By Billions of Dollars Without Any Basis in the Record.

103. The Public Service Commission changed the basis of Tier 3 between January and July 2016. The changes were substantial. There is no record basis or substantial evidence supporting switching from cost-of-operation metrics to the Social Cost of Carbon based metric for nuclear power plants, only.³⁴ The difficulty in public understanding and review of these changes is manifest on the record. The novel and not fully presented or publically explained Social Cost of Carbon approach underscores the need for sufficient review before a several billion dollar increase in a subsidy to be borne by ratepayers can be ordered to be necessary. Granting only a fourteen (14) day period for public comment is far too short to allow for public hearings and opportunity comment on this dramatic change from an established cost of operation calculation before it was replaced by the unusual and novel price fixing Social Cost of Carbon based formula adopted in Tier 3. Indeed, a rate increase of this nature was not proposed or even suggested in the State Energy Plan, nor explicitly authorized or required by legislation or express regulatory authority by the federal or any other state government for nuclear power plants.

Under the Regulatory Rulemaking Provisions of SAPA, Additional Hearings For the Tier 3 Proposal Were Clearly Required by Law.

104. The normal procedure would be the notice to the public of the rulemaking. In this case, there were a number of legislative type hearings to the public regarding the initial Tier 3 proposal submitted in the January 2016 White Paper. Additionally there was a Supplement compiled for the Generic Environmental Impact Statement associated with the entire proceeding. As noted, this SEQRA process is completely consistent with previous action in many policy

³⁴ Without making a similar change to the application of the Social Cost of Carbon for Tiers 1 and 2.

based rulemakings of the Commission. There is not a requirement for a SEQRA review for a standard ratemaking procedure. Under SAPA, the billions of dollar increase between the January White Paper proposal and the subsequent July Responsiveness Proposal for Tier 3 would have been the substantial change justifying additional public comment requirements. The Commission did not comply with these provisions – it did not require the proper public notice timeline, nor did it comply with SEQRA. For these reasons, the Commission’s *December Denial of Petitions for Rehearing* stating that because the proceeding was a ratemaking and did not have to comply with the provisions of SAPA 102(i)(a) is an error of law.

THIRD CAUSE OF ACTION

THE ORDER CONTAINS A MISTAKE OF FACT AND VIOLATES THE STATE ADMINISTRATIVE PROCEDURE ACT §201 WHICH REQUIRES USE OF WORDS WITH COMMON EVERYDAY MEANINGS

105. Petitioners repeat and re-allege each of the foregoing paragraphs of their Amended Verified Petition as if fully set forth herein.

106. SAPA §201 states that, “This article establishes minimum procedures for all agencies [that] each agency shall strive to ensure that, to the maximum extent practical, its rules, regulations and related documents are written in a clear and coherent manner, using *words with common and everyday meanings*.” (emphasis added)

107. Nuclear energy is not, nor has ever been, “zero-emissions.” It is well-known that nuclear energy production routinely, on a daily basis, produces large quantities of nuclear waste, radioactive isotopes, thermal pollution and greenhouse gases including radioactive CO₂ and methane.

108. The use of zero emissions within a Clean Energy Standard is misleading and is not consistent with the “common and everyday meanings.”

109. Even if the Commission inadvertently called nuclear energy “zero-emissions,” it conflates fact, and in order to justify a multi billion dollar subsidy to a profitable industry makes this a material issue in this matter.

110. Tier 3 violates SAPA §201 using the nomenclature the Commission created - “zero-emission” credits – to justify Tier 3.

111. This is not just a matter of semantics, is mistake of fact is the very basis of Tier 3.

112. “Common and everyday meanings” of words relies upon agreed to dictionary definitions. Emissions in the Oxford English Dictionary emissions are defined as “The production and discharge of something, especially gas or radiation.” The Cambridge Dictionary defines emissions as “the act of sending out gas, heat, light, etc.”³⁵

113. Black’s Law Dictionary, 10th Edition defines emissions as, “the production or sending out of heat, light, gas, radiation, carbon smoke, etc.” (p 638). Thus, the three authorities on meanings of words agrees, that heat, gas and radiation, all qualify as emissions.

114. Under normal operating conditions nuclear reactors routinely and daily emit known climate change catalysts and carcinogens, as well as greenhouse gases and heat. The record before the Commission contained evidence of these regular emissions. (*see Aff. Hito-Shapiro, Indian Point Aerial Thermal Plume image*).

³⁵ <http://dictionary.cambridge.org/dictionary/english/emission>

115. Indian Point's cooling intake systems alone annually suck in an amount of water equivalent to the volume of the Hudson River from Troy, New York to Lower Manhattan. Thermal pollution represents an especially negative impact in a warming world. Nuclear reactor dumps billions of BTUs of heat into the water body – river, lake or ocean – it uses for cooling. On a daily basis two reactors emit approximately the amount of heat produced from the detonation of a Hiroshima-sized atomic bomb. see *Aff. Elie/Lee* ¶29.

116. It is well known New York's nuclear reactors are leaking into the air and the environment. On Feb. 5, 2016 a tritium leak of approximately 14.8 million picocuries of radioactive tritium was discovered at Indian Point. Indian Point has been emitting tritium for at least the past eleven (11) years. An NRC inspection report found that workers at Fitzpatrick were being subjected to high amounts of radiation since radioactive materials have been leaking for over the past four years.^{36,37}

117. Nuclear power is actually a chain of highly energy-intensive industrial processes which – combined – consume large amounts of fossil fuels and generate potent warming gases., The nuclear energy fuel cycle includes: Uranium mining; Milling; Enrichment; Fuel fabrication; Transport; Construction and Maintenance of Steel and Concrete structures; Fission Carbon Emissions of New Man-Created Carbon Atoms Released into Atmosphere as Radioactive Carbon-14 and Methane; Safe Storage of Nuclear Waste and Closed Nuclear Facilities. (See *Aff. Conover, Heath*.)

³⁶ <http://www.nrc.gov/reading-rm/adams.html>

³⁷ Docket No. 50-333, License No. DPR-59
Inspection Report 05000333/2016002, Leaks and Spills at US Commercial Nuclear Reactors
<http://pbadupws.nrc.gov/docs/ML1532/ML15322A312.pdf>

118. Petitioners provided authoritative evidence in reports by the International Atomic Energy Agency (“IAEA”) and Electric Power Research Institute (“EPRI”) regarding fission carbon emissions. One of the by-products of fission is newly made carbon-14, a highly radioactive form of carbon which is emitted on a daily basis from all operating nuclear reactors.

119. Upon information and belief, the Commission had knew or should have known that nuclear energy production is not emission free or zero emissions. The Commission’s total disregard of facts is material to the cause of action at issue in this matter. The Commission’s unconsidered identification of the nuclear energy production as being “zero-emissions” was a violation of lawful procedure.

120. Reliance on misleading word connotation “zero-emissions” in Tier 3 substantively violates the SAPA §201. The misdirected use of common words has affected an error of fact and law SAPA §201, resulting in the Commission’s error.

121. . This mistake of fact has resulted in a mistake of law, and therefore must be corrected, as the mistake of fact diametrically opposes to the purported purpose of the Orders.

122. On its face “zero emission credits (“ZECs”) cannot be sustained. To correct this mistake of fact Petitioners respectfully request the Court to strike from all the Orders all references to nuclear energy being “zero emissions.” Petitioners are petitioning this Court to order the removal of all references to nuclear energy being “zero-emissions”, “clean,” “emissions free”, “carbon free”, or being eligible for “zero emission attributes” or “zero emissions credits” (referred to as “ZECs”).

123. Furthermore, subsequent to the removal of such references we ask the Court to remand this matter to the Commission for new consideration based on the reality that nuclear energy production is not emission free and is not zero emissions.

FOURTH CAUSE OF ACTION

THE ADOPTION OF TIER 3 VIOLATES THE STATE ENVIRONMENTAL QUALITY REVIEW ACT SEQRA

124. Petitioners repeat and re-allege each of the foregoing paragraphs of their Amended Verified Petition as if fully set forth herein.

125. The Commission's environmental review of the Orders violates the State Environmental Quality Review Act ("SEQRA") because the Supplemental Generic Environmental Impact Statement failed to take a "hard look" at the January 2016 White Paper *and the proposal* set forth in the July 8, 2016 Responsive Proposal that would become the Commission's *August Order*.

126. The Commission issued the *Draft Generic Supplemental Environmental Impact Statement* (Draft Supplement Generic EIS) on February 23, 2016, which was noticed in the State Register on February 24, 2016. On May 23, 2016, the *Final Supplemental Generic Environmental Impact Statement* was issued, evaluating the ZEC program for a six year term and only two scenarios – a limited and biased binary analysis that does not look at other reasonable, less expensive, and more effective alternatives, nor did it consider the inclusion of Indian Point and twelve year term.

127. SEQRA Regulations direct the reasonable alternatives analysis to look at different technologies and different scale or magnitude alternatives. 6 NYCRR 617.9(b)(5)(v)(b),(c). The

Supplemental Generic EIS violates both the letter and spirit of these provisions. Thus a second *Supplemental Generic EIS* to consider the July Responsive Proposal was required, but never undertaken.

128. The *Supplemental Generic EIS* reviews the previous January 2016 proposal – and not the substantially revised July 2016 proposal for Tier 3 that was Ordered by the Public Service Commission. The Tier 3 versions differ substantially since it include Indian Point as a potential beneficiary, and thus render the SEQRA analysis *prima facie* invalid. The well-established requirement of taking a hard look prior to taking action was not undertaken for the two very different Tier 3 proposals. The *Supplemental Generic EIS* does not provide a sufficient basis for the required findings that “weigh and balance relevant environmental impacts” because it lacks any analysis regarding incremental production and storage of nuclear waste in New York, or increased human health and environmental costs due to increased risks of operating the nuclear reactors without adequate insurance; nor does it consider the increased costs as a result of increased waste storage and additional radiological contamination, which will be incurred by New York State after twelve (12) additional years of operation and the inclusion of the Indian Point reactors as potential beneficiaries. 6 NYCRR Part 617.11(d)(2), (4).

129. The “no action” scenario reviewed focused on allowing existing 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 Public Record Includes Many Alternatives For the Analysis But All Were Ignored by the Public Service Commission in their SEQRA Analysis.

130. The Public Service Commission failed to consider the most obvious alternative, which involves replacing the planned closing of nuclear reactors with alternative energy

resources. These sources could have included higher energy efficiency resources or increased renewable energy. Even the Cost Study indicates such alternatives would be cost effective and viable.³⁸ The *Supplemental Generic EIS* relied upon by the Commission does not include higher energy efficiency resources or increased renewable energy as a reasonable alternative. In comparison, the Commission's SEQRA analysis in the 2004 Renewable Portfolio Standard record found that increased use of renewables may result in, among other things, the reduction of greenhouse gas emissions. *See Order Regarding Retail Renewable Portfolio Standard* at 76 (September 24, 2004).

131. There is not a proper factual basis or analysis to support the Commission decisions on Tier 3 because the new cost study included in the July 8 Responsive Proposal was not considered in the *Supplemental Generic EIS* adopted on August 1, 2016. The *Supplemental Generic EIS* review analyzes and reaches legally required findings regarding environmental impacts and mitigation based upon a proposal that is substantially different from that adopted by the Commission.

132. The *Supplemental Generic EIS* does not provide a sufficient basis for the required findings that “weigh and balance relevant environmental impacts” because it lacks any analysis regarding incremental production and storage of nuclear waste in New York; increased human health and environmental costs due to increased risks of operating the nuclear reactors without adequate insurance, nor does it consider the increased costs as a result of increased waste

storage and additionally radiological contamination which will be incurred by New York State after twelve (12) additional years of operation.³⁹

133. The direct costs of the *July 8th Responsive Proposal* for Tier 3 (\$7.6 billion through March 31, 2029) are estimated to be more than triple the total direct costs of Tier 1 (\$2.44 billion through 2030), though the total annual generation to be provided by Tier 1 for new renewables sources in 2030 (~34 TWh per year) is more than 25% greater than the amount of nuclear to be subsidized by Tier 3 through March 2029 (~27 TWh per year). This suggests that incentives spent on new renewable generation sources would be nearly four (4) times more effective in providing true zero-emissions renewable generation than the Tier 3 subsidies for continued nuclear generation, which is not emission free, even at the point of generation.

134. Further, the Commission has long ago concluded that increased renewables reduce greenhouse gases (one of the stated reasons for the need for Tier 3). The data on the Commission's public record, a subsidized nuclear program will deliver approximately 50% less generation of energy than new renewables contemplated in Tier 1 and Tier 2 by 2030.

135. This analysis is evidence that new renewables are significantly more cost-effective than the nuclear Tier 3 in meeting the state's emissions goal and will continue to operate without additional significant expenditures beyond the 2029 end date for the Tier 3 subsidy program.

136. Further, under this Order, increased decommissioning costs that would required because of the additional years of operation (2017-2029) of these nuclear generators will not be

³⁹ See 6 NYCRR Part 617.11(d)(2), (4).

controlled by New York State. The transfer of FitzPatrick, and its decommissioning fund to Exelon, will effectively hand over New York State's decommissioning fund to a private corporation, whose interest may not be in fully restoring New York State property and assets, but in increasing its own profitability. It should be noted that the NRC, not New York State, will now have sole authority as to funds expended on clean up will be required at some future date. The environmental risk of insufficient funds or plans for safe decommissioning and long-term or even permanent nuclear waste storage scenarios were not addressed by the Final Generic SEIS.

137. Notably the Commission has evaded consideration of the massive intergenerational costs and environmental risks uniquely imposed upon the state by aging nuclear plants and their ever-enlarging inventory of nuclear waste. Emblematic of the Commission's lack of understanding – or, worse, willingness to turn a blind eye to the magnitude – of the risk is its statement in the *December Denial of Petitions for Rehearing* that: “Nothing in the record supports the premise that these facilities are not properly insured.”ⁱ This statement is demonstrably wrong as a matter of fact. The federal Price-Anderson Act of 1957 places the primary liability for a nuclear accident squarely on the shoulders of the public. In the more than half-a-century which has transpired since its enactment, neither the insurance industry, nor the nuclear power industry has been willing to assume full liability for the consequences of a catastrophic event. In addition, the federal Nuclear Waste Policy Act of 1982 places the full liability for long-term storage of nuclear waste on the public. See *Aff. Elie/Lee* ¶ 32.

138. The nuclear full fuel cycle has created Superfund sites and over 1,500 mines leaching radioactivity and heavy metals into despoiled ecosystems. The impact on environmental justice, particularly Native American, communities has been horrific. Nuclear releases a continuing stream of radioactive emissions into air and source waters as part of

ordinary reactor operation. Virtually every nuclear power site in the country – New York’s included – have had accidental radioactive leaks. Nuclear involves the heavy exploitation of water systems. It destroys billions of fish and other aquatic life in cooling intake systems and pumps out massive thermal pollution plumes. Every day New York’s reactors run they create nuclear waste – a material so poisonous the National Academy of Sciences has determined it must be sequestered from the environment for a million years. *See. Aff Elie/Lee ¶10, see Aff Heath)*

139. The Commission’s failure to consider the potential environmental impacts of additional nuclear waste production and storage; inclusion of Indian Point as a potential beneficiary of the Tier 3 program; and reasonable and economically less expensive alternatives to nuclear subsidies when sufficient information was available on the record is arbitrary and capricious; and is in violation of law.

FIFTH CAUSE OF ACTION

TIER 3 OF PUBLIC SERVICE COMMISSION ORDERS ARE SET RATES WHICH ARE UNJUST AND UNREASONABLE, UNJUSTLY DISCRIMINATORY AND UNDULY PREFERENTIAL, IN VIOLATION OF PUBLIC SERVICE LAW § 66-C.

140. Petitioners repeat and re-allege each of the foregoing paragraphs of their Amended Verified Petition as if fully set forth herein.

141. The Public Service Law requires that electricity rates be “just and reasonable.” *Public Service Law § 66-c.* The Public Service Commission Orders violates this clear legal obligation. The Orders require those individuals who have opted and contracted to have clean energy instead of nuclear power, to pay an additional fee over and above the price for their

chosen source of electricity. These early adopters are unjustly and unreasonably burdened with the Tier 3 nuclear subsidy. Thus, the Commission does not have legal authority to issue the Orders and as such the Order must be nullified and voided.

142. Furthermore the Public Service Law § 65.3 requires that no electric corporation shall be granted any undue or unreasonable preference or advantage to any corporation or to any particular description of service to undue and unreasonable prejudice or advantage. Tier 3 grants undue and unreasonable preference by subsidizing nuclear power reactors, and to corporations that own and operate them, in an amount approximately twice as much as subsidies for renewable energy generation in Tier 1 and Tier 2 combined.

143. The Commission has grievously abdicated its self-professed responsibility to act in the public interest and protect the environment and public health. The Orders give nuclear – and nuclear alone – a stranglehold over the energy sector. The rigid terms of the Orders lock the State into purchase and subsidization of aging, obsolete facilities, no matter how detrimental the states aging nuclear reactors may become over the years, even from a safety and security perspective.

Tier 3 Nuclear Subsidization Was Not Included in the 2015 State Energy Plan and the NYISO Determined that There is No Necessity for the Nuclear Generation Units Anticipated to Close Without the Subsidies

144. The June 22, 2015 New York State Energy Plan sets forth a stated goal of fifty (50%) percent of all electricity used in the state should use energy generated from renewable resources by 2030. Noticeably absent from statutory authorization for the Plan is nuclear generated energy. In fact, the State Energy Plan does not indicate any actual or potential need to provide for the maintenance, preservation, promotion or subsidization of nuclear power plants.

The plan is silent on and does not discuss or contemplate the Tier 3 nuclear power subsidization program that is subject of the instant proceeding.

145. The Public Service Commission is required to regulate electricity generation under the State's policy of conservation of energy, which concerns the "development of alternate energy production facilities, co-generation facilities and small hydro facilities...as determined by the most recent *state energy plan*." N. Y. Public Service Law §66-c, Conservation of energy, § (1). Indeed, adopting the State Energy Plan is one of, if not the primary catalyst underlying the proceedings and actions producing the Public Service Commission Orders. The Legislature did not include nuclear power plants under the energy conservation requirements governing Commission actions.

Ratepayers Who Purchased 100% Renewably Sourced Energy Prior to the Orders Will Unfairly Be Paying Higher Rates Than all other Ratepayers

146. Tier 3 requirements set forth in the Orders unfairly and unjustly discriminate against early adopters of 100% carbon emissions-free renewably sourced energy. This unjust double charge is more egregious considering that the NYISO concluded that even without the Fitzpatrick and Ginna nuclear facilities in the next forecast window for electricity need, 2016 - 2020, that there are no reliability concerns with electricity generation in New York, the underlying justification for Tier 3 subsidy.

147. The Commission asserts that, if New York's nuclear plants closed, every baseload MWh of power lost from the nuclear units would be replaced with fossil-fuels. This assertion is an unsupported assumption. The Commission simply adopts, without critical evaluation, the conclusion offered to the Commission in a report commissioned by nuclear proponents with a vested interest in the nuclear plants the Commission pronounced to be "qualified" for subsidies.ⁱⁱ

The multibillion corporations which run nuclear plants in New York, and have long reaped the profits provided by long-term and very large subsidies and deregulation of the electric market in the 1990s and early 2000s.ⁱⁱⁱ It makes no sense to keep throwing good money after bad, to give the monopolistic nuclear industry more subsidies now that they cannot compete. And the record is bereft of evidence that giving even more subsidies and creating an even more uneven playing field to prop up aging costly nuclear plants is a “public necessity.” (see *Aff. Elie/Lee* ¶14)

148. The group of Petitioner ratepayers that have contractually opted to have 100% of their electricity supplied by renewable electricity providers will have to pay an “additional surcharge” for electricity unjustly requires these consumers to purchase what many of them they sought to avoid - nuclear generated electricity which is not 100% renewable.

149. On April 1, 2017, the Tier 3 ZEC requirement will mandate that each Load Serving Entity (“LSE”) purchase a percentage of ZECs from NYSERDA, with the costs of such purchases to be borne by all New York LSE retail customers.

150. Under the Commission Order, even if customers such as Petitioners chose to purchase 100% renewable generated energy, such as wind or solar, from LSEs, they will be forced to pay for nuclear generated electricity. Under the Commission Order scheme, even if customers are willing to pay more for 100% renewable power, they must also pay for nuclear energy and support continued release of nuclear waste heat and toxic emissions and increased amount of nuclear waste, and are thus penalized by paying more than 100% of the value of their electricity. The rates paid by the State of New York, by and through its agencies or agents pursuant to the Commission Orders Tier 3 / ZEC requirement are “in addition” to the standard electric rates, and as such this surcharge is a direct payment of state monies to the utility

recipient and constitutes a gift of state property in violation of Article VIII, § 1 of the New York State Constitution, due process for lack of proper notice, violation of equal power and equal application of the law and violation of separation of powers.

151. Over the Commission Order's twelve (12) year duration of the Tier 3, it does not matter how cheap and available electrical power becomes to those who already chose to buy 100% renewable generated energy – these captured customers must also pay for nuclear generated electricity.

152. All LSE customers will be forced to buy nuclear generated electricity regardless of the customer's preference and regardless of the customer's financial status. Under the Tier 3 nuclear subsidy, NY ratepayers will be legally required to fund and promote the profitability of the state's aging, outdated, nuclear fleet. The Commission did not consider the whether the nuclear subsidy was just and reasonable, or whether it would have deleterious economic impacts, or be burdensome on low-income ratepayers, small businesses or local governments.

153. Tier 3 falls disproportionately on municipalities that have already taken steps to use renewable sources of power. For example, the Village of Rockville Centre, as a Load-Serving Entity, is required to purchase 39,000 Zero-Emissions Credits in 2017 at a cost of \$684,060. Ulster County purchases 100% renewable power for its county buildings, but will still have to pay \$36,120 for the nuclear subsidy in 2017, and more than \$500,000 over the mandatory 12-year life of the subsidy.

154. In Westchester County, the burden of Tier 3 will fall upon thousands of electric customers and municipalities that have opted for renewable energy under encouragement by New York State. In 2015, the State selected Sustainable Westchester Inc. to manage the first

Community Choice Aggregation pilot program under Governor Cuomo's Reforming the Energy Vision strategy. This program allowed Westchester municipalities to contract directly with energy suppliers to realize bulk discounts on retail rates, and to choose power from clean, renewable sources. Individual residents and small businesses in participating communities automatically receive the benefits of these discounts and renewable power sources, unless they specifically opt out. At this time, 20 municipalities, accounting for over 110,000 of Westchester's electric customers and over 40% of the County's population, have joined this program. In particular, 14 municipalities have specifically chosen to purchase 100% renewable power. These municipalities purchasing 100% renewable power are the Cities of New Rochelle and White Plains, the towns of Bedford, Mamaroneck, New Castle, North Salem and Ossining, and the Villages of Hastings-on-Hudson, Irvington, Larchmont, Mamaroneck, Ossining, Pelham and Tarrytown. The Towns of Greenburgh, Lewisboro and Somers, and the Villages of Mount Kisco, Pleasantville and Rye Brook have joined the Community Choice Aggregation program for basic electricity supply. (*see Aff. Warren Lucas, Exhibit "C" attached to Affirmation. Shapiro*)

155. Petitioners paid premiums for choosing not to use and support nuclear energy and were early adopters of solar and wind energy. Now Tier 3 will be force Petitioners to pay even more, once for the clean and sustainable energy supply they selected, such as wind, solar or geothermal, and now again, against their will, for dirty and toxic nuclear energy. For these reasons, the Public Service Commission did not legal authority to Order Tier 3 and it should be vacated.

156. The result of Tier 3 of Commission Order result in egregious harm to Petitioners, who will be forced to support and pay for the continuation of nuclear energy production in New

York State, when they have chosen to opt out of using nuclear energy. The Commission's Order raises a very serious question of whether the Commission has the right to dictate that kind of energy ratepayers choose to use. Does the Commission have the right to dictate the use and subsidization of the most expensive and most dangerous form of energy which routinely emits greenhouse gases, as well as radioactive isotopes and heat waste — or does the public have the right to choose less expensive and/or more sustainable, safer non-emitting forms of energy?

157. Petitioners and their supporters are among hundreds of thousands of state residents at risk of utility shut off at any given time and will be significantly impacted by the additional electric cost they will be forced to bear as a direct result of the mandatory, unduly burdensome nuclear subsidies imposed by Tier 3.

158. Data filed by New York's electric utilities show that more than 766,000 New Yorkers were in arrears of more than 60 days in paying their utility bills.⁴⁰ Petitioners are concerned about adding to the energy insecurity of New Yorkers to provide a multi-billion subsidy a sole corporate beneficiary, (*See Aff. Of Blair Horner Exhibit "G" at ¶13-14*).

159. Tier 3 singles out and penalizes those New York state ratepayers that were early adopters. The Orders, perversely, undermine the State's renewable energy goals by creating an incentive for consumers to buy LESS than 100% renewable energy to avoid paying the nuclear surcharge. Once it becomes known that 100% renewable customers are going to take that additional hit, ESCOs will have a strong incentive to offer only 85% renewable energy packages. Hence, the discriminatory results of Tier 3 will like reduce demand for and installation of

⁴⁰ Data on latest arrears reports filed by utilities as of November 10, 2016 accessed at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MattSeq=1331&MNO=91-M-0744>.

renewable energy in New York, the exact opposite result of the one contemplated and order in the State Energy Plan. The subsidies that ratepayers will be required to pay are neither just nor reasonable, and unduly and unreasonably prejudicial in violation of the Public Service Law.

SIXTH CAUSE OF ACTION

THE COMMISSION'S ADOPTION OF TIER 3 IS AN ABUSE OF DISCRETION, ARBITRARY AND CAPRICIOUS, LACKING IN A RATIONAL BASIS AND NOT OTHERWISE IN ACCORDANCE WITH LAW.

160. The Commission, pursuant to the Governor Cuomo's executive order to create an "enforceable mandate", expanded the Large-Scale Renewable Proceeding under its renewable energy program to include a track for nuclear energy plants, renaming the proceeding to the Clean Energy Standard. The Commission administratively set pricing, eligibility and conditions for twelve (12)-year NYSERDA contracts to subsidize the nuclear reactors and to ensure that a buyer comes forward to purchase the Fitzpatrick plant.

161. The Commission premised this regulatory course on three principles: (1) an environmental conservation policy that carbon emissions would impermissibly increase in the event that Ginna and FitzPatrick, or other nuclear plants similarly situated, closed; (2) that a nuclear subsidy is to be applied to all ratepayers based on the lowest possible rates arising from the "anticipated operating costs of the units and forecasted wholesale prices" rate methodology as setting an "appropriate and fair value of the environmental attribute of nuclear generating utilities" ; and (3) that there exists an "urgency" to implementing the nuclear subsidy program — switching to the social cost of carbon methodology for the subsidy — based on the Commission's public necessity test." *August Order* at 20, 45, 119, 149; *see also February Order* at 5.

162. Additionally, Entergy, the owner of the FitzPatrick and Indian Point nuclear plants, proposed an option of using the Social Cost of Carbon”to set the price of the subsidy. Constellation proposed a similar methodology. *August Order* at 151. The Commission, two weeks before closing the proceeding, adopted Entergy’s proposed methodology – the first of its kind to be used in the utility regulatory ratemaking scheme.

163. The Commission refers to the *August Order* as “transformative change”, that the purpose of the Clean Energy Standard is to transform the electric system and that it is not an isolated, discretionary spending program. *August Order* at 70-71. The Commission determined in the *August Order* that Nine Mile Point, Ginna and Fitzpatrick were eligible for the subsidies pursuant to Tier 3 - even without looking at FitzPatrick’s books.

164. The Commission denied the Petitions to Rehear from every entity except the owners of Ginna and Fitzpatrick. The Commission granted a partial rehearing to the owners of Ginna and FitzPatrick to remove the condition that was included to induce them to enter into a contract of sale, which they did one week after the *August Order* was issued and effective.

165. The record contains significant unexplained inconsistencies regarding the Commission’s methodology in promulgating the Tier 3 subsidy and on an expedited basis.

The Commission Had Already Authorized The Retirement of Ginna

166. The record plainly states that “[t]he Commission has already authorized the Ginna facility to retire *without further action* from the Commission in 2017.” *Emphasis added. August Order* at 125-126. Indeed, the Commission issued the authorization for Ginna to retire on February 24, 2016 - the very same day that the Commission, in the instant proceeding, authorized the expedited track of Tier 3 to provide a ratepayer-backed subsidy to prevent Ginna

and other nuclear plants from closing. *See also*, Proposal for Continued Operation of the R.E. Ginna Nuclear Power Plant, LLC, Order Adopting the Terms of a Joint Proposal, Case No. 14-E-0270 (February 24, 2016) at 29-30.

167. The record does not contain a rational basis to support the Commission's authorization of the retirement of Ginna while commensurately authorizing the subsidization of Ginna to continue operating, absent any explanation for the basis of the Commission's inconsistent agenda. For example, because the policy grounds against closing Ginna is that carbon emissions would increase, it is inconsistent or otherwise lacking in a rational basis, for the Commission to have otherwise authorized Ginna's closure.

168. "The Commission recently evaluated the financial and operational capability of Exelon Generation Company, LLC, the anticipated operator of the plants eligible for the ZEC program, and found the company to be financially sound and capable of operating the facilities safely. (see Exhibit "C" attached hereto p.39) therefore there is no rational basis for the Commission to find that it is a public "necessity" to subsidize continued operations of Exelon's nuclear reactors within New York State. The Commission's determination that Exelon is "financially sound and capable of operating the facilities safely", points to Tier 3 used to create windfall profits for Exelon.

The New York Independent System Operator Assesses No Statewide Resource or Load Reliability Deficiency in the Event FitzPatrick Retires.

The record plainly states that the Commission relied on a Generator Deactivation Assessment dated February 11, 2016, by the New York Independent System Operator (NYISO) — NYISO is the entity which operates competitive wholesale markets to

manage the flow of electricity across New York from the power producers who generate it to the local utilities that deliver it to residents and businesses - which assessed that the loss of the FitzPatrick nuclear plant along with a number of other plant retirements, would create a statewide resource deficiency constituting a resource Reliability Need starting in 2019. (*See*, Order Further Expanding Scope of Proceeding and Seeking Comments, Case No. 15-E-0302 [February 24, 2016] at 3). The Commission quoted the NYISO assessment, in part, to justify the expeditiousness of promulgating Tier 3. However, the record does not disclose that NYISO subsequently, on April 22, 2016 revised their findings (New York State Independent Service Operator, Generator Deactivation Assessment James A. FitzPatrick Nuclear Generating Facility, Original February 11, 2015, Revised April 22, 2016, attached hereto as Exhibit “D”). This revised and superseding assessment made mere two months later, and during the pendency of Tier 3’s proceeding, found that there would be no resource deficiency in terms of load forecast if FitzPatrick, and all other generators currently mothballed and scheduled to retire, were to close. “This analysis does not identify resource adequacy or transmission security-related Reliability Needs for the near-term period from 2016 through 2020.” (Exhibit “D”, p 3)

169. Thus, the record does not contain a rational basis for the Commission to expedite Tier 3 under its air pollution conservation policy without the Commission explaining the impact of NYISO’s revised assessment of no statewide resource Reliability Need in the event of FitzPatrick’s closure regardless of Ginna’s refueling cycles in September.

The Commission, Switched Methodologies from the Traditional Cost-of-Operation Methodology to The “Transformative” (Non-Cost) Social Cost of Carbon Methodology without Explanation, or Justification, Offering a Two-Week Comment Period Before Closing the Record.

170. In the Order Further Expanding Scope of Proceedings (February 24, 2016) and the Appendix, the Commission originally proposed a detailed cost-of-operation basis for imposing the Tier 3 subsidy:

“Support is provided on demand in the form of per MWh renewable energy credit ...payments for actual production pursuant to short-term contracts. The price of the ...payments is based on the minimum amount of support necessary above existing revenue streams to cover, among other things, the fuel and operational costs of the facility (“going forward costs”) as determined by the Commission after an examination of the books and records of the facility owner. The price of the...payments shall be based on an amount no more than the minimum amount of support necessary above existing revenue streams to cover the reasonable facility going-forward costs of fuel, labor and other operating and maintenance (O&M) costs; new capital costs; taxes (or payments in lieu of taxes); operating risks; and corporate overhead costs as determined by the Commission after an examination of the books and records of the facility owner. Sunk costs (e.g., debt costs, equity costs, and past investments in environmental controls) shall not be included. (See, Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Order Further Expanding Scope of Proceeding and Seeking Comments, Case. No. 15-E-0302 (February 24, 2016) at 5 (“February Order”).

“Financial eligibility would be based on: (a) An examination of relevant portions of the books and records of the facility (including a documented after- tax cash flow forecast) and, to the extent appropriate, of the facility owner/operator and any affiliates; (b)The basis for and reasonableness of expected operating and capital costs. This evaluation may include, among other things, a comparison to prior years' costs and a comparison to costs of like generation; (c)The existence of any other cash sources available to the facility, such as: (1) tax benefits, (2) subsidies, (3) contracts, (4) other sources, including restructuring financing; (d) Whether market rules are increasing the costs of the facility and, if so, whether any steps can be taken to reduce such costs; (e) Whether the facility's real property tax assessment is consistent with the assessments imposed in similarly situated facilities elsewhere, and if not, what action has been taken to address this matter; (f) Whether the facility is required to operate as part of a package of assets that is financially viable as a whole; (g)Whether the facility generates enough revenue, based on expected output, to cover its operating costs; (h) Whether the facility generates enough revenue to make necessary capital improvements; (i) Whether the facility generates enough revenue to cover its fixed costs, including (1) debt service; (2) property taxes; (3) security costs; (4) other costs; (j) Whether the facility has attempted to make use of other resource programs available to it; and (k)Whether the facility has attempted to make use

of other resource programs available to it.... The request (for financial support) must include the entity's most recent three years' income statements, balance sheets, cash flow statements, and income tax returns related to the facility.... The request must also identify the type of facility; date of commercial operation; list of affiliates; list of contracts; and description of financing arrangements.”

171. On July 8, 2016, the Commission abruptly switched from its detailed cost-of-operation methodology for the ratepayer-funded subsidy, which included the lowest possible rates, to the non-cost metric of the social cost of carbon methodology, dismissively stating in response to comments, “The parties are correct that the methodology... does not rely on detailed finding of the exact costs to operate the nuclear plants as might have been done in the cost-of-service approach, therefore there is no need for further investigation or comments on the detailed costs.” *August Order* at 123-124. The Commission closed the proceeding two weeks later.

172. Despite referring to Tier 3’s non-cost methodology as “transformative change”, the Commission promulgated the new methodology without further hearings, technical meetings, or a revised cost study or SEQRA study based on the revised methodology or otherwise explaining the Commission’s justification (or lack thereof) regarding the use of the social cost of carbon. The record lacks a rational basis for the Court to determine whether the agency acted reasonably in using or not using the non-cost methodology in its rulemaking, including articulating or accounting for how the costs associated with greenhouse gas emissions can adequately support its methodology and decision and whether the methods and estimates are sufficient for use in regulatory decision making and cost-benefit analysis.

173. The Commission is statutory responsibility to ensure rates are “just and reasonable”. Here, the Commission failed to give due consideration to responsible alternative ratemaking methodologies which were the subject of multiple public hearings, and failed to offer

a reasoned explanation in support of its own chosen ratemaking methodology. Petitioners assert this sudden change in methodology was "arbitrary and capricious" agency action.

174. The record does support altering a prior course, and without explanation a, this Court is unable to determine whether the agency had valid reasons for its actions. The Commission's action to use of social cost of carbon methodology is not supported by substantial evidence or consideration in the record and is therefore arbitrary and capricious.

175. It should be noted that a separate lawsuit challenging the *August Order* on the federal preemption that Tier 3 subsidies for nuclear generators interfere with the wholesale utility markets - and the dormant commerce clause ground has been filed in federal court under *Coalition for Competitive Electricity v. Zibelman*, 1:16-cv-8164. The Commission Set the NYSERDA Contract Prices Administratively Without Following its Own Guidelines under Ratemaking for a Monopoly.

176. The Commission administratively set the pricing of the long-term subsidy to facilitate the execution of the NYSERDA contract by September, 2016, so that the owners of the Ginna nuclear plant could enter into a contract to purchase the Fitzpatrick plant. The Commission is also acting alone under its program — there are only one or two owners of all the nuclear reactors in New York — regulating a virtual monopoly.

177. The Commission contract prices administratively without following its own guidelines under ratemaking for a monopoly.

178. In its *Order Adopting a Ratemaking and Utility Revenue Model Policy Framework* (issued and effective May 19, 2016) - a continuation of a process that began in 2013

when the Commission ordered Staff to begin a re-examination of regulatory paradigms and markets, the Commission does not develop, analyze or implement the methodology of the national social cost of carbon, non cost-of-operation, formula within New York's ratemaking scheme.

179. However, for purposes of Tier 3, the May 19 Order contains Commission guidelines for a utility monopoly which the Commission has not explained was not applied to Tier 3: "in most cases, a large portion of (monopoly generated utility) revenues should inure to ratepayers (May 19 Order at 51)" and that "in order not to delay the development of services, and to avoid burdening parties, we establish an expectation that an 80% allocation to ratepayers and a 20% allocation to shareholders will be considered reasonable for services that stem directly from monopoly functions" (May 19 Order at 53)."

180. "The distinction between monopoly and competitive services is critical in the ratemaking treatment of new revenue sources... Earnings opportunities from competitive functions...should depend on the extent to which utilities place shareholder funds at risk. Revenues from monopoly functions should be considered on a par with other revenues associated with conventional utility functions, subject to the hybrid of incentive and cost-of-service rate treatment described in the discussion of outcomes-based ratemaking. For example, natural gas delivery companies earn revenues from selling pipeline capacity that is not needed to serve their native load. Because these revenues derive from ratepayer funding of a monopoly service, they are allocated principally to the benefit of ratepayers, with a percentage allocated to the utility as an incentive to maximize the revenues." (May 19 Order at 42). Tier 3, without explanation, deviates from the Commission's own standards.

181. The Commission administratively setting the purchase price under long-term contracts is ratemaking. Moreover, Tier 3's ratemaking under the *August Order* is not prospective in nature because Tier 3 provided the contract which guaranteed the social cost of carbon subsidy in order to facilitate Exelon entering into a contract with Entergy to purchase FitzPatrick: the effect of the August 1 Order was definite and immediate,

182. Underscoring the deficiencies of explanation, information and transparency, in the record regarding the Commission's abrupt switch to the non-cost-of-operation methodology, one need only look at the extent of the omissions from the notices of comment: 1) Commission did not publish and did not provide notice that it was establishing that it was making a switch to the social cost of carbon; 2) that the Commission was making facility specific determinations for contract beneficiaries; 3) that the financial obligations will apply to every LSE serving retail load within a regulated distribution utility territory, including investor-owned utilities serving in their role as electric commodity supplier of last resort, jurisdictional municipal utilities, competitive Energy Supply Companies serving electric commodity to retail customers, and community choice aggregators not otherwise served by an Energy Supply Company; 4) no notice that customers purchasing power directly from the NYISO will be considered LSEs for this purpose and that this adoption of the Renewable Energy Standard is a changed regulatory requirement for the purposes of the Uniform Business Practices (UBP); (5) that the Commission reserves the right should the Indian Point attributes become at risk, to possibly calculate the ZEC price to reflect the difference between upstate and downstate market revenues, developing a methodology to calculate the upstate/downstate price differential if necessary. *August Order* at 130; (6) that the 12-year duration will be conditional upon a buyer purchasing the FitzPatrick facility and that taking title prior to September 1, 2018; and (7) that if the sale and closing does

not occur, there will be no commitment for the program and that the Commission's purpose in imposing the condition was to...induce a buyer to come forward to purchase the FitzPatrick facility.

The Commission's Promulgation of Tier 3 is *Ultra Vires*

183. To the extent that the social cost of carbon methodology does not address the statutory standard of just and reasonable, it is *ultra vires*. The "just and reasonable" language has its roots in the Natural Gas Act, 15 U.S.C. § 717c (2012). State laws governing public service commissions have generally adopted the same framework and judicial inquiries now typically focus on whether the end result of the rate-setting process satisfies the just and reasonable standard.

184. The ZECs which are being administered administratively by the Commission under a monopoly system may result in an unfair advantage for nuclear generation. To the extent that New York is a deregulated market, the Commission's administration of the ZEC program for the nuclear generators is *ultra vires*. The fact that the nuclear plants pushed to have this subsidy promulgated by August 1, 2016 so that they could meet their refueling cycles "(excuses no) deviation from the just and reasonable standard, for not even 'a little unlawfulness is permitted.'"

185. The Commission's expansion of the definition of an LSE to include "customers purchasing power directly from NYISO" (the wholesale markets), is *ultra vires*.

186. The PSC had no express or delegated authority to broker the contract of sale of nuclear reactors which, but for the PSC's action, Fitzpatrick would have closed and for which

closure NYISO found no statewide resource deficiency; The PSC had no express or delegated authority to mandate that load serving entities enter into contracts to purchase ZEC's; The PSC had no express or delegated authority to include private end-use customers as load serving entities. The PSC had no express or delegated authority to administer and direct the monopoly of nuclear generators in New York's deregulated markets.

187. The PSC's sweeping, transformative, hasty, and bold exercise of arbitrary power under Tier 3 is *ultra vires* and that portion of the CES Order should be vacated.

188. . The Court's role in reviewing an administrative determination is to ensure that it is not made in violation of lawful procedure or affected by an error of law, and was not arbitrary and capricious or an abuse of discretion. Given the serious deficiencies in this record, Tier 3 should be vacated.

CONCLUSION

189. Thus, for all of the reasons set forth above Tier 3 of the *August Order* which were issued in violation of lawful procedure, are based on a mistake of fact, and create an economically deleterious and burdensome multi-billion dollar surcharge for twelve (12) years to be paid by public ratepayers, including individuals, small businesses, not-for-profits and local government for the sole benefit of one industry, thereby creating prejudicial government subsidized competition in the free market, must be vacated and rescinded.

190. This matter is riddled with the Commission's multiple statutory violations or errors.

191. If as the Petitioners claim the Commission Order are those of rulemaking the Commission failed to comply with statutorily require procedure set forth in SAPA in following various ways:

- The Responsive Proposal was not published in the State Register as required by §202(4-a);
- The Commission failed to provide statutorily required 30 day comment period required by §202(4-a);
- The Commission did not wait the statutorily required 30 period prior to issuing the Order required by SAPA § 202(4-a);
- Tier 3 of the Order failed to use clear and coherent words with common everyday meanings, in violation of SAPA §20 ;
- The Commission did not consider the deleterious economic effect and overly burdensome impacts on small businesses and local governments in violation of SAPA§202-A(1);
- The Commission did not Identify environmental issues, take a hard look, and make reasoned elaboration, specifically with regard to costs and environmental impacts of increased radioactive and thermal emissions and waste, in the August 1, 2016 Supplemental Generic Impact Statement in violation of SEQRA.

192. Alternatively, if as the Commission assertion that the Orders are ratemaking, the failed to follow lawful procedure, as the record is devoid of transparent cost analysis, evidence of

need in light of NYISO determination that there will be no reliability issues; and was not based on a utility request for surcharge, but was generated on the Commission's own initiative for electric generation facilities, and thus interferes with the New York's energy free market. Commission's adoption of the Tier 3 portion of the Order is ultra vires, as it is arbitrary and capricious, prejudicial, without justification of being reasonable and fair.

193. Petitioners have exhausted their administrative remedies, alternatively, they need not exhaust their administrative remedies due to exceptions to the rule of exhaustion, including futility, *ultra vires*, or constitutional rights.

194. Organizational standing to sue exists because one or more of the Petitioner-organization's members have standing to sue, the association is an appropriate representative of interests that are germane to its purposes and "neither the asserted claim nor the appropriate relief requires the participation of the individual members". One or more of the individual members of the organization is a residential electric customer, electing to receive service from an electric service company.

195. While Petitioners believe the relief they seek is appropriate in Article 78 action, in an excess of caution Petitioners also seek Declaratory Judgment relief.

RELIEF REQUESTED

1. For all of the above reasons set forth above Tier 3 of the Commission Orders were made in violation of lawful procedure and were not supported by the factual evidence in the

record, and are contrary to law. Therefore, the Tier 3 portion of the Commission's Order should be vacated, annulled and rescinded.

2. We request this Court to declare the Tier 3 of the Commission Orders to be arbitrary and capricious, and in violation of the New York State Administrative Procedures Act, as set forth herein.
3. We request this Court to order all references in the Orders of nuclear energy production being "zero-emissions" be struck to correct the mistake of fact upon which Tier 3 relies.
4. We request the Court to declare Tier 3 of the Commission Orders to be ultra vires, contrary to law and in violation of Public Service Law §66, as set forth herein.
5. We request the Court to declare Tier 3 of the Commission Orders to be null and void, because they violate the due process rights of Petitioners under the New York State and United States Constitutions.
6. Alternatively, we request the Court remand Tier 3 of the Commission Orders to the Commission to follow lawful procedures and correct mistakes of fact, as set forth herein.

WHEREFORE, the Petitioners request that the Court grant the relief requested in this petition as well as the costs, fees and disbursements of this proceeding and attorneys fees, and such other and further relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR Section 7804(c),
answering papers, if any, must be served at least five days before the return date herein.

Dated: Nanuet, New York
January 13, 2017

A handwritten signature in black ink, appearing to read 'SHAPIRO', written over a horizontal line.

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ⁱ Commission, December 15, 2016 Order, p 39.

ⁱⁱ The report the Commission placed its “benefit-cost” evaluation on was referred to by the Commission as the Brattle Group report (see, e.g., July 8, 2016 Responsive Proposal, p 1), was actually a 12 page December 2015 report drafted by two economists affiliated with the Brattle Group, Inc., who acknowledge it to be an “extension and refinement” of a previous report dated July 7, 2015. Berkman M and Murphy D, New York’s Upstate Nuclear Power Plants’ Contribution to the State Economy, Dec 2015.

[http://www.brattle.com/system/publications/pdfs/000/005/229/original/New_York's Upstate Nuclear Power Plants' Contribution to the State Economy.pdf?1449526735](http://www.brattle.com/system/publications/pdfs/000/005/229/original/New_York's_Upstate_Nuclear_Power_Plants'_Contribution_to_the_State_Economy.pdf?1449526735), preface, p 1, & p 4 fn 6. Both reports expressly note they do not represent the opinion of The Brattle Group. Id and Berkman M and Murphy D, The Nuclear Industry’s Contribution to the U.S. Economy, Report prepared for Nuclear Matters, Jul 7, 2015.

[http://www.brattle.com/system/news/pdfs/000/000/895/original/The Nuclear Industry's Contribution to the U.S. Economy.pdf?1436280444](http://www.brattle.com/system/news/pdfs/000/000/895/original/The_Nuclear_Industry's_Contribution_to_the_U.S._Economy.pdf?1436280444). The July 7 2015 report was prepared for Nuclear Matters, a nuclear promotional group linked to Exelon. As Elliott Negin of the Union of Concerned Scientists, notes, despite 2013 revenues of \$23.5 billion, Exelon has sought state and federal help in rescuing its financially ailing reactors. As part of that effort, Exelon “launched a front group, Nuclear Matters, to sell the public on the need to keep the remaining U.S. fleet of some 100 reactors running. ... A New York public relations firm, Sloane & Company, is managing Nuclear Matters for Exelon.” Negin, Elliott, Nuclear Giant Exelon Launches Front Group to Cover Its Assets, Huffington Post, Jun 2, 2014, updated Nov 5, 2014. <http://www.huffingtonpost.com/elliott-negin/nuclear-giant-exelon-launch-5428994.html>. See also, Knauss, Tim, Upstate New York’s nuclear plants support 25,000 jobs, industry consultant says, Syracuse.com, Dec 7, 2015.

http://www.syracuse.com/news/index.ssf/2015/12/upstate_new_yorks_nuclear_plants_support_25000_jobs_industry_consultant_says.html.

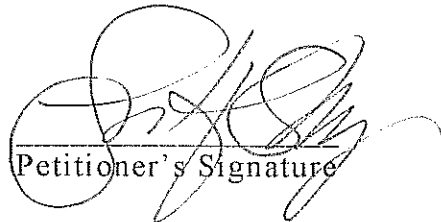
ⁱⁱⁱ The inability of the commercial nuclear power industry to exist without large subsidies is hardly limited to New York and has persisted since the dawn of the nuclear age. See, e.g., Cooper M, Renaissance in Reverse: Competition Pushes Aging U.S. Nuclear Reactors to the Brink of Economic Abandonment, Report, Institute for Energy and the Environment at Vermont Law School, Jul 2013, <http://216.30.191.148/071713%20VLS%20Cooper%20at%20risk%20reactor%20report%20FINAL1.pdf>; Koplow D, Nuclear Power: Still Not Viable without Subsidies, Report of the Union of Concerned Scientists, Feb 2011.

http://www.ucsusa.org/assets/documents/nuclear_power/nuclear_subsidies_report.pdf.

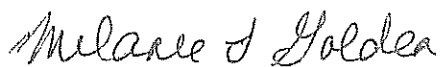
VERIFICATION

STATE OF NEW YORK)
) SS:
COUNTY OF ROCKLAND)

I, Susan Hito Shapiro as a member of Goshen Green Farms, LLC, am a Petitioner in the within hybrid Article 78 and Declaratory Relief Proceeding. I have read the foregoing complaint and know the contents thereof. The contents are true to my own knowledge except as to matters therein stated to be alleged upon information and belief, and as those matter I believe them to be true.


Petitioner's Signature

Subscribed and Sworn to before
Me on this 13th day of January 2017



NOTARY PUBLIC

MELANIEL GOLDEN
NOTARY PUBLIC-STATE OF NEW YORK
NO 02G06336668
QUALIFIED IN ROCKLAND COUNTY
MY COMMISSION EXPIRES 02-08-2020