

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
New York on December 15, 2016

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair  
Patricia L. Acampora  
Gregg C. Sayre  
Diane X. Burman, abstaining

CASE 15-E-0302 - Proceeding on Motion of the Commission to  
Implement a Large-Scale Renewable Program and a  
Clean Energy Standard.

ORDER ON PETITIONS FOR REHEARING

(Issued and Effective December 15, 2016)

BY THE COMMISSION:

INTRODUCTION

On August 1, 2016, the Commission issued an Order Adopting a Clean Energy Standard (CES Order).<sup>1</sup> In the CES Order the Commission adopted the State Energy Plan goal that 50% of New York's electricity is to be generated by renewable sources by 2030 as part of a strategy to reduce statewide greenhouse gas emissions by 40% by 2030. Consistent with the SEP goal, the Commission also adopted a Clean Energy Standard (CES) consisting of two major components. The first major component, the Renewable Energy Standard (RES), includes: (a) program and market structures to encourage consumer-initiated clean energy purchases or investments; (b) obligations on load serving entities to financially support new renewable generation

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<sup>1</sup> Case 15-E-0302, et al., Clean Energy Standard, Order Adopting a Clean Energy Standard (issued August 1, 2016).

resources to serve their retail customers; (c) a requirement for regular renewable energy credit (REC) procurement solicitations; (d) obligations on distribution utilities on behalf of all retail customers to continue to financially support the maintenance of certain existing at-risk small hydro, wind and biomass generation attributes; and (e) a program to maximize the value potential of new offshore wind resources. The second major component, the Zero-Emissions Credit Requirement (ZEC Requirement), includes obligations on load serving entities to financially support the preservation of existing at-risk nuclear zero-emissions attributes to serve their retail customers.

Seventeen petitions were filed requesting that the Commission rehear or reconsider a number of issues decided in the CES Order. Petitions were filed by Ampersand Hydro, LLC (Ampersand); Constellation Energy Group, LLC and Exelon Generation Company, LLC (Exelon); Taylor Biomass Energy, LLC (Taylor); H.Q. Energy Services [U.S.] Inc. (HQ); Energy Ottawa, Inc. (Energy Ottawa); Castleton Commodities International, LLC and its affiliates Roseton Generating LLC and CCI Rensselaer LLC (Castleton); Independent Power Producers of New York (IPPNY); Alliance for a Green Economy and Nuclear Information and Resource Service (AGREE); New York Association of Public Power (NYAPP); Transmission Developers, Inc. (TDI); Brookfield Renewable Energy Group (Brookfield); Alliance for Clean Energy New York (ACE NY); ReEnergy Holdings, LLC (ReEnergy); RENEW Northeast, Inc. (RENEW); Public Utility Law Project of New York, Inc. (PULP); Council on Intelligent Energy & Conservation Policy, Promoting Health and Sustainable Energy, Rockland County Sierra Club, Sierra Club Lower Hudson Group (CIECP); CH4 Biogas, LLC (CH4).<sup>2</sup>

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<sup>2</sup> The matters raised in the Petitions are organized below into subject areas.

By this order the Commission (a) denies most of the petitions because they do not raise mistakes of law or fact or new circumstances warranting rehearing; (b) notes that some of the eligibility issues raised will be further explored but that granting rehearing is not the appropriate approach for addressing those issues; and (c) approves Exelon's petition requesting elimination of the condition requiring transfer of the FitzPatrick Facility in order for the ZEC agreements to go beyond the first tranche of the program (2 years) as the purposes sought by the imposition of that condition have been obtained through actions taken subsequent to the issuance of the CES Order.

#### NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), Notices of Proposed Rulemaking were published in the State Register on September 14, 2016 [SAPA No. 15-E-0302SP5] and September 28, 2016 [SAPA Nos. 15-E-0302SP8 through 15-E-0302SP23]. The time for submission of comments pursuant to the Notices expired on November 14, 2016. The Comments received are summarized below.

#### LEGAL AUTHORITY

The Public Service Commission's rules of procedure regarding petitions for rehearing provide, in pertinent part, that:

Rehearing may be sought only on the grounds that the Commission committed an error of law or fact or that new circumstances warrant a different determination. A petition for rehearing shall separately identify and specifically explain and support each alleged error or new circumstance said to warrant rehearing.<sup>3</sup>

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<sup>3</sup> 16 NYCRR §3.7(b).

TIER 1 ELIGIBILITY - HYDROPOWER

HQ argues that exclusion from the RES of existing large scale hydroelectric generation and all hydroelectric involving storage impoundment is contrary to the public policy goals of New York and the Commission's obligation to ensure reliability and cost-effective electric service to the State's consumers. Specifically, HQ argues that the Commission's reliance on old Renewable Portfolio Standard (RPS) findings concerning impoundments is improper and concerns about methane emissions are baseless. HQ argues that all forms of generation included in the baseline of existing renewable generation as described in the CES Order should also be eligible for RES Tier 1 compensation. HQ further argues that the Commission cannot claim the attributes associated with the electric power HQ has sold or will sell into New York unless HQ specifically sells the power bundled with the attributes which to date, according to HQ, it has not. Similarly, Energy Ottawa argues that the Commission has no authority to claim environmental attributes that belong to generation owners.

Clearwater supports HQ's position that to exclude new storage impoundment hydroelectric power from RES Tier 1 eligibility is unsupported by record evidence, is arbitrary and capricious, is not the result of reasoned decision-making, and is unduly discriminatory.

MI comments that it is important for the Commission to strive to achieve the 50 by 30 at the lowest possible cost and therefore, eligibility requirements for Tier 1 should be broad and inclusive and as long as the new hydropower projects satisfy the applicable delivery requirement, MI believes they should be part of the competition.

Acadia center submits comments in opposition to HQ's petition for rehearing and urges the Commission to reject the

request to modify Tier 1 RES eligibility requirements. Acadia Center states that expansion of the Tier 1 eligibility requirements is inconsistent with the New York CES objectives. Acadia Center suggests the New England states - with the exception of Vermont - exclude new, large-scale hydro from eligibility toward meeting RPS requirements. According to Acadia Center Vermont allows new large-scale hydro resources to count toward its voluntary RPS target, but Vermont is a relatively small market. Acadia Center posits that allowing mature large-scale hydro generators to compete alongside other renewable resources could inhibit the growth of emerging renewable technologies and deprive the state of local economic benefits embedded in New York State energy and climate goals.

Acadia Center supports encouraging non-hydro renewable projects in order to promote fuel diversity and owner diversity which are part of the proposed project selection criteria in a recently filed NYSERDA/DPS Staff Phase 1 Implementation Plan Proposal. Acadia Center states that very large hydro projects involving impoundments have environmental impacts that are inherently unacceptable and sufficient record evidence exists to inform the Commission's decision to exclude any hydroelectric facilities with new impoundments in light of their harmful impacts. Acadia Center comments that the Commission's limits on hydro resource Tier 1 eligibility are in the public interest and are in furtherance of the State Energy Plan and should remain as such.

IPPNY also responds in opposition of the petition of HQ. IPPNY claims that HQ has failed to demonstrate that the Commission has committed an error of law or fact in upholding its policy, first adopted in 2004 when it defined the scope of eligible hydroelectric generation under the RPS. According to IPPNY, limiting eligibility to low-impact hydroelectric

resources has been widely adopted by other states in their implementation of their renewable portfolio standards; recognizing the adverse environmental impacts of large-scale hydroelectric.

Discussion

HQ's argument that that exclusion of large scale hydroelectric generation and all hydroelectric involving storage impoundment is not supported by the record is not correct. The Order specifically discusses excluding large scale hydro and impoundments including reference to extensive debates previously held on the issue during development of the RPS program. HQ argues the record in the RPS Case is too old to rely on, but HQ does not offer more recent reports, scientific papers or any other demonstration to show that the environment concerns from 12 years ago are no longer relevant. Moreover, the record in the RPS Case, upon which the Commission relies, consists of considerable information regarding the environmental impacts of large-scale hydroelectric power and impoundment. Specifically, the Final Generic Environmental Impact Statement (RPS Final GEIS) in Case 03-E-0188 has an extensive discussion of the impacts including water quality impacts related to temperature, dissolved oxygen, and stratification; aquatic and terrestrial impacts on fishery resources, impacts to wildlife and botanical resources including total transformation of riparian communities, changes to bird habitats and loss of habitat for wildlife such as beaver and otter.<sup>4</sup> Further, many of the party submissions in that case include detail discussion of the

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<sup>4</sup> Case 03-E-0188, Retail Renewable Portfolio Standard, Final Generic Environmental Impact Statement Section 6.2.2.

environmental impacts of impounded hydroelectric facilities.<sup>5</sup> If in the future HQ can produce evidence countering the impact of impoundments, the Commission will consider it in one of the triennial reviews.

HQ further argues that because specific concerns regarding methane were not mentioned in the RPS Order,<sup>6</sup> it is inappropriate to consider methane impacts in the CES proceeding. The Commission sees no reason to ignore methane issues just because they have more prominence today than they did a decade ago. However, even without considering methane impacts of new impoundment, the other significant impacts associated with this type of hydropower is sufficient to support its exclusion from the CES program. Finally, HQ's argues that since the CES Order recognizes impounded hydroelectric facilities in the baseline, it is irrational not to allow new impoundments. The argument ignores the fact that environmental impacts related to existing facilities have already occurred<sup>7</sup> and it is the additional

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<sup>5</sup> See RETEC exception to RD RETEC is a coalition including the American Lung Association of New York State; American Wind Energy Association; Citizens Advisory Panel; Community Energy; Fuel Cell Energy, Inc.; Hudson River Sloop Clearwater; Natural Resources Defense Council; New York Lawyers for the Public Interest; New York League of Conservation Voters; New York Public Interest Research Group; New York Renewable Energy Coalition; New York Solar Energy Industries Association; Pace Energy Project; Plug Power; PowerLight; Public Utility Law Project; Riverkeeper; Safe Alternatives for Energy Long Island; Scenic Hudson; Sierra Club Atlantic Chapter; Solar Energy Industries Association; Sustainable Energy Developments, Inc; and Union of Concerned Scientists

<sup>6</sup> Case 03-E-0188, Order Regarding Retail Renewable Portfolio Standard (issues September 24, 2004) ("RPS Order").

<sup>7</sup> See Final SGEIS in Case 15-E-0302 et al. p. 5-52, stating the environmental impact of upgrading existing hydroelectric projects or adding energy production facilities and equipment to existing NPDs is anticipated to be relatively small in comparison to the impacts already incurred and as compared to the benefits of more renewable energy generation.

environmental impacts from new impoundments that the Commission has no interest in funding or otherwise promoting and warrant exclusion of new impoundments from the CES program.

MAINTENANCE OF BASELINE RESOURCES

Petitions filed by Brookfield, Ampersand, HQ, Energy Ottawa, RENEW, IPPNY, and ACE NY state that the Commission erred in its decision in the CES order by not including all baseline resources in the CES program either by way of Tier 2, as proposed in Staff's White Paper, or by allowing zero-emitting baseline resources to get the same level of zero emission credit support that is being provided to the at-risk nuclear facilities. Further, they claim that by counting all existing renewable resources towards that 50% mandate by the State, but not providing a mechanism for compensating those existing resources, creates confusion, market disruption, and unfair complications for existing generators. HQ, IPPNY, Brookfield, and ACE NY argue that without adequate compensation, some existing baseline resources will sell their energy and attributes into neighboring markets, noting Massachusetts' recent legislation requiring utilities to enter into long-term power purchase agreements (PPAs) with renewable generators.<sup>8</sup> Petitioners claim that this scenario will cause attrition of New York's baseline, making it more difficult and expensive for the State to meet its 50 by 30 goal.

Further, ReEnergy argues that the Commission's decision on existing renewable resources relied on two erroneous factual assumptions that existing renewable resources do not have high going-forward costs, and that existing renewable resources are not at imminent risk of exporting to other regions. ReEnergy points out that biomass facilities have high

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<sup>8</sup> 2016 Mass. Act ch. 188.



operation and maintenance costs, and requests that the Commission reconsider implementing Tier 2a as described in Staff's White Paper.

Many comments received supported compensating existing baseline resources. New York State Assemblyman John T. McDonald III (108th District) comments that existing hydroelectric facilities should be included for compensation in the CES program and that a lack of recognition leaves the facilities little option but to export to other markets or be forced to cease operations as their finances continue to deteriorate. New York State Senator George A. Amedore, Jr. (46th District) agrees stating that he believes that the CES Order wrongly eliminated existing renewable resources from participating in the program, specifically, existing hydropower resources.

New York State Senators Elizabeth Little and Joseph A. Griffo also support CES participation by existing hydropower facilities to award them for their zero-emissions attributes. Senators Little and Griffo comment that hydropower plants are a critical component of the renewable capacity portfolio and that they provide a steady, reliable source of power and have a lifespan longer than other renewable energy resources. They also comment that the CES does not provide hydroelectric plants in their region, both small and large, with the tools that they need, noting that only smaller facilities qualify to apply for the maintenance tier and other facilities will continue to operate at a loss and eventually be forced to cease operations and larger plants will continue to export to more lucrative markets. The Senators also note non-energy related benefits of some hydro facilities including flood protection, supporting local municipal budgets, as well as, providing direct and indirect jobs.

Albany Engineering et al. comments that hydropower and all other existing non-emitting resources should have meaningful opportunities for participation in the CES. Albany Engineering et al. claims that neighboring states are currently issuing RFPs for hydropower contracts that risk locking up New York's existing clean energy in out-of-state markets for multiple years and therefore, contrary to the CES Order, export opportunities are neither speculative nor off in the distance. Albany Engineering et al. purports that if the CES Order is not modified to include existing renewable resources, the financial viability of many hydropower facilities will quite simply be put at risk, in a manner that the maintenance tier alone is ill-suited to address with only a short-term administrative focus on minimum cost-of-service. Albany Engineering et al. supports reconsideration of the CES Order to allow privately-owned hydropower facilities to compete in the REC market or be compensated at least the same as nuclear generation under the ZEC program.

Many commenters including the Low Impact Hydro Power Institute (LIHI) comment in favor of financial support for existing facilities. LIHI states existing facilities should be recognized for their renewable and social benefit attributes in a similar manner as nuclear power pursuant to the ZEC requirement. Clearwater comments that differential treatment of existing resource is arbitrary. Noble Environmental Power (Noble) agrees and expresses disappointed that the CES Order does not include procurement of existing resources. Brookfield states that imposition of a Maintenance Tier and the exclusion of existing renewable resources from participating in the RES is not supported by the record in the CES proceeding.

Noble and Brookfield believe that it is inappropriate not to pay the established value per MWh for attributes created

SEQRA SUPPLEMENTAL FINDINGS

In February 2015, in accordance with the State Environmental Quality Review Act (SEQRA), the Commission finalized and published a Final Generic Environmental Impact Statement (FGEIS) that explored the potential environmental impacts associated with two major Commission policy initiatives: REV and the Clean Energy Fund. On February 23, 2016, the Commission issued a Draft Supplemental Generic Environmental Impact Statement specifically relating to the CES and the establishment of a support mechanism to sustain the operations of eligible nuclear facilities. Seven entities submitted comments, and on May 19, 2016, the Commission adopted the Final Supplemental Generic Environmental Impact Statement (FSGEIS). In conjunction with adoption of the CES Order, the Commission adopted a SEQRA Findings Statement prepared in accordance with Article 8 of the Environmental Conservation Law (SEQRA) and 6 NYCRR Part 617, by the Commission as lead agency for these actions and attached to the CES Order as Appendix G. The SEQRA Findings Statement was based on the facts and conclusions set forth in the FSGEIS and the FGEIS.

In conjunction with the decisions made in this Order, the Commission has again considered the information in the FSGEIS, the FGEIS and the August 1, 2016 SEQRA Findings Statement and hereby adopts a SEQRA Supplemental Findings Statement prepared in accordance with Article 8 of the Environmental Conservation Law (SEQRA) and 6 NYCRR Part 617, by the Commission as lead agency for these actions. The SEQRA Supplemental Findings Statement is attached to this Order as Appendix B. The SEQRA Supplemental Findings Statement is based on the facts and conclusions set forth in the FSGEIS, the FGEIS and the August 1, 2016 SEQRA Findings Statement. The modifications adopted in this Order do not alter or impact the

by electricity produced without carbon emissions to all power generators which produce them, without undue discrimination or preference. Noble recommends the Commission provide payment to existing resources for non-emitting power attributes either at the ZEC price or the NYSEDA announced REC price. Noble points out that the ZEC price and the current CES price is significantly greater than the price realized by the Noble projects in their NYSEDA Contract. Policy Integrity states that modifying the Order to consistently value the clean energy attributes of all clean energy resources would both strengthen the economic foundation of the CES and eliminate the basis for legal claims by Plaintiffs.

Pace Energy and Climate Center (Pace) believes the failure to conduct a risk assessment related to existing renewable resource attributes migrating into other states constitutes an error of fact. Pace and Noble argue that the failure to provide sufficient justification for the assertion that older renewable resources coming off RPS contracts have likely recovered all or most of their initial capital costs and no longer require financial support constitutes an error of fact. Pace adds that some parties cite specific projects that are already exporting RECs out of New York at the conclusion for their RPS terms. Pace comments that to be counted towards CES compliance, renewable attributes from existing renewable generation must be appropriately tracked or acquired and retired towards the CES obligation and that New York State cannot assume or mandate the retirement of these RECs without fairly compensating the owners of the generation.

Brookfield comments that the Maintenance Tier is an unworkable construct which does not recognize the valuable non-emitting contribution of the State's independent hydropower generation and that the Commission should allow all existing

renewable resources to sell RECs to LSEs to meet LSE obligations under the CES. Some commenters claim that the Maintenance Tier will not advance the CES or 50 by 30 goals. Pace argues that the 5 MW cap on existing hydroelectric facilities for eligibility in the Maintenance Program is not supported within the Order and encourages the Commission to reconsider.

Noble opposes the Commission's decision to only allow "going forward" costs for Maintenance Tier support. Noble comments that the benefits of the jobs created by building new infrastructure under Tier 1 may be at the expense of long term jobs created by Noble's existing projects. Noble warns that without CES support, it may be dismantling its existing wind turbines and selling their respective sites to new generators which could re-erect similar turbines to sell the same non-emitting power attributes to NYSERDA for a 20 year term. Noble recommends the Commission extend the NYSERDA contracts with Noble projects at the 2017 CES REC price, but for a period reduced by the term of the existing NYSERDA contracts.

Pace and others agree with those Petitioners arguing that Commonwealth of Massachusetts's enactment of "An Act to Promote Energy Diversity" satisfies the legal requirements for rehearing as a new circumstance. Pace argues that the Act lends credence to the immediacy of the threat of export of existing renewable resources and/or hydropower and provides enticements to leave the in-state market. Clearwater comments that the Commission committed an error of fact by not adequately addressing the economic impact of the newly-enacted long-term PPA provision recently adopted in Massachusetts. CIECP comments that the Massachusetts statute may be seen as invigorating the wider renewable energy market, spurring jobs, incentivizing transmission developments and inviting the way towards a more productive inter-state clean energy cooperation.

Many comments were also received in direct support of biomass and ReEnergy's existing Lyonsdale biomass facility in Lewis County. The Adirondack League, Empire State Forest Products Association (ESFPA), New York Bioenergy Association (NYBEA), Assemblymember Ken Blankenbush (117<sup>th</sup> District), Assemblymember Clifford Crouch (112<sup>th</sup> District) and the Lewis County Board of Legislators comment on the value of the biomass industry in general and the existing biomass facilities in particular, and on the economic health of the North Country. New England Wood Pellet and Northern Timber Forestry Services comment that the Commission should reexamine the CES to recognize the environmental and economic benefits of biomass energy. Assemblymember Blankenbush states that the biomass energy sector creates jobs, helps reduce greenhouse gas emissions, enhances forest health and ensures a diverse renewable energy portfolio while advancing energy independence. Assemblymember Crouch and the Lewis County Board of Legislators comment on the difficulties facing the Lyonsdale Biomass Facility and the important role the facility plays in the surrounding area. In addition, since September 16, 2016, over 150 letters and e-mails from facility suppliers and employees and local businesses have been submitted to the Commission expressing support for the inclusion of the Lyonsdale Biomass Facility in the CES program.

Multiple Intervenors, on the other hand, strongly opposes subsidizing renewable generation facilities that already are or were the recipient of RPS subsidies. Multiple Intervenors (MI) comments that the Commission should refrain from taking any action on rehearing that would increase the cost of the CES program for customers. In that regard, MI supports the Commission's decision to continue the Maintenance Tier program as described in the August 1 Order, stating that it is

prudent to strive to limit Tier 2 to only those costs demonstrated to be necessary to maintain renewable attributes from selected facilities. MI agrees that there is no imminent risk of losing the emission attributes associated with existing renewable facilities and favors incentivizing new facilities as opposed to utilizing scarce resources to subsidize facilities that have already been developed and are in operation. MI notes that parties seeking to expand eligibility for CES-related incentives at customer expense have failed to address the incremental rate impacts associated with their positions or recommendations.

Discussion

The Commission recognizes the importance of all of the State's existing renewable resources and their contributions to the environment and local economy. However, at this time we do not have sufficient information to support the assertions that all baseline merchant facilities are at risk of ceasing operation or fleeing the New York energy markets. To date there has been no significant attrition of hydro or wind resources. Enactment of a new program in Massachusetts is a welcome development as it will contribute to a broader, more fluid market for new renewable resources, but it is not a change in circumstances. The CES Order already took full consideration that other states would be competing for renewable resources.

Notwithstanding these observations, consistent with the Commission's treatment of nuclear resources under the ZEC program, the Commission agrees that it is in the best interests of electric consumers to retain existing renewable resources, provided that the cost of retention is less than the cost to replace them with new facilities under the Tier 1 REC program. For that reason the Commission finds that it is necessary to begin immediately to further develop the eligibility criteria

for Tier 2 to ensure that cost effective retention of baseline resources is achieved to the extent practicable. Therefore, the Commission will require Department of Public Service Staff to prepare, for Commission review, recommendations for consideration of eligibility changes for Tier 2, in consultation with stakeholders, without waiting for the first triennial review. Factors to consider will include: the cost to consumers; changes in eligibility criteria; a showing of financial hardship; facility locational considerations; and program options. Staff should also identify how complimentary REV initiatives such as community aggregation can assist baseline renewable generators to remain in operation through voluntary renewable energy purchases and engage local communities in working with local renewable generators as a vehicle to support achievement of the CES while also lending support to local renewable companies.

#### ELIGIBILITY OF INCREMENTAL PRE-2015 RESOURCES

TDI requests that the CES Order be modified to provide that incremental renewable power that flows into the New York Control Area from adjacent control areas that is not currently counted as included in the 2014 Baseline inventory is eligible to be used by LSEs to satisfy their mandatory obligations under the RES. TDI also asks the Commission to note that large-scale vintage impoundment hydropower would so qualify. TDI styles its request as a clarification to make the CES Order more definitive. TDI argues that the modifications are fully consistent with goals of the program established by the CES Order and are necessary in order to ensure that the program functions as intended. According to TDI, LSEs that purchase such incremental renewable energy should be relieved of the obligation to purchase RECs or to make Alternative Compliance



Payments in an amount that corresponds to the quantity of such energy purchased by the LSE. TDI urges that such incremental renewable energy should count towards the 50 by 30 goal and reduce the number of RECs that need to be purchased accordingly.

Similarly, HQ argues that the Commission erred by not including in the CES all incremental large-scale hydroelectric generation, including impoundment and regardless of vintage that is delivered over new transmission lines. HQ claims that such exclusion is unreasonable and that the record supports allowing it into the CES program.

#### Discussion

Any incremental renewable power that flows into the New York Control Area from adjacent control areas that is not currently counted as included in the 2014 Baseline inventory will contribute towards achieving the 50 by 30 goal. The goal is applied to actual consumption by New York's electricity consumers; therefore their increased consumption of renewable resources contributes towards meeting the goal. But TDI is incorrect about its modifications being fully consistent with the way the RES program is intended to function. The intent of the mandatory obligation component of the RES program is to encourage investments in new renewable resource generation infrastructure. While existing renewable resources in the 2014 Baseline contribute towards the goal, and additional output and/or imports from existing renewable resources could also contribute towards the baseline, the stock of existing renewable resource generation facilities is insufficient to ultimately achieve the total 50 percent by 2030 goal.

The mandatory obligation component of the RES program which requires REC purchases from new resources coming on line after January 1, 2015 is specifically intended to function as an aid to developers to add new, long-lived facilities to the

renewable resource portfolio that supplies the State's energy needs. Allowing the proposed one-for-one offset from existing resources would actually tend to defeat this intent. A continuous, incentive to build new facilities is essential to the RES program reaching its goals.

While the Commission does not agree with TDI's proposal to allow incremental existing hydro to serve as a replacement for new Tier 1 renewable resources, its pleadings raise the question on how to treat new voluntary arrangements to purchase incremental existing renewable resources that do not qualify under Tier 1 but can provide long lasting benefit to New York. In addition to consideration of the Tier 2 resources, Staff is directed to consider how these arrangements can be added to the base of resources and should be considered in a manner that best serves the interests of all ratepayers.

#### BIOMASS EMISSIONS

Taylor argues that the Commission committed an error by failing to establish a fixed emission standard to determine eligibility of adulterated biomass facilities in the Clean Energy Standard. Taylor argues that the Commission's continuance of the comparative emission testing process, requiring a demonstration that electricity generated from adulterated biomass fuel results in no more emissions than generation fueled by unadulterated biomass feedstock, represents a mistake of fact. According to Taylor, this has proved to be a difficult hurdle for this new technology that is purported to have a much cleaner emissions profile than direct combustion technology. Taylor further argues that the comparative emissions testing process will have a negative impact on energy markets in contradiction to the Commission's stated goal of animating retail renewable energy markets.

Discussion

The Commission agrees that it is critical that we not inadvertently omit opportunities for eligible technologies to participate in the CES due to practical requirements. Staff is presently working with NYSERDA and their biomass consultant to see what revisions can be made to the testing requirements for syngas technologies to make them less onerous without comprising the intent of promoting cleaner technologies. The Commission directs Staff and NYSERDA to complete their assessment of what revisions can be made to the testing requirements within the first quarter of 2017 so the Commission may consider this topic further.

BIOGAS ATTRIBUTES

CH4 argues that biogas projects have the potential to provide environmental and economic benefits beyond the production of renewable energy and therefore, should be eligible for increased attribute payments in order to recognize these additional attributes and related increased costs. Specifically, CH4 argues that biogas provides benefits related to diversion of organic waste from landfills, elimination of spreading untreated organic waste on cropland (avoiding potential for nutrient pollution of surface waters), and reducing the carbon footprint of farms and food processors.

Discussion

CH4's argument that biogas projects have the potential to provide environmental and economic benefits beyond the production of renewable energy that should be valued and compensated does not raise an error of law or fact or otherwise warrant rehearing. Biogas is already eligible to bid for contracts in Tier 1 of the CES program. Financial compensation for potential benefits above those directly related to the

emission attributes of a renewable or zero-emission generation technology are beyond the scope of the CES Program because they do not sufficiently relate to the provision of ratepayer electric service.

APPLICATION TO MUNICIPAL UTILITIES

NYAPP seeks clarification that the four rural electric cooperatives and the municipal electric utilities taking their full requirement of power from the New York Power Authority (NYPA) are not subject to the CES Order. NYAPP also seeks rehearing of the CES Order regarding its application to other municipal utilities. NYAPP argues that applying the ZEC and RES requirements to municipal utilities is inequitable and illogical because the electricity these customers consume is already between 75% and 100% renewable with NYPA's hydroelectric facilities providing the bulk of that renewable power. NYAPP further argues that the municipal utilities have historically done their part in supporting hydroelectric power and nuclear power through historic purchases from NYPA's Niagara hydroelectric facility and Fitzpatrick Nuclear Generation facility when it was previously owned by NYPA. NYAPP requests that its members be exempt from the requirements of the CES Order.

Discussion

The Commission fully expects that customers of both NYPA and the Long Island Power Authority (LIPA) will participate in achieving the State's goal of fifty percent renewable electricity consumed in New York by 2030 and indeed both entities have committed to do so.<sup>9</sup> The arguments NYAPP raises in its petition for rehearing are similar to those already

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<sup>9</sup> See NYPA Reply Comments (May 13, 2016); NYPA Letter (July 22, 2016); LIPA Letter (July 22, 2016).

addressed in the CES Order and do not warrant rehearing. As the CES Order states, the Commission is instituting this program to prevent widespread damage from carbon emissions that affect everyone and it is fair and appropriate for all consumers to participate. If municipal utilities were exempt from the LSE obligation, the burden on other LSEs would increase and the fact that municipal utilities currently obtain very low-cost power is not a persuasive argument for exempting them from sharing in a statewide obligation.

#### ZEC REQUIREMENT

##### State Law

Castleton claims the Commission acted beyond the scope of its legislatively delegated authority and asks the Commission to rescind the ZEC Requirement. Castleton claims the ZEC Requirement and adoption of the Social Cost of Carbon are invalid because they are fundamentally focused on environmental concerns, which the Legislature has not delegated to the Commission. Castleton also claims that the Commission inappropriately intruded on an area of legislative debate as evidenced by the upstate nuclear fleet being a recurring topic of public discourse; the Governor's support for preservation of the upstate facilities; and the Legislature's failure to address the issue through specific legislation. Finally, with regards to legislative authority, Castleton claims that the ZEC price formula inappropriately attempts to balance the social cost of carbon with the social cost of nuclear power generation and that such balancing is outside the Commission expertise. According to Castleton, the ZEC Program is an explicit attempt by the Commission to weigh the competing social concerns of combating global warming against controlling the cost of electricity, but without any legislative guidance on how to balance those

competing concerns. Castleton also argues that the novelty and disruptiveness of the ZEC Requirement is further evidence the Commission acted beyond its authority.

AGREE and CIECP also ask the Commission to rescind the ZEC Requirement. They characterize the approval of the CES Order as representing an overreach of the Governor's authority. They argue that the CES Order violates Public Service Law (PSL) §5.2, which they allege is a mistake of law warranting rehearing. They note that PSL §5.2 requires the Commission to encourage all jurisdictional persons and corporations, to formulate and carry out long-range programs, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of environmental values, and the conservation of natural resources. AGREE also claims that the CES Order is uneconomical and highly inefficient; increases radioactive waste, environmental contamination, and risks to public safety; and it is a waste of public and natural resources in contradiction of the PSL.

Noble makes an opposite claim that PSL 66 and the principles of electric regulation long practiced by the Commission require that generators be paid the established value per MWh for attributes created by producing electricity without carbon emissions regardless of vintage or technology. Constellation comments that the Commission did not exceed its scope of delegated authority or transgress the difficult-to-define line between administrative rulemaking and legislative policy-making noting that the argument against fails because the PSL expressly delegates to the Commission the authority required to promulgate the ZEC Requirement. Constellation cites several statutory sources of authority, including PSL sections 4(1), 5(1), 5(2), and 66(2).

Discussion

The arguments that the Commission exceeded its PSL authority in approving the ZEC Requirement are incorrect. The claim that consideration of environmental factors is beyond the authority delegated to the Commission by Legislature is belied in particular by PSL §5(2) which requires the Commission to consider preservation of environmental values and the conservation of natural resources and PSL §66(2) which gives the Commission the responsibility of preserving public health. The argument that the ZEC Requirement amounts to an inappropriate balancing of the social cost of carbon with the social cost of nuclear power generation is also without merit. Balancing the costs, environmental impacts, and rate impacts of various options is well within the Commission's expertise. In fact, performing such balancing is fundamental to the Commission's role as a regulator. In making their PSL arguments, the opponents of the ZEC Requirement also fail to account for the overlay of the State Environmental Quality Review Act by which the legislature has required the Commission in all its decisions to weigh environmental values with all other traditional social and economic concerns ordinarily considered under the PSL. The Commission made no mistake of law in approving the ZEC Requirement and the Petitioners' claims about the PSL have no legal merit. In true essence, Petitioners are really expressing policy arguments indicating their disagreement with the Commission's determination that the ZEC Requirement is in the public interest. The Commission has already considered Petitioners' policy views and arguments in the CES Order, understands them, and disagrees with them. The ZEC Requirement the Commission adopted in the CES Order is the best way to preserve the affected zero-emissions attributes while staying within the State's jurisdictional boundaries. Rehearing of the

policy arguments now is not warranted by what has been raised in the Petitions.

Federal Law

Castleton claims the Commission mistakenly acted in an area pre-empted by federal law and imposed an unlawful burden on interstate commerce. Castleton argues that the CES Order incorrectly regulates the wholesale market for electricity which is exclusively within the jurisdiction of the Federal Energy Regulatory Commission (FERC). Castleton claims that the ZEC Requirement directly inserts the Commission into the administration of the wholesale markets by modifying the prices received by the nuclear plants for wholesale sales; directing LSE's as to what power resources to purchase from, in what quantities, and how much to pay for such power in the wholesale market; and interfering with the normal functioning of the wholesale markets for both capacity and energy. Castleton also claims the CES Order inappropriately compels wholesale purchasers of electricity to buy a fixed amount of their power needs only from four upstate nuclear plants. Castleton argues that the terms of the ZEC Requirement excludes from participation all out-of-state facilities simply based on their location. Castleton also characterizes the ZEC Requirement as economic protectionism at its core.

Hudson River Sloop Clearwater, Inc. (Clearwater) supports Castleton's petition claiming that in adopting the ZEC Requirement the Commission overstepped its authority, acted in an area pre-empted by federal law and has unconstitutionally burdened interstate commerce. CIECP and the American Petroleum Institute (API) also argue that that the Commission overstepped its authority in relation to the ZEC program.

API further comments that ZECs are fundamentally different than RECs and that RECs are premised on a renewable



generator producing specific amounts of energy, they are not dependent, as are the ZECs, on the generator having failed to obtain sufficient revenues from the NYISO markets to permit their continued operation. API continues, that unlike RECs, which are traded and valued based on supply and demand, ZECs value is tied directly to the NYISO market price and set administratively by the PSC such that when the nuclear generators are projected to receive greater NYISO revenues they are deemed to require a lower subsidy and the ZEC value is adjusted down. API concludes that by subsidizing nuclear generators that would otherwise be uneconomic in a competitive market, the ZEC Requirement directly interferes with these market signals, potentially deterring or harming more efficient generators. According to API, the PSC should instead allow the market to incent the most efficient and competitive resource mix for the state. Brookfield posits that valuing all existing zero-emitting generation in the same way would mitigate challenges that claim the ZEC Requirement violates the Commerce Clause of the U.S. Constitution, besides preserving existing resources and providing a level playing field, .

Natural Resource Defense Council (NRDC) disagrees for policy reasons on including the ZEC Requirement in the CES but believes that the Commission has the legal authority to adopt the ZEC Requirement and it is not preempted by federal law. NRDC raises concerns that while Castleton's petition is only seeking rehearing on the ZEC Requirement, its argument for preemption could be used to challenge renewable energy programs across the country. However, NRDC argues that the Commission is well within its authority to undertake a range of activities in order to regulate the New York's energy resource mix and to ensure the goals of the State Energy Plan (SEP). Since the ZEC Requirement is necessary to achieve the SEP goals, NRDC believes

it is well within the Commission's authority under state law. Further, NRDC claims that the CES Order is fully consistent with the Federal Power Act and the recent U.S. Supreme Court decision in Hughes v Talen Energy Marketing, LLC.<sup>10</sup>

Constellation comments that the arguments contending the ZEC Requirement is preempted by the Federal Power Act fail because they mischaracterize how the ZEC Requirement works. Constellation explains that ZECs are not based on power supplied in the wholesale markets. They are credits reflecting the environmental attributes associated with the production of energy using particular technology. Constellation states that when ZECs are sold and bought, the payment price is not a wholesale rate and that ZEC purchases entail separate payments for separate environmental attributes. Constellation also notes that the ZEC Requirement is modeled on the REC programs adopted by three dozen states, including New York.

Constellation states that the ZEC Requirement does not discriminate against out-of-state resources, rather it is open to any facility without geographic limits. Constellation also notes that the Commission's intent in adopting the ZEC Requirement was to preserve the zero-emissions attribute benefits of the facilities. Further, Constellation notes that the dormant Commerce Clause does not apply to the ZEC Requirement because NYSERDA purchases ZECs from generators, using state funds. New York is a market participant as a purchaser of ZECs.

#### Discussion

The arguments related to inappropriate regulation of the wholesale market and burdens on interstate commerce are rejected as incorrect. As explained in the CES Order, neither, the ZEC Requirement nor any other aspect of the CES program

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<sup>10</sup> 136 S. Ct. 1288 (2016).

inappropriately intrudes on the wholesale market or interferes with interstate commerce. FERC has determined that attributes credit payments do not interfere with wholesale competition. Further, the ZEC Requirement does not establish wholesale energy or capacity prices, it only establishes pricing for attributes completely outside of the wholesale commodity markets administered by the NYISO and regulated by FERC. The CES Order specifically notes that the ZEC Requirement addresses well recognized externalities often associated with electricity generation but not considered by the wholesale market.

Nor does the ZEC Requirement impinge upon interstate commerce. Attempts to characterize the ZEC Requirement as a Commission-imposed requirement to purchase power from specific sources are clearly misplaced. ZECs, like RECs, provide a revenue source for generation assets that do not obtain sufficient revenues from the NYISO markets to operate. ZEC revenues compensate generators for environmental attributes that are not valued by market revenues, to induce the generators to continue to produce those attributes for the benefit of customers. REC revenues also compensate generators for environmental attributes that are not valued by market revenues, to induce the generators to build new facilities to produce those attributes for the benefit of customers. There is no fundamental difference between those two concepts. The CES program's demand for ZECs, like RECs, is created by administrative mandate. Neither the price of ZECs or RECs is tied directly to the NYISO market price for energy or capacity. Again, the ZEC program establishes pricing and purchase requirements for attributes. This requirement in no way requires specific power purchases or otherwise administratively favors instate economic interest over others. Indeed, the "Order has been painstakingly designed to produce needed reforms

and carbon reductions while protecting utility customers and maintaining an effective wholesale market and ensuring the continued bulk electric system reliability that New Yorkers expect and require."<sup>11</sup> Rehearing of the ZEC Requirement is not warranted by what has been raised in the Petitions regarding federal laws.

#### Policy Divergence

Castleton argues that the Commission erred by failing to explain key aspects of the ZEC Requirement. Specifically, Castleton claims the Commission failed to explain (a) its divergence from existing policies and regulatory structures; (b) what the follow-on implications of that divergence will be; (c) how the Commission will reconcile the new paradigm facing wholesale market participants in New York with existing and, presumably, to be continued rules governing that market, and (d) the reasonableness or accuracy of the federal agencies' Social Cost of Carbon metric. Both Clearwater and CIECP question how the Commission will administer a mixed reliance on competition and more traditional regulation in the wholesale markets.

CIECP recommends New York excise the ZEC Requirement as it is a diversion of mass resources away from combating climate change. CIECP urges the Commission to promote a rapid and dramatic scale-up of renewable resources and energy efficiency and eliminate the ZEC Requirement. CIECP claims the ZEC requirement lacks transparency and the objective first promoted has changed over the course of the proceeding, depriving the public of an opportunity to counter the process. CIECP comments that the State Energy Plan made no mention of nuclear attributes or ZECs. According to CIECP, the ZEC Requirement prevents consumers who want to buy 100% renewable

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<sup>11</sup> CES Order, p. 75.

from buying 100% renewable. Clearwater believes that New York needs to create a transition plan to phase out both nuclear power and fossil fuel generation, and not a prolonged nuclear bailout.

Constellation comments that none of the Petitions identify any genuine error of law or fact, and that the Commission should deny them and continue its efforts to promote clean generation resources. Entergy refutes the claim that the ZEC Requirement can be supplanted by additional renewable energy and energy efficiency beyond the aggressive incremental levels called for in the CES program as belied by the record evidence in the CES proceeding. Entergy points out that many parties, including environmental organizations, concurred with the DPS Staff assessment that the 50 by 30 mandate is an ambitious goal, and that substantial build-out of transmission would be needed and raised concerns that higher levels of renewable resources could lead to operational issues. Entergy believes the determinations concerning the implementation of the ZEC Requirement have a clear and well-documented factual basis reflected in record evidence and the requests for a rehearing should be denied.

Assemblymember William A. Barclay (120th District) supports the ZEC Requirement and comments that nuclear generating facilities are New York's largest generator of carbon-free electricity and agrees with the Commission that it is an essential part of our state's energy portfolio. Assemblymember Barclay also states that any delay in acting on the proceeding could jeopardize the fate of these plants. The New York State AFL-CIO also supports the ZEC program.

Discussion

The CES Order explains in detail that the ZEC Requirement is designed to preserve the zero-emission attributes of certain nuclear facilities, and that the program is based on necessity in furtherance of the public interest because the wholesale energy and capacity markets do not value the emission attributes of the nuclear generation facilities.<sup>12</sup> The CES Order also explains the implications of the ZEC Requirement and how it only establishes pricing for attributes completely outside of the wholesale commodity markets.<sup>13</sup> Contrary to the arguments of Castleton, CIECP and others, the ZEC Requirement is well supported by the record and the CES Order provides a detailed explanation and analysis of why the ZEC Requirement was designed and adopted the way it is.<sup>14</sup> The arguments made to the contrary are simply incorrect and do not establish a basis for rehearing.

Cost Issues

AGREE argues that the Cost Study that accompanied the Clean Energy Standard proposal was misleading and inadequate regarding implications for the nuclear tier. AGREE argues that the cost estimates are extremely low and based on an uncritical acceptance of information contained in a report by Brattle Group.<sup>15</sup> AGREE argues that the direct costs of the ZEC Requirement promulgated under the CES Order are more than an order of magnitude greater than those contemplated in the Cost Study. AGREE also argues that the Cost Study offers only vague and opaque explanations regarding the methods for estimating

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<sup>12</sup> P. 124-129.

<sup>13</sup> P. 133.

<sup>14</sup> P. 119-152.

<sup>15</sup> December 2015 Brattle Report: New York's Upstate Nuclear Power Plants' Contribution to the State Economy available at [http://www.brattle.com/system/news/pdfs/000/000/969/original/New\\_York's\\_Upstate\\_Nuclear\\_Power\\_Plants'\\_Contribution\\_to\\_the\\_State\\_Economy.pdf?1449526627](http://www.brattle.com/system/news/pdfs/000/000/969/original/New_York's_Upstate_Nuclear_Power_Plants'_Contribution_to_the_State_Economy.pdf?1449526627).

costs related to the nuclear facilities. Clearwater and CIECP share the concern that the Commission did not properly consider costs related to the ZEC Requirement. MI notes that without an unforeseen reduction in the output of the Upstate nuclear generation facilities, the ZEC Requirement alone will cost customers close to \$1 billion over the next two years and possibly in excess of \$7.5 billion through March 2029. MI contends that there is a possibility that the cost of the CES collectively will cost customers well over \$10 billion in subsidies, which will be reflected in higher electricity costs.

#### Discussion

As explained in the CES Order, the chief purpose of the Cost Study is to estimate a range of cost and bill impacts, to inform the determination whether the CES is likely to achieve its goals within a reasonable range of estimated bill impacts.<sup>16</sup> To accomplish this purpose, the Study used best estimates of critical cost and benefits elements and applied sensitivity analyses across several important variables. The findings of the Cost Study demonstrate both a reasonable range of bill impacts and a net societal benefit.

AGREE's claim that the direct costs of the ZEC program are more than an order of magnitude greater than those considered by the Cost Study is simply not supported by the record or anything provided in AGREE's Petition. Further, the Commission did consider environmental and health impacts associated with continued operation of the nuclear facilities in its consideration and acceptance of the Final Generic Supplemental Environmental Impact Statement (Final GSEIS). Moreover, because the risk associated with these impacts are expected to be small and existing mitigation measures are considered sufficient to reduce the probability and effect of

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<sup>16</sup> P. 70-72.

any negative impacts, such factors would not have a significant impact on the Cost Study, its conclusions, or the Commission's reliance on it to provide a reasonable range of bill impacts.<sup>17</sup>  
FitzPatrick Transfer

Exelon requests rehearing and removal of the CES Order requirement which conditioned the 12 year duration of the ZEC contracts on transfer of the James A. FitzPatrick Nuclear Power Plant by September 1, 2018. The specific condition reads as follows:

6. For the three facilities for which an initial determination of facility-specific public necessity has been made upon inception of the program, the 12-year duration will be conditional upon a buyer purchasing the FitzPatrick facility and taking title prior to September 1, 2018, the date six months before the commencement of the period of Tranche 2. If the sale and closing does not occur, there will be no commitment for the program to continue beyond Tranche 1 and the Commission will have six months before the otherwise-planned commencement of Tranche 2 to determine a future course of action, if any.

Exelon argues that enforcing the condition across all three facilities risks premature closure of R.E. Ginna Nuclear Power Plant (Ginna Facility) and Nine Mile Point Nuclear Station (Nine Mile Point Facility) because it injects too much uncertainty for Exelon to justify making costly, long-term investment decisions for the Ginna and Nine Mile Point Facilities. Exelon further argues that neither it, nor Entergy completely control the outcome of the proposed transaction because it is subject to review by the Department of Justice, the Federal Regulatory Commission, and the Nuclear Regulatory Commission.

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<sup>17</sup> Final GSEIS p 5-8.



Discussion

The Commission's purpose in imposing the condition was to attract a buyer for the FitzPatrick facility so as to ensure the preservation of the zero-emissions attributes of all of the qualifying facilities given the publically known intentions of the FitzPatrick facility's current owner, Entergy, to close the plant absent a transfer. The intent of the condition has been met by Exelon now being contractually obligated to purchase the FitzPatrick facility. That is a material and substantial change in circumstances since the CES order was adopted. Now that the intent of the condition has been met to the extent that the transfer is within the control of the involved parties, continued application of the condition would only create a perverse incentive for Exelon to withhold further investments in the Ginna and Nine Mile facilities. While previously that incentive was outweighed by the Commission's desire to induce a buyer to come forward to ensure the preservation of the zero-emissions attributes of the FitzPatrick facility, the Commission agrees with Exelon that the condition has now outlived its usefulness and now may be detrimental. Accordingly, Exelon's request for rehearing is granted and its Petition to remove the condition is approved.

PROCEDURAL ISSUES

State Administrative Procedure Act

1. Rulemaking Procedures

AGREE and CIECP claim that adoption of the CES Order violates the State Administrative Procedure Act (SAPA) because SAPA requires agencies to establish rules consistent with the objectives of applicable statutes and to consider using approaches designed to avoid undue deleterious economic or overly burdensome impacts [SAPA § 202-a(1)]. AGREE argues that

the ZEC Requirement is economically burdensome and inconsistent with Commission policy supporting renewable energy, and therefore contradicts SAPA. AGREE further argues that the ZEC Requirement violates SAPA because it does not provide for an interim review of the program during the 12 year term [SAPA § 207(4)].

AGREE and other petitioners also argue that because Staff of the Department of Public Service filed a document during the comment period entitled Staff's Responsive Proposal that proposed modifications to the original proposal that the Commission was considering, Staff's Responsive Proposal amounts to either a wholly new proposal under SAPA § 202(1)(a), or a substantial revision of the proposed rule under SAPA §102(9). AGREE argues that the elements of Staff's Responsive Proposal, being in its view a substantial revision under SAPA, should have been subject to a new notice and a minimum 30-day public comment period pursuant to SAPA §202(4-a)(a), or a new notice and a minimum 45-day public comment period pursuant to SAPA § 202(1)(a).

On the other hand, Constellation Energy Nuclear Group (Constellation) states the Staff's Responsive Proposal was not a "substantial revision" within the meaning of SAPA; rather it was a "logical outgrowth" of the prior proposal and therefore, the CES Order does not violate SAPA notice requirements. Similarly, Entergy states that Staff's Responsive Proposal constituted neither a brand new policy proposal requiring a 45-day comment period nor a revised rulemaking under SAPA requiring a 30-day comment period.

#### Discussion

The SAPA arguments described above regarding SAPA §§ 202-a(1), 202(4-a)(a) and 207(4) are incorrect as a matter of law. SAPA divides agency rulemakings into two types: SAPA

§102(2)(a)(i) rules, and SAPA §102(2)(a)(ii) rules. The first type, SAPA §102(2)(a)(i) rules, are informally referred to as "hard rules" and they result in a codified rule published by the Department of State in the official compilation of codes, rules and regulations of the State of New York, widely known as the NYCRR. The procedures for promulgating SAPA §102(2)(a)(i) rules entail many more requirements than the procedures for promulgating SAPA §102(2)(a)(ii) rules. The second type, SAPA §102(2)(a)(ii) rules, are informally referred to as "soft rules" and they include all rules of the Commission that fall in the category of "ratemaking". The CES Order was promulgated as a ratemaking rule of the type defined in SAPA §102(2)(a)(ii).

SAPA § 202-a(1) does not apply to ratemaking rules. SAPA § 202-a(5)(b) expressly states that a rule defined in SAPA § 102(2)(a)(ii) shall be exempt from the requirements of SAPA § 202-a, which includes SAPA § 202-a(1). Similarly, SAPA § 202(4-a)(a) does not apply to ratemaking rules. SAPA § 202(4-a)(a) expressly states that it applies except with respect to any rule defined in SAPA § 102(2)(a)(ii). Again similarly, SAPA § 207(4) does not apply to ratemaking rules. SAPA § 207(5) expressly states that SAPA § 207 shall not apply to a rule defined in SAPA §102(2)(a)(ii), which includes SAPA § 207(4). As neither SAPA § 202-a(1), SAPA § 202(4-a)(a) or SAPA § 207(4) applies to promulgation of the CES Order, the arguments that the rulemaking violated such sections are without any foundation in law and therefore are dismissed.

In any event, the CES Order clearly described the policy basis for the actions taken and the arguments made regarding consistency and burdens are without merit. In addition, the Staff Responsive Proposal did not revise the proposed rule and SAPA § 202(1)(a) was not violated. The Staff Responsive Proposal merely proposed a modification to the

proposed rule, like other modifications proposed by many parties, by proposing a way to better define the processes for determining the ZEC price, facility eligibility and other details of the program. It did not materially alter the purpose or effect of the program, which is to preserve the attributes of at risk zero-emission facilities, specifically the Upstate nuclear facilities.<sup>18</sup> An additional un-required extra 14 day comment period was provided for parties to comment on the Staff Responsive Proposal. From a practical perspective, the volume and quality of discussion submitted in comments responding to Staff's Responsive Proposal<sup>19</sup> is testament to the fact that parties had ample time to read, understand and reply in a meaningful manner to Staff's Responsive Proposal. SAPA does not require such a reply opportunity.

2. Notice of Exclusions and Limitations

Brookfield claims that parties to the proceeding were not provided notice that the Commission was considering the exclusions and limitations ultimately imposed on eligibility for existing facilities. Clearwater comments that the Commission committed an error of law by failing to notify potentially impacted stakeholders of limitations and exclusions for specific categories of renewable energy generation.

Discussion

The allegations of Brookfield and Clearwater, even if they were true, do not demonstrate an error of law. Sufficient notice was provided by the notices that were issued, therefore

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<sup>18</sup> See Case 15-E-0302, supra, Order Expanding Scope of Proceeding and Seeking Comments (issued January 21, 2016). See also Staff's White Paper on Clean Energy Standard (January 25, 2016) pp. 2-3 (explaining that one of the four purposes of the proposal is to prevent premature closing of upstate nuclear facilities).

<sup>19</sup> Over 150 comments were submitted in relation to Staff's Responsive Proposal.

the allegations are not true, but the actions complained of do not even require notice because all the Commission did regarding exclusions and limitations ultimately imposed on eligibility for the existing facilities of concern was to maintain the status quo. An agency that provides notice that it is considering taking a new action is not required to give additional notice when it later, after considering the record, decides against taking the new action. Declining to take a new action does not constitute a rulemaking, it merely continues an old rule.

State Environmental Quality Review Act Process

AGREE and CIECP argue that the Commission's environmental review of the actions taken in the CES Order violates the State Environmental Quality Review Act (SEQRA) because the Generic Environmental Impact Statement (GEIS) evaluated only two scenarios rather than all reasonable alternatives. Additionally, AGREE argues that the Staff and the Commission did not include or acknowledge the significant and well-documented costs of the environmental impacts of nuclear power. Specifically, AGREE and CIECP lament the lack of analysis regarding incremental production and storage of nuclear waste in New York; health cost related to radiation exposure and the increased risk of operating the facilities without adequate insurance.

Clearwater also supports the AGREE and CIECP petitions related to the claim that the Commission committed an error of law with regard to SEQRA compliance because it failed to consider all reasonable alternatives to nuclear subsidies. Clearwater also supports AGREE and others' argument that the Commission committed an error of fact with regard to the equations used to calculate the Social Cost of Carbon by equating the cost of carbon abatement with the cost of emissions.

The Institute for Policy Integrity, New York University School of Law (IPI) states that the correct value of the zero-emissions attribute is the monetized value of the external benefit that a nuclear plant provides by avoiding the carbon emissions that would have been emitted if the power it provides was generated by another generator. IPI further comments that the Social Cost of Carbon is the best available estimate of the monetary value of the marginal external damage of carbon emissions.

Constellation comments that the decision to base ZEC prices on the Social Cost of Carbon was well supported noting that the Commission considered various pricing mechanisms and concluded that pricing ZECs based on the Social Cost of Carbon would account for the harm carbon emissions cause, and therefore the value added by the preservation of the zero-emissions attributes of the participating nuclear facilities. Constellation adds that ZECs capture a value not addressed by interstate markets for electricity and capacity.

Constellation further comments that the GEIS and the CES Order explain the ZEC alternatives, that the increased energy efficiency or renewable energy alternative to ZECs would not have achieved the Commission's goals and that it would be impossible to deploy the magnitude of resources in the short-term that would be required to offset the 27.6 million MWh of zero emissions nuclear power that could be lost. Constellation also notes that courts have routinely affirmed that agencies can satisfy SEQRA by determining that purported alternatives cannot feasibly achieve their goals.

#### Discussion

Contrary to the arguments of some Petitioners, the Commission's environmental review of the actions taken in the CES Order was complete and legally sufficient. SEQRA requires

that all reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor or agency primarily responsible for the action.<sup>20</sup> AGREE argues the GEIS should have evaluated mandating higher levels of energy efficiency as an alternative to continued operation of the nuclear facilities. As explained in the CES Order, mandating higher levels for energy efficiency is not a reasonable alternative. It is not reasonable to assume that either energy efficiency measures or additional new renewable generation opportunities can be identified and implemented in sufficient time to offset the 27.6 million MWh of zero-emissions nuclear power per year.<sup>21</sup> Because even if energy efficiency can compare favorably with ZEC program costs, it is unreasonable to assume that sufficient additional energy efficiency measures could be identified and implemented in time to offset the 27.6 million MWh of zero-emissions nuclear power that would need to be replaced per year. Similar to energy efficiency, it is not realistic to assume that sufficient additional renewable resources at a reasonable price or perhaps any price could be identified and implemented in sufficient time to offset the 27.6 million MWh of zero-emissions nuclear power per year.<sup>22</sup> To the extent that a portion of the emission attributes of the nuclear facilities could be replaced with increased renewable generation, rather than entirely with fossil fuels, the Final SGEIS considers the impacts of the potentially higher levels of renewable energy and/or energy efficiency.<sup>23</sup>

Similarly, arguments that the CES Order is not sufficiently supported regarding the environmental impacts

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<sup>20</sup> 6 NYCRR §617.2.

<sup>21</sup> CES Order

<sup>22</sup> CES Order p 126-127

<sup>23</sup> Final SGEIS Section 5 and Appendix A (responding to an identical point AGREE had made commenting on the Draft SGEIS).

associated with the program also lack merit. Specifically, AGREE and CIECP lament the lack of analysis regarding incremental production and storage of nuclear waste in New York; health cost related to radiation exposure. However, the argument ignores the analysis of impacts related to continued operation of the nuclear facilities contained in the Final SGEIS, as well as the SEQRA Findings Statement attached to the CES Order both of which explicitly acknowledge and consider health effects related to continued operation of the nuclear facilities. The Social Cost of Carbon estimates were developed for the Environmental Protection Agency (EPA) in coordination with other federal agencies and prepared by the U.S. Interagency Working Group. Their validity has already been tested by a Court and they have passed muster.<sup>24</sup> The Commission is satisfied that they have been correctly calculated.

Finally, AGREE's argument concerning the inherent danger of operating nuclear generation facilities without sufficient insurance must be rejected. Nothing in the record supports the premise that these facilities are not properly insured. Further, 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.<sup>25</sup>

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<sup>24</sup> See Zero Zone, Inc. et al., v U.S. Dept. of Energy, 832 F3d 654 (directly affirming the use of the Social Cost of Carbon in a decision by a government agency).

<sup>25</sup> Case 16-E-0472, Entergy Nuclear FitzPatrick, LLC and Exelon Generation Company, LLC - FitzPatrick Transfer, Order Approving Transfer and Continuing Lightened Regulation (issued November 17, 2016).



SEQRA SUPPLEMENTAL FINDINGS

In February 2015, in accordance with the State Environmental Quality Review Act (SEQRA), the Commission finalized and published a Final Generic Environmental Impact Statement (FGEIS) that explored the potential environmental impacts associated with two major Commission policy initiatives: REV and the Clean Energy Fund. On February 23, 2016, the Commission issued a Draft Supplemental Generic Environmental Impact Statement specifically relating to the CES and the establishment of a support mechanism to sustain the operations of eligible nuclear facilities. Seven entities submitted comments, and on May 19, 2016, the Commission adopted the Final Supplemental Generic Environmental Impact Statement (FSGEIS). In conjunction with adoption of the CES Order, the Commission adopted a SEQRA Findings Statement prepared in accordance with Article 8 of the Environmental Conservation Law (SEQRA) and 6 NYCRR Part 617, by the Commission as lead agency for these actions and attached to the CES Order as Appendix G. The SEQRA Findings Statement was based on the facts and conclusions set forth in the FSGEIS and the FGEIS.

In conjunction with the decisions made in this Order, the Commission has again considered the information in the FSGEIS, the FGEIS and the August 1, 2016 SEQRA Findings Statement and hereby adopts a SEQRA Supplemental Findings Statement prepared in accordance with Article 8 of the Environmental Conservation Law (SEQRA) and 6 NYCRR Part 617, by the Commission as lead agency for these actions. The SEQRA Supplemental Findings Statement is attached to this Order as Appendix B. The SEQRA Supplemental Findings Statement is based on the facts and conclusions set forth in the FSGEIS, the FGEIS and the August 1, 2016 SEQRA Findings Statement. The modifications adopted in this Order do not alter or impact the

findings issued previously. Neither the nature nor the magnitude of the potential adverse impacts will change as a result of this Order. Rather, removing the condition related to the transfer of the FitzPatrick Facility and any negative incentive that it could have caused, increases the likelihood that the CES program will successfully preserve the existing at-risk nuclear zero-emissions attributes to serve retail customers, which the Commission previously found is expected to yield overall positive environmental impacts, primarily by reducing the State's use of, and dependence on, fossil fuels, among other benefits.<sup>26</sup>

The Commission orders:

1. Staff of the Department of Public Service shall prepare recommendations for consideration of eligibility changes for Tier 2, in consultation with stakeholders, for Commission review without waiting for the first triennial review. Staff should also identify how complimentary REV initiatives such as community aggregation can assist baseline renewable generators to remain in operation through voluntary renewable energy purchases and engage local communities in working with local renewable generators as a vehicle to support achievement of the CES while also lending support to local renewable companies.

2. In addition to consideration of the Tier 2 resources, Staff is directed to consider how new voluntary arrangements to purchase incremental existing renewable resources that do not qualify under Tier 1 but can provide long lasting benefit to New York should be considered in a manner that best serves the interests of all ratepayers.

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<sup>26</sup> Case 15-E-0302, supra, Order Adopting a Clean Energy Standard (issued August 1, 2016), Appendix G, p 51.

3. The Commission directs Staff and NYSERDA to complete their assessment of what revisions can be made to the testing requirements for syngas technologies within the first quarter of 2017 so the Commission may consider this topic further.

4. The petition for limited rehearing of Constellation Energy Nuclear Group, LLC and Exelon Generation Company, LLC's (Exelon) is granted to the extent described in the body of this order. Upon rehearing, the Zero-Emissions Credit (ZEC) Requirement is modified to eliminate in its entirety, as it applies to the nuclear facilities currently owned by Exelon, the requirement stated in Appendix E, page 3, paragraph 6 of the Order Adopting a Clean Energy Standard issued in this proceeding on August 1, 2016. Accordingly, the Exelon ZEC contract may be amended to conform to this modification. This modification does not apply to the FitzPatrick nuclear facility or its ZEC contract. The owner, Entergy Nuclear FitzPatrick, LLC, has not sought a modification of either the requirement or the ZEC Contract and has different interests.

5. The other sixteen petitions for rehearing addressed in the body of this order are denied.

6. This proceeding is continued.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS  
Secretary

Commenters

## Acadia Center

Albany Engineering Corporation, Boralex Hydro Operations, Brookfield Renewable, Cube Hydro Partners, Emory Steven & Thompson Paper Company, Dunn Paper, EONY, Gravity Renewable, Kruger Energy, Northbrook Energy, Oakvale Hydro, Riverrat Glass and Electric, Tucker Strategies, Verdant Power, Village of Highland Falls, and Azure Mountain

Alliance for Clean Energy New York; Environmental Advocates of New York; Natural Resources Defense Council; the Pace Energy and Climate Center; and Sierra Club.

## Adirondack League Club

## American Petroleum Institute

Assemblyman William A. Barclay, 120<sup>th</sup> District

Assemblyman Ken Blankenbush, 117<sup>th</sup> District

Assemblyman Clifford W. Crouch, 112<sup>th</sup> District

Assemblyman John T. McDonald III, 108<sup>th</sup> District

## Brookfield Renewable

Constellation Energy Nuclear Group, LLC

Council on Intelligent Energy & Conservation Policy and Promoting Health and Sustainable Energy.

Empire State Forest Products Association and New York Bioenergy Association

Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, Entergy Nuclear FitzPatrick, LLC and Entergy Nuclear Operations, Inc.

Hudson River Sloop Clearwater, Inc.

Independent Power Producers of New York, Inc.

Institute for Policy Integrity, New York University School of



Law

Lewis County Board of Legislators

Low Impact Hydropower Institute

Multiple Intervenors

Natural Resources Defense Council

New England Wood Pellet

New York State AFL-CIO et al.

New York State Senator George A. Amedore, Jr., 46th District

New York State Senators Elizabeth O'C. Little and Joseph A. Griffio (jointly)

New York Power Authority

Noble Environmental Power, LLC

Northern Timber Forestry Services

OneGRID

Pace Energy and Climate Center

State Environmental Quality Review Act  
SUPPLEMENTAL FINDINGS STATEMENT

December 15, 2016

Prepared in accordance with Article 8 - State Environmental Quality Review Act (SEQRA) of the Environmental Conservation Law and 6 NYCRR Part 617, the New York State Public Service Commission (Commission), as Lead Agency, makes the following supplemental findings.

**Name of Action:** Clean Energy Standard (Case 15-E-0302)  
Order on Petitions for Rehearing

**SEQRA Classification:** Unlisted Action

**Location:** New York State/Statewide

**Date of Final  
Generic Environmental  
Impact Statement:** May 23, 2016

**FGEIS available at:**  
<http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterSeq=48235&MNO=15-E-0302>

**I. Purpose and Description of the Action.**

An order of the Public Service Commission granting the petition for limited rehearing of Constellation Energy Nuclear Group, LLC and Exelon Generation Company, LLC's, and upon rehearing, the Zero-Emissions Credit Requirement was modified to eliminate in its entirety the requirement stated in Appendix E, page 3, paragraph 6 of the Order Adopting a Clean Energy Standard issued in this proceeding on August 1, 2016. The modification eliminates a previously imposed condition requiring transfer of the FitzPatrick Facility in order for the ZEC agreements to go beyond the first two-year tranche of the program.

**II. Facts and Conclusions in the FSGEIS Relied Upon to Support the Decision**

In developing this supplemental findings statement, the Commission has reviewed SEQRA Findings Statement issued in conjunction with the Order Adopting a Clean Energy Standard issued on August 1, 2016, the "Final Supplemental Generic Environmental Impact Statement, issued on May 23, 2016 (FSGEIS), as well as the, related Final Generic Environmental Impact Statement issued February 6, 2015 in Case 14-M-0101 (FGEIS). The following findings are based on the facts and conclusions set

forth in the FSGEIS and the FGEIS.

The modifications described above do not alter or impact the SEQRA findings issued previously. Neither the nature nor the magnitude of the potential adverse impacts will change as a result of the modification. Rather, removing the condition related to the transfer of the FitzPatrick Facility and any negative incentive that it could have caused, increases the likelihood that the CES program will successfully preserve the existing at-risk nuclear zero-emissions attributes to serve retail customers, which the Commission previously found is expected to yield overall positive environmental impacts, primarily by reducing the State's use of, and dependence on, fossil fuels, among other benefits [see, SEQRA Findings Statement issued in conjunction with the Order Adopting a Clean Energy Standard issued on August 1, 2016, at Appendix G, p 51.



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Commissioner Diane X. Burman, abstaining:

As reflected in my comments made at the December 15, 2016 session, I abstain from voting on this item.