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, VICKEY 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,

Index No. 07242-16

MEMORANDUM OF LAW IN SUPPORT OF AMENDED VERIFIED PETITION AND COMPLAINT

-against-

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

MEMORANDUM OF LAW IN SUPPORT OF AMENDED VERIFIED PETITION AND COMPLAINT

PETITIONERS MEMORANDUM OF LAW IN SUPPORT OF THE AMENDED VERIFIED PETITION

Preliminary Statement

Nuclear energy is neither renewable nor clean. It is Orwellian to consider - and to impose - a public subsidy to enrich private nuclear corporations in an executive branch forum entitled *Proceeding on Motion of the Commission to Implement a Large-Scale* ***Renewable*** *Program and a* ***Clean Energy*** *Standard* (Case 15-E-0302).[1] The Commission promoted its efforts in this case as creating a plan that would support renewable energy and implement the 2015 New York State Energy Plan goal of reaching 50% of energy generated from renewable sources by 2030. The Order created three categories, or Tiers. Petitioners do not challenge here Tier 1 and Tier 2 that support renewable energy development. *Amended Verified Petition ¶ 9.* Petitioners specifically challenge Tier 3, which mandates public subsidization of private nuclear power generation in the form of at least twelve years of higher electric bills through what the Commission calls Zero Emission Credits. *Amended Verified Petition¶ 10.*

The subsidies will, at a cost to residential, business, non-profit and local government ratepayers, a projected $7.6 to $10.4 billion from ratepayers over a mandatory twelve-year term. *Amended Verified Petition ¶ 4.* The newly created Tier 3 nuclear subsidy is funded by ratepayer in the form of increased electricity bills. The bill increases will result from a requirement that all utility companies and other "Load Serving Entities" purchase Zero Emission Credits at a price set by the State of New York. The Orders require all electric ratepayers to make the nuclear industry profitable, even if the ratepayers have previously decided to purchase, and have contracted for,

[1] *Emphasis added.*

their electricity from 100% renewable sources. The Tier 3 subsidy is substantially more than the subsidy provided for all renewables *combined* and effectively directs substantial amounts of public money away from other important energy efficiency efforts such as supporting new clean energy technologies and electrical grid modernization.

This proceeding, pursuant to Article 78 of the New York Civil Practice Law and Rules and pursuant to Article 30, seek Declaratory Judgment to declare null and void Tier 3 of the Public Service Commission Order(s) of August 1, 2016[2] and November 17, 2016[3] (the "August Order" and the "November Order," respectively, and collectively "Orders"). A stated goal of the Commission in issuing the Orders is the reduced use of carbon-based fuel in the generation of electricity, which is a goal shared by Petitioners. However, the Commission designed Tier 3 to ensure the continued operation of nuclear power plants in the State, which have had a long history of serious air, water, and land emissions and leaks, both nuclear and carbon. Tier 3 of the Orders creates a totally new concept, Zero Emission Credits, that provides billions of dollars in ratepayer subsidies in the form of higher electric bills to the owners of these nuclear power plants.

The Commission issued the Orders without due process and based upon an inadequate record in violation of the State Administrative Procedure Act, the State Environmental Quality Review

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[2] Case15-E-0302, *Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard* and Case 16-E-0270, *Petition of Constellation Energy Nuclear Group LLC; R.E. Ginna Nuclear Power Plant, LLC; and Nine Mile Point Nuclear Station, LLC to Initiate a Proceeding to Establish the Facility Costs for the R.E. Ginna and Nine Mile Point Nuclear Power Plants*, Order Adopting a Clean Energy Standard.

[3] Case 15-E-0302, *supra*, *Order Approving Administrative Cost Recovery, Standardized Agreements and Backstop Principles*.

Act, the 2015 State Energy Plan, and the Public Service Law. *Amended Verified Petition ¶ 6, 8.* Moreover, the Commission process and decision contravened consistent Commission practice in proceedings involving utility bill surcharges associated with environmental policy or the generation of electricity.

The *Amended Verified Petition*, and supporting papers and submissions, challenge the process used to design and implement the Tier 3. Subsequent to issuance of the August Order, seventeen petitions were filed requesting rehearing. On December 15, 2016, the Commission denied the Petitions for Rehearing. Petitioners now challenge the Tier 3 of the Orders in this expedited proceeding.[4]

In January 2016, the Commission staff prepared and published a "White Paper," which proposed nuclear subsidies based upon reactors "cost of operations." *Amended Verified Petition ¶ 44.* While not subject to robust examination by parties in the proceeding, the calculation of the subsidy at least attempted to conform with the Commission's ratemaking obligations. Then, after public comments and hearings were closed, in July 2016, the Commission Staff issued its "Responsive Proposal," which suddenly and substantially changed the Tier 3 subsidy formula to one based upon a federal concept known as the Social Cost of Carbon, which was designed for a totally different purpose. *Amended Verified Petition¶ 59.* The Social Cost of Carbon construct

[4] Petitioners originally filed a *Verified Petition* on November 30, 2016 challenging the underlying August 1, 2016 Order even though the Commission had yet not ruled upon the petitions for rehearing. Pursuant to a stipulation by and between Petitioners and Respondents, it was agreed that no reply by Respondents would be filed before January 13, 2017, providing additional time for Petitioners to Modify the Verified Petition in part due to the Commission's imminent Order on the Rehearing request that was issued on December 15, 2016. This *Memorandum of Law in Support of the Amended Petition* refers to Petitioners January 13, 2017 duly filed *Amended Verified Petition.*

has absolutely no connection to the cost factors the Commission must evaluate in complying with its statutory mandate to ensure that utility rates are just and reasonable. At a minimum, utilities seeking ratepayer support must demonstrate a shortfall between projected revenues and operating costs plus a reasonable profit.

Ignoring more than 100 years of practice, and without providing the public an opportunity to evaluate the value or logic of the assumptions, the Commission adopted this new and novel subsidy structure in its *August Order*. This new formula substantially increased the sums directly payable to the nuclear plant operators without developing a full record or providing the public time to review and comment as required by law. *Amended Verified Petition* ¶ 91.

Additionally the *August Order* deviated substantially from the topic discussed throughout the proceeding in another significant way. It included the possibility that Westchester County's Indian Point nuclear plant would be eligible to receive subsidies under Tier 3. *Amended Verified Petition* ¶¶ 36, 43, 77, 88, 89, 93.

The process for issuing the Orders violated the State Administrative Procedure Act in a number of ways. Notably, the Public Service Commission failed to publish in the State Register the Staff's Responsive Proposal, failed to allow for 30-day public comment period, and failed to wait the 30 days prior to adoption by the Commission of the Order on August 1. *Amended Verified Petition* ¶¶ 90, 92, 95 - 98.

The process of adopting the Tier 3 provisions also violated the State Environmental Quality Review Act, which requires the Public Service Commission to consider more efficient and more cost-effective alternatives before committing to policies that may have a significant environmental impact. The environmental review deferred to the evaluation of the Nuclear Regulatory Commission for conclusions regarding the increased environmental burdens, risks or costs associated with increased nuclear waste production mandated by the prolonged operation of the nuclear generators pursuant to Tier 3. The Commission's environmental review is inconsistent with the State Energy Plan's evaluation of the significant impacts of nuclear energy generation. State law requires completion of a "hard look" at environmental, social, and economic impacts prior to Commission action to inform that decision-making. The environmental review also failed to consider alternative methods of meeting the State's greenhouse gas reduction goals, other than the proposed large subsidies to nuclear power plants. State law requires agencies to consider "all reasonable alternatives."

Tier 3 does not meet fundamental requirements of the Public Service Law. Tier 3 is not "just and reasonable" ratemaking, as required, because it unfairly discriminates against early adopters of clean energy, and it unreasonable conflicts with the renewable energy programs in Tier 1 and Tier 2 of the Order. It also authorizes a subsidy outside the scope of the State Energy Plan that the Commission cannot adopt as a matter of law. Thus, the provisions of Tier 3 of the Orders are null and void.

Finally, the Orders create a bizarre and contradictory position on nuclear energy within New York State. *Amended Verified Petition* ¶ *11*. Tier 3 of the *August Order* includes Indian Point

as a potential beneficiary of the nuclear subsidy program. This Commission decision directly counters the near-decade-long effort of New York State opposing the license renewal for Indian Point, including in numerous filings by the Attorney General's Office. In a further significant departure, Tier 3 undermines New York's efforts in connection with nuclear waste and leak issues at West Valley, and its Indian Point efforts, including the 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 recently announced Indian Point closure agreement increased the chance that it will be eligible for subsidies due to increased costs before reported agreed-to closure date in 2021

Petitioners' economic, environmental, and public health interests are directly harmed by Tier 3. Petitioners have specifically chosen to enter into contracts with renewable energy producers and suppliers at a higher cost than energy generated by non-renewably sourced facilities such as nuclear or gas. Petitioners decided to pay a premium to producers and suppliers of electricity generated with renewable sources to reduce New York's reliance on nuclear-generated electricity because of the severe harmful impacts of routinely released nuclear radiation, significant impacts of operation to the Hudson River, and the potentially catastrophic impacts in the event of a containment breach or failure of the storage of the spent nuclear fuel. Petitioners will now be required to pay an additional cost toward the Tier 3 subsidy for nuclear-generated electricity.

The Commission has substantial expertise and decades of practice calculating to the penny the costs associated with the generation, supply, transmission and delivery of energy. Its capricious

rubric used to fashion the Tier 3 subsidy construct is unconscionable. Any decision pertaining to an apparent objective of protecting the jobs of private nuclear generation facility workers through public subsidies, however understandable, has statewide ramifications and is within the province of the Legislature. It is not within the province of the Commission under the Public Service Law.

FACTS AND BACKGROUND

A number of actions by New York State government and New York State electricity market realities factored into the process and the ultimate result of the Commission Order challenged in this proceeding.

In June 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. *Amended Verified Petition at ¶ 41.*

The State Energy Plan does not mention maintenance, preservation, or promotion of nuclear energy, subsidization of nuclear plants, or any type of Tier 3 program that would become part of the Orders.[5] Nuclear energy is expressly not included as one of the types of energy in the 50%

[5] *See Order Expanding Scope of Proceedings and Seeking Comments* (January 21, 2016) *available at* http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefd-{C29C66EA-CE42-$FD2-B679-19A39E0F1C4F}.

goal for renewable energy sources. In fact, since the Commission adopted the Renewable Portfolio Standard in 2004, it has "refus[ed] to classify nuclear power as clean energy."[6]

The Renewable Portfolio Standard is "a policy and program designed to encourage the increased use of renewables" (non-fossil fuel electricity purchases) in a given jurisdiction. The Commission unequivocally stated that it still "relies upon" "the record" from that Renewal Portfolio Standard Order[7] in which the Commission refused to classify nuclear power as a renewable energy resource, citing, among other reasons, that even though nuclear power avoids greenhouse gas emissions, nuclear power utilizes uranium, a form of nonrenewable energy.[8]

On December 2, 2015, Governor Cuomo directed the Commission to ensure 50% renewable energy generation by 2030 ("50 x 30"), as set forth in the New York State Energy Plan, by promulgating a Clean Energy Standard. *Amended Verified Petition at ¶ 43.* The Governor, under questionable legal authority, also directed the Commission to develop a process to prevent the "premature retirement of safe, upstate nuclear power plants during this transition." The Governor's letter stated that the closure of nuclear plants upstate would impact the State's climate progress – specifically that "the elimination of upstate nuclear facilities ...would eviscerate the emission reductions achieved by the State's renewable energy programs."

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[6] *See* Appendix B, Comment Summaries, at 9, paragraph 5 of the Order Adopting a Clean Energy Standard (August 1, 2016) (*citing* Case 03-E-0188, Order Regarding Retail Renewable Portfolio Standard (September 24, 2004) ("Renewable Portfolio Standard") (adopting a Renewable Portfolio Standard Policy designed to achieve total renewable generation of 25% by 2013)).

[7] *December Denial of Petitions for Rehearing* at 6.

[8] *Renewable Portfolio Standard Order* at 2, 6, 48, and 73.

Amended Verified Petition at ¶ 43. The Governor's directive put further pressure on Commission staff by requiring that the Clean Energy Standard be presented by June 2016.

The Governor's directive does not provide evidence or a basis for its sweeping conclusion about the impacts of the loss of nuclear power on the State's climate progress. It also does not substantiate why State energy goals could not be met in any other way or with any other energy generation technologies. On April 22, 2016, importantly and in contradiction to the Governor's letter, the New York Independent Service Operator ("NYISO") specifically concluded that the loss of the power generated by the Fitzpatrick and Ginna nuclear power plants, also subject to the Commission Orders, would not be the basis for the Tier 3 nuclear subsidy. *Amended Verified Petition ¶ 54.* NYISO manages the State's competitive wholesale electric marketplace and is responsible for ensuring grid reliability – that there is adequate supply to meet demand. NYISO concluded that in the next system reliability forecast window, 2016 - 2020, that there are no electricity system reliability concerns in New York stemming from the anticipated closures of the FitzPatrick and Ginna reactors, as well as those from a number of other generation units expected to cease operation by July 1, 2017.[9] *Amended Verified Petition at ¶54.*[10]

On January 25, 2016, the Commission's *White Paper on the Clean Energy Standard* ("*White Paper*") was filed and published in the State Register in accordance with the January 21, 2016

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[9] NYISO made this evaluation pursuant to the established process set forth in Section 31.2.11.2.4 of Attachment Y to the Open Access Transmission Tariff, using the most recent available load forecast data in NYISO's 2016 Load and Capacity Data Report ("Gold Book"). *See Shapiro Affirmation* at ¶.

[10] *See Generator Deactivation Assessment, James A. FitzPatrick Nuclear Generating Facility, New York Independent System Operator*, (February 11, 2016), (rev. April 22, 2016), *attached to* the *Shapiro Affirmation* at Exhibit __.

Order.[11] The *White Paper* proposes that Tier 3 be created within the Clean Energy Standard - not as part of its renewable energy mandate, but as a separate obligation. *Amended Verified Petition at ¶ 44.* Tier 3 provides qualifying nuclear plants with support payments through a production credit system procured from qualifying providers. The *White Paper* proposed the Tier 3 require payments be "based upon the difference between the anticipated operating costs of the units and the forecasted wholesale prices."[12] In this proposal, the Commission initially set a path for Tier 2 *Renewable Energy Credits* for non-nuclear utility plants and Tier 3 *Zero Emission Credits* for nuclear power plants, both based on established cost-of-operation metrics to establish just and reasonable rates.[13]

On July 8, 2016, the Department of Public Service announced that the proposed Tier 3 mechanism was changed to a valuation of avoided carbon emissions impacts of nuclear generation, instead of the previously used cost-of-operation based formula. In addition, the proposal adopted an unprecedented application of the Environmental Protection Agency's "Social Cost of Carbon" regulatory analysis tool as the basis of pricing subsidies for nuclear generation. *Amended Verified Petition ¶ 59.* The change to ratepayers amounts to an "order of

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[11] 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).

[12] *See* Staff White Paper on Clean Energy Standards, (January 25, 2016) at 32, *available at* http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId-%7B930CE8E2-F2D8-404C-9E36-71A72123A89D%7D.

[13] The *Renewable Energy Credits* are not the subject of the instant *Amended Verified Petition*. Tier 2 *Renewable Energy Credits* initially contained a "maintenance tier" for existing renewables, but in the August 1 order, the PSC declined to guarantee maintenance subsidies for existing renewables. Also, the prices for Tier 2 RECs were projected to be far, far less than the prices of nuclear Zero Emission Credits in Tier 3.

magnitude" increase in the projected cost of the nuclear subsidy. *Amended Verified Petition* ¶ 45. Tier 3 effectively turns on its head the duly enacted State Energy Plan by removing from competition, and instead publicly subsidizing, with New York State ratepayer money, the well-established and long-time, heavily federally-subsidized nuclear power generation industry – a non-renewable source of energy.

There was no meaningful way for the public to review and comment on the Commission's plan to spend billions of their ratepayer dollars based upon the newly proposed Social Cost of Carbon valuation. In fact, the cost study and the public presentations by the Department of Public Service staff made prior to July 8, 2016, were not for the significantly increased costs of the changed Tier 3. This final proposal was released less than one (1) month before the Public Service Commission's August 1, 2016 Order adopting the Social Cost of Carbon valuation and inclusion of Indian Point as a potential beneficiary of Tier 3.

Tier 3 effectively forces the Tier 1 and Tier 2 renewable energy sectors to directly compete with the more heavily subsidized and protected from competition nuclear-generated energy. As a policy choice, this directly conflicts with, and effectively overrules key provisions of the State Energy Plan and the PSL § 66-c obligations to encourage renewable sources in the New York State energy mix.[14] Tier 3 also creates the opposite of the intended "market-based" decentralized "distribute energy" approach promoted in the Reforming Energy Vision proceedings.[15] It creates

[14] The *Reforming Energy Vision* also mandates the encouraging of renewable sources of energy. *In the Matter of Reforming the Energy Vision, Case 14-M-0101* (October 6, 2015).

a discriminatory preference for nuclear energy generated that is unsupported by State Law and inconsistent with the State Energy Plan.

New York State Electricity Market Developments Demonstrate Nuclear Energy is Commercially Unviable

A number of developments before and during the Commission proceedings raised questions about economic viability of the New York nuclear reactors, including:

> On July 11, 2014, after claiming millions of dollars in losses, Exelon announced plans to retire Ginna, and 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. *Amended Verified Petition* ¶ *38*.
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> On November 2, 2015, Entergy announced plans to close the FitzPatrick nuclear facility in late 2016 or early 2017. *Amended Verified Petition* ¶ 42.
>
> In January 2016, Exelon announced that Nine Mile 1 would close, if New York State did not subsidize it. Although Nine Mile 1 is losing money, the new Nine Mile 2, reportedly, is currently profitable. *Amended Verified Petition* ¶ 17.
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> On January 25, 2016, the staff "White Paper" which proposed, *inter alia*, that the Commission adopt a program known as the Zero-Emission Credit ("ZEC") requirement to save New York nuclear reactors facing "financial difficulties." *Amended Verified Petition* ¶ 44.
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> On August 1, 2016, the Order included a finding of "public necessity" for the Ginna, FitzPatrick, and both Nine Mile Point nuclear facilities, which was a requirement of that same Order(s) for the Zero Emission Credit subsidy. The Indian Point nuclear facilities would also be able to take advantage of the subsidy upon a subsequent "public necessity determination." *Amended Verified Petition* ¶¶ 34, 147.

Despite these developments, at no time would there be a full analysis or explanation on the public record and for the public to review the Commissions conclusion of financial difficulties and public necessity providing the necessary record and legal justification for Tier 3.

The Public Service Commission Denies Petitions for Rehearing on the Order

On December 15, 2016, the Commission issued an Order on Petitions for Rehearing regarding the Orders challenged by the instant Amended Verified Petition. *Amended Verified Petition ¶ 76.* In August and September 2016, parties filed seventeen petitions for rehearing challenging, among other things, the basis for the "obligations on load serving entities to financially support the preservation of existing at-risk nuclear zero-emissions attributes to serve their retail customers," or Tier 3. *December Denial of Petitions for Rehearing at* 2. The Petitions to the Commission requested that the proceeding be subject to a rehearing, but were denied by the Commission because, "they do not raise mistakes of law or fact or new circumstances warranting rehearing." *December Denial of Petitions for Rehearing at 3.* The Clearwater/Goshen Green Farms *Verified Petition* was filed on November 30, 2016, and was amended on January 13, 2017. The *Revised Amended Petition* challenges the August 1, 2016 Order and subsequent related November 17, 2016 Orders, as well as the *December 15, 2016 Denial of Petitions for Rehearing.*

The Subsidized Nuclear Power Plants

FitzPatrick

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 Nuclear Power Plant. *Amended Verified Petition ¶ 35.* On November 2, 2015, Entergy announced plans to close the FitzPatrick nuclear facility in late 2016 or early

2017[16] On July 12, 2016, eight days after Tier 3 was revised, Exelon indicated it would purchase Fitzpatrick if New York State provided financial incentives and on November 17, 2016, the Commission approved it.[17] *Amended Verified Petition* ¶ *75.* Tier 3 would be null and void if the event Exelon's purchase of FitzPatrick did not go forward by September 2018.[18]

Ginna

In 1969, the Robert Emmett Ginna Nuclear Power Plant ("Ginna") – a single pressurized water reactor – was licensed along the south shore of Lake Ontario, in Ontario, New York, and in 1970 began commercial operation. *Amended Verified Petition* ¶ *34.* 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. CENG is a joint venture of Exelon Corporation, ("Exelon") and Electricite de France, in which Exelon owns a majority share (50.01%).

More than two years before the Orders were approved, on July 11, 2014, after claiming millions of dollars in losses, Exelon announced that it would recommend to its trustees to retire Ginna without financial assistance to support its continued operation, and asked New York for state aid to keep the facility open. The Commission authorized a temporary financial incentive, after a review of the facility's operating costs, to be provided to CENG to ensure continued operation of

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16 Case #15-E-0640, *supra.*

17 *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

18 *See* August Order at 143.

Ginna for the purpose of ensuring system reliability through March 2017, by which time transmission system upgrades are scheduled to be completed. *Amended Verified Petition* ¶ *38.* At that point, the planned upgrades would render Ginna superfluous from a system reliability standpoint. Rochester Gas & Electric has certified to the Commission that those upgrades are on schedule and will be completed and in service prior to March 2017. *Amended Verified Petition* ¶ 38.

Nine Mile Units 1 & 2

In 1969 and 1988, respectively, the Nine Mile Point, Unit 1 ("Nine Mile 1") and Nine Mile Point, Unit 2 ("Nine Mile 2") boiling water nuclear reactors began operation in Scriba, New York, on the southeast shore of Lake Ontario. *Amended Verified Petition* ¶ 33. Exelon has a majority ownership stake in the Nine Mile Point Nuclear Station, consisting of Nine Mile 1 and Nine Mile 2 through the same CENG joint venture that owns Ginna. 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 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.

The Petitioners

Petitioners are a number of organizations and individuals that have been harmed by the Commission Orders. *Amended Verified Petition* ¶¶ 19 – 29. Petitioners have exhausted their

administrative remedies.[19] As the affidavits in support of the *Amended Verified Petition* demonstrate, the organizations have clearly established standing to challenge the Orders in this proceeding 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.

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

Argument

FIRST CAUSE OF ACTION

THE PUBLIC SERVICECOMMISSION ACTED CONTRARY TO LAW WHEN IT FAILED TO FOLLOW THE REQUIREMENTS OF THE STATE ADMINISTRATIVE PROCEDURE ACT.

In its Rehearing Denial, the Commission explained that issuance of the *July 8th Responsive Proposal* did not require a State Administrative Procedure Act public notice and comment period before the Commission took action approving that proposal.[20] According to the Commission, in contrast to SAPA §102(2)(a)(i) rules, so-called "hard rules" that result in a codified rule published in the State's official compilation of codes, rules and regulations of the (NYCRR), this

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[19] Alternatively, they need not exhaust their administrative remedies due to exceptions to the rule of exhaustion, including futility, *ultra virus*, or constitutional rights.

[20] *December 15, 2016 Denial of Petitions for Rehearing* at 33 – 35.

proceeding falls under SAPA §102(2)(a)(ii) rules, which are informally referred to as "soft rules" because this is a "ratemaking" proceeding. The Commission stated that soft rules pertaining to ratemaking proceedings did not require it to allow further process between issuance of the *July 8th Responsive Proposal* and its action adopting the proposal in August. Moreover, the Commission suggested that the distinction between hard and soft rules is not especially relevant, stating:

> 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. 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 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.[21]

Emphasis added.

The Commission incorrectly characterized its actions regarding the Orders as a "ratemaking." *Amended Verified Petition ¶ 79, 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 denial of the request for rehearing issued on December 15, 2016 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.

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21 *December Denial of Petitions for Rehearing* at 34-35; *footnotes omitted.*

This is a self-serving characterization to evade lawful procedure, belied by the Commission's actions and the very nature of the proceeding. Further, the *July Staff Responsive Proposal* recommended a vastly different approach to calculating the subsidy. While the goal—providing subsidies to the nuclear industry in New York through a new tax ("surcharge") or electric ratepayers, did not change the method and amount of the calculation changed dramatically. Following the Commission's argument to its logical conclusion, it would not have incurred any State Administrative Procedure Act obligations if it had used Powerball lottery numbers to set the amount of the subsidy.

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* State Administrative Procedure Act § 202(8). The violations have a profound 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 sent. The Court has recognized this principle when it vacated provisions of the Commissions Order in the *In the Matter of Eligibility Criteria for Energy Service Companies,* Case 15-M-0127. The Court concluded that "must provide an opportunity to be heard in a meaningful manner and at a meaningful time." *See National Energy Marketers Association, et al. v. New York State Public Service Commission*; *Retail Energy Supply Association, et al. v. Public Service Commission of the State of New York, et al.; Family Energy Inc., et al. c New York State Public Service Commission*, Case Nos. 868-16/870-16/874-16 (Sup. Ct. Albany County July 22, 2016); *see also Matter of Kaur v. New York Urban Dev. Corp.* 15 N.Y.S. 3d 235, 260 (2010).

"An agency may not file a rule with, or submit a notice of adoption to, the secretary of state unless the agency has previously submitted a notice of proposed rulemaking and complied with the provisions of this section". SAPA § 202(5); *see, e.g., Matter of Homestead Funding Corp. v. State of N.Y. Banking Dep't*, 95 A.D.3d 1410, 1412-13 (3d Dep't 2012).

The Commission Proceedings Trigger the Requirements of Both Provisions of State Administrative Procedure Act § 102, But Fail to Meet the Requirements of Either Provision.

On July 8, 2016, the Department of Public Service's Staff posted its *Responsive Proposal*, which was significantly and dramatically different from the prior proposal submitted in the January 2016 White Paper. At that time, it announced that the deadline for public comments on the Responsive Proposal would be July 18, 2016. After multiple parties filed requests for extension of the comment period and urged the Commission to follow the public comment requirements of the State Administrative Procedure Act, the Public Service Commission *only* 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 *July 8th Responsive Proposal. Amended Verified Petition ¶ 46.* Upon information and belief, the *July 8th Responsive Proposal* was not published in the State Register. *Amended Verified Petition ¶ 37, 44.* The Order was adopted on August 1, 2016. *Amended Verified Petition ¶ 47.*

SAPA §202(4-a) legal obligations require that when 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."*

Emphasis added. SAPA § 202(4)(a). The Public Service Commission rehearing denial specifically asserts that this provision does not apply in this proceeding.

The *July 8th 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. *Amended Verified Petition ¶¶ 58-64.* 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 less than $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.

It is inarguable that this truncated comment period combined with the substantial and meaningful changes should have received a new State Administrative Procedure Act notice rather than being treated like an "add-on." That question has been argued recently in the case of *National Energy Marketers Assn. v New York State Pub. Serv. Commn.*, 2016 N.Y. Misc. LEXIS 2739, *1, 2016 NY Slip Op 26233, 1. No such principle has been found by a New York court to cover "add-ons"

or "logical outgrowths" of a proposed administrative rule specified in the initial notice. It did not receive such notice, thus violating the Law.

Assuming, Arguendo, the 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.

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*.

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.[22] 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.

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. *Amended Verified Petition ¶ 63, 66, 72.* 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. *Amended Verified Petition ¶ 24.*

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.

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

[22] 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.

plants, only.[23] The difficulty in public understanding and review of these changes is manifest on the record. *Amended Verified Petition ¶¶62m 175.* 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 to comment on this dramatic change from an established cost of operation calculation to 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 the State Administrative Procedure Act, Additional Hearings For the Tier 3 Proposal Were Clearly Required by Law.

The normal procedure requires notice to the public of the rulemaking. In this case, there were a number of legislative type hearings for 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-based rulemakings of the Commission. In contrast, there is not a requirement for a SEQRA review for a standard ratemaking procedure. Under the State Administrative Procedure Act, the billions of dollar increase between the January White Paper proposal and the subsequent July Responsiveness

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

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 Rehearing Denial stating that because the proceeding was a ratemaking and did not have to comply with the provisions of the State Administrative Procedure Act 102(i)(a) is an error of law.

SECOND CAUSE OF ACTION

THE PUBLIC SERVICE COMMISSION ACTIONS WERE ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION WHEN IT MISAPPLIED THE SOCIAL COST OF CARBON METRIC AS THE LEGAL BASIS FOR TIER 3 FOR THE NUCLEAR REACTORS AND WHEN THEY DECLARED THE REACTORS PUBLICLY NECESSARY.

The *July 8th Responsive Proposal* switched the subsidy structure from the operating-cost-to market-revenue differential proposed in January to a valuation of the carbon emissions impacts of nuclear power based on the Social Cost of Carbon. There is no record provided to the public explaining or justifying the need for the subsidy or to justify the amount of the subsidy. And there were no adjudicatory hearings that would have required the submission of such information and its public evaluation. *See* SAPA § 300 *et seq.* The Commission changed the use of the Social Cost of Carbon with respect to nuclear power relative to its use in all other parts of the Order - Tier 1 and Tier 2. The Commission offered no explanation of why it applied the Social Cost of Carbon differently to nuclear power than to all other energy sources within the same Orders, and offered no detailed analysis supporting its conclusion that the nuclear reactors that are the beneficiaries of the subsidy are publicly necessary. The rationale used to justify billions

of dollars of subsidies to these nuclear reactors under Tier 3 was arbitrary and capricious in violation of State Law.

The Social Cost of Carbon Analysis was Used Differently for Tier 1 and Tier 2.

An agency is required to set forth its reasons for altering a prior course, and without such an explanation, a reviewing court is unable to determine whether the agency had valid reasons for its actions. *Long Island Lighting Co. v. Pub. Serv. Comm'n*, 137 A.D.2d 205, 212 (3d Dep't 1988) (*citing Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 63 N.Y.2d 424, 441 (1984)). The *July 8th Responsive Proposal* fundamentally changed its application of the Social Cost of Carbon metric with respect to nuclear generation, by using it to *price a consumer subsidy* for nuclear power, rather than use it as an *estimate of the environmental impacts* of nuclear power for the purpose of regulatory analysis. However, the use of the Social Cost of Carbon was applied differently with respect to all other parts of the Clean Energy Standard proposal, namely Tier 1 and Tier 2, respecting renewable energy sources. Nor did the Department revise its Cost Study and Environmental Impact Statement, in which the Social Cost of Carbon was applied uniformly to all energy sources as a measure of their environmental impact. All of these are different applications of the same concept, and there is no rationale or justification for the difference.

In addition, the *July 8th Responsive Proposal* arbitrarily and capriciously adopted a different, unspecified methodology for evaluating the environmental impacts of nuclear power than it did for all other energy sources. There was no justification for using a completely novel, unspecified

methodology for evaluating the environmental impact of nuclear power in a different way than for all other energy sources in the Clean Energy Standard proposal. In the August Order, the Commission arbitrarily and capriciously adopted the proposal without modification or correction.

The Social Cost of Carbon Was Misapplied by the Commission.

The Commission misapplies the Social Cost of Carbon metric it uses in the Order. The federal Interagency Working Group did not formulate the social cost of carbon to provide subsidies for nuclear energy, renewable energy, or any other purported means of mitigating carbon emissions. *Amended Verified Petition* ¶ . The Environmental Protection Agency has expressly utilized the Social Cost of Carbon solely for the purposes of regulatory analysis, to compare the global impacts of carbon dioxide emissions from different energy resource options. The Commission cites *Zero Zone v the United States Department of Energy* for the proposition that the Social Cost of Carbon has passed judicial muster.[24]

The Commission's attempt to confuse the validity of its use of the Social Cost of Carbon relies, misleadingly, on an inapposite federal case. Indeed, the federal court in *Zero Zone* determined that the Department of Energy had statutory authority jurisdiction in its regulatory role to use the Social Cost of Carbon for setting electrical appliance efficiency standards. *Zero Zone*, a completely different substantive and procedural situation, is not *prima facia* evidence for the application of Social Cost of Carbon for Subsidies to commercially uncompetitive nuclear power

[24] *Zero Zone, Inc. et al., v. U.S. Dept. of Energy*, 832 F.3d 654 (7th Cir. Aug. 8, 2016).

plants in New York. Further, there is no explanation of why the Social Cost of Carbon would not apply to all Renewable Energy Credits and why the Commission only applied it to price Tier 3's so-called Zero Emissions Credits for nuclear generation.

The implications of the change in calculation of the subsidies also did not include analysis or demonstration, on the record, of the actual financial bases of need for the significant amount of monies of the beneficiaries of the subsidy. Thus, the sudden and significant changes made on the scant public record for these changes were arbitrary and capricious.

There Was No Factual Record Developed for the "Public Necessity" Determination; The "Public Necessity" Regulatory Designation Criteria Did Not Exist Before this Commission Proceeding.

There was not public review or comment opportunity with respect to the "public necessity" components of the Order, as well as the "public necessity" determination for any particular nuclear power generator. *Amended Verified Petition* ¶¶ *55,56.*[25] The "public necessity" finding, which is the critical to authorizing subsidies for any particular nuclear facility under Tier 3, has no basis in the State Energy Plan. The public necessity findings in Tier 3 are directly tied to representations regarding the economic conditions of the four nuclear power plant operators, but there was no detailed factual record on this determination for any of the nuclear reactors, nor was the legally required public comment and review on those findings.

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[25] The Commission's assertion of necessity, it must be noted, is directly contradicted by the April 22, 2016 NYISO which does "not identify resource adequacy or transmission security-related Reliability need for the 2016 - 2020 near term period." *Amended Verified Petition* ¶ *169.* The Commission omitted from the record the material NYISO Generator Deactivation Assessment for FitzPatrick issued on April 22, 2016.

In justifying the Tier 3 Subsidy for the nuclear generators, the Commission applied a previously unknown and never used before public necessity five- point test. It summarily concluded, and without a record, that each of the four reactors met this test. *See* August 1, 2016 Order at 49-52.

There is no basis in the State Energy Plan for the Commissions Public Necessity test for the nuclear reactors. 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). The Public Service Law excludes nuclear generation from the State Energy Plan.

The subsidies for two of the four reactors the Commission declared "publicly necessary" will cease in 2029, at the latest, when their previously renewed federal licenses expire, regardless of the subsidies provided. If the basis for nuclear subsidies is the assumption that closed reactors are replaced by fossil fuel generation, then in 2029 the closures of Ginna and Nine Mile Point Unit 1 and the termination of Tier 3 nuclear subsidies mean that all of their generation would be replaced with fossil fuels - and those reactors, therefore, have no role to play in meeting the 2030 goal. Without interim emissions goals in the State Energy Plan, there is no basis for the nuclear subsidies.

The Commission determined that the four nuclear reactors were necessary without any public record demonstrating why that was the case. This finding was the critical component authorizing the Tier 3. The Commission then changed the way it applied the Social Cost of Carbon from the

way it applied the concept in Tiers 1 and 2 without explanation. The misapplication of the Social Cost of Carbon valuation then inflated the amount of the Tier 3 subsidy by billions of dollars. The Commission's actions were arbitrary and capricious in changing the application of the Social Cost of Carbon metric and concluding, without any record support, that this subsidy was necessary to allow continued operation of the nuclear reactors through 2029.

THIRD CAUSE OF ACTION

PSC ACTED ARBITRARILY AND CAPRICIOUSLY, CONTRARY TO LAW WHEN IT ISSUED THE PSC ORDER WITHOUT USING CLEAR AND COHERENT WORDS WITH COMMON EVERYDAY MEANINGS AS REQUIRED BY STATE ADMINISTRATIVE PROCEDURE ACT §201.

The Public Service Commission violated fundamental obligations of the State Administrative Procedure Act. In advancing Tier 3, the Public Service Commission used a false and confusing "sales pitch" to the public that goes beyond semantics. Tier 3 of the Clean Energy Standard Order touts so-called "zero-emission" credits earned from ongoing nuclear power generation. The use of these terms is misleading.

"Section 202 of the State Administrative Procedure Act 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." *Matter of Med. Soc'y of State of N Y., Inc. v. Levin,* 185 Misc. 2d 536, 540 (Sup. Ct. N.Y. County 2000), *aff'd,* 280 A.D.2d 309 (1st Dep't 2001). *Accord,* SAPA § 202(1)(a). The Act, establishes that "notice of proposed rulemaking "shall" contain, among other things,

> minimum procedures for all agencies, provided, however, an agency may adopt by rule additional procedures not inconsistent with statute. 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."

SAPA §201.

Tier 3 violates the requirements for the use of clear and coherent language with common and everyday meanings. It identifies nuclear generation as "zero-emission" falsely asserting to members of the public that the subsidy will result in energy that is produced with no emissions. The cycle of producing nuclear fuel and transporting in to nuclear facilities is far from carbon emissions free. The public record on this point is clear – numerous submissions, including by Petitioner Clearwater, provide authoritative evidence of nuclear emissions. *See Conover Affidavit at ¶ 7.* A brief search on the internet reveals that emission(s) is defined as "the production and discharge of something, especially gas or radiation"; listed synonyms include discharge, release and leak.[26] The United States government agency that has among its many responsibilities addressing emissions into the air, the Environmental Protection Agency (EPA), notes, "EPA uses its authority from the Clean Air Act to limit the amount of radioactive material

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[26] Cambridge Dictionary, http://dictionary.cambridge.org/dictionary/english/emission, defines emissions as "the act of sending out gas, heat, light, etc." The Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/emission, defines emissions as "the act of producing or sending out something (such as energy or gas) from a source". Merriam-Webster also cites radiation to illustrate emissions: "something set forth by emitting: as 2 a: something set forth by emitting as *(1):* electromagnetic radiation from an antenna or celestial body *(2) usually plural*: substances discharged into the air (as by a smokestack or an automobile engine) b: effluvium." (The definition of effluvium http://www.merriam-webster.com/dictionary/effluvium is 1: "an invisible emanation" and 2: "a by-product especially in the form of waste.")

released into the air from nuclear facilities. EPA sets limits on radioactive emissions from all federal and industrial facilities." *Amended Verified Petition ¶ 43; See Conover Aff. at ¶ __.*[27]

There is substantial information about the emissions impacts of nuclear power generation. Nuclear energy production involves mining, milling, fabrication, transportation, and use and storage that all produce extensive carbon and other greenhouse gas emissions.[28] Nuclear plants routinely emit known carcinogens and climate change catalysts, radioactive, greenhouse gases, and thermal emissions into the air, water and ground through planned and unplanned releases and release. Under normal operating conditions nuclear reactors routinely and daily emit tritium, cesium, strontium; greenhouse gases including newly produced atoms of Carbon-14, as radioactive CO_2 and methane; as well as, large quantities of thermal pollution.[29] Since radioactive emissions are cumulative, adding additional years to operation of financially unviable nuclear reactors unwittingly significantly increases cumulative radioactive, thermal and greenhouse gases emissions from nuclear energy production. Also, as reactors age, spills, leaks, and accidents greatly increase emissions

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27 *See* https://www3.epa.gov/radtown/nuclear-power-plants.html.

28 Prima facie support showing high-energy use during front stage of the nuclear fuel cycle: Nuclear Information and Resource Service, slides, nuclear waste presentation, Nov 3, 2016. https://drive.google.com/file/d/0B6f4Eb125YU1cFptdmFkV0l4TUk/view. (Figures derived from WISE Uranium web page data http://www.wise-uranium.org/index.html.) Making nuclear fuel creates voluminous amounts of contaminated (radioactivity and heavy metals) waste at the front end of the nuclear fuel cycle – before fission. In rounded numbers, making 1 ton of uranium fuel leaves behind: 20,000 tons of waste rock (from mining); 4,000 tons of solid and 4,000 tons of liquid waste (from milling); 5 tons of solid and 46 cubic meters of liquid waste (from conversion); 6 tons of depleted uranium (from enrichment); and 0.5 cubic meters of solid waste and 8 cubic meters of liquid waste (from fuel fabrication).

29 *See* ___, *attached to* the *Shapiro Affirmation* at Exhibit __.

The NRC has identified that some reactors in New York State are currently leaking and emitting radioactive tritium into the groundwater.[30] On February 5, 2016, Entergy notified the Nuclear Regulatory Commission of a new on-site tritium leak at the Indian Point nuclear power plant. One of the well samples taken around that time detected tritium levels of about 14.8 million picocuries per liter.[31] Since September 2005, leakage of radioactive emissions identified as emanating from an exterior wall of the Unit 2 spent fuel pool has been continuously leaking. *Amended Verified Petition ¶ 137 - 138.*[32] An inspection report released by the Nuclear Regulatory Commission describes violations at the James A. FitzPatrick Nuclear Power Plant, including exposing workers to high amounts of radiation and allowing leaks of radioactive emissions and material over the past four years.[33]

The Commission Orders directly contradicts facts and information submitted in the proceedings by the New York State Attorney General to contest the license renewals for Indian Point Unit 2 and Unit 3 before the Nuclear Regulatory Commission.[34] This agency and the State's highest legal officer have made clear that nuclear emissions are reality within New York State where

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30 *See Aff Elie/Lee, attached to* the *Shapiro Affirmation* at Exhibit D.

31 *See Aff Elie/Lee, attached to* the *Shapiro Affirmation* at Exhibit D.

32 *See* Groundwater Leakage information, *available at* http://www.nrc.gov/info-finder/reactors/ip/ip-groundwater-leakage.html.

33 *See* 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

34 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
In the Matter of Entergy Nuclear Operations Inc., v. New York State Department of State, No. 179. New York State Court of Appeals (Albany).

nuclear power plants are currently leaking and emitting radioactive tritium into the groundwater of New York State.[35]

FOURTH CAUSE OF ACTION

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

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 8th Responsive Proposal* that would become the Public Service Commission Order on August 1, 2016. There were no additional environmental impact statement analyses regarding the *July 8th Responsiveness Proposal.*

On May 23, 2016, the *Final Supplemental Generic EIS* was issued. *Amended Verified Petition* ¶ 57. The *Supplemental Generic EIS* only looks at the January Tier 3 Proposal and a no action alternative – a false binary analysis. 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

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35 Entergy notified the NRC on Feb. 5. 2016 of a new on-site tritium leak at the Indian Point nuclear power plant. One of the well samples taken around that time indicated tritium levels of about 14.8 million picocuries per liter. In September 2005 leakage was identified on an exterior wall of the Unit 2 spent fuel pool. http://www.nrc.gov/info-finder/reactors/ip/ip-groundwater-leakage.html An inspection report released by the Nuclear Regulatory Commission describes violations at the James A. FitzPatrick Nuclear Power Plant, including exposing workers to high amounts of radiation and allowing leaks of radioactive material over the past four years. http://www.nrc.gov/reading-rm/adams.html 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/ML1632/ML16332A312.pdf

provisions. Thus a second *Supplemental Generic EIS* to consider the July Responsive Proposal was required, but never undertaken. The "no action" scenario reviewed focused on allowing existing nuclear reactors to close as owners deemed them too unprofitable. *Amended Verified Petition ¶ 129.*

Judicial Standard of Review for SEQRA Actions.

In reviewing a SEQRA determination, judicial review is limited to whether "a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." *In re Corrini v Scarsdale, 781 Misc.3d 907, 781 N.Y.S.2d 623, 2003 WL 23145905 (N.Y.Sup.), 5* (West. Cty. Dec. 23, 2003). The Court cannot "weigh the desirability of any action or choose among alternatives, but assure that the agency itself has satisfied SEQRA, procedurally and substantively …'[n]othing in the law requires an agency to reach a particular result on any issue, or permits the second-guess of the agency's choice which can be annulled only if arbitrary, capricious or unsupported by substantial evidence." *Id. citing In re City of Rye v. Korff, 249 A.D.2d 470 quoting In re Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400, 416 – 417, 503 N.Y.S.2d 298. In re Jackson* further holds that the Court's analysis is whether the agency "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." *In re Jackson, 67 N.Y.2d at 416, 503 N.Y.S.2d 298.* In reaching such conclusion, the lead agency must follow the criteria set forth in 6 NYCRR § 617.2 - .3. The conclusions are not supported by substantial evidence, or have little or no support, the Court may annul the determination. *See In re WEOK Broadcasting Corp. v Planning Board of the Town of Lloyd, 79 N.Y.2d 373.* The

information necessary is generally "the kind of evidence on which reasonable person are accustomed to rely in serious affairs." *Id. at 383.*

The SEQRA review falls far short of the obligation to look at potentially significant adverse environmental impacts. Notably, the Orders advance Zero Emissions Credits into the public record yet fails to actually look at the emission generated by nuclear generated electricity, including the various stages of uranium's life cycle (mining, processing, transporting, emissions, containment and storage) as fuel. Not only did the Commission fail to consider impacts on the physical environment of prolonging the operation of nuclear facilities in New York, the Commission also failed to consider impacts on the economic environment. Higher utility bills harm low- and moderate-income ratepayers by forcing them to forgo a quality meal for their families or staying home from work when sick so as to accumulate sufficient funds to pay these artificially higher bills. Higher utility bills increase the operating costs of businesses, potentially leading to loss of jobs if they curtail operations or move out of New York to lower-cost states. The Commissions environmental review also failed to consider financial and environmental impacts of the out-of-market subsidy on the maintenance of existing and development of additional real renewable energy and on the Petitioners who are already paying a premium above wholesale energy prices through contracts with renewable energy producers and suppliers.

The Supplemental Generic Environmental Impact Statement Does Not Analyze the Impacts of the Order, Instead Reviews a Previous Substantially Different Proposal That Does Not Include the Social Cost of Carbon.

The Commission issued the Draft Supplemental Generic Environmental Impact Statement (Draft Supplemental Generic EIS) on February 23, 2016, which was noticed in the State Register on

February 24, 2016. *Amended Verified Petition ¶ 48.* The *Supplemental Generic EIS* reviews the previous January 2016 proposal – and not the substantially revised *July 8th Responsiveness Proposal.* The Tier 3 versions differ substantially, and thus render the SEQRA analysis *prima facia* invalid. *Amended Verified Petition ¶ 59 – 64, 139.* 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. 6 NYCRR Part 617.11(d)(2), (4).

The *July 8 Responsive Proposal* was not considered in the *Supplemental Generic EIS* adopted as Final 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. 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.[36]

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 controlled by New York State. *Amended Verified Petition* ¶ 136. 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 Supplemental Generic EIS*.

The Public Record Includes Many Reasonable Alternatives For the Analysis But All Were Ignored by the Public Service Commission in their SEQRA Analysis.

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. *Amended Verified Petition* ¶ 130. The *Supplemental Generic EIS* roes not included higher energy efficiency resources or increased renewable energy as a reasonable alternative. In comparison,

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

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 the Renewable Portfolio Standard* at 76 (September 24, 2004).

The direct costs of the *July 8, 2016 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. 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 in 2030, at more than three (3) times the cost. *Amended Verified Petition* ¶ 134. This analysis is evidence that new renewables are significantly more cost-effective than the nuclear tier in meeting the state's emissions goal and will continue to operate beyond the 2029 end date for the Tier 3 subsidy program.

The Commission's failure to consider other alternatives to nuclear subsidies when sufficient information was available on other forms of generation that the Orders fund at far lower levels of subsidy but that would provide more energy over the 12 mandatory term of Tier 3 is arbitrary

and capricious, and in violation of law and could will have substantial negative economic and environmental impacts.

FIFTH CAUSE OF ACTION

TIER 3 OF PUBLIC SERVICE COMMISSION ORDERS IS CONTRARY TO PUBLIC SERVICE LAW § 66-C, THEREBY ENACTED IN EXCESS OF JURISDICTION AND, THUS, IS NULL AND VOID.

It is well-established that the Commission "has only those powers conferred upon it by the Legislature and such other powers as are incidental thereto or necessarily implied therefrom." *In the Matter of New York Telephone Co. v. Public Service Commission* 397 N.Y.S. 2d 223 (1977). "[T]he repository of the Commission's regulatory authority is the Public Service Law, and the Commission is powerless to exceed the authority conferred on it by that statute." *In the Matter of National Merchandising Corp. v. Public Service Commission*, 5 N.Y. 2d 485 (1959). 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. *Amended Verified Petition ¶ 88.*

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 Order and it is null and void.

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 the corporations that own and operate them, in an amount approximately twice as much as subsidies for renewable energy generation.

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

The June 22, 2105 New York State Energy Plan sets forth a stated goal of fifty percent of all electricity used in the state should use energy generated from renewable resources by 2030. *Amended Verified Petition ¶ 79.* Noticeably absent from statutory authorization for the Plan is nuclear generated energy. *Amended Verified Petition ¶ 41.* In fact, the State Energy Plan is silent on whether nuclear power has any particular or special role to play and does not indicate any actual or potential need to provide for the maintenance, preservation, promotion or subsidization of nuclear power plants. The plan also does not discuss or contemplate the Tier 3 nuclear power subsidization program that is subject of the instant proceeding.

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*." 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. Thus, there is no statutory authority for the Commission to create the Tier 3 provisions as they have been set forth in the Orders.

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

The Tier 3 requirements set forth in the Orders unfairly and unjustly discriminates 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, one of the key underlying justifications for Tier 3 subsidy. *Amended Verified Petition at ¶ 146.* 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 cost for electricity that unjustly requires these consumers to purchase what many of them they sought to avoid - *nuclear generated electricity which is not 100% renewable. Amended Verified Petition ¶ 159.* In fact, those paying 100% for renewable sources will end up have to pay 115% of their rates for that same power because of the Tier 3 subsidies.

The Public Service Law requires the Commission to set "just and reasonable" prices in a fair manner under the State's policy of conservation of energy. Tier 3 of the Orders fails to meet this clear legal requirement. Not only is the Public Service Commission without express statutory

authorization to enact the Tier 3 nuclear power subsidization - which does not even appear to have been contemplated by the State of New York until there was a express directive by the Governor to the Public Service Commission in December 2015. *Amended Verified Petition at ¶ 43.* Moreover, the States did not even contemplate such an approach in its lengthy process, from 2004 to 2015, to develop the State Energy Plan.[37]

The Orders expressly and discriminatorily require a group of ratepayers – those that have taken the burden of advancing the state's ultimate goal of renewably sourced energy by committing to purchase 100% of their needs from these sources - and makes them pay an additional "surcharge." *Amended Verified Petition* ¶¶ 146, 148, 150. In effect, Tier 3 singles out and penalizes those New York state ratepayers that were early adopters. Further, the increase in electricity bills will disproportionately impact those ratepayers struggle to pay their existing (pre-Zero Emission Credits impacted electricity bills). *Amended Verified Petition ¶¶ 157, 158.*

Tier 3 is also unreasonable in its departure from the State Energy Plan and its directives in State law on energy conservation. *See* PSL § 66-c. Tier 3 legally obligates all ratepayers subsidize an otherwise economically unsustainable nuclear industry, and thus effectively acts counter to other State initiatives seeking to decentralize the New York electricity market and develop competitive markets for renewable and distributed energy in an effort to reduce ratepayer subsidies and costs. *Amended Verified Petition ¶ 13, 14.* 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

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37 *See Affidavit of Lucas* at ¶¶ , *attached hereto* as Exhibit __ to the *Amended Verified Petition.*

at a cost of $684,060.[38] *Amended Verified Petition ¶ 153.* 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.[39] *Amended Verified Petition ¶ 153.* 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 Reforming the Energy Vision strategy. *Amended Verified Petition ¶ 154.* 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. *Amended Verified Petition ¶ 154.* 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.

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[38] *See* http://liherald.com/rockvillecentre/stories/Electric-bill-hike-coming,86741.

[39] Calculated using formula for PSC Tier 3 Tranches and energy consumption for Ulster County buildings for 2015-2016 provided by Ulster County Comptroller's Office.

Tier 3 unjustly and unreasonably singles out and penalizes those New York state ratepayers that were early adopters. For these reasons, the Public Service Commission did not have legal authority to Order Tier 3. 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 15% double-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 renewable energy in New York. 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 TIER 3 SUBSIDY UNDER THEORDER IS AN ABUSE OF DISCRETION, ARBITRARY AND CAPRICIOUS, LACKING IN A RATIONAL BASIS, AND NOT OTHERWISE IN ACCORDANCE WITH THE LAW.

The Commission expanded the Large-Scale Renewable Proceeding to include a track for nuclear energy plants. The Commission administratively set pricing, eligibility and conditions for 20-year NYSERDA contracts to subsidize the nuclear reactors and to ensure that a buyer comes forward to purchase the Fitzpatrick plant. 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 - in its original proposal - 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.

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 Order concludes that Nine Mile Units 1 & 2, Ginna and Fitzpatrick were eligible for the subsidies under the NYSERDA contracts - even without looking at FitzPatrick's financial statements. To understand the scope of the Order, the Commission's Denied the Petitions to Rehear to every entity except the owners of Ginna and Fitzpatrick and that the Commission granted a partial rehearing to the owners of Ginna and FitzPatrick to remove the condition that was place there to induce them to enter into a contract of sale which they did one week after the August Order was issued and effective. 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.

"When the issue before the Court concerns the exercise of discretion by an administrative agency, it 'cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious'. The Court also must be that decisions of the

Commission that '(a)dministrative agencies are endowed by experience with greater expertise' and on issues of fact and policy it is appropriate to defer to the agency and 'whose judgment in such matters will be set aside only it if can be shown that rational basis and reasonable support in the record are lacking. Stated differently, Commission's determinations are entitled to substantial deference and must be affirmed unless they lack 'any reasonable support in the record for the action taken'. '[A] court, in dealing with a determination which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency',...'an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself' and not by the agency's post order actions". *National Energy Marketers Assn. v New York State Pub. Serv. Commn.*, 53 Misc. 3d 641, 658-659 (Supreme Court, Albany County, 2016) (*internal quotations and citations omitted*) .

The courts have held that the Commission can validly set rates based on considerations other than cost as long as the determination is rationally based. *See e.g., New York State Council of Retail Merchants, Inc. v. Public Service Commission*, 45 N.Y.2d 661, 669 (1978), where the Court found that a rational basis exists in the record to support ratemaking introducing time-of-day pricing as the basis for a new rate structure for the furnishing of electricity, and, as a first step to that end, approving the proposal of Long Island Lighting Company to initiate the program by charging particularly designed time-of-day rates to a small group of its largest commercial and industrial customers).[40] Here, the record contains significant unexplained inconsistencies regarding the Commission's methodology in promulgating the Tier 3 subsidy and on an

[40] *See also MCI Telecommunications Corp. v. Public Service Com.*, 108 A.D.2d 289, 296 (3rd Dep't 1985) where the Court concluded that a rational basis exists in the record to support ratemaking for superior quality of long-distance telephone access service based on negative competitive market, relative market positions, and the greater value of the service to a class of customers.

expedited basis. Although the Commission may exercise independent judgment as to ratemaking (essentially legislative function) by basing its analysis on data that is *not part of record,* (*Rochester Gas & Electric Corp. v Public Service Com.*, 135 A.D.2d 4 [N.Y. App. Div. 3d Dep't 1987], *app. dismissed*, 72 N.Y.2d 840 [1988] [emphasis added]), the record in the case at bar contains significant contradictions which the Commission has not explained, s*ee generally, Dist. Hosp. Partners, L.P. v. Burwell, 786 F.3d 46* (D.C. Circuit, 2015) (agency action was arbitrary and capricious because inconsistencies in the record went unexplained (internal quotations and citations omitted)), as follows:

The Commission Had Already Authorized The Retirement of Ginna Prior to the August Order.

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.[41] 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

[41] *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.

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.

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, NYISO would create a statewide resource deficiency constituting a resource Reliability Need starting in 2019.[42] 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 - indeed, on April 22, 2016, a mere two months later, and during the pendency of Tier 3's proceeding - issued a revised, superseding assessment, finding 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. 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 Without Explanation, or Justification, Offering a Two-Week Comment Period Before Closing the Record.

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[42] 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; it assessed that the loss of the FitzPatrick nuclear plant along with a number of other plant retirements. *See* https://home.nyiso.com, *last visited* on January 8, 2017. *See also* Order Further Expanding Scope of Proceeding and Seeking Comments, Case No. 15-E-0302 (February 24, 2016) at 3.

In the Order Further Expanding Scope of Proceedings (February 24, 2016) at 5 and the Appendix, the Commission originally proposed a detailed cost-of-operation basis for imposing the Tier 3 subsidy (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"):

> "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."

The *July 8th Responsiveness Proposal* 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.

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 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.

> An agency is required to set forth its reasons for altering a prior course and without such an explanation, a reviewing court is unable to determine whether the agency had valid reasons for its actions.

Long Island Lighting Co. v. Pub. Serv. Comm'n, 137 A.D.2d 205, 212 (3d Dep't 1988), *citing Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n,* 63 N.Y.2d 424, 441 (1984).[43]

Here, the Commission expressly left open the question of whether *any* state-mandated bilateral contract ratemaking program - including a program based on the social cost of carbon, a non-cost-of-operation metric - would, in fact, be "untethered" to the retail sale of electricity in the competitive wholesale generators market which is overseen by NYISO, from which the Commission regulation is exempted under federal law (69, 100, 121). A separate lawsuit challenging the CES 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.

The Commission's reliance on *Multiple Intervenors v. Public Service Com.,* (*infra*) for the proposition that the Commission has "authority to include the cost of programs in rates, if

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[43] *See generally, Farmers Union Cent. Exchange, Inc. v. Federal Energy Regulatory Com.,* 734 F.2d 1486 (D.C. Circuit, 1984) where the Court remanded the FERC order where FERC contravened its statutory responsibility to ensure that oil pipeline rates are "just and reasonable", failed to give due consideration to responsible alternative ratemaking methodologies proposed during its administrative proceedings, and failed to offer a reasoned explanation in support of its own chosen ratemaking methodology was "arbitrary and capricious" agency action.

needed."[44] The *Multiple Intervenors* court upheld the Commission's order authorizing a novel rate structure - the recoverability of certain direct side management lost profits and incentive payments under the Commission's conservation program in subsequent rate proceedings - because (1) the PSC had the authority under Public Service Law § 5(2) to establish conservation programs and to set rates based on factors other than electricity production and (2) the record was void of any indication that the Commission's program would not be cost effective in achieving the energy conservation policy. *Id.* at 143.

In the case at bar, the Commission did much more than introduce a new rate structure: 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.[45]

The promulgation of the Tier 3 subsidy in the August Order is not merely an environmental conservation program. It is ratemaking. The Commission promulgated the purchase price under long-term NYSERDA contracts based on the Social Cost of Carbon, outside a cost-of-operation methodology, which falls squarely, by analogy, with the facts presented by *New York State Elec.*

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[44] *Order Expanding Scope of Proceeding and Seeking Comments* (January 21, 2016) at 6, footnote 12.

[45] *Cf. New York State Council of Retail Merchants, Inc. v. Public Service Com.*, 45 N.Y.2d 661, 664-665 (1978) (authorizing the introduction of time-of-day pricing as the basis for a new rate structure and, as a first step to that end, approving the proposal of the utility company to initiate the program was rational and not arbitrary and capricious absent any evidence that the plan was not cost effective in meeting PSC's energy conservation policy).

& Gas Corp. v. Saranac Power Partners, L.P. 117 F. Supp. 2d. 211, 245, 251-253 (U.S. N.D., 2000). In 1978, Congress passed the Public Utilities Regulatory Policies Act ("PURPA"), 16 U.S.C. § 824a–3, as part of a package of legislation entitled the "National Energy Act." PURPA was designed to promote long-term economic growth by reducing the nation's reliance on oil and gas, encourage the development of alternative energy sources and thereby combat a nationwide energy crisis. In *New York State Elec. & Gas Corp.*, the utility company unsuccessfully challenged the Commission's order which obligated it to pay more than avoided costs under PURPA contracts (but, there, unlike the case at bar, Congress expressly exempted qualified co-generators from state rate (just and reasonable) regulation). The Commission administratively setting the purchase price under long-term NYSERDA contracts is ratemaking. Moreover, Tier 3's ratemaking under the CES Order is not prospective in nature because Tier 3 provided the NYSERDA contract which guaranteed the social cost of carbon subsidy in order to facilitate Exelon entering into a contract with Energy to purchase FitzPatrick: the effect of the Oder was definite and immediate,

The omissions from the public comment notices for the proceeding demonstrate the deficiencies of explanation, information and transparency, in the record regarding the Commission's abrupt switch to the non-cost-of-operation methodology. The Commission notices did not publish and did not provide notice that it was establishing

(1) purchase rates and purchasing requirements under long-term NYSERDA contracts;
(2) there was no notice about the mandated NYSERDA contract provisions;
(3) that the PSC was approving NYSERDA contracts;
(4) that the PSC was making facility specific determinations for NYSERDA contract beneficiaries;
(5) that the obligation will apply to every Load Serving Entity 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;

(6) no notice that customers purchasing power directly from the NYISO will be considered Load Serving Entity s 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;

(7) that the Commission reserves the right should the Indian Point attributes become at risk, to possibly calculate the Zero Emission Credit price to reflect the difference between update and downstate market revenues in order to put downstate facilities on Indian Point attributes become at risk, to possibly calculate the Zero Emission Credit 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);

(7) 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,

(8) 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.

Thus, the manifest deficiencies in the notice render it insufficient and unlawful.

The PSC Promulgated Tier 3 Without Regard to Its Own Rules Regarding Ratemaking in The Arena of a Monopoly.

An administrative agency acts arbitrarily and capriciously when it fails to conform to its own rules and regulations"' *Matter of Law Enforcement Officers Union, Dist. Council 82, AFSCME, AFL-* CIO v. State, 229 A.D.2d 286, 291 (3d Dep't 1997) (*quoting Matter of Era Steel Canst. Corp. v. Egan,* 145 A.D.2d 795, 799 (3d Dep't 1988). The Commission set the purchase price

rates for the NYSERDA contracts because "[t]he need for an administratively determined price results from too few owners of the affected facilities for there to be a valid competitive process." *August Order at 130 at footnote 89.*

In it *Order Adopting a Ratemaking and Utility Revenue Model Policy Framework* (issued and effective May 19, 2016) ("*May Order*") - 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 PSC 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. *May Order at 90-91.* However, for purposes of Tier 3, the 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" 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" *See May Order at 51, 53.* "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 Order at 42*. Thus, Tier 3, without explanation, deviates from the Commission's own standards.

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. *See* CPLR 7803(3). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Matter of Peckham v Calogero*, 12 NY3d 424, 431(2009), *citing Matter of Pell v Board of Educ.*, 34 NY2d 222, 231(1974). "The courts will not interfere with the conclusion [of the rate-making agency] except to safeguard the consumer against arbitrary power" *City of Rochester v Rochester Gas & Elec. Corp.*, 233 NY 39, 49 (1922); *Permian Basin Area Rate Cases*, 390 U.S. 747, 797-799 (1968). Given the serous deficiencies in this record, the Orders should be vacated.

Conclusion

Tier 3 purports to set a Clean Energy Standard based upon Zero Emission Credits for nuclear power generation. The order negatively affects Petitioners' interests in violation of State laws. These include Petitioner economic, environmental and public health interests as Petitioner ratepayers that have specifically contracted to avoid nuclear generated electricity, have chosen to power their homes and businesses with one hundred (100%) percent renewably sourced electricity, will now be required to pay additional costs toward the Tier 3 subsidy for nuclear generated electricity. Tier 3 also impacts organizational Petitioner's and their members

economic and environmental interests because it subsidizes reactors will continue to be operated long past their economically viable.

The hallmark of accountability in the United States is adhering to the regulatory review process mandated by laws that guide government decision-making and action. The administrative process in New York provides rights to individual citizens that guarantee their participation. In this case, those laws were not followed, and Petitioners were effectively cut out of a process that will determine how much they spend and what sources of electricity generation they must pay for through 2029. The Commission radically changed Tier 3 between January and July 2016. The proposal takes an entirely different and novel approach to subsidizing nuclear energy, dismissing the originally proposed cost calculation for this part of the Clean Energy Standard. Troublingly, and without an administrative record, the Commission, without a clear record, concludes there is "public necessity" for the nuclear subsidy and misleads the public by claiming the credits mechanism is zero-emissions. The vitally important administrative safeguards, while simple, direct, and extremely important in our democracy, were not followed for Tier 3.

State law procedural and substantively requirements must be followed in both the ratemaking and rulemaking contexts of an executive agency like the Public Service Commission. These provisions require the public be provided the opportunity to review and comment on the substance of the Commission proposals. Further, the Commission, as an agency and a creation of the New York State Legislature, must act pursuant to the legal authority granted to it. These statutes prohibit the use of misleading language to justify its actions, require these actions to be "just and reasonable," particularly in situations involving billion dollars of subsidies, and

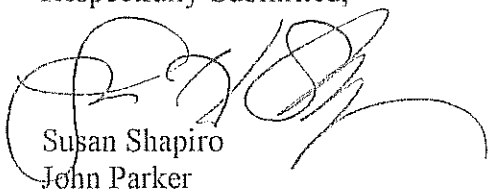
requires a full review and "hard look" at the environmental impacts prior to the Public Service Commission issuing an Order. Irrespective of the substance of Tier 3 of the Orders, these legal obligations for developing and Ordering Tier 3 have not been followed in this proceeding.

We are not asking the Court to insert its judgment as to issues upon which the Commission has authority. Instead, we are only asking the Court to ensure that required legal procedural and factual requirements for the PSC's actions and determinations be followed.

For the foregoing reasons, we ask that this Court annul and void the Tier 3 of the Public Service Commission Order.

Dated: January 13, 2017

Respectfully Submitted,



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