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 OPPOSITION TO MOTION TO DISMISS

-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 OPPOSITION TO MOTION TO DISMISS

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PRELIMINARY STATEMENT

Respondent-Defendants' seek to dismiss the Amended Verified Petition (the "Petition") without answering or providing a record of the proceedings below. The Commission claims that Tier 3 Zero Emission Credit program is beyond the authority of the Court and not subject to review - with respect to how they derived the resulting Order. The Commission's arguments upset and contest the separation of powers. These efforts, as the Commission points out, represent a "superior means-ends fit" to Order $7.6 billion of ratepayers' money to be paid to subsidize failing nuclear reactors under the guise of a Clean Energy Plan meant to meet the state's goal of fifty percent renewable energy supply by 2030. Simply stated, the record does not support the Order.

On this Motion to Dismiss, the following key facts and laws are indisputable:

- *The Administrative Record is not before the Court;*
- *There is no specific authority for the Commission to create subsidies for Nuclear Power;*
- *State Law Obligates the State Energy Plan to be Followed. Energy Law Section 6-104(5)(b);*
- *The State Energy Plan does not contemplate a future for unviable Nuclear Power;*
- *The State Energy Plan identifies nuclear power plants having "radioactive emissions";*
- *Tier 3 Subsidizes Operation of 4 nuclear power plants when the Organization in charge of energy markets says that at most, 2 are necessary;*
- *The Commission, and the direct beneficiaries of the billions of dollars in subsidies - Constellation Energy - contests any Participant's right to challenge the Order.*

Petitioners challenge Tier 3 of the Clean Energy Standard Order of August 1, 2016 (the "Order), which includes new provisions that substantially changed the program shortly before the Order was issued by the Public Service Commission (the "Commission" or "PSC") . The Tier 3 program subsidizes the continued operation of four nuclear reactors – James A. Fitzpatrick, R.E. Ginna, and the Nine Mile Point Unit 1 and Unit 2 nuclear facilities in upstate New York (the "Upstate Reactors") through 2029. These Tier 3 subsidy provisions are challenged in this proceeding. The subsidy is funded through "Zero Emission Credits." The name of these credits

served little more than to confuse public perception regarding reasons justifying the Tier 3 subsidy proposal - the unsupported claim that nuclear energy production is "zero-emissions."

A mere twenty-one (21) days after significant changes were first proposed, Tier 3 was substantially changed. It has little to do with supporting a transformation of New York to a Clean Energy Standard - in fact, it directs substantial ratepayer financial resources away from promoting renewables, and directs those monies to subsidizing commercially unviable nuclear reactors by ensuring their operation for another twelve years. The Public Service Law does not authorize the Commission to subsidize the nuclear electric generation industry in New York.

The Large-Scale Renewable Program and the State Energy Plan identify the need to transform to a new energy system and promote renewables:

> We must keep moving forward. New York should accelerate its ongoing transition to a clean energy economy in order to capture the benefits of scale that will lower project costs and produce the job growth, increased private investment in local economies, and emissions reductions that the State and its residents need. *State Energy Plan, Vol 1 at 10.*

The State Energy Plan sets forth renewable energy options for New York State, but its voluminous effort does not contemplate supporting nuclear power, nevermind forcing and diverting billions of dollars of ratepayer monies to subsidize unviable nuclear reactors for twelve years.

STANDARD OF REVIEW ON A MOTION TO DISMISS

Respondents-Defendants', the Commission and Constellation Energy Nuclear Group, Exelon Generation Company, LLC, Ginna Nuclear Power Plant, LLC, Nine Mile Point Nuclear Power Station, Entergy Nuclear Fitzpatrick, LLC, Entergy Nuclear Indian Point 2 and 3, LLC (collectively the "Nominal Respondents" and together with the Commission, the "Respondents") have moved to dismiss the Petition, without answering it and without the administrative agency providing its record. The Motion to Dismiss should be denied by the Court.

The movant has the burden to demonstrate that the pleading, as liberally construed in favor of the plaintiff, states no legally cognizable cause of action. *Leon v Martinez*, 84 N.Y.2d at 87-88; *Guggenheimer v Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 (1977). Even if there are defects in a pleading, in assessing a motion under CPLR § 3211(a)(7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994). Under such circumstances, the inquiry becomes whether the petitioner indeed has a cause of action, not simply whether he or she has stated one in the petition or complaint. *Leon v. Martinez*, 84 N.Y.2d at 88; *Rovello v Orofino Realty Co.*, 40 N.Y.2d 633, 635-36 (1976) at 636; *Guggenheimer v Ginzburg*, 43 NY.2d at 275 (1977) ("the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one").[1]

The Court "must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff "the benefit of every possible favorable inference." *J.P.Morgan Sec. Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324 (2013) at 334 *citing AG Capital Funding Partners, LP v. State st. Bank & Trust Co.*, 5 N.Y.3d 582 (2005), and the Court need "determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994).

In the instant case Petitioners have stated causes of action which raise issues that preclude dismissal, particularly where neither the administrative record, nor the answer, have been provided. Each cause of action will be discussed herein, demonstrating why respondents cannot meet their burden on this motion.

[1] Petitioners, in an abundance of caution, submit additional affidavits of Petitioners' and members of Petitioners' organizations in support of the Petition and in opposition to the Motion to Dismiss. *See* Affirmation of Susan Shapiro, Esq., sworn to on March 24, 2017 and Affidavits attached thereto.

PETITIONERS' CLAIMS ARE TIMELY

Respondents do not contest the timeliness of the filing of by Petitioners' Clearwater, Goshen Green, NIRS, IPSEC, and PHASE. *PSC MOL* at 19; *Nom. MOL* at 17. [2]

Respondents, however, citing to CPLR § 217(1) seek to dismiss the claims of the remaining Petitioners on statute of limitations grounds arguing that they have failed to "bring those claims "within four months after the determination to be reviewed." *PSC MOL* at 19–20, *Nom. MOL* at 16–17. Nominal Respondents.point out that the Commission's September 7, 2016 Notice claimed it was "only toll[ing] the statute of limitations as to the petitioner[s] for rehearing," so they argue the remaining are time barred, and that the "relation back" doctrine does not "save" remaining Petitioners. *Nom. MOL* at 17.

Rehearing Denial Commences the Statute of Limitations

The Court of Appeals has decisively addressed the question of when the statute of limitations period begins to run in the context of an Article 78 challenge to administrative action. *See Walton v. New York State Dept. of Correctional Servs.*, 8 N.Y.3d 186, 194 (2007). An administrative determination becomes "final and binding" when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies.

> First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be … significantly ameliorated by further administrative action or by steps available to the complaining party.

citing Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y., 5 NY3d 30, 34, 832 NE.2d 38, 799 NYS2d 182 (2005)[3]

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[2] References to "PSC MOL" are to the Memorandum of Law of the Public Service Commission and to "Nom. MOL" to the Memorandum of Law of the Constellation, et. al., submitted herein. Further it would be unreasonable for the Court to use different statute of limitations for different parties in the same action.

[3] *See also Matter of City of New York [Grand Lafayette Props. LLC]*, 6 NY3d 540, 548, 847 NE2d 1166, 814 NYS2d 592 (2006); *Matter of Comptroller of City of N.Y. v Mayor of City of N.Y.*, 7 NY3d 256, 262, 852 NE.2d 1144, 819 NYS.2d 672 (2006);

The Commission issued the Order on August 1, 2016. The remaining question, is deciding the point at which petitioner's administrative remedies are exhausted, courts must take a pragmatic approach and, when it is plain that "resort to an administrative remedy would be futile," an Article 78 proceeding should be held ripe, and the statute of limitations will begin to run. *See Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52, 57, 385 NE2d 560, 412 NYS2d 821(1978)*. But hindsight cannot be used to determine whether administrative steps were futile. *See Walton*, 8 NY.3d at 194.

The statutory time period for a rehearing request is 30 days; there is no dispute that requests were timely. The Commission, as a matter of law, must decide on a re-hearing request in 30 days. PSL § 22. There were no other administrative remedies or options available to Petitioners. Their request for the rehearing was timely, and they awaited the Commission's timely decision on that request. *Cf. Gross v. State Pub. Serv. Comm'n*, 195 A.D.2d 866, 867, *citing Matter of Columbia Gas v Public Serv. Commn.*, 118 AD.2d 305 (where Petitioner did not make a timely request for rehearing, and thus the Commission was not required to respond, the four month statute of limitation exceeded.)[4] Here, the Commission denied the rehearing requests on December 15, 2016, thus commencing the Statute of Limitation. As case laws law makes clear, all Petitioners properly commenced their claims prior to April 16, 2017 deadline.

Petitioners' Causes of Action are Ripe for Judicial Review

All the cause of actions raised by the Petitioners are ripe for decision by the Court despite

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[4] The finality and exhaustion of remedies requirements are drawn from case law on ripeness for judicial review. *See Matter of Essex County v Zagata*, 91 NY2d 447, 453-454, 454 n, 695 NE.2d 232, 672 NYS2d 281 (1998); The two requirements are conceptually distinct. "The focus of the 'exhaustion' requirement ... is not on the challenged action itself, but on whether administrative procedures are available to review that action and whether those procedures have been exhausted. *Church of St. Paul & St. Andrew v Barwick*, 67 NY.2d 510, 496 NE2d 183, 505 NYS.2d 24 (1986) *cert denied* 479 US 985, 107 S.Ct 574, 93 L Ed.2d 578 (1986). Those who wish to challenge agency determinations under Article 78 may not do so until they have exhausted their administrative remedies, but once this point has been reached, they must act quickly--within four months--or their claims will be time-barred. *Cf. Stop-The-Barge v Cahill*, 298 AD2d 817, *affd* 1 NY3d 218.

Respondents' claim. On Indian Point, they argue, the case is not ripe for adjudication because even though Indian Point is eligible for Tier 3 Zero Emission Credit subsidies, it did not yet apply. When the Order included Indian Point 2 and Indian Point 3 Nuclear Reactors as named beneficiaries of Tier 3, issues related to Indian Point became ripe for adjudication.

Respondents ignore the fact that the Order created the regulatory standard for eligibility of Indian Point to qualify for the Zero Emission Credit program. That change means that Indian Point will not have to show financial need, or the impact on cost to ratepayers, or any of the other requirements under the public necessity test to obtain subsidies. This definitive change, if unchallenged now, will stand as against Indian Point, as this change of standard is the Commission's definitive position on the test used to determine eligibility for Indian Point subsidies. If and when Indian Point (the only identified nuclear reactors that have not yet applied) applies for the subsidies, Petitioners will be beyond the statute of limitations to challenge their eligibility.

The Commission approved the first set (the "tranche") of subsidies to the Upstate Reactors without any financial audit, or review of books and records of each corporation who had claimed financial problems, reducing it to ministerial action. Based solely on the word of the nuclear operators that they were no longer profitable, the Commission approved billions of dollars in subsidies.

The bottom line is that the Commission treated the necessity test as a "checklist" type questionnaire that they then answered within the Order itself. Such actions by the agency are *de facto* ministerial - an action performed upon a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the act, such as the granting of a hunting or fishing license. *See* 6 NYCRR § 617.2(w). For example, under SEQRA, such a ministerial approval is explicitly excluded from the review requirements of the act. *See* 6

NYCRR § 617.5(c)(19) (Type II List). The Order provides that within two (2) years, when the second set (or the 2nd tranche) of the Tier 3 subsidy becomes available, Indian Point would become eligible for Zero Emission Credits. At this point, such an application under the new "necessity" test would make Indian Point eligible for subsidization. Petitioners in the Indian Point reactor community have the right to request adjudication of issues related to the inclusion of Indian Point, as there will be no other opportunities to do so, and they will run the risk that the statute of limitations to challenge the Order's change of eligibility standard would lapse, and that any further approvals by the Commission to provide subsidization of Indian Point are merely ministerial. Indian Point representatives have already publicly stated that Indian Point is no longer financially viable to operate.[5]

The Court Should Deny the Motion to Dismiss Petitioners' First Cause of Action which Alleges Violations of the State Administrative Procedure Act ("SAPA")

The Commission commenced the underlying proceeding and issued the Clean Energy Standard of its own volition. Respondent's cannot dispute that the proceeding was required by the legislature or directed by legislation. *See Resp. PSC,* at 20; *Nom. Rep, MO*L at 19. Commission claims that its actions are authorized by the Public Service Law because it is a "publicly beneficial program." *PSC, MOL* at 20. The Commission claims and defines its actions as a ratemaking, and told the public as much in the rehearing denial. Petitioners' need not succeed to prove every element of its claims regarding the Commission's actions, only that it presents a "legally cognizable cause of action." *Leon v Martinez*, 84 N.Y.2d at 87-88. For the following reasons, it is clear that Petitioners'

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5 *See* Shapiro Aff. ¶16, The closure of Indian Point is an economic decision based on three factors: lower revenues, higher operating costs, and the expense of the relicensing struggle, Entergy officials said in a press conference Monday, January 11, 2017, http://patch.com/new-york/peekskill/shutting-indian-point-was-financial-decision-entergy

meet this burden in their challenge to Commission actions under the State Administrative Procedures Act. Thus, Respondents' Motion to Dismiss necessarily fails.

During the course of the proceeding, the Commission dramatically and radically changed the Zero Emission Credit proposal. Petitioners' due, perhaps, to the unprecedented Commission initiated nuclear subsidy program argued to the Court that the Commission failed to provide procedural due process and failed to follow SAPA's rulemaking process, however the Commission chose to define it. *Petitioners'* MOL at 21 - 25. Petitioners' argued, *by analogy*, that if the utilities themselves were proposing such a dramatic rate increase they would be subject to evidentiary hearings to establish and have cross-examination and review of the proposal.[6] The Commission provided nothing close to such an opportunity to review their revised Tier 3 program.

Respondents' Claim the Order is Promulgated Under SAPA § 102(2)(a)(ii) to Avoid Notice and Hearing Requirements.

Respondents' repeatedly assert Tier 3 was promulgated pursuant to § 102(2)(a)(ii)(i.e., ratemaking). *PSC.* MOL at 30. Tier 3, using the social cost of carbon formula in applying non-cost-of-operation basis for just and reasonable ratemaking for generators, is a new rule under SAPA 102 (2)(a)(i) (i.e., rulemaking). In order for the Court to determine whether this "transformative"[7] regulatory action was rulemaking, ratemaking or both, the administrative record is essential.

However, even if we were to accept Respondents' classification of the action, the Commission's adoption of Tier 3 is a substantial revision from its original proposal to utilize cost of operation as the sole basis to fund continued operations of the Upstate Reactors. It is a major change because the ratepayer impact cost exceeds 1% (Petitioners allege at least 2.5% in paragraph 91 of the Petition), which would require additional notice and hearing under SAPA, .The question

[6] *See* PSC MOL at 32-33; *See also* Petitioners' MOL at 21 -22.
[7] Order at 7, 12, 70, 71, 119 (citing transformative nature of the regulatory scheme)

of whether the impact cost is less or more than 1% is a question of fact that cannot be determined on this motion, particularly where the Court does not have the benefit of the administrative record.[8]

Respondents' argue their administrative actions were solely ratemaking which has more limited public review and comment obligations. Respondents' claim that re-noticing of "major change" are not required by SAPA § 102(2)(a)(ii). Respondents,' however, ignore the fact that the administrative action actually falls under both provisions of SAPA § 102.[9] *Petition* at 24-26. It sets out an entire new program - the Tier 3 Zero Emission Credit Program - is clearly subject of rulemaking subject to the processes of SAPA § 102(2)(a(i). It then applies its regulatory 5 factor "necessity" determination - which has the significant impact to the payments of ratepayers throughout the state.[10]

The problem arises, in part, because the Legislature did not direct the Commission to act on the policy decisions and choices for the Tier 3 Zero Emission Credit program to guide its actions. Simply, on it own accord, the Commission created a regulatory program and then decided that the less "burdensome" approach (for the Commission) under SAPA's procedural requirements should apply. The Commission's arguments that it is a "ratemaking" diminishes accountability and review to the public. The Commission's actions crossed the "difficult-to-define line between administrative rulemaking and legislative policy-making." *Boreali v. Axelrod*, 71 NY.2d 1, 11-14 (1987). Just as the Commission cannot use powers "residing wholly" in the Legislature, it cannot do more than "fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation." *Matter of Nicholas v. Kahn*, 47 NY.2d 24, 31 (1979). Moreover, the

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[8] Without any explanation Nominal Resp. claim the Order was a "logical outgrowth" of the original proposal, Nom. MOL at 30. This bare and unsubstantiated allegation that Tier was a "logical outgrowth" cannot be determined without a factual review of the record, which has not been provided on this Motion to Dismiss.

[9] Subject, of course, to the challenges made by Petitioners' that the Tier 3 Zero Emission Credit program is contrary to law and thus, must be annulled by the Court.

[10] *See* Appendix E, August 1, 2017 Commission's Clean Energy Standard Order

Commission's actions based in "general power" is a departure from previous actions of the Legislature and those actions of the Commission itself. See Discussion of the "Used and Useful" Legislation on unviable nuclear power reactors, see supra Section.[11] It is a significant departure from actions by the Legislature on this subject of nuclear power plant operations.

Simply, the Zero Emission Program of Tier 3 created a regulatory program governed by the procedural mandates of SAPA §102(a)(i) and then applied that Commission created program, causing a significant increase in ratepayer expenses (which would arguable be addressed by SAPA § 102(a)(ii)). The Commission gratuitously commends itself that "the 14-day comment period on that proposal afforded more process than SAPA required." *PSC* MOL at 31. The Commission is dead wrong, SAPA provides procedural rights to the public.[12]

Respondents' Claim that Petitioners' Failed to Raise Claims About a New Notice Period Until the Request for Rehearing are Unsupported by the Record

Nominal Respondents.' arguments ignore the record entirely. In fact, multiple parties complained to the Commission, during the proceeding, that the July 18, 2016 deadline for public comments was not insufficient.[13] In response, the Commission extended the comment period for four additional day. Pet. MOL at 21.

The Changes to the Order Made in the July 8 Responsiveness Proposal Were Substantial.

Among other things, the Commission revised the Order by adding:

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[11] *See also* the Commission's efforts under the Renewable Portfolio Standard, *available at* PSC Case 03-E-0188: Proceeding Regarding a Retail Renewable Portfolio Standard, http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterSeq=17612; *See also* NYSERDA: Renewable Portfolio Standard page https://www.nyserda.ny.gov/All-Programs/Programs/Clean-Energy-Standard/Renewable-Portfolio-Standard.

[12] *See Shapiro* Aff. at ¶10, Exhibit 6. Petitioners' request that the Court take judicial notice of the Legislation as directly relevant to the impacts to the public caused by the lack of procedural due process in this proceeding.

[13] Further, aggrieved by the government action even if they Even if the issue is not personally raised by Petitioner on the administrative record, as the issue was raised in the record by others it is rightfully before the Court. *Matter of Youngewirth v. Town of Ramapo Town Bd., 98 A.D.3d 678.*

- A mandatory twelve year funding period versus a temporary stop gap measure, as originally contemplated;
- A change in the compensation scheme from the well established "cost-of-operations" model to the misapplied concept of "social cost-of-carbon" that was not developed to calculate nuclear subsidies and it raised the costs of the subsidy exponentially to at least approximately $7.6 billion dollars;
- The creation, adoption and implementation of a new and novel "public necessity" regulatory standard, which is based only on a claim of loss of profit by the nuclear generator/beneficiary without financial audit and confirmation of such claim;
- The inclusion of Indian Point as an eligible named beneficiary of Tier 3.

The Commission's changes are major and substantial revisions, and require additional process.

The Commission's Determinations are Not Entitled to Deference.

Petitioners note that the Social Cost of Carbon calculation was not developed to determine a valuation for a subsidy program for commercial unviable nuclear reactors. Further, because there is no statutory authorization, there is no way to glean whether the Commission's program meet the Legislature's intent for action. *See Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 845 (1984).* The Legislature severely restricted financial recoupment regarding failing nuclear reactors. Thus, the Commission's actions in creating a new regulatory program, and in making policy and other assumptions, are not entitled to the deference normally afforded administrative agencies during judicial review.

SECOND CAUSE OF ACTION SHOULD NOT BE DISMISSED: QUESTION OF FACT WHETHER TIER 3 OF THE ORDER IS ARBITRARY AND CAPRICIOUS

The Second Cause of Action argues that Tier 3 should be vacated because the Commission's use of the "social cost of carbon" methodology, the determination of public necessity eligibility, and the determination of the necessity to maintain the operation of the subject nuclear reactors, were arbitrary and capricious. Petition ¶¶ 103-104. Respondents argue the Commission's actions were proper. *PSC* MOL at 36-38; *Nom.* MOL at 33-36.

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 NY.3d 424, 431 (2009). The Commission's discretion in choosing how to determine rates does not extend so far that it can turn to speculation or forgo adequately setting forth the basis in the record for its conclusions. *See 300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY.2d 176, 180 (1978); *Matter of Montauk Improvement v Proccacino*, 41 NY.2d 913, 914 (1977).

The Commission Did Not Provide the Administrative Record to The Court

The Court needs the administrative record to determine whether the Commission's Order has a rational basis. The Commission, however, made this motion to dismiss without filing the administrative record with the Court or with Petitioners. Courts have held that it is not proper to reach the merits of a claim on a motion to dismiss prior to service of answers and the filing of the administrative record, where, as here, the facts on the record are not "so fully presented" to allow a determination. *Matter of Youngewirth v Town of Ramapo Town Bd.*, 98 A.D.3d 678, 950 N.Y.S.2d 157 (2d Dept. 2012). *See also Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100, 101 (1984).

An agency's determination lacks a rational basis if it "relied on factors which (the Legislature) ha[d] not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007)

(internal quotations and citations omitted); *Matter of Nat's Fuel Gas Distrib. Corp. v Public Serv. Comm'n*, 16 NY.3d 360, 368 (2011).

Irrational and Arbitrary Finding of Public Need

The Commission's "foundational premise" for Tier 3 is based upon a single environmental determination - The closure of Fitzpatrick and Ginna, as scheduled on or about April 1, 2017, would result in a need for fossil fuel generated electricity to replace it, jeopardizing the State's Energy Plan for renewable energy by "backsliding" its carbon emissions reduction goals.

The NYISO maintains the reliability (the ability of the electric systems to supply the aggregate electrical demand and energy requirements of their customers at all times, taking into account scheduled and reasonably expected unscheduled outages of system elements) of the New York State Bulk Power System which are binding on all Market Participants, including the Commission.[14] The Commission, in determining to whether there was a need for fossil fuel replacement electricity, relied on New York System Independent Operator (NYISO) Fitzpatrick Generator Deactivation Assessment dated February 11, 2016 ("Original NYISO report"), which was expressly superseded, withdrawn and revised by an April 22, 2016 Report ("Revised NYISO report") which found that there was no need for replacement energy. The Revised NYISO report provided facts and conclusions contrary to the "foundational premise" of Tier 3, finding solar power provides more energy than had originally been assessed. The administrative record below (which

[14] Under the NYISO's rules, a generator must provide the NYISO with a minimum of 365 days' notice before it may be Re- tired or enter into a Mothball Outage...If the Generator Deactivation Assessment does not identify a Reliability Need, an Initiating Generator that has indicated an interest in an early deactivation in its Generator Deactivation Notice may be Retired or enter into a Mothball Outage. NYISO Technical Bulletin 185 (recertified 03/18/16) http://www.nyiso.com/public/webdocs/markets_operations/documents/Technical_Bulletins/Technical_Bulletins/Technical_Bulletins/tb_185.pdf (last viewed March 8, 2016). See generally, New York State Reliability Council Reliability Rules & Compliance Manual For Planning and Operating the New York State Power System Version 36 March 11, 2016 (attached herewith); See also, CES Order at 73 ("Ensuring both the reliability and efficiency of the power system is one of the Commission's chief responsibilities").

has not been provided to the Court) would show the lack of a rational basis to support the Commission's conclusion to that replacement energy was necessary.

In the Commission's July 8th Responsive Proposal, despite the revised NYISO Report for FitzPatrick, continued its finding that "every baseload MWh of zero-emission power from Upstate New York nuclear-power generating facilities (for example, Fitzpatrick and Ginna) that is lost would probably be replaced with power generated with significant levels of carbon emissions"[15], even though no replacement power was needed.

Nominal Respondents argue that the Commission need not have considered the revised NYISO report of no reliability because the "expedited program was a different program." (Nom MOL at 50). This argument, which Petitioners vehemently dispute, would require a review of the full record for the Court to make a determination.. They further argue that the revised NYISO Report need not have been considered because the electric grid system's reliability, much like the Commission's decision to close Ginna is not an "environmental" concern, defies logic and is unavailing *Nom. Resp.*, MOL at 49. The Commission-Respondent's argument that reliability and environmental concerns are "apples and oranges" is equally unavailing. *PSC* MOL at 44. The Order states that the very "foundational basis" and "clear component" of the Commission's authority to promulgate Tier 3 is based on its environmental ZEC program reasonably complying with the State's Energy Plan[16]

Specifically, the Commission's has claimed that, among other things, unless FitzPatrick and Ginna remain operational, the State would "backslide" in its carbon reduction goals and achievements, because of the requirement for fossil fuel replacement electricity in the event of those

[15] Case 15-E-0302, Staff's Responsive Proposal for Preserving Zero Emissions Attributes (July 8, 2016) at 1
[16] 15-E-0302, Order Adopting a Clean Energy Standard (August 1, 2016) at 78, 154

plants ceasing operations.[17] An agency's determination lacks a rational basis if it "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (*internal quotations and citations omitted*); *Matter of Home Depot U.S.A., Inc. v. New York State Pub. Serv. Commn.*, 55 A.D.3d 1111, 1113 3d Dep't 2008 (unexplained contradictions in the record is arbitrary and capricious). Reliability considerations to close a nuclear power plant and thereby commit the State to a course of foreclosing nuclear-powered operation as an alternative action which might be more environmentally sound than closure and replacement by fossil fuel plants is an environmental consideration. *Cf. Citizens for Orderly Energy Policy, Inc. v. Cuomo Citizens for an Orderly Energy Policy, Inc. v. Cuomo*, 159 A.D.2d 141, 160-61 (3rd Dep't 1990) *aff'd* 78 NY2d 398 (1991) *recon. den* 79 NY2d 851 (1992).

The Commission environmental review utterly failed to consider the revised NYISO report, making its determination of "public necessity" for fossil fuel replacement on a withdrawn and superseded report. It is undisputed that the Commissioner totally ignored the revised NYISO Report, which found that there would be NO reliability or resource deficiency in the event FitzPatrick and Ginna retired, as scheduled — data which undercuts the very "foundational premise" for Tier 3. The Commission does not even address this omission in its motion to dismiss.

Commission's Misuse of the Social Cost of Carbon for Tier 3 is Arbitrary and Capricious

The Commission changed the valuation methodology away from using the cost-of-operations proposed in the Staff's White Paper, and instead adopted the nuclear industry's proposal

[17] Case 15-E-0320, Order Adopting a Clean Energy Standard (August 1, 2016) at 1-2, 19, 45 ("The closure of upstate nuclear power plants would... result in an increase of (carbon emissions) of more than 15.5 million tons per year"); see also, Staff White Paper Proposing a Clean Energy Standard (January 25, 2016) at 27, 29.

of using a social-cost-of-carbon method which was not meant to value nuclear plant subsidies and does not require any audit of operational costs.

The Order determines the price of Zero Emission Credits through a formula based on the U.S. Environmental Protection Agency's social cost of carbon. This is a gross misapplication, and one which will impose an unnecessarily high cost on New York consumers without demonstrated furtherance of emissions reduction. The Social Cost of Carbon is a metric developed by the EPA, in conjunction with other federal agencies, to estimate the impact of regulatory decisions as they affect incremental carbon dioxide (CO_2) emissions.[18] It represents the present-value of the consequences of CO_2 emissions, *not the cost of emissions abatement.*[19] It also increases dramatically over time, resulting in rising costs for the nuclear tier as the program nears its expiration and reactors get closer to their retirement dates. The Order adopts the Commission's entirely inconsistent applications of the Social Cost of Carbon. Throughout the Cost Study, the Commission quantifies the "carbon benefits" of the Clean Energy Standard, applying it equally to both renewables and to nuclear to determine the net costs as adopted by the White Paper. In the Responsive Proposal, the Commission shifted the social cost of carbon to only non-renewable nuclear power energy --and incorporated an unexplained but far larger estimate of the benefits of nuclear. The Commission neither adjusted the pricing of subsidies for renewables using the Social Cost of Carbon, nor changed its estimate of the carbon benefits of renewables to be consistent with the new methodology for the nuclear tier.

The Commission's action is arbitrary and capricious in its misapplication of the Social Cost of Carbon metric; its inconsistent application of the metric with respect to nuclear but not renewable

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[18] U.S. Environmental Protection Agency. "EPA Fact Sheet: Social Cost of Carbon." December, 2015. https://www3.epa.gov/climatechange/Downloads/EPAactivities/social-cost-carbon.pdf

[19] Shouse, Kate. U.S. Environmental Protection Agency, Office of Air and Radiation. "Social Cost of Carbon: Valuing CO2 Impacts in U.S. Regulatory Impact Analysis." Presentation to the United Nations Framework Convention on Climate Change May 20, 2016. http://unfccc.int/files/focus/mitigation/technical_expert_meetings/application/pdf/01_us_epa_shouse.pdf

energy or efficiency resources; and its failure to evaluate the availability of lower cost means of emissions abatement.

The Staff's White Paper proposed that the subsidy be based on Staff examination of the books and records of the facility,[20] whereas the adopted July 8th Responsive Proposal[21] indicates that the Commission need not look at a nuclear plant's books and records to determine eligibility for the subsidy, Tier 3. It accorded the Commission unfettered power to award the subsidy to any nuclear plant without ever looking at its books and records. The Commission provided no explanation for the change in policy from examining the books and records to determine eligibility to completely doing away with any inspection or any part of the five-prong public necessity test[22] for eligibility. This is another example of the arbitrary and capricious nature of Tier 3.

The condition of private sale as part of this regulatory scheme was neither mentioned in the Staff's White Paper nor in the July 8 Responsive Proposal. The Commission provided no reasoned explanation for its decision to switch from the cost-of-operation methodology to the social cost-of-carbon, citing only that there is a risk with federal preemption.[23] The Commission's discretion in choosing how to determine rates does not extend so far that it can turn to speculation or forgo adequately setting forth the basis in the record for its conclusions. *See 300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY.2d 176, 180 (1978); *Matter of Montauk Improvement v Proccacino*, 41 NY.2d 913, 914 (1977).

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[20] Case No. 15-E-0320, Order Adopting a Clean Energy Standard (August 1, 2016) at 119.

[21] Case 15-E-0320, Staff's Responsive Proposal for Preserving Zero Emissions Attributes (July 8, 2016) at 3; Case No. 15-E-0320, Order Adopting a Clean Energy Standard (August 1, 2016) at 49-50, 124.

[22] Case No. 15-E-0320, Order Adopting a Clean Energy Standard (August 1, 2016), Appendix E (Methodology and Requirements) at 2.

[23] Case 15-E-0320, Oder Adopting a Clean Energy Standard (August 1, 2016) at 100-101

Accordingly, and for all of the foregoing reasons, the Commission's rationale of fossil fuel replacement and concomitant backsliding of the State's carbon emission reduction goals for subsidizing the operation of the State's nuclear power reactors, is arbitrary and capricious, mandating that Tier 3 be null and void. The Petitioners have stated a cause of action and the Respondents' motion to dismiss must be denied.

THIRD CAUSE OF ACTION IS NOT SUBJECT TO DISMISSAL: THE COMMISSION VIOLATED SAPA §201 "COMMON AND EVERYDAY MEANING" REQUIREMENT

In moving to dismiss the Third Cause of Action, Nominal Respondents have the audacity to state that this Court is without power to review this claim. In fact, they state that "separation of powers precludes the courts from getting involved in the discretionary decisions of a state agency." *Nom. Resp.* MOL at 37. This statement, made without authority, flies in the face of the Court's long held responsibility for judicial review.[24] The Commission claims that they have the right to define and use "zero-emissions" in whatever way they see fit, as long as that use is explained somewhere in 163 page Order. *PSC Resp.*, MOL at 36. Based on the Commission's reasoning, they could call carbon spewing coal plants "zero-emissions," and it would be not be violate SAPA §201.

Here, there is a question as to whether the Commission can use the terminology of "zero emissions credits" for the nuclear energy generators subsidy. This cause of action challenges the Commission adoption of the term "zero-emissions" to describe nuclear power generation and whether it falls within the "common and everyday meaning" of the term, as required by SAPA §201. The meaning of the words is profound - the industry does produce emissions and the zero emissions idea is the fundamental justification of the Tier 3 $7.6 billion program.

[24] *Marbury v. Madison*, 5 U.S. 137 (1803). Executive orders are unquestionably subject to judicial review.

The 2015 Energy Plan states, "nuclear power plants have radioactive emissions that result from routine operations."[25] The record, not before the Court, is replete with evidence of nuclear energy emissions. The Commission's use of these terms is misleading and deceptive, in addition to violating SAPA. In fact, even the Better Business Bureaus long concluded that the use of such words in connection with nuclear energy is false, deceptive and misleading to members of the public because there are in fact emissions from nuclear energy generation.[26]

Petitioners' submitted into the record authoritative evidence and reports by the International Atomic Energy Agency and Electric Power Research Institute regarding the nuclear greenhouse gas and carbon emissions.[27] The long established fact is clear, despite Commission's choice to ignore the facts that nuclear energy is not "zero emissions". *See* Affidavit of David A. Lochbaum, Director, Nuclear Safety Project, Union of Concerned Scientists ("Lochbaum Aff.") *attached to* the Shapiro Aff. at Exhibit 5, ¶¶ 26, 27, Figure 4, Greenhouse Gases Emitted by Electricity Producers.

Moreover, the Lochbaum Aff. supports Petitioner's claim that nuclear energy generation is not emission free - relying in part of the business records submitted by the actual nuclear power plants themselves, indicating that:

- The 2013 reports submitted to the NRC by the Indian Point indicate there are gaseous and liquid emissions of fission and activation products, including tritium, and the greenhouse gases, including Carbon-14. *See* Lochbaum Aff. ¶¶ 11-16.
- In 2015, reports submitted to the NRC for Ginna indicate there have been gaseous emissions of fission & activation products, including tritium, and the greenhouse gases, including Carbon-14. *See* Lochbaum Aff. ¶¶ 17-20.

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[25] New York 2015 State Energy Plan, Volume II: Technical Appendix, Impacts and Consideration, p. 33.

[26] *See* Lochbuam Aff ¶31 Letter dated December 3, 1998, from Peter C. Marinello, Senior Advertising Review Specialist, National Advertising Division, to Katherine Kennedy, Natural Resources Defense Council, "Advertising for Nuclear Energy." The Better Business Bureau concluded:"it is inaccurate to make unqualified claim that nuclear electricity does not "pollute the air" and, "consumers can reasonably interpret the claim to mean that electricity generated by nuclear power is produced without any negative impact on the environment. The record however does not support this interpretation of the claim".

[27] Once again because the Commission chose not to provide an administrative record, this Court is unable to review these facts and make a determination to dismiss this cause of action.

- On July 18, 1991, the NRC announced $137,500 fine on the owner of the FitzPatrick for unplanned and unmonitored releases of radioactive gases to the atmosphere from the liquid waste concentrator, "the levels released to Lake Ontario were as high as 65 times the maximum permissible concentration," *See* Lochbaum Aff. ¶ 21.

- In September 2006, a report submitted to the New York State Department of Environmental Conservation by the owner of the FitzPatrick nuclear plant indicated thermal emissions with the maximum difference between the water taken in and discharged back was 28.9°F. *See* Lochbaum Aff. ¶ 24.

- As part the Clean Water Act permit process, the Final Environmental Impact Statement prepared by the New York State Department of Environmental Conservation ("DEC"), addressed renewal of the State Pollutant Discharge Elimination System permits for the power plants along the Hudson River, examining the effects of warmed water discharged by Indian Point Unit 3. The Indian Point thermal emissions are clear. *See* Lochbaum Aff. ¶ 25, *Figure 3, Thermal Discharge Plumes from Indian Point Unit 3 and the Downstream Lovett Generating Station.*

The use "zero-emissions credits" label for Tier 3 is an egregious abuse of the public's trust in the veracity of government action. The Commission's misuse of common words, is an error of fact and law, and is arbitrary, capricious, baseless, and unsupported by science. This cause of action cannot be dismissed, particularly without the administrative record.

PETITIONERS HAVE STANDING TO ASSERT THEIR SEQRA CLAIMS AND THEY HAVE STATED A PROPER FOURTH CAUSE OF ACTION UNDER SEQRA

Petitioners Have Sufficient Standing

The Court must reject Respondents' attempt to dismiss Petitioners' SEQRA claims (the Fourth Cause of Action) for lack of standing. Petitioners do have standing, and, as the Court of Appeals has held, if any one of the petitioners has standing, the Court need not determine whether each of the petitioners also has standing. *Chamber of Commerce v Pataki*, 100 NY.2d 801, 812, (2003) cert denied 540 U.S. 1017, 124 S. Ct. 570, 157 L. Ed. 2d 430 (2003). See also *County of Rensselaer v Regan*, 80 NY.2d 988, 991, n (1992).

Nominal Respondents argue that Petitioners "do not explain how they are injured from the operation of nuclear plants other than Indian Point." PSC MOL at 39. The Commission also argues that Petitioners have not alleged actual environmental injury that is distinct from the public at large. However, there are allegations asserting environmental injury different from the public at large due to the Commission's improper subsidization of the Upstate Reactors.[28]

For example, Petitioner Joseph Heath alleges his past use and enjoyment of Lake Ontario for extensive recreational activities, including boating, swimming and water skiing. See Supplemental Affidavit of Joseph Health, sworn to March 22, 2017 (the "Heath Aff.") ¶¶ 5-7, attached to the Shapiro Aff. at Exhibit 2. While he still often takes the "relatively short drive" to Lake Ontario to enjoy the "scenic, aesthetic" quality of the lake, he has been unable to enjoy his past recreational activities there due to thermal and radioactive emissions into Lake Ontario from the Upstate Reactors. Heath Aff. ¶¶ 6-8). He alleges that he would use and enjoy the lake more if not for the negative impacts of the operation of the nuclear reactors. Heath Aff. ¶ 8. He had been anticipating the announced closures of the Ginna and FitzPatrick nuclear reactors, and the fact that the releases and emissions from them would have stopped impacting his use and enjoyment of Lake Ontario. Heath Aff ¶ 9. The Zero Emissions Credits, by subsidizing these reactors that would have closed, have directly harmed and impacted his environmental, scenic, and aesthetic enjoyment of Lake Ontario. Heath Aff. ¶¶ 9-10. Even Nominal Respondents recognize the particularized harm that comes from interference with use and enjoyment of affected land. (Nom. Resp. Br. at 41).

Similarly, members of Petitioner NIRS, an organization that advocates "for the cessation of nuclear power generation" for the "protection of public health and safety." allege direct harm in

[28] Even if there are defects in a pleading, in assessing a motion under CPLR Section 3211 (a) (7), "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994). Petitioners are submitting affidavits in response to the motion to dismiss to further support their standing in this proceeding.

their environmental, scenic, and aesthetic use and enjoyment of Lake Ontario as a result of the Commission's Tier 3 Zero Emissions Credits that subsidize the Upstate Reactors that would have closed but for the subsidy. Petition ¶ 22. See Affidavits of NIRS members, Richard Weiskopf, sworn to on March 22, 2017 ("Weiskopf Aff.") ¶¶ 7-10, and Linda DeStefano, sworn to on March 22, 2017 ("DeStefano Aff.") ¶¶ 7-10, attached to the Shapiro Aff. at Exhibit 4.[29]

Moreover, these NIRS members live within the 50-mile ingestion pathway emergency preparedness zone ("EPZ") of the Upstate Reactors, as designated by the Nuclear Regulatory Commission (Weiskopf Aff. ¶4, DeStefano Aff. ¶4). This EPZ emergency-planning zone identifies the areas and residents that are located in a designated zone of injury different from the public at large. See Shapiro Aff. ¶10, Exhibit 6.

Further, Petitioner Clearwater members allege that they use and enjoy the scenic, aesthetic and environmental quality of Lake Ontario and would use and enjoy it more but for the thermal and radioactive releases and emissions of the Upstate Reactors into Lake Ontario; these releases would have stopped but for the Commission's order. *See* Affidavits of Clearwater members Jeff Debes, sworn to on March, 22, 2017 ("Debes Aff) ¶¶ 8-10; and Andra Leimanis, sworn to on March 22, 2017 ("Leimanis Aff.") ¶¶ 4, 6, 9-10), *attached to* the *Shapiro Aff.* at Exhibit 4.

Similar allegations of environmental injury are made by members of Petitioners Green Education and Legal Fund ("GELF"). *See* Affidavit of member Jessica Maxwell, sworn to on March 23, ¶¶ 7-16 ("Maxwell Aff."); Affidavit of Beyond Nuclear member Peter Swords, sworn to on March 22, 2017, ¶¶ 5, 7-10 ("Swords Aff."); Affidavits of supporters of Petitioner New York Public Interest Research Group ("NYPIRG") Karen A. Costello, sworn to on March 23, 2017, ¶¶ 6-

[29] NIRS also participated in the underlying proceedings extensively, requested extension of time to comment after July 8th, and filed a timely petition for rehearing with the Commission.

9 ("Costello Aff."); and, Affidavit of Donald A. Hughes, sworn to on March 22, 2017, ¶¶ 6-11 ("Hughes Aff.") *All above listed Affidavits are attached to* the *Shapiro Aff.* at Exhibit 4.[30]

The Petition Alleges Violations of SEQRA, and Without the Administrative Record the Court Cannot Decide the Issue by Motion to Dismiss

The Commission's purported alternatives analysis did not satisfy SEQRA requirements. The Commission failed to identify, take a hard look or make a reasoned elaboration with regard to the obvious, less onerous alternatives to continued nuclear generation - renewable sources of electrical generation. Moreover, the Commission utterly failed to consider the environmental impacts additional years of nuclear generation the two reactors at Indian Point. Since the administrative record was not provided by the Commission this court does not have the SEQRA record to consider or to review and, therefore, it would be improper for this Court to dismiss this cause of action. *Matter of Youngewirth v. Town of Ramapo Town Bd.*, 98 A.D.3d 678, 681, 950 N.Y.S.2d 157 (2d Dept 2102)("it was error for the Supreme Court, as an alternative ground for dismissal, to reach the merits of the petitioner's SEQRA claims prior to service of the respondents' answers and the filing of the complete administrative record....it cannot be said that 'the facts are so fully presented in the papers of the respective parties that it is clear that no dispute as to the facts exists'" (citations omitted)).

The original sin for the SEQRA analysis is the improper defining of the Action. See 6 NYCRR § 617.2(a). It is arbitrary and capricious because, without reason or rational explanation, the Commission chose to ignore the April NYISO reassessment. Thus, instead of analyzing the impacts, and the alternatives, for replacement of power of two reactors - it erroneously assumed that

[30] Respondents' ignore the significance of the imminent factors in the injury, in the case challenging the proposed nuclear fuel repository in Yucca Mountain. In *Nuclear Energy Inst., Inc. v. EPA*, 362 U.S. App. D.C. 204 (D.C. Cir., 2004), the prospect of future contamination of a town's groundwater by a proposed nuclear waste repository was held sufficiently imminent. This holding was reached despite the fact that "radionuclides escaping from the Yucca repository may not reach [the] community *for thousands of years*." *Emphasis added.*

the analysis was for the replacement generation for four nuclear reactors.. The Revised NYISO Report is a complete contradiction and refutation of the Commission's original core basis for Tier 3 – avoiding significant fossil fuel electricity generation greenhouse gas emissions from power that would have to replace four commercial economically non-viable nuclear reactors that were headed out of business.

The Decision to Commit the FitzPatrick and Ginna Nuclear Plants to a Course of Action Requiring Fuel Replacement by Fossil Fuel Plants is An Environmental Matter.

The Commission's SEQRA environmental review is necessarily inaccurate. The Commission's review relied upon the environmental facts and conclusions in its May 23, 2016 *Final Supplemental Generic Environmental Impact Statement* that specifically assessed the environmental impact of fuel replacement (with only fossil fuels) based on the closing of *both* the Fitzpatrick and Ginna nuclear power plants: Under a 'no action' scenario, where these economically stressed facilities retired, discontinuing operations would require that an approximate annual 10,500 GWh of electricity generation be met through alternative sources, *possibly* including fossil fuels.[31] *(emphasis added)*

It did not consider non-fossil fuel alternative sources such as increased availability of solar power, efficiency, demand reduction and transmission upgrades. The Commission's deficient environmental analysis inaccurately, and unlawfully produces a findings statement indicating it "avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable." *Decision-making and findings requirements*, 6 NYCRR § 617.11(d)(5). The Commission's environmental review fails as a matter of law. Further, the Commission's actions during the

[31] *Final Supplemental Environmental Impact Statement* (May 23, 2016) at 4-5, Case 15-E-0302, Order Adopting Clean Energy Standard.

environmental review clearly constitutes an abuse of discretion as a matter of law, is arbitrary and capricious and mandates the nullity of Tier 3.[32]

The fact that the NYISO "study stating that the certain nuclear plants can be retired with no impact to electric reliability" is substantial. As a result, the environmental impact statement process for the Tier 3 of Order was substantially skewed because the action (Tier 3) was incorrectly defined, looked at an inaccurately high estimate of megawatts of energy that needed to be replaced. Therefore, the environmental review in the administrative record was based upon an inaccurate assessment of the potentially significant adverse impacts of the proposed Tier 3 or possible alternatives, and as a matter of law, should be rejected by the Court.

PETITIONERS STATED A PROPER FIFTH CAUSE OF ACTION - THE COMMISSION ORDER IS ULTRA VIRES

The Legislature has provided authority to advance energy conservation. The conservation requirements do not mention nuclear energy in state energy planning efforts. Despite Respondents' assertions to the contrary, the otherwise broad scope of the Commission to act regarding nuclear power generation is limited by both PSL § 66-c and by Chapters 517 and 518 of the Laws of 1986. (the Commission is left to regulate to advance law and not to create entire programs that make legislative policy determinations).

The State of New York, and particularly the Commission had significant challenges posed by nuclear power plants in the past. The issued The Legislature setting forth the duties, powers, and

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[32] An agency's determination lacks a rational basis if it "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (*internal quotations and citations omitted*); An agency's decision is arbitrary and capricious, as here, if the agency (1) "entirely failed to consider an important aspect of the problem," (2) "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," (3) "failed to base its decision on consideration of the relevant factors," or (4) made "a clear error of judgment." *Utah Envtl. Long. v. Troyer*, 479 F.3d 1269, 1280 (10th Cir. 2007).

authorizations regarding the State Energy Plan. PSL § 66-c. Moreover, there is no rational basis to charge all ratepayers, including 100% renewable-only customers. Absent the Commission's "foundational premise" that the carbon emissions reductions affect all ratepayers, which, as explained above, is not supported by the facts, there is no rational basis to impose the nuclear subsidy on 100% renewable ratepayers. *Cf. Cty. of Westchester v. Helmer*, 296 A.D.2d 68, 69 (3d Dep't 2002).

"The common thread of the case law applying the separation of powers doctrine is that the executive branch may not infringe upon the primacy of the legislative branch in the policy-making function of government. The line is impermissibly crossed most often when the executive acts not pursuant to some express statutory delegation of power, but under a claimed implied general authority to enforce the law. The courts have struck down the executive action when it went "beyond stated legislative policy and prescribe[d] a remedial device not embraced by the policy." In doing so, the legislative province was invaded because the executive "utilized a remedial device which, rather than implementing a legislative policy, enacted a new policy not embraced by the [legislative body]." *Citizens for an Orderly Energy Policy, Inc. v. Cuomo*, 159 A.D.2d 141, 152-53, 559 N.Y.S.2d 381, 387 (3d Dept' 1990) (*internal citations omitted*).

The Commission does not have authority to maintain or even prevent the slated closure of the Upstate Reactors. Since the Commission based the viability of Tier 3 upon the condition of the sale of FitzPatrick from Entergy to Exelon, it means that, but for the sale of FitzPatrick which was made a condition of this subsidy, the Commission, would not have authorized the continued viability of Tier 3. Contrary to Nominal Respondents' bare assertion, there is no separation of powers issue in this case. The Commission promulgated Tier 3 under its own discretionary power, but, in doing so, failed "to safeguard the consumer against arbitrary power." *See 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).

Despite Respondents' assertions to the contrary, the otherwise broad scope of the Commission to act regarding nuclear power generation is limited by both PSL § 66-c and by Chapters 517 and 518 of the Laws of 1986. Accordingly, and for all of the foregoing reasons, the Commission's rationale of fossil fuel replacement and concomitant backsliding of the State's carbon emission reduction goals for subsidizing the operation of the State's nuclear power reactors, is ultra vires and arbitrary and capricious. The Petitioners have stated a cause of action and the Respondents' motion to dismiss must be denied.

THE SIXTH CAUSE OF ACTION SHOULD NOT BE DISMISSED AS TIER 3 IS ARBITRARY AND CAPRICIOUS

The Commission's authorization to close Ginna "without further action" on April 1, 2017, and the revised NYISO report finding no resource deficiency for the closure of FitzPatrick and Ginna, is at the core of the Petitioner's arbitrary and capricious causes of action. Further monopoly utility ratemaking procedures are applicable to subsidizing generators.

The Commission's foundational finding that closing FitzPatrick and Ginna requires fossil fuel replacement, causing carbon emissions backsliding mandating the nuclear subsidy is arbitrary and capricious because actual data indicates there was no resource deficiency for electricity replacement, fossil fuel, or otherwise in the event FitzPatrick and Ginna closed. These arguments have been fully discussed and addressed at pages 13-14, and 23-25 in this brief.

CONCLUSION

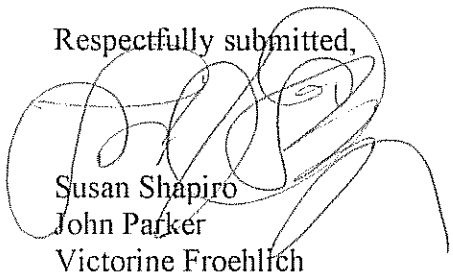
The Court should reject Respondents' Motion to Dismiss. The Court is required to view Petitioners' claims in the light most favorable to them, and give every possible inference in favor of

most strongly advocated by the State in its efforts to advance to a rapid transition to clean, renewable energy, not nuclear or fossil fuels.

The Petition in this case tackles the difficult and immensely consequential administrative actions of the Commission to create a whole new program for nuclear subsidy and then implement it. It lays out the grounds for challenges to the Commission under Article 78 of the CPLR, and for Declaratory Judgment. Viewed in the light most favorable to Petitioners, as a matter of law, Petitioners' respectfully request for the Court to Deny the motion to dismiss

March 24, 2017

Respectfully submitted,



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