

PLEASE TAKE NOTICE, that upon the annexed Verified Petition of Petitioners, verified on the 30th day of November 2016, and all exhibits annexed thereto, application will be made to the Supreme Court of the State of New York, County of Albany, 16 Eagle Street Albany New York 12207 on the 20th day of January 2017, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for a judgment granting the relief requested in the Petition as follows:

1. rescinding, annulling, and vacating the Tier 3 portion of the orders issued by the New York State Public Service Commission dated August 1, 2016 (see attached hereto Exhibit “A”) and September 17, 2016 (*see* attached hereto Exhibit “B”) which is in violation of law, without jurisdiction, arbitrary and capricious, and created up to a \$10 billion subsidy to corporation(s) operating aging nuclear plants in New York State;
2. awarding Petitioners’ the costs and disbursements of this action; and,
3. granting such other and further relief as this Court deems just and proper.

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

In an abundance of caution, Petitioners are filing this Petition in order to preserve Petitioners’ rights to challenge the Tier 3 portion of the August 1, 2016 PSC Order and the November 17, 2016 PSC Orders. On September 7, 2016 the PSC issued an Order containing language which may toll the statute of limitations, but is ambiguous. Thus, absent a PSC decision

on Petitioners request for a rehearing and based upon this ambiguous order, this filing is made to bring this Petition to the Court of jurisdiction.

In the event this Court finds that this Petition is premature based on the September 7, 2016 Public Service Commission order – which provides that a challenge may be tolled until the agency makes a decision on petitions for rehearing of the underlying August 1, 2016 Order, the substantive and procedural errors of law and fact will remain.

Dated: Nanuet, New York
November 30, 2016

Respectfully submitted,

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The Petitioners HUDSON RIVER SLOOP CLEARWATER and GOSHEN GREEN FARMS, LLC and of and by their Counsel, Susan H. Shapiro, Esq., as and for its Verified Petition, alleges as follows:

SUMMARY OF THE ACTION

1. The TIER 3 portion of PSC ORDER dated August 1, 2016 in Case 15-E-0302 and Case 16-E-0270 (attached hereto as “A”) and the two subsequent PSC ORDERS dated November 17, 2016 (attached hereto as Exhibit “B”) (hereinafter collectively referred to as “Tier 3” or “PSC Order”) requires the public ratepayers to fund a \$7.6 to \$10 billion bailout program which will be directed solely to the corporate owners of unprofitable nuclear power plants in New York State.

2. Tier 3, upon information and belief, would bring about one of the largest transfers of wealth from the ratepaying public to a single corporate entity in New York State history. Indeed, it is anticipated that the one hundred percent (100%) surcharge imposed on ratepayers will pay for the bailout of one or two multibillion corporations – don’t we mean the bailout of New York State’s largely failing nuclear power plant industry (and not the corporations??).

3. Tier 3 contains many deficiencies, including implementing a program beyond the legal authority of the PSC, numerous assumptions and statements not supported by any technical basis, errors of fact, and legal procedural defects preventing public comment and review in violation of multiple sections of the State Administrative Procedures Act (“SAPA”).

4. Tier 3 requirements are inconsistent with previous PSC Orders, stand in direct conflict with previous and continuing State actions, undermines the New York State Energy

Plan, and disrupts the State's deregulated energy market system. In multiple ways, the action of the PSC on Section Tier 3 of the Order represents a substantial overreach, encroaching upon areas of state legislative and federal regulatory authority, disrupting fair and competitive energy structures at both the state and federal level.

5. This is an action for declaratory relief for an order declaring that the Tier 3 portion of the PSC August 1 and November 17 Orders are impermissible violations of due process and/or a violation of the New York State Constitution, Article VIII §1, commonly referred to as the "Gift and Loan Clause" as complained of herein.

6. Petitioners also seek declaratory relief in the form of an order declaring that the PSC's conduct, which lacked transparency or legislative authority created a deleterious economic and overly burdensome expense to ratepayers, including small businesses, not-for-profits and local governments for the sole financial benefit of one or two multibillion dollar companies, constitutes unlawful conduct.

7. Petitioners allege that the adoption of the Tier 3 portion of the Order was unlawful because the PSC ignored its legal obligation to protect the public interest and the economy.

8. Furthermore the PSC ignored its own procedural laws, which were put in place to protect the public and its state resources.

FACTS AND BACKGROUND

9. In June 2015, the PSC opened a proceeding entitled "In the Matter of the Implementation of Large-Scale Renewable Program and a Clean Energy Standard ("CES"), Case

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

10. In April 2014, prior to the proceedings that are the subject of this Petition, the PSC instituted a regulatory proceeding for an initiative known as the New York State Reforming Energy Vision (“REV”), in which the State committed to actively support renewable energy and energy efficiency and to work to coordinate a wide range of distributed energy resources - i.e., development of clean energy and electricity produced from many small sources linked together. The REV initiative was promoted and heavily publicized as a critical part of an overall effort by the PSC to improve system efficiency, to empower customer choice, and to encourage greater adoption of clean renewable generation and energy efficiency technologies and practices.

11. In July 2015, or shortly thereafter, the New York State Energy Planning Board promulgated 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. The State Energy Plan (“SEP”) does not mention promotion of nuclear energy, subsidization of nuclear plants, or any type of ZEC/Tier 3 program.¹

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

12. In stark contradiction to the REV initiative, the Tier 3 requirement of the PSC Order removes from competition and instead publicly subsidizes, with New York State ratepayer money, the well-established, long federally heavily-subsidized nuclear power generation industry. There was no meaningful way for the public to review and comment on the PSC's plan to spend billions of their ratepayer dollars. Tier 3 is contrary to the admirably lofty goals of REV, which actively support new and fledgling and established, bona fide zero emission technologies trying to be established in the energy marketplace. Tier 3 forces the renewable energy sector to compete in the market with proportionally less ratepayer funding than Tier 3 provides to the nuclear industry. This unfairly skews the marketplace against timely implementation of efficiency technologies, demand side initiatives, and transmission modernization mandated by the REV.

13. Tier 3 creates the opposite of the intended "market-based" decentralized approach promoted in the REV, and creates a discriminatory preference for the unsustainable and outdated nuclear industry in New York by financially bailing out large centralized nuclear energy producers, without the legally required public review or comment, and contrary to law.

14. In 1970, the Robert Emmett Ginna Nuclear Power Plant ("Ginna") – a single pressurized water reactor – opened along the south shore of Lake Ontario, in Ontario, New York. The facility is now owned by a subsidiary of the Constellation Energy Nuclear Group, LLC, Exelon Corporation, ("Exelon") whose subsidiary R.E. Ginna Nuclear Power Plant, LLC is the licensee and operator of Ginna Nuclear Power Plant ("Ginna").

15. 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, when transmission system upgrades were scheduled to be completed. At that point, the planned upgrades would render Ginna superfluous.

16. In 1970 and 1988, respectively, the Nine Mile 1 and Nine Mile 2 boiling water nuclear reactors began operation in Scriba, New York, on the southeast shore of Lake Ontario. Exelon has a majority ownership stake in the Nine Mile Point Nuclear Station consisting of Nine Mile 1 and Nine Mile 2. On information and belief, the remaining ownership in these facilities is by Électricité de France, which has 49.991% and 40.99% ownership of Nine Mile Point 1 and Nine Mile Point 2, respectively.

17. 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.

18. In 1975, the James A. FitzPatrick Nuclear Power Plant (“FitzPatrick”), a single boiling water reactor located in Scriba, NY, on the southeast shore of Lake Ontario began operation. The facility is owned by Entergy Corp (“Entergy”) whose subsidiary, Entergy Nuclear FitzPatrick, LLC is the licensee and operator of the FitzPatrick Nuclear Power Plant.

19. On November 2, 2015, Entergy announced plans to close the FitzPatrick nuclear facility in late 2016 or early 2017.

20. On January 24, 2016, the PSC staff issued a “white paper” which proposed, *inter alia*, that the PSC adopt a program known as the Zero-Emission Credit (“ZEC”) requirement to

save New York nuclear reactors facing “financial difficulties.” The white paper proposed the ZEC requirement be used “based upon the difference between the anticipated operating costs of the units and the forecasted wholesale prices.”²

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

22. On July 8, 2016, the PSC issued “Staff’s Responsive Proposal for Preserving Zero-Emissions Attributes” (July 8, 2016 Responsive Proposal”), which significantly revised its prior recommendation, changing the formula for determining the amount of the ZEC requirement subsidies based on a novel concept ostensibly related to the estimated “social cost of carbon.”³

23. The July 8, 2016 Responsive Proposal significantly altered the substance and rationale of Tier 3, and drastically increased the amount of the public bailout from the Staff’s original cost estimates – which ranged from **\$59 million to \$658 million over the first 7 years**. In the significantly revised Responsive Proposal, PSC Staff estimated the cost to be **\$953 million for only the first two years**. The bailout charged to ratepayers will escalate from \$17.48 per MWh in 2017-2019 to \$29.15 per MWh in 2027-2029 (depending on energy and capacity price

² See Staff White Paper on Clean Energy Standards (1/25/16) at 32, available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B930CE8E2-F2D8-404C-9E36-71A72123A89D%7D>.

³ See Staff’s Responsive Proposal for Preserving Zero Emission Attributes (7/8/16) at 2, available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7BBBF4008-FD27-4209-B8E1-AD0375810E%7D>.

adjustments), locking New York ratepayers into paying for a large nuclear industry bailout estimated to be **\$7.6 billion over the 12 year term of the proposal.**⁴

24. The July 8, 2016 Responsive Proposal, for the first time, allows the Indian Point nuclear generating facilities to be included in the proposed nuclear subsidy, which could add another **\$2.8 billion** to the cost of its proposal, for a potential total of more than **\$10.4 billion**, which would be funded by ratepayers – including residents of all income levels, large and small businesses, non-profits, and municipalities. In the Mid-Hudson region, this would compound already high rates and the Lower Hudson Capacity Zone surcharge.⁵

25. The July 8, 2016 Responsive Proposal, on information and belief, altered the ZEC requirement scheme for the purpose of providing Exelon – its primary beneficiary – added incentive to purchase FitzPatrick. In fact, the terms of the Tier 3 ZEC requirement would be null and void in the event Exelon’s purchase of FitzPatrick did not go forward by a specified date.

26. The July 8, 2016 Responsive Proposal legally obligated all ratepayers to pay for qualified ZECs, regardless of whether or not they - as personal, small business, not-for-profit or local government consumers of electricity - opt to purchase nuclear energy or other sources of truly zero emissions energy such as renewable wind, solar and hydroelectric power.

27. The July 8, 2016 Responsive Proposal represented a significant departure from the previous January 2016 proposal that had been initially submitted to the public for comment. It included an entirely new formula for calculating the cost of the nuclear subsidies based on the new and novel concept of the “social cost of carbon.” The new formula raised the projected price

⁴ If Indian Point is added the total climbs to approximately \$10.4 billion.

⁵ From Clearwater’s comments on CES dated 7/22/16.

exponentially, resulting in deleterious and burdensome increased costs to individual ratepayers, small businesses and local governments along with designation of certain nuclear power plants as being a “public necessity”. The July 8, 2016 Responsiveness Proposal also does not factor in a reasonable and rational consideration of the increased costs of nuclear waste storage for the extended operation of these facilities, increased health and environmental costs of the operations, and increased risks – in terms of life, health and property damage – should these aging nuclear facilities fail without adequate insurance due to Price Anderson Act of 1957 liability limitations.

28. The July 8, 2016 Responsive Proposal further significantly changed and expanded the ambit of ZEC recipients to include Indian Point. This significant change directly contradicts the multi-year proceedings of the New York State’s intervention in the License Renewal for Indian Point Units 2 and 3 before the Nuclear Regulatory Commission and the Atomic Safety Licensing Board. New York has argued vigorously against the re-licensing of these facilities contending that the aging facility does not meet the regulatory requirements allowing the facility to continue operating.⁶ The State of New York remains an active litigant in the NRC proceeding on license renewal during the duration of the proceeding underlying the PSC Order.

29. Additionally, on April 2, 2010 the New York State Department of Conservation denied Indian Point Clean Water Act permits authorizing water discharges due to violations of

⁶ 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.

water quality standards thus, effectively denying the facility the 2.5 billion gallons per day of Hudson River water needed to cool the facility during its operations.⁷

30. The significant and substantive changes of the July 18, 2016 Responsive Proposal were not published in the State Register. After publication only on the PSC website, the PSC allowed only a fourteen (14) day public comment period. Among significantly changed portions of Tier 3's ZEC requirement were the estimated \$7.6 Billion to \$10.4 Billion required ratepayer nuclear bailout, insertion into the record of a the previously unrepresented "social cost of carbon" metric, and insertion into the record of a determination of the "public necessity" determination for particular nuclear facilities.

31. On July 12, 2016 Exelon indicated it would purchase Fitzpatrick if New York State provided financial incentives.⁸

32. On August 1, 2016 the PSC Order was adopted which includes Tier 3.

33. On August 1, 2016, just ten (10) days after the public comments period closed, and less than statutorily required 30 days waiting period prior to issuance of an Order, the PSC issued the Order which included Tier 3 recommendations contained in the July 8, 2016 Responsive Proposal, 3 creating a public financial subsidy for financially unsustainable nuclear facility operations in New York State.

⁷ See Letter of William Adriance, Chief Permit Administrator of the Department of Environmental Conservation to Dara Gray, Entergy Nuclear Operations, Inc Re: Joint Application for CWA § 401 Water Quality Certification NRC License Renewal – Entergy Nuclear Indian Point Units 2 and 3 DEC Nos.: 3-5522-00011/00030 (IP2) and 3-5522-00105/00031 (IP3) *Notice of Denial, dated April 2, 2010.*

⁸ See Joint Application under FPA Section 203 of Entergy Nuclear FitzPatrick, LLC http://elibrary.ferc.gov/idmws/file_list.asp?document_id=14487740.

34. The Order included a finding of “public necessity” for the Ginna, FitzPatrick and both Nine Mile Point nuclear facilities.⁹ Thus, on information and belief, with a truncated public review of merely fourteen (14) days, the Order authorizes billions in subsidies to inure to the benefit of a single company, Exelon, upon completion of the planned sale of FitzPatrick to Exelon.

JURISDICTION OF THE COURT

35. Pursuant to Title 6 CCR-NY Chapter X, Subchapter A. Article 1, Part 664.8 Appeals and review, an appeal from, or an application for review of, a decision, determination or order under this Part may be made in accordance with the provisions of Title 11 of the Act. This Court has jurisdiction to hear this matter pursuant to Article 78 of the New York State Civil Practice Law and Rules.

PARTIES

36. HUDSON RIVER SLOOP CLEARWATER, INC., (“Clearwater”) is a New York with a purpose to defend and restore the Hudson River, one of the great and historic rivers of the United States, to investigate and conduct research into contamination and destruction of the river, its tributaries and similar river systems, and to inform the public of such dangers and to assist the public in taking measures to stop such contamination and to educate and assist the public on the importance of preserving the Hudson River. *See* Affidavit of David Conover, attached hereto as Exhibit “C”.

⁹ *PSC Order* at 128.

37. Clearwater and its members are electricity ratepayers that are impacted and injured by the PSC Orders that mischaracterize the environmental impacts of the emissions of the continued operating of nuclear power plants in New York beyond their economic viability and sustainability by ratepayer subsidies; their use and enjoyment of the River that they protect and use to educate the public will be impacted by continued emissions and will make it more difficult to attract participation in their programs and distort or impair the content of their education programs.

38. Clearwater has participated in the proceedings for the PSC Orders and submitted comments into the public record challenging the underlying factual assertions used to justify the incredible and substantial public subsidies to the failing nuclear power plants benefiting directly from the ratepayer subsidy.

39. Clearwater in the proceedings for the PSC Orders has questioned and challenged a Tier 3 requirement that offers unsubstantiated and confusing rationales about the cost of carbon to justify billions of dollars of subsidies at the detriment of renewable energy sources that would produce no emissions and stop degradation of the environment and the Hudson River and its Valley from emission associated with another 12 years of nuclear power plant operations.

40. GOSHEN GREEN FARMS, LLC, (“Green Farms”) is a New York State Limited Liability Corporation which operates a commercial organic farm located within the 50 mile

radius from Indian Point nuclear reactors, approximately 244 miles from FitzPatrick and 270 miles from Ginna.¹⁰ See Affidavit of Susan Shapiro, attached hereto as Exhibit “D”.

41. Green Farms is an electricity ratepayer in New York State, which, if Tier 3 Requirement of the PSC Orders goes into effect, will be forced to pay increased utility rates, and be compelled to subsidize nuclear energy in the State. Green Farms purchases only solar and wind energy and opposes purchasing expensive, dangerous, toxic and emission-spewing nuclear energy.

42. Particularly, as a New York State business, Petitioner will be injured by the results of PSC’s misleading characterization of nuclear energy as being emissions-free. The PSC has incredulously accepted the nuclear industry’s self-promotional assertions and, without scrutiny or any apparent evaluation, adopted the reasoning and “findings” of the Brattle consultants cost report drafted by two individuals who were commissioned and compensated by Exelon.¹¹

¹⁰ The Chernobyl Exclusion Zone was established soon after the nuclear disaster. The Exclusion Zone has since been widened and it now covers an area of 2,600 square kilometres (1,600 square miles).

¹¹ The Brattle Group report (referenced herein as the “Brattle 2 Report”) is a 12 page December 2015 report drafted by two economists affiliated with the Brattle Group, Inc., who acknowledge it to be an “extension and refinement” of a previous report, both of which are expressly noted to not represent the opinion of The Brattle Group. (Berkman M and Murphy D, New York’s Upstate Nuclear Power Plants’ Contribution to the State Economy, Dec 2015)
http://www.brattle.com/system/publications/pdfs/000/005/229/original/New_York's_Upstate_Nuclear_Power_Plants'_Contribution_to_the_State_Economy.pdf?1449526735. (preface, p 1, & p 4 fn 6).
Berkman M and Murphy D, The Nuclear Industry’s Contribution to the U.S. Economy, Report prepared for Nuclear Matters, Jul 7, 2015.
http://www.brattle.com/system/news/pdfs/000/000/895/original/The_Nuclear_Industry's_Contribution_to_the_U.S._Economy.pdf?1436280444. Elliott Negin of the Union of Concerned Scientists, notes, despite 2013 revenues of \$23.5 billion, Exelon has sought state and federal help in rescuing its financially ailing reactors. As part of that effort, Exelon “launched a front group, Nuclear Matters, to sell the public on the need to keep the remaining U.S. fleet of some 100 reactors running. A New York public relations firm, Sloane & Company, is managing Nuclear Matters for Exelon.”

43. Implementation of Tier 3 would increase the cumulative radioactive emissions load within the state. On July 18, 2016 Green Farms submitted written comments to the PSC and objected to including the Tier 3 nuclear bailout, because the PSC failed to consider alternatives as required by SEQRA and only relied upon a cost benefit done by Exelon's Brattle consultants— even though Exelon is the direct beneficiary, and possibly the sole beneficiary of the Tier 3 subsidy.

44. Green Farms' organic farming practices are negatively impacted by increased radioactive emissions, and increased energy costs negatively impact Green Farms' ability to operate its farm.

45. Green Farms has submitted comments and filed a petition with the PSC for a rehearing. To preserve its rights, and with an abundance of caution, Green Farms is submitting this Petition to prevent being barred by a statute of limitations claim from challenging Tier 3 of the PSC Order because of the unexplained failure of the PSC to make a timely decision on the rehearing request as required by law.

46. THE NEW YORK STATE PUBLIC SERVICE COMMISSION, has offices located at the Empire State Plaza Agency Building 3, Albany, NY 12223-1350 and is a New York State agency whose primary mission is to ensure affordable, safe, secure, and reliable access to electric, gas, steam, telecommunications, and water services for New York State's residential and business consumers, while protecting the natural environment. The Department also seeks to stimulate effective competitive markets that benefit New York consumers through strategic investments, as well as product and service innovations.

47. Respondent Audrey Zibelman is Chair of the NEW YORK STATE DEPARTMENT PUBLIC SERVICE COMMISSION, (“PSC”), and is being sued only in her official capacity.

48. Respondent Patricia L. Acampora is a Commissioner of the NEW YORK STATE DEPARTMENT PUBLIC SERVICE COMMISSION, (“PSC”), and is being sued only in her official capacity.

49. Respondents Gregg C. Sayre is a Commissioner of the NEW YORK STATE DEPARTMENT PUBLIC SERVICE COMMISSION, (“PSC”), and is being sued only in his official capacity.

50. Respondents Diane X. Burman is a Commissioner of the NEW YORK STATE DEPARTMENT PUBLIC SERVICE COMMISSION, (“PSC”), and is being sued only in her official capacity.

51. Nominal Respondents, CONSTELLATION ENERGY NUCLEAR GROUP, LLC with subsidiaries and affiliates EXELON GENERATION COMPANY, LLC , R.E. GINNA NUCLEAR POWER PLANT, LLC and NINE MILE POINT NUCLEAR STATION, LLC; (“Exelon”) owns and operates Ginna, Nine Mile Point 1 and Nine Mile Point 2 nuclear reactors within New York State .

52. Nominal Respondents, ENTERGY POWER GENERATION CORP with subsidiaries and affiliates ENTERGY NUCLEAR FITZPATRICK, LLC, INDIAN POINT 2, LLC, and INDIAN POINT 3, LLC, (“Entergy”) owns and operates Fitzpatrick, Indian Point 2 and Indian Point 3 nuclear reactors within New York State.

FIRST CAUSE OF ACTION

PSC ADOPTION OF THE TIER 3 ZEC REQUIREMENTS IS ULTRA VIRES AND CONTRARY TO THE PUBLIC SERVICE LAW § 66-C, AND IN VIOLATION OF CONSTITUTIONAL PROTECTIONS, THUS NULL AND VOID

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

54. The Public Service Law (“PSL”) requires that electricity rates be “just and reasonable.” The PSC Order violates this clear legal obligation as it discriminates against a class of ratepayers that have opted to have 100% of their energy supplied by renewable forms of energy and nonetheless requires them to pay a second time for a portion of the electricity they consume.

55. The July 8, 2016 Responsive Proposal asserts that Tier 3 ZEC requirement supports consumer choice, renewable energy, and that it will lower electrical power costs for ratepayers in New York. It accomplishes none of these objectives.

56. The July 8, 2016 Responsive Proposal drastically increased the amount of subsidy that would go to four aging nuclear power plants that would be shuttered without the bailout. It mandates that all ratepayers *must* pay for this nuclear bailout, regardless of whether or not they opt to purchase nuclear energy or renewable energy from wind, solar or hydroelectric.

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

58. Under the PSC Order, even if customers chose to purchase 100% renewable generated energy, such as wind or solar, from LSEs – as is the case with Petitioner Green Farms – they will be forced to pay for nuclear generated electricity. Under the PSC Order scheme, even if customers are willing to pay more for 100% renewable power, they must also pay for nuclear energy and are thus penalized by paying more than 100% of the value of their electricity.

59. The rates paid by the State of New York, by and through its agencies or agents pursuant to the PSC Orders Tier 3 / ZEC requirement are “in addition” to the standard electric rates, and as such this surcharge is a direct payment of state monies to the utility recipient and constitutes a gift of state property in violation of Article VIII, § 1 of the New York State Constitution, due process for lack of proper notice, violation of equal power and equal application of the law and violation of separation of powers.

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

61. All LSE customers will be forced to buy nuclear generated electricity regardless of the customer’s preference and regardless of the customer’s financial status. Thus, without consideration to electricity consumers, many of whom made purchase decisions prior to the PSC Order, and whether they would otherwise qualify for subsidized energy due to socio-economic statuses, their energy purchases will be legally required to fund and promote the profitability of the state’s aging nuclear fleet’s operators. The PSC did not consider the whether the nuclear

bailout would be just and reasonable, or whether it would have deleterious economic impacts or be burdensome on small businesses or local governments.

62. 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, 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.”¹²

63. The Public Service Law does not authorize the PSC to subsidize nuclear generating facilities through regulation of prices.

64. The Legislature has neither granted the Commission the authority to regulate prices, nor to base them upon the cost of operation for the affected nuclear power plants. The PSC Order and the price regulating Tier 3 of the PSC Order was in excess of the PSC’s jurisdiction.

65. Accordingly, Petitioners are entitled to an order reversing, annulling, vacating and/or setting aside the Tier 3 ZEC requirement of the PSC Order, because it is neither “just or reasonable” and therefore the Commission acted in excess of its jurisdiction when issuing the Order.

SECOND CAUSE OF ACTION

THE PSC, IN TETHERING THE “SOCIAL-COST-OF-CARBON” METRIC TO RATEMAKING, IMPERMISSIBLY SET UNREASONABLE AND UNJUST RATES, LACKING IN RATIONAL BASIS AND SUBSTANTIAL

¹² N. Y. Public Service Law §66-c, Conservation of energy, § (1).

**EVIDENCE IN THE RECORD, AND WAS THEREFORE ARBITRARY
AND CAPRICIOUS AND WAS BEYOND THE PSC AUTHORITY.**

66. In authorizing the CES Order, the Commission initially set a path for Renewable Emission Credit for non-nuclear utility plants and Zero Emission Credits (ZECs) for nuclear power plants, both based on established cost-of-operation metrics to establish just and reasonable rates.

67. On July 8, 2016, the Commission announced that the ZECs metrics were being changed to a “social-cost-of-carbon” basis, essentially a non-cost-of-operation based formula.

68. In doing so, the PSC failed to hold evidentiary or any public hearings to consider, among other issues, the legality, theory, and practicality of, as well as the just and reasonable balancing of consumer and investor interests and fairness as between the utilities customers and their stockholders under this new theory of ratemaking; there were no economic experts before the Commissioner on behalf of both the nuclear plant and other electric utilities and the consumer; no cross examination — in breach of the PSC ’s own “Foundational Principles” to guide the development of a new ratemaking model as set forth in its own 107-page Opinion issued a mere two months earlier on May 19, 2016. (CASE 14-M-0101.)

69. The PSC’s “Foundational Principles” include, among other things, aligning earning opportunities with customer value, providing accurate and appropriate value signals, maintaining a sound electric industry, shift balance of regulatory incentives to market incentives, cost causation especially for ‘residential and small commercial customers’, policy transparency, fair value, rates should reflect cost causation, including embedded costs as well as long-run

marginal and future costs, gradualism, and that a large portion of revenue should inure to ratepayers.

70. There is no rational basis or substantial evidence in the record to safeguard the consumer against arbitrary regulatory power to uphold the PSC abruptly switching from its proposed Tier 3 Zero Emission Credit tethered to the cost-of-operation metrics to the novel “social-cost-of-carbon” metric for nuclear power plants, only.

71. With only fourteen (14) day notice to comment, the PSC switched from the cost-of-operation metric it had previously proposed for the ZEC, instead authorizing the retention of this basis for the RECs, only, and switched to the novel price fixing “social-cost-of-carbon” theory for the Tier 3 ZEC, effective August 1, 2016.

72. Indeed, a rate increase of this nature has not been adopted by legislation or regulatory authority by the federal or any other state government for nuclear power plants.

73. Rate making based on cost-of-operation principles to establish just and reasonable rates is well established and had the Legislature wanted to do away with the historical concepts including fair value and earnings, prudent investment and reproduction costs in determining fair value, and the realization of the risk of an investment in a speculative field such as nuclear power facilities, the Legislature would have done so. Public Service Law Section 65(1) (assure the provision of safe and adequate electricity service at rates that are "just and reasonable").

74. The PSC’s use of the new “social cost of carbon” metric for nuclear power plants is designed to recover all competitive losses, irrespective of the impact that such rates would

have on consumers or a State's economy or how rates will be held down to the lowest reasonable level and thus constitutes unreasonable and unjust rates beyond the PSC's ratemaking power.

75. The public interest mandates that the PSC guard against abuses in what is essentially a marketplace of monopolies. This concern is especially compelling in the nuclear power plants under Tier 3 because the industry is dominated by one or two entities, with virtually no competitors - essentially a monopoly - in New York. The PSC, in setting the rates, is not acting as a surrogate to market forces, and is instead, acting to replace market forces in looking to avoid the consequences of management decisions that would ordinarily guide decisions under market forces, nor is there an indication of how percentage allocation to rate holders and to shareholders that will be considered reasonable for services that stem directly from monopoly functions.

76. In deregulating New York's electric industry, the PSC rejected the "utilities' claim that consumers, *as a matter of law*, must pay rates designed to recover every dollar of stranded costs, regardless of origin and ratepayer impact", reserving the issue on a case-by-case factual basis under electric competition. Public Service Opinion No. 96-12 (May 20, 1996).

77. There is also no rational basis and no substantial evidence in the record that the new rate structure based on the "social-cost-of-carbon" for nuclear power plants may operate to conserve resources or to improve utility efficiency or to otherwise operate against arbitrary regulatory power.

78. The determination of the PSC was exercised without any rational basis and without reasonable support or substantial evidence and should be set aside on this ground, prohibiting against arbitrary and capricious regulatory power.

79. In issuing the Clean Energy Standard Rate-Setting Order, insofar as the orders adopt standards and procedures for determining ratepayer-funded nuclear subsidy based on the environmental “social cost of carbon” “Zero-Emission Credits”(Tier 3), the Commission exceeded the authority granted it by the Legislature under Public Service Law.

80. The portion of the Public Service Law that grants the Commission the specific power to set “just and reasonable” prices in a fair manner under the state energy conservation goals, specifically, 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) (*emphasis added*). The Legislature did not include nuclear power plants under this energy conservation ratemaking scheme.

81. The PSR's concept of the “public necessity” under the Tier 3 ratemaking scheme was not addressed under the 2015 New York State Energy Plan promulgated by the State Energy Board under the Energy Laws of New York¹³. In so doing, the PSR, impermissibly, legislated the investor interest to the exclusion of legislative interest in the utilization of facilities and their future usefulness. Nuclear utility power plants, which are not emission free, are not entitled to a free ride on the backs of ratepayers and as a result benefit from discriminatory rule making by the PSC. The PSC is not authorized to set rates that are impermissibly discriminatory in rates, charges and services to ratepayers. (see Public Service Law Section 65(c

82. Accordingly, the Petitioners are entitled to an order reversing, annulling, vacating and/or setting aside the CES Order, Tier 3, as void as the product of the Commission's ultra vires action.

¹³ <https://energyplan.ny.gov/Plans/2015>

THIRD CAUSE OF ACTION

PSC ACTED ARBITRARILY AND CAPRICIOUSLY AND CONTRARY TO LAW WHEN IT ISSUED ITS ORDER WITHOUT PROVIDING THIRTY (30) DAYS FOR PUBLIC COMMENT AND FAILED TO PUBLISH THE PROPOSED RULE IN THE STATE REGISTER THIRTY (30) DAYS PRIOR TO ADOPTION OF THE ORDER AS REQUIRED BY STATE ADMINISTRATIVE PROCEDURE ACT (“SAPA”) §202 (4-A).

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

84. On April 8, 2016, the PSC initially issued the proposed Order.

85. On April 29, 2016, the PSC issued a one-week extension of time to file Reply Comments on the Clean Energy Standard White Paper as published in State Register and the April 8, 2016 Notice of Comment Period for Staff White Paper and Cost Study in the CASE 15-E-0302 – Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard proceeding.

86. The April 29, 2016 public comment period on the initial proposal was extended from April 29 to May 6, 2016.

87. On May 27, 2016, the PSC issued a Notice regarding a technical conference on the Clean Energy Standard (CES) related to procurement issues. The Notice provides additional information for the conference indicating that it would be held on June 9, 2016 after the close of the public comment period.

88. On July 8, 2016, the PSC staff issued its Responsive Proposal, which was significantly different from the prior published April 8, 2016 Clean Energy Standard White

Paper. Upon information. Upon information and belief the Responsive Proposal was not published in the State Register.

89. The July 18, 2016 deadline – the date that PSC indicated that public comments were due – was subsequently extended by the agency, briefly, by an additional four (4) days requiring that public comments to be submitted by July 22, 2016. The entire public comment period for the substantially revised proposal ended after providing only fourteen (14) days for comment to be submitted to the PSC.

90. The July 8 Responsiveness Proposal was a “substantial revision” of the April 8, 2016 initially proposed Order.¹⁴ The Staff Responsive Proposal represented a significant departure from the previously publicly noticed proposal. Not only did the July 8th Responsive Proposal include an entirely new formula for calculating the cost of the nuclear subsidies (which raised the projected price exponentially), but it also included entirely new policy concepts, such as the designation of ‘public necessity’ for certain nuclear units. The only opportunity afforded parties and the public to review and comment on the brand new ‘public necessity’ components of the Order, as well as the ‘public necessity’ determination for any particular generator, was during the illegally shortened public comment period.

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

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

¹⁴ See SAPA §102(9).

comments on the revised text of the proposed rule, which, unless a different time is specified in statute, shall be not less than thirty days after the date of publication of such notice.”¹⁵

The Revised Rulemaking Was Not Published in the State Register

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

93. SAPA §202 4-a requires that in noticing a revised rule making “an agency shall submit a notice of revised rulemaking to the secretary of state for publication in the state register for any proposed rule which contains a substantial revision.” They didn’t do this.

94. Furthermore, SAPA §202 4-a requires “the notice of revised rule making must appear in the state register at least thirty days prior to the adoption of the rule.” They do this.

95. “Regulatory promulgation consistent with the provisions of the New York State Administrative Procedure Act (SAPA) is not a matter which rests within the particular and specialized expertise of an agency. Interpretation of the SAPA is not dependent on an understanding of technical data or underlying operational practices. The statute outlines uniform administrative procedures that state agencies must follow in their rule making, adjudicatory, and licensing processes and that courts review in their usual de novo adjudicative function. Thus, the legislative direction to these agencies is compliance, not implementation. As specialized knowledge is not necessarily implicated, the courts use their own competence to decide issues of

¹⁵ SAPA § 202(4)(a).

law raised, since those questions are of ordinary statutory reading and analysis. The principle of deference to an agency's special expertise shall be applied only where such expertise is relevant.”

Med. Soc'y of N.Y., Inc. v. Levin, 185 Misc. 2d 536, 537, 712 N.Y.S.2d 745, 746 (Sup. Ct. 2000)

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

FOURTH 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 SAPA §201, AND FAILED TO CONSIDER THE DELETERIOUS ECONOMIC EFFECT AND OVERLY BURDENSOME IMPACTS ON SMALL BUSINESSES AND LOCAL GOVERNMENTS REQUIRED BY SAPA §201-A (1)

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

98. SAPA §201 states “This article establishes 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.”

99. Here, Tier 3 violates SAPA §201 in two (2) ways. First by not using words with “common and everyday meanings,” and is confusing and inaccurate because nuclear energy is

not, nor has ever been zero-emissions – it routinely emits greenhouse gases and radioactive and thermal emissions; and second, by relying upon the “social cost of carbon” in an unclear, incoherent and inconsistent manner.

100. These designations that do not use “common and everyday meanings” and instead use false terminology contrary to science, and not just semantics. SAPA requires that the PSC proposed Order sent to the public for comment not mischaracterize the facts.¹⁶

101. Nuclear energy production is far from emission free or carbon free. Mining, milling, fabrication, transportation, use and storage are all produce extensive carbon and other greenhouse gas emissions.¹⁷ 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 CO₂ and methane; and, large quantities of thermal pollution. Since radioactive emissions are cumulative, adding additional years to operation of financially non-viable nuclear reactors unwittingly significant increases cumulative radioactive, thermal and greenhouse gases emissions from nuclear energy production. Also as

¹⁶ Prior filings of Clearwater, CIECP-PHASE in this proceeding detail and provide extensive authoritative evidence of nuclear emissions and negative environmental impacts.

¹⁷ 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).

reactors age, spills, leaks, and accidents greatly increase emissions. The NRC has identified that all reactors within New York State are currently leaking and emitting radioactive tritium into the groundwater of New York State.¹⁸

102. New York State Department of Environmental Conservation (“DEC”) has denied nuclear reactors within NYS water discharge permits due to nuclear energy productions continuing radioactive, thermal and greenhouse gases emissions.¹⁹ Thus, the PSC order directly contradicts facts and information published by both the NYS DEC and New York State Attorney General.²⁰

103. All the nuclear plants within New York, except for Nine Mile 2, lack closed cycle cooling systems and on a daily basis release large quantities of thermal emissions which directly heat the air and water, resulting in a direct impact on climate change. Prolonging the life of financially failing nuclear reactors, which do not have closed cycle cooling has a direct negative

¹⁸ *The NRC was notified on Feb. 5, 2016, by Entergy 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.* 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/ML1532/ML15322A312.pdf>

¹⁹ New York Dept. of Env. Conservation, Nos.: 3-5522-00011/00030 (IP2) and 3-5522-00105/00031 (IP3) Notice of Denial (April 2, 2010).

²⁰ 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).

impact on climate change, which is diametrically in opposition to the purported purpose of the PSC Order.

104. The “zero-emission” terminology promulgated by the PSC in Tier 3 as it directly conflicts with the commonly understood meaning of the word “emissions” and dictionary definitions. A quick internet search shows that emission(s) is defined as “the production and discharge of something, especially gas or radiation”; listed synonyms include discharge, release and leak.²¹

105. Therefore, all references to nuclear energy being “clean,” “emissions free”, “carbon free”, “zero emissions” or nuclear energy having “zero emission attributes” must be removed from the PSC Order. Further, total amount of potential subsidies be clearly stated.²²

106. On its face “zero emissions credits” for nuclear cannot be sustained, and all reference to nuclear as being “zero emissions” must be removed to be accurate. Therefore Petitioners ask this Court to strike from the Order such references to nuclear energy being “zero emissions.”

²¹ 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.”) The U.S. Environmental Protection Agency (EPA), <https://www3.epa.gov/radtown/nuclear-power-plants.html>, notes “EPA uses its authority from the Clean Air Act to limit the amount of radioactive material released into the air from nuclear facilities. EPA sets limits on radioactive emissions from all federal and industrial facilities.”

²² The \$7.6 billion to \$10 billion total noted in this Petition is the product of number crunching by our fellow environmental advocates.

107. Reliance on misleading word connotation –that nuclear energy is “emission free” – in Tier 3 substantively violates the SAPA §201 procedure thus Tier 3 must be rescinded and voided and only be reconsidered with clear, scientifically accurately language.

“Social Cost of Carbon”

108. Furthermore, Tier 3 inappropriately relies on a confusing construct, which was first introduced in the July 8, 2016 Responsive Order, entitled the “Social Cost of Carbon.” The PSC Order determines the price of ZECs through a formula based on the U.S. Environmental Protection Agency’s (EPA) Social Cost of Carbon (“SC-CO2”), yet grossly misapplies it when creating a formula that will impose an unnecessarily high cost on New York consumers without demonstrated furtherance of emissions reduction. The SC-CO2 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 (CO2) emissions. The SC-CO2 represents the present-value of the consequences of CO2 emissions, not the cost of emissions abatement.

109. The DPS Cost Study itself, contradicts the July 8, 2016 Responsive Proposal and Tier 3, as it provides substantial other evidence submitted in the course of the proceeding that there are substantially lower costs and far more effective means of reducing emissions. Efficiency is acknowledged to be the cheapest and fastest means of carbon reduction, and renewable energy resources are projected to decrease in cost and to require lower levels of public support over time. Yet, Tier 3’s use of a new and novel concept of SC-CO2 will cause dramatic increases in costs over time, resulting in rising costs as the Tier 3 program nears its expiration, and nuclear reactors get closer to their retirement dates.

110. Tier 3 adopts inconsistent applications of the SC-CO₂. Throughout the Cost Study, DPS relied upon the SC-CO₂ to quantify the “carbon benefits” of the CES, applying it equally to both renewables and nuclear to determine the net costs as adopted by the White Paper. In contradiction to the Responsive Proposal and in Tier 3 of the Order, SC-CO₂ was shifted to the other side of the ledger, to determine the subsidies to be paid to one energy source--nuclear--and incorporated an unexplained, but far larger, estimate of the benefits of nuclear. Neither the pricing of subsidies for renewables using the SC-CO₂, nor its estimate of the carbon benefits of renewables were adjusted to be consistent with the new methodology for Tier 3.

111. By setting the cost of greenhouse gas emissions reductions (abatement) at the same price as the cost of emissions releases, the Commission has, in effect, promulgated a policy in which the direct cost of reducing emissions must be equivalent to the environmental harms from increasing emissions. The Commission’s violates SAPA §201 as relies on an inconsistent application of the SC-CO₂ metric with respect to nuclear, but not renewable energy or efficiency resources; and its fails to evaluate the availability of lower cost means of emissions abatement. It is action is arbitrary and capricious in its misapplication of the SC-CO₂ metric.

112. Furthermore, the purported amount of carbon saved by continuing nuclear operations was promoted by the industry and manifestly adopted without verification – or even scrutiny – by the DPS and PSC, and is misleading and not based in scientific fact and is unduly complicated, is the opposite of clear and coherent and creates deleterious economic effect and overly burdensome impacts on ratepayers, including small businesses, not-for-profits, and local government who already invested in true renewable energy such as solar and wind, often at a premium. Perhaps what is the most unjust and unreasonable about the use of this metric is that Tier 3 penalizes Petitioners, as early adopters and investors in clean sustainable energy systems,

by forcing them to pay for a surcharge to support nuclear energy, an energy supply they chose to opt out due to nuclear energy's continuous and cumulative toxic emissions and unmanageable waste.

Violation of SAPA §201-a (1)

113. Revised regulations have been found to be unconstitutional under the New York State Constitution. *See Matter of the Med. Soc'y of the State of New York, Inc. v. Levin*, 185 Misc. 2d 536, 539, 712 N.Y.S.2d 745 (N.Y. Sup. Ct. 2000) (holding promulgation of revised regulations to be arbitrary and capricious and an abuse of discretion in violation of state Administrative Procedure Act because, inter alia, "the impacts of the proposed changes on small businesses and other members of the public were not properly or adequately identified"), *aff'd*, 280 A.D.2d 309, 723 N.Y.S.2d 133 (N.Y. App. Div. 2001). *See State Farm Mut. Auto. Ins. Co. v. Mallela*, 175 F. Supp. 2d 401, 414 (E.D.N.Y. 2001)

114. Here, the PSC failed to consider the increased surcharge ordered in the ZEC requirement. It does not consider that the significantly increased 12-year ratepayer surcharge for the nuclear industry bailout will create undue deleterious economic effect and have overly burdensome impacts on small businesses and not-for-profit corporations, such as Petitioners, and local governments. SAPA §201-a (1) requires that an agency shall, to the extent consistent with the objectives of applicable statutes, consider utilizing approaches which are designed to avoid undue deleterious economic effects or overly burdensome impacts of the rule upon persons, including persons residing in New York state's rural areas, directly or indirectly affected by it or upon the economy or administration of state or local governmental agencies.”

115. Due to significant violations of lawful procedures statutorily prescribed in SAPA, as set forth above, Petitioners are entitled to an order reversing, annulling, vacating and/or setting aside Tier 3 to bailout the nuclear industry contained in the PSC Order.

FIFTH CAUSE OF ACTION

THE TIER 3 ZEC REQUIREMENT VIOLATES SEQRA

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

117. The Commission's environmental review of the actions taken in the CES violates the State Environmental Quality Review Act (SEQRA) because the Generic Environmental Impact Statement failed to take a "hard look" at the proposal by evaluating only two scenarios – a false binary analysis that does not look at other reasonable, less expensive and more effective alternatives. The regulations direct the reasonable alternatives analysis to look at different technologies and different scale or magnitude alternatives.²³ The Generic SEIS violates both the letter and spirit of these provisions.

118. The "no action" scenario, which would involve allowing nuclear reactors to close as owners deemed them too unprofitable. Under this scenario, the market would determine what resources replaced the power generated by nuclear facilities.

119. The PSC failed to consider the most obvious alternative which involves replacing the planned closing of nuclear reactors with alternative energy sources, such as higher efficiency

²³ See 6 NYCRR 617.9(b)(5)(v)(b),(c).

energy sources or increased renewable energy, even though the DPS Cost Study indicates such alternatives would be cost effective and viable. 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 new renewables in 2030 (~34 TWh per year) is more than 25% greater than the amount of nuclear to be subsidized through March 2029 (~27 TWh per year). This suggests that incentives spent on new renewable generation sources would be nearly four (4) times as effective in providing zero-emission generation than subsidies to non-zero-emissions nuclear generation.

120. Considering that two of the four reactors the Commission declared “publicly necessary” and eligible for Tier 3 subsidies will have to cease operations in 2029 at the latest, regardless of the subsidies provided, the relative cost-effectiveness of renewable energy incentives is even greater. Nine Mile Point 1 and Ginna together generate 9-10 TWh per year, and their closure in 2029 (at the latest) would leave only 17 TWh of nuclear generation potentially available in 2030. Thus, based on data available to the Commission on the public record through DPS’s proposals and supporting analysis, a subsidized nuclear program will deliver approximately 50% less generation of energy than new renewables in 2030, at more than 3 times the cost; this analysis is evidence that new renewables are up to six (6) times more cost-effective than the nuclear tier in meeting the state’s emissions goal.

121. The PSC’s failure to consider alternatives to nuclear subsidies when sufficient information was available on the record is arbitrary and capricious, and in violation of law and will have substantial economic and environmental impacts.

122. The Generic SEIS review analyzes and reaches legally required findings regarding environmental impacts and mitigation based upon a proposal that is different from that adopted by the PSC. In fact, the Generic SEIS review is predicated upon a 3 year reviewed ratemaking proposal, but Tier 3 of the PSC Order is a twelve (12) year surcharge. Thus, the SEQRA certification is not for Tier 3 that was actually the subject of the SEQRA review.²⁴ Furthermore the Generic SEIS 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 decommissioning costs which will be incurred by New York State after twelve (12) additional years of operation.²⁵

123. Tier 3 does not contain a proper factual basis or analysis to support the Commission decisions because the underlying cost study was not considered in the Generic SEIS adopted on August 1, 2016.

CONCLUSION

124. The result of Tier 3 of PSC Order result in egregious harm to Petitioners, who will be forced to support and pay for the continuation of nuclear energy production in New York State, when they have chosen to opt out of using nuclear energy. The PSC’s order raises a very serious question of whether the PSC has the right to dictate that kind of energy ratepayers use. Does the PSC have the right to dictate the most expensive and lethal form of energy – nuclear

²⁴ See 6 NYCRR Part 617.11(d).

²⁵ See 6 NYCRR Part 617.11(d)(2), (4).

must be supported with surcharge – or does the public have the right to choose less expensive and/or more sustainable forms of energy?

125. In fact, Petitioners paid premiums for choosing not to use and support nuclear energy and were early adopters of solar and wind energy. Now Tier 3 will be force Petitioners to pay twice: once for the clean and sustainable energy supply they selected, such as wind, solar or geothermal, and now again, against their will, for dirty and toxic nuclear energy.

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

127. This matter is riddled with the PSC's multiple statutory violations or errors. The PSC failed to comply with statutorily require procedure set forth in SAPA by failing to:

- Publish the Responsive Proposal in the State Register; provide statutorily required 30 day comment period; and, allow statutorily required 30 day waiting period prior to issuing the Order in violation of SAPA § 202(4-a);
- Use clear and coherent words with common everyday meanings, in violation of SAPA §201 ;
- Consider the deleterious economic effect and overly burdensome impacts on small businesses and local governments in violation of SAPA§202-A(1);

- Identify environmental issues, take a hard look, and make reasoned elaboration in the August 1, 2016 Supplemental Generic Impact Statement in violation of SEQRA.

128. The PSC's adoption of the Tier 3 portion of the Order is ultra vires, as it is arbitrary and capricious without justification of being reasonable and fair.

RELIEF REQUESTED

1. For all of the above reasons set forth above Tier 3 of the PSC Orders was made in violation of lawful procedure and was not supported by the factual evidence in the record, and is contrary to law. Therefore, the Tier 3 portion of the PSC's Order should be vacated, annulled and rescinded.
2. We request the Court to declare the Tier 3 of the PSC Order to be arbitrary and capricious, and in violation of the New York State Administrative Procedures Act, as set forth herein.
3. We request the Court to declare Tier 3 of the PSC Order to be ultra vires, contrary to law and in violation of Public Service Law §66, as set forth herein.
4. We request the Court to declare Tier 3 of the PSC Order to null and void because it violates the due process rights of Petitioners under the New York State and United States Constitutions.
5. Alternatively, we request the Court remand Tier 3 of the PSC Order to the PSC to follow lawful procedures and law, as set forth herein.

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

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

Dated: Nanuet, New York
November 30, 2016

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