

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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In the Matter of

HUDSON RIVER SLOOP CLEARWATER, INC.,  
GOSHEN GREEN FARMS, LLC, NUCLEAR  
INFORMATION AND RESOURCE SERVICE,  
INDIAN POINT SAFE ENERGY COALITION, and  
PROMOTING HEALTH AND SUSTAINABLE  
ENERGY, INC.

Petitioners-Plaintiffs,

Index No. 07242-16

For a Judgment pursuant to Article 78 of the CPLR,

-against-

NEW YORK STATE PUBLIC SERVICE  
COMMISSION, along with KATHLEEN BURGESS in  
her official capacity as Secretary, AUDREY  
ZIBELMAN, 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,

Nominal Respondents-Defendants.

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STATE OF MARYLAND            )  
  ) ss:  
COUNTY OF MONTGOMERY )

TIMOTHY JUDSON, being duly sworn, hereby deposes and states, under penalties of perjury, the following:

**REPLY AFFIDAVIT OF  
TIMOTHY JUDSON-  
NIRS IN FURTHER  
SUPPORT OF VERIFIED  
ARTICLE 78 PETITION**

1. I am the Executive Director of Nuclear Information and Resource Service (“NIRS”), a California, Maryland and New York registered corporation, and submit this Affidavit in further support of Petitioners’ effort, pursuant to Article 78 of the New York State Civil Practice Law and Rules to annul, vacate, and set aside Tier 3 of the Public Service Commission’s (the “PSC”) August, 1 2016 Order (the “Order”), and in specific response to certain allegations made by Respondents with respect to NIRS in papers filed in this action. This affidavit supplements my affidavit of January 12, 2017 previously submitted in this matter.

2. Constellation’s characterizations in this action of my comments on behalf of NIRS in the proceedings below are blatantly inaccurate and taken out of context. *See* March 30, 2018 Constellation Memorandum of Law (the “Con MOL”) at 8-9 & 23.<sup>1</sup>

3. It is readily apparent throughout our comments that NIRS rejected the very principle of a nuclear subsidy, and any notion that nuclear was entitled to be rewarded for purportedly not producing carbon emissions. Our comments explicitly argued against the subsidy in any form, and we contended that all environmental impacts of energy production needed to be considered, and were not.

4. Constellation states in support of its claims that, “Petitioner NIRS, for example, argued that the PSC should not set a ZEC price based on a plant’s cost of operations because nuclear plants’ cost of operations were likely to increase exponentially in coming years... thereby exposing ratepayers to the prospect of potentially large increases in their bills.” (Con MOL at 8) Constellation’s statement is demonstrably false. Neither in the comments cited by Constellation,

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<sup>1</sup> References to “Constellation” include Respondents Constellation Energy Nuclear Group, LLC; Exelon Generation Company, LLC, R.E. Ginna Nuclear Power Plant, LLC; and Nine Mile Point Nuclear Station, LLC, all of whom submitted joint responses herein.

nor in any other filing, did NIRS claim that “nuclear plants’ cost of operations” would increase “exponentially.”

5. In fact, the only occasion in which NIRS used the term “exponentially,” is in our August 31, 2016 Petition for Rehearing, where NIRS described the price of the nuclear subsidy program increasing dramatically as a result of the PSC’s adoption of the social cost of carbon-based formula in the Final Order (R 15-E-0302-365). In the Petition for Rehearing, NIRS stated: “Not only did the new proposal include an entirely new formula for calculating the cost of the nuclear subsidies (*which raised the projected price exponentially*), but also included entirely new policy concepts, such as the designation of “public necessity” for certain nuclear units” (R 15-E-0302-365 at 6) (Emphasis added).

6. In addition, NIRS’s statement to which Constellation refers is taken entirely out of context. NIRS did not argue that the PSC should adopt another means of pricing any nuclear subsidy, but that the nuclear tier should be abandoned entirely. Constellation’s citation refers to statements made in a section of NIRS’s recommendations on “Cost Management” in the design of the Clean Energy Standard. NIRS’s second recommendation is “Abandoning the Nuclear Tier.” In those comments, NIRS argued that the projected costs of Tier 3 provided in the PSC’s Cost Study did not seem credible, and that the actual costs would likely be much greater. In support of that argument, NIRS stated, “the costs of nuclear power are rising significantly, making it likely that the costs of the proposed Nuclear Zero Emissions Credits will increase over the life of the Clean Energy Standard” (R 15-E-0302-189 at 15-16). At no point did NIRS recommend another means of pricing ZECs.

7. Constellation implies that NIRS recommended pricing the ZEC subsidy according to the social cost of carbon, stating: “Even Petitioner NIRS asked: if the ZEC Program’s purpose is to ‘avoid greenhouse gas emissions,’ ‘why isn’t the cost of the ZEC based on the cost of carbon, instead of on the difference between market rates and nuclear operating costs?’” (Con MOL at 9) The quoted statement is taken entirely out of context. It is a rhetorical question—not a statement—in the midst of a series of other rhetorical questions, all pointing out significant flaws and inconsistencies underlying the Tier 3 proposal in the January 25, 2016 Staff White Paper (the “White Paper”). The section of NIRS’s Reply Comments in which the quoted statement is found is titled “B. What value do the ZECs represent? No one seems to know” (R 15-E-0302-209 at 5). NIRS utilized a rhetorical device of a series of questions and counterexamples to show how arbitrary, capricious, and without merit the proposal was in order to make our case that the Tier 3 Proposal was ill-conceived and predicted upon fallacious assumptions.

8. Constellation repeats their mischaracterization of NIRS’s comments, also stating: “Several commentators proposed using the social cost of carbon, and one of the Petitioners even asked why the social cost of carbon was *not* being used, implying that using it was appropriate.” (Con MOL at 23) As stated above, Respondents have mischaracterized (deliberately or not) NIRS statement by taking it entirely out of context. Our intent in asking the question was to illustrate the confusion among many parties to the Clean Energy Standard proceeding about what “value” the ZEC subsidy was intended to represent: “[T]he White Paper never clearly defines exactly what value the ZEC is meant to capture. Parties commenting on the nuclear tier are equally confused. Across comments, there is no emerging consensus regarding value the ZECs are being developed to represent” (R 15-E-0302-209 at 6). NIRS then went on to illustrate the state of confusion through a series of questions drawn from the comments filed by other parties.

NIRS concluded that section of its comments by pointing out that the PSC should provide a clear definition of the “product” nuclear ZECs are intended to capture, to do so transparently and with opportunity for the public to comment: “So, we find ourselves asking... What do upstate nuclear reactors or reactors that are in financial distress provide in the form of additional value to consumers over reactors that are downstate or profitable? Or even over other kinds of energy resources? And why hasn’t the Staff attempted to account for any of nuclear energy’s obvious detriments in the calculation of the value of a ZEC? If the proposal is to force consumers to buy a nuclear product, it is incumbent upon Staff and the Commission to define the exact product being sold and to clearly define its value. This calculation should be done transparently and *be made available for public comment. Nothing approximating such a process has happened in this proceeding*” (R 15-E-0302-209 at 6) (Emphasis added). The intent of our statement was, in fact, to argue that the PSC had provided no sound basis for the Tier 3 proposal and that, if the PSC insisted on promulgating a nuclear subsidy, it would need to completely revise the proposal, provide a sound evidentiary and policy basis for it, and start a new process of public comment and review.

9. Contrary to Constellation’s snide claim that “No one can claim surprise” (Con MOL at 23), NIRS in fact was surprised that the PSC adopted a social cost of carbon methodology for Tier 3 and was also surprised that PSC did not provide a sufficient period for public comment upon issuance of the Revised Proposal.

10. Finally, the PSC preposterously argues that NIRS does not have standing to bring this action.

11. As alleged in the Petition, NIRS was a “party to the regulatory proceeding that is the subject of this litigation, New York Public Service Commission Case 15-E-0302, and participated in and provided comment in the [underlying] proceeding extensively, including filing a petition for rehearing with the Public Service Commission.” (Petition ¶ 22) The PSC has acknowledged that NIRS is a party, and includes NIRS on its Master Matter “Party List” as #69 in this proceeding (Case 15-E-0302). *See* Party List, #69, a copy of which is attached to the Affirmation of John L. Parker, Esq.<sup>2</sup> I am advised that for this reason alone NIRS has standing in this action.

12. Moreover, Tier 3, which allows the otherwise failing upstate nuclear reactors to continue operating, is clearly germane to the interests of NIRS, which advocates for the cessation of nuclear power generation, the protection of public health and safety with respect to radioactive materials and the operation of nuclear power reactors, and the adoption of renewable energy sources. According to its mission statement, NIRS is “a national non-profit organization devoted to a nuclear-free, carbon-free world” and it has “served as the information and networking hub for people and organizations concerned about nuclear power, radioactive waste, radiation, and sustainable energy issues since 1978.”

13. Finally, NIRS has alleged that the unlawful Tier 3 subsidy imposes “large, direct financial costs” on its “over 4,000” New York members “for many years through surcharges on their electric utility bills, and it imposes large, indirect financial costs on them through surcharges on their local governments’ and school districts’ electric utility bills.” (Petition ¶ 22)

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<sup>2</sup> A copy of the Party List can also be found at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=15-e-0302&submit=Search+by+Case+Number:>

14. Accordingly, this lawsuit is germane to the interests of NIRS, whose members are New York electricity retail consumers who are forced to pay the Tier 3 subsidies promulgated by the PSC. I am advised that these facts provide an additional basis for NIRS's standing in this case.

  
TIMOTHY JUDSON

Sworn to before me this  
3<sup>rd</sup> day of December, 2018

  
Notary Public

JOHN R. URCILO  
NOTARY PUBLIC  
MONTGOMERY COUNTY, MARYLAND  
MY COMMISSION EXPIRES NOV. 21, 2022