SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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,

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.

Albany County
Index No. 07242-16

PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' MOTIONS TO STRIKE PORTIONS OF REPLY MEMORANDUM AND CERTAIN EXHIBITS TO ACCOMPANYING AFFIRMATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

PRELIMINARY STATEMENT

The two separate Motions to Strike large portions of Petitioners' Reply made by the PSC and Constellation/Exelon are a last ditch effort to keep the Court from fully reviewing what really happened in this case. The Motions should be denied in their entirety. There is nothing raised in Petitioners' papers that is not properly presented to the Court in this case, which has always been about the unlawful procedure used by PSC, the lack of legal authority to enact Tier 3, the fact that Tier 3 unjustifiably provided "windfall profits" to Respondent Constellation/Exelon, was arbitrary and capricious, and hijacked the public interest for a private purpose.

The subjective and improper nature of the motions is best demonstrated by the fact that Respondents PSC and Constellation/Exelon cannot even agree on what they want the Court to strike—significant portions of the Reply Memorandum that the PSC thinks are proper are being challenged by Constellation/Exelon and large portions of the Reply Memorandum that Constellation/Exelon thinks are proper are being attacked by the PSC.[1] The remedy sought by Respondents' is extreme by any measure, trying to re-write over half of Petitioners Memorandum of Law and supporting papers, or, in in Constellation/Exelon's case, even a request to strike it in its entirety.

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[1] The numerous instances of disagreement between the Respondents in connection with the motions to strike (approximately 27 pages) are reflected in Exhibit 4 to the accompanying Parker Opposition Affirmation. Exhibit 4 highlights in yellow portions that the Constellation/Exelon wants to strike that the PSC doesn't, and highlights in blue are what the PSC wants to strike but Constellation doesn't. Both Respondents challenge the same exhibits, except for Exhibit J to the December 14, 2018 Parker affirmation, which only Constellation/Exelon challenges. To avoid confusion, Petitioners will address (i) Constellation/Exelon's motion to strike portions of the Reply Memorandum and Exhibit J in one section; (ii) the PSC's motion to strike portions of the Reply Memorandum in another section, and (iii) the remaining motions to strike exhibits in a final section.

While all of Respondents' attempts to rewrite Petitioners' Reply papers are meritless, and will be addressed more fully below. Petitioners cannot help but point out the truly absurd nature of some of them:

(i) Respondent Constellation/Exelon goes so far as to move to strike a Reply Affirmation by Petitioner NIRS (Exhibit J to the Parker Affirmation)—which was submitted to refute Constellation/Exelon's plain mischaracterization of NIRS' public comments in the proceeding below.[2]

(ii) The PSC inexplicably argues that certain materials are outside the Record even though the PSC expanded the administrative Record when it finally provided this Court and Petitioners with all of the public comments that the PSC concedes were before it "prior to the administrative determinations at issue" *See* Letter from John C. Graham to the Court, dated October 31, 2018. The PSC confirmed that these public record materials were sent to the Court to "obviate the need for further litigation" on the completeness of the administrative Record. *Id.* Yet shockingly, the PSC now claims that Petitioners are precluded from referring to these Record materials. *See e.g.*, PSC claim that document R.15-E-0320-5899 cannot be discussed (see PSC Memorandum at p. 15), even though it was part of the PSC's October 31, 2018 supplemental Record submission.[3] Respondents cannot have it both ways: first supplementing the Record to avoid an appeal, and then arguing that Petitioners cannot refer to the supplemental

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2 References to the "Parker Affirmation" are to the December 14, 2018 "Affirmation of John L. Parker Esq.," Petitioners' attorney, with redaction. References to "Second Parker Affirmation" are to the December 14, 2018 "Affirmation 2 of John L. Parker, Esq. Containing Unredacted Copies of Documents Pursuant to Order." References to the "Parker Opposition Affirmation" are to the accompanying Affirmation of John L. Parker, Esq. in Opposition to the Respondents' Motions to Strike" dated January 14, 2019.

3 References to the "PSC Memorandum" are to the "Memorandum of Law of State Respondents Public Service Commission of the State of New York, et al. in Support of Their Verified Answer and in Opposition to the Amended Petition-Complaint" dated March 30, 2018.

Record materials that they concede were before it during the underlying proceeding.

(iii) The PSC argues that Petitioners' Reply contending that the Order is inconsistent with the State Energy Plan is "not responsive to Respondents' answering papers," yet the PSC has an entire section in its Memorandum of Law entitled, "The ZEC Program is consistent with the State Energy Plan," to which Petitioners are replying. *See* PSC Answering Memorandum, Point IV.D at pp. 48-50; *see also* 5, 6, 9, 11.

(iv) Respondent Constellation/Exelon seeks to strike the official March 16, 2016 State Register notice issued by Respondent PSC in the underlying proceeding, as well as any references to it.[4] In doing so, Constellation/Exelon attempts to mislead the Court by claiming the Notice is not part of the underlying proceeding. A quick read of the Notice itself demonstrates it is part of the proceeding and is discussed in the Order.[5] The notice forms a significant basis of Petitioners' State Administrative Procedure Act claims because the PSC notice states that the Tier 3 "level of support would be no more than the level otherwise required to encourage new renewable facilities," which the Order materially changed without notice.

(v) The PSC wants to re-write Petitioners Reply Memorandum by limiting the descriptive words used by Petitioners. For example, the PSC does not like the fact that Petitioners describe the "windfall profits" to Constellation/Exelon (Petition ¶ 168) as billions of dollars in "bonus revenue" in the Reply Memorandum. The unjustified billion dollar profits to Constellation were alleged throughout the Petition *See e.g.*, ¶¶ 6, 65, 72, 82, 88, 104); Opening

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[4] This Register Notice was attached to Exhibit B to the Parker Affirmation.

[5] At the end of the Notice, it specifically references that it is the second state Registry Notice in the underlying proceeding "(15-E-0302-SP2)".

Memorandum at pp. 22-24, 29.[6] It is unconscionable to allow Respondents to dictate what words the Petitioners may use in their Reply.

Respondents miss the fundamental nature of the case – it is a hybrid declaratory judgment and Article 78 challenge – and notably this Court by Order allowed Petitioners' declaratory judgment claims to continue, as well as claims that the PSC Tier 3 action was ultra vires, and in violation of the procedural due process requirements of the State Administrative Procedures Act ("SAPA").[7] Evidence supporting these claims, including affidavits identifying the substantial revisions in Tier 3 that required new due process notice (for e.g., material changes in cost), and conduct supporting the ultra vires nature of the PSC action (private vs. public purpose) are properly before the Court for those claims. Respondents ask the Court to put on blinders and only look at one aspect of this case—that the PSC action was arbitrary and capricious—and thereby attempt to limit the record and evidence considered by the Court based on that claim alone. In any event, the attempt to strike materials even for the arbitrary and capricious claims is without merit. Expert affidavits were part of a negotiated stipulation and are not an enlargement of the record but rather an analysis of the Administrative Record

Respondents put Petitioners through a lengthy process, requiring pre-approval of the experts, and addressing the ability of Petitioners' experts to review and analyze the confidential portions of the Record below. The detailed Confidentiality Agreement never precluded the use of the selected and approved experts in furthering Petitioners' case to analyze or comment on the Record in this case; in fact, it set forth specific parameters for its use.

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[6] References to the "Opening Memorandum" are to Petitioners "Memorandum of Law in Support of Amended Verified Petition and Complaint" dated January 13, 2017.

[7] See this Court's "Decision/Order/Judgment" dated January 22, 2018, deciding Respondents' motions to dismiss.

Moreover, these affidavits are also permissible to support the declaratory judgment claims in the hybrid action. In fact, this Department has allowed additional affidavits in support of declaratory judgment claims even when on the date of oral argument:

> We see no reason to upset the exercise of discretion by Special Term in receiving the affidavits in support of petitioner's application on the date of argument. Any prejudice which this may have created could easily have been cured by respondents' objection and a request that they be allowed to submit further papers. Although the record does not disclose whether any such objection was made, it is significant to note that Special Term's decision on petitioner's application for declaratory relief was not rendered until over two and one-half months after the matter was argued. This was more than enough time for respondents to respond to any new material which may have appeared in petitioner's affidavits.

James H. Maloy, Inc. v. Town Bd. of Town of Guilderland, Albany Cty., 84 A.D.2d 856, 857, 445 N.Y.S.2d 27 (3d Dept 1981). Here, Respondents did not move to sur-reply, but instead made these extreme motions to strike large portions of the Petitioners Reply.

The expert affidavits also represent a legally permissible analysis of the administrative Record—not an enlargement of it. See. *Stahl York Ave. Co., LLC v. City of New York*, 50 Misc. 3d 1207(A), 28 N.Y.S.3d 650 (Table), 2016 WL 104502, 2016 N.Y. Slip Op. 50011(U) at 25-26 (N.Y. Co. Sup. Ct. 2016), *aff'd*, 162 A.D.3d 103, 77 N.Y.S.3d 57 (1st Dept. 2018) ("Contrary to respondent's argument, however, the affidavit and accompanying exhibits represent an analysis of the administrative record, not an enlargement of it" and were thus properly considered).

Petitioners have complied with all scheduling deadlines

Petitioners take great offense at PSC's suggestion to this Court that Petitioners "did not comply" with scheduling deadlines and instead "engaged in non-meritorious motion practice." *See* PSC Memorandum at p. 3. There has been no claim by either Respondent that deadlines or scheduling stipulations have been missed. In fact, the vitally important to the issues in this matter, Petitioners motion eventually led to an expansion of the administrative Record and access

to Constellation/Exelon's confidential information regarding costs of operations. The largest delay in this case resulted from Respondents' Motion to Dismiss this action without answering or providing an administrative Record.

There is nothing in the Reply papers that should surprise or prejudice the Respondents, and for which Respondents were not on notice. Petitioners' Reply papers may clarify or put a finer point on some of their claims in this hybrid action, which seeks a declaration that the PSC Tier 3 Order was "ultra vires" (CPLR 3001-declaratory judgment) and "in excess of jurisdiction" (under CPLR § 7803(2)) and "were made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (under CPLR § 7803(3)).

The Court should reject Respondents' attempts to redraft Petitioners' Reply papers by deleting exhibits and striking significant portions (and legal arguments) in the Reply Memorandum that they do not like or want the Court to consider. Such a request is over the line of proper legal practice, and should be rejected by the Court.[8]

ADDITIONAL BACKGROUND

Petitioners Did Not Receive the Full Administrative Record Until 22 Months After It Filed Its Verified Petition

Respondents' self-serving argument that Petitioners cannot stray from the wording of its initial papers does not recognize the actual progression of events in this case, or standard legal practice. The hybrid Article 78/declaratory judgment challenge to government action was based

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[8] To the extent the PSC and Constellation would like to get the last word on the legal arguments made, Petitioners suggest that Respondents submit Sur-reply memoranda. Petitioners want this Court to decide this case on the merits with the now-complete record, all of the submitted pleadings, affirmations, affidavits and documentation, and providing every party with an opportunity to set out their case. This case is of significant public interest and Petitioners have nothing to hide. In fact, Constellation/Exelon in its Motion to Strike actually replied to many of the arguments made in Petitioners Reply.

on Petitioners Verified Amended Petition submitted to the Court in *January 2017*, containing information known to Petitioners at that time. It was not until *March 31, 2018—over one year later*—that Petitioners received the PSC's initial certified administrative Record.

Respondents fail to acknowledge Petitioners received the confidential documents and remaining parts of the full administrative Record in November 2018, only 45 days prior to Petitioners serving their Reply papers. *See* Letter from John C. Graham to the Court, dated October 31, 2018. It took negotiations with the Respondents regarding the exchange of the "confidential commercial information," specifying who would be permitted to review it, and how the information would be presented to the Court, even anticipating that some redactions may be necessary.

The October 31, 2018 PSC letter also supplemented the Record by providing the Petitioners and the Court with a DVD containing thousands of public comments that were before it "prior to the administrative determinations at issue", which, until that date, the PSC had strenuously argued should not be made part of the Record. *Id.* The materials were finally sent to the Court and to Petitioners to "obviate the need for further litigation" on the completeness of the administrative Record. *Id.* Yet, in its motion to strike, the PSC now claims that Petitioners are precluded from referring to these very Record materials. See e.g. PSC claim that document R.15-E-0320-5899 "does not exist in the filed record which this Court held was complete" on July 18, 2108 (PSC Answering Memorandum p. 15). The Court never held that the administrative Record was 'complete" but rather ruled that the administrative filed was "sufficiently developed" to provide "an adequate basis upon which to review" and thus the Court would not "compel" the PSC to provide further documents. July 18, 2018 Decision/Order/Judgment of the Court at p. 5. The Court never prevented the PSC from providing further record materials, as it ultimately did,

and in fact "encouraged" the parties to renew their discussions about access to certain confidential documents and records. *Id* at fn. 2.

ARGUMENT

A. Constellation/Exelon's Motion to Strike Portions of the Reply Memorandum and Exhibit J to the Parker Affirmation Should be Denied in Its Entirety

Constellation/Exelon moves to strike portions of the Reply Memorandum improperly claiming there were eleven (11) "new" arguments that were not previously made by Petitioners. Each argument was raised in the Amended Petition or Opening Memorandum, and/or responds to arguments made by Respondents in their answering papers. Petitioners will address each numbered alleged "New Argument" set forth in Constellation's Answering Memorandum at pp. 10- 17.

#1. Arguments concerning inconsistency with State Energy Plan (pages 2, 4, 8-13 of Reply Memorandum).

It is absurd for Respondents to claim that Petitioners cannot argue that Tier 3 is inconsistent with the State Energy Plan in its Reply Memorandum, particularly when Point IV. D of the PSC's Answering Memorandum his entitled, "The ZEC Program is consistent with the State Energy Plan." *See* PSC MOL at Point IV.D pp. 48-50; and pp. 5, 6, 9, 11.[9] Further, contrary to Constellation/Exelon's claim, the argument that Tier 3 is inconsistent with the SEP is *not* a new claim—it was raised in the Petition (see e.g. ¶ 3 ("Petitioners are challenging Tier 3 because it contravenes the…State Energy Plan"), ¶ 41 ("The State Energy Plan does not mention maintenance, preservation, or promotion of nuclear energy, subsidization of nuclear plants, or any type of ZEC/Tier 3 program"); ¶ 103 (Tier 3 "was not proposed or even suggested in the

[9] Constellation even tries to preclude Petitioners from citing New York's statutory provision relating to the State Energy Plan, Energy Law § 6-104, even though the PSC has cited to this same statute in its Answering Memorandum at pp. 4, 9 and 49.

State Energy Plan, nor explicitly authorized or required by legislation or express regulatory authority"); 144-145 (State Energy Plan does not "contemplate the Tier 3 nuclear power subsidization program," etc.); and ¶ 159 and throughout the Opening Memorandum (see e.g., pp. 2-3, 5, 7, 11-12, 23, 27, 28, 40, 42).

#2. Discussion of statutes allegedly authorizing the PSC to adopt Tier 3 Authority (pages 2, 15-18 of Reply Memorandum)

Only Constellation/Exelon challenges this material; the PSC does not and for good reason: Petitioners are rebutting the PSC Answering Memorandum, section Point IV.B. entitled, "The Commission acted in accordance with its statutory authority." Clearly, a discussion and rebuttal of the specific alleged statutory basis of the PSC's legal jurisdiction set forth in its Answering Memorandum is proper in this action which seeks a declaration that Tier 3 is *ultra vires* (Petition-"Relief Requested" #4) and claims that Tier 3 was not "authorized or required by legislation or express regulatory authority" (Petition ¶ 103).[10]

#3. Discussion of *Boreali* (pages 2, 7-7, 13-15, 22-32 of Reply Memorandum).

Petitioners did raise *Boreali* in responsive papers, in advance of the Reply and *prior to* Respondents' answer to the Petition. Specifically, Petitioners argued:

> The Commission's actions crossed the "difficult-to-define line between administrative rulemaking and legislative policy-making." *Boreali v. Axelrod*, 71 N.Y.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

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10 Despite Respondents' arguments regarding PSL § 66-c, lack of jurisdiction is a legal issue that can always be raised. When under 66-c or lack of jurisdiction, generally, those allegation are properly before the Court in the Petition. As the Court noted

> that a pleader state the facts making out a cause of action, and it matters not whether he [or she] gives a name to the cause of action at all or even that he [or she] gives it a wrong name"

Johnson ex rel. Fredo v. Verona Oil, Inc.,36 A.D.3d 991, 992–93, 827 N.Y.S.2d 747, 749 (3d Dept 2007)(citations omitted).

> interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation.

See Petitioners' Memorandum of Law In Opposition to Motion to Dismiss, dated March 27, 2017 at p. 9.[11]

Further, the *ultra vires* nature of the Tier 3 was alleged in the Petition (see e.g., ¶¶ 183-188, 192, 193) and the fourth request for declaratory relief specifically requests the Court to declare that Tier 3 is *ultra vires*. (See also Opening Memorandum at p.23). Constellation's reliance on *State ex rel. Harkavy ex. Rel. Does v. Consilvio,* 34 A.D.3d 67, 77 n.3 (1st Dept 2006), *rev'd on other grounds,* 8 N.Y.3d 645 (2007), a habeas corpus case brought by prisoners, is misplaced. There, unlike here, the petitioners had not even "mentioned" their "separation of powers" argument prior to their reply in the lower Court. The *Consilvio* court nonetheless ruled on the merits of both claims, finding that *Boreali* was inapplicable because the administrative action "did not issue guidelines affecting the public" but was a memorandum that "gave direction and advice", which "did not require legislative authorization." 34 A.D.2d at 77 n.3.

#4. Impact of Increased Efficiency (pages 38-40 of Reply Memorandum)

Constellation/Exelon claims the impact of increased energy efficiency was raised only in connection with the Petition's SEQRA claim, which the Court dismissed. Petitioners understand Respondent's issue on this point, but refer the Court to the Petitioners' arguments on consistency with the State Energy Plan, and is part of the arbitrary and capricious argument previously raised by Petitioners. *See e.g.,* Petitioners Memorandum in Opposition to Motion to Dismiss at pp. 15-16 ("The Commission's action is arbitrary and capricious...with respect to... renewable energy or efficiency resources.")

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[11] References to "Memorandum in Opposition to Motion to Dismiss" are to Petitioners "Memorandum of Law in Opposition to Motion to Dismiss" dated March 24, 2017, *more than one year before* Respondents Answering Memoranda were submitted.

#5. Impact of 12-year term on development of new renewables (pages 41, 43-44 of Reply Memorandum).

The argument that the lengthy term of Tier 3 hampers the adoption/development of renewables was alleged in the Petition and the Opening Memorandum of Law. *See* Petition ¶ 159 ("results of Tier 3 will likely reduce demand for and likely installation of renewable energy in New York, the exact opposite result of the one contemplated ...in the State Energy Plan"); The threat to clean energy development was also pointed out in Petitioner affidavits. *See. e.g.*, ¶ 26 of Affidavit of Michel Lee, dated March 30, 2017, on behalf of Petitioners PHASE and IPSEC (the "PHASE/IPSEC Aff.") ("Tier 3 threatens to severely undermine the transition to a clean energy economy. It diverts twice as much support to aging nuclear plants as the PSC Order provides to all renewables combined. And it forces continued reliance upon dirty large baseload power, just at the point renewables and efficiency technologies were getting a foothold in the marketplace.")

#6. Misuse of social cost of carbon arguments (pages 46-47; 56-58 of Reply Memorandum).

Constellation/Exelon incorrectly claims that Petitioners' Reply argues for the first time that the social cost of carbon is a global metric. Petitioners' Opening Memorandum (at p. 26) does discuss the "global" aspect of the social cost of carbon under the subheading "The Social Cost of Carbon Was Misapplied by the Commission"). The PSC fails to acknowledge that on March 30, 2018 in its Memorandum in Opposition to the amended Petition they presented to the Court the EPA document via internet link that discusses the global nature of the social-cost-of-carbon.[12] PSC MOL at 50-51. This concept was discussed further in Petitioners' Reply because

[12] It is worth noting that the EPA Fact Sheet cited by the PSC in its Memorandum was *not* in the administrative record and is also post-decision. The document cited is the International Working Group on Social Cost of Carbon United States Government, Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis under Executive 12866 at 2, available at https://19january2017snapshot.epa.gov/sites/production/files/2016-12/documents/scc_tsd_2010.pdf.).

the EPA Fact Sheet relied on by the PSC in its argument clearly notes that the SCC is a global metric. In fact, Petitioners' point out that PSC misapplied the SCC, because it only focuses on state impacts. Constellation/Exelon also argues that Petitioners never argued that the PSC should have considered the impacts from methane. However, this issue of methane emissions was set forth in the Petition and the Opening Memorandum. *See* Petition ¶¶ 107, 117 and Opening Memorandum at p. 31. Petitioners' reference to the EPA's social cost of methane was raised to show that the PSC cherry-picked the social cost of one greenhouse gas (SCC) while ignoring the social cost of methane, which according to the EPA is 25 times as potent as carbon at trapping gas in the atmosphere," and is included in the same EPA website.

#7. Discussion of Fitzpatrick purchase condition (pages 2-3, 5, 48-52 of Reply Memorandum).

The Petition and Opening Memorandum did refer to the FitzPatrick purchase requirement--that the final Tier 3 was a deal to induce Exelon to take over FitzPatrick; and, that Tier 3 would not necessarily continue to exist if a sale of FitzPatrick was not consummated. In fact, the first two sentences in the Opening Memorandum discussing the Sixth Cause of Action (i.e., Tier 3 is void as arbitrary and capricious) state:

> "The Commission expanded the Large-Scale Renewable Proceeding to include a track for nuclear energy plants. *The Commission administratively set pricing, eligibility and conditions ... to ensure that a buyer comes forward to purchase the Fitzpatrick plant."*

(at p.44, emphasis added). *See also*, Petition ¶¶ 35 ("On November 2, 2015, Entergy announced plans to close the FitzPatrick nuclear facility in late 2016 or early 2017. Pet MOL at pp. 54, 68, 186-187;. 13-14: ("On November 2, 2015, Entergy announced plans to close the FitzPatrick nuclear facility in late 2016 or early 2017. On July 12, 2016, eight (8) days after the Revised Proposal appeared on the PSC's website, Exelon indicated it would purchase Fitzpatrick if New York State provided financial incentives and on November 17, 2016, the Commission approved

it." Petition ¶ 75. Tier 3 would be null and void if the event Constellation/Exelon's purchase of FitzPatrick did not go forward by September 2018."); Petitioner MOL p. 54 ("The Commission notices did not publish and did not provide notice that it was establishing ... (7) that the 12-year duration will be conditional upon a buyer purchasing the FitzPatrick facility and that taking title prior to September 1, 2018; and, (8) that if the sale and closing does not occur, there will be no commitment for the program and that the Commission's purpose in imposing the condition was to...induce a buyer to come forward to purchase the FitzPatrick facility"); and PHASE/IPSEC Aff. , ¶ 12 ("the Governor facilitated negotiations for Entergy to sell FitzPatrick to Exelon so the plant could remain open and the PSC staff began to incorporate a subsidy scheme to provide revenue for New York's aging upstate nuclear power plants.") and ¶ 31 ("Tier 3, the overall record and public evidence shows, represents an effort to provide environmental cover for a behind-the-scenes economic deal.").

#8. Discussion of jobs (pages 54-55 of Reply Memorandum).

In a discussion of the "capricious rubric" of Tier 3, the Opening Memorandum argued that, "any decision pertaining to an apparent objective to protect the jobs of private nuclear generation facility workers through public subsidies, however understandable, has statewide ramifications and is in the province of the Legislature, and "it is not within the province of the Commission under Public Service Law." See Opening Memorandum at p.7. Accordingly, Constellation/Exelon is once again wrong in its claim that this argument was not made prior to the Reply Memorandum. Constellation/Exelon Memorandum at p. 15.

#9. In-Depth Discussion of Exhibit B to Parker Affirmation-PSC State Register Notice (#2) in the Underlying Proceeding (pages 63, 71, 72-73, 78 of the Reply Memorandum).

Constellation/Exelon disingenuously misleads the Court by arguing this State Register Notice dated 3/16/2016, which states that "the level of support [for Tier 3] will be no more than

the level otherwise required to encourage new renewable facilities," is not part of the underlying case. Constellation/Exelon argues that the Notice relates to an "expedited program" is not part of the Record in this proceeding (Constellation Answering Memorandum at p. 16). This argument is belied by the Notice itself that specifically references that it is the second state Register Notice in the underlying proceeding "(15-E-0302-SP2)", and the proposed action and purpose set forth in the Notice describe the underlying proceeding. Even the page in the CES Order that Constellation/Exelon cites flies in the face of its argument: The Order states, "The Commission further ***expanded the instant proceeding*** on February 24, 2016 to consider an expedited program to maintain the viability of certain nuclear power plants." (*Emphasis added*). *See also* response to #10, which follows. (R. 5-E-0302-352-A at p.23)

#10. Arguments regarding "Changed ... Ratio" and parity between renewables and nuclear subsidies (pages 4, 6, 71-72 of the Reply Memorandum)-

First, this argument responds to the Constellation/Exelon Memorandum, which states that, "any cost increases are besides the point. The State Register Notice did not specify any particular program cost, and hence would not 'require any change to cover' the responsive proposal's cost." *See* Constellation/Exelon Memorandum pp. 24 & 25. Petitioners' Reply Memorandum responds that, while the Register Notices did not give a specific cost amount, they made clear there was to be parity between Tier 3 and the renewable Tiers, and that it was a substantial revision to remove the cost parity requirement without notice.

Second, this lack of parity was set forth in the Petition, which states the "Responsive Proposal contained three significant changes" including it "dramatically increased the price tag for nuclear subsidies, and the nuclear subsidies are far greater in comparison to support for renewables and efficiencies contemplated in Tier 1 and 2 combined" Petition ¶¶ 5. *See also* Petition ¶ 12 (Tier 3 "provides a exponentially and proportionally larger amounts of funds than

those provided to renewable and efficiency technologies supported by Tier 1 and Tier 2"); ¶ 133 (that the "direct costs of the July 8 Responsive Proposal for Tier 3 ($7.6 billion through March 31, 2029) is estimated to be more than triple the direct costs of Tier 1 ($2.44 billion through 2030)"); Petitioner Memorandum at pp. 6, 6, 10, 11, 25, 27, 38, 40, 44; Memorandum in Opposition to Motion to Dismiss at p. 16.

#11. Argument that Tier 3 was a Type (1) Rule (SAPA §102(2)(a)(i)) (pages 81-90 of the Reply Memorandum).

As even the PSC Memorandum points out, Petitioners do claim that the action is "within the scope of SAPA § 102 (2) (a) (i), and is therefore subject to various SAPA procedural requirements...including the requirement to re-notice any 'substantial revision' of the originally-proposed rule." PSC Memorandum at p. 30 (citing to the Petition and Opening Memorandum). In fact, both the PSC and Constellation argue in their respective Memoranda why the action is not a Type (i) Rule but a Type (ii) Rule under SAPA. (PSC Memorandum at pp. 30-33 & fn.16 and Constellation Memorandum at pp. 9, 18-19, 20 fn.9, 27). Both Respondents also argue that if it is considered both rule types, only the procedures relating to Type (ii) should apply. *See* PSC Answering Memorandum at p. 33, fn.16; Constellation Answering Memorandum at p. 20, fn.9.

Petitioners' Reply addresses Respondents' arguments by citing additional case law and arguing why Type (i) process should apply even if Tier 3 falls within both types of rules. The SAPA Type (i) argument was raised in the Petition. *See e.g.*, 104 (PSC claim that it "did not have to comply with the provisions of SAPA 102(i)(a) is an error of law").[13] In opposing Respondents Motions to Dismiss filed well before their Respondents' answers, Petitioner could not have said

[13] Throughout the Petition the lack of adequate comment period is repeatedly raised, and specifically Petitioners plead that SAPA §202(4-a) (the re-notice provision for substantial revisions] was violated, ¶ 191. Only SAPA §102(i) (a) rules are subject to the provisions of §202(4-a). Thus Petitioners affirmed that they considered the rule to be a SAPA Type (i) rule.

it any clearer: "the Zero Emission Program of Tier 3 created a regulatory program governed by the procedural mandates of SAPA §102(a)(i)" (Petitioners Memorandum Opposition. Motion to Dismiss at p. 10).

Petitioners cite SAPA §202(4-a), legal obligations when a "substantial revision" in revised rule making, procedures occurs, once again these procedures are on a, applicable to Type (i) rules. *See* Petitioners Memorandum at pp. 19-20).

Exhibit J to the Parker Affirmation is Also Proper

Respondent Constellation/Exelon goes so far as to move to strike a Reply Affirmation by Petitioner NIRS (Exhibit J to the Parker Affirmation)—which was submitted to refute the plain mischaracterization in Constellation/Exelon's Answering Memorandum of NIRS' public comments in the proceeding below.

B. The PSC's Motion to Strike Portions of the Reply Memorandum Should be Denied in Its Entirety

The PSC provided a chart of the portions of Petitioners' Memorandum of Law that it seeks to strike. Petitioners have prepared a chart that replicates the PSC chart, but adds a third column to reflect Petitioners' responses. This chart, entitled "Chart of Petitioner Responses to PSC Reason to Strike" ("Petitioners' Chart") is attached in an Appendix to this Memorandum. In addition, to the extent the issue has been discussed above in response to Constellation/Exelon's motion to strike portions of the Reply Memorandum, Petitioners' Chart will refer the Court to that section.

C. The Court Should Reject Both the PSC and Constellation/Exelon's Attempts to Strike the S, T & U to the Parker Affidavit

Both Respondents challenge Exhibits S, T & U to the Parker Affirmation, as new expert

affidavits that "are not part of the administrative record." [14]

1. Respondents' Seek to Strike Expert Statements Despite Consenting to the Experts and the Use of their Work

With this Court's encouragement, the Parties to the case negotiated Petitioners' access to "confidential commercial information." See the "Stipulated Protective Order" (the "Stipulation"), attached as Exhibit 3 to the accompanying Parker Opposition Affirmation,.[15] The 'confidential information' was provided by Constellation/Exelon to the PSC in 2016, during the underlying challenged proceeding, ostensibly in an effort to accelerate the PSC determination of the cost of operations formula so that the company would know what to expect by its August 1, 2016 deadline for future planning. The information was never made public. Yet, when the PSC provided the initial Record in this case, it provided this confidential information to the Court, but not to the Petitioners. This Stipulation was so ordered by the court on September 24, 2018, approximately twenty-one (21) months after Petitioners filed their Petition. The Stipulation required approval by Respondents' for Experts Cain and Cooper.

At the time of the Stipulated agreement of the parties, Respondents were on actual notice that expert review and analysis of the Record could become part of Petitioners' submission to the Court. There was no objection to such use of expert analysis– indeed there was a procedure agreed to just for such submissions.

2. The Expert Affidavits are Legally Permissible in this Case

As discussed earlier, the Cain and Cooper Affidavits are permissible to support the

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[14] Respondents also seek to strike the redacted version of the Exhibit S-Cain Affidavit that is attached as Exhibit 2 to the Second Parker Affirmation, which was submitted pursuant to the Stipulation.

[15] To avoid confusion, the exhibits to the accompanying affirmation of John L. Parker Opposition Affirmation begin with Exhibit 3 since the Second Parker Affirmation contained Exhibits 1 and 2.

declaratory judgment claims in the hybrid action. In fact, this Department has allowed additional affidavits in support of declaratory judgment claims even when submitted on the day of oral argument:

> We see no reason to upset the exercise of discretion by Special Term in receiving the affidavits in support of petitioner's application on the date of argument. Any prejudice which this may have created could easily have been cured by respondents' objection and a request that they be allowed to submit further papers. Although the record does not disclose whether any such objection was made, it is significant to note that Special Term's decision on petitioner's application for declaratory relief was not rendered until over two and one-half months after the matter was argued. This was more than enough time for respondents to respond to any new material which may have appeared in petitioner's affidavits.

James H. Maloy, Inc. v. Town Bd. of Town of Guilderland, Albany Cty., 84 A.D.2d 856, 857, 445 N.Y.S.2d 27 (3d Dept 1981).

With respect to Petitioners' Article 78 claim that the Tier 3 was arbitrary and capricious, Respondents argue that the material should be stricken because judicial review of administrative action is usually limited to the facts and record adduced before the agency when the determination was made. However, it is not set in stone that additional materials cannot be considered.

Courts have also allowed affidavits that "represent and analysis of an administrative record:

> Finally, the Court rejects respondents' argument that the affidavit of Jeremy Stern, Stahl's "Facility Director," is inadmissible, because, they contend, it is outside of the administrative record.... Contrary to respondent's argument, however, the affidavit and accompanying exhibits represent *an analysis of the administrative record, not an enlargement of it.* Nevertheless, Stahl's analysis fails to overcome the rational determination of the LPC that Stahl has not met its burden of demonstrating that it is incapable of achieving a reasonable return from the Buildings.

Stahl York Ave. Co., LLC v. City of New York, 50 Misc. 3d 1207(A), 28 N.Y.S.3d 650 (N.Y. Co.

Sup. Ct. 2016), aff'd, 162 A.D.3d 103, 77 N.Y.S.3d 57 (1st Dept. 2018)(emphasis added).

Courts have also allowed contested exhibits to remain even though they were not part of the certified administrative record when they "directly impact the ultimate decision at issue" and "collectively bear upon the issues at hand." *Mattia v. Vill. of Pittsford Planning & Zoning Bd. of Appeals*, 61 Misc. 3d 592, 598–99, 83 N.Y.S.3d 409, 414–15 (Monroe County Sup. Ct. 2017) In *Mattia*, Petitioners brought an Article 78 proceeding seeking to annul the classification of an action by a zoning board and requesting the Court to change the SEQRA classification from a Type I to a Type II action. In setting aside the administrative determination, the Court refused to strike materials that were outside of the administrative record:

> Petitioners included pre-decision communications between Ms. Brugg and Mr. Turner, APRB [Architectural Preservation and Review Board] records, and contemporaneous e-mails between Ms. Brugg and Ms. Zoughlin - to which the PZBA [Pittsford Planning and Zoning Board of Appeals] objects. This Court sees no reason to strike the same, as *they collectively bear upon the issues at hand.* The PZBA, on numerous occasions, cited in its document that the APRB did not properly assume lead agency status; initially classified this as a Type I action; and, did not explain the switch to a Type II designation. The Brugg/Turner communications and APRB records deal with those items raised by the PZBA, and are thus relevant given its own allegations. In addition, the Brugg/Zoughlin e-mails on the Type classification were submitted to the PZBA's attorney in support of Petitioners' position. The e-mails may not have been made formal exhibits at any meeting, but they do directly impact the ultimate decision at issue - the proper Action Type classification. Accordingly, this Court allows the contested exhibits to remain in the record. See e.g. Knibbs v. Wagner, 14 A.D.2d 987, 222 N.Y.S.2d 469 (4th Dept. 1961) (sustaining denial of motion to strike evidentiary matters which were relevant and thus not prejudicial).

Id. (footnotes omitted; emphasis added).

Courts have also have allowed additional materials that were not in the administrative record when that material amplifies legal positions that the petitioners have previously asserted:

> Although petitioners' reliance on the 2368 Case is crucial to its contention that the BSA's determination in the instant case is at odds with its decisions in similar cases, the Court acknowledges that this case was not submitted during the administrative hearing, and as such, is outside the administrative record.

> "[J]udicial review of administrative determinations is confined to the 'facts and record adduced before the agency" (*Matter of Featherstone v. Franco*, 95 NY2d 550, 554 [2000]). Nonetheless, the administrative record reflects that petitioners have been arguing the issues of inconsistency in determinations by the DOB and the BSA, and *the 2368 Case just strengthens the previously existing arguments advanced by the petitioners. The Court looks to it not because of the facts, but because it amplifies legal positions which the petitioners have asserted before the BSA and the DOB.*

OTR Media Grp., Inc. v. Bd. of Standards & Appeals of City of New York, 59 Misc. 3d 1201(A) (New York. Co. Supreme Court 2018)(emphasis added).

The cases relied on by Respondents are inapposite.

Many cases cited by Respondents involve raising an issue for the first time in an *appellate* reply brief. *See e.g. Ardolino v. Reinhardt,* 128 A.D. 339 (1st Dept 1908); *Duke v. Town of Riverhead*, 77 A.D.32d 702, 910 N.Y.S.2d 448 (2d Dept 2010).

Other cases involve the record in evidentiary administrative hearings and attempts to provide evidence not submitted at that hearing. See e.g., *Matter of World Buuddhist Ch'An Jing Ctr., Inc. v. Schoeberl*, 45 A.D.2d 947, 948 (3d Dep't 2007P ("Petitioner filed grievences, and after a hearing, the Board of Assessment review upheld the assessor's denial of [tax] exemptions....Petitioner commenced this special proceeding pursuant to article 78 claiming that the denials were arbitrary and capricious and should be annulled"); *Matter of Featherstone v. Franco*, 95 N.Y.2d 550 (2000)(Reviewing termination of tenancy after administrative hearing). Even in those cases, if "the record is incomplete or substantial questions arise which cannot be resolved therefrom," additional submissions are permissible. *Piasecki v. Dept. of Social Services*, 225 A.D.2d 310, 311, 639 N.Y.S.2d 319 (1st Dept. 1996).

Others cases cited by Respondents involve attempts to introduce evidence that has no nexus to the administrative record below. For example, by letter dated January 7, 2018, the PSC

provided the Court with a January 2, 2019 decision in Matter of *Kopald v. New York State Pub. Serv. Commn.* (Index No. 905947-18), in further support of its motion to strike. A review of the papers submitted in that Article 78 case and the exhibits that were challenged and ultimately excluded shows that these documents were *not* any analysis of the record before the PSC but rather were: an order of the Kentucky Service Commission; comments filed in a Massachusetts Public Service Commission proceeding, an Order of the New Mexico Public Regulation Commission, an interrogatory response from an Arizona rate proceeding and another proceeding before the PSC, and comments by a group opposed to electronic metering, "Stop Smart Meters Woodstock NY."

Here, Petitioners did not have any of the confidential material until November 1, 2018, so could not fully analyze the specifics of the Record, and could not have provided it earlier based on the timeline in this case. While all the arguments that experts Cooper and Cain made were all previously raised by the Petitioners, these affidavits, which analyze the record and help amplify positions that Petitioners have already taken, are timely and proper. The attempts to strike the Cain and Cooper affidavits conflate and confuse the issue of evidence before the Court.

Exhibit S-Cain Affidavit is Proper

Expert Cain's review and analysis was pre-approved by respondents. His affidavit analyzes the 'confidential data' Respondent Exelon/ Constellation submitted into the Record to compare the difference between the actual cost of operations as submitted to the PSC by Constellation/Exelon (under the veil of confidentiality), to the actual cost of Order. In addition to using it to further amplify Petitioners argument with respect to the rationality of adopting Tier 3, the Cain analysis demonstrates the substantial revisions to the Original Proposal, which establishes the violation of SAPA's due process procedures. The Cain Affidavit confirms Petitioners' claims below and raised previously herein that Tier 3 results in an enormous

windfall, quantified by Constellation/Exelon's own data. Based upon the analysis, Cain coins the phrase "bonus revenue" to describe what Petitioners' have called billions of dollars in windfall profits.

Exhibit T-Cooper Affidavit is Proper

Expert Cooper's review and analysis was pre-approved by the Respondents. Despite Respondents' representations to the contrary, the issues raised in the Affidavit of Expert Cooper were before the Court—Petitioners' argued about the "capricious rubric" of Tier 3 that "any decision pertaining to an apparent objective to protect the jobs of private nuclear generation facility workers through public subsidies, however understandable, has statewide ramifications and is in the province of the Legislature, and "it is not within the province of the Commission under Public Service Law." *See* Opening Memorandum at p. 7. Expert Cooper clearly asserts that he is supporting and reiterating criticisms of Tier 3 submitted to the PSC by Petitioner NIRS in the underlying record case. *See* Cain Affidavit, p. 4 fn 2. These issues, including PSC's lack of sufficient support for renewables which directly relates to the ultra vires nature of Tier 3 and its inconsistency with the State Energy Plan which directs the PSC action with respect to energy policy in New York. Cooper offers a limited analysis on these points of the administrative record, not an enlargement of it.

Exhibit U-Resnikoff Affidavit is Proper

Dr. Marvin Resnikoff's Affidavit is proper and permissible as it merely points out evidence already in the Record for the court's convenience and is not offered to supplement the record itself. He excerpts portions of the International Atomic Energy Commission Technical Report Series No. 421 and an Electric Power Research Institute 2010 Technical Report, (pp.56-58) both of which were submitted in the Record below (R-15-E-0302-5899 at p.45 and R-15-E-0302-5899 at pp. 146, 178. 184-85,191, 204-05, 219, respectively) that Respondents and already

before the Court that have not been challenged, that show the actual carbon emissions of NYS nuclear reactors. He also reiterates the lifecycle carbon emissions of nuclear power generation, already set forth by the public in the Record (15-E-0302-189, -209,-272-A, -348-A, -373-B) and in previous papers in this case. *See* e.g., Petition ¶ 117; Opening Memorandum at p. 35. This scientific information, already in the Record, supports Petitioners SAPA §201 declaratory judgment action as to whether nuclear energy is "carbon-free" or "zero-emissions," as well as the arbitrary nature of the Order. This affidavit is referred to in only one footnote in the Reply Memorandum (fn 42).

D. The Court Should Deny the Motions to Strike Exhibits V, W, X and Y to the Parker Affirmation

Respondent move to Strike Exhibits V, W, X & Y, which they label as various "official reports, press releases and articles" that are not part of the administrative record. Electronic citations for each of these exhibit is also provided. It is ironic that the PSC, itself, went outside the record to provide documents to the Court (see fn. 12 herein), yet now they are challenging Petitioners right to do the very same. This challenged set of documents is properly submitted to the Court.

Exhibit V-"Case 15-E-0302 –NYSERDA April 5, 2018 – CES Financial Status Report for calendar year 2017" is Proper

This document is identified as an official document in the PSC E-15-0302, which is the underlying proceeding being challenged by Petitioners. The report supports and demonstrates Petitioners claim about the failure to adhere to SAPA requirements – here, that the parity between renewables (Tiers 1 and 2) and nuclear (Tier 3) was discarded in the Clean Energy Standard Proceeding, without being re-noticed as required. Both the declaratory judgment and Article 78 claims involve the unlawful "substantial revision" of the proposed rule without proper notice. This document is available on the official New York State governmental website.

Exhibit W-Constellation/Exelon Press Release is Proper

This document is a press release issued by Respondent Constellation/Exelon entitled, "Exelon to Assume Ownership and Operation of Entergy's James A. FitzPatrick Nuclear Power Plant in Upstate New York. It was issued prior to the December 15, 2018 Decision on the Petitions for rehearing, which are also the current challenged before this Court. This press release contains contemporaneous information released by to the public by Respondents, providing information relating to the FitzPatrick purchase contingency, evidence of improper public purpose.

Exhibit X-Syracuse Times Article is proper

This article entitled, "Inside the Hardball Tactics to Save FitzPatrick: NY threatened to seize the nuke plant," dated August 11, 2016 was published before the Respondent's PSC rehearing decision, which is the subject of this case. It is a contemporaneous report about the participants actions regarding the development of the terms and conditions of Tier 3, which is the subject of this case. Specifically, the report providing information relating to FitzPatrick and the Petitioners claim of the ultra vires nature of Tier 3.

Exhibit Y- Crain's Chicago Business Article is proper

This article entitled, "Does Lobbying Pay? Ex-Exelon Exec Highlights Former Employer as Poster Child," was also submitted to the Court in support of Petitioners claim that Tier 3 was ultra vires, hijacking the public interest for a private purpose. This article reports on a presentation made by former Exelon executive/employee at a public forum describing the windfall profits , and further "amplifies" a number of Petitioners' claims. *See OTR Media, supra*).

CONCLUSION

Respondents' motion to strike should be rejected by the Court. Petitioners' establish that their arguments and evidence are properly before the Court. This is a case of unprecedented public significance, as it impacts millions of New Yorkers to the tune of billions of dollars. This case should be decided on its merits. While Petitioners believe that the Reply submissions are proper for the reasons described above, Petitioners request reasonable time to resubmit a reply, consistent with the Court's decision, so as to provide a clear and coherent set of arguments to the Court in the interest of fundamental fairness.

Dated: January 14, 2019
Nanuet, New York

ROCKLAND ENVIRONMENTAL GROUP, LLC

BY: John L Parker

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APPENDIX

Chart of Petitioner Responses to PSC Reason to Strike

Argument	PSC Reason to Strike	Petitioner Response
Page 2 -"Bonus revenues" argument	• Not presented to the Commission	Bonus revenues" argument is synonymous with "windfall profits."
	• Raised for the first time on reply	Raised in: • -Pet. ¶168 "The Commission's determination that Exelon is "financially sound and capable of operating the facilities safely", points to Tier 3 used to create windfall profits for Exelon"; • The unjustified billion dollar profits to Constellation were alleged throughout the Petition *See e.g.*, ¶¶ 4, 6, 72) • Opening Memorandum at pp. 109.147,152, 168
Page 6 -Figure 1, "Screen from Executive Presentation	• Extra-record material	Statement by former Exelon executive describing what occurred at the time and also submitted in support of claim that PSC action was ultra vires.
	• Raised for the first time on reply	• Support for declaratory judgment action unlawful public purpose and *ultra vires*
Page 6 - Comparison between funding processes for renewables and Tier 3	• Not presented to the Commission	Provided as background as a statement of fact set forth in Order
	• Raised for the first time on reply	Raised in: • Memorandum in Opposition to Motion to Dismiss p.16 -17 "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."
Point I.A., pages 7-13; State Energy Plan argument	• Not responsive to Respondents' answering papers	Responsive to PSC Memorandum pp 48-50 - "The ZEC Program is consistent with the State Energy Plan". See also pp. 5, 6, 9, 11. See further discussion Section A.1 above.

Argument	PSC Reason to Strike	Petitioner Response
Point I.C., pages 22-32; argument regarding Commission authority based upon *Boreali v Axelrod*	• Raised for the first time on reply	Petitioners did raise *Boreali* in advance of the Reply and *prior to* Respondents' answer. See Memorandum in Opposition to Motion to Dismiss, pp. 9-10; Raised in underlying proceedings R.15-E-0302-363; See discussion Section A.3 above;
	• Not responsive to Respondents' answering papers	Responsive to: • PSC Memorandum Point IV.B at pp. 43-47 "The Commission acted in accordance with its statutory authority." • Cons Memorandum OL pp. 3, 38-41
Point II.B., pages 34-35; introduction Cooper and Cain review	• Based on extra-record material	• Respondents approved experts; affidavits proper for declaratory relief & permissible analysis of administrative record, not a record enlargement. • See discussion Section C.1 below;
Point II.B.1., pages 35-36 [Windfall profits]	• Raised for the first time on reply	Raised in: • Pet. ¶168- "Tier 3 used to create windfall profits for Exelon";
	• Not responsive to Respondents' answering papers	Responsive to: • PSC MOL pp. 5, 6, 17, 53, 57 • Cons MOL pp. 6, 24, 25 •
Point II.B.2., pages 36-37 [100% fossil fuel replacement]	• Raised for the first time on reply	Raised in: • Petition ¶ 133,147;
	• Not responsive to Respondents' answering papers	Responsive to: • PSC Memorandum pp.14, 25, 41, 46, 56 PSC argues fossils fuels would replace nuclear; • Cons Memorandum pp. 2, 11, 29, 42
	• Based on extra-record material	• Expert analysis of administrative record not an enlargement; • See discussion Section C.1 below
Point II.B.3., pages 38-40	• Raised for the first time on reply	Raised in • Petition ¶ 5,12,37, 65,130

Argument	PSC Reason to Strike	Petitioner Response
[Ignores efficiency and increased renewable energy backsliding]		• Pet. Opening Memorandum p. 37 • Pet. Memorandum in Opposition to Motion to Dismiss pp. 13, 17, 28
	• Not responsive to Respondents' answering papers	Responsive to: • PSC Memorandum pp. 6,46,51 • Cons Memorandum pp. 36, 39 • Order p 19
Point II.B.4, pages 40-45 [Doesn't account for renewable energy]	• Based on extra-record material	• Expert analysis of Record not enlargement • See discussion Section C.1 below
	• Raised for the first time on reply	Raised in: • Petition ¶ 133, 134, 135 • Pet. Opening Memorandum pp. 13, 38; • Pet. Memorandum in Opposition to Motion to Dismiss pp. 13, 28
	• Not responsive to Respondents' answering papers	Responsive to: • Backsliding PSC Memorandum pp. 6, 46,52 • Con Memorandum pp. 36, 39 • CES Order p 19
Point II.B.5, pages 45-48 [SCC – A & C misuse of environmental measure]	• Based on extra-record material	• Expert analysis of Record not enlargement; • See discussion Section C.1 below.
	• Not responsive to Respondents' answering papers	Responsive to: • PSC Memorandum Point V pp. 50-54 "THE COMMISSION RATIONALLY INCORPORATED THE SOCIAL COST OF CARBON INTO ITS METHOD FOR CALCUATING ZEC PAYMENTS"
Point II.B.6, pages 48-55 [Pre-Conditions Fitzpatrick & economic conditons]	• Raised for the first time on reply	• See discussion A.7 above; Raised in: • Petition ¶¶ 35,54, 68, 168-187; • Opening Memorandum pp 14, 44, 53, 54; • Memorandum in Opposition to Motion to Dismiss p. 27 "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."

Argument	PSC Reason to Strike	Petitioner Response
	• Not responsive to Respondents' answering papers	Responsive to: • PSC Memorandum Point VI p 54-58 "THE ZEC PROGRAM IN ALL RESPECTS RATIONAL AND LAWFUL"
	• Based on extra-record material	• Expert analysis is not enlargement of record; • See discussion Section C.1 below
	• Subpoint (e) challenges a rationale that does not exist in the Commission order under review	Raised in: • Opening Memorandum pp 7, 35
Point II.B.8, pages 55-56 [12 year term arbitrary]	• Raised for the first time on reply	Raised in: • Petition ¶60,151; • Opening Memorandum p.38; • Memorandum in Opposition to Motion to Dismiss pp 2, 11.
	• Not responsive to Respondents' answering papers	Responsive to: • PSC Memorandum p 6; • Cons. Memorandum p 26.
Point II.B.9, pages 56-59 [Zero Emission carbon free is arbitrary and capricious]	• Raised for first time on reply	Raised in: • Petition ¶105-123; • Opening Memorandum pp. 29-33.
	• Not responsive to Respondents' answering papers •	Responsive to: • PSC Memorandum pp. 40-41; • Cons Memorandum pp. 35-36.
Point III.A.1.b., c. pages 69-70 [Cost to consumer increased - Substantial revision: $2 per month]	• Raised for the first time on reply	Raised in: • Petition ¶ 5, 20,60,63,65,91, 100,102FN, 102, 103, 104 " Under SAPA, the billions of dollar increase between the January White Paper proposal and the subsequent July Responsiveness Proposal for Tier 3 would have been the substantial change justifying additional public comment requirements" • Pet. Opening Memorandum p. 22; • Pet. Memorandum in Opposition to Motion Dismiss p.10;

Argument	PSC Reason to Strike	Petitioner Response
		See also further discussion A.9 & 10 above.
	• Not responsive to Respondents' answering papers	Responsive to: • PSC Memorandum pp. 7, 17, 23, 34-35, 36, 37; • Cons. Memorandum pp. 8,24,25,26.
Point III.A.1. pages 71-72 Ratio of subsidy changed	• Raised for the first time on reply	Raised in: • Petition ¶¶ 4, 5, 60, 133; • Pet. Opening Memorandum pp. 5, 6, 10, 11, 25, 27, 38, 40, 44; • Pet. Memorandum in Opposition to Motion to Dismiss p. 16.
	• Not responsive to Respondents' answering papers	Responsive to: • PSC Memorandum pp. 11, 43; • Constellation Memorandum pp. 24 "Petitioners assert that the shift to the social cost of carbon was a "substantial revision" because it supposedly increased the ZEC Program's costs over the amount estimated in the PSC's Cost Study released in April 2016, citing a $7.6 billion figure for the ZEC Program's 12-year term (Am. Pet. at 59-60; see also id. at , 88, 91, 101 n 33). But to start, any cost increases are beside the point. The State Register Notice did not specify any particular program cost, and hence, would not "require any changes to cover" the Responsive Proposal's costs."
Point III.A.3. pages 72-73 [Cost of operations to SCC substantial revision]	• Raised for the first time on reply	Raised in: • Petition ¶¶ 5,103; • Pet. Opening Memorandum pp 3-4, 23; • Pet. Memorandum in Opposition to Motion to Dismiss p 8.
	• Not responsive to Respondents' answering papers	Responsive to: • PSC Memorandum pp 30,33; • Constellation Memorandum pp 8, 24-25.

Argument	PSC Reason to Strike	Petitioner Response
Point III.A.4. pages 73-74 [Eligibility/necessity substantial revision]	• Raised for the first time on reply	Raised in: • Petition at ¶ 25,63, 66, 72, 88, 89, 93, 100,102,161; • Pet. Opening Memorandum pp. 12, 21, 22, 28,45 • Pet. Memorandum in Opposition to Motion to Dismiss pp 6-7,10-11,17.
	• Not responsive to Respondents' answering papers	Responsive to: • PSC Memorandum p 49-50; • Cons Memorandum pp 26-28, 30-31.
Point III.A.6. page 79 [Fitzpatrick Contingency	• Raised for the first time on reply	Raised in: • Pet at ¶35,164,168,182, • "The New York Independent System Operator Assesses No Statewide Resource or Load Reliability Deficiency in the Event Fitzpatrick Retires." Pet. ¶168; • Pet MOL pp. 13, 54; • Pet MOL Opp. Motion to Dismiss pp. 27, 28.
	• Not responsive to Respondents' answering papers	Responsive to: • PSC MOL p. 55; • Cons MOL p. 32, 33.
Point III.A.7. pages 79-80 [Truncated comment period due to Exelon's demands]	• Raised for the first time on reply	Raised in: • Petition ¶96.
	• Not responsive to Respondents' answering papers	Responsive to: • PSC Memorandum • Cons. Memorandum pp 16, 20-23
Point III.B.3. pages 88-89 if both (i) and (ii)	• Raised for the first time on reply	Raised in: • Petition ¶83 " The Commission Proceedings Trigger the Requirements of Both Provisions of SAPA§102 But Fails to Meet the Requirements of Either Provision", ¶104; • Pet. Opening Memorandum p19-20; • Pet. Memorandum in Opposition to Motion to Dismiss p 9-10 • See also further discussion A.11 above. •

Argument	PSC Reason to Strike	Petitioner Response
	• Not responsive to Respondents' answering papers	Responsive to: • PSC Memorandum p 33, fn 16; • Cons. Memorandum p 20, fn 9; • See discussion A.11 above.