

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.

Index No. 07242-16

AFFIRMATION OF
JOHN L. PARKER, ESQ.
IN OPPOSITION TO THE
RESPONDENTS'
MOTIONS TO STRIKE

JOHN L. PARKER, being an attorney duly admitted to practice before the Court of New
York, submits this Affirmation pursuant to CPLR Section 2106, as follows;

1. I submit this Affirmation in support of and on behalf of Petitioners for their Opposition to Respondents' Motion to Strike Petitioners' Reply Memorandum of Law in their hybrid Article 78 of the New York State Civil Practice Rules ("CPLR") and Declaratory Judgment action, challenging Tier 3 of Clean Energy Standard promulgated by the New York State Public Service Commission ("Commission" or "PSC"), and seeking that the Court annul Tier 3 of the Clean Energy Standard ordered by the Commission on August 1, 2016.

2. On December 17, 2018, Petitioners submitted to the Court their reply Memorandum of Law in the above referenced matter. Petitioners' commenced this action on November 30, 2016 by Verified Petition ("Petition") that was subsequently amended on January 12, 2017 in the form of an Amended Verified Petition. The case challenges Tier 3 of the Public Service Commission's Clean Energy Standard Order of August 1, 2016, and the Public Service Commission's subsequent denial of rehearing petitions in that Matter.

3. Respondents' now challenge the argument's raised by Petitioners' that have been put before the Court since the inception of the case in 2016. The hybrid Declaratory Judgment / Article 78 relief sought by Petitioners' addresses, among other things, challenge the PSC's action regarding Tier 3 because of the unlawful process under the State Administrative Procedure Act ("SAPA") used by the PSC for Tier 3, the lack of legal authority to enact Tier 3, the fact that Tier 3 unjustifiably provided "windfall profits" to Respondent Constellation / Exelon (a public process for a private purpose/end), and pursuant to Article 78, the nine bases that Petitioners' set forth demonstrating that Tier 3 was arbitrary and capricious.

4. The litigation process in this case included significant efforts by Petitioners' to gain access to the actual administrative record that was before the PSC at the time of the challenged actions. Under the ordinary course, the CPLR § 7804(e) requires that the agency

provide a copy of the full administrative record to Petitioners when it files its answers with the Court in an Article 78 challenge.

5. Petitioners received the full administrative record, including copies of confidential information regarding commercial operations of Respondent Constellation/ Exelon by letter dated October 31, 2018.

6. Despite requests to the PSC that the full administrative record be provided to Petitioners, including 13,000 public comments, and despite Petitioners' Motion to Compel production of the complete record considered by PSC, it agreed, on their own initiative, to provide to the Petitioners those records on a DVD with the October 31, 2018 letter, in an attempt to avoid "further litigation."

7. The process undertaken in this case has been subject to numerous stipulations by and between the parties and subject to a number of Court Orders. There are no allegations by any parties that compliance with such procedural agreements and stipulations have been untimely in this proceeding.

8. Prior to gaining access to the 'confidential information' of Respondent Constellation /Exelon, Respondents insisted on negotiations to restrict access and use of that information. *See* Stipulated Protective Order, September 24, 2018, *attached hereto* as Exhibit 3.

9. Among the detailed requirements of the Stipulated Protective Order, it included the right of Respondents' to approve experts selected by Petitioners to review the information, the limits to Petitioners and their attorneys to review such information, and provisions that for the use of such information before this Court to not publicly review the underlying data (through submission of the redacted section of Petitioners Reply Memo of Law). Although the negotiation

and the Stipulation are detailed and lengthy, there was no discussion (or even suggestion) that there was any issue with presenting the information or any analysis of such information to the Court. Indeed, Respondents had every such opportunity as evidenced by their requirement regarding *how the confidential information should be submitted to the Court*.

10. Petitioners properly filed with the Court their pleadings and all supporting documents in this case, and it must be noted that material information relevant to this case – documents submitted to the PSC in the public proceeding – were not available to Petitioners during the filing with the Court of the Amended Verified Petition and its Memorandum of Support on January 12, 2017. Petitioners properly submitted its Verified Petition based upon the information that it had on hand in 2016 and 2017.

11. Petitioners have done their level best to provide the Court with all of the necessary pleadings, supportive documents, and arguments in support of their hybrid Declaratory Judgment / Article 78 proceeding challenging Tier 3 of the Clean Energy Standard Order as adopted by the immensely powerful state agency, the Public Service Commission. Gaining access to all of the information, including what was put before the PSC during the underlying proceeding, and developing that record into a coherent case, within the strictures of the stipulations, orders, and rules has been challenging. However, any procedural delays in this case were the result of motion practice in this proceeding – Respondents’ moved to dismiss, Petitioners’ moved for Respondent PSC to a complete copy of the administrative record the agency acknowledged was before it in the underlying proceeding, as well as Respondents’ insistence on a stipulations for Petitioners’ right to gain access to and analysis certain ‘confidential information.’

12. Petitioners understand the positions of Respondents and disagree. Their motions to Strike should be denied.

13. The Declaratory Judgment and Article 78 arguments plead by Petitioners' were duly set forth, and there were no "surprises" or "unfairness" intended by Petitioners' in their Reply Memo of Law presented to the Court.

14. Expert Cain's analysis of the 'confidential information' put a finer point on and amplified the Petitioners' argument made throughout the proceeding - that Tier 3 is a "windfall profit," and provides substantial "bonus revenue" in excess of the purported PSC purpose of its Order.

15. The notion of the "bonus revenue" is the product of an analysis by Expert Cain, and the information upon which his analysis is based was fully before the PSC during the underlying proceeding – it was submitted to PSC by Respondent Constellation / Exelon.

16. Respondents' attempts to strike the affidavits of Experts Cain, Cooper and Resnikoff conflate and confuse the issue of the evidence before the Court. There is no question that in a declaratory judgment action, Petitioners' are permitted to present to the Court arguments and affidavits that may not have been before the agency in the underlying proceeding as discussed in the accompanying Memorandum of Law. Thus, analyses of Experts Cain and Cooper supporting and Petitioners' arguments regarding jurisdiction or authority, and the substantial revisions (increase in the cost to ratepayers in the change from the original proposal without notice (cost of operations to the Social Cost of Carbon) adopted by PSC and Ordered by that agency, including the challenge to Respondent PSC's procedural and due process violations under SAPA are properly submitted.

17. Expert Cain's analysis of confidential information was pre-approved by Respondents and properly before the Court. Expert Cain's affidavit of the confidential information amplifies Petitioners' arguments regarding the difference between the actual cost of operation and the actual cost of Tier 3 (under the Social Cost of Carbon). It also demonstrates and amplifies Petitioners' arguments of the substantial revision between these two approaches which establishes violations of SAPA due process, and confirms Petitioners' repeated allegations of an improper or ultra vires purpose of Tier 3 – producing a 'windfall profit' based upon Respondent Constellation / Exelon's data submitted to PSC, in which Cain describes the 'windfall profits' as "bonus revenue." Cain's limited analysis does not enlarge the administrative record on these points.

18. Expert Cooper's analysis of confidential information was also pre-approved by Respondents and is properly before the Court. It amplifies and supports the public comments by NIRS regarding jobs and economic impacts from Tier 3, and the lack of sufficient support for renewables in Tier 3 which is ultra vires, because it is not consistent with the State Energy Plan. Cooper's limited analysis does not enlarge the administrative record on these points.

19. Expert Resnikoff's affidavit offers an explanation of the scientific information existing in the record before the Court, specifically regarding Petitioners sought after declaratory judgment on PSC violations of SAPA § 201 because they did not use common and everyday language when it claimed that Tier 3 is "zero emissions." Resnikoff's affidavit re-iterates the abundance of information provided to the PSC in the underlying proceeding and is properly before the Court on the question of whether "zero emission credits" are advanced by Tier 3 – establishing definitively what was repeated in Petitioners' pleadings, memorandums of law and supporting documents – nuclear reactors are not zero emission sources of emissions.

20. Respondents' arguments to Strike Portions of Petitioners' Reply Memo demonstrate the subjective nature of their arguments. Respondents' disagree on what should be struck – there are approximately 27 page of substantive legal argument that they do not agree upon. Respondents' disagreement highlights that they are asking the Court to re-write Petitioners' reply to exclude argument that they, individually, do not want the Court to consider. See Highlighted Disagreements between Constellation / Exelon and PSC In Their Motions to Strike Portions of Petitioners' Reply Memorandum, *attached hereto* as Exhibit 4.

21. 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 proceeding and the exhibits that were challenged and ultimately excluded were *not* an 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; documents from a different proceeding before the PSC; and comments by a group opposed to a general proposal for electronic metering by a citizens group. These documents were not involved in the challenge to the New York state proceeding and had no nexus to the issues raised, and thus, the Court concluded that they were properly not considered by the Court.

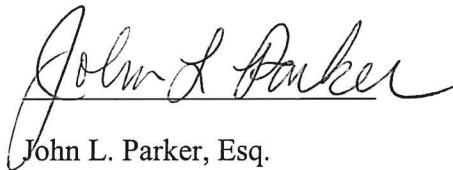
22. Petitioners' establish that their arguments and evidence are properly before the Court and this is a case of significance, as it impacts millions of New Yorkers to the tune of billions of dollars. If the Court decides to strike portions of Petitioners' submissions, in the interest of fundamental fairness, Petitioners request reasonable time for the opportunity to

conform and to re-submit their Reply consistent with the Court's decision enabling Petitioners to provide a clear and coherent set of arguments to the Court in the interest of fundamental fairness.

23. Petitioners' seek what they have sought from the beginning – for the Court to adjudicate the case on the merits..

January 14, 2018

Respectfully submitted,

A handwritten signature in cursive script that reads "John L. Parker". The signature is written in black ink and is positioned above the typed name and address.

John L. Parker, Esq.
Susan H. Shapiro, Esq.
Melanie Liebman-Golden, Esq.
Counsel for the Petitioners
Rockland Environmental Group
75 North Middletown Road
Nanuet, NY 10954
(845) 371-2100